



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

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

Petitioners,

vs.

DEPARTMENT OF EDUCATION, STATE
OF HAWAI'I, and CHRISTINA
KISHIMOTO, Superintendent of the
Hawai'i Public Schools,

Respondents.

DOE-SY1819-054

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION

Due Process Hearing: August 21-27, 2019

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On June 20, 2019, the Department of Education, State of Hawaii, and Christina Kishimoto, Superintendent of the Hawaii Public Schools (hereinafter collectively “Respondents”

¹ Personal identifiable information is provided in the Legend.

or “DOE”) received a request for a due process hearing under Hawaii Administrative Rules (hereinafter “HAR”) Title 8, Chapter 60, in accordance with the Individuals with Disabilities Education Act (hereinafter “IDEA”), from Student, by and through Parent 1 (hereinafter collectively “Petitioners”).

A pre-hearing conference was held on July 23, 2019, before Hearings Officer Chastity T. Imamura, with Jane S. Preece, Esq. (hereinafter “Ms. Preece”), representing Petitioners, and Carter K. Siu, Esq. (hereinafter “Mr. Siu”), representing Respondents. At the pre-hearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for August 21 through and including August 26, 2019. Deadlines were also set for the filing of substantive motions, disclosures, and objections to be noticed. A hearing date for any substantive pre-hearing motions was set for August 12, 2019. At the pre-hearing conference, the parties acknowledged that the deadline for the undersigned Hearings Officer’s Decision (hereinafter “Decision”) was on August 24, 2019. Due to the unavailability of the Respondents’ witnesses, Mr. Siu indicated that he would be requesting an extension of the deadline.

On July 25, 2019, Mr. Siu submitted a declaration and request to extend the 45-day decision deadline from August 24, 2019 to October 8, 2019. On July 26, 2019, the undersigned Hearings Officer granted Respondents’ request, finding good cause for an extension of the deadline. The new deadline for the Decision was set for October 8, 2019.

On August 2, 2019, Mr. Siu submitted two substantive motions: 1) Respondents’ Motion to Strike Evidence of Student’s Behaviors at Locations Other Than at School, and 2) Respondents’ Motion for Partial Summary Judgment, or, in the Alternative, to Dismiss Issues 5 and 10. On August 8, 2019, Ms. Preece timely submitted Petitioners’ memoranda in opposition to both of Respondents’ Motions. Mr. Siu timely submitted reply briefs on August 9, 2019.

The hearing on both of Respondents' Motions was held on August 12, 2019, with Ms. Preece representing Petitioners and Mr. Siu representing Respondents. The Order Denying Respondents' Motion to Strike Evidence of Student's Behaviors at Locations Other Than at School was filed on August 13, 2019. The Findings of Fact, Conclusions of Law and Order Granting in Part and Denying in Part Respondents' Motion for Partial Summary Judgment, or, in the Alternative, to Dismiss Issues 5 and 10 was also issued on August 13, 2019 (hereinafter referred to as "FOF, COL & Order-8/13/19").² An Amended Pre-Hearing Order was also filed on that date clarifying the issues to be determined at the Hearing. A Second Amended Pre-Hearing Order was filed on August 15, 2019, again clarifying the issues to be determined at the Hearing.³

The Hearing commenced on August 21, 2019. Present at the Hearing were Hearings Officer Chastity T. Imamura; Parent 1 and Ms. Preece, on behalf of Petitioners; DOE District Educational Specialist and Mr. Siu on behalf of Respondents. The Hearing continued to August 22, 23, and 26. By agreement of the parties, an additional day of testimony was scheduled for August 27, 2019.

At the end of the Hearing, the undersigned Hearings Officer expressed an interest in having both parties submit closing briefs due to the number of issues, witnesses, and the length of testimony that was presented at the Hearing. Neither party had any objection to that request and the deadline for the closing briefs to be submitted was set for September 24, 2019.

Having reviewed and considered the evidence and arguments presented, together with the

² More information for the background and issues related to Respondents' two motions are outlined in the FOF, COL and Order-8/13/19.

³ The Second Amended Pre-Hearing Order was submitted due to Ms. Preece's request to include an additional IEP at issue, which was allowed over objection of Respondents to assist with clarifying the issues presented.

entire record of this proceeding, the undersigned Hearings Officer renders the following findings of fact, conclusions of law, and decision.

II. ISSUES PRESENTED

Petitioners asserted eleven (11) issues in the original request for IDEA impartial due process hearing (hereinafter referred to as “Request”). In the FOF, COL and Order-8/13/19, Issue 10 was dismissed from the Request as being moot due to a concession made by Ms. Preece that an initial evaluation was completed pursuant to a settlement agreement. As clarified in the Second Amended Pre-Hearing Order, the following are the remaining issues to be addressed in this decision.⁴

- 1) Whether the Home School predetermined the services that Student would receive from the school and ignored the recommendations of the Functional Behavioral Assessment (hereinafter “FBA”) that was completed.
- 2) Whether the IEP team meeting disregarded the concerns of the parents and only focused on the principal’s opinions, which were strongly expressed in a 9-page document.
- 3) Whether the Home School acted in bad faith by agreeing to perform a FBA and then ignoring the FBA based on its predetermination of the services that would be provided.
- 4) Whether the Principal created a hostile and intimidating environment in the Individualized Education Plan (hereinafter “IEP”) meetings.

⁴ The issues have been identified and clarified by the undersigned Hearings Officer in accordance with HAR §8-60-65(e). Both parties had the opportunity to object, clarify or request clarification on all the issues presented in the three pre-hearing orders. As no objections, clarifications, or requests for clarifications were received by the Hearings Officer, they will be addressed as presented in the pre-hearing orders.

- 5) Whether the Principal rejected the opinion of the DOE-contracted expert.
- 6) Whether the Home School failed to follow its own IEP by allowing the DOE Provider to not perform the duties in the IEP and/or failed to keep any records of doing so.
- 7) Whether the Home School failed to perform counseling as required under the IEP and/or failed to keep parents informed of the progress of the counseling.
- 8) Whether the two Behavioral Services Plans (hereinafter “BSP”) that were created after the IEP meetings were incorporated into the IEP or discussed with parents.
Petitioners also allege that the BSPs were insufficient and there are no records that they were discussed with teachers.
- 9) Whether the two BSPs were followed by the school, whether punishments that were used were not recommended by the BSP and FBA.
- 11) Whether the school failed to consider the private evaluations of Student and its own DOE-funded evaluation and failed to give a prior written notice that it would not consider them.

III. FINDINGS OF FACT

Procedural History and Background

1. Student is currently attending Home School.⁵
2. In August 2016, Student underwent Evaluation conducted by Parents’ Private Assessor, at Parents’ Private Assessor Company.⁶
3. Parents’ Private Assessor diagnosed Student as having Diagnosis⁷

⁵ Testimony of Parent 1, *Transcript (Volume 2) page 331, lines 6-10 (hereinafter referenced as “Tr. (V2) 331:6-10.”)*

⁶ *Petitioners’ Exhibit 1, page 1 (hereinafter referenced as “P-Ex.1, p.1”)*.

⁷ *P-Ex.1, p.20*

4. In December 2016, Student was determined to be eligible for services under Section 504 and was provided services and accommodations pursuant to Section 504.⁸
5. In March 2017, Assessment was done at Parents' Private Provider Company 1 and Student was deemed eligible and in need of services.⁹
6. On August 30, 2017, a Request for Due Process Hearing was filed by Parent 1 on behalf of Student, through Parent 1's attorney, due to the denial of IDEA services for Student.¹⁰
7. On September 20, 2017, a Settlement Agreement was reached between Parent 1 on behalf of Student, and the Department of Education (hereinafter "DOE"), in which the DOE agreed to evaluate Student for eligibility under IDEA. Assessments were conducted.¹¹
8. On December 4 and 5, 2017, IEP meetings were held. The IEP team determined that Student was eligible for services under IDEA and an IEP was created (hereinafter "IEP-12/5/2017").¹²
9. All the assessments to be completed pursuant to the settlement agreement were done prior to the IEP meetings and the results of the various assessments were included in the IEP-12/5/2017.¹³ The FBA was completed by DOE Provider 1 in October 2017 and a follow up letter clarifying DOE Provider 1's recommendations was signed on November 7, 2017.¹⁴
10. Other assessments done by Parents' Private Provider Company 1 were also discussed and

⁸ P-Ex.2, p.1-3.

⁹ P-Ex.3, p.1-9.

¹⁰ P-Ex.4, p.1-9.

¹¹ P-Ex.5, p.1-2.

¹² P-Ex.9, p.1-17; also admitted into evidence as *Respondents' Exhibit 3, pages 049-065* (hereinafter referenced as "R-Ex.3, p.049-065").

¹³ P-Ex.9, p.2-5/R-Ex.3, p.050-053.

¹⁴ R-Ex.4, p.161-172.

- included in IEP-12/5/2017.¹⁵
11. Parents were present at both meetings on December 4 and 5, 2017,¹⁶ and concerns of Parents about Student's behaviors and needs were discussed during the meeting and documented in IEP-12/5/2017.¹⁷
 12. In January 2018, DOE Provider 1 created a BSP for Student (hereinafter "BSP-1/12/2018"). The draft BSP was emailed to Parent 1 by SPED Teacher on January 25, 2018¹⁸ and the updated BSP was emailed to Parent 1 by DOE Provider 1 on February 14, 2018.¹⁹
 13. On or about October 16, 2018, the BSP was revised for use in the following school year, and the revised BSP was emailed to Parent 1 on or about November 9, 2018 (hereinafter "BSP(2)-11/21/2018").²⁰
 14. IEP meetings were held on November 15, 2018 and December 5, 2018, from which an IEP was created (hereinafter "IEP(2)-12/5/2018").²¹ At the meetings, the concerns of Parents were discussed and considered by the IEP team, and some additions were made to the IEP based on Parents' concerns, including "Parent consultation with the team to include Provider, teacher, and any other team member."²²
 15. In December 2018, Home School filed a Request for Due Process Hearing to request a finding that the FBA that was done by DOE Provider 1 on October 17, 2018 was

¹⁵ See IEP-12/5/2017, *P-Ex.9, p.5/R-Ex.3, p.053.*

¹⁶ See IEP attendance sheets, *P-Ex.9, p.16-17/R-Ex.3, p.064-065.*

¹⁷ See IEP-12/5/2017, *P-Ex.9, p.6-8/R-Ex.3, p.054-056.*

¹⁸ *R-Ex.5, p.297-302.*

¹⁹ *P-Ex.10, p.1-5.*

²⁰ *P-Ex.13, p.1-4.*

²¹ *P-Ex.15, p.1-14.*

²² *P-Ex.15, p.3-5 & 10.*

- appropriate to discern the nature of Student's learning and behavioral needs.²³
16. A settlement agreement dated January 31, 2019 (hereinafter "SA-1/31/2019") was reached to resolve the Home School's Request for Due Process Hearing. Pursuant to the SA-1/31/2019, the DOE would conduct a new FBA using one of three approved providers.²⁴
 17. Private Provider 2 was chosen to administer the new FBA pursuant to the SA-1/31/2019.²⁵
 18. Private Provider 2 did not disclose to the DOE that Private Provider 2 was the relation of Student's current Private Provider 1, and was the clinical director of Parents Private Provider Company 1, where Private Provider 1 worked because Private Provider 1 believed it was common knowledge, having worked with DOE in the past.²⁶
 19. In February and March 2019, Private Provider 2 administered the new FBA and sent out a draft of the FBA to the IEP team members prior to April 3, 2019 to allow them to make comments or corrections.²⁷
 20. On April 3, 2019, a meeting was held with IEP team members where Private Provider 2 presented Private Provider 2 findings and recommendations in the FBA.²⁸
 21. On April 8, 2019, a prior written notice (hereinafter "PWN") and an evaluation summary report (hereinafter "ESR") were sent to Parents by the DOE. In both documents, the DOE notified Parents that Student was deemed to be still eligible for services under the

²³ *P-Ex.16, p.1-4.*

²⁴ *P-Ex.17, p.1.*

²⁵ *Tr. (V1) 126:16-18.*

²⁶ *Transcript, Volume 1, page 211, line 9 through page 212, line 1, (hereinafter referenced as "Tr. (V1) 211:9-212:1").*

