



OFFICE OF DISPUTE RESOLUTION

DEPARTMENT OF THE ATTORNEY GENERAL

STATE OF HAWAI'I

In the Matter of STUDENT, by and through
PARENTS/LEGAL GUARDIANS,¹

Petitioner(s),

vs.

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

Respondents.

DOE-SY2021-032

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: February 8, 2021
May 11-12, 2021

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On October 26, 2020, the Department of Education, State of Hawai'i and Christina Kishimoto, Superintendent of the Hawai'i Public Schools (hereinafter "Respondents" or "DOE") received a request for a due process hearing (hereinafter "Complaint") under the Hawai'i Administrative Rules Title 8, Chapter 60, in accordance with the Individuals with Disabilities

Education Act, from Student, by and through Parents/Legal Guardians (hereinafter collectively “Petitioners”). Respondents submitted a response to Petitioners’ Complaint on November 5, 2020.

A prehearing conference was held on November 23, 2020 with Hearings Officer Chastity Imamura, Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Kris S. Murakami, Esq. (hereinafter “Ms. Murakami”), representing Respondents. During the prehearing conference, the Due Process Hearing was scheduled for January 11, 12, and 14, 2021. At the prehearing conference, a deadline for substantive motions to be filed was given as December 4, 2020, opposition briefs were due on December 11, 2020, and reply briefs, if any, were due on December 17, 2020. A hearing date of December 22, 2020 at 10:00 a.m. was set for any motions to be heard.

On December 4, 2020, Petitioners timely filed Petitioners’ Motion for ‘Stay-Put’ Order and for Partial Summary Judgment; Memorandum in Support of Motion; Declaration of Counsel Keith H.S. Peck; Declaration of [Private School Director]; Exhibits “1” through “4;” and Certificate of Service (hereinafter “Motion”). On December 11, 2020, Respondents filed Respondents’ Memorandum in Response to Petitioners’ Motion for ‘Stay-Put’ and Memorandum in Opposition to Petitioners’ Motion for Partial Summary Judgment filed on December 4, 2020; Declaration of Kris S. Murakami; Declaration of [District Educational Specialist]; Exhibit “A”; Certificate of Service (hereinafter “Response”). On December 14, 2020, Petitioners timely filed their Reply Memorandum in Support of Motion; Declaration of Counsel; Exhibit “5” & “6”; Certificate of Service (hereinafter “Reply”).

On December 22, 2020, the hearing was held for Petitioners’ Motions. Present at the hearing were Hearings Officer Chastity T. Imamura, Mr. Peck, on behalf of Petitioners, Ms.

Murakami, on behalf of Respondents, and the assigned court reporter. The hearing on Petitioners' Motions was conducted via the Zoom web-based video conferencing platform due to government mandates related to the global pandemic involving coronavirus or COVID-19. An Order Granting Petitioners' Motion for 'Stay-Put' Order was filed on December 30, 2020. An Order Denying Petitioners' Motion for Partial Summary Judgment was also filed on that date.

Due to the coronavirus 2019 global pandemic, the parties stipulated to the Due Process Hearing (hereinafter "Hearing") being conducted via video conferencing to ensure compliance with government mandated social distancing.² An Order Regarding Video Conference Due Process Hearing was issued on December 14, 2020, which set forth the parameters for the video conference hearing. These parameters included: the instructions to participate via the Zoom video conference internet platform; a court reporter would participate in the video conference hearing, swear in the witnesses, and transcribe the proceedings; all witnesses were required to participate in the Hearing using both the video and audio functions of the Zoom platform; and that witnesses and parties would ensure confidentiality of the proceedings by participating in a private setting.

On January 11, 2021, prior to the start of the Hearing, Ms. Murakami requested an opportunity to speak with Mr. Peck further about a possible resolution to the case. Upon further discussion, both parties agreed to continue the Hearing to allow for further discussions between the parties for a possible resolution of this case. The Hearing was continued to February 8-9, 2021. On February 8, 2021, the parties were still in discussions about a possible resolution to the case, however one of Petitioners' witnesses had a busy schedule that was difficult to coordinate

² See Governor of the State of Hawai'i's Seventeenth Proclamation Related to the COVID-19 Emergency, effective December 16, 2020.

for the Hearing, so the parties agreed to start the Hearing and have the witness testify and then continue the remainder of the witnesses and evidence for another date.

