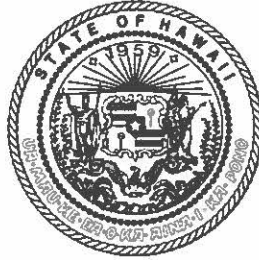


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OFFICE OF DISPUTE RESOLUTION
DEPARTMENT OF THE ATTORNEY GENERAL
STATE OF HAWAII

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

Petitioners,

vs.

DEPARTMENT OF EDUCATION, STATE
OF HAWAII and KEITH T. HAYASHI,
Superintendent of the Hawaii Public Schools,

Respondents.

DOE-SY2324-025

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing:
February 22, 23, 26, 27, 2024

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. Additionally, Petitioners reference Section 504 of the Rehabilitation Act of 1973

¹ Personal identifiable information is provided in the Legend.

(“Section 504”), as amended in 1974, codified at 29 U.S.C. §§ 794, et seq.; and the Hawaii Administrative Rules §§ 8-61-1, et seq. in their claims and requests for relief.

II. INTRODUCTION

On December 26, 2023, the Department of Education, State of Hawaii and Keith T. Hayashi, Superintendent of the Hawaii Public Schools (“Respondents” or “DOE”) received a Complaint and Resolution Proposal (“Complaint”) from Student, by and through Student’s Parent (collectively “Petitioners”).

On January 2, 2024, Respondents filed Department of Education’s Response to Petitioners’ Complaint.

On January 18, 2024, a Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for January 29, 2024.

On January 29, 2024, a prehearing conference was held with Keith H.S. Peck, Esq. (“Mr. Peck”) appearing on behalf of Petitioners, and Deputy Attorney General Emma R. Christopherson (“Ms. Christopherson”) appearing on behalf of Respondents. During the prehearing conference, the parties agreed to have the due process hearing on February 22, 23, 26 and 27, 2024.

Following the prehearing conference, a Prehearing Order was issued to the parties on January 29, 2024, setting forth the issues and procedures for the due process hearing, and deadlines for submission of substantive motions, witness and exhibit lists, exhibits, and witness email addresses. No substantive motions were filed, and the parties timely submitted their witness list, exhibit list, and exhibits.

The due process hearing took place on February 22, 23, 26, and 27, 2024, using Zoom, a videoconferencing platform. All participants appeared remotely via video and audio for all days

of the due process hearing except for Parent. Parent testified on February 22 and 23, 2024 via video and audio. After Parent's testimony, Parent's presence was waived for the remainder of the hearing. The undersigned Hearings Officer presided over the matter. Petitioners were represented by Mr. Peck, and Respondents were represented by Ms. Christopherson. The Department of Education District Educational Specialist ("DES") was present on behalf of Respondents.

Petitioners called Parent as their only witness during the due process hearing. Respondents called the following witnesses during the due process hearing: Principal, OT, EA, and SBBH Supervisor. Petitioners did not call any rebuttal witnesses.

The following Petitioners' exhibits were admitted into evidence during the hearing: Exhibit 1 (pages 1-24, 25-49), Exhibit 2 (pages 54-57), Exhibit 3 (pages 58-71, 72, 73-76, 77, 78-79, 80-81, 82-86, 87-88), and Exhibit 4² (pages 89-96, 97-132, 133-134, 10/20/2023 Audio File, 11/20/2023 Audio File). Tr. Vol. 2, 113:10-114:25³; Tr. Vol. 4, 300:18-302:12, 389:19-390:7⁴.

The following Respondents' exhibits were admitted into evidence during the hearing: Exhibits 3, 4, 5, 9, 10, 11, 12, 13, 14, 15⁵, 19, 20, 21, 22, 23, 25, 27, 29, 31⁶, 32, and 33.

² Petitioners' oral motion to number a two-page document entitled "Fwd: Notes for Meeting on 10/20/23" as pages 133 and 134 was granted. See Petitioners' First Amended Witness List & Exhibit List; Certificate of Service, filed on February 14, 2024. Tr. Vol. 1, 42:3-16.

³ "Tr. Vol. 2, 113:10-114:25" means Transcript Volume 2, page 113, line 10 to page 114, line 25.

⁴ Transcript Volume 1 is a transcription of the due process hearing held on February 22, 2024; Transcript Volume 2 is a transcription of the due process hearing held on February 23, 2024; Transcript Volume 3 is a transcription of the due process hearing held on February 26, 2024; and Transcript Volume 4 is a transcription of the due process hearing held on February 27, 2024.

⁵ There is an error in the transcript. Respondents' Exhibit 15 was among the exhibits named and admitted into evidence. Parent, Tr. Vol. 2, 123:14-124:9; Tr. Vol. 3, 176:15-177:22.

⁶ DOE Exhibit 31, pages 189-198 was created by Respondents' counsel at the request of the undersigned Hearings Officer for use during the due process hearing. Caution is advised when reviewing these documents as they are not professional transcripts of the IEP meetings.

Tr. Vol. 2, 115:1-117:6; Tr. Vol. 3, 176:15-177:22; Tr. Vol. 4, 302:13-303:22, 390:8-391:20.

On March 8, 2024, Petitioners submitted a written request to the undersigned Hearings Officer to extend the 45-day period in which a decision is due under H.A.R. § 8-60-69, from March 10, 2024 to April 24, 2024, so that transcripts can be prepared and post-hearing briefs filed. Respondents stipulated to the request for an extension. Petitioners' request was granted on March 8, 2024. The new deadline by which a decision in this matter must be issued is April 24, 2024. See Order Granting Petitioners' Request for an Extension, dated March 8, 2024, issued on March 8, 2024.

Petitioners and Respondents timely submitted their closing briefs on March 28, 2024 and April 1, 2024, respectively. Petitioners submitted a response to Respondents' closing brief prior to the deadline to submit closing briefs. Respondents objected to Petitioners' response. Petitioners' response and Respondents' objection were taken into consideration in issuing this administrative decision.

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. Although all the evidence was considered, only evidence relevant to the resolution of the issues is stated in the findings.

III. ISSUES PRESENTED

In their December 26, 2023 Complaint, Petitioners allege procedural and substantive violations of the IDEA and Section 504. Specifically, Petitioners allege that Respondents denied Student a free appropriate public education ("FAPE"). Petitioners raise the following issues:

- Issue 1 – Whether the 11/20/2023, 10/20/2023 IEP ("Oct./Nov. IEP") was a denial of FAPE with regard to Student's Extended School Year ("ESY") services because:
 - (a) The Individualized Education Program ("IEP") states that Student will

- be able to access a setting with nondisabled peers “(when available)”;
- (b) The IEP team did not discuss and/or describe the location of Student’s ESY services based upon Student’s unique difficulties if needing to travel for certain lengths of time;
- (c) The IEP team did not discuss and/or describe the need for Student to have peers in Student’s ESY program; and/or
- (d) The IEP team used data that was not appropriate to determine the length of the frequency and/or duration of ESY services.

Issue 2 – Whether the Oct./Nov. IEP is vague and/or unclear regarding the service Individual Instructional Services (“IIS”) where Parent asked for a consistent aide and the IEP states that Student will have IIS services for 1825 minutes a week and 1:1 adult monitoring during unstructured time.

Issue 3 – Whether the Oct./Nov. IEP omits Objectives that are appropriate for Student in the following particulars:

- (a) Learn to understand unsafe behaviors, [REDACTED];
- (b) Learn to [REDACTED];
- (c) Learn to use the [REDACTED] outside of home/school, use [REDACTED], and not talk to strangers in [REDACTED];
- (d) Learn to understand when Student needs [REDACTED]; and/or
- (e) Learn to adjust behavior in different community settings, ask for help, do not touch others, do not do disruptive behavior, not be aggressive towards others, and comply with authorities.

Issue 4 – Whether the Oct./Nov. IEP team discussed and/or described sufficient behavior interventions to address Student’s needs.

Petitioners request the following remedies:

Remedy 1 – Find that the DOE denied Student a FAPE for the violations asserted;

Remedy 2 – Order the DOE to reimburse Parent for any privately funded programs and/or services related to a denial of FAPE;

Remedy 3 – Order the DOE to directly fund any private services (including private related services, such as transportation and necessary expenses related to the provision of private services);

Remedy 4 – Order compensatory education if Parent was unable to provide all of the services Student required to ameliorate Student’s losses; and/or

Remedy 5 – Order such other relief that is appropriate and justified in equity and/or in law, under the circumstances.

IV. FINDINGS OF FACT

Witnesses

1. Parent is a [REDACTED]. Parent is not a licensed speech/language pathologist or occupational therapist. Parent, Tr. Vol. 1, 97:12-98:9, 100:21-101:4.
2. Principal is the principal of Home School and this school year is Principal's second year in this position. Before becoming a principal, Principal was a vice principal at another school for fifteen (15) years, where Principal was an administrator for the school's special education department. Before becoming a vice principal, Principal was a teacher for thirteen (13) years, one (1) of which was teaching special education. Principal, Tr. Vol. 3, 182:10-184:6.
3. OT has been an occupational therapist for approximately twenty-eight (28) years. OT is currently employed by a private company through which OT provides virtual occupational therapy services to the Hawaii Department of Education for students ages pre-kindergarten through high school. OT has provided occupational therapy services to DOE since December of 2016. OT, Tr. Vol. 3, 267:8-268:24; DOE Ex. 27 at 177-178.
4. EA is an educational assistant with the Hawaii Department of Education. EA has known Student since Student was [REDACTED] years old and worked with Student when Student was in the [REDACTED] grades. EA is currently Student's educational assistant and is physically with Student 75% of the school day. EA is with Student from 7:45 a.m. to 10:00 a.m., 11:30 a.m. to 1:00 p.m., and 1:30 p.m. to 2:00 p.m. During the times when EA is not with Student, other individuals provide support to Student. When EA is not with Student, EA is servicing other special needs students in another grade or on a lunch break. EA, Tr. Vol. 4, 313:20-317:15.

5. SBBH Supervisor has an undergraduate degree in child development, and a master's degree in social work. SBBH Supervisor is a licensed clinical social worker and licensed social worker. SBBH Supervisor currently holds two (2) positions with the DOE: social worker and school-based behavioral health supervisor. SBBH Supervisor became a social worker for the DOE in 2014. As a social worker, SBBH Supervisor supports the implementation of Section 504 plans across the island, ensures compliance with Section 504, and provides support to school-level counselors and student services coordinators. SBBH Supervisor became a school-based behavioral health supervisor for the DOE in 2022, and in this position, SBBH Supervisor ensures that schools within SBBH Supervisor's complex area of responsibility are providing services and interventions consistent with Section 504 and IDEA. As a school-based behavioral health supervisor, SBBH Supervisor also works with school-level counselors and student services coordinators; and carries a small caseload providing direct mental health services to students. Home School is within the complex area that SBBH Supervisor is responsible for. DOE Ex. 20 at 141; DOE Ex. 29 at 181; SBBH, Tr. Vol. 4, 355:23-358:2.

