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OFFICE OF DISPUTE RESOLUTION

DEPARTMENT OF THE ATTORNEY GENERAL

STATE OF HAWAI'I

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

Petitioner(s),

vs.

DEPARTMENT OF EDUCATION, STATE
OF HAWAI'I,

Respondents.

DOE-SY2324-026

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing:
February 26-28, 2024

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On January 16, 2024, the Department of Education, State of Hawai'i (hereinafter "Respondents" or "DOE") received a Request for IDEA Impartial Due Process Hearing (hereinafter "Complaint") under the Hawai'i Administrative Rules Title 8, Chapter 60, in accordance with the Individuals with Disabilities Education Act, from Student, by and through Parent (hereinafter "Petitioners"). On January 31, 2024, Respondents filed DOE's Response to

¹ Personal identifiable information is contained in the Legend.

Petitioners' Request for IDEA Impartial Due Process Hearing.

A prehearing conference was held on February 2, 2024, before Hearings Officer Chastity T. Imamura; with Eric A. Seitz, Esq. (hereinafter "Mr. Seitz"), representing Petitioners; and Ryan W. Roylo, Esq. (hereinafter "Mr. Roylo"), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter "Hearing") was scheduled for February 26-28, 2024.

The parties agreed to conduct the Hearing via the Zoom videoconferencing application. An Order Regarding Videoconference Due Process Hearing was issued on February 6, 2024, which set forth the parameters for the due process hearing. A court reporter participated in the video conference hearing to swear in the witnesses and transcribe the proceedings. Each witness was given a set of instructions with their Zoom meeting invitation and prior to being sworn in for their testimony. All witnesses were required to participate in the Hearing using both the video and audio functions of the Zoom platform, and witnesses and parties were instructed to ensure the confidentiality of the proceedings by participating in a private setting.

The Due Process Hearing began on February 26, 2024. Present at the Hearing were Parent and Mr. Seitz, on behalf of Petitioners; District Educational Specialist and Mr. Roylo, on behalf of Respondents; this Hearings Officer; and the assigned court reporter. Petitioners called Parent, Case Manager (hereinafter "CM"), Family Friend (hereinafter "FF"), Social Worker (hereinafter "SW"), and Certified Nursing Assistant (hereinafter "CNA"), to testify. Witness testimony for Petitioners was continued to February 27, 2024, where Petitioners called Registered Behavior Technician (hereinafter "RBT") to testify. Petitioners and Respondents came to an agreement that one additional witness for Petitioners would testify during Respondents' case and both parties will be allowed to conduct direct and cross examination of

the witness, however, that witness was unavailable until the afternoon, so Respondents began their case-in-chief and called School-Based Behavior Health District Educational Specialist (hereinafter “SBBH DES”) to testify. In the afternoon of February 27, 2024, the last witness for Petitioners, DOE Board-Certified Behavior Analyst (hereinafter “DOE BCBA”) testified, and Petitioners rested their case-in-chief. On February 28, 2024, Respondents called their last witness, Principal, and rested their case-in-chief. Petitioners did not have any rebuttal witnesses to present, so the Hearing concluded on the same date. Both parties provided an oral closing argument, and both parties were provided an opportunity to prepare a written legal brief to support their arguments for the issues in this case. Due to the expedited nature of this case, both parties were instructed to prepare their written legal briefs by Friday, March 8, 2024. Petitioners did not submit a written brief but Respondents submitted their written legal brief on March 8, 2024.

Each party submitted their exhibits for the Hearing by the disclosure deadline of February 16, 2024. Both parties were informed that any exhibits that were discussed or mentioned during the proceeding would be received for consideration in the Decision in this case, but that this Hearings Officer would allow the parties to propose additional exhibits after the Hearing was completed. On February 28, 2024, a list of exhibits that were discussed during the hearing was provided to counsel by this Hearings Officer. Both parties were allowed to propose additional exhibits from their previously disclosed documents that were not discussed at the Hearing to be received as evidence in this matter. The lists of proposed additional exhibits were due on March 4, 2024. Any objections to the proposed exhibits were due on March 5, 2024.

On March 4, 2024, Respondents timely submitted their correction to the list of exhibits submitted by this Hearings Officer and their request for an additional exhibit to be considered in

this case. Respondents noted that Respondents' Exhibit 34, pages 208-211 was admitted through DOE BCBA and requested that Respondents' Exhibit 80, pages 567-601 be admitted into evidence to accompany Respondents' Exhibit 82.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, page 01; Exhibit 2, pages 02-07; and Exhibit 4², pages 08-12.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibits 2-3, pages 003-033; Exhibit 5, pages 050-066; Exhibit 6, pages 079-080; Exhibits 8-9, pages 083-101; Exhibits 12-13, pages 105-124; Exhibit 23, pages 165-166; Exhibit 26, pages 170-198; Exhibits 32-34, pages 204-211; Exhibit 39, page 217; Exhibits 48-77, pages 251-539; Exhibit 80, pages 567-601; and Exhibit 82, an audio recording dated January 12, 2024.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding,³ the undersigned Hearings Officer renders the following findings of fact, conclusions of law and decision.

II. JURISDICTION

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

² Upon review of Petitioners' Exhibit List, Petitioners had listed an Exhibit 3, "IEP Meeting Transcript, dated January 12, 2024," however no such exhibit was submitted to the Office of Dispute Resolution by Petitioners. During the Hearing, Petitioners subsequently offered an exhibit, consisting of Student's medical discharge summary, which was marked and received as "Exhibit 4," even though it was erroneously referred to during the Hearing as Exhibit 3.

³ This Hearings Officer notes that while the testimony of all witnesses and all received exhibits were reviewed by this Hearings Officer, only the relevant information taken from the testimony and exhibits are cited to in this Decision. Not all witness testimony or exhibits are cited herein.

III. ISSUES PRESENTED

Petitioners raised one (1) issue in the Complaint to be addressed at the Hearing:

Issue 1 – The DOE failed to provide Student with a residential placement to receive mental health and related services and/or failed to provide Student with appropriate mental health services in order to address Student’s mental health issues and enable Student to access Student’s education.

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

Remedy 1 – Order that the DOE provide Student with a residential placement to address Student’s needs.

IV. FINDINGS OF FACT

Witness background and other information

1. CM is currently a case manager for the State of Hawai’i Department of Health [REDACTED] Division (hereinafter “DDD”) and has been so employed for about fourteen (14) years. Testimony of CM, Tr.V1, 70:13-20.
2. CM has a bachelor’s degree and master’s degree in psychology. Testimony of CM, Tr.V1, 70:21-71:3.
3. CM has been assigned to Student’s case since 2017 when an application was made to see if Student qualified to receive services from DDD. Based on Student’s [REDACTED] [REDACTED] diagnosis, Student was determined to be eligible for personal assistant/habilitation services, community learning services, and respite services from DDD. Testimony of CM, Tr.V1, 71:25-73:6.
4. DDD services are for minors under the age of eighteen (18) who have an [REDACTED] [REDACTED] [REDACTED]. The State of Hawai’i Department of Health Children Adolescent Mental Health Division (hereinafter “CAMHD”) has a different set of eligibility criteria, but

- they focus more on mental health services to be provided. Testimony of CM, Tr.V1, 96:17-97:7.
5. DDD does not have the ability to place minors under the age of eighteen (18) in a residential setting. CAMHD and the DOE have the ability to place minors in residential placements. Student has applied for services under CAMHD but was denied based on eligibility. Testimony of CM, Tr.V1, 100:11-101:15; Testimony of Principal, Tr.V3, 31:25-32:13, 57:4-58:16.
 6. FF was employed as a community health worker and voluntary case manager and has bachelors' degrees in psychology and communications. Testimony of FF, Tr.V1, 105:22-106:15.
 7. FF has known Parent since they were children and has been around Student since Student was born. FF has been involved with assisting Parent with Student's care for the last [REDACTED] months or so prior to the Hearing. Testimony of FF, Tr.V1, 106:16-107:8.
 8. SW was employed by Private Company to be an in-home service provider for Student. SW has a high school degree and has been working with special needs children in a different country and then on Island since October 2023. Testimony of SW, Tr.V1, 115:6-116:6.
 9. CNA is a certified nursing assistant who was hired to provide in-home care for Student. CNA worked with Student from November 2023 and worked to provide in-home services for two (2) days. Prior to working with Student, CNA received brief training from a staff member of Private Company. Testimony of CNA, Tr.V1, 125:4-126:14.

