



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

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

Petitioners,

vs.

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

Respondents.

DOE-SY2021-005

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing:
December 2-3, 2020

Hearings Officer: Charlene S.P.T. Murata

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

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals with Disabilities Education Act ("IDEA"), as amended in 2004, codified at 20 U.S.C. §§1400, et seq.; the federal regulations implementing IDEA, 34 C.F.R. Part 300; and the Hawaii Administrative Rules §§8-60-1, et seq. Additionally, Petitioners reference Section 504 of the Rehabilitation Act of 1973

¹ [REDACTED]

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

II. INTRODUCTION

On July 15, 2020, the Department of Education, State of Hawaii and Christina Kishimoto, Superintendent of Hawaii Public Schools (“Respondents” or “DOE”) received a Complaint and Resolution Proposal from Student, by and through Student’s Parent (collectively “Petitioners”).

On July 24, 2020, Respondents filed Department of Education’s Response to Petitioners’ Complaint and Resolution Proposal.

On August 10, 2020, a Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for August 17, 2020. Before the prehearing conference, Petitioners requested permission to file a First Amended Complaint and Resolution Proposal. Respondents did not object to the request.

On August 20, 2020, with the consent of the undersigned Hearings Officer and with no objections by Respondents, Petitioners filed a First Amended Complaint and Resolution Proposal (“FAC”).

On August 28, 2020, Respondents filed a response to Petitioners’ FAC.

On September 10, 2020, an Amended Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for September 22, 2020.

On September 22, 2020, a prehearing conference was held with Keith H.S. Peck, Esq. (“Mr. Peck”) appearing on behalf of Petitioners, and Deputy Attorney General Anne T. Horiuchi (“Ms. Horiuchi”) appearing on behalf of Respondents. During the prehearing conference, the parties agreed to have the due process hearing on December 2-4, 2020, and requested an

extension of the 45-day decision deadline. The request was granted on September 23, 2020, extending the 45-day decision deadline to December 18, 2020. See Order Granting Respondents' Declaration of Anne T. Horiuchi to Extend the Decision Deadline from November 3, 2020 to December 18, 2020, filed September 22, 2020, issued on September 23, 2020.

On September 23, 2020, a Prehearing Order was issued to the parties, setting forth the issues and procedures for the due process hearing, and deadlines for submission of substantive motions, witness and exhibit lists, exhibits, and witness email addresses. No substantive motions were filed, and the parties timely submitted their witness and exhibit lists, exhibits, and witness email addresses.

Due to the Coronavirus 2019 global pandemic, the parties agreed to conduct the due process hearing using a video conferencing platform to ensure compliance with government mandated social distancing. See Governor of the State of Hawaii's Third Supplementary Proclamation, effective March 23, 2020, and Twelfth Proclamation Related to the COVID-19 Emergency, effective August 20, 2020.

On November 13, 2020, an Order Regarding Due Process Hearing Via Video Conference was issued to the parties, setting forth the procedures that would be implemented during the due process hearing using the Zoom video conferencing platform.

The due process hearing took place on December 2-3, 2020 using the Zoom video conferencing platform. All participants in the due process hearing appeared remotely via video and audio. The undersigned Hearings Officer presided over the matter. Petitioners were represented by Mr. Peck, and Respondents were represented by Ms. Horiuchi. Parent was present for the due process hearing. The Department of Education District Educational Specialist ("DES") was present on behalf of Respondents.

Petitioners called Director of Private School-2 and Parent as their witnesses during the due process hearing. Respondents called the following witnesses during the due process hearing: DOE Student Services Coordinator and Special Education Teacher (“SSC-SPED Teacher”), DOE District Resource Teacher and DOE SPED Teacher-1. Petitioners did not call any rebuttal witnesses.

The following exhibits were admitted into evidence without objections: Petitioners’ Exhibits 1 through 3, pages 1 through 31 and 66-137²; Respondents’ Exhibits 1 through 48, pages 1-212 (Tr. Vol. I, 6:21-7:2; Tr. Vol. II, 241:18-242:8, 174:13-21)³.

On December 8, 2020, Petitioners submitted a request to the undersigned Hearings Officer to extend the 45-day period in which a decision is due under HAR §8-60-69, from December 19, 2020 to February 2, 2021, so that transcripts can be prepared and post-hearing briefs filed. Respondents stipulated to the request for an extension. An Order Granting in Part and Denying in Part Petitioners’ request to extend the decision deadline was issued on December 9, 2020. Petitioners’ request to extend the decision deadline was granted; however, the request to extend it to February 2, 2021 was denied. The new deadline by which a decision in this matter must be issued is February 1, 2021.

On January 7, 2021, the parties timely submitted their closing briefs.

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

² Petitioners did not move into evidence Exhibit 2, pages 60-65. Petitioners withdrew Exhibit 1, pages 32-59, because they are duplicative of DOE’s Exhibits 19 and 21, pages 40-53 and 55-68. Tr. Vol. II, 173:5-14.

³ “Tr. Vol. I, 6:21-7:2” means Transcript Volume I, page 6, line 21 through page 7, line 2.

III. ISSUES PRESENTED

In their August 20, 2020 FAC, Petitioners allege procedural and substantive violations of the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973. Specifically, Petitioners allege that the Respondents denied Student a free appropriate public education (“FAPE”). Petitioners raise the following issues:

Issue 1 – Whether the DOE denied Student a FAPE when Student’s 5/29/2019 IEP expired on or about 9/05/2019⁴.

Issue 2 – Whether the 5/28/2019 IEP failed to provide sufficient Supplementary Aids and Services for Student to be successful in the Least Restrictive Environment and/or make adequate gains on Student’s academic, behavioral, and/or social needs.

Issue 3 – Whether the phrase “Behavioral Intervention Plan” in the 5/28/2019 IEP is vague and will not allow Parent a means to enforce this modification. Specific needed behavioral interventions were also something that should have been determined at the 5/28/2019 IEP meeting and listed in Student’s 5/28/2019 IEP.

Issue 4 – Whether the phrase “Safety Crisis Plan” in the 5/28/2019 IEP is vague and will not allow Parent a means to enforce this modification. Specific needed safety interventions/measures were also something that should have been determined at the 5/28/2019 IEP meeting and listed in Student’s 5/28/2019 IEP.

Petitioners request the following remedies:

Remedy 1 – Find that the DOE denied Student a FAPE.

Remedy 2 – Order the DOE to reimburse Parents for the costs of providing Student educational and related services from June of 2019 through August 2020.

Remedy 3 – Order the DOE to directly fund Student’s educational and related expenses from August 2020 through July 2021.

⁴ At the beginning of the due process hearing on December 2, 2020, Petitioners made an oral motion to amend Issue 1. Respondents did not object to Petitioners’ oral motion. Petitioners’ oral motion was granted. Therefore, Issue 1 in this Decision reads differently from the 9/23/2020 Prehearing Order. Tr. Vol. I, 5:1-20.

Remedy 4 – Order such other relief that is appropriate and justified in equity and/or in law, under the circumstances.

IV. FINDINGS OF FACT

1. Student is currently ___ years old and was diagnosed with ___ in July of 2018. Pet. Ex. 1 at 001-002; Pet. Ex. 2 at 71.
2. Student is eligible for special education and related services pursuant to the IDEA and Hawaii Administrative Rules Chapter 60 under the category of ___. “Due to [Student’s] [___], it is difficult for [Student] to make progress toward grade level standards without modification and support. [Student] needs specifically designed instruction to ensure success across all school settings.” Pet. Ex. 1 at 2-4.
3. Student’s delay in acquisition of adaptive, cognitive, communication, and interpersonal skills and behaviors impacts Student’s ability to learn. Pet. Ex. 1 at 2.
4. During the 2018-2019 school year, Student attended Public School-1’s ___ disabled program. Pet. Ex. 2 at 71.
5. On September 5, 2018, an IEP meeting was held at Public School-1, resulting in a September 5, 2018 IEP (“9/05/2018 IEP”). According to the 9/05/2018 IEP, the IEP annual review date was September 5, 2019. DOE Ex. 19 at 40.
6. The 9/05/2018 IEP lists various supplementary aids and services. Under the “Supplementary Aids and Services, Program Modifications and Supports for School Personnel” (“Supplementary Aids and Services”) section, the following supplementary aids and services are listed:

Sensory Regulation Plan
Occupational Therapy Consult
Safety Crisis Plan
Behavior Support Plan
Close Adult Supervision (Grouped)

___ Consultation

DOE Ex. 19 at 51.

7. Under the “Clarification of Service and Supports” section of the 9/05/2018 IEP, the following clarification is provided: “A safety crisis plan should be developed and implemented to ensure safety in the situation that [Student] is exhibiting unsafe behaviors [REDACTED]. [Student] will be provided close adult supervision in a grouped setting. Additional supplementary aides and services should be considered once [Student] enters school to best support [Student].” DOE Ex. 19 at 51.
8. The 9/05/2018 IEP states that “Student will participate in a self contained [sic], [___] special education program. Student will participate with non-disabled peers for all other non academic [sic] and extracurricular activities.” DOE Ex. 19 at 52.
9. Present at the 9/05/2018 IEP meeting were Parent, SSC-SPED Teacher, and others. SSC-SPED Teacher was at the meeting in SSC-SPED Teacher’s capacity as the Student Services Coordinator of Public School-2. DOE Ex. 17 at 37, Ex. 19 at 53. Although Public School-1 was Student’s home school, it was anticipated that Student would transfer from Public School-1 to Public School-2 because Public School-1 did not have a special education [___] on its campus. SSC-SPED Teacher, Tr. Vol. II, 179:19-180:2.
10. On September 10, 2018, a Prior Written Notice of Department Action was issued (“9/10/2018 PWN”). The 9/10/2018 PWN proposed various services and supplementary aids, including a Safety Crisis Plan and Behavior Support Plan. It was also proposed that Student would participate in a self-contained, [___] special education program, and Student would participate with non-disabled peers for all other non-academic and extracurricular activities. DOE Ex. 18 at 38-39.

11. On February 1, 2019, Student's special education teacher at Public School-2, SPED Teacher-2, submitted a request for an evaluation because Student was demonstrating dangerous self-harm behaviors since returning from winter break. DOE Ex. 5 at 20.
12. On February 1, 2019, Parent executed two "Consent for Release of Information" forms, granting permission to the DOE, Public School-2, to receive and release information from/to Board Certified Behavior Analyst of Private Agency ("BCBA-1"). DOE Ex. 32 at 121-122.
13. On February 4, 2019, an IEP meeting was held at Public School-2, resulting in a February 4, 2019 IEP ("2/04/2019 IEP"). According to a conference announcement, the purpose of the 2/04/2019 IEP meeting was to develop an IEP and review the plan's effectiveness/appropriateness in meeting Student's needs, review and renew it, if needed. The IEP annual review date did not change and remained as September 5, 2019. DOE. Ex. 21 at 54, 55.
14. The 2/04/2019 IEP lists various supplementary aids and services. Under the "Supplementary Aids and Services" section, the following supplementary aids and services are listed:
 - Sensory Regulation Plan
 - Occupational Therapy Consult
 - Safety Crisis Plan
 - Behavior Support Plan
 - Close Adult Supervision (Grouped)
 - ___ ConsultationDOE Ex. 21 at 66.
15. Under the "Clarification of Service and Supports" section of the 2/04/2019 IEP, the clarification remained the same as the clarification in the 9/05/2018 IEP. DOE Ex. 21 at 66.

16. The 2/04/2019 IEP also states that the extent Student would not participate with non-disabled students remained the same as the 9/05/2018 IEP. DOE Ex. 21 at 67.
17. Present at the 2/04/2019 IEP meeting were the following people: District Resource Teacher, Behavior Analyst, SPED Teacher-2, Parent, Principal, and others. DOE. Ex. 10 at 26.
18. On February 4, 2019, Parent signed a “Consent for Assessment as Part of a Reevaluation” form. DOE Ex. 8 at 24.
19. On February 7, 2019, Parent signed another “Consent for Assessment as Part of a Reevaluation” form. DOE Ex. 9 at 25.
20. On February 7, 2019, two Prior Written Notice of Department Action were issued. DOE Ex. 7 at 23, Ex. 22 at 69.
21. One February 7, 2019 Prior Written Notice of Department Action proposed that Student be administered a Functional Behavioral Assessment (“FBA”) by a licensed behavior analyst-board certified behavior analyst (“LBA-BCBA”). The IEP team considered first developing and implementing a Behavioral Support Plan to meet Student needs, but this option was rejected because the “severity of [Student’s] behaviors warrant a more in-depth assessment by an LBA-BCBA” (“2/07/2019 PWN-FBA”). DOE Ex. 6 at 21, Ex. 7 at 23.
22. A second February 7, 2019 Prior Written Notice of Department Action proposed that Student receive extended school year services after 4 calendar days of missed instruction (“2/07/2019 PWN-ESY”). DOE Ex. 22 at 69-70.
23. Student attended Spring ESY on March 19, 2019 through March 22, 2019 for four days. DOE Ex. 42 at 195.