Student

6. Student is currently [REDACTED] years old and in the [REDACTED] grade at Home School. DOE Ex. 9 at 045.
7. Student has a medical diagnosis of [REDACTED]. DOE Ex. 9 at 046.
8. Student is eligible for special education and related services pursuant to the IDEA and Hawaii Administrative Rules Chapter 60 under the category of [REDACTED]. DOE Ex. 9 at 046.

Facts of Case

9. In May of 2023, DOE conducted an “AFLS” assessment on Student involving Student’s self-management skills. Parent, Tr. Vol. 1, 24:16-25:3, 46:5-20.
10. On May 10, 16 and 23, 2023, Home School collected baseline data for Student on the goal and objective of “CVC Pronunciation.” DOE Ex. 15 at 129.
11. On May 22-24, 2023, Home School collected baseline data for Student on the following goals and objectives: maladaptive behaviors (avoidant/off task, [REDACTED]); and prosocial behaviors (appropriate social behaviors, transitions between staff members, [REDACTED], joining peers appropriately). DOE Ex. 15 at 130-135; DOE Ex. 25 at 170-175.
12. On May 25, 2023, an annual IEP meeting was held, resulting in an IEP with the same date (“May IEP”). During the annual IEP meeting, some of Student’s goals changed. Home School was not able to take data on these new goals as the school year ended soon after. Principal, Tr. Vol. 3, 193:19-194:11; Pet. Ex. 4 at 109-111, ¶¶34, 38, 43.
13. Student’s May IEP provided Student with occupational therapy and speech/language therapy services, and the IEP contained goals and objectives for occupational therapy. Pet. Ex. 4 at 102-103, 111, 114.
14. Between May 27, 2023 to August 6, 2023, Student was on a summer break and did not attend school⁷. DOE Ex. 25 at 170-175.

⁷ The undersigned takes judicial notice of the Hawaii DOE’s Official School Calendar for the 2022-2023 and 2023-2024 school years.

<https://www.hawaiipublicschools.org/DOE%20Forms/2022-23calendar.pdf> and
<https://www.hawaiipublicschools.org/DOE%20Forms/2023-24calendar.pdf>

15. On May 30, 2023, DOE received a due process complaint under case no. DOE-SY2223-042, alleging that the May IEP did not offer Student a FAPE. Pet. Ex. 4 at 093, 095, 099.
16. For the summer of 2023, Student was offered ESY at Public School because Home School did not have ESY. Parent chose not to send Student to summer ESY at Public School because Parent felt it was too far and Student could not tolerate the drive. Parent did not work so that Parent could stay home with Student. Parent attempted to work with Student on the goals and objectives in Student's IEP during the summer. Parent took Student to a "[REDACTED] camp" where Student was able to be with nondisabled children. Student attended the [REDACTED] camp for two (2) days. Pet. Ex. 4 at 112 (§46), 115 (§59), 118 (§75); Parent, Tr. Vol. 1, 33:23-34:16, 95:8-22.
17. Parent also took Student to a "[REDACTED] program" during the summer of 2023 where Student participated for eight (8) days. The [REDACTED] program was approximately the same distance or farther away from Student's home than Public School. Pet. Ex. 4 at 117-118, §§72-74.
18. Parent testified that during the summer of 2023, some of the goals that Parent worked on with Student were reading, drawing, pronunciation, going to the [REDACTED], physical education, math, counting, writing his/her name, counting cash, and Parent took Student out to interact with other people. Due to Student not being in a school setting, Student did not receive ninety (90) minutes of general education on a daily basis. Parent, Tr. Vol. 1, 99:15-103:22.
19. Upon Student's return to Home School after the summer break, Home School collected regression data on August 7, 8, 10 and 11, 2023 on the following goals and objectives: maladaptive behaviors (avoidant/off task, [REDACTED]); and prosocial behaviors

(appropriate social behaviors, transitions between staff members, [REDACTED] joining peers appropriately). DOE Ex. 15 at 130-135; DOE Ex. 25 at 170-175. Home School collected regression data on August 11, 16 and 23, 2023 on the goal and objective for “CVC Pronunciation.” DOE Ex. 15 at 129.

20. On August 11, 2023, an IEP meeting was held, resulting in an IEP with the same date (“August IEP”). Pet. Ex. 1 at 001-024; DOE Ex. 5 at 015-038.
21. Present at the August IEP meeting were Parent, Principal, DES, SPED Teacher, EA, OT, a district resource teacher, a general education teacher, another special education teacher, a physical therapist, and a speech/language pathologist. Pet. Ex. 1 at 024.
22. According to the August IEP, Student would receive the following Special Education and Related Services: occupational therapy services; speech/language therapy; and special education (910 minutes per week). DOE Ex. 5 at 035.
23. According to the August IEP, Student would receive the following Supplementary Aids and Services, Program Modifications and Supports for School Personnel (“Supplementary Aids and Services”): physical therapy consultation; IIS for one thousand eight hundred twenty-five (1825) minutes per week; school-based behavioral health (“SBBH”) consultation services; visual aids and supports; prompting and redirection; social stories; daily “Close Adult Monitoring;” simplified language and directions; modified assignments; pre-teaching concepts and routines; priming behavior/academic expectations; and communication between home and school. DOE Ex. 5 at 035. One thousand eight hundred twenty-five (1825) minutes per week is the equivalent of an entire week. Parent, Tr. Vol. 1, 38:17-19.

24. The August IEP contains a section called “Clarification of Services and Supports.” Under the clarification section of the August IEP are the following statements: “...1825 minutes of Individualized instructional Support Services (the person may vary)...;” “Close Supervision-support during unstructured times with social situations and transitions;” and “Strategies that are successful with [Student]: [REDACTED] plan (every 1.5 hours)...Close Adult Monitoring...” Pet. Ex. 1 at 021-022; DOE Ex. 5 at 035-036.
25. IIS entails a person assigned to be with a student throughout the school day, either to assist the student with behavior or academic needs. Principal, Tr. Vol. 3, 200:6-10.
26. According to the August IEP, Student qualifies for ESY and needs ESY services after a break of [REDACTED] calendar days. The ESY section of the August IEP states that Student will receive “[s]pecially designed instruction in special education and general education setting for a total of 4 hours per day. Specially designed instruction will include the following: [Student] will participate in a general education setting daily for 90 minutes to support [Student’s] needs in the areas of generalizing behavioral and social skills. [Student] will receive Individualized Instructional Support (IIS) while in the special and general education setting...[Student] will receive specially designed instruction in a special education small group setting for 150 minutes per day to provide direct instruction in the areas of behavior, math, ELA and social skills. [Student] will receive Individualized Instructional Support (IIS) while in the special education setting.” With respect to Student’s least restrictive environment during ESY, the August IEP states: “[Student] will receive instruction for Academics and Social Skills in a special education and general education (when available) setting. [Student’s] needs for intensive interventions in these academic and life skill areas along with [Student’s] behaviors,

including avoidance in large group settings require the small group setting with fewer distractions and a low student to teacher ratio to best meet [Student's] needs until [Student's] skills better develop in these areas. [Student's] time spent with general education peers will be supported by Individualized Instructional Support (90 minutes/week)." The August IEP also includes numerous accommodations and modifications during ESY, such as the use of a behavior support plan ("BSP") and a [REDACTED] plan. DOE Ex. 5 at 034-035.

27. A BSP is a document that is used by people who are working with a child. A BSP is designed to meet a child's behavioral needs and has specific interventions that target the child's behaviors. A BSP contains proactive strategies to help a child be successful, and reactive strategies for people to respond to a child's problem behaviors in a similar way so that the child can have consistency. SBBH Supervisor, Tr. Vol. 4, 372:7-24.
28. On September 22, 2023, an administrative hearing decision was issued for case no. DOE-SY2223-042, finding a violation of IDEA ("9/22/2023 Decision"). Pet. Ex. 4 at 099-132.
29. The 9/22/2023 Decision ordered, among other things, the parties to reconvene for an IEP meeting to discuss any concerns Parent may have and noted that a preexisting IEP meeting was held on August 11, 2023, which may satisfy the hearings officer's order to reconvene for an IEP meeting if both parties were satisfied with the resulting IEP from the August IEP meeting. Pet. Ex. 4 at 130; Parent, Tr. Vol. 1, 36:5-37:6.
30. On October 16, 2023, the IEP team agreed to have a revision IEP meeting to discuss the 9/22/2023 Decision, ESY data, [REDACTED] services, and other concerns Parent had shared with the IEP team. Pet. Ex. 3 at 072; DOE Ex. 32, 10/20/2023 IEP Meeting Recording at 00:02:16-00:02:30.

31. Also, on October 16, 2023, Parent sent Home School the following email message (“10/16/2023 email”): “Dear IEP Team, At the meeting on Friday 10/20/23 at 2:15 I want to talk about the following:

Extended School Year services. A. If the ESY site will not be at the home school, I will need another program that is not [REDACTED] away. B. Whether the program is at [his/her] home school or not, it must be with other children and some of these other children need to be non-disabled. C. This program should specify what activities my [son/daughter] will be doing with non-disabled peers. Just being around non-disabled peers will not help my [son/daughter] to learn to socialize. D. I want the ESY program to be at least 6 hours long and 5 days a week. E. I want 30 hours of compensatory services with non-disabled peers for socialization. This needs to be a structured social program which integrates my [son/daughter] in activities with non-disabled peers. F. The IEP must clearly state what I agree with, or I will reject it.

Addressing my [son/daughter’s] Daily-living skills needs. My [son/daughter’s] needs in dressing, [REDACTED] and morning routines needs to be addressed, among other daily-living skills [he/she] does not possess.

Having a consistent 1:1 aide through out the day. I feel that I have been manipulated when the IEP team discusses an aide. I want an aide that is consistent throughout the day, not having my [son/daughter] get passed from one person to another and going with just close adult supervision at times.

How to address my [son/daughter’s] behaviors. I want to discuss all of my [son/daughter’s] behaviors in the classes [he/she] had in inclusion and now when [he/she] is being prevented from being around [his/her] friend. What behavior problems does [he/she] have. What interventions have been tried and what works. Whatever works to head off this behaviors [sic] should be listed in the IEP under Supplemental Supports.

Least restrictive environment. My [son/daughter] is very unhappy with being isolated from [his/her] peers. I was lied to about the amount of time [he/she] spends in an inclusion program at the last IEP meeting and the amount was significantly reduced. I want my [son/daughter] to be in an inclusion class for 73% or more of the day. Item #23 of the IEP must clearly commit, in writing, to this without using vague of [sic] illusory language like ‘as appropriate’ or ‘when not receiving special education instruction’.”

Pet. Ex. 3 at 133-134; DOE Ex. 11 at 072 (bold in original).