10. RBT was hired by Private Company to be an in-home service provider for Student. Prior to being hired by Private Company, RBT had not worked with disabled children and was working doing maintenance and general groundwork. RBT received some training prior to working with Student. Testimony of RBT, Tr.V2, 8:16-9:11, 10:1-8, 19:11-20:4.
11. SBBH DES is a district educational specialist for the DOE who works in the area of school-based behavioral health. SBBH DES has a bachelor's degree in religion with a focus on psychology and education and a master's degree in clinical psychology. SBBH DES has experience in running school mental health programs and has also worked for CAMHD. Testimony of SBBH DES, Tr.V2, 29:12-31:3.
12. DOE BCBA is a board-certified behavior analyst who is licensed in the State of Hawai'i and works for the DOE. DOE BCBA has a teaching credential and a master's degree in education. Prior to becoming a board-certified behavior analyst for the DOE, DOE BCBA was a teacher for autism and intensive behavior programs, and was a district autism consultant teacher. Testimony of DOE BCBA, Tr.V2, 72:19-75:25; R-Ex.77, p.539.
13. DOE BCBA has worked with Student since Student was around [REDACTED] years old and started in the [REDACTED] program that DOE BCBA was teaching. DOE BCBA has worked with Student since that time. DOE BCBA currently works with Student as Student's board-certified behavior analyst, overseeing the registered behavior technicians that work with Student at school and reviews and updates Student's behavior intervention plan as needed. Testimony of DOE BCBA, Tr.V2, 76:1-22, 80:3-19.

14. Principal is currently the principal of Home School and has been so employed for five (5) years. Prior to that, Principal was a general education teacher, a special education teacher, a temporary vice principal, and a vice principal. Principal has a bachelor's degree in elementary education and a master's degree in interdisciplinary curriculum and instruction. Testimony of Principal, Tr.V3, 8:6-10:6.
15. A therapeutic foster home is a regular home environment with a family that is highly trained in working with students with high needs when it comes to disabilities and could allow a student to remain at their regular public school. Testimony of Principal, Tr.V3, 46:19-47:3.

Student's background

16. Student is currently [REDACTED] years old and lives with Parent within Home School's district. Prior to living with Parent, Student lived primarily with Student's other biological parent near Previous School and would stay with Parent on the weekends. Student started living with Parent around September 2023. Testimony of Parent, Tr.V1, 42:2-43:2; Testimony of DOE BCBA, Tr.V2, 76:25-78:12, 80:20-81:11.
17. Parent lives [REDACTED] on Island that [REDACTED]. Testimony of Parent, Tr.V1, 47:17-22; Testimony of CM, Tr.V1, 80:19-81:11.
18. Student was diagnosed with [REDACTED] and [REDACTED] when Student was around [REDACTED] years old. Testimony of Parent, Tr.V1, 10:22-11:14.
19. Student has been determined to be eligible for IDEA special education and related services under the category of [REDACTED]. Testimony of Parent, Tr.V1, 11:7-14; R-Ex.2,

- p.004; R-Ex.5, p.051; R-Ex.8, p.084; R-Ex.12, p.106.
20. Student was recently also diagnosed with [REDACTED] and a [REDACTED]. Testimony of Parent, Tr.V1, 23:15-22; R-Ex.12, p.106; R-Ex.74, p.427.
 21. Student is currently approximately [REDACTED]. Testimony of Parent, Tr.V1, 17:22-18:2.
 22. Student currently needs to learn functional skills such as completing two-step tasks without prompting; reading safety/survival signs; inputting a list of items into an electronic device (such as a grocery list); budgeting and determining if Student has enough money to purchase items; and communicating Student's needs, wants, and feelings. R-Ex.2, p.004-006.
 23. When Student becomes frustrated, upset, or overstimulated, and will sometimes run, scream, or engage in self-injurious behaviors. [REDACTED]. R-Ex.2, p.004-006.
 24. Student had also become increasingly aggressive since approximately [REDACTED], often engaging in striking or grabbing others. Testimony of Parent, Tr.V1, 18:3-19.
 25. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- [REDACTED]. Testimony of Parent, Tr.V1, 43:14-45:6.
26. Trials of medication were prescribed to Student as early as July [REDACTED] to address Student's increasing aggression, however the medications did not appear to work and were discontinued by the end of August [REDACTED]. R-Ex.74, p.436.
 27. In September [REDACTED], Student assaulted Parent [REDACTED] [REDACTED] needing to call the paramedics⁴ to come and restrain Student. Testimony of Parent, Tr.V1, 11:18-12:1, 43:3-20.
 28. Student was taken by the paramedics to County Hospital, who stabilized Student with medication and then transferred Student to Hospital. Testimony of Parent, Tr.V1, 12:2-8.
 29. Hospital stabilized and treated Student and discharged Student on or about [REDACTED] [REDACTED]. Student returned home after some time after being discharged from Hospital due to Student being discharged to child welfare services. Testimony of Parent, Tr.V1, 12:9-13, 51:9-24; R-Ex.73, p.410-423.
 30. Upon Student's release from Hospital on [REDACTED], neither Parent nor child welfare services received any information or intervention plans to use to manage Student's behaviors. Student did receive medication upon Student's discharge from Hospital. Testimony of Parent, Tr.V1, 51:15-53:24; R-Ex.75, p.431-433.
 31. When DDD was informed that Student was going to be discharged from Hospital in

⁴ It is unclear based on the record whether the police were also called to the home to assist with Student, but being that it is not relevant to the issues in this case, the term "paramedics" will be used throughout this Decision as a general term to represent that emergency personnel including possibly police, fire, and paramedics, were called.