²⁷ *Tr. (V1) 132:3-11.*

²⁸ *Tr. (V1) 154:24-155:6.*

- IDEA, and that no change in Student's eligibility category was made.²⁹
22. On April 12, 2019, an email was sent by Principal to the IEP team members documenting Principal's personal thoughts and concerns about the FBA, its findings and the desire of Parents to see the recommendations of the FBA implemented in Student's IEP.³⁰
23. Principal sent the email ahead of time to allow the IEP team members to consider it before discussing it at the meeting.³¹ Principal did not send the email to intimidate or influence any of the other IEP team members.³²
24. On April 12, and 17, 2019, a IEP revision meetings were held to review Student's IEP considering the results of the FBA by Private Provider 2. The school-based members of the IEP team and Parents' and their supporters did not come to a consensus regarding possible revisions to be made in Student's IEP.³³
25. During one of the April 2019 meetings, Private Provider 2 misinterpreted a comment made by Principal³⁴ and asked to end the meeting early, despite the team not coming to a consensus regarding Student's IEP.³⁵
26. In May 2019, DOE Provider 3 did a consultation for services to be provided to Student,

²⁹ *P-Ex.20, p.1-5.*

³⁰ *P-Ex.21, p.1-10, also submitted as R-Ex.5, p.437-443.*

³¹ *Tr. (V4) 653:10-21, P-Ex.21, p.1/R-Ex.5, p.437.*

³² *Tr. (V1) 74:5-23.*

³³ *See generally* Testimony of Private Provider 2, *Tr. (V1) 155:19-161:15*; Testimony of Principal, *Tr. (V4) 657:21-658:3*, also the PWN dated 6/7/2019 (hereinafter "PWN-6/7/2019"), which summarizes the meetings on April 12, 17, and June 4, 2019, *P-Ex.23, p.1-4.*

³⁴ The undersigned Hearings Officer finds that the comment by Principal in recommending that Student's new provider, was contextually appropriate in the circumstances and was not an offensive comment on Private Provider 2's qualifications on administering a FBA, which is how Private Provider 2 said that Private Provider 2 interpreted Principal's comment. *Tr. (V1) 162:3-163:11*. This interpretation of Principal's comment is further supported by Principal's testimony, *Tr. (V1) 99:21-101:10*, *Tr. (V4) 599:5-12*, General Education Teacher 1's testimony. *Tr. (V1) 53:19-54:13.*

³⁵ *Tr. (V1) 161:16-162:8.*

which included a review of Student's records, assessments (including the FBA by Private Provider 2) and observations of Student in school.³⁶

27. On June 4, 2019, at the request of the Parents, another IEP meeting was held to review Student's IEP.³⁷ Again, no agreement was found between the School team and Parents' team regarding changes to Student's IEP.³⁸
28. At most of the IEP meetings³⁹ Parents brought at least one supporter⁴⁰ with them, and Home School communicated with Parents and their supporters regarding meeting dates and any planned agendas for the IEP and other meetings related to Student.⁴¹
29. On June 7, 2019, a PWN was sent by the school regarding the IEP meetings of April 12, 17, and June 4, 2019 (hereinafter "PWN-6/7/2019").⁴² In the PWN, the DOE informed Parents that due to the DOE's assessment of the FBA, and Student's current performance in the school setting, no changes will be made to the IEP that was created at a meeting on February 19, 2019,⁴³ other than including the summary report of the FBA.⁴⁴
30. The members of the IEP team that testified at the Hearing included General Education Teacher 1, Principal, SPED Teacher, DOE Provider 3, Private Provider 3,

³⁶ Testimony of DOE Provider 3, *Tr. (V3) 542:8-543:12, R-Ex.7, p.563-567.*

³⁷ See Email from SPED Teacher in response to Parent 1's email request for another IEP meeting, *R-Ex.5, p.452-453, also PWN-6/7/2019, P-Ex.23, p.1-4.*

³⁸ PWN-6/7/2019, *P-Ex.23, p.1-4.*

³⁹ See e.g., IEP-12/5/2017 attendance sheet, *P-Ex.9, p.16/R-Ex.3, p.064, IEP(2)-12/5/2018 attendance sheets, P-Ex.15, p.13-14, also P-Ex.24, p.14-16, R-Ex.3, p.117-119.*

⁴⁰ Parents' supporters were identified by witnesses as: Private Provider 4, Parent Advocate, and Private Provider 1. *Testimony of General Education Teacher 1, Tr. (V4) 811:6-16*

⁴¹ See *P-Ex.9, p. 16-17, R-Ex.3, p.064-065; P-Ex.15, p.13-14; P-Ex.24, p. 014-016, R-Ex.3, p.117-119.*

⁴² *P-Ex.23, p.1-4, also submitted as R-Ex.3, p.120-123.*

⁴³ This IEP was not received into evidence but was noted in the PWN-6/7/2019.

⁴⁴ Both parties submitted into evidence an IEP that appears was the eventual product of the April 12, 17, and June 4, 2019 meetings. This IEP will hereinafter be referenced as IEP(3)-6/4/2019. *P-Ex.24, p.1-16; R-Ex.3, p.104-119.*

- DOE Provider 4, DOE Behavioral Health Specialist 2, Parent 1, and Private Provider 1.⁴⁵
31. General Education Teacher 1 has extensive experience in teaching and working mostly with certain students in their twenty-nine (29) year career.⁴⁶
 32. General Education Teacher 1 demonstrated knowledge in the behaviors and tendencies of younger students, as well as being able to measure their behavioral and academic progress in school.⁴⁷
 33. General Education Teacher 1 was very familiar with Student, Student's IEPs, Student's BSPs and Student's everyday performance during the 2018-2019 SY, having monitored Student's progress daily through General Education Teacher 1's charts and notes,⁴⁸ as well as weekly recordings.⁴⁹ Additionally, Parent 1 stated multiple times that General Education Teacher 1 was an excellent teacher and did good work with Student.⁵⁰
 34. General Education Teacher 1 also demonstrated sincere concern for Student and Student's overall well-being, during General Education Teacher 1's testimony and when General Education Teacher 1 contacted the school counselor and spoke with a social worker about concerns that General Education Teacher 1 had with Parents and their reactions to positive reports about Student.⁵¹
 35. General Education Teacher 1's testimony was credible and helpful in determining matters

⁴⁵ While Private Provider 2 testified and was present at several of the IEP meetings, it did not appear from Private Provider 2's testimony that Private Provider 2 was present as a part of the IEP team, rather that Private Provider 2 was there to discuss the FBA.

⁴⁶ *Testimony of General Education Teacher 1, Tr. (V1) 8:21-9:4, 10-:2-6.*

⁴⁷ *See e.g., Tr. (V1) 11:19-13:1 (General Education Teacher 1's knowledge of the benchmark scores and how they relate to other students' scores); Tr. (V1) 40:24-41:8 (General Education Teacher 1's familiarity with tendencies of same-aged children having problems with ____).*

⁴⁸ *R-Ex. 7, p. 542-556.*

⁴⁹ *Tr. (V1) 17:7-18:12.*

⁵⁰ *Testimony of Parent 1, Tr. (V3) 440:1-5, R-Ex.5, p.403, 447.*

⁵¹ *Tr. (V1) 47:15-49:22, also R-Ex.5, 415-416.*

involving Student including, but not limited to, IEP meeting discussions, Student's performance and behaviors in school, concerns involving Parents, concerns about Principal, concerns about the FBA, performance of DOE Provider 1, and implementation of Student's BSP.

36. Principal has extensive experience as an educator in the Hawaii public school system, having been first a teacher for twenty-seven (27) years, and then an administrator for fifteen (15) years.⁵²
37. Principal's presence and demeanor while testifying supported Principal's testimony that Student is liked by the community as well as by Student's students and staff, including the teachers at Home School.⁵³
38. Principal demonstrated sincere concern for Student's well-being, and Student's performance at school, as well as the performance of other students at Home School.⁵⁴
39. SPED Teacher has extensive experience as a special education teacher, having earned a master's Degree in special education, being dually certified in special education and elementary education, as well as being a special education teacher for twenty-two (22) years.⁵⁵
40. SPED Teacher is familiar with Student and Student's IEP, having been Student's care coordinator for approximately one and a half (1.5) years, and in providing Student's

⁵² *Tr. (V1) 69:19-70-5.*

⁵³ *See e.g., Principal's Testimony, Tr. (V4) 664:3-12, 671:3-7.*

⁵⁴ *See generally Principal's Testimony, Tr. (V1) 87:11-89:21, 91:12-19, 92:23-93:22, Tr. (V3) 609:3-610:5, 611:22-614:23, 616:13-618:19, Tr. (V4) 635:13-637:7, 640:13-641:22, 643:7-344:10, also R-Ex.5, p.303-307, R-Ex.5, p.360-361, R-Ex.5, p.365-367, R-Ex.5, p.386-389, and R-Ex.5, p.398-402.*

⁵⁵ *Tr. (V4) 681:4-20.*

special education services.⁵⁶

41. During the 2018-2019 School Year (hereinafter “SY”), SPED Teacher worked with Student on the goals and objectives relating to Student’s IEP, evaluating Student’s performance and progress on Student’s goals and objectives,⁵⁷ as well as monitoring Student’s behavioral progress with the use of the BSPs created by DOE Provider 1.⁵⁸

Predetermination

42. Home School carefully considered Student’s assessments, background, academic, social and behavioral needs, as well as Parent’s concerns in creating the IEPs for Student.
43. IEP-12/5/2017 includes a detailed summary of each of the assessments of Student, as well as a list of additional data provided by Parents, and a lengthy dictation of Parent’s concerns.⁵⁹
44. The supplemental aids and services section of the IEP-12/5/2017⁶⁰ includes many of the recommendations included in Parent’s Private Assessor’s initial evaluation and the letter from Parent’s Private Doctor 1, in addition to the recommendations by DOE Provider 1 and Student’s prior 504 plan. Examples of these recommendations are: movement breaks/regularly scheduled breaks,⁶¹ preferential seating,⁶² alternative testing options when testing knowledge instead of writing when feasible and appropriate,⁶³ time

⁵⁶ *Tr. (V4) 682:3-18.*

⁵⁷ *Tr. (V4) 686:21-694:12.*

⁵⁸ *Tr. (V4) 694:13-697:20.*

⁵⁹ *IEP-12/5/2017, P-Ex.9/R-Ex.3.*

⁶⁰ *P-Ex.9, p.13/R-Ex.3, p.061.*

⁶¹ *Recommended in Parents’ Private Doctor 1’s letter (P-Ex.8, p.1);*

⁶² *Recommended in Parents’ Private Assessor’s report (P-Ex.1, p.22); Parents’ Private Doctor 1’s letter (P-Ex.8, p.1)*

⁶³ *Recommended in Parents’ Private Doctor 1’s letter (P-Ex.8, p.2)*

extension for assignments when necessary,⁶⁴ chunking of material,⁶⁵ accessibility to fidget items as needed.⁶⁶

45. The supplemental aids and services section of the IEP-12/5/2017 also includes “after school pick up support”⁶⁷ that appears to be specifically to address Parents’ concerns of Student wandering around campus after dismissal from class or Student’s attempts to run to Parents’ vehicle during pick up.⁶⁸
46. IEP(2)-12/5/2018 includes a nearly two-page dictation of Parents’ new concerns with Student’s behaviors, as well as a number of questions and concerns about the way Home School is implementing Student’s IEP.⁶⁹
47. The supplemental aids and services section of the IEP(2)-12/5/2018 includes “parent consultation with the team to include provider, teacher, and any other team member,” which appears to have been added to address the concerns expressed by Parents.⁷⁰
48. Prior to the IEP meeting in April 2019, Private Provider 2 sent a draft of the FBA to the IEP team members, and both General Education Teacher 1 and Principal contacted Private Provider 2 regarding corrections to Private Provider 2 draft.⁷¹
49. On or about April 3, 2019, Private Provider 2 presented Private Provider 2 FBA findings and recommendations to the IEP team.⁷²

⁶⁴ Recommended in Parents’ Private Assessor’s report (*P-Ex.1, p.22*); Parents’ Private Doctor 1’s letter (*P-Ex.8, p.1*)

⁶⁵ Recommended in Parents’ Private Doctor 1’s letter (*P-Ex.8, p.1*)

⁶⁶ Recommended in Parents’ Private Assessor’s report (*P-Ex.1, p.22*);

⁶⁷ *P-Ex.9, p.13/R-Ex.3, p.061.*

⁶⁸ *P-Ex.9, p.6/R-Ex.3, p.054.*

⁶⁹ *P-Ex.15, p.3-5.*

⁷⁰ *P-Ex.15, p.10.*

⁷¹ *Tr. (V1) 132:3-133:7, 180:20-181:8.*

⁷² *Tr. (V1) 154:24-155:6.*

50. During the IEP meetings on April 12, and April 14, 2019, the FBA findings and recommendations were again discussed and considered by the IEP team.⁷³
51. During the April and June 2019 IEP meetings, discussions regarding Student's IEP had become contentious, due in large part to Parents' and their supporters' behaviors and beliefs that Student should be provided services in the school, and their refusal to discuss other information regarding Student's progress, supplemental aids and supports, and tests and assessment results.⁷⁴
52. At the April and June 2019 IEP meetings, school-based IEP team members attempted to discuss other relevant data and observations of Student, but it was Parents that declined to discuss anything besides the FBA.⁷⁵
53. Parents' and their supporters strongly believe that providing Student with a provider in the school setting is in the best interests of Student,⁷⁶ however, the progress and improvement that Student has made in the school setting,⁷⁷ in addition to observations in Private Provider 2's FBA demonstrate that Home School's decision in not allowing services in the school was made with Student's best interests in mind.
54. For example, Student's primary behavioral problems occur outside the school setting

⁷³ See PWN-6/7/2019, P-Ex.23, p.1-4.