32. Also, on October 16, 2023, SPED Teacher emailed to Parent copies of an IEP meeting agenda for October 20, 2023; “Trial Data Sheet” for School Year 2022-2023; a draft IEP; “Pre-Break Data” for May 8-23, 2023; and “Post Break Data” for August 7-19, 2023. According to the IEP meeting agenda, the IEP team would be discussing ESY and the ESY data, Parent’s [REDACTED] concerns, and follow-up on physical therapy/occupational therapy. The draft IEP contained the following statement for ESY: “[Student] will receive instruction for Academics and Social Skills in a special education and general education (when available) setting.” DOE Ex. 12 at 074-113; Parent, Tr. Vol. 2, 120:23-122:10.
33. On October 20, 2023, an IEP meeting was held to revise Student’s IEP (“10/20/2023 IEP meeting” or “October IEP meeting”). Present at the IEP meeting on October 20, 2023 were Parent, District Employee, Principal, DES, SPED Teacher, OT, a general education teacher, a physical therapist, a speech/language pathologist, and BHS. BHS is a behavioral health specialist with the DOE. Pet. Ex. 1 at 048; DOE Ex. 9 at 068. The IEP meeting was not completed on October 20, 2023, and was continued to November 20, 2023.
34. During the 10/20/2023 IEP meeting, Principal read through Parent’s 10/16/2023 email and asked Parent clarifying questions about what Parent was seeking in Parent’s 10/16/2023 email.
35. During the 10/20/2023 IEP meeting, Principal reassured Parent that the upcoming winter ESY would be at Home School, and that they were doing their due diligence to make sure that ESY for summer 2024 would also be at Home School. Principal asked Parent if there was anything else Parent wanted Principal to comment on regarding securing Home

- School as the location for summer ESY, and Parent shook Parent's head to indicate no. DOE Ex. 32, 10/20/2023 IEP Meeting Recording at 00:04:39-00:06:48, 00:13:50-00:14:02; Parent, Tr. Vol. 1, 52:6-53:2; Parent, Tr. Vol. 2, 126:13-131:13.
36. During the 10/20/2023 IEP meeting, Principal shared with Parent that the purpose of having nondisabled students present is to provide Student with opportunities for generalization of Student's behavior goals during ESY. DOE Ex. 32, 10/20/2023 IEP Meeting Recording at 00:06:45-00:09:10; DOE Ex. 31 at 189⁸.
37. When summer ESY is available at Home School, there are other disabled students, and Student will have access to nondisabled peers during ESY. Parent, Tr. Vol. 2, 167:6-21; Principal, Tr. Vol. 3 at 188:1-6, 195:5-12.
38. During the 10/20/2023 IEP meeting, Principal asked a clarifying question regarding Parent's request for a "consistent 1:1 aide through out [sic] the day" and "close adult supervisor," and asked Parent if Parent was requesting that Student have the same person with Student all day, to which Parent said, "Yeah." DOE Ex. 32, 10/20/2023 IEP Meeting Recording at 00:11:59-00:13:07; DOE Ex. 31 at 189-190.
39. During the 10/20/2023 IEP meeting, Principal asked Parent if Parent had any data to suggest that ESY needed to be changed from five (5) to six (6) hours or that Student have a shorter break before receiving ESY services. Principal asked Parent what goals Parent saw Student lose during the summer break that would necessitate a shorter length of time without ESY services. Parent replied that a discussion right now was not appropriate

⁸ DOE's Exhibit 31 contains transcribed excerpts of the 10/20/2023 and 11/20/2023 IEP meetings. The transcripts were made by counsel at the request of the Hearings Officer to facilitate the review of the IEP meetings. The transcripts are unofficial transcription of the IEP meetings and should be used with caution.

because Student did not have ESY services and that Parent had worked with Student during the break. The school members of the IEP team explained that the current data showed that Student did not show much regression during the summer break, and that Student is able to recoup lost skills after [REDACTED] days. Parent informed the school members of the IEP team that Parent was not able to read or understand the ESY data SPED Teacher had sent to Parent before the IEP meeting. Principal offered to schedule a time to meet with Parent to review the ESY data, but stated that at this point, the ESY data did not support any changes to Student's ESY. Principal proposed that they continue to collect data based on new IEP goals, especially during the upcoming winter break, hold off on making any changes to ESY, and reconvene during Student's annual review period or before the summer break to determine if ESY should be changed. Principal asked Parent if Parent had any questions, and Parent replied, "No." DOE Ex. 32, 10/20/2023 IEP Meeting Recording, 00:14:05-00:24:02; DOE Ex. 31 at 190; Parent, Tr. Vol. 2, 119:11-120:1.

40. During the 10/20/2023 IEP meeting, Parent asked the rest of the IEP team if they had read the AFLS assessment. OT informed Parent that OT had read the AFLS assessment, and that Student's May IEP took into consideration the AFLS assessment and addressed [REDACTED]. DOE Ex. at 10/20/2023 IEP Meeting Recording, 00:42:36-00:47:38.

41. During the 10/20/2023 IEP meeting, Parent shared concerns about Student's ability to [REDACTED]
[REDACTED] The school members of the IEP team shared with Parent that Student is able to [REDACTED] "effectively" at school. OT asked Parent whether Student was [REDACTED] at home. Parent did not answer the

4. Can use [REDACTED]
[REDACTED] [;]

5. Understands when needs [REDACTED]
[REDACTED].

6. Adjusts behavior in different community settings, asks for help, does not touch others, does not do disruptive behaviors, is not aggressive towards others, complied with authority figure[.]

My concerns from first meeting are the same.”

Pet. Ex. 3 at 073-074; DOE Ex. 13 at 114 (bold in original).

43. On October 30, 2023, OT emailed Parent and other members of the IEP team information about [REDACTED] as OT had stated he/she would during the 10/20/2023 IEP meeting. DOE Ex. 14 at 115-126.
44. On October 31, 2023, SPED Teacher emailed to Parent reformatted versions of the ESY data. SPED Teacher offered to sit down with Parent to go over the data. Pet. Ex. 3 at 058-071; Parent, Tr. Vol. 2, 122:1-123:13.
45. On November 2, 2023, SPED Teacher emailed to Parent more legible versions of the ESY data sheets and offered again to meet with Parent to discuss the data. The attachments sent to Parent contained baseline data, regression data, and recoupment data for break period May 21, 2023 to August 6, 2023. DOE Ex. 15 at 127-136; Parent, Tr. Vol. 2, 123:14-19.
46. On November 14, 2023, SPED Teacher confirmed with Parent that SPED Teacher had given all the ESY data to Parent. SPED Teacher again asked Parent if Parent wanted to go over the ESY data with SPED Teacher and Principal, because SPED Teacher wanted to answer any questions that Parent might have before their next IEP meeting. Parent

declined SPED Teacher's offer to discuss the ESY data. DOE Ex. 19 at 140; Parent, Tr. Vol. 2, 123:20-124:9.

47. On November 20, 2023, the revision IEP meeting ("11/20/2023 IEP meeting" or "November IEP meeting") resumed with the following people: Parent, SBBH Supervisor, BHS, Principal, SPED Teacher, OT, a general education teacher, a physical therapist, and a speech/language pathologist. Pet. Ex. 1 at 049; DOE Ex. 9 at 069. Student was present in the meeting room but not within view of the camera.
48. SBBH Supervisor was new to the IEP meeting. SBBH Supervisor was invited to the IEP meeting to provide support and feedback in assessing Student's behaviors and discuss future development of a BSP. Principal, Tr. Vol. 3, 207:25-208:18; DOE Ex. 33 at 11/21/2023 IEP Meeting Recording⁹, 00:15:56-00:17:58.
49. At the start of the 11/20/2023 IEP meeting, Principal provided a summary of what was discussed during the 10/20/2023 IEP meeting, including Student's ability to use the [REDACTED]. At the end of the summary, Principal asked Parent if Parent had any questions or comments about what was summarized and if it was okay to move on. Parent did not have any questions. DOE Ex. 33, 11/21/2023 IEP Meeting Recording at 00:04:56-00:08:03.
50. During the 11/20/2023 IEP meeting, Principal read Parent's 10/16/2023 email regarding Parent's concern about Student having a "consistent 1:1 aide." Principal explained that Student is being offered the service of having one-on-one support and not an individual person. SPED Teacher explained that EA is currently Student's aide but DOE Employee

⁹ The November IEP meeting took place on the 20th, not 21st. The video recording of the November IEP meeting was mislabeled, which resulted in the exhibit being mislabeled.

steps in throughout the day to provide breaks to EA. If EA is sick or unable to work with Student, then DOE Employee, SPED Teacher-2¹⁰ or SPED Teacher would step in to provide IIS services to Student. After Principal and SPED Teacher's explanation, Parent was asked if Parent had any other questions. Parent said no and that Parent still did not agree with having multiple people providing IIS services to Student throughout the day. DOE Ex. 33, 11/21/2023 IEP Meeting Recording at 00:08:04-00:10:23; DOE Ex. 31 at 193.

51. Student consistently has one-to-one supervision throughout the school day. EA, Tr. Vol. 4, 315:22-317:20¹¹, 329:14-330:14, 334:1-336:15.
52. During the 11/20/2023 IEP meeting, the IEP team discussed Parent's 10/16/2023 email regarding Student's behaviors. The IEP team discussed Student's behavior in school; triggers (such as non-preferred activities); coping strategies (such as color-coded visual support to communicate various emotions, "candle breaths"); behavior interventions (such as emotion chart); and transitions being a challenge for Student. The IEP team, including Parent, agreed that SBBH Supervisor would conduct observations of Student, the team would have an initial line of inquiry ("ILI") meeting, and update Student's BSP¹² with Parent's help. DOE Ex. 33, 11/21/2023 IEP Meeting Recording at 00:10:23-00:17:58; DOE Ex. 31 at 193-196; Parent, Tr. Vol. 2, 141:1-142:7.

¹⁰ SPED Teacher-2 is a special education teacher and teaches the [REDACTED] and [REDACTED] grades. EA, Tr. Vol. 4, 316:11-317:8, 350:13-21.

¹¹ Although the transcript says "[REDACTED]," the undersigned heard the witness say "[REDACTED]."

¹² It is noted that while the IEP team discussed "updating" Student's BSP, Student did not have a BSP as a supplementary aid and service. Student only had a BSP during ESY. DOE Ex. 5 at 034-035; DOE Ex. 9 at 064-065.

53. During the 11/20/2023 IEP meeting, Parent gave Parent's perspective on what initiates Student's behaviors and what kind of reactions are productive. Parent, Tr. Vol. 1, 85:1-19. Parent shared with the school members of the IEP team that staying calm, using simple sentences can help with Student's behavior, and being able to anticipate Student's needs is helpful because Student has difficulty communicating. Principal asked Parent, "So, as far as addressing the behavior, [Parent], we're going to have [SBBH Supervisor] come down to do the observations. Umm, come together do the initial line of inquiry, and look at the ways we can adjust them. Does that feel like a good plan to address some of these behaviors with your input as well?" Parent replied, "Yeah, yeah." Principal then asked, "Okay. So, we can go on to the next one on your list?" Parent replied, "Yeah." DOE Ex. 33, 11/21/2023 IEP Meeting Recording at 00:19:51-00:30:33.
54. During the 11/20/2023 IEP meeting, the IEP team discussed how Parent did not like the wording "close adult monitoring" in the August IEP. The IEP team discussed which terms to use--"close adult monitoring" or "one-to-one." The IEP team agreed to use the term "one-to-one" instead of "close adult monitoring." DOE Ex. 33, 11/21/2023 IEP Meeting Recording at 1:02:15-1:03:19.
55. During the 11/20/2023 IEP meeting, SPED Teacher explained the ESY data sent to Parent, and that the ESY data showed that Student was doing well. SPED Teacher explained that although Student showed a little regression with CVC words, Student was able to recoup Student's losses. SPED Teacher informed Parent that besides the CVC words, Student did not regress in any of the other objectives. SPED Teacher then asked Parent if Parent had any questions and Parent stated no. Principal then asked Parent if there was anything else Parent wanted to bring up, and Parent replied no and that Parent

still didn't agree. DOE Ex. 33, 11/21/2023 IEP Meeting Recording at 00:39:00-00:41:55; DOE Ex. 31 at 196-197; Parent, Tr. Vol. 2, 125:16-126:12.