- [REDACTED], CM tried to set up transition for Student's release by finding providers to provide services to Student in the home, however no providers could be lined up before Student was discharged from Hospital. Testimony of CM, Tr.V1, 91:22-92:21.
32. On around [REDACTED], Student had another violent episode, requiring Parent to call the paramedics again, who returned Student to County Hospital. Student was transferred to Hospital shortly thereafter. Testimony of Parent, Tr.V1, 12:14-20; R-Ex.74, p.424-428.
33. Upon Student's admission to Hospital, Hospital needed to use stronger doses of medication to stabilize Student due to Student's continued episodes of dysregulation and aggression at Hospital. [REDACTED]
[REDACTED]
[REDACTED]" R-Ex.74, p.424-427, P-Ex.4, p.09.
34. Student was again stabilized by Hospital, who determined that Student was no longer in need of involuntary hospitalization and discharged Student. Hospital discharge summary noted that Student no longer met the criteria for hospitalization, and that a behavioral plan and a care transition plan were developed with significant coordination was developed for Student upon discharge. The discharge documents noted that the plans indicated that Student would follow a daily schedule directed by staff. P-Ex.4, p.09-10.
35. During this hospitalization, Parent requested that Hospital refer Student to Local Residential Placement to see if Student could be placed there until Student's behaviors were better managed with less violent outbursts. After reaching out to

- Local Residential Placement, the medical director there told Hospital that “there is no longterm placement for this patient in the state in all likelihood and that family should pursue a solution on the [REDACTED].” R-Ex.26, p.176-177.
36. Hospital’s staff’s discussions with Student’s social worker and DDD personnel also indicated that there were little to no resources available for Student in the State of Hawai’i, as a minor with [REDACTED] who does not have a serious mental illness or is medically needy but poses a behavioral threat to staff.⁵ R-Ex.26, p.178-179.
37. Prior to discharge, a team (hereinafter “Planning Team”) consisting of members of the DDD, Student’s medical insurance company, the DOE, Hospital, and Parent, prepared for Student’s discharge by obtaining the services of Private Company, an applied behavior analysis (hereinafter “ABA”) company from Second Island, to hire and train professionals on Island to assist the family with providing services to Student at the home. The services provided included in-home ABA services and respite care services. Testimony of Parent, Tr.V1, 14:13-17:18; Testimony of CM, Tr.V1, 73:7-75:12; Testimony of DOE BCBA, Tr.V2, 125:13-127:19.
38. Student’s DDD plan had to be specially approved because it allotted more hours than DDD normally provides to clients (which is normally twenty (20) hours a week for combined services and a maximum seven hundred sixty (760) hours of respite care per year), and the plan for Student was for twenty-four (24) hour care for Student upon Student’s discharge from Hospital. Testimony of CM, Tr.V1, 73:16-75:16, 82:3-83:17, 85:17-87:22, 93:10-13.

⁵ The doctor who wrote this spoke with a social worker from the State of Hawai’i Child and Welfare Services, who also noted that while there are suitable out-of-state placements for minors with [REDACTED], the DOE would have to pay for placement.

39. At around this time, Parent had also requested training for Student's family to provide them with information on how to manage Student's behaviors, but Parent was unable to secure training through DDD, Student's medical insurance, or Private Company. Testimony of Parent, Tr.V1, 47:2-22.
40. Student's DDD plan provided coverage for two-to-one staff for Student, where there would be two (2) staff members assigned to Student for the services being provided, as well as training and consultation behavioral services, including a functional behavioral assessment, identifying challenging behaviors in the home and community, developing a strategy approach, and training Student's entire circle of providers on the plan. The two-to-one service could not be implemented since there were not enough staff members located to provide the services and the training and consultation service was stopped due to the short time frame of services provided to Student. Testimony of CM, Tr.V1, 84:3-17, 84:22-85:16.
41. DDD could not locate any providers for Student on Island but was able to contract with Private Company on Second Island to provide services for Student's transition home from Hospital. Private Company had sent out numerous requests for personnel on Island and found three (3) available service providers. Testimony of CM, Tr.V1, 75:22-76:20.
42. Upon Student's return home on [REDACTED], Student struck Parent [REDACTED] [REDACTED]. The next day, [REDACTED] [REDACTED], Student punched CNA, one of the contracted caregivers from Private Company. CNA quit working with Student after being struck on the second night of Student's return home from Hospital. Testimony of Parent, Tr.V1, 19:7-15;

- Testimony of CNA, Tr.V1, 127:4-130:15, 138:9-140:24.
43. CNA has been unable to work and still experiences pain from Student striking CNA on [REDACTED]. Testimony of CNA, Tr.V1, 130:21-133:7.
 44. Student also returned to Home School with the support of DOE BCBA and the DOE one-to-one registered behavior technician assigned to Student. While at Home School, Student displayed occasional maladaptive behaviors, but the personnel at Home School were able to redirect and manage these behaviors. Testimony of DOE BCBA, Tr.V2, 113:24-114:23, 135:24-136:10.
 45. At Home School and Prior School, DOE BCBA worked closely with Student's registered behavior technicians and teachers to ensure that they were consistently implementing Student's BIP and IEP, as well as collecting data to see if any updates or changes needed to be made to Student's program to manage Student's behaviors. Testimony of DOE BCBA, Tr.V2, 97:19-103:8, 110:5-17.
 46. Parent and [REDACTED] attempted to continue working with Student and the contracted assistants, including SW and RBT, when Student returned home from school. Both RBT and SW observed numerous occasions when Student was aggressive, including striking Parent and [REDACTED], and engaging in self-injurious behaviors. FF also observed Student being aggressive and striking Parent after returning home in November 2023. Testimony of FF, Tr.V1, 107:11-108:9; Testimony of SW, Tr.V1, 117:6-118:6, 119:17-21, 120:20-121:5; Testimony of RBT, Tr.V2, 11:14-24, 15:1-19, 17:18-18:16.
 47. Staff contracted by Private Company would also occasionally cancel and not come to Student's home to assist with Student's care during the November to December 2023

- time period when Student was at home. Testimony of FF, Tr.V1, 107:9-15, 108:10-20.
48. On around [REDACTED], Student became aggressive toward Parent again, this time using objects to damage items in the house and hurt Parent. Even with the presence and assistance of [REDACTED] and RBT, Student's behavior could not be controlled, and the paramedics were called. Testimony of Parent, Tr.V1, 20:8-21, 39:6-40:17.
 49. Student was taken again to County Hospital and, after some time,⁶ Student was transferred back to Hospital for involuntary hospitalization. Testimony of Parent, Tr.V1, 21:1-25.
 50. During the periods of time that Student was admitted for involuntary hospitalization at Hospital, the DOE was unable to provide educational or related services to Student due to the department of Hospital where Student was located being a locked and secured facility. Hospital did not allow the DOE to send personnel in to provide services to Student. Testimony of Parent, Tr.V1, 22:5-12; Testimony of DOE BCBA, Tr.V2, 143:12-20; Testimony of Principal, Tr.V3, 30:4-31:11.
 51. In December 2023, Private Company Owner sent Parent a letter informing Parent that Private Company would be discontinuing their services for Student after a thirty (30) day period and that Private Company Owner does not believe that Student can benefit from in-home or community services and requires a higher level of care. Testimony of Parent, Tr.V1, 36:6-37:1; Testimony of CM, Tr.V1, 77:24-78:12; P-Ex.1, p.01.

⁶ Parent testified that Hospital initially refused to admit Student, saying that Student did not need involuntary hospitalization, and while this Hearings Officer finds this testimony to be credible, it is not particularly relevant to the issues in this case. Tr.V1, 21:1-13.

52. Since receiving the letter from Private Company Owner, Parent and CM have been attempting to find alternative providers to provide DDD services to Student in the home for when Student is discharged from Hospital. As of February 26, 2024, CM has not been able to secure services for Student for Student's home setting. At this time, Student cannot safely be returned home without proper supports in place. Testimony of Parent, Tr.V1, 37:13-38:1; Testimony of CM, Tr.V1, 78:13-79:2, 99:2-6; Testimony of DOE BCBA, Tr.V2, 125:2-12, 139:25-139:24.
53. Hospital has been trying to discharge Student since at least February 2024, but continues to hold Student for involuntary hospitalization based on court orders that Parent has been pursuing. Testimony of Parent, Tr.V1, 38:2-39:5.