24. On March 25, 2019, a Functional Behavior Assessment Results & Report was issued by BCBA-1 (“3/25/2019 FBA”). DOE Ex. 30 at 108-119.
25. BCBA-1 is a board-certified behavior analyst and licensed behavior analyst with Private Agency. DOE Ex. 48 at 211.
26. On April 1, 2019, an Assessment Report: Functional Behavioral Assessment (05) was submitted by Behavior Analyst (“4/01/2019 Assessment Report”). According to the 4/01/2019 Assessment Report, “when [Student] is denied access to a preferred item or activity, [Student] will engage in behaviors such as head butting, slapping, and flopping to the ground. [Student] also demonstrates maladaptive behaviors to escape demands or nonpreferred activities. These behaviors have been maintained by a history of reinforcement at both home and school.” DOE Ex. 31 at 120.
27. An IEP meeting took place on April 2, 2019. Present at the April 2, 2019 IEP meeting were the following people: BCBA-1, General Education Teacher, District Resource Teacher, SPED Teacher-2, Parent and Vice Principal. DOE Ex. 13 at 29.
28. On April 4, 2019, a Prior Written Notice of Department Action was issued (“4/04/2019 PWN”). The 4/04/2019 PWN proposed that Student remain eligible for special education services under the category of _____. This proposal was made after reviewing the FBA and other assessments and information. The IEP team agreed that Student’s behaviors associated with _____ hindered Student from accessing a general education _____ without specially designed instruction, accommodations and modifications to meet Student’s needs. DOE Ex. 12 at 28.
29. Parent was also provided a copy of an “Evaluation Summary Report” on April 4, 2019. The report was a summary of a re-evaluation of Student, determining that Student

remained eligible for special education and related services under the category of ____.
DOE Ex. 15 at 32-35.

30. On April 10, 2019, BCBA-1, created a Behavior Intervention Plan based on the 3/25/2019 FBA and other sources (“4/10/2019 BIP”). DOE Ex. at 201-212.
31. No one signed the “Acknowledgement and Consent” form for the 4/10/2019 BIP indicating that they had read, understood, participated, and received a copy of the 4/10/2019 BIP. DOE Ex. 48 at 212.
32. Parent did not receive a copy of the 4/10/2019 BIP. DOE Ex. 48 at 212; Parent, Tr. Vol. I, 132:19-133:4.
33. A Behavior Intervention Plan (“BIP”) gives an IEP team strategies on what they should do when challenging behaviors occur and setting up an environment that would be conducive in limiting or decreasing challenging behaviors from occurring in the first place. District Resource Teacher, Tr. Vol. II, 219:4-13.
34. On April 16, 2019, an IEP meeting was held at Public School-2, resulting in an April 16, 2019 IEP (“4/16/2019 IEP”). The IEP annual review date was not changed and remained on September 5, 2019. Pet. Ex. 1 at 16; DOE Ex. 24 at 72.
35. The 4/16/2019 IEP is similar to the 2/04/2019 IEP with the exception of some changes to the Benchmark/Short-Term Objective for “English Language Arts and Literacy: ____ to ____.” DOE Ex. 21 at 60, Ex. 24 at 77. The most significant change between the 4/16/2019 IEP and the 2/04/2019 IEP is the addition of the Benchmark/Short-Term Objective for “Physical Well-Being, Health, and Motor Development: ____ to ____, Health and Personal Care: Safe Practices” to the 4/16/2019 IEP. DOE Ex. 83-84.

36. The Benchmark/Short-Term Objective for “Physical Well-Being, Health, and Motor Development: ___ to ___, Health and Personal Care: Safe Practices” in the 4/16/2019 IEP is almost identical to the “Progress Monitoring” section of the 4/10/2019 BIP. DOE Ex. 24 at 83, Ex. 48 at 208-210.
37. The 4/16/2019 IEP meeting was to discuss the 4/10/2019 BIP and to revise the IEP to include BCBA-1’s recommendation for certain goals and objectives and increase support in the classroom. District Resource Teacher, Tr. Vol. II, 214:5-215:21.
38. Present at the 4/16/2019 IEP meeting were the BCBA, District Resource Teacher, SPED Teacher-2, Parent, Vice Principal, and General Education Teacher. Pet. Ex. 1 at 31; DOE Ex. 24 at 87, Ex. 26 at 90.
39. The 4/16/2019 IEP lists various supplementary aids and services. Under the “Supplementary Aids and Services” section, the following supplementary aids and services were listed:
- Sensory Regulation Plan
 - Occupational Therapy Consult
 - Safety Crisis Plan
 - Behavior Intervention Plan
 - 1-on-1 educational assistant
 - ___ Consultation
- DOE Ex. 24 at 85.
40. Under the “Clarification of Service and Supports” section of the 4/16/2019 IEP, the following relevant clarification was provided: “A Behavioral Intervention Plan has been developed and should be followed daily at school....A safety crisis plan has been developed and implemented to ensure safety in the situation that [Student] is exhibiting unsafe behaviors such as eloping and head banging. [Student] will be provided 1-on-1 adult supervision in the school setting.” DOE Ex. 24 at 85.

41. The 4/16/2019 IEP also states that “[Student] will participate in a self contained [sic], ___ special education program. [Student] will participate with non-disabled peers for all other non academic [sic] and extracurricular activities.” DOE Ex. 24 at 86.
42. On April 18, 2019, a Prior Written Notice of Department Action was issued (“4/18/2019 PWN”). The 4/18/2019 PWN proposed various services and supplementary aids, including a Safety Crisis Plan, Behavior Intervention Plan, and 1-on-1 adult supervision. The 4/18/2019 PWN also proposed that Student participate in a self-contained, ___ special education program, and participate with non-disabled peers for all other non-academic and extracurricular activities. DOE Ex. 25 at 88-89.
43. The 4/18/2019 PWN explained why certain actions were proposed or refused. With respect to some of the proposed actions, the 4/18/2019 PWN explains: “Safety Crisis Plan: Daily When [sic] needed is [sic] [Student] elopes or bangs head to a point of injury. Behavior Intervention Plan: Daily to help [Student] meet IEP goals and objectives of distinguishing maladaptive behaviors. 1-on-1 educational assistant: Daily to help [Student] meet new goals and objectives and follow and take data on the Behavioral Intervention Plan implementation.” The 4/18/2019 PWN also explained that the least restrictive environment proposal was made because “Educational benefits to the student include providing access and opportunities to address IEP goals. Non-academic benefits to the student include participation in social activities amongst peers to gain relationships as well as learning appropriate behaviors.” DOE Ex. 25 at 88-89.
44. The 4/18/2019 PWN also explained other options that were considered and rejected. The IEP team considered that the 1-on-1 educational support person be a registered behavior technician (“RBT”), but they rejected this option because “[a]t this time the

implementation of [Student's] Behavioral Intervention Plan can be completed by the school team. Data collection will be monitored and changes can be made if warranted in the future.” DOE Ex. 25 at 89.

45. The 4/18/2019 IEP team's proposed and refused actions were based on reviewing an FBA, IEP team input, Parent input, BCBA-1 recommendations and a BIP. DOE Ex. 25 at 89.
46. On May 28, 2019, Parent and Public School-2's Principal signed a "Consent to Amend the Annual IEP" form that would have allowed the IEP team to amend the annual IEP without convening a meeting ("5/28/2019 Consent form"). Principal signed the following portion of the 5/28/2019 Consent form:

Attached is a Prior Written Notice describing proposed amendments to your child's annual Individualized Education Program (IEP) based on a discussion with you on 4/16/2019.

I propose to amend the annual IEP, dated 09/05/18, without having a meeting. A revised copy of the IEP with the amendments incorporated will be provided to you upon receipt of your consent to amend the IEP.

The 5/28/2019 Consent form continued on to read:

Indicate below whether you agree to amend the Individualized Education Program (IEP) without convening a meeting. Please sign and return this document to the school, to the attention of: [SPED Teacher-2].

Check one of the following:

I **agree** to amend the annual IEP without having a meeting. By consenting, I understand that the proposed amendments described in the attached Prior Written Notice, dated 5/28/19 will be incorporated into the IEP.

I **do not** agree to amend the annual IEP without having a meeting. By not consenting, I am requesting that an IEP meeting be held to discuss the proposed changes.

- (Bold in original). Although Parent signed the 5/28/2019 Consent form, Parent did not check either of the options. DOE Ex. 29 at 107; Parent, Tr. Vol. I, 160:9-161:15.
47. On May 28, 2019, a Prior Written Notice of Department Action was issued (“5/28/2019 PWN”). The 5/28/2019 PWN proposed that 3000 minutes per quarter of applied behavioral analysis (“ABA”) services be added to Student’s IEP, and a certified RBT would provide the Individual Instructional Support. The basis for the proposal was that the “1. ABA Services are classified as supervision/monitoring programming by a B.C.B.A. (Board Certified Behavioral Analyst) for the Individual instructional support of the RBT (Registered Behavioral Technician) throughout the school day. 2. A certified RBT is required to provide ABA services.” The proposal was based on a review of Student’s FBA. DOE Ex. 28 at 106.
48. A May 29, 2019 IEP (“5/29/2019 IEP”) was drafted without a meeting taking place. Parent, Tr. Vol. I, 133:15-25; Pet. Ex. 1 at 1-15; DOE Ex. 27 at 91-105.
49. According to the 5/29/2019 IEP, the IEP annual review date was not changed and remained on September 5, 2019. Pet. Ex. 1 at 1; DOE Ex. 27 at 91.
50. Parent received an email with a link that had limited access to the 5/29/2019 IEP. Parent would not have been able to access the 5/29/2019 IEP through this link at the time of the due process hearing. Parent, Tr. Vol. I, 134:7-13.
51. The 5/29/2019 IEP lists various supplementary aids and services. Under the “Supplementary Aids and Services” section, the following supplementary aids and services were listed:

Sensory Regulation Plan
Occupational Therapy Consult
Safety Crisis Plan
Behavior Intervention Plan

___ Consultation
ABA Services
Individual Instructional Support (RBT certified 1:1)

Pet. Ex. 1 at 14; DOE Ex. 27 at 104.