56. During the 11/20/2023 IEP meeting, the IEP team again discussed Student's [REDACTED] skills. Parent shared that Student has been getting better with [REDACTED] at home and is showing more independence. DOE Ex. 33, 11/21/2023 IEP Meeting Recording at 00:41:54-00:44:25; DOE Ex. 31 at 197.
57. During the 11/20/2023 IEP meeting, SBBH Supervisor proposed a clarification statement to insert into the Clarification of Services and Supports section of the IEP so that the IEP team would understand what school-based behavioral health is doing to support the team and Student. SBBH Supervisor read the clarification statement and provided a copy in the "chat box" in the virtual meeting. SBBH Supervisor's proposed clarification statement was adopted verbatim into the Oct./Nov. IEP. SBBH Supervisor provided Parent SBBH Supervisor's contact information so that Parent could contact SBBH Supervisor if Parent had any questions. SBBH Supervisor then left the virtual meeting¹³. DOE Ex. 33, 11/21/2023 IEP Meeting Recording at 00:44:36-00:46:04; DOE Ex. 9 at 065.
58. In addition to addressing Parent's 10/16/2023 email, the IEP team also addressed Parent's 10/24/2023 email. Principal read Parent's 10/24/2023 email. Principal asked Parent if Parent wanted the school to work on these "tasks." Parent explained that Parent is working with Student on many things, such as putting on [REDACTED], and wanted the school to address these tasks since there was more time in school. Parent was given the opportunity to comment on whether the IEP team thoroughly addressed Parent's

¹³ BHS left the meeting at 00:42:08 before SBBH Supervisor spoke to the IEP team.

concerns. SPED Teacher offered to print out some visuals that are being used at school for Parent to use at home with Student, such as “[REDACTED].” SPED Teacher commented that if the same things are used at school and home, perhaps that would help with Student’s behavior. Parent commented that sometimes the visuals at home are too small and asked the school to make the visuals bigger. EA shared that Student understands things that are dangerous and if Student sees the sign, Student will understand it. SPED Teacher informed Parent that they could talk later about which visuals Parent wanted and the school could print out some important ones, such as those dealing with safety. DOE Ex. 33, 11/21/2023 IEP Meeting Recording at 00:39:00-00:40:00, 00:46:04-00:50:44; DOE Ex. 31 at 197-198.

59. Student is learning community signs or visuals at school, such as “don’t touch,” “no swim,” “enter,” “hospital,” “playground,” “crosswalk,” “stop sign,” “stoplight,” “open,” “close,” “no food,” “airport,” “mean dog,” “dog park,” “leash,” and “boys and girls bathroom.” Many of the signs are in pictorial form. Student currently remembers 28 of the 30 signs taught to Student. EA, Tr. Vol. 4, 320:25-324:16.
60. Students generally do not have access to hot water or hot things, household cleaners, and strangers in the school setting. Schools use cold water; household cleaners are locked up and kept away from students; and strangers should not be on school campuses and visitors report to the office. OT, Tr. Vol. 3, 273:5-277:16
61. The October 20, 2023 and November 20, 2023 IEP meetings resulted in an IEP with the same dates (“Oct./Nov. IEP”). Pet. Ex. 1 at 025-049; DOE Ex. 9 at 045-069.
62. The Oct./Nov. IEP contains thirteen (13) goals with accompanying objectives for Student: seven (7) goals in the area of Language Arts, targeting reading, language,

- speaking and listening; two (2) in the area of Mathematics; three (3) in the area of Health, targeting interpersonal communication and self-management; and one (1) in the area of Physical Education. DOE Ex. 9 at 051-063.
63. One of the goals in the area of Language Arts in the Oct./Nov. IEP has objectives that will address developing Student's communication skills and using gestures or full body demonstrations to convey ideas. DOE Ex. 9 at 062.
64. The goals in the area of Health in the Oct./Nov. IEP have objectives that will address Student's ability to identify perspectives; answer and ask questions; cope with not getting Student's way; use calming strategies (such as taking deep breaths, squeezing hands, requesting a break); and independently express the need to go to the [REDACTED]. DOE Ex. 9 at 057- 058, 060.
65. The goal in the area of Physical Education in the Oct./Nov. IEP has objectives that will address Student's ability to use a [REDACTED] grasp or writing tools to independently copy/draw, write Student's name and the alphabet; improve Student's bilateral coordination to cut; and improve Student's functional independence to independently manipulate [REDACTED]. DOE Ex. 9 at 063.
66. The Special Education and Related Services did not change between the August IEP and the Oct./Nov. IEP. DOE Ex. 9 at 065.
67. According to the Oct./Nov. IEP, Student will receive the following Supplementary Aids and Services: physical therapy consultation; IIS for 1825 minutes per week; SBBH consultation services; visual aids and supports; prompting and redirection; social stories; simplified language and directions; modified assignments; pre-teaching concepts and

- routines; priming behavioral/academic expectations; communication between home and school; and daily “1:1 adult monitoring.” DOE Ex. 9 at 065.
68. IIS and 1:1 adult monitoring mean the same thing. Principal, Tr. Vol. 3, 200:11-17.
69. The Oct./Nov. IEP’s clarification section is almost the same as the clarification section in the August IEP except for the addition of SBBH Supervisor’s proposed language and “close adult monitoring” was changed to “1:1 adult monitoring.” SBBH Supervisor’s proposed language reads: “School Based Behavioral Health (SBBH) Consultation services will include providing clinical consultation support to the school level counselor, teacher, and other support staff to guide behavioral strategies as part of a classroom Behavior Support Plan.” DOE Ex. 9 at 065-066.
70. The ESY section of the Oct./Nov. IEP is the same as the August IEP. DOE Ex. 5 at 034-035; DOE Ex. 9 at 064-065.
71. In developing the Oct./Nov. IEP, the IEP team relied on ESY data, IEP team input, and observations. DOE Ex. 10 at 071.
72. According to the Oct./Nov. IEP, an annual review of the IEP will be done on or before May 25, 2024, and a reevaluation will be conducted on or before July 1, 2025. DOE. Ex. 9 at 045.
73. Student receives IIS services from EA daily for approximately 75% of the school day. For the remaining 25% of the school day, IIS services are provided to Student by SPED Teacher-2, another educational assistant, or a life skills teacher. EA, Tr. Vol. 4, 315:10-317:20, 334:1-336:15.
74. Principal testified that the IIS and “1:1 adult monitoring” in the Supplementary Aids and Services section of the Oct./Nov. IEP is a “redundant statement,” the term “individual

instructional support” and “1:1 adult monitoring” are synonymous, and Student would not have two individuals providing one-to-one support to Student at the same time.

Principal, Tr. Vol. 3, 258:19-260:14.

75. On November 28, 2023, SBBH Supervisor conducted an observation of Student at school. SBBH Supervisor, Tr. Vol. 4, 360:23-362:1.
76. Following the Oct./Nov. IEP meeting, a Prior Written Notice, dated December 4, 2023, was issued (“December PWN”). The December PWN confirmed that an observation would be done by a school-based behavioral health specialist, and then an ILI meeting would be held to develop a BSP for Student. The December PWN also confirmed that Student returned from summer break with little to no regression and the data at that time did not justify increasing Student’s current ESY services from 4 hours/day to 6 hours/day. The December PWN further confirmed that the school would continue to gather data prior to and after winter break and reconvene later to discuss ESY. DOE Ex. 10 at 070-071.
77. On December 5, 2023, SPED Teacher emailed to Parent copies of a draft IEP and PWN. Pet. Ex. 3 at 077.
78. On December 26, 2023, Petitioners filed the instant Complaint.
79. On December 29, 2023, Student attended winter ESY for one (1) day at Home School and had access to nondisabled peers. DOE Ex. 3 at 010-012; Parent, Tr. Vol. 1, 54:2-6.
80. On January 11, 2024, a resolution meeting was held to attempt to resolve the issues raised in the Complaint. Present at the resolution meeting were Parent, Principal, DES, Mr. Peck, Ms. Christopherson, and District Employee who served as the facilitator. During the resolution meeting, Home School asked to schedule an ILI meeting, however, Mr.

Peck requested that scheduling be conducted through regular communications between school and Parent and not at the current resolution meeting. Pet. Ex. 3 at 078-079; DOE Ex. 4 at 013-014.

81. After the resolution meeting on January 11, 2024, Principal emailed Parent: “Subject: Re: Behavior Support Planning Meeting Dates” “We would like to schedule a meeting to gather information about [Student’s] current behavioral strengths and challenges so we can update [Student’s] behavior support plan. This is not an IEP meeting. This type of meeting is called an Initial Line of Inquiry (ILI). Again the purpose of the meeting is to gather information about [his/her] behavior to develop [Student’s] new behavior support plan. Can you meet on either of the following dates: January 16...January 23...” Pet. Ex. 3 at 080; DOE Ex. 22 at 146.
82. On January 15, 2024, Parent responded to Principal’s 1/11/2024 email stating that Parent wanted Mr. Peck present at the ILI meeting. Parent was not available for the dates suggested by Principal and suggested January 22 or January 24, 2024. Pet. Ex. 3 at 080; DOE Ex. 22 at 146.
83. On January 17, 2024, SBBH Supervisor conducted a second observation of Student at school. DOE Ex. 20 at 141; SBBH Supervisor, Tr. Vol. 4, 364:18-365:9.
84. Also on January 17, 2024, Petitioners clarified that Student was not attending a private school and that the Complaint mentioned private school in error. Pet. Ex. 3 at 078-079.
85. On January 18, 2024, Principal confirmed that the ILI meeting was scheduled for January 24, 2024. Pet. Ex. 3 at 083; DOE Ex. 22 at 145-146.
86. On January 22, 2024, Parent sent an email to Principal stating that Mr. Peck would not be attending the ILI meeting on January 24, 2024. Parent also stated, among other things,

that “1. A BSP that is developed by someone and not done as part of an IEP meeting is not legally appropriate...they are changeable and not describe in the IEP is a denial of FAPE. This is what I have also alleged through my current Complaint against the DOE.

2. The behaviors I see at home and you see escalating at school are due to your isolation of [Student]. [He/she] was 73% in general education before. You lied and said [he/she] was in much less general education to reduce this amount and now [his/her] behaviors have gotten worse because [he/she] is upset.” Pet. Ex. 3 at 082; DOE Ex. 22 at 145.