The Hearing commenced on February 8, 2021, using the Zoom video conferencing platform. Each attendee to the Hearing was sent a link through email to access the Hearing by the Office of Dispute Resolution. Present in the video conference Hearing were Hearings Officer Chastity T. Imamura; Parents/Legal Guardians (hereinafter “Parents”) and Mr. Peck on behalf of Petitioners; and District Educational Specialist (hereinafter “DES”) and Ms. Murakami on behalf of Respondents, as well as the assigned court reporter. Private Registered Behavior Technician (hereinafter “Private RBT”) testified on behalf of Petitioners. At the conclusion of Private RBT’s testimony, the Hearing was continued to March 8-9, 2021.

The parties continued to discuss possible resolutions to the case and the Hearing was rescheduled again to April 6-7, 2021 and once again to May 11-12, 2021. Due to the delays in the Hearing dates for possible resolution of the case, Respondents requested an extension of the decision deadline from January 9, 2021 to February 23, 2021. Petitioners also requested an extension from February 23, 2021 to April 9, 2021. Respondents again requested an extension from April 9, 2021 to May 24, 2021 to accommodate the latest dates set for the Hearing. All the aforementioned requests for extension were granted and the deadline for the decision was set for May 24, 2021.

On May 11, 2021, the Hearing resumed after it was determined that a resolution could not be reached by the parties. At the continued Hearing, Petitioners called Parent as their witness during their case-in-chief and rested. The parties again requested additional time to discuss matters involving a possible resolution, and the Hearing was continued to May 12, 2021. On May 12, 2021, Respondents presented their case, calling Care Coordinator, Speech-Language

Pathologist (hereinafter “SLP”), and Vice Principal to testify. Petitioners did not present rebuttal evidence.

Each party submitted their exhibits for the Hearing by the disclosure deadline of January 4, 2021. On Monday, May 17, 2021, this Hearings Officer provided counsel with a list of the exhibits that were addressed or mentioned during the Hearing or that were specifically requested by either party as part of the Hearing. Due to the number of additional exhibits that were submitted by the parties, this Hearings Officer requested that the parties submit a final list of exhibits that they wanted to be considered as part of the decision in this case by Monday, May 24, 2021. Each party was also given the opportunity to state their objections to any proposed exhibits submitted by the opposing party by Friday, May 28, 2021.

Petitioners submitted the following additional exhibits for consideration by this Hearings Officer in the Decision: Petitioners’ Exhibit 3, page 296 and pages 350-353. Respondents did not state any objections to these exhibits being received as evidence for consideration in the decision, so they were received as evidence. This Hearings Officer also received Respondents’ copy of an audio recording, Exhibit 77, since Petitioners’ audio recording of the same meeting was received and could provide additional clarity of the discussions at the meeting.

Petitioners’ exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 001-016; Exhibit 2, pages 019-237, 239-295; Exhibit 3, pages 296-360 (including two pages numbered 313), and a link to the meeting audio recording. Respondents’ exhibits that were received and considered as part of this Decision are as follows: Exhibit 1, pages 003-018; Exhibit 6, page 027; Exhibit 7, page 028; Exhibit 76, pages 444-448, and Exhibit 77, a link to the meeting audio recording.

Both parties wanted the opportunity to submit closing briefs regarding the legal issues and the relevant facts supporting those issues to this Hearings Officer for review. Due to the request by the parties to provide written closing briefs for consideration, Petitioners submitted another request for extension, which was granted. The new deadline for this Decision is July 9, 2021. The deadline by which the briefs were to be submitted was Friday, June 18, 2021. Both parties timely submitted their closing briefs on that date.

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.

II. JURISDICTION

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

III. ISSUES PRESENTED

Petitioners assert seven (7) issues in the Complaint to be addressed at the Hearing:³

1. Whether Student’s Individualized Educational Program (hereinafter “IEP”) of October 12, 2020 (hereinafter “IEP-10/12/2020”) would allow Student to make appropriate progress toward Student’s needed skills given the formulation of the objectives in the IEP.
2. Whether Respondents denied Student a free appropriate public education (hereinafter “FAPE”) in Student’s IEP-10/12/2020 where Student’s placement for extended school year services was not defined and/or was not the least restrictive environment for Student.