52. Under the “Clarification of Service and Supports” section of the 5/29/2019 IEP, the following relevant clarification was provided: “A Behavioral Intervention Plan has been developed by a B.C.B.A. and should be followed daily at school [sic] the team....A safety crisis plan has been developed and should be implemented to ensure safety in the situation that [Student] is exhibiting unsafe behaviors such as eloping and head banging. [Student] will be provided 1-on-1 Individual Instructional Support in the school setting by a [sic] someone who is RBT certified.” Pet. Ex. 1 at 14; DOE Ex. 27 at 104.
53. To the extent that Student will be participating with non-disabled peers, the 5/29/2019 IEP states that “[Student] will participate in a self contained [sic], [___] special education program. [Student] will participate with non-disabled peers for all other non academic [sic] and extracurricular activities. Pet. Ex. 1 at 15; DOE Ex. 27 at 105.
54. On May 31, 2019, a Progress Report was issued for the 5/29/2019 IEP. DOE Ex. 41 at 180-194.
55. SPED Teacher-1 was a special education teacher at Public School-2 from 2016 to 2020. In summer of 2019, SPED Teacher-1 was a ___ special education teacher for extended school year. In January of 2020, SPED Teacher-1 became a Student Services Coordinator for Public School-2. SPED Teacher-1, Tr. Vol. II, 228:21-230:1.
56. From June 6, 2019 through August 2, 2019, Student received summer extended school year (“ESY”) services from SPED Teacher-1. SPED Teacher-1 worked with Student during ESY in the summer of 2019. Student had an RBT with Student the entire time

- Student was in the ESY program. Student did not bang Student's head but Student did throw tantrums. The RBT was able to provide Student with instructions and prompting until the tantrum was completed. DOE Ex. 43 at 196; SPED Teacher-1, Tr. Vol. II, 229:6-231:14.
57. Parent did not tell SPED Teacher-1 during the summer of 2019 about any concerns Parent had regarding the services Student was receiving from Public School-2. SPED Teacher-1, Tr. Vol. II, 231:15-19.
58. Student also participated in a day camp that was run by Director. The day camp ran for two weeks in the end of June 2019. The day camp facilitated language and social skills through verbal behavior and ABA for ___ "campers." The day camp ran from 8:00 a.m. to 12:00 p.m. each day. Director, Tr. Vol. I, 31:5-32:5, 101:1-5.
59. When Student began at day camp, Student had no functional language skills with a lot of problem behaviors. Student threw tantrums and tried to elope. Although the purpose of the day camp was not to address behavioral needs, because the day camp was ABA based and verbal-behavior based, the day camp did address Student's behavioral needs. Student grew during the two weeks at day camp. Director, Tr. Vol. I, 32:17-33:1.
60. On July 31, 2019, Parent signed a "Request for Release" form, requesting the release of Student from Public School-2 to transfer to Private School-1 ("7/31/2019 Request for Release"). DOE Ex. 46 at 199. Signing the 7/31/2019 Request for Release was not a rejection of special education services or rescinding Student's right to special education eligibility. SSC-SPED Teacher, Tr. Vol. II, 194:11-195:20.
61. Parent registered Student at Private School-1 after signing the 7/31/2019 Request for Release form. Parent, Tr. Vol. I, 142:1-143:21.

62. Student attended Private School-1 beginning of fall 2019 for the 2019-2020 school year. Pet. Ex. 2 at 82; Parent, Tr. Vol. I, 143:18-21.
63. The 2019-2020 school year at Private School-1 ran from August 2019 through May 2020. Parent paid \$100 per month from August 2019 through February 2020. Director, Tr. Vol. I, 109:7-23, 111:13-17. Due to school closure from the COVID-19 pandemic, Parent paid \$50 for March 2020, and paid nothing for April and May 2020. Parent received tuition assistance for the 2019-2020 school year. Director, Tr. Vol. I, 109:19-23, 110:7-111:6.
64. On August 9, 2019, Principal sent a letter to Parent informing Parent of their right to a free appropriate public education (“8/09/2019 FAPE letter”). The 8/09/2019 FAPE letter reads:

Free Appropriate Public Education (FAPE)

Although your child is not currently enrolled in a DOE public school, your child is still eligible to receive a FAPE which includes special education and related services through an individualized education program (IEP). If you intend to have your child receive a FAPE and to have an IEP developed, you must contact the principal at the number listed above.

If we do not hear from you by August 23, 2019 expressing your intent to have your child receive a FAPE, this will serve as an acknowledgement that you do not want your child to receive a FAPE and:

- An IEP will not be developed for your child.
- The DOE will not be responsible for developing subsequent IEPs until you contact your child’s current DOE home school to request one.

Private School Participation Project (PSPP)

Our records indicated that your child has been identified by the DOE as having a disability, but is enrolled in a private school. Your child may be eligible for services under the PSPP, see the attached description for details. If you wish to pursue this option, please contact the principal at the phone number listed above.

The 8/09/2019 FAPE letter contains handwritten changes that were made by Principal. Attached to the 8/09/2019 FAPE letter was a document entitled “Private School Participation Project (PSPP)” for Preschool-Grade 12 for school year 2018-2019. On the PSPP Project Description are handwritten notes by SSC-SPED Teacher to Parent stating that an updated PSPP Project Description would be sent to Parent when it became available. DOE Ex. 36 at 126-129; SSC-SPED Teacher, Tr. Vol. II, 182:8-186:4; Parent, Tr. Vol. I, 144:12-146:1.

65. On August 20, 2019, an initial assessment was done by Director for Private School-1, resulting in an Individualized Applied Behavior Analysis Education Plan for Student (“8/20/2019 ABA Plan”). Pet. Ex. 2 at 71-77.
66. The 8/20/2019 ABA Plan was based on an ABA program. Director, Tr. Vol. I, 35:3-24.
67. The assessment tool used for the 8/20/2019 ABA Plan was the Verbal Behavior Milestones Assessment and Placement Program (“VB-MAPP”). Pet. Ex. 2 at 71.
68. The 8/20/2019 ABA Plan contained the results of an assessment of Student’s language, learning, and social skills, as well as behavioral barriers that were interfering with Student’s ability to learn more advanced skills. The 8/20/2019 ABA Plan (1) presented the results of the VB-MAPP Milestones Assessment; (2) presented the results of the VB-MAPP Barriers Assessment; and (3) provided goals, targets, and objectives to be taught through ABA with an emphasis on verbal behavior in his school environment for the 2019-2020 school year. Pet. Ex. 2 at 71-77; Director, Tr. Vol. I, 36:2-10.
69. The VB-MAPP Milestones Assessment assessed Student in 16 skill areas. A higher score on this assessment indicates higher skill levels. Student received a score of 10 out of 170. Pet. Ex. 2 at 72.

70. The VB-MAPP Barriers Assessment looks at 24 barriers in behavior, language, learning, and social skills. Each barrier has a maximum of 4 points. The higher the points, the more barriers there are. Student scored a total of 84 points out of 96 points, with elevations on 22 of the 24 barriers. Pet. Ex. 2 at 73; Director, Tr. Vol. I, 36:11-37:6, 38:14-21.
71. The VB-MAPP is based upon Applied Behavior Analysis with a focus on Skinner's (1957) analysis of verbal behavior. The VB-MAPP can help identify a student's strengths and weaknesses across a variety of critical skills, and compare and contrast the student's skills with those of typically developing children. Pet. Ex. 2 at 71.
72. The 8/20/2019 ABA Plan noted that Parent was concerned about Student's lack of communication and words, Student's crying and throwing tantrums and overall skill level. Parent stated that Student understood more than Student could express and could follow simple directions when Student wanted to. Parent explained that Student was not potty trained and needed physical assistance for dressing. Student ate finger foods and was a picky eater. Pet. Ex. 2 at 71.
73. Although there was a plan to conduct a re-assessment some time in February/March of 2020 to determine Student's progress with the 8/20/2019 ABA Plan, the re-assessment was not done due to the COVID-19 pandemic. Pet. Ex. 2 at 74; Director, Tr. Vol. I, 80:10-13.
74. During the 2019-2020 school year at Private School-1, utilizing the 8/20/2019 ABA Plan, Student made significant progress. Student's problem behavior decreased quickly. Initially, Student's primary mode of communication was pointing or grunting or bringing a person to an item that Student wanted. When a sign language program was

initiated for Student and Student was given speech therapy, the combination allowed Student to have a working “communication system” which decreased Student’s problem behavior because Student’s frustration from not being able to communicate subsided.

Director, Tr. Vol. I, 42:15-44:3.

75. Private School-1 provided the following assistive technologies and accommodations to Student during the 2019-2020 school year: prepare Student for upcoming transitions; sign language program; token system; visual aids; extra time; preferential seating; preferential nap cot location; access to preferred sensory items and activities; reversed inclusion opportunities; moment to moment analysis of Student’s motivation; Student specific positive reinforcers; Verbal Behavior Teaching Procedures; Parent communication books; staff rotation for generalization; counters; mobile data collection supplies; Echoic program provided by speech language pathologist; BCBA consult; ABA programs; and Registered Behavior Technician implementing programs. Pet. Ex. 2 at 77; Director, Tr. Vol. I, 44:4-45:20.
76. On August 22, 2019, SSC-SPED Teacher emailed Parent stating that a FAPE letter had been sent to Parent on August 9, 2019, and attached a PSPP Project Description for the 2019-2020 school year (“8/22/2019 email”). DOE Ex. 37 at 128.
77. Parent did not respond to the 8/09/2019 FAPE letter by August 23, 2019. SSC-SPED Teacher, Tr. Vol. II, 187:2-21; DOE Ex. 38 at 130.
78. On July 1, 2020, SPED Teacher-1 emailed Parent a copy of a FAPE letter dated June 30, 2020 for the 2020-2021 school year (“6/30/2020 FAPE letter”); a copy of the PSPP Project Description for School Year 2019-2020 because the 2020-2021 school year version was not yet available; and a copy of the Procedural Safeguards Notice. SPED

Teacher-1 noted that “[Student] is due for an updated [IEP] plan.” SPED Teacher-1 also sent a paper copy of the aforementioned documents by mail. DOE Ex. 39 at 131-177; SPED Teacher-1, Tr. Vol. II, 231:24-233:12.

79. The 6/30/2020 FAPE letter reads:

Free Appropriate Public Education (FAPE)

Although your child is not currently enrolled in a DOE public school, your child is still eligible to receive a FAPE which includes special education and related services through an individualized education program (IEP). If you intend to have your child receive a FAPE and to have an IEP developed, you must contact the principal at the number listed above.

If we do not hear from you by July 13, 2020 expressing your intent to have your child receive a FAPE, this will serve as an acknowledgement that you do not want your child to receive a FAPE and:

- An IEP will not be developed for your child.
- The DOE will not be responsible for developing subsequent IEPs until you contact your child’s current DOE home school to request one.

Private School Participation Project (PSPP)

Our records indicated that your child has been identified by the DOE as having a disability, but is enrolled in a private school. Your child may be eligible for services under the PSPP, see the attached description for details. If you wish to pursue this option, please contact the principal at the phone number listed above.

80. Parent did not contact DOE or anyone at Public School-2 in the summer of 2020 to let them know that Parent would like to have Student’s IEP revised. Parent, Tr. Vol. I, 147:22-148:4.

81. On July 15, 2020, Petitioners filed a Complaint and Resolution Proposal in the instant matter. DOE Ex. 1 at 1-7.

82. As of July 15, 2020, DOE had not contacted Parent to set up an IEP meeting. Parent, 135:13-17.

83. On August 17, 2020, Distance Learning at Public School-2 for the 2020-2021 school year began. Pet. Ex. 2 at 67-70.
84. On August 20, 2020, Petitioners filed their FAC. DOE Ex. 3 at 11-17.
85. On August 20, 2020, an Individualized Applied Behavior Analysis Education Plan for the 2020-2021 school year was done by Director (“8/20/2020 ABA Plan”). Pet. Ex. 2 at 82-90.
86. The 8/20/2020 ABA Plan was based on assessments done on August 19, 2020. After a school year at Private School-1, Student improved on the VB-MAPP Milestones Assessment and the Barriers Assessment, scoring 35.5 out of 170 and 64 out of 96, respectively. Pet. Ex. 2 at 83-85, 88-89; Director, Tr. Vol. I, 46:3-48:25.
87. Based on Student’s needs, the following accommodations and assistive technology will be provided to Student for 2020-2021 school year: preferential seating; preferential nap cot location; sign language program, timers; token system; prepare Student for upcoming transitions; visual aids; extra time; access to preferred sensory items and activities; reverse inclusion program; Parent communication books; SLP services; Special Education Teacher Consult; BCBA consult; ABA programs; and RBT services. Pet. Ex. 2 at 90; Director, Tr. Vol. I, 50:1-11.
88. On August 24, 2020, Parent enrolled Student at Private School-2’s ___ program for the 2020-2021 school year. Pet. Ex. 2 at 78-79; Director, Tr. Vol. I, 51:16-17.
89. On September 17, 2020, SPED Teacher-1 emailed to Parent a copy of the PSPP Project Description for the 2020-2021 school year. DOE Ex. 40 at 178-179; SPED Teacher-1, Tr. Vol. II, 233:13-21.

90. Parent did not contact SPED Teacher-1 after SPED Teacher-1 sent the September 17, 2020 email with the PSPP Project Description for the 2020-2021 school year. SPED Teacher-1, Tr. Vol. II, 234:4-7.

Private School-1 and Private School-2

91. Private School-1 is a non-profit program established by Director in May of 2019. Pet. Ex. 3 at 93; Director, Tr. Vol. I, 31:5-9.