87. On January 24, 2024, an ILI meeting took place. Present at the ILI meeting were Parent, Student, EA, SPED Teacher-2, Principal, OT, SBBH Supervisor, another occupational therapist, a district resource teacher, a speech/language pathologist, an SBBH intern, and others. During the ILI meeting, the team, including Parent, discussed Student’s strengths, problem behaviors, and triggers. The team was not able to finish the ILI meeting and it was continued to January 31, 2024. Parent, Tr. Vol. 1, 86:16-87:4; Parent, Tr. Vol. 2, 142:2-11; SBBH Supervisor, Tr. Vol. 4, 370:3-371:4; DOE Ex. 23 at 150-151.
88. After the ILI meeting, but before meeting to develop a BSP, SBBH Supervisor conducted a third observation of Student. SBBH, Tr. Vol. 4, 365:22-366:10.
89. On January 28, 2024, Parent emailed Principal stating that the team ignored Parent’s input and failed to address Parent’s concerns in Parent’s 1/22/2024 email during the ILI meeting on January 24, 2024, and therefore Parent wanted to reschedule the next ILI meeting so that Mr. Peck could be there. DOE Ex. 23 at 150-151.
90. On January 31, 2024, Principal responded to Parent’s 1/28/2024 email: “Aloha [Parent], Please give us some dates and times so we can reschedule the second half of the ILI/BSP development meeting. In response to the issues/concerns you brought up in your email

please see below: 1. ...Our position is that a BSP does not need to be fully incorporated into an IEP... 2. Opportunity for sharing this concern was provided during the discussion on the possible causes of [his/her] behaviors. (Fast and Slow triggers). We can add this to the discussion as we complete the ILI and continue to develop [his/her] BSP together.” DOE Ex. 23 at 149-150.

91. On February 7, 2024, Parent stated that Mr. Peck would be able to participate in an ILI meeting on February 20, 2024. DOE Ex. 23 at 149.
92. On February 20, 2024, the team reconvened to continue the ILI meeting and to begin developing a BSP for Student. Present at the meeting were Parent, SPED Teacher-2, SBBH Supervisor, Mr. Peck, Ms. Christopherson, EA, Principal, a district resource teacher, and a speech/language pathologist. SBBH Supervisor presented the team with a draft BSP based on the data collected from the ILI meeting. The team spent most of the time discussing what had happened at the previous ILI meeting and reviewing information. The team also discussed that the IEP may need to be revised to reflect any BSP interventions developed at the meeting. A BSP was not completed, and the meeting was continued to March 1, 2024. Parent, Tr. Vol. 1, 87:2-14; Parent, Tr. Vol. 2, 142:12-143:1; SBBH Supervisor, Tr. Vol. 4, 371:10-375:12.
93. On February 26, 2024, Home School was able to secure the necessary personnel to have summer 2024 ESY at Home School. Principal, Tr. Vol. 3, 187:21-188:22.

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.” Schaffer, 126 S. Ct. at 535. Neither Schaffer nor the text of the IDEA supports imposing a different burden in IEP implementation cases than in formulation cases.

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. 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).

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 a 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., 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 Endrew 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.” Endrew F. v. Douglas

County Sch. Dist., 137 S. Ct. 988, 1001 (2017). See also, Blake C. 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(s), 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 annually. 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 (2nd Cir.2012).

C. ISSUES FOR DETERMINATION

1. Whether the Oct./Nov. IEP was a denial of FAPE with regard to Student’s ESY services.

In this allegation, Petitioners allege that the ESY services proposed by the DOE in the Oct./Nov. IEP denies Student a FAPE because (a) the Oct./Nov. IEP conditions Student’s access to a setting with nondisabled peers on a “when available” basis; (b) the Oct./Nov. IEP team did not discuss and/or describe the location of Student’s ESY services based upon Student’s unique

difficulties if Student needed to travel for certain lengths of time; (c) the Oct./Nov. IEP team did not discuss and/or describe the need for Student to have peers in Student's ESY program; and/or (d) the Oct./Nov. IEP team used data that was not appropriate to determine the length of the frequency and/or duration of ESY services. Based on the evidence, Petitioners met their burden of proof in showing that Student was denied a FAPE when the Oct./Nov. IEP conditioned Student's access to a setting with nondisabled peers on a "when available" basis.

(a) It was an IDEA violation for the Oct./Nov. IEP to condition Student's access to nondisabled peers on "when available."

In this issue, Petitioners are alleging that the Oct./Nov. IEP denies Student a FAPE because it conditions Student's access to nondisabled peers during ESY on the availability of general education students: "[Student] will receive instruction for Academics and Social Skills in a special education and general education (when available) setting." (FOF 26, 70). During the hearing, Principal testified that the phrase "when available" in Student's Oct./Nov. IEP was a "misstatement" and "should not have been put in there," and that the Oct./Nov. IEP requires that Student receives (ninety) 90 minutes of general education during ESY, and Student in fact received 90 minutes of general education during ESY in the winter of 2023¹⁴. Principal, Tr. Vol. 3, 196:7-198:2, 224:9-17. As discussed below, conditioning Student's access to the general education setting on a "when available" basis, even though Student received the required minutes of general education thus far, is still a denial of FAPE.

An IEP must contain, among other things, a statement of specific educational services to be provided to a child. 20 U.S.C. § 1414(d). An IEP is a "comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related

¹⁴ Principal also testified that the phrase "when available" in Student's Oct./Nov. IEP is "not accurate." Principal, Tr. Vol. 3, 197:3-15.

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). By including the phrase “when available,” there is no guarantee that Student will have access to nondisabled peers during ESY. According to the Oct./Nov. IEP, Student will be in the special education and general education settings for a total of (four) 4 hours per day during ESY. The IEP also states that “[Student] will participate in a general education setting daily for 90 minutes to support [Student’s] needs in the areas of generalizing behavioral and social skills.” (FOF 26, 70). However, when read with the statement that “[Student] will receive instruction for Academics and Social Skills in a special education and general education (when available) setting,” it is not guaranteed that Student will participate in a general education setting for 90 minutes every day during ESY. An IEP is essentially a contract between the school and parents. When reading a contract, it is “well-established [] that contracts should be interpreted to give meaning and effect to all contract terms.” Hawaiian Ass’n of Seventh-Day Adventists v. Wong, 130 Hawaii 36, 57 (2013). By giving meaning to all the aforementioned sentences, the result is a conditional access to a general education setting contingent on nondisabled peers being available.

As Petitioners correctly argue, the “phrase ‘when available’ introduces an unacceptable level of vagueness that significantly impedes a parent’s ability to enforce the IEP’s provisions.” Pet. Closing Brief, p. 3. Even though Parent did not raise any questions or concerns about the phrase “when available” during the IEP meetings in October and November, and the phrase was in the August IEP and a draft IEP sent to Parent before the October IEP meeting, it still constitutes a denial of FAPE because it denies Parent meaningful participation in the IEP

process¹⁵. DOE Closing Brief, pp. 26-27. Parental participation encompasses both the formulation of an IEP and the enforcement of the IEP. M.C. V. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1198 (9th Cir.2017). As the Ninth Circuit Court of Appeals explains,

Under the IDEA, parental participation doesn't end when the parent signs the IEP. Parents must be able to use the IEP to monitor and enforce the services that their child is to receive. When a parent is unaware of the services offered to the student—and, therefore, can't monitor how these services are provided—a FAPE has been denied, whether or not the parent had ample opportunity to participate in the formulation of the IEP.

M.C. V. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1198 (9th Cir.2017). The IDEA envisions that a written IEP offer would constitute a “formal, specific offer from a school district [that] will greatly assist parents in “present[ing] complaints with respect to any matter relating to the... educational placement of the child.”” M.C. v. Antelope, 858 F.3d at 1197 (quoting Union Sch. Dist., 15 F.3d 1519, 1526 (9th Cir.1994) (quoting 20 U.S.C. § 1415(b)(1)(E)). Although Student was provided 90 minutes of general education during winter ESY in 2023, Parent cannot be sure that the school would continue to provide 90 minutes of general education during any upcoming ESY sessions, because the “when available” phrase would allow Home School to cut back the amount of general education exposure to Student.

¹⁵ Parent's testimony regarding when Parent found out about the phrase “when available” draws into question Parent's credibility. During questioning by Mr. Peck, Parent testified that Parent received a draft copy of the Oct./Nov. IEP on December 5, 2023, and that Parent at that time did not know that the phrase “when available” would be put into the IEP document. When Mr. Peck asked, “you only got the document and only discovered later that they added a phrase that was never part of the discussions in the IEP meeting?” Parent replied, “Yes.” Parent, Tr. Vol. 2, 150:1-151:24. The undersigned questions the veracity of Parent's testimony because the phrase “when available” was in the August IEP and in a draft IEP Parent received on October 16, 2023 to use during the 10/20/2023 IEP meeting. (FOF 26, 32). However, at what point Parent found out about the phrase only affects parent's participation rights in the formulation of the Oct./Nov. IEP, and not the enforcement of the IEP. There is insufficient evidence to establish when and under what circumstances the phrase was added to Student's IEP. Principal, Tr. Vol. 3, 198:22-199:23.

Also, a claim that DOE is failing to implement the ESY provision of the Oct./Nov. IEP will be more difficult for Parent to prove than if the IEP were to simply state that Student will be in a general education setting during ESY. DOE could simply point to the “when available” language as a defense to not providing Student with instruction in the general education setting because it was not available. Another example of why the “when available” language is problematic is if Student were to transfer to another school. The IDEA requires the new school to provide “services comparable to those described in the child’s IEP from the previous public agency....” 34 C.F.R. § 300.323(e); see also 20 USC § 1414(d)(2)(C). Student’s Oct./Nov. IEP would allow the new school to provide Student with access to nondisabled peers only when the new school has nondisabled peers available.

Based on the foregoing, Petitioners have met their burden in showing that Parent’s participation in the IEP process was significantly infringed upon when Student’s access to the general education setting during ESY is conditioned on a “when available” basis, thereby denying Student a FAPE.

(b) Petitioners fail to prove that the Oct./Nov. IEP team did not discuss and/or describe the location of Student’s ESY services based upon Student’s unique difficulties if Student needed to travel for certain lengths of time.