⁷⁴ See Testimony of Principal, Tr. (V4) 653:12-21, 660:9-661:14; Testimony of SPED Teacher, Tr. (V4) 715:6-14, 717:1-718:12; Testimony of DOE Provider 4, Tr. (V4) 743:22-744:11; Testimony of DOE Behavioral Health Specialist 2, Tr. (V4) 789:13-790:6; see also R-Ex.5, p.408-414, R-Ex.5, p.415-416.

⁷⁵ See Testimony of SPED Teacher, Tr. (V4) 715:6-21, 717:1-15, 719:16-720:6, Testimony of DOE Provider 4, Tr. (V4) 744:2-5, Testimony of DOE Behavioral Health Specialist 2, Tr. (V4) 789:13-790:6, also PWN-6/7/2019, P-Ex.23, p.2-4.

⁷⁶ See Testimony of Private Provider 2, Tr. (V1)150:7-154:17, Addendum by Private Provider 1, P-Ex.11, p.5,

⁷⁷ See Testimony of General Education Teacher 1, Tr. (V1) 61:23-62:13, Tr. (V4) 819:17-820:12, Testimony of Principal, Tr. (V3) 608:11-609:16, also R-Ex.5, p.415-416.

even though Student has shown improvement at school, as described by Parents' concerns in the IEP(2)-12/5/2018.⁷⁸ as well the Addendum, dated May 10, 2018 (hereinafter "Addendum-5/10/2018"), done by Private Provider 1.⁷⁹

55. While Private Provider 1 attempts to attribute the problematic behaviors Student exhibits at home to Student's struggling to behave while in the school setting through the principle of behavior contrast,⁸⁰ this conclusion is rebutted by Private Provider 1's own observations that Student "consistently shows regression in the home setting when there are extended breaks from school."⁸¹
56. In the Addendum-5/10/2018, Private Provider 1 notes "Upon discussing progress and the upcoming summer vacation [Parents] reported the following: **throughout extended breaks from school**, [Student] will consistently engage in non-compliance, yelling and arguing. Frequently these behaviors will escalate to threats of aggression and aggression."⁸² The observations of Private Provider 1 (as reported by Parents) do not support the behavioral contrast principle as described by Private Provider 1 during

⁷⁸ Parents' concerns (as documented in the IEP) note that "I think [Student] has improved a lot with Student's ability to control Student's aggression towards other people. I am really happy with Student's progress so far." *P-Ex.15, p. 3*. However, Parents also note concerns that "Homework is still a big issue for us. As everyone knows, Student's capable of doing the work. Student's even capable of doing it quickly. However, I find it almost impossible to make this happen. We regularly spend hours trying to get Student to start on Student's homework. ... I just found out that [Student] has been having some trouble on the bus." *P-Ex.15, p.4*.

⁷⁹ *P-Ex.11, p.2*.

⁸⁰ Private Provider 1 testified that this is a 'behavioral principle called behavior contrast, where behaviors start to decrease in one setting, they go up in another setting.' Private Provider 1 went on to say "[a]nd we have seen with [Student] happen over and over again that Student is able to hold it together through school. Student has this strict schedule, Student's able to follow that and follow the contingencies of school. And once Student gets home, it's almost like Student's more relaxed, and so those behaviors start to come out." *Tr. (V2) 248:11-19*.

⁸¹ *P-Ex.11, p.2*.

⁸² *P-Ex.11, p.2*.

Private Provider 1's testimony.

57. Additionally, in the FBA, the most notable problematic behaviors observed by Private Provider 2 occurred in the community setting and the home setting.⁸³
58. In the community setting, Student's private provider was present and worked with Student for the duration of the observation. In that setting, Student had seven (7) instances of non-compliance, one (1) instance of disruptive behavior, two (2) instances of aggression and four (4) instances of elopement.⁸⁴
59. In the community setting, Student demonstrated a dislike of having provider with Student, by asking provider to "stay away from Student for the first 10 minutes of the session[.]"⁸⁵
60. In the home setting, no provider was present and no notable BSP was being implemented.⁸⁶ In the home setting, Student only completed one (1) out of seven (7) instructions independently and without repeated prompting or engaging in protesting behavior.⁸⁷
61. Student argued with both Parent 1 and Parent 2, hit Parent 2 three (3) total times, while saying things like "you're not the boss of me, get out of my face," kicked papers that Student's sibling was coloring, spilled Student's milk, argued with Parent 2 at least two (2) more times, refused to shower initially and then "eventually went upstairs, protesting and yelling."⁸⁸

⁸³ See generally *P-Ex.19*, p.6-13.

⁸⁴ *P-Ex.19*, p.11.

⁸⁵ *P-Ex.19*, p.9.

⁸⁶ *Testimony of Private Provider 2, Tr. (VI) 223:24-225:8.*

⁸⁷ *P-Ex.19*, p.11

⁸⁸ *P-Ex.19*, p.12.

62. In the school setting, the school staff consistently followed Student's IEP and the BSP created by DOE Provider 1,⁸⁹ and they were able to gain compliance or cessation of the protest/whine or disruptive behavior.
63. During the first classroom observation, Private FBA did not note the number of specific observations made, but Student was observed to engage in some mild-off task behaviors, but it was noted that General Education Teacher 1 counted to ten each time and Student responded by completing the instruction.⁹⁰
64. During the second classroom observation, Student refused to complete a directive and engage in off-task behaviors, but after General Education Teacher 1 offered a break to drink water,⁹¹ Student returned to the classroom independently, sat down with class and began to participate.⁹²
65. During the second classroom observation, Private FBA did note that General Education Teacher 1 observed Student involved in an incident with a peer where Student "pointed at the peer saying, 'you did that' twice before reaching out an arm and shoving the peer's shoulder with Student's hand." Private Provider 2 went on to note that Student was paired with the same peer and refused to talk to the peer five (5) out of five (5) times.⁹³ General Education Teacher 1 did not observe this incident but testified that General Education Teacher 1 did not believe that it happened as described by Private Provider 2 because one or more of the other students would have reported the incident to General

⁸⁹ *P-Ex.19, p.16, 18, 20.*

⁹⁰ *P-Ex.19, p.7.*

⁹¹ Offering Student movement breaks is one of the supplemental aids and services included in Student's IEP. *See e.g., P-Ex.15, p.10.*

⁹² *P-Ex.19, p. 8.*

⁹³ *P-Ex.19, p.8.*

Education Teacher 1 if it involved Student inappropriately touching another student.⁹⁴

The undersigned Hearings Officer gives more weight to the testimony of General Education Teacher 1, given the finding that General Education Teacher 1 is credible *supra*, as well as considering other seemingly colored interpretations of incidents by Private Provider 2, which will be discussed further below.

66. During the third classroom observation, Student followed four (4) out of (9) instructions independently, was provided redirection six (6) times and received praise one (1) time in the first class setting, and was observed to follow nineteen (19) out of twenty-six (26) instructions independently, was provided redirection ten (10) times and received praise thirty (30) times.⁹⁵
67. The consistency of the data collection of the behaviors observed in the FBA are unclear.
68. For example, Private Provider 2 specifically noted three actions of aggression in the school/community setting. However, in reading the summary of observations made, it appears that at least six (6) acts described could fall under the description of aggression.⁹⁶

⁹⁴ *Tr. (VI) 39:24-41:8.*

⁹⁵ *P-Ex.19, p.9.*

⁹⁶ Private Provider 2 defined “aggression” as “any actual or attempted instance of [Student] making forceful contact between Student’s body and someone else’s. May include: behaviors into another.” The six descriptions are: 1) Student shoved peer in class after peer dropped a ___ in class (*P-Ex.19, p.8*); 2) Student pushed a peer when peer was swiping and tossing a ___ in Student’s face (*P-Ex.19, p.11*); 3) Student later swiped Student’s hand at the same peer and then grabbed peer’s ___ and threw it out of the circle (*P-Ex.19, p.11*); 4) Student walked by a peer and *either kicked* the peer or tried to jump over the peer’s outstretched legs (*P-Ex.19, p.13*); 5) While student played and chased peers around during recess, Student chased and then grabbed a peer, “though this seemed to be appropriate in the context of the game” (*P-Ex.19, p.13*); and 6) Student threw a large kickball at a student’s head. (*P-Ex.19, p.13*). While the last description of throwing a ball at another student’s ___ would actually not qualify as aggression under Private Provider 2’s definition, it describes what normally would be considered aggressive behavior, which again calls into question some of the data collection practices of Private Provider 2 during this FBA.

When asked specifically about the three (3) instances Private Provider 2 noted in Private Provider 2's report, Private Provider 2 testified that one of the acts included Student grabbing another student's arm during what Private Provider 2 described as a tag-like game. Although Private Provider 2 noted that the other students were also engaged in similar behaviors and that Student was asked to stop and did so immediately, Private Provider 2 still counted this act as an act of aggression by Student.⁹⁷

69. Another example of Private Provider 2's inconsistent observations was Private Provider 2's description of Student's instance of 'elopement' during the school/community setting. According to the definitions provided in the FBA, Private Provider 2 counted acts of 'elopement' as instances of Student "moving more than 6 feet away from an adult when not contextually appropriate and without first obtaining permission."⁹⁸ However, in reviewing the notes on elopement further on in the FBA, Private Provider 2 notes "elopement was observed primarily when [Student] was required to wait in line. In these circumstances, [Student] was observed to elope 3-5 feet away from the line to look at trees, birds or plants, or to move around with peers."⁹⁹ It is concerning that these incidents appear to have been documented as 'elopement' even though they did not qualify under the given definition.

70. The social, emotional and behavioral problems that Parent 1, Private Provider 1 and Private Provider 2 want the proposed provider to address do not appear to affect Student's ability to access Student's education, therefore the IEP team's decision not to include provider services in the IEP was based on Student's needs in accessing Student's

⁹⁷ *Tr. (V2) 226:17-229:6.*

⁹⁸ *P-Ex.19, p.14.*

⁹⁹ *P-Ex.19, p.39.*

education.