³ Petitioners’ Issue #1 listed in the Complaint related to Student’s stay-put placement during the pendency of the Hearing and was resolved via prehearing motion, so will not be discussed in this Decision.

3. Whether Student's IEP-10/12/2020 addresses Student's behavioral needs through behavioral supports, services and/or interventions.
4. Whether Student's IEP-10/12/2020 addresses Student's need to access Student's home and community program and/or engage with non-disabled peers.
5. Whether Student's IEP-10/12/2020 is ambiguous on the Individual Instructional Support Student will receive in the use of the term "daily" for frequency, and whether Student will receive 2:1 support by a registered behavioral technician.
6. Whether Respondents denied Student a FAPE by placing Student in an over restrictive placement in Student's IEP-10/12/2020.
7. Whether Student's IEP-10/12/2020 provides Student with a current means to implement the IEP.

IV. FINDINGS OF FACT

Student's background

1. Student is [REDACTED] years old and is a resident in Home School's district.⁴
2. Student is eligible for IDEA services under the criteria of [REDACTED], which include deficits in [REDACTED]. These deficits impact Student's ability to gain skills in the areas of [REDACTED].⁵
3. Student has significant behavioral problems, which include [REDACTED].⁶
4. Student has been attending Private School for approximately [REDACTED].

⁴ Petitioners' Exhibit 1, page 001 (hereinafter referenced as "P-Ex.1, p.001"), Respondents' Exhibit 1, page 004 (hereinafter referenced as R-Ex.1, p.004").

⁵ P-Ex.1, p.002, R-Ex.1, p.004.

⁶ Testimony of Parent, Transcript of Proceedings, Volume 2, page 91, lines 3-17 (hereinafter referenced as "Tr.V2, 91:3-17").

█ years.⁷

5. In August and October 2019, Respondents prepared an IEP for Student (hereinafter referred to as “IEP-10/2019”). Student’s IEP-10/2019 placed Student at Private School for implementation of Student’s IEP-10/2019.⁸
6. On November 26, 2019, Petitioners filed a Complaint and Resolution Proposal objecting to the IEP-10/2019 under DOE-SY1920-028.⁹
7. One of the issues in Petitioners’ November 26, 2019 Complaint was “Whether the 10/28/2019 IEP denied Petitioners a FAPE because it places Student into a private program that will not implement the IEP.” Petitioners further clarified that Private School did not agree to implement the IEP in lieu of Student’s program at Private School.¹⁰
8. Attached to the Complaint in DOE-SY1920-028 as Exhibit “4” was an email from Private School Director to Home School’s previous vice principal regarding the IEP-10/2019. In the email, Private School Director indicated that Private School did not believe that the IEP-10/2019 was an appropriate program for Student and that Private School did not agree to implement the IEP-10/2019.¹¹
9. Case number DOE-SY1920-028 was resolved in February 2020 through a settlement agreement dated January 31, 2020 (hereinafter referred to as “SA-1/31/2020”). In the SA-1/31/2020, the parties agreed to the following relevant provisions: “1) The DOE will directly fund Student’s private school educational and related expenses for the

⁷ Testimony of Parent, Tr.V2, 90:14-17.

⁸ P-Ex.3, p.333, 338.

⁹ P-Ex.3, p.299-349.

¹⁰ P-Ex.3, p.304.

¹¹ P-Ex.3, p.345-346.

- “[Private School] Program” in a timely manner that does not threaten the potential for the continuing engagement of Student in any aspect in [Student’s] program. This funding will continue until October 31, 2020; ... 3) The DOE recognizes the “[Private School] Program” as the “stay put” placement for Student; 4) The Parties will convene Student’s annual IEP meeting on or before October 28, 2020.”¹²
10. In December 2019, SLP did an observation of Student at Private School for one hour. SLP documented notes from the observation in the DOE’s computer event log.¹³
11. On December 20, 2019, Care Coordinator sent an email to Private School Director and Private RBT to request the progress reports for the quarter and overall grades for the first semester of the school year.¹⁴
12. Between December 2019 and October 2020, Care Coordinator testified that Care Coordinator attempted to contact Private School to obtain records and data for Student, however no documentation of these requests was made a part of the record in this case.¹⁵
13. On October 2, 2020, Vice Principal sent an email to Parents to schedule an IEP meeting to develop an annual IEP for Student pursuant to the SA-1/31/2020. Vice Principal inquired if Parents would be available on October 12, 2020. Vice Principal further stated in the email “Please help coordinate [Private School’s] participation in the IEP meeting.”¹⁶
14. Parents responded to Vice Principal’s October 2, 2020 email on October 5, 2020,

¹² P-Ex.3, p.352-353.