During the summer of 2023, Home School did not have ESY at Home School and offered Student ESY at Public School. (FOF 16). Parent did not approve of Student attending ESY at Public School and decided to keep Student at home to try to implement portions of Student’s IEP. (FOF 16). At the time of the Oct./Nov. IEP meeting, the IEP team did not yet know whether it could offer Student ESY at Home School during the upcoming 2024 summer session. During the IEP meeting in October, the IEP team discussed the location of where summer ESY in 2024 would take place. Principal informed Parent that Home School was in the process of

securing Home School as the location for ESY during the summer of 2024. Parent was given the opportunity to ask questions or make comments, but Parent declined. (FOF 35). While the IEP team did not definitively say where summer ESY for 2024 would be, they did discuss Home School as being a possible location and that Home School was trying to make sure that it could have summer ESY in 2024. If Parent was not satisfied with the school's efforts and had wanted to discuss scenarios, such as having summer ESY at another location that would require Student to travel for a certain length of time, Parent had the opportunity to pose such scenarios for the rest of the IEP team to address. The IEP team was respectful towards each other and there is no evidence that the school members of the IEP team prevented Parent from talking. See Dept. of Educ., Hawaii v. C.B., Civil No. 11-00576 SOM/RLP, 2012 WL 1537454, *11 (D.Haw. May 1, 2012) ("The court declines to place upon a school the burden of recognizing a parent's concern about the inadequacy of a school's response to the parent's inquiry when the parent has given no indication of concern.") "[P]arents must talk, or complain, when given the chance. Timely input can allow a school district to respond meaningfully to parental requests." Schoenbach v. D.C., 309 F.Supp.2d 71, 89 (U.S.D. Dist. of Columbia March 25, 2004).

Even if the IEP team should have discussed Student's "unique difficulties" if Student needed to commute to a school that is farther than Home School, it would only be a procedural misstep that did not seriously impede Parent's participation, nor would it rise to the level of a substantive violation. First, "the physical location where a placement will be implemented is an administrative decision made by the DOE...." N.S. v. State of Hawaii, Dept. of Educ., Civil No. 09-00343 SOM/KSC, 2010 WL 2348664, *8 (D.Haw. June 9, 2010). See also, Oliver C. v. State of Hawaii, Dept. of Educ., 762 Fed.Appx. 413, 415 (9th Cir.2019) ("A change in location alone does not qualify as a change in 'educational placement.'" Upon student moving from [REDACTED]

District to the [REDACTED] District, it was within DOE's authority to determine that the school in the [REDACTED] District would implement student's IEP, against Parents' wishes.) Therefore, failing to discuss or describe (during the IEP meeting or written within the IEP itself) the location of where summer ESY will take place would not amount to a substantive violation because it is within DOE's authority to decide the location of where Student's ESY services would be implemented.

Second, in the past, Parent communicated to Home School that Parent could drive Student to another school for summer ESY if DOE reimbursed Parent for lost wages¹⁶. While lost wages are important, this is a personal reason and not a reason related to Student's educational needs¹⁷. See e.g. Los Angeles Unified Sch. Dist., 11 ECLRP 37, 113 LRP 43695, at FOF ¶21, Legal Conclusion ¶8 (SEA CA October 21, 2013) (An administrative law judge found that a student's mother not being able to drive and needing to care for another disabled child and the student's father having difficulty dropping off and picking up student each day due to his work schedule did not justify offering student transportation services); Ms. S. ex rel. L.S. v. Scarborough Sch. Committee, 366 F.Supp.2d 98, 99-100 (U.S.D.C. Maine Feb. 7, 2005) (court opined that a parent's request for accommodations based on personal reasons (i.e., unable to have an adult at home to ensure that a child gets home from school) may be beyond the reach of the IDEA if it is made for personal reasons unrelated to the student's educational needs.)

In addition to the IEP team discussing Home School as a possible location for ESY services during the summer of 2024¹⁸, this issue is moot because on February 26, 2024, Principal

¹⁶ Pet. Ex. 4 at 115, ¶60.

¹⁷ It is noted that neither the August IEP nor the Oct./Nov. IEP have listed transportation as a needed service or Supplementary Aids and Services for Student.

¹⁸ Petitioners also did not cite to any legal authority requiring an IEP to state the location of where an IEP will be implemented.

testified that Home School was able to secure the necessary personnel to have summer ESY at Home School. Student will be able to have ESY services at Home School during the summer of 2024, which usually starts around early June. (FOF 93). Although Parent testified that Parent wanted to know where summer ESY will be offered due to Parent's previous experience last year when speaking with Home School about summer ESY, Home School should be given a reasonable amount of time to prepare for the summer, which includes a reasonable amount of time to secure necessary personnel. The school members of the IEP team informed Parent on October 20, 2023 that they were working on securing Home School as the location for summer ESY. They were able to secure Home School as the location for summer ESY on February 26, 2024. Summer ESY will start in early June 2024. Knowing the location of where summer ESY will take place three (3) months in advance is more than adequate notice for Parent. Furthermore, Student's annual IEP must be conducted before summer ESY starts, which would provide further opportunity for Parent to discuss the ESY location with the other IEP team members, if Parent so chooses. (FOF 72).

(c) Petitioners fail to prove that the Oct./Nov. IEP team did not discuss and/or describe the need for Student to have peers in Student's ESY program.

In this issue, Petitioners are alleging that the IEP team did not address Parent's concerns that Student will not be with any peers (disabled and nondisabled) during ESY. Petitioners point to Parent's 10/16/2023 email and 10/24/2023 email¹⁹ as evidence of Parent's request that Student not be alone during ESY. Pet. Closing Brief, p. 8. In Petitioners' closing brief, Petitioners allege

¹⁹ Parent's emails to the IEP team states in relevant parts: 10/16/2023 email-"B. Whether the program is at [his/her] home school or not, it must be with other children and some of these other children need to be non-disabled. C. This program should specify what activities my [son/daughter] will be doing with non-disabled peers. Just being around non-disabled peers will not help my [son/daughter] to learn to socialize." 10/24/2023 email-"[Student] needs activities during ESY with non-disabled peers so [Student] can interact." (FOF 31, 42).

that the IEP team failed to “address Parent’s concern regarding the Student being the only child in the Extended School Year (ESY) program, effectively isolating [him/her] from both disabled and non-disabled peers.” Pet. Closing Brief, p. 7. Petitioners’ closing brief also states: “The complete absence of peers, disabled or non-disabled, in the Student’s ESY program starkly contrasts with the Act’s emphasis on social integration....” Pet. Closing Brief, p. 8. Petitioners fail to meet their burden of proof with respect to this issue.

First, Petitioners do not cite to the record where Home School will not have any students, besides Student, during ESY. During the October IEP meeting, the IEP team addressed Parent’s concern that Student may be alone during ESY. Principal explained during the October IEP meeting that the purpose of having nondisabled students during ESY is to provide Student with opportunities to generalize Student’s behavior goals. (FOF 36). Summer ESY at Home School is available to other disabled students²⁰ and Student will have access to nondisabled peers during ESY. (FOF 37). If Parent felt that Principal’s explanation was unclear as to why Student needs to be with nondisabled peers or whether Student would have access to peers during ESY, Parent could have asked the school members of the IEP team for clarification, but Parent did not.

Second, Student’s Oct./Nov. IEP indicates that Student will be with peers during ESY. Student’s Oct./Nov. IEP have the following statements: “require the small group setting,” a “low student to teacher ratio,” and “general education peers.” (FOF 26, 70). The Oct./Nov. IEP’s mention of a small group setting, student/teacher ratio, and general education peers implies that there will be peers. Also, the statements in the ESY grids in the August IEP and Oct./Nov. IEP

²⁰ Parent is aware that other disabled students attend ESY at Home School because Parent testified that disabled students from another school goes to Home School for ESY when ESY is available at Home School. Parent, Tr. Vol. 2, 167:6-21. And in the past when Student did attend ESY at Home School, there were other children. Parent, Tr. Vol. 2, 168:24-169:3.

are the same. (FOF 70). If Parent needed more information about what type of students or how many students would make-up the small group or the student/teacher ratio, those are clarifying questions Parent could have asked. Unless Parent asks questions, the other IEP team members may not know that Parent is confused or uncertain about something.

Based on the foregoing, Petitioners fail to meet their burden in showing that the IEP team did not discuss and/or describe the need for Student to have peers in Student's ESY program.

(d) Petitioners failed to prove that the Oct./Nov. IEP team used data that was not appropriate to determine the length of the frequency and/or duration of ESY services.

As an initial matter, this issue is about the "data" upon which the IEP team relied on in determining the "length of the frequency and/or duration of the ESY services," and it is not about the appropriateness of the "length of the frequency and/or duration of ESY services" itself.

Petitioners allege that the data used to determine the frequency and/or duration of ESY services "did not account for the Parent's provision of home instruction," and that there was a "disregard for the Parent's efforts to mitigate regression through home instruction, further illustrating the misapplication of data in determining the Student's needs." Pet. Closing Brief, p.

10. Although not expressly stated, Petitioners are alleging that the ESY data collected after Student returned from summer break in 2023 is inaccurate or does not reflect Student's regression because Parent had provided Student with services during the summer²¹. Petitioners

²¹ Petitioners also argue that DOE "inaccurately cit[ed] the introduction of new Goals and Objectives" or the "incorrect assertion of new Goals and Objectives" as a reason to "postpone discussions on the ESY services." According to Petitioners, "Student's Goals and Objectives had not changed since the annual IEP in May of 2023." Pet. Closing Brief, pp. 9-10. This argument is not persuasive because some of Student's goals had changed on May 25, 2023 during the annual IEP meeting. (FOF 12). Student went on summer break on or about May 27, 2023. (FOF 14). Student returned to school in early August and regression data was taken. (FOF 19). Up to this point, Home School did not have the opportunity to take data on the new goals in the May 2023 IEP. The next school break is winter break, which is in December.

fail to meet their burden of proof in showing that the Oct./Nov. IEP denied Student a FAPE with regard to ESY services because the IEP team used data that was not appropriate to determine the length of the frequency and/or duration of ESY services.

According to the Oct./Nov. IEP, Student qualifies for ESY services after a break of [REDACTED] calendar days and Student will receive “[s]pecially designed instruction in special education and general education setting for a total of 4 hours per day.” (FOF 26, 70). Parent, however, “want[ed] the ESY program to be at least 6 hours long and 5 days a week.” (FOF 31).

In revising Student’s IEP during the October and November IEP meetings, the IEP team relied on ESY data, IEP team input and observations. (FOF 71). Home School took baseline data before Student went on a summer break, which took place in May through August of 2023. (FOF 10, 11). Upon Student’s return from summer break, Home School took data to ascertain if Student experienced any regression. (FOF 19). On August 11, 2023, the IEP team held a meeting and developed the August IEP which provided Student with ESY services after [REDACTED] [REDACTED] calendar days without services for a period of four (4) hours a day. (FOF 26).

Prior to the October IEP meeting, Parent was provided a copy of the ESY data, a draft of the IEP and an agenda for the IEP meeting. (FOF 32). During the October IEP meeting, Parent stated that the ESY data was not readable. (FOF 39). In response, Principal offered to meet with Parent to go over the data. (FOF 39). On October 31 and November 2, 2023, the ESY data was reformatted and sent to Parent to assist Parent in understanding the ESY data. (FOF 44, 45). A week later on November 14, 2023, SPED Teacher asked Parent if Parent would like to meet with SPED Teacher and Principal to go over the ESY data because SPED Teacher wanted to make

DOE’s position that they wanted to see how Student did with the new goals to determine ESY services is reasonable and justified. DOE did not misrepresent Student’s IEP goals.

sure that Parent understood the ESY data. Parent declined the offer to meet to discuss the ESY data. (FOF 46).