71. For example, Private Provider 1 testified that Private Provider 1 has a different definition of ‘well-behaved’ than the DOE in that the DOE focuses on the absence of ‘major incidents’ and Student’s academic success. Private Provider 1 focuses rather on “look for those little things that the teacher is not going to be looking for. Because Private Provider 1’s not there to help Student with Student’s social skills necessarily. Private Provider 1’s not there to be watching Student, making sure that Student’s not elbowing other kids and things that demonstrate that Student struggles socially.”¹⁰⁰ Whereas, General Education Teacher 1 testified that while Student does have behavior challenges,¹⁰¹ the IEP and BSP have improved Student’s behaviors such that Student was able to access Student’s education and have a successful year.¹⁰²
72. Private Provider 1’s testimony additionally supports the conclusion that the structure of the school setting, together with the implementation of the BSP has helped improve Student’s behaviors without the support of a provider.
73. For example, Private Provider 1 testified that Student’s regression in the home setting during extended breaks from school are during long breaks, such as winter or spring break. Private Provider 1 would see more regression during those times, in part because “Student also has a lot more time to be in an unstructured setting during those breaks. So, yeah, Student usually—like most kids with disabilities, they do better with routine, with schedule. So when that changes for breaks, it’s usually very challenging for most

¹⁰⁰ *Tr. (V2) 277:24-279:4.*

¹⁰¹ *Tr. (V1) 55:8-57:9.*

¹⁰² *Tr. (V4) 819:11-820:2.*

kids.”¹⁰³

74. Private Provider 2 indicated that Private Provider 2 concerns with Student’s behavior arise from Student’s social interactions which may “decrease Student’s ability to have productive, meaningful friendships, minimally. At the other end, if Student doesn’t learn how to kind of interact appropriately with and have these stronger relationships, other students could respond, other kids that Student meets in the world could respond in kind. And so if Student’s physical, they might respond physically...But I certainly am concerned that if Student’s social needs are not addressed, Student’s going to continue to struggle.”¹⁰⁴
75. Private Provider 2 further went onto opine that the other students at Home School may have been taught to take care of Student or “assuage Student in a certain way” because Private Provider 2 surprisingly observed that “Student was not challenged by any peers when Student was behaving in a way that was sort of rude or pushy.”¹⁰⁵ This Hearings Officer finds this opinion to be contradicted by the testimony of General Education Teacher 1, who noted that students report incidents involving Student to General Education Teacher 1 when incidents arise.¹⁰⁶
76. While Private Provider 2’s concerns focus mainly on Student’s ability to make and maintain friendships in the future,¹⁰⁷ the IEP team’s information at the time the IEPs were created showed that Student had friendships in the school and was able to get along with

¹⁰³ *Tr. (V2) 316:9-317:1.*

¹⁰⁴ See also Private Provider 2’s testimony, *Tr. (V1) 187:23-188:20.*

¹⁰⁵ *Tr. (V1) 143:9-23.*

¹⁰⁶ *Tr. (V1) 40:17-41:23.*

¹⁰⁷ *Tr. (V1) 145:23-147:5.*

Student's classmates.¹⁰⁸

77. Principal considered Private Provider 2's FBA and documented Principal's concerns with the assessment, as well as Principal's concerns with Parents' behaviors, in a document that Principal emailed to the IEP team prior to the April 12, 2019 meeting. Principal's email to the IEP team demonstrates that Principal carefully considered the FBA and its recommendations, analyzed the benefits of a provider in light of the IEP team's obligations to place Student in the least restrictive environment (hereinafter "LRE") and to monitor, reinforce and improve Student's academic, social and behavioral performance at school.¹⁰⁹
78. Principal's concerns expressed in Principal's email were also supported by General Education Teacher 1¹¹⁰ and SPED Teacher,¹¹¹ and neither of whom felt intimidated or pressured to take such a position.¹¹² Each of them independently reached the same conclusion of disagreeing with the presence of a provider in the school setting.
79. General Education Teacher 1 carefully reviewed the FBA done by Private Provider 2¹¹³ and disagreed with the recommendation to have a provider present in school with Student based on General Education Teacher 1's experience in working with Student throughout

¹⁰⁸ See e.g., Testimony of DOE Behavioral Health Specialist 2 (Student enjoys lunch activities and likes to bring friends with Student), *Tr. (V4) 785:18-786:14*, Testimony of DOE Behavioral Health Specialist 2 (Student has many friends, but one in particular that Student would be around a lot), *Tr. (V4) 787:22-788:2*, Testimony of SPED Teacher (Student would come into SPED Teacher's class and hung out with kids there and talked and played with some of them) *Tr. (V4) 698:6-13*, see also Email from General Education Teacher 1 to Parents (regarding Student's friend in school) *R-Ex.5, p.370-372*.

¹⁰⁹ *R-Ex.5, p. 437-443*.

¹¹⁰ *R-Ex.5, p.415-416*.

¹¹¹ *Tr. (V4) 708:25-710:2*.

¹¹² See Testimony of General Education Teacher 1, *Tr. (V4) 810:9-21*, Testimony of SPED Teacher, *Tr. (V4) 683:23-684:2*.

¹¹³ *Tr. (V1) 37:15-42:23*.

- the year and seeing improvements in Student's performance and behavior.¹¹⁴
80. General Education Teacher 1 also believed that Student's home-based provider services were not effective based on General Education Teacher 1 communications with Parent 1, wherein Parent 1 would tell General Education Teacher 1 about difficulties that the providers would have in getting Student to do homework, and at least once having to chase Student down after Student ran away and hid in a bush.¹¹⁵
81. General Education Teacher 1's testimony and email to District Superintendent also support the conclusion that Parents and their supporters were the reason that the IEP meetings were contentious and non-productive after the FBA was done by Private Provider 2.¹¹⁶
82. Specifically, General Education Teacher 1 notes that "[t]he IEP meetings have been very disturbing, especially with [Parent 1's] friend/advocate, [Private Provider 4] present." General Education Teacher 1 goes on to say that when Private Provider 4 is at IEP meetings, "the meetings are turned upside down rarely focusing on [Student] or focused on behaviors I have never seen in the school setting. [Private Provider 4] seems to attack with the desire to 'win,' or win based on semantics, rather than working collaboratively with the team to focus on the needs of the child and win for the best interest of the child."¹¹⁷
83. Having observed General Education Teacher 1's demeanor and the genuine concern General Education 1 showed for Student and Student's well-being during the two (2)

¹¹⁴ *Tr. (VI) 63:20-65:2.*

¹¹⁵ *Tr. (VI) 64:1-16.*

¹¹⁶ *R-Ex.5, p.415-416.*

¹¹⁷ *R-Ex.5, p.415-416; Tr. (VI) 49:3-50:4, 57:21-62:13.*

times General Education 1 testified at the Hearing, the undersigned Hearings Officer finds General Education Teacher 1's testimony persuasive as to the disorder caused at the IEP meetings by Parents and their supporters.

84. SPED Teacher's conclusion that Student performs better when Student is allowed to make decisions and has more independence and having a provider accompany Student to school would make Student feel stigmatized is based on SPED teacher's extensive work with Student in Student's special education program.¹¹⁸
85. The IEP team's decision not to provide provider services or allow Student's private provider to accompany Student to school as part of Student's IEP was also supported by DOE Provider 3¹¹⁹ and Private Provider 3.¹²⁰
86. In May 2019, DOE Provider 3 consulted with Home School to prepare for work with Student after having taken over from DOE Provider 1. As part of DOE Provider 3's consultation, DOE Provider 3 reviewed the FBA prepared by Private Provider 2 and prepared Private Provider 2's own findings and recommendations for Student's services.¹²¹
87. DOE Provider 3's review of the FBA highlights some data collection inconsistencies in Private Provider 2's FBA, including the elopement data discussed *supra*,¹²² the combining of the school and after school setting data,¹²³ and Private Provider 2's practice of mixing data collection between interval and frequency data, which could have affected

¹¹⁸ *Tr. (V4) 709:7-19.*

¹¹⁹ *Tr. (V3) 559:1-560:12, Tr. (V3) 571:6-572:18.*

¹²⁰ *Tr. (V3) 514:11-516:118.*

¹²¹ *R-Ex.7, p.563-567; Tr. (V3) 560:23-562:6, Tr. (V3) 575:14-576:10, Tr. (V3) 581:587:9.*

¹²² *Tr. (V3) 557:8-24.*

¹²³ *Tr. (V3) 546:12-547:16*

the way the data was reported.¹²⁴

88. DOE Provider 3 also reviewed the records and documentation of the work that DOE Provider 1 had done with Student prior to DOE Provider 1 departure, had consultations with Parents, Student's teachers, and reviewed the BSP plan and its implementation by Student's teachers.¹²⁵
89. DOE Provider 3's conclusion that Student would not benefit from the services of a provider in the school setting was made after careful consideration of Private Provider 2's FBA, consultation with Parents, Private Provider 4, Private Provider 1,¹²⁶ Student's teachers, as well as based on DOE Provider 3's observations of Student in school and additional data collection using Private Provider 2's data collection methods.
90. Private Provider 3 is a licensed provider in the State of Hawaii and is the owner of DOE Contracted Provider Company 2.¹²⁷ Private Provider 3 is an expert, having previously been qualified as an expert in those fields, and by having extensive qualifications and experience.¹²⁸
91. Private Provider 3's conclusion that Student would not benefit from services in the school setting also supports the IEP team's determination that Student's insurance-based provider would not be provided as part of Student's IEP.
92. Private Provider 3's analysis of why a provider for Student in the school setting would not be in Student's best interest is particularly persuasive because of Private Provider 3's extensive qualifications in this field. Private Provider 3 notes that while the team

¹²⁴ *Tr. (V3) 553:13-555:13, R-Ex.7, p.565.*

¹²⁵ *Tr. (V3) 544:11-25, Tr. (V3) 573:19-574:20.*

¹²⁶ *Tr. (V3) 573:19-574:20, 582:22-24.*

¹²⁷ *R-Ex.8, p.598-601.*

¹²⁸ *R-Ex.8, p.598-601, Tr. (V3) 494:12-501:23.*

members have differing opinions as to the best treatment for Student, the evaluation of Student's behavior across settings show that Student's behaviors have become much more stable and manageable at school, and while some behavioral issues remain, they are largely social related and in unstructured environments. Private Provider 3 further goes on to say that having a provider during recess and lunch would create a social stigma and would create internal pressure on Student.¹²⁹

93. DOE Provider 4 is a licensed clinical psychologist who has been working in that capacity for the past seventeen (17) years, of which sixteen (16) was spent working for the DOE. DOE Provider 4 is an expert, with a focus on working with children.¹³⁰
94. DOE Provider 4 is also a member of the IEP team that carefully considered the FBA done by Private Provider 2, and its finding and recommendations. DOE Provider 4 was not intimidated or influenced in DOE Provider 4's decision by the letter written by Principal.¹³¹
95. The DOE does not have a blanket policy against allowing services to be provided in public schools, as it was established that the DOE does have students in public schools that receive services, including the services of providers in the school setting.¹³²

¹²⁹ Tr. (V3) 514:11-516:118.

¹³⁰ Tr. (V4) 724:9-25.

¹³¹ Tr. (V4) 732:23-734:8.

¹³² While this is technically not a relevant issue under the IDEA, Petitioners raise this as a part of their predetermination argument. *See* Testimony of Private Provider 2 (who is familiar with one provider that provides services in DOE schools) Tr. (V1) 119:9-17; Private Provider 1 (who is aware of other providers working in DOE schools who generally exhibit more severe challenging behaviors on a regular basis) Tr. (V2) 275:18-277:3; Private Provider 3 (whose company has been providing services in public schools during the school day), Tr. (V3) 521:2-522:23; DOE Provider 3 (who is currently supervising approximately seven (7) providers in public schools), Tr. (V3) 576:11-578:2; and DOE Provider 4 (who is familiar with at least two (2) other students at DOE schools receiving services), Tr. (V4) 750:13-24.

96. The PWN-6/7/2019 accurately summarizes the events of the IEP meetings on April 12, April 14, and June 4, 2019.¹³³ The FBA was discussed at length in both the April 12 and April 14 meetings, by Parents and their supporters with the intent of getting all the recommendations in the FBA into Student's IEP. On the day of the second IEP meeting, April 17, 2019, Home School had allowed Parent Advocate to observe Student in school and present Parent Advocate's observations at the IEP meeting. Parents were also allowed to present IEP goals and objectives that they had drafted to be included in the IEP. At the third IEP meeting on June 4, 2019, the school-based IEP team members were able to present their impressions of Student's behaviors considering the FBA, but the school-based IEP team members and the Parents and their supporters were at an impasse. At that point, the administrator at the IEP meeting offered to continue the IEP-2/19/2019 and allowed Parents to proceed as they saw fit.

Implementation—Service Duties

97. Home School performed all its duties under Student's IEPs.
98. DOE Provider 1 performed DOE Provider 1 duties as required under the IEP, which included creating, revising, and implementing BSPs for Student, consulting with teachers, keeping records of DOE Provider 1's work, and attempting to work with Student's outside providers.
99. In October 20, 2017, DOE Provider 1, who was licensed, administered a FBA to Student.¹³⁴
100. A copy of this FBA was emailed to Parent 1 on Thursday, November 2, 2017.¹³⁵

¹³³ R-Ex.3, p.120-123.