¹³ R-Ex.6, p.027.

¹⁴ R-Ex.7, p.028.

¹⁵ Testimony of Care Coordinator, Tr.V3, 158:20-159:12, 294:17-21.

¹⁶ Testimony of Vice Principal, Tr.V3, 293:8-17; P-Ex.3, p.354.

indicating that Parents would be available for the meeting on October 12, 2020.

Parents requested that the team set aside a four (4) hour block of time to try to get an IEP completed for Student. Parents indicated that they wanted to participate in the meeting via telephone.¹⁷

15. On October 6, 2020, Private RBT and Private Board-Certified Behavior Analyst (hereinafter “Private BCBA”) both sent emails to Parents indicating that they were unable to attend the October 12, 2020 IEP meeting. Private RBT related that Private RBT needed two (2) weeks’ notice for any IEP meeting due to scheduling of other matters.¹⁸

16. It does not appear that Private RBT’s and Private BCBA’s emails were forwarded to Home School, but Care Coordinator was informed that they needed two weeks’ notice to attend IEP meetings.¹⁹

17. On October 8, 2020, Care Coordinator received Student’s progress reports from Private School for the 2019-2020 school year.²⁰

18. Care Coordinator did not specifically ask for Student’s program at Private School nor any data, assessments, behavioral plans, or other components of Student’s program besides the progress reports and report cards but believed that the term ‘progress report’ would include all of those additional items.²¹

19. On October 11, 2020, Parents sent an email to Care Coordinator, Principal, and two

¹⁷ P-Ex.3, p.354.

¹⁸ Testimony of Private RBT, Tr.V1, 16:11-17:5.P-Ex.3, p.356-357.

¹⁹ See P-Ex.3, audio recording of IEP meeting, approximate timestamp [1:40-1:54] (hereinafter referred to as “P-Ex.3, IEP recording [1:40-1:54]”); R-Ex.77, [00:04-00:14].

²⁰ Testimony of Care Coordinator, Tr.V3, 158:7-10, 174:10-16,

²¹ Testimony of Care Coordinator, Tr.V3, 174:10-16, 204:25-206:16.

- other DOE personnel of Parents' concerns regarding Student's IEP. These concerns emphasized Student's progress at Private School under Private School's program, which they noted was designed to transition Student into post-IDEA living. Parents noted that Student's program is meant to broaden Student's daily interactions and activities that Student may be able to access after IDEA programming ends.²²
20. On October 12, 2020, the IEP team held a meeting to develop Student's annual IEP, in accordance with the SA-1/31/2020.²³
21. Present at the IEP meeting were Parents, Vice Principal, Care Coordinator, SLP, Occupational Therapist (hereinafter "OT"), General Education Teacher-Curriculum Coordinator, Student Services Coordinator, School Psychologist, and Special Education Teacher.²⁴
22. At the start of the IEP meeting, Care Coordinator informed the team that Private School representatives had indicated that they needed at least two (2) weeks' notice to attend an IEP meeting, so they were not attending the October 12, 2020 IEP meeting.²⁵
23. Care Coordinator also informed the team that Private School had sent data for Student in the form of progress reports, a speech-language therapy report, and an occupational therapy report.²⁶
24. As the team began going through the draft IEP that was provided to the team members for reference during the meeting, Care Coordinator informed Parents that

²² Testimony of Parent, Tr.V2, 105:1-107:4; P-Ex.3, p.358.

²³ See P-Ex.3, IEP recording [3:12-3:16, 14:19-14:50], R-Ex.77 [1:33-1:36, 12:36-12:58].