Petitioners' argument that the data obtained by Home School was not appropriate because Student received some "home instruction" from Parent while at home during the summer of 2023 is insufficient to establish that the ESY data is not appropriate. Parent testified that Parent did not work during the summer of 2023 so that Parent could be with Student. (FOF 16). Parent testified that during the summer, Parent and Student worked on the goals in Student's IEP, such as reading, drawing, pronunciation, going to the [REDACTED], physical education, math, counting, writing his/her name, counting cash, and Parent took Student out to interact with other people. (FOF 18). Student was able to interact with nondisabled children at a [REDACTED] camp for two (2) days and participated in a [REDACTED] program for eight (8) days. (FOF 16, 17). Student, however, did not receive ninety (90) minutes of general education daily and there is insufficient evidence of how often and how long Parent and Student worked on the goals. (FOF 18). Parent testified that Parent only implemented the objectives in Student's IEP, but not every aspect of the IEP²². Although Parent testified that Parent implemented the objectives in Student's IEP, Parent is not a licensed occupational therapist or speech/language pathologist. (FOF 1). While Home School can collect regression data, which it did, Home School cannot control the data that was produced. Based the data that was produced, Student showed little to no regression. (FOF 39, 55). Therefore, it was reasonable for the IEP team to determine that Student's ESY should remain the same pending more information. Student having shown no significant regression would not have justified increasing ESY services as Parent is advocating for.

²² Parent, Tr. Vol. 2, 154:13-22.

As such, Parent's right to participate in the IEP process was not significantly infringed upon because Parent was given the ESY data before the IEP meetings, offered multiple opportunities to discuss the ESY data outside of an IEP meeting, and the ESY data was discussed during the October and November IEP meetings. Therefore, Petitioners fail to meet their burden in showing that the Oct./Nov. IEP team used inappropriate data to determine the length of the frequency and/or duration of ESY services for Student.

2. Whether the Oct./Nov. IEP is vague and/or unclear regarding the service IIS where Parent asked for a consistent aide and the IEP states that Student will have IIS services for 1825 minutes a week and 1:1 adult monitoring during unstructured time.

In this allegation, Petitioners allege that the IIS support in the Oct./Nov. IEP is vague and unenforceable because the Oct./Nov. IEP states that Student will have IIS services for 1825 minutes a week, daily "1:1 adult monitoring," and "close supervision-support during unstructured times." Pet. Closing Brief, p. 12. Petitioners fail to meet their burden of proof in showing that using different terminologies to describe a service that Student will receive is a denial of FAPE.

An IEP must include "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child. . . ." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). The IEP must state the "anticipated frequency, location, and duration of those services." 20 U.S.C. § 1414(d)(1)(A)(i)(VII). The Supplementary Aids and Services section of the Oct./Nov. IEP lists that Student will receive IIS for 1825 minutes per week and daily "1:1 adult monitoring." (FOF 67). The clarification section of the Oct./Nov. IEP has the following relevant statements: "...1825 minutes of Individualized Instructional Support Services (the person may vary);" "Close Supervision—support during unstructured times with social situations and transitions;"

and “[s]trategies that are successful with [Student]:...1:1 Adult Monitoring.” (FOF 24, 69). Although it may appear confusing to use the terms IIS, 1:1 adult monitoring, and close supervision, the IDEA does not require an IEP to be perfect. What is required is that Student receives special education and related services that will address Student’s educational needs. Petitioners fail meet their burden in showing that using different terminologies to describe a service that Student will receive significantly infringed upon Parent’s opportunity to participate in the IEP formulation process. As Parent had testified, 1825 minutes per week represents the entire school week (FOF 23), and Student’s Oct./Nov. IEP clearly states that Student will receive 1825 minutes of IIS.

Prior to the October IEP meeting, Parent informed the IEP team that Parent wanted Student to have a “consistent 1:1 aide through out [sic] the day.” (FOF 31). During the October IEP meeting, Principal sought clarification from Parent and asked Parent if Parent meant that Parent wanted Student to have the same person with Student during the entire school day, to which Parent said, “Yeah.” (FOF 38). During the November IEP meeting, Principal addressed Parent’s request for a “consistent 1:1 aide” and informed Parent that it is the service that is provided to Student and not the individual person. SPED Teacher explained that EA is currently providing IIS services to Student, but SPED Teacher, SPED Teacher-2 or DOE Employee would step in during the day to allow EA to have a break or when EA is out sick. While Parent understood the explanation, Parent still did not agree with having multiple people provide IIS services to Student throughout the day. (FOF 50). If Parent was confused with the terms “IIS” and “1:1 adult monitoring,” Parent did not inform the rest of the IEP team of Parent’s confusion during the October or November IEP meetings.

Furthermore, the term “close adult monitoring” in the August IEP was changed to “1:1

adult monitoring” in the Oct./Nov. IEP because Parent did not like the term “close adult monitoring” in the August IEP. (FOF 23, 24, 54, 67, 69).

Even assuming that using the term “1:1 adult monitoring” instead of consistently using the term IIS amounted to a procedural violation, Petitioners fail to show that the procedural violation resulted in a substantive violation. As discussed above, Parent’s opportunity to participate in the IEP formulation process was not significantly infringed upon, and there was no loss of educational opportunity for Student because Student will receive 1825 minutes per week of IIS services regardless of what the service is called. Parent’s request for a “consistent aide” or “consistent 1:1 aide”²³ was responded to when Student was given IIS services for 1825 minutes per week, even though the person who will provide the IIS service will change during breaks or when EA is sick. Although the Oct./Nov. IEP also states that Student will receive daily 1:1 adult monitoring, 1:1 adult monitoring and IIS mean the same thing. (FOF 68). Even assuming that IIS and 1:1 adult monitoring have different meanings, Student will receive 1825 minutes of IIS regardless because nowhere in the Oct./Nov. IEP does it state that Student will receive IIS or 1:1 adult monitoring. If there is any confusion caused by using different terms, the confusion actually entitles Student to 1825 minutes of IIS and 1:1 adult monitoring service. Based on the foregoing, Petitioners fail to meet their burden in showing that Student was denied a FAPE because the Oct./Nov. IEP is vague and/or unclear regarding IIS service²⁴.

²³ The term “consistent aide” is used in Petitioners’ Complaint, and the term “consistent 1:1 aide” is used in Parent’s 10/16/2023 email to SPED Teacher. (FOF 31).

²⁴ Respondents’ argument that Petitioners are precluded from relitigating the adequacy of the IIS description because it was the subject of a previous due process hearing is not persuasive. DOE’s Closing Brief, p. 7. The hearings officer’s findings in the 9/22/2023 Decision concerns whether IIS was adequately described in the 5/25/2023 IEP. Pet. Ex. 4 at 103. In the instant case, Petitioners’ allegation regarding IIS is in the context of how the term “1:1 adult monitoring” makes IIS vague or unclear.

3. Whether the Oct./Nov. IEP omits Objectives that are appropriate for Student.

In this allegation, Petitioners allege that the Oct./Nov. IEP should have included objectives for the following “particulars”²⁵:

- (a) Learn to understand unsafe behaviors, such as when things are [REDACTED]
[REDACTED];
- (b) Learn to adjust [REDACTED]
- (c) Learn to use the [REDACTED] outside of home/school, use [REDACTED]
[REDACTED], and not talk to strangers in [REDACTED];
- (d) Learn to understand when Student needs [REDACTED]
[REDACTED]; and/or
- (e) Learn to adjust behavior in different community settings, ask for help, do not touch others, do not do disruptive behavior, not be aggressive towards others, and comply with authorities.

These particulars are listed in Parent’s 10/24/2023 email to Home School. (FOF 42). According to Petitioners, DOE “improperly omits objectives that are crucial for the Student’s education and development, specifically in teaching practical life skills and safety awareness, on the grounds that these skills are not applicable within a school setting.” Pet. Closing Brief, p. 15. Petitioners argue that Parent’s request to have objectives for the above particulars “aligns with the IDEA’s broader goals of preparing students for independent living and ensuring their safety.” Pet. Closing Brief, pp. 15-16. Petitioners further argue that the “omission of objectives related to practical life skills and safety awareness from the 11/20/2023 and 10/20/2023 IEP constitutes a failure to provide FAPE as required under the IDEA.” Pet. Closing Brief, p. 17. Petitioners seek

²⁵ The word “particulars” is used in Petitioners’ Complaint.

a revision IEP meeting “to discuss and incorporate objectives that address the Student’s functional and developmental needs, ensuring a comprehensive educational plan that prepares the Student for life beyond the school environment.” Pet. Closing Brief, pp. 17-18.

In Parent’s 10/16/2023 email to SPED Teacher, Parent listed, among other things, the following areas of concern that Parent wanted to discuss at the upcoming October IEP meeting: Student’s “needs in [REDACTED]...among other daily-living skills [he/she] does not possess;” and “...all of my [son/daughter’s] behaviors in the classes....What interventions have been tried and what works.” (FOF 31).

During the October IEP meeting, the IEP team discussed Student’s ability to use the [REDACTED]. Principal sought clarification from Parent regarding Parent’s concerns about [REDACTED], and Parent shared Parent’s concerns. The school members of the IEP team shared with Parent that based on the observations of people who worked with Student at school, Student was able to [REDACTED] effectively at school and that Student could independently use the [REDACTED]. The school members of the IEP team asked Parent questions to ascertain how Student was doing with [REDACTED] at home. Parent shared that Student would tell Parent to “go away” when Student had to use the [REDACTED]²⁶. (FOF 41). Later in the October IEP meeting, Parent again expressed Parent’s concern about Student’s ability to go to the [REDACTED] independently without an adult being present and being able to generalize Student’s ability when Student is in a public setting, [REDACTED]. OT informed the IEP team that OT would look for resources for Parent, SPED Teacher, and EA to help Student gain independence while using the [REDACTED]²⁷. (FOF 41).

²⁶ DOE Ex. 32, 10/20/2023 IEP Meeting Recording at 0:25:55-0:33:13; DOE Ex. 31 at 190-191.

²⁷ DOE Ex. 32 10/20/2023 IEP Meeting Recording at 0:54:18-0:57:44; DOE Ex. 31 at 192-193.

After the 10/20/2023 IEP meeting, Parent sent another email on October 24, 2023 to the IEP team stating Parent's concerns from the 10/20/2023 IEP meeting and listing additional concerns regarding Student's needs. (FOF 42).

During the November IEP meeting, the IEP team discussed Student's behavior at school and strategies that worked in addressing Student's behaviors. (FOF 52, 53). The IEP team, inclusive of Parent, agreed that SBBH Supervisor would conduct an observation of Student, and then the IEP team would reconvene to discuss updating Student's BSP. (FOF 52, 53). Principal read Parent's 10/24/2023 email and asked Parent if Parent wanted the school to work on these "tasks." Parent expressed that Parent was working with Student on many things, such as putting on [REDACTED], and wanted the school to address those tasks since there was more time at school. Parent was given the opportunity to comment on whether the IEP team thoroughly addressed Parent's concerns, and SPED Teacher offered to print out some visual signs for Parent to use at home so that perhaps using the same visuals at school and home would help with Student's behavior. (FOF 58). Both Principal and SPED Teacher provided Parent opportunities to ask questions and comment on whether the IEP team addressed the concerns in Parent's 10/24/2023 email. If Parent was not satisfied with the school's responses to Parent's 10/24/2023 email, Parent did not express this to the rest of the IEP team. While the IEP team did not address line by line the concerns listed in the 10/24/2023 email, Parent's response gave the school members of the IEP team a reasonable impression that Parent's concerns were addressed.