Student's behavioral data related to aggression for 2023

54. Due to Student receiving ABA services in school and based on Student's behavior intervention plan (hereinafter "BIP"), behavioral data was kept for Student's maladaptive behaviors noted in the BIP, specifically self-injurious behaviors, screaming, elopement, aggression, and aggressive screaming. Testimony of DOE BCBA, Tr.V2, 100:24-103:8.
55. Aggression as defined in Student's BIP dated September 20, 2022 means "any instance of [Student] using [Student's] body or an object to make forceful physical contact with another person. Examples of aggression in the BIP include [REDACTED]
[REDACTED]
[REDACTED] R-
Ex.3, p.20.
56. Self-injurious behavior is defined in the BIP as any time Student [REDACTED] Student's own

- hand, [REDACTED] The examples given for self-injurious behavior is when Student is upset, frustrated, has high task demands, lacks functional communication/training, or when people are too close to Student's space. R-Ex.3, p.20.
57. In January 2023, Student had an average of 1.6 instances of aggression per day; however, Student had over five (5) instances of aggression for two (2) days. R-Ex.48, p.252.
58. In January 2023, Student had an average of 17.9 instances of self-injurious behavior per day, with an increasing trend. R-Ex.48, p.253.
59. In February 2023, Student had an average of 1.4 instances of aggression per day with two (2) days where Student again had over five (5) instances of aggression. R-Ex.49, p.257.
60. In February 2023, Student had 16.9 instances of self-injurious behavior per day, with an increasing trend after February 3, 2023. R-Ex.49, p.257.
61. In March 2023, Student had 1.33 instances of aggression per day with an increase of instances after Student's return to school from spring break. R-Ex.50, p.260.
62. In March 2023, Student had 13.8 instances of self-injurious behavior per day, with an increase in self-injurious behavior after Student's return from spring break. R-Ex.50, p.259.
63. In April 2023, the data graphs appear to have some dates where data was not collected and no summary of the data was contained in the graphs. Based on the graphs, it appears that Student continued to display aggression and self-injurious behavior, but both appeared to be on a downward trend toward the end of the month.

- R-Ex.51, p.262, 264.
64. In May 2023, Student had a low average of instances of aggression per day; however, on [REDACTED], Student had over five (5) instances of aggression in that day. R-Ex.52, p.265.
 65. In May 2023, Student had an average of 18.3 instances of self-injurious behavior per day, with an increasing trend. R-Ex.52, p.265.
 66. In June and July 2023, the data was combined due to Student attending extended school year (hereinafter “ESY”). Student had very few instances of aggression per day; however, on two (2) days in June and July, Student had four (4) or more instances of aggression in that day. R-Ex.53, p.270.
 67. In June and July 2023, Student had an average of 13 instances of self-injurious behavior per day, with an increasing trend. R-Ex.53, p.270.
 68. In August 2023, Student had an average of 5 instances of aggression per day and the range of aggression varied between two (2) and eighteen (18) on a given day. R-Ex.54, p.276.
 69. In August 2023, Student had an average of 63 instances of self-injurious behavior per day, with an increasing trend and a wide range of variability from less than forty-two (42) to one hundred two (102) times on days. R-Ex.54, p.275.
 70. A summary of Student’s data report by a different board-certified behavior analyst noted that Student’s trends in August for aggression and self-injurious behaviors underscored the urgency and importance of addressing these issues promptly. One suggestion by the board-certified behavior analyst was to shorten Student’s regular school day and provide Student with a structured setting where the team can better

- manage and support Student.⁷ R-Ex.54, p.278.
71. In September 2023, Student had an average of 2.33 instances of aggression per day; with a range of zero (0) instances on the lowest day and seven (7) instances on the highest day. R-Ex.55, p.280.
 72. In September 2023, Student had an average of 20 instances of self-injurious behavior per day, with a decreasing trend. R-Ex.55, p.280.
 73. From November 28, 2023 to December 19, 2023,⁸ Student displayed nine (9) instances of aggression over five (5) separate days, with one day having four (4) instances. R-Ex.56, p.288.
 74. From November 28, 2023 to December 19, 2023, Student averaged fifteen (15) daily instances of self-injurious behaviors, with a continuously increasing trend toward the end of the observation period. R-Ex.56, p.286.
 75. In November to December 2023, DOE BCBA collected behavior data for Student using sheets provided to Student's home service providers. It was unclear whether the systems being used at school were consistently being used at home, such as the token economy that worked with Student at school. When DOE BCBA spoke with RBT, it did not appear that the token economy system was being used the way it was supposed to be implemented nor was it being consistently implemented. Testimony of DOE BCBA, Tr.V2, 105:1-107:7.

Meetings and individualized education program for Student

⁷ It is unclear from the record whether Student's school day was, in fact, shortened as recommended by the August 2023 data summary and whether that shortened day affected the results for the remainder of the year.

⁸ No data report exists for October 2023 and this is likely due to Student's stay in either County Hospital or Hospital throughout most of the month of October.

76. Student's individualized education program (hereinafter "IEP") in place prior to the events relevant to this case was dated September 27, 2022 (hereinafter "IEP-09/27/2022"). R-Ex.2, p.003-019.
77. Student's IEP-09/27/2022 did not contain any information about Student demonstrating any aggression toward any person in the home or at school. *See* R-Ex.2, p.003-019.
78. The IEP-09/27/2022 had the following relevant services in place for Student:
- a. Extended School Year (hereinafter "ESY") after breaks of twenty-four (24) calendar days for twenty (20) hours per week, additional adult support for two hundred forty (240) minutes per day, and eighty (80) minutes total of speech-language therapy for the ESY period.
 - b. Special education services for nine hundred (900) minutes per week.
 - c. Occupational therapy services for one hundred twenty (120) minutes per quarter.
 - d. Daily transportation.
 - e. Speech-language therapy services for two hundred forty (240) minutes per quarter.
 - f. Teacher consultation by board-certified behavior analyst/autism for twenty (20) minutes per quarter.
 - g. One-to-one registered behavior technician services for one thousand four hundred (1400) minutes per week, and for one thousand two hundred (1200) minutes for ESY.
 - h. Behavior Intervention Plan (hereinafter "BIP") developed by a board-certified behavior analyst. Testimony of DOE BCBA, Tr.V2, 82:13-84:21; R-Ex.2, p.016.
79. Student was placed in an "Intensive Behavior program that is highly structured to address [Student's] behavior, social, sensory, and functional academic needs." R-Ex.2, p.003.
80. Student's ten (10) page BIP, dated September 20, 2022, focused on four (4) specific behaviors of Student: screaming, aggression, elopement, and self-injurious behaviors. The BIP had specific definitions for each behavior and specific ways to address each behavior, including setting event strategies, replacement behaviors, antecedent

interventions, and classroom management strategies. Testimony of DOE BCBA, Tr.V2, 85:21-86:15, 87:22-93:13; R-Ex.3, p.020-031.