²⁴ P-Ex.1, p.016, R-Ex.1, p.018; *see also generally* P-Ex.3, IEP recording, R-Ex.77.

²⁵ P-Ex.3, IEP recording [1:40-1:54], R-Ex.77 [00:04-00:14].

²⁶ P-Ex.3, IEP recording [8:41-8:53], R-Ex.77 [06:56-07:11].

the IEP draft was based on the data that Private School had sent Care Coordinator. Vice Principal then asked Parents if they wanted Private School to attend the IEP meeting. Parents responded by saying that it was the DOE's IEP meeting, so they are making themselves available.²⁷

25. Parents informed the IEP team repeatedly throughout the meeting that the program that Private School was implementing was not the DOE's previous IEP, but was a program created by Private School. Parents also informed the IEP team that the program that Private School was implementing was the reason that Student was making progress and what they wanted to have remain in place for Student.²⁸

26. The IEP team discussed the draft IEP present levels of educational performance and goals and objectives; and after each section, inquired if Parents had anything to add. Parents reminded the team that they simply wanted Student to continue Private School's program because Student was making progress under that program.²⁹

27. Parents did indicate that they did not understand where the IEP team selected Student's needs for the IEP present levels of educational performance, and Care Coordinator informed Parents that it was based on what Private School had sent them.³⁰

28. When the IEP team discussed Student's special education and related services section of the IEP, Parents asked the team from where the numbers of minutes in the draft IEP were derived. Care Coordinator and Vice Principal reported that it was based on

²⁷ P-Ex.3, IEP recording [13:56-15:28], R-Ex.77 [12:15-13:39].

²⁸ See P-Ex.3, IEP recording, R-Ex.77.

²⁹ P-Ex.3, IEP recording [15:30-28:40], R-Ex.77 [13:46-26:52].

³⁰ P-Ex.3, IEP recording [37:37-39:24], R-Ex.77 [36:14-38:21]

Student's previous IEP, the information from Private School, and the invoices for payments that the DOE had been making to Private School.³¹

29. The IEP team also discussed Student's behaviors and asked Parents if Student had a behavior support plan at Private School. Parents indicated that Student must have one, but they were not familiar with it for the IEP meeting. The IEP team then noted that they will ask Private School for the behavior support plan later but that they would put it in the IEP.³²

30. The IEP team then went through a discussion of the continuum of educational placements where Student could be placed, starting with the general education classroom to homebound schooling. Parents stated during this discussion that they did not understand why they needed to have this discussion, but wanted Student to be placed at Private School.³³

31. The IEP team then determined that Student would receive Student's services at Private School and used language similar to Student's IEP-10/2019 for the educational placement for Student.³⁴

32. While both Care Coordinator and Vice Principal believed that the IEP team had enough information to develop Student's IEP at the October 12, 2020 meeting; the team did not have information on Student's daily schedule at Private School, a written copy of Student's educational program at Private School, any behavior plans for Student at Private School, nor any recent assessments or data collection information

³¹ P-Ex.3, IEP recording [1:00:57-1:04:48], R-Ex.77 [59:16-1:03:40].

³² P-Ex.3, IEP recording [1:08:40-1:10:45], R-Ex.77 [1:07:00-1:09:03]

³³ P-Ex.3, IEP recording [1:14:58-1:22:46], R-Ex.77 [1:13:20-1:21:04].

³⁴ P-Ex.1, p.015, R-Ex.1, p.017.

from Private School.³⁵

33. At no time during the IEP meeting did the team propose postponing the IEP meeting to secure the presence of someone from Private School who would have additional information on Student's progress and/or program. Instead, the team asked Parents if they had any information that the team wanted. Parents responded consistently that they did not know the details of Student's program at Private School, only that it was working.³⁶

Student's IEP-10/12/2020

34. Student's IEP-10/12/2020 contained present levels of educational performance information taken directly from the progress reports for Student from Private School.³⁷

35. Student's IEP-10/12/2020 contained goals and objectives that were based on the present levels of educational performance information provided by Private School and were very similar to the goals and objectives that Student was still working on in Private School.³⁸

36. Student's IEP-10/12/2020 contained information for Student's special education and related service minutes that were taken from the IEP-10/2019, as discussed by the IEP team at the October 12, 2020 IEP meeting.³⁹

³⁵ Testimony of Care Coordinator, Tr.V3, 159:17-165:19.