¹³⁴ P-Ex.7, p.2-12.

¹³⁵ P-Ex.7, p.1.

101. DOE Provider 1 began making observations of Student in school and working with General Education Teacher 2 to collect data of Student's behaviors to utilize for drafting the BSP.¹³⁶
102. On January 25, 2018, a draft BSP was emailed to Parents¹³⁷ and a meeting was held on or around January 31, 2018 to discuss the draft BSP.¹³⁸ A final copy of BSP-1/12/2018 was emailed to parents on February 14, 2018.¹³⁹
103. In March 2018, DOE Provider 1 sent an email with data collection information that was collected since the implementation of the BSP. This email also included a summary of the observations made by DOE Provider 1 and the success of the teacher's implementation of Student's BSP.¹⁴⁰
104. Data was being recorded by General Education Teacher 2 daily from February 5, 2018 to May 31, 2018¹⁴¹ and used by DOE Provider 1 to evaluate and modify as necessary Student's BSP for the next school year.¹⁴²
105. DOE Provider 1 drafted a new BSP for Student for 2018-2019 school year, and this draft was emailed to General Education Teacher 1 and SPED Teacher on October 29, 2018,¹⁴³ and the rest of the school based IEP team on November 21, 2018.¹⁴⁴ This email also included IEP goals related to Student's BSP that DOE Provider 1 wanted included in

¹³⁶ See *P-Ex.10, p.1, R-Ex.5, p.298.*

¹³⁷ *R-Ex.5, p.297-302.*

¹³⁸ See *R-Ex.5, p.297-298.*

¹³⁹ *P-Ex.10, p.1-5.*

¹⁴⁰ *P-Ex.14, p.1-3.*

¹⁴¹ *P-Ex.14, p.7-23.*

¹⁴² *P-Ex.14, p.4-6.*

¹⁴³ *R-Ex.5, p.313-315.*

¹⁴⁴ *R-Ex.5, p.316-317.*

- Student's new IEP.¹⁴⁵
106. On October 28, 2018, Parent 1 emailed DOE Provider 1 to request the data that was collected on Student's performance in preparation for Student's upcoming IEP meeting.¹⁴⁶
107. In response to that request, on November 7, 2018, DOE Provider 1 emailed the raw data from Student's teachers from February 2018 to November 2018, with an explanation of DOE Provider 1's observations and DOE Provider 1's suggestion that DOE Provider 1 would organize the data for the upcoming IEP meeting.¹⁴⁷
108. On December 12, 2018 and February 1, 2019, meetings were scheduled with Parents, DOE Provider 1 and the IEP team to discuss the new BSP for Student, but both were cancelled by Parents.¹⁴⁸
109. Throughout the school year, DOE Provider 1 worked with General Education Teacher 1 and SPED Teacher to implement Student's BSPs, address any problems arising with Student's behaviors, and acknowledge any successes that Student had in problematic areas.¹⁴⁹
110. Parents also met with DOE Provider 1 and were aware that DOE Provider 1 was keeping records and data on Student's progress over the school year.¹⁵⁰

¹⁴⁵ *R-Ex.5, p.316-317.*

¹⁴⁶ *P-Ex.14, p.6.*

¹⁴⁷ *P-Ex.14, p.4-31.*

¹⁴⁸ Testimony of General Education Teacher 1, *Tr. (VI) 59:21-61:2*, Testimony of Private Provider 1, *Tr. (V2) 312:2-18.*

¹⁴⁹ Testimony of General Education Teacher 1, *Tr. (VI) 61:23-13, R-Ex.5, p.415.*

¹⁵⁰ Notably, in the 10/28/2018 email to DOE Provider 1, Parent 1 says "...I was wondering if you'd be able to send me all the data you've collected on [Student] over the last year." Later in the email chain, Parent 1 goes on to say, "I think I would like to meet with you **more often.**" Both emails demonstrate, despite Parent 1's testimony to the contrary, that DOE Provider 1 did keep records and did communicate with Parent 1 as required by the IEP. *P-Ex.14, p.5-6.*

111. It was because of DOE Provider 1's assistance to General Education Teacher 1 that Student had a successful year.¹⁵¹
112. Parent 1's primary concerns with DOE Provider 1 were with DOE Provider 1's lack of collaboration with Private Provider 1, as well as DOE Provider 1's and the rest of the IEP team's resistance to addressing Student's behaviors that occurred frequently outside the school setting.¹⁵²
113. The record shows that DOE Provider 1 did meet with parents and Private Provider 1 to coordinate Student's program. DOE Provider 1 met with Private Provider 1 at Student's home,¹⁵³ and a meeting took place on January 31, 2018 between DOE Provider 1, Principal, Private Provider 1 and Parents to review the BSP that DOE Provider 1 had drafted for Student.
114. Another attempt was made to meet to discuss Student's BSP with Parents and Private Provider 1¹⁵⁴ for the school year, as discussed, *supra*, but both meetings that were scheduled were cancelled.

Implementation—Counseling

115. DOE Behavioral Health Specialist 2 and DOE Behavioral Health Specialist 1 provided counseling to Student in accordance with the IEP.¹⁵⁵
116. DOE Behavioral Health Specialist 2 testified credibly at the Hearing and the testimony was supported by multiple documents received into evidence.

¹⁵¹ See Testimony of General Education Teacher 1, *Tr. (V1) 59:10-15, Tr. (V4) 819:11-21, R-Ex.5, p.415.*

¹⁵² See *Tr. (V2) 355:4-13, Tr. (V2) 361:9-364:10.*

¹⁵³ *Tr. (V2) 255:5-23.*

¹⁵⁴ See Testimony of General Education Teacher 1, *Tr. (V1) 59:21-61:2, Tr. (V4) 826:11-827:1.*

¹⁵⁵ *Tr. (V4) 775:3-9; Tr. (V4) 781:5-783:3, R-Ex.7, p.477-492; R-Ex.7, p.557-562.*

117. DOE Behavioral Health Specialist 2 provided direct services, individual counseling, group counseling and observations of Student as outlined in Student's IEPs.¹⁵⁶
118. DOE Behavioral Health Specialist 2 and DOE Behavioral Health Specialist 1 also maintained IEP progress reports on each annual goal in Student's IEP-12/5/2017 and IEP-2/19/2019.¹⁵⁷
119. DOE Behavioral Health Specialist 2 and DOE Provider 4 were also having General Education Teacher 1 and SPED Teacher complete weekly questionnaires to monitor Student's behaviors.¹⁵⁸
120. While Parent 1 testified that Parent 1's impression when Parent 1 saw the Assessment results was that Student was doing much worse socially,¹⁵⁹ this was contradicted by testimony of DOE Provider 4, who stated that the 'much worse' label on the Assessment printout was simply referring to the statistical difference between the test results, and that the 'low risk' score was more important in indicating Student's performance and behaviors in school.¹⁶⁰ Because DOE Provider 4 demonstrated the most knowledge of the test,¹⁶¹ this Hearings Officer gives more weight to DOE Provider 4's testimony and analysis.
121. DOE Behavioral Health Specialist 2 even provided additional counseling to Student during the summer break so that DOE Behavioral Health Specialist 2 could keep up a

¹⁵⁶ *Tr. (V4) 775:6-9.*

¹⁵⁷ *Tr. (V4) 777:10-785:17, R-Ex.6, p. 459-471.*

¹⁵⁸ *See* Testimony of General Education Teacher 1, *Tr. (V1) 17:7-19:4*, Testimony of SPED Teacher, *Tr. (V4) 712:6-22*, Testimony of DOE Provider 4, *Tr. (V4) 735:8-736:3*, Testimony of DOE Behavioral Health Specialist 2, *Tr. (V4) 806:4-807:15.*

¹⁵⁹ Testimony of Parent 1, *Tr. (V3) 400:22-401:12*

¹⁶⁰ Testimony of DOE Provider 4, *Tr. (V4) 753:2-755:4, 764:24-766:10*

¹⁶¹ Testimony of DOE Provider 4, *Tr. (V4) 735:8-740:13, 766:7-10,*

- good relationship with Student and Parents.¹⁶²
122. Home School was not required to keep Parents informed of the progress of the counseling,¹⁶³ but DOE Behavioral Health Specialist 2 communicated with Parents via email regarding Student's counseling.¹⁶⁴
123. DOE Behavioral Health Specialist 2 started sending weekly updates to Parents via email in or around August 2018.¹⁶⁵ While Parent 1 testified that Parent 1 did not receive any updates or emails from DOE Behavioral Health Specialist 2 until February 2019,¹⁶⁶ this Hearings Officer gives more weight to the testimony of DOE Behavioral Health Specialist 2, especially considering Parent 1's claim of having "never seen any documentation of [Student] receiving counseling," until receipt of Respondents' evidentiary binders for the instant Hearing.¹⁶⁷
124. It is clear that Parents received IEP progress reports regarding Student's receipt of counseling under the IEP since the "Parent concerns" section of IEP(2)-12/5/2018 notes "I am concerned of the lack of content with [DOE Behavioral Health Specialist 2's] portion of the IEP progress report,"¹⁶⁸ and DOE Behavioral Health Specialist 2' emails sent to Parents on January 23 and January 30, 2019 further show that DOE Behavioral

¹⁶²Tr. (V4) 789:2-29, Tr. (V4) 799:20-800:6, R-Ex.7, p.477-492. See also Parent 1's email, dated May 20, 2019, wherein Parent 1 writes, *inter alia*, "I had hoped to discuss the continuation of [Student's] counseling sessions with [DOE Behavioral Health Specialist 2] throughout the summer, **just like last year**. I feel like that continuity is really important for [Student]." R-Ex.5, p.452.

¹⁶³ Tr. (V4) 788:3-12, See IEP-12/5/2017 (P-Ex.9, p.13-14, R-Ex.3, p.061-062), IEP(2)-12/5/2018 (P-Ex.15, p.10-11), and IEP(3)-6/4/2019 (R-Ex.3, p.114-115).

¹⁶⁴ R-Ex.5, p. 368-369, R-Ex.5, p.382-383,

¹⁶⁵ Tr. (V4) 795:11-796:18.

¹⁶⁶ Tr. (V5) 844:12-17.

¹⁶⁷ Tr. (V2) 354:9-19.

¹⁶⁸ P-Ex.15, p.4.

Health Specialist 2 was in communication with Parents about Student's counseling.¹⁶⁹

125. DOE Behavioral Health Specialist 2 and DOE Provider 4 also met with Parents to discuss their concerns about Student having negative self-talk in the home setting,¹⁷⁰ and they also informed Student's teachers that they were going to monitor Student based on the reports.¹⁷¹

Implementation—BSP

126. The BSPs that were created and implemented for Student in 2018 were sufficient and improved Student's behaviors in the school setting.
127. The terms of the BSPs were included in the IEP and were discussed at multiple meetings, including the IEP meetings, where Parents were present.
128. Most of the items included in the BSP-1/12/2018 were also written into the IEP-12/5/2017's supplemental aids and services section. These include: verbally communicate clear behavioral expectations, provide frequent reminders of behavioral expectations, token system to encourage positive behavior, provide options between given activities when feasible and appropriate, and behavior plan.¹⁷²
129. The only items that were contained in the BSP-1/12/2018 that was not specifically written into the IEP were: catch Student being good and prompt replacement behaviors before unwanted behaviors are likely to occur.¹⁷³
130. Parents were sent a copy of the draft BSP-1/12/2018¹⁷⁴ and a meeting including Parents,

¹⁶⁹ R-Ex.5, p.368, R-Ex.5, p.382.

¹⁷⁰ Testimony of DOE Provider 4, Tr. (V4) 768:23-770:11.

¹⁷¹ R-Ex.5, p.375-376, R-Ex.5, p.382.

¹⁷² IEP-12/5/2017, P-Ex.9, p.13, BSP-1/12/18, R-Ex.4, p.205-206.

¹⁷³ R-Ex.4, p.205-206.

¹⁷⁴ R-Ex.5, p.297-298.