81. Student also had a safety plan, dated January 10, 2022 (hereinafter “SP-1/10/2022”), which provided instructions for keeping Student safe in the event of an elopement.
82. Student’s next IEP was dated October 23, 2023 (hereinafter “IEP-10/23/2023”), which included information about Student’s increased aggression toward others at school.⁹ P-Ex.5, p.050-066.
83. The IEP-10/23/2023 also had information from Parent regarding Student’s September 2023 hospitalization and other aggressive/dangerous incidents Parent experienced with Student, including [REDACTED]. Parent also expressed to the IEP team that Student may have depressed or suicidal thoughts. R-Ex.5, p.051.
84. At the October 23, 2023 meeting, Parent requested that the IEP team look into a residential setting to address Student’s mental health be included or consideration of an out-of-state placement be considered for Student. R-Ex.5, p.051.
85. The IEP-10/23/2023 also included information about medication that the Hospital doctors were trying to give Student to see if it would curb Student’s aggressive behavior. At the time of the IEP-10/23/2023 meeting, Student was hospitalized at Hospital. R-Ex.5, p.051.

⁹ Specifically, the ‘background’ section in the IEP included the following relevant information which appears to be related to school: “When [Student] is upset, [Student] may scream, [REDACTED] or may be aggressive towards others who may be in [Student’s] space or line of vision[;]” and “If [Student] starts to self-talk and mention such phrases as ‘[REDACTED]’ from [Student’s] favorite TV shows, please redirect, as it is often a pre cursor (*sic*) to aggressive behavior.”

86. Student's IEP-10/23/2023 offered the same relevant services as Student's IEP-09/27/2022, except that the ESY services were offered to Student after a twenty-one (21) calendar day break instead of twenty-four (24) calendar day break. *Compare* R-Ex.2, p.016; R-Ex.5, p.063.
87. Student's least restrictive environment (hereinafter "LRE") statement indicated that Student would not participate with nondisabled peers in the general education setting when receiving specialized instruction for the academic portion of the school day. Student would participate to the greatest extent possible with Student's nondisabled peers for lunch, recess, and other school events or activities. R-Ex.2, p.018; R-Ex.5, p.065.
88. A new safety plan, dated September 10, 2023, was developed to address Student's elopement and ways to ensure Student's safety. R-Ex.6, p.079-080.
89. The IEP team met again on December 13, 2023, "to discuss Student's Winter ESY" and issued a new IEP (hereinafter "IEP-12/13/2023"). Testimony of Principal, Tr.V3, 12:6-13:5; R-Ex.8, p.083-099.
90. By the time Student's team met on December 13, 2023, Student had been hospitalized on two (2) separate occasions and had to return to Hospital due to violent behavior toward Parent and others, despite Planning Team's plans for twenty-four (24) hour support for Student.
91. The IEP team determined that Student's ESY services would begin after four (4) calendar days of break because Student was adjusting to being back in school after a time in a facility and needed the stability of school's structure and schedule during the extended breaks from school. Testimony of Principal, Tr.V3, 13:6-25; R-Ex.9, p.100-

- 101.
92. At the December 13, 2023 IEP meeting, Parent raised concerns with the IEP team that Student needed residential placement and the team determined that they would have a follow-up meeting to address Parent's concerns. Testimony of Principal, Tr.V3, 15:16-16:4; *see also* R-Ex.9, p.100-101.
93. Other than the ESY offer, Student's IEP-12/13/2023 did not have any changes from IEP-10/23/2023. *See* R-Ex.5, p.050-066; R-Ex.8, p.083-099.
94. A safety plan was developed for use with Student at Home School, which was different from the safety plan developed for Student at Prior School. This new safety plan focused on deescalating Student in a situation where the safety of any person became compromised. This plan included an option for Student to be led to a room to deescalate or for other students to be removed from the room where Student is located and removing potentially dangerous objects from any room with Student. Testimony of DOE BCBA, Tr.V2, 95:23-97:3; R-Ex.70, p.402-403.
95. Student's IEP team met again on January 12, 2024. Parent attended this meeting with Mr. Seitz, and an attorney for the DOE attended as well. *See* R-Ex.12, p.122; R-Ex.80, p.567-601; R-Ex.82, an audio file dated January 12, 2024 (hereinafter referenced as "R-Ex.82, 1/12/24 audio").
96. Throughout the meeting, Parent and Mr. Seitz indicated that Parent wanted the IEP team to include residential placement for Student due to Student's violent behaviors at home. Testimony of SBBH DES, Tr.V2, 52:8-53:8; Testimony of Principal, Tr.V3, 23:18-24:3, 24:9-18; *see also* R-Ex.81, p.567-601; R-Ex.82, 1/12/24 audio.
97. In December 2023, SBBH DES was contacted to participate in an IEP team meeting

- for Student to help the IEP team decide on what kind of mental health services the DOE could offer to Student and Parent. SBBH attended the January 12, 2024 IEP meeting. Testimony of SBBH DES, Tr.V2, 31:4-32:23.
98. The school-based behavioral health services that the DOE usually provides in schools consist of evidence-based practices, like therapy and parent training and counseling. Services are also provided to teachers for classroom management purposes, to set up classrooms to support a student's needs. Schools can also provide a connection to community support, such as available service providers or putting families in contact with CAMHD or DDD for services. Testimony of SBBH DES, Tr.V2, 33:19-36:18.
99. Prior to the January 12, 2024 meeting, SBBH DES attended the Planning Team meeting to try to figure out what kind of services could be provided for Student to transition Student after being discharged. Some services that were being considered were parent training and counseling, supportive counseling of around twenty (20) minutes per week, and/or additional counseling, depending on how Student's assessment results turned out. Testimony of SBBH DES, Tr.V2, 37:3-39:12.
100. At the January 12, 2024 meeting, SBBH DES indicated that since Student's behaviors are under control at school using other programs, such as applied behavior analysis, the school would not normally offer mental health services, but due to Parent's request, they would be willing to offer counseling to be put in Student's IEP and some Parent training. Testimony of SBBH DES, Tr.V2, 56:24-57:7, 58:15-59:1, 64:11-65:5; R-Ex.81, p.591-593; R-Ex.82, 1/12/2024 audio, [00:53:28-00:57:43].
101. It was apparent during the meeting that Parent and Mr. Seitz were not willing to discuss options other than residential placement of Student and the meeting ended

- early when Parent and Mr. Seitz left the meeting. Testimony of SBBH DES, Tr.V2, 41:18-42:2; Testimony of Principal, Tr.V3, 23:12-24:8; *see also* R-Ex.82, 1/12/2024 audio.
102. The IEP team did not continue discussions after Parent and Mr. Seitz left the meeting but documented another IEP, dated January 12, 2024 (hereinafter “IEP-01/12/2024”). R-Ex.12, p.105-122.
103. Principal did not believe that the IEP team would have offered Student residential placement as Student’s placement even if Parent and Mr. Seitz had stayed throughout the meeting. The DOE was willing to provide other types of mental health services to Student but not in a residential placement setting. Testimony of Principal, Tr.V3, 40:6-42:19.
104. Because the IEP team did not conclude the discussions about the proposed school-based behavioral health services that SBBH DES was willing to provide for Student and because they did not get consent from Parent to provide those services, none of those types of services were included in Student’s IEP-01/12/2024. Testimony of SBBH DES, Tr.V2, 41:1-23, 49:2-50:8.
105. The IEP-01/12/2024 contained information about the problems Parent encountered with Student’s return home in November 2023, such as the lack of training of the staff contracted to provide in-home supports for Student and the continued aggression displayed by Student against both the support staff and Student’s family. R-Ex.12, p.106.
106. The IEP-01/12/2024 also contained input from SBBH DES, where SBBH DES noted an offer of counseling for Student and training support for Parent, and noted that the