³⁶ See P-Ex.3, IEP recording, R-Ex.77.

³⁷ Testimony of Care Coordinator, Tr.V3, 166:18-174:16; Testimony of Vice Principal, Tr.V3, 300:11-24; P-Ex.1, p.002-006, R-Ex.1, p.004-008.

³⁸ Testimony of Private RBT, Tr.V1, 63:13-17; Testimony of Care Coordinator, Tr.V3, 176:14-186:1; compare P-Ex.2, p.58-67 with P-Ex.1, p.8-13, R-Ex.1, p.10-15.

³⁹ Testimony of Care Coordinator, Tr.V3, 187:10-190:25, 237:18-238:11; P-Ex.1, p.014, R-Ex.1, p.016; see also P-Ex.3, p.331.

37. Some of the information in Student's IEP-10/12/2020 were based on invoices for payment received by the DOE from Private School.⁴⁰

38. Student's IEP-10/12/2020 contained the following supplementary aids and supports:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁴¹

39. The statement regarding Student's integration with non-disabled students contained the following language: "[Student] will not participate with [Student's] non-disabled peers during instructional time. [Student] will attend school at [Private School]."⁴²

Private School

40. Private School has created an individualized program for Student that is currently being implemented at Private School.⁴³

41. Student's program at Private School focuses on functional and independent living skills in the home and community, including skills for [REDACTED].⁴⁴

42. Student receives special education and related services, including but not limited to, [REDACTED]

[REDACTED]

⁴⁰ Testimony of Vice Principal, Tr.V3, 300:24-301:4, 305:16-306:5.

⁴¹ P-Ex.1, p.014, R-Ex.1, p.016.

⁴² P-Ex.1, p.015, R-Ex.1, p.017.

⁴³ Testimony of Private RBT, Tr.V1, 15:13-15, 15:25-16:3,

⁴⁴ Testimony of Private RBT, Tr.V1, 19:21-20:22.

[REDACTED]

[REDACTED].⁴⁵

43. Student's program at Private School includes community-based instruction, including

[REDACTED]

[REDACTED]

[REDACTED].⁴⁶

44. Student has a behavior support plan at Private School, which targets and describes problem behaviors and provides interventions to decrease the behavior.⁴⁷ Since

Student has attended Private School, Student's [REDACTED] have lessened and decreased in intensity.⁴⁸

45. Student is also making progress in many areas of Student's individualized program at

Private School. For example, Student has mastered the skills of [REDACTED]

[REDACTED]

[REDACTED] by the first quarter of the 2020-2021 school year. Student has also made

progress on [REDACTED]

[REDACTED]

[REDACTED].⁴⁹

46. Private School has a daily schedule for Student and Student attends school at Private School every day, excluding some holidays and weekends, due to Student's needs.⁵⁰

⁴⁵ P-Ex.2, p.025-051.

⁴⁶ Testimony of Private RBT, Tr.V1, 30:6-31:3, 52:1-15.

⁴⁷ Testimony of Private RBT, Tr.V1, 31:8-33:21, 50:21-51:24; P-Ex.2, p.290-293.

⁴⁸ Testimony of Parent, Tr.V2, 92:7-12.

⁴⁹ P-Ex.2, p.058-80, P-Ex.2, p.296-289.

⁵⁰ Testimony of Private RBT, Tr.V1, 60:11-61:8, P-Ex.2, p.046-051.

47. Private School is accredited by the Hawai'i Association of Independent Schools (hereinafter "HAIS") and employs licensed professionals, including board-certified behavior analysts and registered behavior technicians, who work with Student in Student's daily schedule.⁵¹
48. Private School provides two-to-one service professionals to Student on a daily basis throughout the school day, based on Student's needs.⁵²
49. Private School also provides Parents with training in [REDACTED]
[REDACTED].⁵³
50. Private School provides transportation to Student to and from school daily.⁵⁴
51. Private School's tuition rates include: Four Thousand Dollars (\$4000) per month for tuition; Eighty Dollars (\$80) per hour for Registered Behavior Technician services (Ninety-Five Dollars (\$95) per hour on holidays); Two Hundred Fifty Dollars (\$250) per hour for board-certified behavior analyst services; One Hundred Sixty-Five Dollars (\$165) per hour for speech-language pathology services; One Hundred Sixty-Five Dollars (\$165) per hour for occupational therapy services; One Hundred Fifteen Dollars (\$115) per hour for ASL interpreter services; One Hundred Sixty-Five Dollars (\$165) per hour for parent training and education; Seven Hundred Dollars (\$700) per month for transportation; Two Hundred Dollars (\$200) per day for interim sessions (extended school year services); and a fifteen percent (15%) administrative fee.⁵⁵