92. Private School-1 was a one-year pilot school program. Director, Tr. Vol. I, 33:2-8.

93. Private School-1 had ___ students. Director, Tr. Vol. I, 33:10-14.

94. Private School-1 was a short-term program used to create Private School-2. Director, Tr. Vol. I, 33:16-18.

95. Private School-1 was used to determine and develop a program and establish what the costs were to run the program. Director, Tr. Vol. I, 33:10-21.

96. Private School-1 is still operating but it is no longer a school and has no students. Director, Tr. Vol. I, 77:15-21.

97. Private School-2 is a for-profit business. Director, Tr. Vol. I, 33:19-21.

98. Private School-2 is located in ___ on ___ in ___. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Director, Tr. Vol. I, 57:13-58:25, 59:2.

99. Private School-2 has a total of ___ students: [REDACTED].
Director, Tr. Vol. I, 59:2-4, 59:14-19.

100. Student is one of the ___ students in the ___ class. Director, Tr. Vol. I, 55:12-15.

101. School starts at 8:00 a.m. and ends at 2:00 p.m. Student takes a nap from 11:15 a.m. to 1:00 p.m. each day. A regular day for Student consists of eating breakfast, toileting, sensory activities, circle time, gross motor play, movement & imitation, snack time, story time, arts & crafts, learning center, play & social skills, lunch, puzzles/books/puppet time. DOE Ex. 2 at 91.
102. [REDACTED] Director, Tr. Vol. I, 117:25-118:4.
103. Director is the BCBA for all ___ students at Private School-2. Director, Tr. Vol. I, 77:22-78:2.
104. There are ___ certified RBT's and ___ RBT's who are in the process of getting certified at Private School-2. Director, Tr. Vol. I, 108:21-109:7.
105. The ___ will sometimes interact with each other for mealtimes, when transitioning between classrooms, and when they are grouped depending on a skill level. Director, Tr. Vol. I, 59:20-60:3.
106. Private School-2 does not have licensed teachers or special education teachers; the adults teaching the students are the RBTs. Director, Tr. Vol. I, 60:15-19, 63:8-21.
107. Private School-2 is an ABA program that have RBTs who provide "ABA teaching" in the areas of language, communication, motor rotation, academic skills, reading, writing and math. Director, Tr. Vol. I, 108:6-19.
108. ABA is a scientific approach to behavioral change. It relies on data collection and carefully defined behavior parameters. Once behavior parameters are defined, then data collection is taken and used to guide a student's program. A student's program can be changed and modified based on the data collection. Director, Tr. Vol. I, 19:11-17.

109. Verbal behavior is under the umbrella of ABA but specific to the analysis of language. ABA analyzes what comes before the behavior (known as antecedent), the behavior, and the consequences. This analysis is known as the “ABCs.” Verbal behavior analyzes language using the same analysis—antecedent of language, the language, the behavior, and the consequences. Director, Tr. Vol. I, 20:8-21:8.
110. The Verbal Behavior Milestones and Assessment and Placement Program (“VB-MAPP”) is a criterion-referenced assessment and it’s based on verbal behavior and it breaks down language skills into milestones. The milestones are across language learning and social skills and based on [REDACTED] different age levels [REDACTED]. Each milestone in the VB-MAPP has component parts and the criteria to meet a specific milestone are carefully defined. Often times, neurologically typical developing children acquire a skill in its entirety, while children with ___ have splintered skills where they have some of the component parts to a skill, but not the other component parts. The VB-MAPP breaks down and charts what component parts are missing in a skill. Director, Tr. Vol. I, 21:21-23:15.
111. Private School-2 has a special education consultant on the students’ ABA programs. The special education consultant is a certified special education teacher and is a doctorate-level BCBA. Director, Tr. Vol. I, 63:8-21.
112. The special education consultant is located in ___. Director, Tr. Vol. I, 79:7-8.
113. Director testified that with the assistance of the special education consultant, Private School-2 is able to evaluate pre-academic and academic curriculum and programs that might be appropriate for Student. Director, Tr. Vol. I, 63:24-64:11.

114. Director testified that Student's level of functioning is currently in the ____, with just some skills emerging into the ____ level. Student is in the "[] range in reading" and "doesn't yet have those skills that are necessary for more pre-academic and academic programming." Director, Tr. Vol. I, 80:18-81:8.
115. Director testified that Director would not be able to cut out the special education consultation because it's an educational program, and the special education consultation is important so that Private School-2 can have a perspective from a professional who can weigh in and "assess and assist in analyzing and...guiding the special education curriculum." Director, Tr. Vol. I, 103:21-104:5.
116. Student will not directly receive services from the special education consultant. The minimum 4872 minutes per school year (\$10,000/year) from the special education consultant will be provided to Director, Student's RBT and any staff who is involved in Student's program. The minutes break down to approximately two hours a week, but the service is provided in minutes so that there can be flexibility in the frequency, duration and time of when the special education consultant is used. Director, Tr. Vol. I, 78:12-79:16, 86:4-14; Pet. Ex. 2 at 79.
117. Private School-2's curriculum follows the Hawaii Early Learning and Development ("HELD") standards that apply to children ages birth through the end of kindergarten. The HELD standards have domain areas such as motor development, social-emotional development, language, reading, writing and math. Director, Tr. Vol. I, 64:17-65:1.
118. Common core does not apply to Student because common core standards begin at kindergarten. Director, Tr. Vol. I, 65:21-66:2.

119. Student does not have a behavioral intervention plan at Private School-2 and Student is not a candidate for an FBA. Director, Tr. Vol. I, 81:9-17.
120. Parent provided Private School-1 with a copy of an IEP when Parent enrolled Student in Private School-1. The IEP that was provided to Private School-1 was done before August 2019. Director, Tr. Vol. I, 81:18-82:21.
121. Parent did not provide Private School-1 or Private School-2 with a copy of Student's behavioral intervention plan for Student. Director, Tr. Vol. I, 82:22-83:2.
122. Student did not have an FBA for the 2019-2020 and 2020-2021 school years at Private School-1 and Private School-2. Director, Tr. Vol. I, 117:6-24.
123. Private School-2 is in the process of becoming licensed [REDACTED] and is seeking preliminary accreditation [REDACTED]. Director, Tr. Vol. I, 53:7-18, 54:20-55:2.

Tuition and Fee of Private School-2

124. The tuition and fee for Private School-2 is an estimate and can be amended and refunded to Parent based on what is actually provided to Student. Director, Tr. Vol. I, 70:19-20, 85:8-17, 88:13-16, 102:18-21, 104:6-105:11.
125. The enrollment contract, Student Costs Analysis, and addendum contract all do not state that the tuition and fee for Private School-2 is an estimate and can be amended and refunded to Parent based on what is actually provided to Student. Pet. Ex. at 78-80. The enrollment contract specifically states that "[i]n the event of any local, state or federal government imposed school closures this contract remains in full force and effect through the entire term of the agreement." Pet. Ex. 2 at 78. The addendum contract specifically states that "[i]n the event of any local, state or federal government imposed

school closures this addendum contract remains in full force and effect through the entire term of the agreement.” Pet. Ex. 2 at 80.

126. The total tuition and fee for Private School-2 was initially \$219,226.80. Pet. Ex. 2 at 78-79.
127. BCBA’s hourly rate is \$200; RBT’s hourly rate is \$75. Pet. Ex. 2 at 78.
128. The total tuition and fee includes a 15% administrative fee (\$27,495.00) which covers anything from office supplies to legal and accounting services costs, insurances to operate the school, the day-to-day operations, and salary of operation manager. The administrative fee is based on 15% of the total cost of the contract (\$183,300.00) before tax. Director, Tr. Vol. I, 68:8-16; Pet. Ex. 2 at 78-79.
129. The Distance Learning Program Assessment⁵ (\$1000/year) covers the services of Director and an RBT to model what it would be like in a distance learning situation. The RBT would act as if he/she were the parent in that situation and would assess the child as far as what their objectives and targets are and how they could be facilitated in a distance learning program. Depending on the student who is being assessed, it would take the Director and an RBT approximately 4-5 hours each to conduct the assessment. Director, Tr. Vol. I, 68:17-70:1, 84:21-85:2; Pet. Ex. 2 at 78-79.
130. The Distance Learning Program and Supplies⁶ covers an iPad, insurance for the iPad, a cover for the iPad, and any educational programming materials and supplies involved in providing a distance learning program. If a family already has a device to use for distance learning, the family would not be charged a Distance Learning Program and

⁵ Also known as “Distance Bridge Program Assessment.” Director, Tr. Vol. I, 84:21-85:2.

⁶ Also known as “Distance Bridge Program & Supplies.” Director, Tr. Vol. I, 84:21-85:2.

Supplies fee. Once the device is no longer needed, it can be returned to the school for a refund or the family can keep it. Although the annual fee for Distance Learning Program and Supplies is listed as \$1500, Student will be charged \$2000. Student will be charged an additional \$500 because there will be a staff member (RBT, BCaBA or BCBA) to implement the program. Director, Tr. Vol. I, 70:2-25, 85:3-17; Pet. Ex. 2 at 78-79.

131. “Distance Learning BCBA, BCaBA, RBT, BT, SLP and SEC hourly rates for service as above” means that the staff member who will be implementing the distance learning will be paid their hourly rate for providing the distance learning. Director, Tr. Vol. I, 71: 1-14; Pet. Ex. 2 at 78.
132. A Functional Behavior Assessment (“FBA”) was not needed for Student at the time of the due process hearing. Director, Tr. Vol. I, 71:17-72:1; Pet. Ex. 2 at 78.
133. A behavior technician is a person who is in training and in the process of becoming a certified RBT. Director, Tr. Vol. I, 72:2-5; Pet. Ex. 2 at 78.
134. Tuition (\$4000/month or \$48,000/year) covers materials and supplies for the Student’s program, all the assessments throughout the year, the assessment processes, ABA programming and the special education curriculum programming, and the overhead of the facility. Director, Tr. Vol. I, 72:6-18; Pet. Ex. 2 at 78-79.
135. On October 15, 2020, Parent signed an addendum to Student’s 2020-2021 school year enrollment contract to include the reverse inclusion program. This addendum added \$3,300.00 to the total for tuition and fee, making the new tuition and fee \$222,526.80. Parent contracted for reverse inclusion program after the school year began. Student’s

reverse inclusion program will run from October 15, 2020 to July 28, 2021. Pet. Ex. 2 at 80.

136. The reverse inclusion program (\$3,300/year) allows non-disabled children from the community to voluntarily come into Private School-2 to become a part of the school day so that students enrolled in Private School-2 can have access to non-disabled children. The non-disabled children who participate or will participate in the reverse inclusion program are children who are in distance learning programs, hybrid programs, or home school programs. For 2020-2021 school year, there are _____-year-old, non-disabled children signed up for the reverse inclusion program. Director, Tr. Vol. I, 73:22-75:6, 88:17-89:24, 98:16-20; Pet. Ex. 2 at 80.
137. The \$3,300 fee for the reverse inclusion program covers one behavior technician to watch one non-disabled child. The behavior technician is paid by the hour. Director, Tr. Vol. I, 94:5-96:24, 98:21-24; Pet. Ex. 2 at 80.
138. Student is contracted to receive 3960 minutes of reverse inclusion with non-disabled peers. These minutes come out to approximately two hours per week of interaction with non-disabled peers. Student sometimes interacts with non-disabled peers on Student's own or shares the non-disabled peers with Student's disabled ____ classmates. There is no set number of non-disabled peers who attend Private School-2 at a given time. Of the ____ non-disabled peers, ____, ____ or all ____ would go to Private School-2 during a reverse inclusion period. Director, Tr. Vol. I, 90:16-92:20. There has been at least one occasion when Student did not have access to a non-disabled peer because they were sick. Director, Tr. Vol. I, 99:3-20.