- best strategy for Student primary disabilities are “medication and a structured environment offered via ABA or intensive behavior management strategies.” R-Ex.12, p.106.
107. The IEP-01/12/2024 contained information from both Student’s insurance and DDD that they were unable to find staff to provide in-home services to Student to implement strategies that were working to manage Student’s behaviors at School. R-Ex.12, p.106.
108. DOE BCBA concurred that Student’s behaviors might be manageable if the same strategies can be implemented at the home that work in the school environment. R-Ex.12, p.106.
109. The IEP-01/12/2024 noted that Hospital indicated that Student’s violent behavior can be managed with medication and “a stable, structured, and predictable environment.” R-Ex.12, p.106.
110. The IEP-01/12/2024 noted that due to Parent and Mr. Seitz leaving early, it did not contain any changes in Student’s services from the IEP-12/13/2023, including the counseling that was offered by SBBH DES at the January 12, 2024 meeting. *See* R-Ex.12, p.105-122.
111. A prior written notice (hereinafter “PWN”) was issued by Home School on January 24, 2024 (hereinafter “PWN-01/24/2024”) regarding the events of the meeting that took place on January 12, 2024. R-Ex.13, p.123-124.
112. The PWN noted that the DOE was willing to offer Student one hundred eighty (180) minutes per quarter of counseling and five hundred forty (540) minutes per quarter of parent counseling/training. R-Ex.13, p.123.

113. The PWN went on to say that Home School’s IEP data demonstrated that Student’s behaviors were not impeding Student’s ability to make progress toward Student’s IEP goals, but were still willing to offer counseling to Student and family to address Student’s transitions and emotional needs. R-Ex.13, p.123.
114. The PWN stated that a residential placement for Student was rejected due to Home School’s ability to provide a free appropriate public education (hereinafter “FAPE”) to Student with the supports in Student’s IEP in light of Student’s needs and circumstances. R-Ex.13, p.123.
115. The PWN noted that the DOE had “additional options to offer” for Student, but they were not discussed due to Parent and Mr. Seitz leaving the meeting early. The DOE’s “additional options to offer” were not listed in the PWN. R-Ex.13, p.124.

V. CONCLUSIONS OF LAW

IDEA framework

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

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

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

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

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

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

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

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

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

Burden of Proof

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

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

A. Respondents failed to provide Student with an appropriate placement and/or appropriate services to enable Student to access Student’s education

Petitioners’ sole argument is in this case that the DOE failed to provide Student with a residential placement to receive mental health and related services and/or failed to provide

Student with appropriate mental health services in order to address Student’s mental health issues and enable Student to access Student’s education. Based on the analysis below, this Hearings Officer concludes that the DOE failed to provide Student with appropriate services to allow Student to access Student’s education.¹⁰

An IEP is a “formal written offer that creates a clear record that will do much to eliminate troublesome factual disputes about when placements are offered, what placements are offered, and what additional education assistance was offered to supplement a placement, if any. The IEP must specify the anticipated frequency, location, and duration of educational services.”

M.C. by and through M.N. v. Antelope Valley Union High School District, 858 F.3d 1189, 1196-1197 (9th Cir. 2017) (*internal quotations omitted*) (*citing Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994)).

¹⁰ While Petitioners specifically argue that Student’s current violent outbursts suggest that Student is suffering from mental health issues, the evidence in the record suggests that Student’s violent behaviors are more likely caused by a failure to provide appropriate wraparound ABA therapy services to Student to manage Student’s behaviors, although there was evidence presented that Student’s outbursts could also be related to Student’s [REDACTED] and [REDACTED] diagnoses. This Hearings Officer points this out because while Petitioners specified mental health services, the finding of FAPE below and the remedy that is being awarded are not specific to mental health services and are more broadly to address Student’s needs as a whole.

This Hearings Officer also notes that while the Complaint and Prehearing Order both specify mental health services as what was lacking in the IEP, the evidence presented during the hearing is that Student has a primary diagnosis of [REDACTED] and has been determined not to be eligible for mental health services based, at least in part, on the [REDACTED] diagnosis. As Respondents did not object to the evidence of Student’s diagnosis and Student’s needs as presented relevant to Student’s [REDACTED] diagnosis, this Hearings Officer finds that this issue can be addressed generally as the failure of the DOE to offer a program that meets Student’s needs and should not be considered a ‘new’ issue raised at the hearing. *See* 20 U.S.C. §1415(f)(3)(B); *see also County of San Diego v. California Special Educ. Hearing Office*, 93 F.3d 1458 (9th Cir. 1996).

Although the specific issue of which needs the IEP failed to address in this case may be different from what was specifically listed in the Complaint, this Hearings Officer finds that Respondents were on notice that the Petitioners were arguing that Student’s IEP was insufficient because it did not provide appropriate services to enable Student to access Student’s education.

A school district or educational agency “has the duty to formulate the plan to the best of its ability in accordance with information developed at the prior IEP meetings but must afford the parents a due process hearing in regard to that plan.” *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1490 (9th Cir. 1986). The IDEA does not “vest within parents a power to veto any proposal or determination made by the school district or IEP team regarding a change in the student’s placement.” *B.B. ex rel. J.B. v. Hawaii, Dept. of Educ.*, 483 F.Supp.2d 1042, 1050 (citing *Doe v. Maher*, 793 F.2d 1470, 1490 (9th Cir. 1986)).

While the DOE contends that they did not develop an IEP for Student from the January 12, 2024 meeting, a written document entitled “Individualized Education Program” was developed, dated January 12, 2024, which included information from the meeting that was held. *FOF 102*. The IEP-01/12/2024 does not include any of the proposed services that the DOE indicates it was willing to offer to Student since no decisions were made at the meeting. *FOF 104*. PWN-01/24/2024 was developed that did include what the DOE was considering offering Student had the meeting not ended prematurely when Parent and Mr. Seitz left the meeting. *FOF 111*. These include adding SBBH counseling services for Student for one hundred eighty (180) minutes per quarter and SBBH parent counseling training for five hundred forty (540) minutes per quarter. *FOF 112*. Even assuming that this would have been the proposed offer for additional services based on the concerns expressed by Parent and other members of the IEP team, these services are inadequate to address Student’s current needs.