Furthermore, the Oct./Nov. IEP either addresses Parent's concerns raised in Parent's 10/24/2023 email or DOE is not required to address these types of concerns. Based on the information available at the time of the IEP meetings, the IEP team made objectives addressing

Student's [REDACTED] needs²⁸. The IEP team made objectives targeting Student's ability to independently express the need to go to the [REDACTED], and Student's ability to independently manipulate [REDACTED] (FOF 64, 65). Student's Oct./Nov. IEP also contains a "[REDACTED] plan (every 1.5 hours)." (FOF 24, 69). This addresses Petitioners' particular (d). If there are more objectives that the IEP should have relating to Student's [REDACTED] needs, the evidence does not support it.

In addition, Petitioners' arguments that the DOE is responsible for "preparing students for independent living" and "life beyond the school environment" are not persuasive in this case as Student is currently [REDACTED] years old and in the [REDACTED] grade. Pet. Closing Brief, pp. 15-16, 17-18. Respondents "as a matter of law...is not responsible for ensuring that...[Student] translates behavior skills learned in the classroom to the home or community settings." San Rafael Elementary School Dist. v. California Special Education, 482 F.Supp.2d 1152, 1160 (N.D.Cal. March 28, 2007). Respondents are "not required to ensure that a student takes behavioral skills learned at school into the home. The District is only required to ensure that a student's IEP is 'reasonably calculated to provide educational benefits.'" San Rafael Elementary School Dist., 482 F.Supp.2d at 1164. Petitioners have not cited to any persuasive legal authority requiring Respondents to address behavioral or living skills needs that a child in Student's age range may have outside of the academic setting²⁹. Since the remaining particulars are skills needed for outside the school setting, and not necessary for Student to receive educational benefits, the DOE

²⁸ Parent's 10/24/2023 email states: "5. Understands when needs [REDACTED] [REDACTED]." (FOF 42).

²⁹ Student in this case is [REDACTED] years old. Respondents' obligation to address Student's daily living skills begins when Student is [REDACTED] years old, or younger if appropriate. H.A.R. § 8-60-44(b); 20 U.S.C. § 1414(d)(1)(A)(i)(VIII). Petitioners have not shown that it is appropriate in this case.

is not responsible for teaching these skills (items a through e, except d). Furthermore, while in school, students generally do not have access to hot water or hot things, household cleaners, or strangers. Strangers should not be on school campus and visitors report to the school office. (FOF 60).

Therefore, the undersigned finds that Petitioners have not met their burden in showing that Respondents denied Student a FAPE when the Oct./Nov. IEP does not address all the particulars in Petitioners' Complaint.

4. Whether the Oct./Nov. IEP team discussed and/or described sufficient behavior interventions to address Student's needs.

In Issue 4, Petitioners are alleging that Respondents committed procedural and substantive violations because (1) the discussion about behavioral interventions was insufficient, and (2) the behavioral interventions contained in the Oct./Nov. IEP are insufficient. Petitioners argue that Student was denied a FAPE because the IEP team delayed in addressing Student's behavioral needs when they "deferr[ed] to a district process outside of the IEP" or was "delayed by external process or policies." Pet. Closing Brief, pp. 18, 19. Although Petitioners' closing brief does not specify what "district process" or "external process" they are referring to, based on the evidence, Petitioners are likely referring to the ILI and BSP meetings that took place after the Oct./Nov. IEP meeting. As explained below, Petitioners fail to show by preponderance of the evidence that Respondents committed either a procedural or substantive violation in formulating the Oct./Nov. IEP regarding Student's behavioral needs.

In the development of an IEP, the IDEA requires that "in the case of a child whose behavior impedes the child's learning or that of others, [the IEP team shall] consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i). In this case, the Oct./Nov. IEP team considered the use of positive

behavioral interventions and supports, and other strategies, to address Student's behavioral needs. During the October and November IEP meetings, Principal asked Parent to clarify Parent's concerns about IIS and the IEP team discussed Parent's concerns about IIS. (FOF 38, 50, 54). The IEP team discussed Student's behavior in school, triggers, coping strategies, and behavior interventions. (FOF 36, 52, 53). A behavioral health specialist, who was not present at the August IEP meeting, participated in the October and November IEP meetings. BHS attended the October IEP meeting, and BHS and SBBH Supervisor attended the November IEP meeting. (FOF 33, 47, 48). The IEP team, inclusive of Parent, agreed that SBBH Supervisor would conduct an observation of Student, and then an ILI meeting would be held and Student's BSP would be updated. (FOF 52, 53). SBBH Supervisor proposed a clarification statement to include in the IEP to explain what school-based behavioral health can do to support Student. SBBH Supervisor's contact information was provided to Parent should Parent have any questions. (FOF 57).

As a result of the October and November IEP meetings, Student was offered the following behavioral supports in the Oct./Nov. IEP: IIS for 1825 minutes per week; visual aids and supports; simplified language and directions; and priming behavioral/academic expectations. (FOF 67). SBBH consultation services will also be offered to the school level counselor, teacher, and other staff members to "guide behavioral strategies as part of a classroom Behavior Support Plan." (FOF 69).

After the Oct./Nov. IEP was completed, SBBH Supervisor conducted two (2) observations of Student before meeting to have an ILI meeting on January 24, 2024. (FOF 75, 83, 87). After the ILI meeting, SBBH Supervisor conducted another observation of Student before meeting to develop a BSP for Student. (FOF 88, 92). During the meeting to develop a

BSP for Student, the team discussed that Student's IEP may need to be revised to reflect any BSP interventions developed at the meeting. (FOF 92).

Petitioners' argument that "[t]his external process, which resulted in a 4 to 5-month delay in developing behavior interventions, still not integrated into the IEP, effectively denied the Student timely access to necessary supports, potentially impeding [Student's] learning and progress, but certainly denied parent [Parent's] right to participation in the IEP development process...." Pet. Closing Brief, pp. 19-21³⁰. Petitioners' argument fails for several reasons. First, the "external process" did not result in a 4 to 5-month delay in developing behavioral interventions. Behavioral interventions were discussed and developed during the October and November IEP meetings and incorporated in the Oct./Nov. IEP. If there are additional behavioral interventions that should have been included in the Oct./Nov. IEP, Petitioners have not stated what those behavioral interventions are, nor does the evidence suggest that Student needed more behavioral interventions than what is included in the Oct./Nov. IEP. The IEP team was required to consider the use of positive behavioral interventions and supports, and other strategies, which the IEP team did. Second, whatever behavioral interventions that were created 4 to 5-months after the Oct./Nov. IEP but are "still not integrated into the IEP," could not have

³⁰ Although not explicitly argued by Petitioners, Petitioners appear to insinuate that a BSP should have been incorporated into Student's Oct./Nov. IEP. See Pet. Closing Brief, pp. 19-20, FN 3. The undersigned does not read Dept. of Educ., State of Hawaii, et al. v. L.S., 2019 WL 1421752, Civil No. 18-cv-00223 JAO-RT (D.Haw. March 29, 2021) as creating an absolute requirement that in situations where students have BSPs, those BSPs must be in their respective IEPs. Whether or not a BSP needs to be incorporated into an IEP is case specific, as the Hawaii District Court held in L.S., "[f]ailing to incorporate the BSP into the IEP **in this case** was a procedural violation..." L.S., 2019 WL 1421752, *12 (bold added). In L.S., incorporating the BSP into the IEP was particularly important because "the behavioral support services that are part of [that] Student's IEP were insufficient..." Id. at *12. Which is not the case here because the behavioral supports for Student in the Oct./Nov. IEP are sufficient. Although Student had a BSP during ESY, Student did not have a BSP during the regular school year. (FOF 26, 70). There is no evidence as to what the BSP for ESY entails.

been considered by the IEP team in October and November because new behavioral information was obtained after the Oct./Nov. IEP was developed. (FOF 75, 83, 87, 88). “[A]n IEP must be evaluated in light of the ‘snapshot’ rule, ‘which instructs us to judge an IEP not in hindsight, but instead based on the information that was reasonably available to the parties at the time of the IEP.’” Dept. of Educ., State of Haw. v. Leo W., 226 F.Supp.3d 1081, 1099, 344 Ed. Law Rep. 246 (D. Haw. Dec. 29, 2016) (citing Baquerizo v. Garden Grove Unified Sch. Dist., 826 F.3d 1179, 1187 (9th Cir.2016)). The IEP team did not meet to start developing a BSP until February 20, 2024. (FOF 92).

Furthermore, Parent did not object to the behavioral interventions during the October and November IEP meetings. The school members of the IEP team took into consideration the comments and suggestions made by Parent during the October and November IEP meetings, and Parent meaningfully participated in the discussion regarding Student’s behavioral needs and interventions. (FOF 36, 52, 53, 57).

Based on the evidence, the IEP team considered the use of positive behavioral interventions and supports, and other strategies, to address Student’s behavior. Therefore, Petitioners fail to meet their burden in showing that the discussion regarding behavioral intervention or the behavioral interventions in the Oct./Nov. IEP were insufficient.

D. PETITIONERS’ SECTION 504 OF THE REHABILITATION ACT OF 1974 CLAIM

Petitioners’ Complaint “assert[s] Student’s eligibility for rights and protections under Section 504 of the Rehabilitation Act of 1974.” Petitioners’ Complaint, p. 2. Petitioners, however, did not present any evidence or argument during the due process hearing and in their closing brief regarding their Section 504 claim. Based on the lack of evidence or argument to

support this claim, the undersigned Hearings Officer concludes that Petitioners have effectively abandoned their Section 504 claim and have not met their burden of proof.

VI. DECISION

Based upon the above-stated Findings of Fact and Conclusions of Law, the undersigned Hearings Officer concludes that Petitioners have proven that DOE denied Student a FAPE by conditioning Student's access to a setting with nondisabled peers "when available," which significantly infringed upon Parent's participation rights in the IEP process.

For the reasons stated above, IT IS HEREBY ORDERED --

1. An IEP revision team meeting shall be held within ten (10) school days of this Order.
2. Due to Student's annual review date being May 25, 2024, the IEP team may agree to address the FAPE violation stated in this Order during the annual review meeting.

The agreement shall be in writing. If the annual review meeting is scheduled after the ten (10) school days indicated in paragraph 1, it will not be a failure to comply with this Order if Parent and Home School agree in writing that the FAPE violation stated in this Order is addressed during the annual review meeting.


3. Any delay in meeting the deadline in this Order because of an act or acts of Petitioners and/or their representatives will extend the deadline set herein by the number of days attributable to Petitioners and/or their representatives. Respondents shall document in writing any delays caused by Petitioners and/or their 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 thirty (30) days

from the date of the decision 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, Hawaii, April 19, 2024.



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