139. The Private School-2's ___ students and ___ students do not have their reverse inclusion time together. Director, Tr. Vol. I, 91:5-11.
140. Student usually participates in the reverse inclusion program on Wednesdays and Thursdays [REDACTED]. Director, Tr. Vol. I, 93:8-15.
141. A BCBA creates the ABA program and an RBT implements the ABA program. Director, Tr. Vol. I, 62:10-14, 63:14-17.
142. Student's ___ classroom has a one-to-one ratio because each student in the class has an RBT. Director, Tr. Vol. I, 55:16-19.
143. Student's RBT is with Student all day for six hours a day. Director, Tr. Vol. I, 98:11-12.
144. Student's RBT would only assist Student when Student needs assistance. When Student is not in need of assistant, Student's RBT would sit behind Student and "fade the prompt." The goal is for Student to gain independence. Director, Tr. Vol. I, 61:22-62:14.
145. The RBTs also collect frequency data on students by using a clicker. Director, Tr. Vol. I, 61:15-62:6.
146. Director will be the BCBA creating the program and overseeing the RBT for Student's program at Private School-2. Director, Tr. Vol. I, 119:117-20.
147. Both "BCBA consultation" (\$12,180/year) and "Mandatory RBT Supervision" (\$12,180/year) will be performed by Director. Director, Tr. Vol. I, 83:18-20, 119:9-16; Pet. Ex. 2 at 79.
148. BCBA consultation of 3654 minutes per school year comes out to approximately an hour and a half per week. Director, Tr. Vol. I, 116:16-117:5.

149. BCBA consultation is consultation with Student's RBT and teacher for Student's ABA programming. As the BCBA, Director will develop a program based on assessments and data collection. The consultation is to develop a program and to consult with the RBT and the teacher so that they can understand the program, implement the program utilizing the teaching procedures and all the different procedures and principles that are involved in the ABA program. Director, Tr. Vol. I, 83:21-84:12; Pet. Ex. 2 at 79. As the BCBA, Director will create the program and go over the data collection on an ongoing basis and make decisions and modifications to the program. Director, Tr. Vol. I, 116:16-117:5.
150. Mandatory RBT Supervision is mandatory according to the Behavior Analyst Certification Board, and it is 5% of an RBT's monthly ABA services that he/she provides. The Mandatory RBT Supervision is to supervise an RBT's performance--their ability to implement the program, their professional ethical codes, and everything regarding an RBT as a professional. Director, Tr. Vol. I, 84:13-20; Pet. Ex. 2 at 79.
151. A \$500 assistive technology fee will cover the use of visual aids, such as photographs, books and an iPad at Private School-2 for Student. The iPad costs \$500. The \$500 assistive technology fee is an estimate and can be amended and refunded to Parent if it is not used. Director, Tr. Vol. I, 87:1-88:16; Pet. Ex. 2 at 79, 90.
152. Speech-Language Therapy of 2436 minutes per school year comes out to about an hour per week. The 2436 minutes is an estimate of how much speech-language therapy Student needs and may change. The total annual cost is \$6,090.00. Director, Tr. Vol. I, 115:19-116:15.

153. Director will provide the speech-language therapy to Student. Student's speech therapy sessions will focus on Student's functional speech production and being able to produce sound combinations like consonant/consonant-vowel combinations into words and eventually into words and phrases and then into sentences for vocal speech. Director, Tr. Vol. I, 118:5-119:8.
154. At the time of the due process hearing, Parent had not yet paid the \$219,226.80 contract amount, but did pay a \$250 deposit. The \$250 deposit will be applied to the \$219,226.80 contract amount. Pet Ex. 2 at 081; Director, Tr. Vol. I, 114:17-115:7, 115:15-18.
155. Private School-2 allowed Parent to select a payment plan of either making a one-time payment, quarterly payments or monthly payments. Director, Tr. Vol. I, 115:11-14.
156. Private School-2 communicates with Parent through phone calls and in-person meetings. Meetings are set throughout the year, but Parent and Director can request a meeting at any time. A communication log is provided to Parent every day by the teacher. Director, Tr. Vol. I, 105:15-25.

Director

157. Director is a certified and licensed speech-language pathologist and a certified and Hawaii licensed board-certified behavior analyst. Director, Tr. Vol. I, 12:11-14.
158. Director has been practicing speech-language pathology for ■ years. Director, Tr. Vol. I, 12:24-13:2.
159. Director received a Master's of Science in communications sciences and disorders in 1999 at ___ in ___. Director, Tr. Vol. I, 12:17-20, 18:15-17.

160. Director has been practicing the subset methodology of verbal behaviors for [REDACTED] years. Director, Tr. Vol. I, 31:19-22.
161. Director contracted with the Department of Education [REDACTED]
[REDACTED]
[REDACTED]. Director, Tr. Vol. I, 28:22-15.
162. Director was qualified as an expert in the area of speech-language pathology and the provision of Autism programs to children with Autism Spectrum Disability. Director, Tr. Vol. I, 44:22-6.

V. CONCLUSIONS OF LAW

A. BURDEN OF PROOF

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

The Supreme Court held in Schaffer that “[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005). The Court “conclude[d] that the burden of persuasion lies where it usually falls, upon the party seeking relief.” Id. at 535. Neither Schaffer nor the text of the IDEA supports imposing a different burden in IEP implementation cases than in formulation cases.

B. IDEA REQUIREMENTS

The purpose of the IDEA is to “ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs.” Bd. of Educ. v. Rowley, 458 U.S. 176,179-91, 102 S. Ct. 3034, 3037-3043 (1982); Hinson v. Merritt Educ. Ctr., 579 F.Supp.2d 89, 98 (2008)(citing 20 U.S.C. §1400(d)(1)(A)). A free and appropriate public education (“FAPE”) includes both special education and related services. H.A.R. §8-60-1; H.A.R. §8-60-3; 20 U.S.C. §1401(9); 34 C.F.R. §300.34; 34 C.F.R. §300.39; 34 C.F.R. §300.101.

Special education means “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a child with a disability to benefit from special education. 34 C.F.R. §300.34; 34 C.F.R. §300.39; 20 USC 1401(26) and (29). To provide FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP.” Dep’t of Educ. of Hawaii v. Leo W., 226 F.Supp.3d 1081, 1093 (D. Haw. 2016).

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

The school is not required to “maximize the potential” of each student; rather, the school is required to provide a “basic floor of opportunity” consisting of access to specialized

instruction and related services which are individually designed to provide “some educational benefit.” Rowley, 458 U.S. at 200. However, the United States Supreme Court in Andrew F. v. Douglas County Sch. Dist. held that the educational benefit must be more than *de minimus*. The Court held that the IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Andrew F. v. Douglas County Sch. Dist., 137 S. Ct. 988, 1001 (2017). See also, Blake C. v. Hawaii Dept. of Educ., 593 F.Supp.2d 1199, 1206 (D. Haw.2009).

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

Retrospective evidence that materially alters the IEP is not permissible. R.E. v. New York City Dep’t of Educ., 694 F.3d 167 (2nd Cir.2012).

Procedural violations do not necessarily constitute a denial of FAPE. Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 892 (9th Cir.2001). If procedural violations are found, a further inquiry must be made to determine whether the violations: (1) resulted in a loss of educational opportunity for Student; (2) significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the Student; or (3) caused Student a deprivation of educational benefits. Amanda J., 267 F.3d 877, 892 (9th Cir.2001).

C. ISSUES FOR DETERMINATION

1. **The DOE denied Student a FAPE when Student's 5/29/2019 IEP expired on or about 9/05/2019 and it was not replaced.**

In this allegation, Petitioners are alleging that Respondents denied Student a FAPE when Student's 5/29/2019 IEP expired on or about September 5, 2019 and Respondents did not conduct an annual review of the IEP or had an IEP in effect for Student at the beginning of the 2020-2021 school year. Pet. Closing Brief at 6-7. There is no dispute that the most recent IEP for Student is dated May 29, 2019. Based on the evidence adduced at the due process hearing, the undersigned Hearings Officer finds that Respondents failed to perform an annual review of Student's 5/29/2019 IEP and to have an IEP in effect for Student at the beginning of the 2020-2021 school year.

The development and revision of IEPs are governed by, *inter alia*, 34 C.F.R. §300.324(a)(6), (b)(1)⁷,

(a) Development of IEP—

(6) Amendments. Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or as provided in paragraph (a)(4) of this section, by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent

⁷ See also, H.A.R. §8-60-48(a)(6) and (b)(1).

must be provided with a revised copy of the IEP with the amendments incorporated.

(b) Review and revision of IEPs—

(1) General. Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team—

(i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(ii) Revises the IEP, as appropriate, to address—

(A) Any lack of expected progress toward the annual goals described in §300.320(a)(2), and in the general education curriculum, if appropriate;

(B) The results of any reevaluation conducted under §300.303;

(C) Information about the child provided to, or by, the parents, as described under §300.305(a)(2);

(D) The child's anticipated needs; or

(E) Other matters.

Furthermore, federal regulations also require that “[a]t the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in §300.320.” 34 C.F.R. §300.323(a).

In the present case, on September 5, 2018, the IEP team formulated the 9/05/2018 IEP. The IEP team at that time decided that an annual review of the 9/05/2018 IEP would be conducted by September 5, 2019 (FOF 5). Before the annual review date, the IEP team met on February 4, 2019, April 2, 2019 and April 16, 2019 (FOF 13, 27, 34). The annual review date was not changed after the February 4, 2019 and April 16, 2019 meetings (FOF 13, 34). On or about May 29, 2019, Student's IEP was revised without a meeting (FOF 48). Principal requested that Parent consent to amend the “annual IEP, dated 09/05/18” without a meeting, but the 5/28/2019 Consent form does not indicate whether Parent gave Parent's consent (FOF 46). Parent testified during the due process hearing that Parent does not recall if Parent checked the box that said Parent agrees to amend the annual IEP without a meeting or if Parent checked the box that said Parent did not agree to amend the annual IEP without a meeting and requested a

meeting to discuss the proposed changes. Parent, Tr. Vol. I, 160:23-161:15. The 5/28/2019 Consent form entered into evidence shows that Parent checked neither boxes (FOF 46). Parent also testified that had there been an IEP meeting, Parent would have liked to ask DOE to place Student at Private School-1 or ask DOE to adopt Private School-1's program. Parent, Tr. Vol. I, 133:15-135:12. Principal and SPED Teacher-2 both did not testify at the due process hearing to provide information regarding the circumstances of the 5/28/2019 Consent form. Therefore, there is insufficient evidence to show that Parent consented to revising Student's IEP without a meeting. As such, the most recent IEP meeting that had parental input was the April 16, 2019.

The 4/16/2019 IEP meeting was to discuss the 4/10/2019 BIP and to revise the IEP to include BCBA-1's recommendation for certain goals and objectives and increase support in the classroom (FOF 37). The 4/16/2019 IEP and the 5/29/2019 IEP remained largely unchanged except for the addition of ABA Services and replacing the 1-on-1 educational assistant with an Individual Instruction Support (RBT certified 1:1) to the 5/29/2019 IEP (FOF 39, 51). As stated in the 4/16/2019 IEP and 5/29/2019 IEP, it was still expected that Student's 9/05/2018 IEP would be reviewed on or about September 5, 2019, which did not happen. An IEP is like a contract. M.C. v. Antelope Valley Union High, 858 F.3d 1189, 1197 (9th Cir.2017). Regardless of whether or not Parent complained about the substance or implementation of Student's 5/29/2019 IEP, the IEP team was contractually obligated to meet and discuss Student's IEP, unless Parent waived Parent's right to a meeting.

Respondents' argument that Parent did not respond to the 8/09/2019 FAPE letter or to SSC-SPED Teacher's August 22, 2019 email is unpersuasive. DOE Closing Brief at 7-10. Respondents have the legal obligation to revise the IEP for Student by the annual review date;

Parent does not have this legal obligation⁸. Because the legal obligation rests with Respondents, Respondents must revise the IEP for Student by the annual review date. In this case, Parent did not withdraw Student from special education services (FOF 60). Student continues to be eligible for special education services as acknowledged by the 8/09/2019 FAPE letter. Parent not calling Public School-2 as requested by the 8/09/2019 FAPE letter or responding to SSC-SPED Teacher's 8/22/2019 email does not eliminate Respondents' legal obligation to make a FAPE offer to Student. Notably, SSC-SPED Teacher's 8/22/2019 email did not ask Parent to respond to SSC-SPED Teacher's 8/22/2019 email but was just a reminder that a FAPE letter was sent to Parent on August 9, 2019 (FOF 76).