The evidence in this case is that Student has documented incidents of aggression and self-injurious behaviors in the home and at school since at least January 2023. *See FOF 54-74*. The incidents of self-injurious behaviors have not steadily decreased with the implementation of Student’s IEP over the course of 2023 and it appears that while the behavior was being managed

in school, it does not seem to be consistent. *See FOF 58, 60, 62, 65, 67, 69, 72, 74.* Student also had multiple documented incidents of aggression at school, with a low average of a little over one (1) incident per day. *See FOF 57, 59, 61, 64, 66, 68, 71, 73.* The IEP team also was aware of Student being violent at the home, which included striking Parent, [REDACTED] and other family members. *FOF 83-85.* The violent outbursts from Student led to Student being hospitalized at least three (3) separate times by the time of the January 12, 2024 IEP meeting. *FOF 27-29, 32-34, 48-49.*

When Student was hospitalized in September to October 2023, October to November 2023, and from December 2023 to February 2024, Student has not been able to access Student's education. *FOF 50.* The violent episodes, the subsequent calls to authorities, and the eventual involuntary hospitalizations of Student that occurred before the January 2024 IEP meeting have resulted in Student not being able to access Student's education. As confirmed by the DOE witnesses who testified at the Hearing, during the time Student was at Hospital, the DOE was unable to send personnel in to provide special education or related services to Student due to the nature of the facility where Student was being hospitalized. *FOF 50.*

Despite Respondents' contention that Student was able to make progress when Student was not in the hospital and attending school, this is not sufficient to alleviate the DOE of its responsibility to create a program that will allow Student to make progress in light of Student's unique needs. In this case, Student's demonstrated need is intensive ABA programming that is consistent in all aspects of Student's life to manage Student's behaviors. Student needs a BIP and properly trained personnel to consistently implement the BIP to manage, redirect, and prevent Student's aggressive and self-injurious behaviors. *See FOF 75, 79, 80, 94, 106-108.* Neither the IEP-01/12/2024 nor the proposed additional counseling services in the PWN-

01/19/2024 provides that type of service to address Student's needs. This Hearings Officer concludes that the IEP-01/12/2024 denies Student a FAPE because it does not sufficiently provide a program that would allow Student to make progress in light of Student's unique needs. Student cannot make progress if Student continues to be hospitalized due to Student's unmanaged aggressive behaviors and the DOE cannot provide Student with special education and related services.

B. Student requires residential placement to manage Student's behaviors to a point where Student may safely be returned to the home and public school environment

Petitioners are asking this Hearings Officer to find that the DOE should place Student in a residential placement where Student's behaviors can be managed to a point where Student can return home safely. This Hearings Officer agrees that Student requires residential placement.

The standard for measuring whether an educational placement is sufficient examines whether the placement includes "educational instruction specially designed to meet the unique needs of the [] child, supported by such services as are necessary to permit the child to benefit from the instruction." *County of San Diego v. California Special Educ. Hearing Office*, 93 F.3d at 1468 (citing *Rowley*, 458 U.S. at 189, 102 S.Ct at 3042). The Ninth Circuit has "identified tests for determining when to impose responsibility for residential placements on the special education system: (1) where the placement is 'supportive' of the pupil's education; (2) where medical, social or emotional problems that require residential placement are intertwined with educational problems; and (3) when the placement is primarily to aid the student to benefit from special education." *County of San Diego v. California Special Educ. Hearing Office*, 93 F.3d at 1468 (citing *Clovis Unified School District v. California Office of Administrative Hearings*, 903 F.2d 635 (9th Cir. 1990)).

1. A residential placement would be supportive of Student's education

Based on the facts of this case, Student would be well-supported in a residential placement by providing Student with consistent ABA programming, implemented with consistency, to redirect, reduce, and/or replace Student's maladaptive behaviors, specifically aggressive and self-injurious behaviors. DOE BCBA testified in this case that Student could return to the home setting safely as long as the BIP that the school uses could be implemented consistently and with fidelity to reinforce the strategies in the BIP. *See* Testimony of DOE BCBA, Tr.V2, 125:2-12139:3-24, 145:1-13. A summary contained in Student's August data report discusses that due to an increase in Student's behaviors in August 2023, the school wanted to reduce Student's school hours so that they could place Student in a more structured setting where staff could better manage and support Student during critical moments, demonstrating that even Student's behavior professionals believe that Student requires a structured setting with consistent implementation of ABA strategies with fidelity to manage Student's behaviors. *FOF 70*. A residential placement could provide that structure and support to manage Student's behaviors so that Student can benefit from Student's education without breaks in services, as Student has experienced since September 2023.

While it does appear that Student could benefit from a less restrictive environment, such as a therapeutic foster home or in-home services by qualified personnel, the evidence in this case has demonstrated that there are insufficient resources in the area, the island, and possibly the State of Hawai'i, that would provide those services to Student. *FOF 17, 36, 41, 47*. The State of Hawai'i DDD is unable to place Student in a therapeutic foster home (or any other residential placement) and are unable to find qualified support staff to provide the necessary services to Student in Student's home. *FOF 5, 52*. Based on the record, Student has been determined ineligible for other possible placements, such as Local Residential Placement, based on the

severity of Student's diagnosis, and Student's insurance company has also been unable to locate suitable providers to support Student in the home. *FOF 35, 51, 52.*

The DOE is the agency able to assist Parent with either finding qualified support staff to provide extended ABA services to Student to both manage behaviors in the home and provide Student's family with training to properly implement ABA strategies. The DOE is the agency also able to locate and place Student in a suitable residential placement that can address Student's behavioral needs and provide Student with a suitable education that would meet the DOE's standards.

A suitable residential placement would provide the necessary around-the-clock support for Student to implement strategies in Student's BIP that could manage, replace, and reduce Student's maladaptive behaviors to the point to allow Student to return to a less restrictive setting. This Hearings Officer concludes that the evidence in this case supports a finding that a residential placement would be supportive of Student's education.

2. Student's social problems require residential placement that are intertwined with Student's educational problems

Student's problems that have resulted in both the numerous hospitalizations since September 2023 and this case all stem from Student's [REDACTED] diagnosis, coupled with Student's additional [REDACTED] and [REDACTED] diagnoses. The evidence in this case shows that since Student does not have clear medical or mental health problems, other agencies or resources that would normally be available to students with such difficulties are not available to Student. CAMHD and Hospital both have found that Student is not a candidate for mental health services due primarily to Student's [REDACTED]. *See e.g. Testimony of Principal, Tr.V3 57:24-58:9; P-Ex.4, p.07-12.*

While Student does not have diagnosed medical and emotional problems, the social problems that Student has involving Student's aggressive and self-injurious behaviors are directly intertwined with Student's educational problems. The record has demonstrated that without intensive ABA programming, which Student has consistently received in the school setting, Student would be unable to access Student's education. *See e.g.*, R-Ex.48, p.253 (Student has an increasing trend of self-injurious behaviors in January 2023 due to Student having a substitute registered behavior technician); R-Ex.50, p.259 (Student had an increase of self-injurious behaviors and aggression after returning from spring break).

While Respondents argue that Student's behaviors at home are separate and apart from Student's behaviors at school, this argument is unreasonable. This is not a situation where Student is perfectly behaved without supports at school and "acts out" only at home. Student in this case has [REDACTED], where Student requires intensive ABA strategies at school, such as a well-developed and consistently implemented BIP to manage Student's behaviors at school. Even when the BIP is consistently implemented, Student continues to demonstrate aggression and self-injurious behaviors at school. *See e.g. FOF 54-74.* When the support for Student at home does not consistently implement ABA strategies to manage Student's behaviors at home, Student engages in violent outbursts at home that cause Student to be hospitalized, where Student does not receive any educational benefits. The record in this case demonstrates that Student's social or behavioral problems are intertwined with Student's educational problems, which supports Student's placement in a residential facility.