⁵¹ Testimony of Private RBT, Tr.V1, 40:15-22; P-Ex.2, p.088-117.

⁵² Testimony of Private RBT, Tr.V1, 59:6-60:10.

⁵³ Testimony of Parent, Tr.V2, 93:8-95:3.

⁵⁴ P-Ex.3, p.294-295.

⁵⁵ Testimony of Private RBT, Tr.V1, 39:20-40:13; P-Ex.2, p.239, P-Ex.2, p.294-295.

52. Respondents were billed a total of Ninety-Four Thousand Two Hundred Three Dollars and Sixty-Nine Cents (\$94,203.69) for Student's special education and related services for the month of March 2020.⁵⁶

Other information and background

53. Parents do not want an IEP from the DOE as they believe that any IEP would allow Student to be moved by the DOE to any place that would technically be able to implement the IEP.⁵⁷ Parents want Student to remain at Private School as Parents believe that is the only place that will assist in transitioning Student to post-school life.⁵⁸

54. Parents want a due process hearing decision that would invoke the stay-put rule or a settlement agreement to assure them that the DOE would not make any attempts to move Student to any other location for Student's IEP implementation.⁵⁹

55. Both Parents and Private School indicate that Private School is implementing Private School's own program and not any IEP for Student based on the SA-01/31/2021.⁶⁰

56. Part of Student's program at Private School involves Student having community-based instruction, such as going to restaurants and ordering food and drinks, playing basketball with non-disabled peers in the community, and participating in gardening or other vocational-type training. These programs are designed to help Student adjust to life after leaving school.⁶¹

⁵⁶ P-Ex.3, p.294-295.

⁵⁷ Testimony of Parent, Tr.V2, 122:4-24.

⁵⁸ Testimony of Parent, Tr.V2, 85:23-89:12, 92:7-21.

⁵⁹ Testimony of Parent, Tr.V2, 120:3-121:2.

⁶⁰ Testimony of Private RBT, Tr.V1, 15:9-16:5; Testimony of Parent, Tr.V2, 85:14-87:2.

⁶¹ Testimony of Private RBT, Tr.V1, 30:6-31:2; Testimony of Parent, Tr.V2, 86:2-20.

57. For some of the outings that are part of Student's program, such as ordering food or coffee, Parents provide money for Student to use for these programs. Private School does not include reimbursement of the funds for these types of purchases made by Student.⁶²
58. Student has great difficulty with transitions and Private School's program is currently being implemented in a way to assist Student in learning to deal with transitions to Student's daily schedule.⁶³
59. The DOE has no intention of moving Student from Private School and has indicated such by stating in Student's IEP-10/12/2020 that Student will be placed at Private School.⁶⁴
60. Parents have not provided any receipts, invoices, or other documentation of any funds that they pay out-of-pocket for Student's community-based instruction or other expenses related to Student's education.
61. Student also receives services after the school day from the State of Hawai'i Department of Health.⁶⁵

V. CONCLUSIONS OF LAW

IDEA framework

To "ensure that the rights of children with disabilities and parents of such children are protected, the IDEA guarantees a FAPE to children with disabilities."⁶⁶ A FAPE includes both

⁶² Testimony of Parent, Tr.V2, 104:12-21.

⁶³ Testimony of Parent, Tr.V2, 92:16-93:22; Testimony of Vice Principal, Tr.V3, 285:3-11, 287:1-12.

⁶⁴ Testimony of Care Coordinator, Tr.V3, 198:21-199:21; Testimony of Vice Principal, Tr.V3, 284:1-284:17.

⁶⁵ Testimony of Private RBT, Tr.V1, 14:19-15:4, 57:13-17.