At most, Parent's failure to respond to the 8/09/2019 FAPE letter is the equivalent of a refusal to participate in an IEP meeting. Parent not responding to the 8/09/2019 FAPE letter is not the equivalent of waiving Student's right to a FAPE. If a public school sends multiple communications to a parent, and if the parent refuses to respond to these communications, the parent, arguably, waives his/her right to participate in an IEP meeting, and the public school can proceed with an IEP meeting without the parent. H.A.R. §8-60-46(d)⁹. Assuming that Parent's

⁸ The Ninth Circuit has held that "[a]n agency cannot blame a parent for its failure to ensure meaningful procedural compliance with the IDEA because the IDEA's protections are designed to benefit the student, not the parent," Doug C., 720 F.3d at 1045.

⁹ Hawaii Administrative Rules §8-60-46(d) states:

Conducting an IEP team meeting without a parent in attendance. A meeting may be conducted without a parent in attendance if the department is unable to convince the parents that they should attend. In this case, the department shall keep a record of its attempts to arrange a mutually agreed on time and place, such as:

- (1) Detailed records of the telephone calls made or attempted and the results of those calls;
- (2) Copies of correspondence sent to the parents and any responses received; and
- (3) Detailed records of visits made to the parent's home or place of

failure to respond to the 8/09/2019 FAPE letter and SSC-SPED Teacher's 8/22/2019 email rises to the level of refusing to participate, which the undersigned is not finding, DOE could have held the annual IEP meeting without Parent. Therefore, the failure to have an annual IEP meeting by September 5, 2019 is a procedural violation.

Under the IDEA, harmless procedural errors do not constitute a denial of FAPE; however, procedural inadequacies that result in the loss of educational opportunity or significantly impede the parent's opportunity to participate in the IEP formulation process will result in the denial of a FAPE. W.G. v. Bd. of Trustees of Target Range School District, 960 F.2d 1479 (9th Cir.1992). A hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of education benefit. 34 C.F.R. §300.513(a)(2). "A procedural error results in the denial of an educational opportunity where, absent the error, there is a 'strong likelihood' that alternative educational possibilities for the student 'would have been bettered considered.'" Doug C., 720 F.3d 1038, 1046 (9th Cir.2013) (quoting M.L. v. Federal Way Sch. Dist., 394 F.3d 634, 657 (9th Cir.2005)). "[A]n IEP team's failure to properly consider an alternative educational plan can result in a lost educational opportunity even if the student cannot definitively demonstrate that his placement would have been different but for the procedural error." Doug C., 720 F.3d at 1046 (citing M.L. v. Federal Way Sch. Dist., 394 F.3d 634, 657 (9th Cir.2005)). Petitioners have met their burden in showing that there was a loss of educational opportunity when Respondents did not revise Student's IEP by the annual review date. Parent testified during the due process hearing that if there had been

employment and the results of those visits.

an IEP meeting and a pretty good program was offered, Parent would have considered it because funding for Private School-1 had ended. Parent, Tr. Vol. I, 128:4-14. Parent further testified that had there been an IEP meeting, Parent would have tried to convince Respondents to place Student at Private School-1, and if Respondents were not willing to place Student at Private School-1, then to consider adopting Private School-1's program. Parent, Tr. Vol. I, 134:24-135:12.

In addition to meeting their burden of showing a loss of educational opportunity, the undersigned Hearings Officer finds Respondents significantly impeded parent's opportunity to participate in the IEP formulation process. The most recent IEP for Student is dated May 29, 2019, but the 5/29/2019 IEP was made without a meeting and there is no record of Parent consenting to the revision of the IEP without a meeting. However, even if Parent had consented to revising the IEP without an IEP meeting, the 5/29/2019 IEP was not intended to be an annual review of Student's IEP because the annual review date did not change—there was still an expectation of an annual review of the 5/29/2019 IEP on September 5, 2019. Therefore, Respondents significantly impeded Parent's opportunity to participate in the IEP formulation process. Parental participation in the IEP and educational placement process is critical and necessary. Doug C., 720 F.3d at 1043-1044. A school has an "affirmative duty" to include parents in the IEP process. Id. at 1044. "Because disabled children and their parents are generally not represented by counsel during the IEP process, procedural errors at that stage are particularly likely to be prejudicial and cause the loss of educational benefits." M.C. v. Antelope Valley Union High School District, 858 F.3d 1189, 1195 (9th Cir.2017). Based on the foregoing, Respondents failed to revise Student's 5/29/2019 IEP before the annual review date.

Respondents also failed to have in effect an IEP at the beginning of the 2020-2021 school year¹⁰. Parent's failure to respond to the 6/30/2020 FAPE letter is not a withdrawal of Student from special education and Student was still entitled to an updated IEP. The 6/30/2020 FAPE letter acknowledged that Student "is still eligible to receive a FAPE," and SPED Teacher-1 acknowledged in SPED Teacher-1's email to Parent on July 1, 2020 that "[Student] is due for an updated [IEP] plan." (FOF 78, 79). Knowing that Student is still entitled to a FAPE, Respondents failed to hold an IEP meeting and update Student's IEP. Again, parental participation is essential in the formulation of an IEP. Respondents' efforts to include Parent in an IEP meeting was not sufficient. Respondents must proactively try to "convince" Parent to participate in an IEP meeting, and only when Respondents are "unable to convince" Parent to attend can Respondents then proceed without Parent. Doug C. at 1044. A solution to not being able to convince a parent to participate in an IEP meeting is not to deny a student a FAPE, but to proceed without that parent¹¹.

By July 15, 2020, DOE still had not contacted Parent to set up an IEP meeting (FOF 82). Public school started on August 17, 2020 for the 2020-2021 school year, and there is no evidence that an updated IEP was drafted or a meeting was held (FOF 83). For the same reasons why not having an annual review of Student's IEP resulted in a loss of educational opportunity and

¹⁰ Although not argued in Petitioners' closing brief, Petitioners' FAC could be construed as alleging that Respondents failed to have an IEP in effect for Student at the beginning of the 2019-2020 school year. The undersigned finds that Respondents did not fail to have an IEP in effect at the beginning of the 2019-2020 school year. Parent received a copy of the 5/29/2019 IEP, even though the link to the IEP expired (FOF 50). Parent did not complain about the services Student was receiving from Public School-2 to SPED Teacher-1 during the summer of 2019 (FOF 57). Therefore, the 5/29/2019 IEP could have been implemented at the beginning of the 2019-2020 school year, which historically begins around early August, until the annual review date of September 5, 2019.

¹¹ The undersigned is not suggesting that based on these facts that Respondents should have proceeded with an IEP meeting without Parent. See FN9.

significantly impeded Parent's opportunity to participate, not having an IEP in effect at the beginning of the 2020-2021 school year resulted in a loss of educational opportunity and significantly impeded Parent's participation rights.

2. The 5/28/2019 IEP¹² failed to provide sufficient Supplementary Aids and Services for Student to be successful in the Least Restrictive Environment and/or make adequate gains on Student's academic, behavioral, and/or social needs.

In this allegation, Petitioners are alleging that the 5/29/2019 IEP failed to provide sufficient Supplementary Aids and Services for Student to be successful in the least restrictive environment and/or make adequate gains on Student's academic, behavioral, and/or social needs.

"A complete IEP that is fully compliant with the IDEA must be in place at the beginning of each school year for all children with disabilities." Rachel H. v. Department of Education Hawaii, 868 F.3d 1085, 1088 (9th Cir.2017). A complete IEP must include, among other things, the following:

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for the school personnel that will be provided for the child—

- (aa) to advance appropriately toward attaining the annual goals;
- (bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and
- (cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

20 U.S.C. §1414(d)(1)(A)(i)(IV). See also, H.A.R. §8-60-44(a)(4). As discussed below, the

¹² The undersigned notes that the FAC refers to a 5/28/2019 IEP. The actual date of the IEP is May 29, 2019. The Prior Written Notice of Department Action was issued on May 28, 2019, the day before the IEP was finalized (FOF 47, 48). A meeting having not taken place for the 5/29/2019 IEP, the undersigned finds the error in the FAC to be *de minimis*. Furthermore, Respondents did not object to the error in the FAC, and therefore, it is waived. Moving forward, the undersigned will refer to the "5/28/2019 IEP" as the "5/29/2019 IEP."

5/29/2019 IEP fails to provide sufficient Supplementary Aids and Services for Student to be successful in the least restrictive environment and/or make adequate gains on his academic, behavioral, and/or social needs.

3. The phrase “Behavioral Intervention Plan” in the 5/29/2019 IEP is vague and will not allow Parent a means to enforce this modification.

In this allegation, Petitioners are alleging that the phrase “Behavioral Intervention Plan” in the 5/29/2019 IEP is vague and will not allow Parent a means to enforce this modification and “specific needed behavioral interventions were also something that should have been determined at the 5/29/2019 IEP meeting and listed in Student’s 5/29/2019 IEP.” First, with respect to Petitioners’ allegation that “specific needed behavioral interventions were also something that should have been determined at the 5/29/2019 IEP meeting and listed in Student’s 5/29/2019 IEP,” Petitioners do not state in their closing brief what specific needed behavioral interventions, beyond what is contained in the 4/10/2019 BIP, they believe should have been determined at the 5/29/2019 IEP meeting and listed in Student’s 5/29/2019 IEP. Having not put forth any argument or evidence about what specific needed behavioral interventions should have been listed in Student’s IEP besides those in the 4/10/2019 BIP, Petitioners have failed to meet their burden in that regard.

Now, turning to the behavioral interventions that are listed in the 4/10/2019 BIP but not listed in the 5/29/2019 IEP, the undersigned finds that the phrase “Behavioral Intervention Plan” in the “Supplementary Aids and Services” section to be too vague for Parent to enforce.

Student’s 9/5/2018 IEP and 2/4/2019 IEP state that Student will have a “Behavior Support Plan.” During the 2/4/2019 IEP meeting, “it was considered that the IEP team first develop and implement a Behavioral Support Plan to meet [Student’s] needs” but the “severity of

[Student's] behaviors warrant a more in-depth assessment by a LBA, BCBA.”¹³ (FOF 21).

Therefore, the IEP team proposed that an FBA be done by a licensed LBA-BCBA (FOF 21). An FBA was done on March 25, 2019 (FOF 24), and based on the 3/25/2019 FBA, the 4/10/2019 BIP was created (FOF 30). In Student's 4/16/2019 IEP, the Behavior Support Plan was replaced by a “Behavior Intervention Plan.” The 4/16/2019 IEP is similar to the 2/4/2019 IEP with the exception of some changes to the Benchmark/Short-Term Objective for “English Language Arts and Literacy: ___” (FOF 35). The most significant change is the addition of a page worth of objectives under “Benchmark/Short-Term Objective” for “Physical Well-Being, Health, and Motor Development: ___, Health and Personal Care: Safe Practices” to the 4/16/2019 IEP (FOF 36). These objectives are almost identical to the “Progress Monitoring” section of the 4/10/2019 BIP (FOF 36). However, the interventions that describe what the IEP team would do when Student exhibits challenging behavior that are listed in the 4/10/2019 BIP are not in the 4/16/2019 IEP (FOF 33).

The 4/16/2019 IEP is almost identical to the 5/29/2019 IEP with the exception of some changes to the “Supplementary Aids and Services” section and “Clarification of Services and Supports” section (FOF 39, 40, 52, 51). The 5/29/2019 IEP also does not describe the interventions that are in the 4/10/2019 BIP.