3. A residential placement would be primarily to aid Student to benefit from special education

Based on the record in this case, Student's violent behaviors have resulted in Student being involuntarily hospitalized, which then resulted in Student not receiving any educational

benefits during the periods of hospitalization. *FOF 27-29, 32-34, 48-50.* The record also demonstrates that Student's behaviors at home are due primarily to the lack of proper implementation of ABA strategies that can be used to manage Student's behaviors. Student requires a structured setting with consistent and often intensive ABA strategies to be implemented to redirect, reduce, and replace Student's aggressive and self-injurious behaviors. *FOF 34, 40, 44-45.* It is clear from the record that the proper resources to provide Student with this supports are not available to Student due to a lack of qualified personnel to provide those services to Student in the area where Student lives, as well as due to a lack of training for Parent and other family members in how to manage Student's behaviors. *FOF 30, 31, 36, 40-41, 51-52.*

A residential placement would allow Student to receive around-the-clock ABA interventions to manage and replace Student's maladaptive behaviors with appropriate behaviors that would allow Student to return to the home and public school setting. In the meantime, Parent and other family members should be provided training to implement the strategies that work with Student upon Student's transition from the residential placement back to the home.

Managing Student's aggressive and self-injurious behaviors properly would prevent Student from engaging in behaviors that result in Student's hospitalization and subsequent lack of educational services. In this case, a residential placement would primarily be to allow Student to access Student's education without interruption.

C. Petitioners' requested remedy of residential placement

Petitioners have requested that this Hearings Officer order that the DOE review Student's IEP and place Student in a residential placement as Student's least restrictive environment and/or provide suitable services to allow Student to access Student's education. This Hearings Officer agrees that Petitioners' request is reasonable.

While Respondents argue that related services for Student in the home are not the responsibility of the DOE and should be managed by other agencies, such as DDD, it is clear from the record that the DOE has the ability and responsibility to find an appropriate placement for Student and pay for the cost of such placement.

A residential placement that is necessary for Student to access Student's education in an uninterrupted manner is within the authority of the DOE, especially for Students who have special education and related needs under the IDEA. Respondents point to their lack of responsibility for Student's hospitalization payments or payments that can be covered by Student's medical insurance, but this is inapplicable to a residential placement for Student. The IDEA makes it clear that placements or services that are solely related to medical concerns of Student are not the responsibility of the DOE. *Ashland Sch. Dist. v. Parents of Student E.H.*, 587 F.3d 1175, 1185 (9th Cir. 2009). However, in this case, Student's behaviors that resulted in Student's hospitalization are the result of Student's disability and the lack of proper supports to manage Student's behaviors and not due to a medical condition. The medical records support the finding that Student's needs are not medical in nature, but are a result of Student's [REDACTED], and [REDACTED]. *FOF 20*.

The record in this case makes it clear that Student requires more support than Student is being provided by Respondents to manage Student's behaviors. Multiple agencies have been working with Student to try to get Student the necessary supports to allow Student to safely return to the home, but they have been unsuccessful thus far. The DOE is the only agency involved that has the ability to place Student in a facility that can properly manage Student's behaviors and while it is clear that the DOE has set up the necessary supports in the school that Student needs to manage behaviors, these supports are not enough to allow Student to benefit

from Student's education without interruptions. If the DOE can find and place Student in an appropriate therapeutic foster home or manage a program as suggested by DOE BCBA where Student is provided consistent ABA programming and a suitable place to live with twenty-four (24) hour care, then that would be an ideal situation, however based on the record, that solution is not possible based on the resources available to Petitioners.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have met their burden of proving the allegation in the Complaint by a preponderance of the evidence. Specifically, this Hearings Officer finds that the IEP team's failure to provide Student with appropriate services and/or an appropriate placement for Student to manage Student's behaviors and allow Student to access Student's education resulted in a deprivation of educational benefits for Student and a denial of FAPE.

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

For the reasons stated above, IT IS ORDERED –

1. Within ten (10) school days¹¹ of this Decision, the IEP team shall schedule an IEP meeting with Parent to update Student's IEP as noted in this Decision.
2. Prior to the IEP meeting, Respondents shall research residential facilities both in Hawai'i and on the mainland that specialize in providing intensive ABA or similar programming for students with [REDACTED].

¹¹ School day means any day, including a partial day, that students are in attendance at school for instructional purposes. H.A.R. §8-60-2. This Hearings Officer specified school days due since the date of this Decision is at or near the time when the DOE students are on spring break and to account for any additional days off that Home School has around that time, while acknowledging the immediacy of the actions that need to be taken.

Respondents shall contact suitable placements to determine whether they would be able to immediately accommodate Student for the remainder of the 2023-2024 school year, for the summer of 2024, and the 2024-2025 school year.

3. The IEP team shall discuss the facilities that they discover and any facilities with information provided to them by Petitioners for possible placements for Student. Student's placement should be done as soon as possible after the necessary arrangements are made for Student to be accepted into the facility.
4. Unless explicitly agreed to by Petitioners in writing, the IEP team shall find that Student's least restrictive environment is a residential placement until Student's behaviors are managed and/or reduced to the point where Student can safely return home. Student's IEP shall be reviewed to reassess Student's least restrictive environment no later than one (1) year after the IEP meeting as ordered above.
5. The DOE shall be responsible for making any necessary arrangements for placing Student in the agreed upon residential placement, including but not limited to: obtaining the necessary paperwork, engaging in negotiations for and/or signing any contracts required by the facility to provide Student with both educational and ABA and/or other related services, providing Student's educational and other records required by the facility, providing any necessary payments to ensure Student's acceptance at the facility, making payments for Student's stay and services provided at the facility, and arranging and paying for any airfare or accommodations necessary to transport Student to the facility.

6. Petitioners shall be responsible for signing and returning any necessary consent forms required either by the DOE to provide records or any other consent forms required by the facility.
7. The DOE shall negotiate in good faith with Petitioners to determine the most suitable facility for Student that is available immediately, however, if the IEP team (inclusive of Petitioners) cannot agree to a specific facility where Student should be placed, the decision shall remain with Respondents to determine which facility Student shall be placed.
8. If Student has not started at the residential placement by sixty (60) calendar days of the IEP meeting required above, the IEP team shall meet again within ten (10) calendar days to work on getting Student into an appropriate placement, unless otherwise agreed to, in writing, by Petitioners.
9. The IEP team shall schedule follow-up meetings no later than every two (2) months of Student's start at the residential placement to evaluate Student's progress at the placement and/or suitability of the placement, unless otherwise agreed to by Petitioners in writing.
10. Any delays in the scheduling of meetings, provision of consents, scheduling of assessments or observations of Student, or for any other reason caused by Petitioners and/or Petitioners' advocates or representatives shall be carefully documented by Respondents and shall extend the timelines set herein by the number of days attributable to Petitioners and/or Petitioners' advocates or representatives.

11. Nothing in this Decision shall prevent Respondents from attempting to recover any part of the cost of the facility from Student's insurance or other State of Hawai'i agencies that may also be responsible for payment of such treatment for Student.
12. Nothing in this Decision shall prevent the parties from agreeing to an alternative to a residential placement, such as a therapeutic foster home with extended school day support provided by the DOE, if both parties agree that the alternative placement is more appropriate for Student.
13. Nothing in this Decision shall override any orders made by the State of Hawai'i Family, District, or Circuit court regarding any collateral cases taking place during or around the time of this Hearing.

RIGHT TO APPEAL

The decision issued by this Hearings Officer is a final determination on the merits. Any party aggrieved by the findings and decision of the Hearings Officer shall have 30 days from the date of the decision of the hearings officer to file a civil action, with respect to the issues presented at the due process hearing, in a district court of the United States or a State court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2) and §8-60-70(b).

DATED: Honolulu, Hawai'i, March 18, 2024.



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