- DOE Provider 1 and SPED teacher was held on January 31, 2018 to discuss the BSP-1/12/2018.¹⁷⁵ Parents were sent a final draft of the BSP-1/12/2018 on February 14, 2018, in response to an email from Parent 1 asking when the BSP was going to start being implemented.¹⁷⁶
131. General Education Teacher 2 was informed of the BSP and implemented the instructions and collected data for DOE Provider 1 to monitor Student's behaviors and performance.¹⁷⁷
132. BSP(2)-11/21/2018 contained the same items as BSP-1/12/2018, except for providing options between given activities when feasible and appropriate and prompt replacement behaviors before unwanted behaviors are likely to occur. BSP(2)-11/21/2018 also included a fade plan to reduce the use of the token reward system over time.¹⁷⁸
133. The items in BSP(2)-11/21/2018 were also included in the IEP(2)-12/5/2018, with the exception of catching Student being good.
134. General Education Teacher 1 was informed of Student's BSP and was in constant communication with DOE Provider 1 about the implementation of the BSP and were utilizing the practices in the BSP consistently, which lead to great improvements in Student's behavior during the school year.¹⁷⁹
135. While Parent 1 claims that DOE Provider 1 created BSPs for student "without Parent 1's knowledge or consent" and that DOE Provider 1 focused mainly on writing tasks,¹⁸⁰ and

¹⁷⁵ *Tr. (V2) 356:5-357:8, P-Ex.10, p.1.*

¹⁷⁶ *P-Ex.10, p.1-5.*

¹⁷⁷ *P-Ex.14, p.7-23.*

¹⁷⁸ *R-Ex.4, p.209-213.*

¹⁷⁹ *R-Ex.5, p.415-416.*

¹⁸⁰ *Tr. (V2) 362:11-17.*

that DOE Provider 1 did not know that DOE Provider 1 was supposed to work on IEP goals,¹⁸¹ this Hearings Officer finds these claims to be without merit. A quick review of Student's BSPs confirm that they were designed to work on Student's in-school behaviors, and not simply writing tasks and that the BSPs were tailored to achieve the annual goals included in Student's IEPs.¹⁸²

136. A review of sample emails sent by DOE Provider 1 to General Education Teacher 1 and SPED Teacher show that DOE Provider 1 was focused on working on Student's overall behaviors in school¹⁸³

137. DOE Provider 1 also informed the school-based IEP team that DOE Provider 1 wanted to add additional hours per month to meet with Parents and General Education Teacher 1 to discuss Student's behavior progress and data, which contradicts Parent 1's testimony that DOE Provider 1 said DOE Provider 1 did not think that Parents needed or cared to know what DOE Provider 1 was doing at school.¹⁸⁴

138. Additionally, despite Parents' and their supporters' attempts to get DOE Provider 1 off the IEP team by filing ethical complaints against DOE Provider 1,¹⁸⁵ rejecting DOE Provider 1's FBA,¹⁸⁶ and rejecting DOE Provider 1's services,¹⁸⁷ DOE Provider 1

¹⁸¹ *Tr. (V2) 363:6-10.*

¹⁸² *R-Ex.4, p.206-213.*

¹⁸³ *R-Ex.5, p.310-315.*

¹⁸⁴ *R-Ex.5, p.316-317.*

¹⁸⁵ Parent 1 testified that Parent 1 filed the Complaints against DOE Provider 1 due to DOE Provider 1's failure to produce any evidence of work being done as well as DOE Provider 1's alleged non-cooperation in working with Private Provider 1, and because DOE Provider 1 was rude to them. *Tr. (V2) 369:10-24, R-Ex.5, p.335.*

¹⁸⁶ The rejection of the FBA done by DOE Provider 1 is particularly concerning because Parents waited over one year after the FBA was completed and the BSPs were being implemented and showed improvement in Student's behaviors before they decided to reject the FBA. *R-Ex.5, p.356.*

¹⁸⁷ *Tr. (V2) 369:25-370:16, 371:9-20, R-Ex.5, p.334, R-Ex.5, p.403,*

continued to work with Student and General Education Teacher 1 to monitor and improve Student's behaviors at school until DOE Provider 1's departure in May 2019.¹⁸⁸

139. While Student's Parent's Private Doctor 1 recommended against taking away recess due to Student's diagnosis in a letter dated in November 2017,¹⁸⁹ Private Provider 3's credible testimony at the Hearing that "physical activity is a great recommendation for most all children just to be physically healthy but [physical activity]'s not an established treatment for Diagnosis" supports the IEP team's decision not to prohibit recess detention as a punishment for Student.¹⁹⁰
140. Nothing in the IEP prohibited taking away Student's recess or having Student write reflections as a deterrence for inappropriate behavior by Student, despite repeated requests from Parent 1.¹⁹¹
141. Home School only used a recess penalty for Student as a last resort when Student's behavior warranted it and Student only lost approximately nine (9) recesses during the school year.¹⁹²

¹⁸⁸ See DOE Provider 1's email to General Education Teacher 1, SPED Teacher, and DOE Behavioral Health Specialist 2 regarding Student on 1/10/2019, *R-Ex.5, p.357*, Emailed update from DOE Provider 1 to IEP team dated 3/7/2019 (appears at the end of an email chain between Parent 1 and Principal), *R-Ex.5, p.397*, Email from General Education Teacher 1 to DOE Provider 1 thanking DOE Provider 1 for all DOE Provider 1's help, including updates on Student's behaviors in April 2019, *R-Ex.5, p.434*, and Testimony of DOE Provider 3, who stated that DOE Provider 3 consulted with DOE Provider 1 prior to DOE Provider 1's departure to discuss Student's strategies and BSP, *Tr. (V3) 540:25-542:3*.

¹⁸⁹ Parents' Private Doctor 1 did not testify at the Hearing, so Parents' Private Doctor 1's request of "[P]lease do not hold Student back from recess time, as it is known that physical activity is important and beneficial to [students with the same diagnosis] and it is also important for in terms of Student's social development," could not be further clarified or questioned. *P-Ex.8, p.1*.

¹⁹⁰ *Tr. (V3) 516:23-517:5*.

¹⁹¹ *R-Ex.5, p. 398-402*.

¹⁹² See Email chain between Principal and Parent 1, *R-Ex.5, p.408-414*, also Testimony of Principal, *Tr. (V3) 611:11-613:25*.

142. On the few occasions Home School took Student's recess away as punishment, the modification of allowing Student to walk with an adult around the campus to get physical activity during the recess time, was reasonable and addressed possible concerns regarding Student's diagnosis.¹⁹³
143. Home School did not use writing as excessive punishment for Student. The reflections that Student was required to write when Student misbehaved was minimal and was also required for other students. Nothing about the writing of a reflection was excessive even considering Student's difficulty with writing.¹⁹⁴

IV. CONCLUSIONS OF LAW

A. Burden of Proof

The U.S. Supreme Court held in *Schaffer ex rel. Schaffer v. Weast* held that “[t]he burden of proof in administrative hearing challenging an IEP is properly placed upon the party seeking relief.”¹⁹⁵ The Court concluded that “[a]bsent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.”¹⁹⁶ Here, the burden of proof falls upon Petitioners as the party seeking relief, to prove the allegations in the complaint by a preponderance of the evidence.¹⁹⁷

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

¹⁹³ Testimony of Principal, *Tr. (V3) 614:1-23*.

¹⁹⁴ Testimony of Principal, *Tr. (V3) 615:6-616:8*, Testimony of SPED Teacher, *Tr. (V3) 698:17-699:10*.

¹⁹⁵ 546 U.S. 49, 62, 126 S.Ct. 528, 537 (2005); *see also Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J*, 502 F.3d 811, 820 (9th Cir. 2007).

¹⁹⁶ *Id.* at 57-58, 126 S.Ct. at 535.

¹⁹⁷ Hawaii Administrative Rules (hereinafter “H.A.R.”) §8-60-66(a)(2)(B).

services designed to meet their unique needs.”¹⁹⁸ A free and appropriate public education (“FAPE”) includes both special education and related services.¹⁹⁹

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.²⁰⁰ To provide FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether the student is eligible for special education, and formulate and implement an IEP.”²⁰¹

In deciding if Student was provided a FAPE, the two-prong inquiry is limited to (a) whether the DOE complied with the procedures of the IDEA; and (b) whether Student’s IEP is reasonably calculated to enable the student to receive educational benefit.²⁰² “A state must meet both requirements to comply with the obligations of the IDEA.”²⁰³

An IEP adequately provides a FAPE if it is reasonably calculated to provide a child with a meaningful educational benefit at the time it was developed.²⁰⁴ The IEP must be tailored to the unique needs of the child and reasonably designed to produce the benefits that are “significantly more than *de minimus*, and gauged in relation to the potential of the child at issue.”²⁰⁵ The DOE is not required to “maximize the potential” of each student; rather, the DOE is required to

¹⁹⁸ *Bd. of Educ. v. Rowley*, 452 U.S. 176, 179-191, 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)).

¹⁹⁹ H.A.R. §8-60-2; 34 Code of Federal Regulations (“C.F.R.”) §300.34; 34 C.F.R. §300.39.

²⁰⁰ H.A.R. § 8-60-2; 34 C.F.R. §300.34, 300.39.

²⁰¹ *Dep’t of Educ. of Hawai’i v. Leo W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

²⁰² *Rowley*, 458 U.S. at 206-207; 102 S.Ct. at 3050-3051.

²⁰³ *Doug C. v. Hawai’i Dept. of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013) (quoting *Rowley*; citations omitted). See also *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001).

²⁰⁴ *J.W. by J.E.W., and J.A.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 449 (9th Cir. 2010).

²⁰⁵ *Blake C. ex rel. Tina F. v. Hawai’i Dept. of Educ.* 593 F.Supp.2d 1199, 1206 (D. Hawai’i 2009).

provide a “basic floor of opportunity” consisting of access to specialized instruction and related services which are individually designed to provide “some educational benefit.”²⁰⁶

The United States Supreme Court, in *Endrew F. v. Douglas County School Dist.*, held that the educational benefit must be more than *de minimus*.²⁰⁷ 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.”²⁰⁸

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.”²⁰⁹ 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.²¹⁰ The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs.²¹¹

C. Compliance with IDEA procedural requirements

In determining whether a school district has complied with procedures set forth in the IDEA, the reviewing body should “strictly review an IEP for procedural compliance,’ although technical deviations will not render an IEP invalid.”²¹² A finding of procedural violations does not necessarily entitle the filing party to relief, and only if a procedural violation has resulted in substantive harm, and thus constitutes a denial of FAPE, may relief be granted.²¹³ The Ninth Circuit also found that “procedural violations may be harmless if they do not result[] in a loss of

²⁰⁶ *Rowley*, 458 U.S. at 200, 102 S. Ct at 598.

²⁰⁷ 137 S.Ct. 988, 1001 (2017).

²⁰⁸ *Id.*

²⁰⁹ *Honig v. DOE*, 484 U.S. 305, 311, 108 S.Ct. 592, 598 (1988).

²¹⁰ H.A.R. §8-60-2; 34 C.F.R. §300.22.

²¹¹ H.A.R. §8-60-45; 34 C.F.R. §300.321-322.

²¹² *Deal v. Hamilton County Bd. Of Educ.*, 392 F.3d 840, 854 (6th Cir. 2004) (citing *Dong ex rel. Dong v. Bd. Of Educ. of the Rochester Cmty. Sch.*, 197 F.3d 793, 799 (6th Cir. 1999)).

²¹³ *Id.*

educational opportunity or significantly restrict parental participation.”²¹⁴

Petitioners raise six (6) arguments relating to procedural violations alleged against Respondents. While they are not expressed specifically as procedural violations, the context and arguments put forth in Issues 1, 2, 3, 4, 5, and 11, deal directly with specific grievances against Home School during the IEP meetings on April 12, April 17, and June 4, 2019, including the failure of the recommendations of the FBA to be included in the resulting IEP. Each issue will be addressed separately below.

1. The Home School did not predetermine the services that Student would receive from the School

Petitioners first issue is that the Home School predetermined the services that Student would receive from the school and ignored the recommendations of the FBA that was completed. Specifically, Petitioners argue that the Home School’s rejection of the recommendation for an insurance-funded provider to accompany Student at school for services was a result of predetermination by the DOE as a policy to deny services in public schools. For the reasons set forth below, the undersigned Hearings Officer concludes that the Petitioners have failed to meet their burden of proving that Home School had made any predeterminations of services for Student.

The issue of predetermination has been explored primarily in the context of school districts predetermining the educational placement of students prior to the IEP meetings.²¹⁵ In *K.D. ex rel. C.L. v. Department of Educ., Hawaii*,²¹⁶ the Ninth Circuit Court of Appeals

²¹⁴ *K.D. ex rel. C.L. v. Department of Educ., Hawaii*, 665 F.3d 1110, 1122-1123 (9th Cir. 2011).