Similar to Department of Education, State of Hawaii v. L.S., 2019 WL 1421752, Civil No. 18-CV-00223 JAO-RT (D. Haw. 03/29/2019), Student has behavioral issues that impede Student's ability to make appropriate educational progress (FOF 2, 3). Like the student in L.S., Student was initially given a Behavioral Support Plan; however, unlike student in L.S., Student's

¹³ Based on this statement, it appears that a Behavioral Support Plan had not yet been developed for Student.

behavior was so severe that the IEP team decided that Student needed a more in-depth assessment by an LBA-BCBA, who eventually developed a BIP for Student (FOF 30). Like L.S., the 4/10/2019 BIP “was never made part of the IEP, and was never sent to Parent during the formulation of the IEP.” L.S., 2019 WL 1421752, at *12. None of Respondents’ witnesses testified that a copy of the 4/10/2019 BIP was given to Parent. Parent, on the other hand, testified that Parent did not see a copy of a 4/10/2019 BIP at the 4/16/2019 IEP meeting, and Parent did not recall going over a behavioral intervention plan at the 4/16/2019 IEP meeting. Parent, Tr. Vol., 132:19-133:4. Although District Resource Teacher testified that an IEP meeting was held to discuss the 4/10/2019 BIP, and after reviewing the BIP, BCBA-1 made certain recommendations (District Resource Teacher, Tr. Vol. II, 214:5-215:11), District Resource Teacher did not recall at the time of the due process hearing what was said, discussed and reviewed with regard to the 4/10/2019 BIP at the 4/16/2019 IEP meeting. District Resource Teacher, Tr. Vol. II, 225:5-10. There was no testimony from District Resource Teacher that a copy of the 4/10/2019 BIP was provided to Parent. There is also no documentary evidence that a copy of the 4/10/2019 BIP was given to Parent. No one signed the “Acknowledgement and Consent” form for the 4/10/2019 BIP indicating that they received a copy of the form (FOF 31). There is, however, a copy of a Behavior Intervention Plan “Acknowledgement and Consent” form attached to the 3/25/2019 FBA and signed by Parent on April 16, 2019, but the part acknowledging that Parent had read, understood, participated and received a copy of a Behavior Intervention Plan is “X’ed” out and replaced with the handwritten words “Sign in 4/16/2019.” DOE Ex. 30 at 119. No one testified regarding this form, and the undersigned gives little weight to it. The undersigned therefore determines that while there was discussion about the 4/10/2019 BIP during the 4/16/2019 IEP meeting, based on the evidence, the extent of the discussion is

unclear. What is clear is that Parent did not receive a copy of the 4/10/2019 BIP before or during the 4/16/2019 IEP meeting (FOF 32). Not having the interventions incorporated in the IEP and not having a copy of the 4/10/2019 BIP hinders Parent's ability to effectively participate in the 4/16/2019 IEP meeting. Furthermore, the 4/10/2019 BIP is eleven pages long. Even if Parent was shown a copy of the 4/10/2019 BIP at the 4/16/2019 IEP meeting, which there is no evidence of, reading eleven pages of technical information while trying to listen to what is being said by multiple people affects how well Parent can participate in the meeting.

The undersigned finds that in this case, when Parent was not provided a copy of the 4/10/2019 BIP and the BIP was not incorporated in the 5/29/2019 IEP, the phrase "Behavior Intervention Plan" is an insufficient "statement of the program modifications or supports for school personnel that will be provided for the child..." 20 U.S.C. §1414(d)(1)(A)(i)(IV). Without incorporating the 4/10/2019 BIP or describing the interventions in the 5/29/2019 IEP, Respondents committed a procedural violation that significantly impeded Parent's ability to meaningfully participate in the formation of Student's IEP. "Because the [BIP] was not made part of the IEP, the district was free to amend or curtail the [BIP] without Parent's knowledge or input, which seriously infringes upon Parent's right to participate in the IEP process." L.S., 2019 WL 1421752, at *12. Based on the foregoing, Petitioners have met their burden in showing that the phrase "Behavioral Intervention Plan" in the 5/29/2019 IEP is vague and will not allow Parent a means to enforce this modification.

4. The phrase "Safety Crisis Plan" in the 5/29/2019 IEP is vague and will not allow Parent a means to enforce this modification.

In this allegation, Petitioners are alleging that the phrase "Safety Crisis Plan" in the 5/29/2019 IEP is vague and will not allow Parent a means to enforce this modification and "specific needed safety interventions/measures were also something that should have been

determined at the 5/29/2019 IEP meeting and listed in Student's 5/29/2019 IEP."¹⁴ Parent testified that Parent did not see a copy of the Safety Crisis Plan at the 4/16/2019 IEP meeting, that Parent was never made aware of the details of the Safety Crisis Plan, and that Parent did not know what would happen in the event of a crisis. Parent, Tr. Vol, I, 133:5-14. None of the DOE witnesses contradicted Parent's testimony and a copy of the Safety Crisis Plan was not offered as an exhibit during the due process hearing.

Student's 9/05/2018 IEP lists a "Safety Crisis Plan" in its "Supplementary Aids and Services" section, and the "Clarification of Service and Supports" section states that "a safety crisis plan should be developed. . . ." (FOF 7). Student's 2/04/2019 IEP also lists a "Safety Crisis Plan" in its "Supplementary Aids and Services" section, and the "Clarification of Service and Supports" section again states that "a safety crisis plan should be developed..." (FOF 15). According to the 4/16/2019 IEP, a Safety Crisis Plan was finally developed at the time of the 4/16/2019 IEP meeting (FOF 40).

For the same reasons Respondents committed a procedural violation by not incorporating the 4/10/2019 BIP into the 5/29/2019 IEP, Respondents also committed a procedural violation by not incorporating the Safety Crisis Plan in the 4/16/2019 IEP or 5/29/2019 IEP. Respondents' silence on the issue of the Safety Crisis Plan—none of the DOE's witnesses talked about the Safety Crisis Plan—raises the question of whether one was even drafted. No one testified that a Safety Crisis Plan was drafted, that Parent was provided a copy or that the IEP team even talked about the Safety Crisis Plan with Parent. The undersigned determines that Parent was not provided a copy of the Safety Crisis Plan either before or during the 4/16/2019 IEP meeting.

¹⁴ Petitioners do not argue what specific needed safety interventions/measures, beyond what is contained in the Safety Crisis Plan, should have been determined at the 5/29/2019 IEP meeting and listed in Student's 5/29/2019 IEP, and therefore have not met their burden in this regard.

Having not provided a copy of the Safety Crisis Plan to Parent, Respondents' failure to incorporate the Safety Crisis Plan into the 4/16/2019 IEP or the 5/29/2019 IEP significantly impedes Parent's ability to participate in the IEP process. Based on the foregoing, the undersigned finds that the phrase "Safety Crisis Plan" in the 5/29/2019 IEP is vague and will not allow Parent a means to enforce this modification.

D. TUITION REIMBURSEMENT FOR PRIVATE SCHOOL

Petitioners seek reimbursement for all educational and related expenses for Private School-1 for the 2019-2020 school year and payment for all educational and related expenses for Private School-2 for the 2020-2021 school year. Pet. Closing Brief at 31; FAC. The U.S. Supreme Court has recognized the rights of parents who disagree with a proposed IEP to unilaterally withdraw their child from public school and place the child in a private school and request reimbursement for tuition at said private school from the local educational agency. Florence County School Dist. Four v. Carter, 510 U.S. 7, 12, 114 S. Ct. 361, 364-365, 126 L.Ed.2d 284 (1993) (citing School Comm. of Burlington v. Department of Ed. of Mass., 471 U.S. 359, 369-370, 105 S. Ct. 1996, 2002-2003, 85 L.Ed.2d 385 (1985)), see also 20 U.S.C. §1415(b)(6), (f)(1)(A). A parent who unilaterally places a child in private school pending review proceedings under the IDEA is entitled to reimbursement if the parent can establish that (1) the public placement violated the IDEA, and (2) the private school placement was proper under the IDEA. Doug C., 720 F.3d 1038, 1041, 1047-1048 (9th Cir.2013) (citing Carter, 510 U.S. at 15, 114 S. Ct. 361). If both are met, "the district court must then exercise its 'broad discretion' and weigh 'equitable considerations' to determine whether, and how much, reimbursement is necessary." C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist., 635 F.3d 1155, 1159 (9th Cir. 2011) (citing Carter, 510 U.S. at 15-16, 114 S. Ct. 361).

The Ninth Circuit Court of Appeals has adopted the standard put forth by the Second Circuit in Frank G. v. Bd. Of Educ., 459 F.3d 356, 365 (2nd Cir.2006), where “to qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child’s potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.” C.B., 635 F.3d at 1159 (citing Frank G., 459 F.3d at 365). Parental placement can be appropriate, even if it does not meet state standards. 34 C.F.R. §300.148(c).

In this case, the public placement of Student violated the IDEA in such a manner that Student was denied a FAPE. This Hearings Officer now examines whether the unilateral placement of Student at Private School-1 in 2019-2020 school year and Private School-2 in 2020-2021 school year were proper under the IDEA.

Private School-1 in 2019-2020 School Year

An impartial due process hearing may be requested “within one hundred and eighty calendar days of a unilateral special education placement, where the request is for reimbursement of the costs of the placement.” H.R.S. §302A-443(a)(2). “The unilateral special education placement timeframe begins on the student’s first day of attendance.” H.A.R. §8-60-61(a)(2). Parent signed a Request for Release form on July 31, 2019, requesting the release of Student from Public School-2 to transfer to Private School-1. Student attended Private School-1 at the beginning of fall 2019, and the school year began sometime in August 2019. (FOF 61-63). The instant Complaint and Resolution Proposal was filed on July 15, 2020 and the FAC was filed on August 20, 2020 (FOF 81, 84). August 2019 to July 15, 2020 is more than one hundred eighty

calendar days. Therefore, Petitioners are barred from seeking reimbursement for the 2019-2020 school year.

In addition to being barred because of an untimely request for impartial due process hearing, Petitioners failed to comply with the notice provision of 20 U.S.C. §1412(a)(10)(C)(iii). According to 20 U.S.C. §1412(a)(10)(C)(iii), reimbursement may be reduced or denied and states in pertinent part:

The cost of reimbursement described in clause (ii) may be reduced or denied—

- (I) if—
 - (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
 - (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);
- (II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or
- (III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

Student was removed from Public School-2 on July 31, 2019 when Parent signed the 7/31/2019 Request for Release and began school sometime around August 20, 2019 when Student took an initial assessment at Private School-1 (FOF 61, 65). Prior to the removal of Student from Public School-2 in the 2019-2020 school year, the most recent IEP meeting that Parent attended was the April 16, 2019 IEP meeting. There is no evidence that during the April 16, 2019 IEP meeting Parent informed the IEP Team that Parent was rejecting the placement proposed by DOE to provide a free appropriate public education to Student, including stating

Parent's concerns and Parent's intent to enroll Student in a private school at public expense. There is also no evidence that 10 business days prior to the removal of Student from Public School-2 Parent had given written notice to DOE that she was rejecting the placement proposed by DOE to provide a free appropriate public education to Student, including stating Parent's concerns and Parent's intent to enroll Student in a private school at public expense. For these reasons, Petitioners request for reimbursement for the 2019-2020 school year is denied.

Private School-2 in 2020-2020 School Year

Private School-2 is not yet a licensed school in the State of Hawaii, but it is in the process of becoming licensed [REDACTED] (FOF 123).

Private School-2 is also in the process of seeking preliminary accreditation [REDACTED] [REDACTED] (FOF 123). Private School-2's pending licensure and accreditation status does not preclude it from being deemed an appropriate placement¹⁵.

¹⁵ H.R.S. §302A-443.5 reads in pertinent parts: Education of students with disabilities; private residential facilities; special education schools or programs; accreditation.

(a) As used in this section:

“Nonpublic special education school or program” means any privately owned or operated preschool, school, educational organization or corporation, treatment facility, day program, residential program, or any other placement that maintains, conducts, or provides classes or programming, including related services as defined by federal or state laws, rules, or regulations, for the purpose of offering instruction or treatment to students with disabilities for consideration, profit, tuition, or fees.

(c) Any nonpublic special education school or program that:

- (1) Is not accredited by the Western Association of Schools and Colleges, any Hawaii affiliate of the Western Association of Schools and Colleges, the Hawaii Association of Independent Schools, the National Association for the Education of Young Children, or the National Early Childhood Program for Accreditation; and
- (2) Receives funding from the State, either directly or through parental reimbursement,

Private School-1 was a non-profit program established in May of 2019 by Director (FOF 91). Director used Private School-1 to create Private School-2. Director used Private School-1 to determine and develop a program and to establish what the costs would be to run the program (FOF 95). Private School-2 is a for-profit business [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(FOF 98). Private School-2 has a total of ___ students [REDACTED] [REDACTED] (FOF 99, 102).

Although Private School-2 does not have licensed teachers or special education teachers, the RBTs serve as teachers and receive guidance from a special education consultant (FOF 106, 107, 111, 112). Private School-2's curriculum follows the Hawaii Early Learning and Development ("HELD") standards (FOF 117).