²¹⁵ *K.D.*, 665 F.3d 1110.

²¹⁶ *Id.* at 1123 (citations omitted), see also *Rachel H. v Dept. of Education, 2014 WL 2800770 (D. Hawaii 2014) (holding that “[a] school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to a predetermined placement.”*

reiterated the standard that “[a] school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement. The IDEA requires that the placement of the student be based on the IEP, not vice versa.²¹⁷ In *K.D.*, the court determined that while the school district had scouted out a potential placement for the student, placement was not predetermined when the record revealed that the school district had considered other options besides [potential placement] and reasonably rejected them.²¹⁸ While this case addresses services rather than placement, the determination of whether Student was denied a FAPE due to predetermination is similar in nature.

Here, Petitioners argue that the DOE has a blanket policy not to provide or allow services in the public schools, and therefore they had predetermined the services that Student will receive as part of Student’s IEP.²¹⁹ However, the evidence presented support that the IEP team carefully considered the FBA completed by Private Provider 2. IEP team members reviewed the draft of the FBA sent out by Private Provider 2 and provided feedback regarding concerns with the FBA.²²⁰ Private Provider 2 was called to a meeting where Private Provider 2 presented Private Provider 2’s FBA’s findings and recommendations prior to the IEP meeting of April 12, 2019.²²¹ The IEP meeting was continued for two additional dates, and between the last two meetings, DOE Provider 3 reviewed the FBA and analyzed the contents.²²² Based upon

²¹⁷ *Id.* at 1123 (citing *Spielberg v. Henrico Cnty. Pub. Schs.*, 852 F.2d 256, 258-259 (4th Cir. 1988)).

²¹⁸ *Id.* See also *K.K. ex rel. K.S.K. v. Hawaii*, 2015 WL 4611947 (the District Court finding that while the process began with a draft IEP, the team members informed [parent] that the draft was just a starting point, and that they would be considering all options, the district had not predetermined student’s placement).

²¹⁹ See Request for Impartial Due Process Hearing, filed on June 10, 2019.

²²⁰ FOF 48.

²²¹ FOF 49.

²²² FOF 86.

DOE Provider 3 review of the FBA, DOE Provider 3 further observed Student in school and determined that the recommendation of the provider for Student in school, as indicated in the FBA by Private Provider 2, was not the best course of action for Student.²²³ Furthermore, Private Provider 2, Parent 1, and Private Provider 1 were present at the IEP meetings, and Private Provider 2 was again allowed to address any questions or concerns regarding the FBA.²²⁴

No evidence was presented to support the argument that the DOE has a blanket policy to refuse to provide services in the school. In fact, the testimony that was presented showed that the DOE did have several specific instances of allowing services in schools.²²⁵

2. The IEP team did not disregard the concerns of the parents and only focus on the Principal's opinions.

In *K.K. ex rel. K.S.K. v. Hawaii*, the Hawaii District Court reviewed the decision in which the administrative hearings officer (hereinafter “AHO”) determined that no predetermination had occurred because the parents of the student were given the opportunity to participate at IEP meetings, and the IEP team considered all the available information.²²⁶ The Court noted that “[i]n cases in which the Ninth Circuit has found predetermination or serious infringement on parental participation, the school district generally developed the entire IEP without any parental input, refused to accommodate the parents’ requests to reschedule, or committed other serious errors in conjunction with the failure to secure parental participation.”²²⁷

Petitioners argue that because the recommendations of Private Provider 2’s FBA were not included in the IEP, that the IEP team did not consider the concerns of Parents and only focused

²²³ FOF 87.

²²⁴ FOF 24, 27-28, 50-52.

²²⁵ FOF 95.

²²⁶ 2015 WL 4611947 at *17 (D. Haw. 2015).

²²⁷ *Id.* at *16 (citing *Cupertino Union Sch. Dist. V. K.A.*, 75 F.Supp.3d 1088, 1100 (N.D.Cal. Dec. 2, 2014))

on the Principal's opinions. The credible evidence presented at the Hearing demonstrates that this argument fails.

Many concerns were raised by members of the IEP team about the findings and recommendations of the FBA, specifically about the observations that were noted and the recommendation of a provider to be present with Student at the school.²²⁸ Several of the IEP team members did not agree with the determination that Student would be better served in school with a provider, and their concerns were supported by the evidence in the record.²²⁹

Of concern in the FBA was the selection and documentation of observations that Private Provider 2 chose to make of Student. Private Provider 2 chose to observe Student at school and at the afterschool program but combine the data for the two programs, even when it was clear that the school setting and afterschool setting were very different in nature.²³⁰ In the school setting, no provider was present and General Education Teacher 1 implemented the BSP created by DOE Provider 1 to work with Student.²³¹ In the afterschool program, Student's insurance-funded provider was present and it was unclear what, if any, BSP was being implemented during that time.²³² Private Provider 2 also chose to observe Student at the home setting with no provider present and no BSP being implemented yet determined that those three settings were appropriate to make a sufficient determination that a provider was necessary at the school. It was clear from Private Provider 2's own notes that Student was much more behaved and under control in the school setting than the home and after school settings, and that the implementation

²²⁸ FOF 27, 77-80, 84, 89, 91-92.

²²⁹ FOF 77, 79-80, 84, 89.

²³⁰ FOF 87.

²³¹ FOF 62-67.

²³² FOF 58.

of the BSP by Student's teachers was effective in managing Student's behaviors.²³³

The school-based IEP team, along with DOE Provider 3 and Private Provider 3 all agreed that assigning Student a provider in the school setting could be detrimental to Student socially, in creating a stigma during lunch and recess.²³⁴ SPED Teacher even noted that Student performs best when Student can make decisions and has more independence, which shows how detrimental a provider could be for Student in school.²³⁵

Several of these concerns regarding Private Provider 2's FBA were included in Principal's letter to the team that was distributed prior to the meeting, to which Parents take strong issue. Members of the IEP team from the school district are allowed to come to IEP meetings with "pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions."²³⁶ Here, Principal demonstrated Principal's consideration of the findings and recommendations, as well as the FBA as a whole, in the letter that Principal drafted to the other team members.²³⁷ Principal's explanation that Principal sent it prior to the meeting so that everyone could read it, consider it, and be ready to discuss concerns about it was a reasonable explanation for Principal's actions.²³⁸

General Education Teacher 1 also wrote an email in support of the conclusions contained within Principal's email and even went so far as to speak with a social worker regarding Student's situation. General Education Teacher 1 had General Education Teacher 1 own

²³³ FOF 57-58, 60-66.

²³⁴ FOF 77-80, FOF 84, 89, 92.

²³⁵ FOF 84.

²³⁶ *N.L. ex rel. Mrs. C. v. Knox County Schools*, 315 F.3d 688, 694 (6th Cir. 2003).

²³⁷ FOF 77.

²³⁸ FOF 22-23.

concerns about what Parents' goals and concerns seemed to be for Student, and General Education Teacher 1 demonstrated that General Education Teacher 1 was not simply following Principal's orders when General Education Teacher 1 made General Education Teacher 1's decisions.²³⁹

IEP team members also present at the meeting indicated that they were willing to consider some of the recommendations of the FBA, even though they disagreed with the recommendation of the provider. Based on the credible evidence, it was Parents and their accompanying team members that were opposed to considering piecemeal the recommendations and insisted on an all or nothing approach.²⁴⁰

Parents brought with them multiple team members for support during the meetings,²⁴¹ their concerns were all discussed and documented in the IEPs, and modifications were made to the IEPs to address Parents' concerns.²⁴² Parents were also provided information prior to the IEP meetings for discussion²⁴³ and were also able to have their team members make observations of Student in school and provide their own private, insurance-funded assessments during the meetings for consideration.²⁴⁴ The credible evidence also shows that Parents were basically able to dominate discussions that were had in at least two of the recent IEP meetings.²⁴⁵ The credible evidence presented at the Hearing shows that Home School did not deny Parents meaningful participation in the IEP meetings.

3. Home School did not act in bad faith by agreeing to perform an FBA and then ignore the recommendations of the FBA based on its predetermination of

²³⁹ FOF 81-83.

²⁴⁰ FOF 96.

²⁴¹ FOF 28.

²⁴² FOF 43-47.

²⁴³ FOF 48, 100-103, 106-107, 123.

²⁴⁴ FOF 96.

²⁴⁵ FOF 81-83, 96.

services.

Petitioners third argument focuses on the idea that the Respondents were willing to have a FBA completed, but ignored the recommendations based on predetermination. This argument fails for the reasons set forth in Issues 1 and 2. Additionally, Respondents' willingness to conduct and pay for an additional FBA when there were no particularly concerning behaviors at school demonstrates that Respondents tried to accommodate and address Parent 1's concerns in developing the new IEP.²⁴⁶

The IDEA and case law based in the Ninth Circuit only requires the DOE to address Student's behavioral issues outside of school if the issues were affecting Student's academic progress.²⁴⁷ The case of *Department of Education of Hawaii v. Leo W. by and through his parent, Veronica W.* is analogous to this case. In *Leo W.*, the Court reviewed the parent's complaint that while student appeared to be doing well in school academically and the teachers did not make note of any behavioral issues at school, student's behaviors at home were getting increasingly worse. As in *Leo W.*, the student's teachers were not making any notes of particularly bad or difficult behaviors by student, and any occasional behavioral problems were noted by the school staff as being consistent with the student's age and common among student's classmates. In that case, the school district refused to conduct a behavioral reevaluation when it was requested by the parent, and the District Court found that the behavioral reevaluation was unnecessary since the "Present Levels of Educational Performance (hereinafter "PLEPs") and

²⁴⁶ While the actual FBA was a result of a settlement agreement, it was a settlement based on DOE's filing of a Request for Due Process Hearing based on Parents' untimely rejection of DOE Provider 1's FBA over a year after it was completed.

²⁴⁷ *Department of Education of Hawaii v. Leo W. by and through his parent, Veronica W.*, 226 F.Supp.3d 1081, 1103 (D. Hawaii 2016) (citing *San Rafael Elem. Sch. Dist. v. Cal. Special Educ. Hearing Office*, 482 F.Supp.2d 1152, 1161 (N.D. Cal. 2007)).

parental concerns only show continued behavioral issues at home.”²⁴⁸ Moreover, the Court also concluded that even though the district committed a procedural violation by not conducting a reevaluation, it was harmless and did not affect the student’s or parent’s substantive rights.²⁴⁹ The Court in *Leo W.* also further analyzed the occasional conduct that the parent said that the parent observed in the school as being problematic behaviors. In those instances, the parent admitted that it “seemed like the Home School was able to handle the situation with appropriate redirection.”²⁵⁰

Here, the Respondents did agree to and paid for a FBA for Student, because of a settlement agreement, even though the school teachers and staff did not believe that Student was exhibiting behavioral problems at school that affected Student’s academic performance. Further, even the Private Provider 2 noted in Private Provider 2’s conclusions in the FBA that when Student had behavioral issues in Non-Compliance, Protest/Whine, and Disruptive Behaviors, “the school staff were observed to consistently follow the Behavioral Support Plan created by [Student’s] school-based provider.”²⁵¹ Here, like in the *Leo W.* case, Respondents noted that Student’s behaviors were under control in the school setting, noted that the behaviors were not affecting Student’s academic performance, and school staff were able to redirect Student’s behaviors using the established BSP. Nonetheless, Home School still conducted the FBA and held several meetings to review and discuss the results of the FBA. The actions by Home School in this case demonstrates that it did not act in bad faith based on predetermination of Student’s services.

4. Principal did not create a hostile and intimidating environment in the IEP

²⁴⁸ *Leo W.*, 226 F.Supp.3d at 1103.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 1104.

²⁵¹ FOF 62

meetings.

Petitioners next argue that Principal created a hostile and intimidating environment at the IEP meetings, thereby preventing the parents from truly being able to participate in the IEP meetings. Petitioners also argue that the parents felt defensive due to the Principal's suggestions that they were responsible for Student's behavioral problems. Finally, in relation to this argument, Petitioners contend that the IEP meetings for Student were not serving their intended function of discussing and deciding what is best for Student.

As discussed *supra*, parental participation is of utmost importance in creating and/or revising an IEP for a child. Here, Petitioners argue that they were not afforded meaningful participation in the IEP meetings from which Student's IEP(3)-6/4/2019 was created. As discussed in Issues 1, 2, and 3, the credible evidence presented at the Hearing demonstrates that Parents and their supporters were able to meaningfully participate in the IEP meetings.

Additionally, Petitioners' argument that they were denied meaningful participation in the IEP meeting fails. In *I.T. ex rel. Renee T. v. Department of Educ.*, the court noted that "the IEP team's ultimate disagreement with parent on the issue whether Student needed mental health/behavioral services does not, in and of itself, constitute a denial of parent's right to participate."²⁵² Here, Petitioners' contention that the IEP team rejected the FBA and its recommendations, even if it were supported by the evidence, also does not constitute a denial of Parents' rights to participate in Student's IEP process.

First, it is noteworthy that Parents were not only present at the IEP meetings on April 12, April 17, and June 4, 2019, they were also accompanied by several individuals that were there to

²⁵² 2012 WL 3985686 at *13 (D. Hawaii 2012) (citing *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003) (*superseded by statute on other grounds*)).

support them.²⁵³ Of those individuals, two of them testified at the Hearing, one being Private Provider 2 and Private Provider 1. Private Provider 2 did note that Private Provider 2 felt that toward the end of one of the April meetings where Private Provider 2 was offended by a comment that Principal made about Student getting a service provider to replace DOE Provider 1. As noted by Principal and General Education Teacher 1, however, this comment was not related to Private Provider 2's performance, rather it was contextually appropriate DOE Provider 1.²⁵⁴

Private Provider 1 testified and Private Provider 1 did not mention any hostility at the IEP meetings. Several school personnel that were present at the IEP meetings also testified: General Education Teacher 1, SPED Teacher, and DOE Behavioral Health Specialist 2. None of the school personnel indicated that they felt intimidated in any way by Principal, nor did any of them believe that Parent 1 did not meaningfully participate in the meeting. In fact, several of the school personnel testified that Parent 1 and Parent 1's team were basically controlling the meeting by redirecting any discussion to the FBA and refusing to discuss other matters on the agenda.

Of note was the email written by General Education Teacher 1, wherein General Education Teacher 1 discussed the IEP meetings where Private Provider 4 is present are often turned upside down and rarely focus on Student or Student's behaviors in school. General Education Teacher 1's impression of Private Provider 4 is that General Education Teacher 1 "seems to 'attack with the desire to 'win', ... rather than working collaboratively with the team to focus on the needs of the child."²⁵⁵ General Education Teacher 1 also confirmed that the IEP

²⁵³ FOF 28.

²⁵⁴ FOF 25.

²⁵⁵ FOF 82.

team members were not intimidated by Principal, and that Parent 1 and Parent 1's supporters were able to actively and participate in the IEP meetings on April 12, April 17, and June 4, 2019. The undersigned Hearings Officer concludes that General Education Teacher 1's testimony was credible and significant to the determination of whether Parents were able to meaningfully participate in the IEP meetings.

Based on the credible evidence presented at the Hearing, this Hearings Officer concludes that the Petitioners have failed to meet their burden to show that they were denied meaningful participation in the IEP meetings, which resulted in a denial of FAPE.

5. Principal's rejection of the opinion of Private Provider 2 did not amount to a denial of FAPE.

Petitioners argue that Principal rejected the opinion of the Private Provider 2 and replaced it with Principal's own. Petitioners have failed to demonstrate how, even if this argument were proven to be true, it amounts to a denial of FAPE.

11. Home School did not fail to consider the private evaluations of Student and the FBA.

Petitioners argue that Home School failed to consider the private evaluations of Student and the FBA and failed to give prior written notice that it would not consider them. Petitioners have failed to meet their burden on this issue.

Home School carefully considered the FBA conducted by Private Provider 2, as discussed in Issues 1 through 4. Of importance to Home School was that the behaviors at school were successfully being managed with the BSPs and without the use of a provider accompanying Student. As indicated in the FBA, Student's behaviors at home and after school where Student generally receives services from a provider were worse and more difficult to manage. While Home School had not completely adopted the recommendations of a provider to provide

consistent services ‘across environments,’ it had also considered implementing some of the recommendations of the FBA.²⁵⁶

Finally, Home School did provide a lengthy four (4) page PWN to Parents on June 7, 2019, in which Home School further discussed the concerns it had with the FBA and its recommendation for a provider in the school setting. In the PWN-6/7/2019, Home School also discussed how the provider would not serve to be the least restrictive environment for Student to receive services in school, which is an important component to FAPE under the IDEA.²⁵⁷

D. Implementation of the IEP-12/5/2017 and IEP(2)-12/5/2018

The Ninth Circuit Court of Appeals has reviewed IDEA cases in relation to implementation failures alleged against school districts. In *Van Duyn ex rel. Van Duyn v. Baker School Dist.*, the Court reviewed the IDEA’s definition of a free appropriate public education as ‘special education and related services that ... are provided in conformity with the [child’s] individualized education program,’ and determined that “[t]here is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.”²⁵⁸ The Ninth Circuit also explored the analysis done by the Fifth Circuit in *Houston Indep. Sch. Dist. v. Bobby R.*,²⁵⁹ and recognized the court’s conclusion that implementation failures did not violate the IDEA because “the significant provisions of [the child’s] IEP were followed, and, as a result, Student received an educational benefit.”²⁶⁰

Petitioners’ remaining issues, 6, 7, 8, and 9, all involve allegations that Home School

²⁵⁶ FOF 96.

²⁵⁷ FOF 96.

²⁵⁸ 502 F.3d 811, 821 (9th Cir. 2007).

²⁵⁹ 200 F.3d 341 (5th Cir. 2000).

²⁶⁰ *Van Duyn*, 502 F.3d at 821.

failed to implement the IEP-12/5/2017 and the IEP(2)-12/5/2018. While they are not specifically addressed as implementation, each argument presented by Petitioners present a question of whether the DOE has performed the required services and supports according to the IEPs. Each remaining issue will be addressed in turn.

6. Petitioners have not proven that DOE Provider 1 did not perform DOE Provider 1 duties as required under the IEP.

Petitioners argue that DOE Provider 1 did not perform DOE Provider 1 duties under the IEP. Specifically, Petitioners maintain that DOE Provider 1 failed to work with outside providers, failed to perform the teacher consultations or failed to keep any record of doing so, and DOE Provider 1 failed to develop and implement an adequate behavioral program. Petitioners also argue that DOE Provider 1 failed to maintain records and was unaware of DOE Provider 1 duties under the IEP. Based on the credible evidence presented at the Hearing, Petitioners have failed to meet their burden of proving the allegations for failure to implement the IEP or that the failure of the implementation was a material failure in this case.

The overwhelming evidence presented at the Hearing confirmed that DOE Provider 1 developed successful BSPs for Student, consulted with Student's teachers and worked to allow teachers to help Student manage Student's behaviors to access Student's education. Private Provider 3 and DOE Provider 3 also confirmed that DOE Provider 1 maintained records and was aware of DOE Provider 1's duties under the IEP.²⁶¹

Even if DOE Provider 1 did not fully implement DOE Provider 1's duties under the IEP, it was not a material failure and Student was able to adequately access Student's education and have a successful school year.

7. Petitioners have failed to prove that Home School failed to perform counseling

²⁶¹ FOF 12-13, 88, 98, 101-107, 109, 111, 113, 133.

as required under the IEP, or that Home School had an obligation under the IEP to keep Parents informed of the progress of the counseling.

Petitioners allege that Home School either failed to do the required counseling under the IEP and/or that Home School failed to keep the parents informed of the progress of the counseling. Petitioners have not presented any evidence to support their contention that Home School failed to perform counseling or that Home School was obligated under the IEP to inform Parents of the progress of the counseling.

In fact, the extensive evidence presented at the Hearing shows that Student was receiving counseling during the school year,²⁶² as well as in the summer.²⁶³ The evidence presented by Respondents also confirm that Home School kept Parents informed of the counseling through progress reports and weekly email updates.²⁶⁴ DOE Behavioral Health Specialist 2 and DOE Provider 4 further met with Parents to discuss additional concerns Student was having regarding negative self-talk, even though none of those behaviors were occurring in the school setting.²⁶⁵

8. Petitioners have failed to produce evidence to support their argument that the BSPs were not incorporated into the IEP plan, were not discussed with the parents, or that the BSPs were insufficient.

Petitioners argue that Student's two (2) BSPs were created after the IEP meetings, were not incorporated into the IEP, and were not discussed with Parents or the IEP team before they were completed implemented. Petitioners further argue that the plans itself were insufficient and there were no records that they were discussed with teachers.

Petitioners have failed to provide any support or evidence for their arguments. While Petitioners attempt to argue that Parents did not consent for the BSPs to be implemented, this

²⁶² FOF 117-119.

²⁶³ FOF 121

²⁶⁴ FOF 122-124.

²⁶⁵ FOF 125

argument is disingenuous as the evidence presented at the Hearing demonstrates that the contrary is true. Petitioners' own exhibits show that Parent 1 had contacted DOE Provider 1 to ask DOE Provider 1 when the BSP was going to start being implemented. In the email sent to DOE Provider 1, Parent 1 says "...I'm looking for an updated copy of the BSP for [Student] that we'd discussed last week Wednesday. I was also wondering when it was going to start being implemented. I think I have to sign something before it can be put into place, so I just wanted to make sure I wasn't the one holding something up..."²⁶⁶

Even though the BSPs were finalized after the IEP meetings, it is clear from the IEPs and BSPs themselves that they were discussed and that most of the aspects of the BSP were already incorporated into the IEPs in the supplemental aids section.²⁶⁷

Petitioners have not presented any evidence or arguments that the BSPs that were drafted and implemented by DOE Provider 1 were insufficient. Respondents' extensive evidence, however, shows that BSPs were sufficient and were discussed with the teachers. General Education Teacher 1 testified that General Education Teacher 1 worked closely with DOE Provider 1 to understand and implement the BSPs that DOE Provider 1 had created for Student.²⁶⁸ General Education Teacher 1 also noted that the BSPs were working to control Student's behaviors so that Student was able to have a successful school year.²⁶⁹

Further, Private Provider 2 noted in Private Provider 2 FBA that the school staff were able to "consistently implement the BSP," which again demonstrates that the BSPs were sufficient in managing Student's behaviors in the school setting.²⁷⁰

²⁶⁶ FOF 130.

²⁶⁷ FOF 127-129, 132-133.

²⁶⁸ FOF 134, 136-138.

²⁶⁹ FOF 79, 111.

²⁷⁰ FOF 62.

Finally, Parent 1's extensive praise and support for General Education Teacher 1 and how General Education Teacher 1 had helped improve Student's behaviors further support that the BSPs were sufficient and being implemented properly, since General Education Teacher 1 explained that the reason General Education Teacher 1 was successful was because of DOE Provider 1 and the BSPs that DOE Provider 1 created and implemented.²⁷¹

9. Petitioners have failed to prove that the BSPs were not followed by Home School or that the punishments that were used for Student were material failures of implementation of the IEP.

Petitioners' primary argument in this issue is that Home School repeatedly used the threat or actuality of in school suspension, taking away recess and/or requiring writing, as punishment and inducement for Student. Petitioners have failed to present any evidence or argument to support this position.

Petitioners' point to Parent's Private Doctor 1's 2017 letter as being the basis for their argument that Home School should never take away recess as a punishment. Since Parent's Private Doctor 1 did not testify at the Hearing, Parent's Private Doctor 1's request for the school to not take away recess could not be further explored, especially considering Private Provider 3's testimony.²⁷²

The IEPs do not contain any prohibition of taking away recess or having Student write 'reflections' when Student has instances of inappropriate behavior.²⁷³ Notwithstanding, the undersigned Hearings Officer concludes that Home School's modifications to Student's recesses being taken away were clear indications that Home School was concerned for the well-being of Student and Student's diagnosis. It is also noteworthy that all the students at Home School were

²⁷¹ FOF 33, 79, 111.

²⁷² FOF 139

²⁷³ FOF 140

subject to the same punishments (i.e., recess being taken away and writing ‘reflections’), and that it only was used for Student in a small number of circumstances.

V. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have not proven a denial of FAPE, as Petitioners have failed to provide sufficient evidence to support each of their arguments in Issues 1-9, and 11, to prove their case by a preponderance of the evidence.

The Hearings Officer denies Petitioners’ requests as outlined in their Request for Due Process 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, October 8, 2019.

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