Director testified that Student made significant progress while in Private School-1. Student's behavior problems decreased and Student was able to better communicate and did not just rely on pointing and grunting (FOF 74). According to Parent, while in Private School-1, Student made social and academic progress. Student no longer threw tantrums and didn't have self-harming behaviors during transitions. Student no longer gave Student's self bruises on Student's forehead. At Private School-1, Student was able to say "mom". Student is more social

Shall apply for accreditation within ninety days from the date of accepting a student with disabilities who was placed there as the result of a hearing officer's decision pursuant to section 302A-443, court order, settlement agreement, or placement by the department. Within the ninety-day application period, the nonpublic special education school or program shall provide proof of its application for accreditation to the department.

and interacts more with Student's sister. While in Private School-1, Student engaged in imaginative play, which Student did not do before attending Private School-1. Student is able to engage in a back-and-forth communication when Student wants something, instead of throwing tantrums or hurting Student's self. Parent, Tr. Vol. I, 136:17-138:8. Parent testified that Student continues to make progress in Private School-2. Parent, Tr. Vol. I, 138:21-24.

Student is in the ___ class in Private School-2 and Student has ___ classmates (FOF 100). School starts at 8:00 a.m. and ends at 2:00 p.m. Student takes a nap from 11:15 a.m. to 1:00 p.m. each day (FOF 101). A regular day for Student consists of eating breakfast, toileting, sensory activities, circle time, gross motor play, movement & imitation, snack time, story time, arts & crafts, learning center, play & social skills, lunch, puzzles/books/puppet time (FOF 101). Student receives speech-language therapy from Director (FOF 152-153) and is able to interact with non-disabled children through the reverse inclusion program (FOF 135-140).

Director is a certified and licensed speech-language pathologist and a certified BCBA (FOF 157). Director created Student's ABA program using the Verbal Behavior Milestones Assessment and Placement Program (FOF 67-71). In Private School-2, Student has an RBT with Student at all times (FOF 143). The RBT implements Student's ABA program and is overseen by Director (FOF 141, 146, 149, 150). Student does not have a BIP, nor is Student a candidate for an FBA at Private School-2 (FOF 119, 122).

Respondents argue that Private School-2 is not a proper placement because Private School-2 will not provide the least restrictive environment for Student and because Director gave contradictory testimony that Private School-2 is an ABA program and an educational program. DOE Closing Brief at 24-25. Respondents' arguments fail because "the Ninth Circuit [has] held that a private program does not need to meet all of a student's educational needs, and merely

needs to provide specially designed educational instruction for the unique needs of the student.” L.S., 2019 WL 1421752, at *14 (citing C.B., 635 F.3d at 1159). Even though Director characterized Student’s program as an educational program when justifying the cost of a special education consultant, this does not make the private school not appropriate. With respect to Respondents’ LRE argument, the “Supreme Court has held that the IDEA’s requirements of public schools are not applicable to private school placement.” Id. at *15 (citing Carter, 510 U.S. at 13-14, 114 S.Ct. 361). Parental placement can be appropriate even if it does not meet state standards. 34 C.F.R. §300.148(c). Based on the foregoing reasons, Petitioners have proven that Private School-2 placement was proper under the IDEA.

Under IDEA, if Petitioners succeed in meeting their burden of proving that the DOE violated the IDEA and denied Student a FAPE, and that the private placement is proper, the reviewing body has the authority to consider equity in determining whether and in what amount tuition reimbursement is to be awarded to a parent that unilaterally places a child at a private program. C.B., 635 F.3d at 1159. “Regarding reimbursement, courts may consider any relevant factor, including the reasonableness of the private tuition, [citation omitted], and the conduct of parents in the IEP formulation process.” LS, 2019 WL 1421752, at *14. The undersigned Hearings Officer finds that Private School-2’s tuition costs to be unreasonable because it includes redundant, excessive, and improper services far beyond what Student needs. Id., at *15.

The total tuition and fees for the 2020-2021 school year for ___ is \$222,526.80 (FOF 126, 135). Private School-2 relied on a 2020-2021 school year rate sheet from [REDACTED] [REDACTED] to formulate its rates. Director, Tr. Vol. I, 66:22-67:7; Pet. Ex. 2 at 92. Private School-2 charges \$4,000 per month for tuition. The \$4,000 tuition covers materials and supplies for Student’s program, all assessments, the assessment processes, ABA

programming and the special education curriculum programming, and the overhead of the facility (FOF 134). However, Private School-2 charges a 15% administrative fee (\$27,495.00) to cover office supplies, legal and accounting services costs, insurance to operate the school, the day-to-day operations, and salary of an operation manager (FOF 128). The 15% administrative fee is redundant of the overhead cost of the facility charged under tuition. Therefore, the 15% administrative fee will be taken out of the reimbursement¹⁶.

Private School-2 assesses \$1,000/year to perform a Distance Learning Program Assessment (FOF 129). The Distance Learning Program Assessment will take the Director and an RBT approximately 4-5 hours each to conduct, and the Director and RBT will be paid their hourly rate for providing the distance learning (FOF 129, 131). Director gets paid \$200/hour as a BCBA and an RBT gets paid \$75/hour (FOF 127). Director and RBT will be paid their hourly rate to conduct the assessment. Furthermore, all assessments throughout the year is charged under tuition (FOF 134). To add an additional \$1,000 on top of the hourly rate and the tuition is excessive and redundant. Therefore, the \$1,000/year Distance Learning Program Assessment will be taken out of the reimbursement.

The Distance Learning Program and Supplies will cost \$1,500/year and covers an iPad, insurance for the iPad, a cover for the iPad, and any educational programming materials and supplies involved in providing a distance learning program. Student will be charged an extra \$500 because there will be a staff member (RBT, BCaBA or BCBA) to implement the program (FOF 130). First, the \$4,000 monthly tuition already covers materials and supplies for Student's

¹⁶ [REDACTED]

Just because ___ charges an administration fee does not mean that it is appropriate for Private School-2 to charge an administration fee.

program. Second, Private School-2 is charging \$500 for an assistive technology fee to cover the use of visual aids, books and an iPad¹⁷ (FOF 151). Whatever materials and supplies that Private School-2 would have used for Student during in-person instruction can be given to Parent to utilize at home. The assistive technology fee covers the cost of an iPad. Finally, an additional \$500 fee because there will be a staff member (RBT, BCaBA or BCBA) to implement Student's program is excessive, redundant and unreasonable. The RBT, BCaBA and BCBA will be charging their hourly rate to implement Student's distance learning (FOF 131). There is no reason to tack on an additional \$500 on top of their hourly rates. Therefore, the Distance Learning Program and Supplies of \$2000 will be taken out of the reimbursement.

Private School-2 also charges \$10,000/year for a special education consultant. The consultant is located in ___ and does not have direct contact with Student. Because Private School-2 does not have any licensed teachers or special education teachers, the consultant will advise the RBT, BCBA or anyone who is involved in implementing Student's ABA program. (FOF 106, 111, 112, 116). Although Student is currently ___ years old, Student's current level of functioning is ___ with some skills emerging into the ___ level (FOF 114). As the Director testified, Student is only in the "pre-academic range in reading," and "doesn't yet have those skills that are necessary for more pre-academic and academic programming" (FOF 114). Private School-2 would use the consultant to evaluate pre-academic and academic curriculum and programs that "might be" appropriate for Student (FOF 113). Evaluating pre-academic and academic curriculum and programs that "might be" appropriate for Student is overly ambitious

¹⁷ Charging \$500 for visual aids, books and iPad is redundant because tuition already covers materials and supplies; however, the undersigned will allow the \$500 assistive technology fee to stand to cover the cost of an iPad that will be utilized solely by Student and not be shared by other students.

when Student does not currently have the skills that are necessary for pre-academic and academic programming¹⁸. Based on Student's level of functioning, the undersigned questions whether the consultant is necessary for this school year for Student; however, even assuming that is it necessary, special education curriculum programming is already included in the \$4,000 monthly tuition. While Private School-2 is not required to have special education teachers, if Parent is being charged for special education, then Private School-2 should provide Student with special education. Private School-2 can either employ a special education teacher who can provide special education for which Parent is already being charged, or Private School-2 can employ a non-teacher and pay on its own to educate this non-teacher to provide special education for which Parent is already being charged. It is not reasonable for Private School-2 to pass on the expense of educating their staff to provide a service that the Parent is already paying for. Based on the above, the \$10,000/year special education consultant charge is taken out of the reimbursement.

Respondents denied Student a FAPE when Student's 5/29/2019 IEP expired on or about September 5, 2019 and Respondents did not conduct an annual review of the IEP or had an IEP in effect for Student at the beginning of the 2020-2021 school year. Student's 5/29/2019 IEP also fails to provide sufficient Supplementary Aids and Services for Student; however, a reduction in reimbursement is warranted because the tuition and fees charged by Private School-2 is unreasonable.

E. PETITIONERS' SECTION 504 OF THE REHABILITATION ACT OF 1974 CLAIM

¹⁸ At the beginning of the 2019-2020 school year, Student was pointing and grunting as Student's primary mode of communication. Private School-1 was able to develop and teach Student a "communication system" utilizing sign language and speech therapy. (FOF 74). According to Parent, Student is now able to say "mom" which is a huge accomplishment. Parent, Tr. Vol. I, 136:22-137:5.

Petitioners' FAC "assert[s] Student's eligibility for rights and protections under Section 504 of the Rehabilitation Act of 1974." DOE Ex. 3 at 00012. Petitioners, however, did not present any evidence or argument during the due process hearing and in their closing brief regarding their Section 504 claim. Based on the lack of evidence or argument to support this claim, the undersigned Hearings Officer concludes that Petitioners have effectively abandoned their Section 504 claim and have not met their burden of proof.

VI. DECISION

Based upon the above-stated Findings of Fact and Conclusions of Law, the undersigned Hearings Officer concludes that Petitioners have proven a denial of FAPE by failing to revise Student's 5/29/2019 IEP by the annual review deadline, to have in effect an IEP for Student at the beginning of the 2020-2021 school year, and to provide sufficient Supplementary Aids and Services for Student, which resulted in a loss of educational opportunity and significantly impeded Parent's participation rights. Petitioners further proved that Private School-2 is an appropriate placement for Student and that Parent is entitled to reimbursement for tuition and related expenses for Student's attendance at Private School-2 for school year 2020-2021. The undersigned Hearings Officer finds that the equitable considerations in this case warrants a reduction of \$40,495.00 in reimbursement for tuition and related expenses or direct tuition payment to Private School-2 for school year 2020-2021. Petitioners proffered no evidence regarding transportation, and therefore that aspect of the relief sought by Petitioners is denied.

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

1. The IEP team shall, within ten (10) school days of this Order, decide if any additional data or information or assessments are needed to determine Student's current needs.

Respondents shall make reasonable effort to obtain any additional data or information

that is needed. Any assessments are to be scheduled and completed within forty (40) calendar days of this Order.

2. An IEP team meeting shall be held within ten (10) school days of obtaining any additional data or information and the completion of all aforementioned assessments. If, however, the IEP team determines that no additional data or information or assessments are needed to determine Student's current needs, the IEP team meeting shall be held within ten (10) school days of that determination.
3. Any delay in meeting any of the deadlines in this Order because of an act or acts of Petitioners and/or their representatives and/or their private providers, will extend the deadlines set herein by the number of days attributable to Petitioners and/or their representatives and/or their private providers. Respondents shall document in writing any delays caused by Petitioners and/or their representatives and/or their private providers.
4. Within 30 calendar days of receiving monthly itemized invoices from Private School-2 for services rendered, Respondents shall make payment, less any payment due to Parent pursuant to paragraph 5 herein, for Student's tuition for the 2020-2021 school year. Private School-2's itemized invoices shall include, at a minimum, a description of the services rendered, the date and duration of the services, and the name and title (such as BCBA, RBT, BT) of the person(s) performing the services.
5. In the event that Parent paid for Student's tuition, Parent will be reimbursed for the amount paid. Respondents shall reimburse Parent within 30 calendar days of receiving proof of payment from Parent.

6. Payment(s) pursuant to paragraphs 4 and 5 shall not exceed a total amount of \$182,031.80.

RIGHT TO APPEAL

The decision issued by this Hearings Officer is a final determination on the merits. Any party aggrieved by the findings and decision of the Hearings Officer shall have 30 days from the date of the decision to file a civil action, with respect to the 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, January 27, 2021.

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