⁶⁶ *Doug C. v. Hawaii Dept. of Educ.*, 720 F.3d 1038, 1043 (2013) (citing 20 U.S.C.

special education and related services.⁶⁷

Special education means “specially designed instruction to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a student to benefit from their special education.⁶⁸ To provide a FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP.”⁶⁹

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.”⁷⁰ It is “a written statement for each child with a disability that is developed, reviewed, and revised” according to specific detailed procedures contained in the statute.⁷¹ The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs.⁷² The IDEA’s core is the cooperative process that it establishes between parents and schools, the central vehicle of which is the development of an IEP.⁷³

Denials of FAPE determinations are based on one of two categories of review. Procedural violations can occur when the educational agency has not complied with the procedures set forth in the IDEA.⁷⁴ Procedural violations do not automatically result in a denial

§1400(d)(1)(B), 20 U.S.C. §1412(a)(1)(A), and 34 C.F.R. §§300.1(b) & 300.101)).

⁶⁷ H.A.R. §8-60-2; 20 U.S.C. §1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

⁶⁸ *Id.*

⁶⁹ *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

⁷⁰ *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).

⁷¹ H.A.R. §8-60-2; 20 U.S.C. §1401(14); 34 C.F.R §300.22.

⁷² H.A.R. §8-60-45; 20 U.S.C. §1414; 34 C.F.R §300.321-300.322.

⁷³ *Lake Washington School Dist. No. 414 v. Office of Superintendent of Public Instruction*, 634 F.3d 1065, 1066 (9th Cir. 2011) (*citing Schaffer v. Weast*, 546 U.S. 48, 53, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005)).

⁷⁴ *Amanda J. ex rel. Annette J. v. Clark County School Dist.* 267 F.3d 877, 890 (9th Cir. 2001) (*citing Rowley*, 458 U.S. at 206-207, 102 S.Ct. at 3034), *see also L.J. by and through Hudson v. Pittsburg Unified School District*, 850 F.3d 996, 1003 (9th Cir. 2017).

of FAPE, however, as a secondary determination must be made as to whether the violation resulted in: 1) loss of educational opportunity, 2) significant infringement on parental participation, or 3) deprivation of educational benefits.⁷⁵

Substantive violations of the IDEA require an examination of the child's IEP. The DOE is not required to "maximize the potential" of each student; rather, the DOE is required to provide a "basic floor of opportunity" consisting of access to specialized instruction and related services which are individually designed to provide "some educational benefit."⁷⁶ However, the United States Supreme Court, in *Andrew F. v. Douglas County School Dist.*,⁷⁷ 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."⁷⁸

"The standard for evaluating IEPs, commonly called 'the snapshot rule,' is not retrospective."⁷⁹ An IEP is to be judged by looking at whether the IEP goals and goal achieving methods were objectively reasonably calculated to confer Student with a meaningful benefit based on the information available to the IEP team at the time the IEP was created.⁸⁰ In determining appropriateness, "an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is at the time the IEP was drafted."⁸¹ For students whose behavior impedes the students' learning or that of others, "the IEP team must

⁷⁵ *Id.* at 892.

⁷⁶ *Rowley*, 458 U.S. at 200-201, 102 S.Ct. at 3047-3048.

⁷⁷ 137 S.Ct. 988, 197 L.Ed.2d 335 (2017).

⁷⁸ *Andrew F.*, 137 S.Ct. at 1001, 197 L.Ed.2d 335; *See also, Blake c. ex rel. Tina F. v. Hawai'i Dept. of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Hawai'i 2009).

⁷⁹ *K.K. ex rel. K.S.K. v. Hawaii*, 2015 WL 4611947 *16 (D. Hawai'i 2015) (quoting *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 439 (9th Cir. 2010)).

⁸⁰ *K.K.*, 2015 WL 4611947 *16 (quoting *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999)).

⁸¹ *J.W.*, 626 F.3d at 439 (quoting *Adams v. Oregon*, 195 F.3d at 1149).

consider the use of positive behavioral interventions and supports, and other strategies to address that behavior.”⁸²

- A. The IEP development process for Student was not a collaborative effort between Parent and Home School and resulted in an IEP that Private School is refusing to implement.

Petitioners have listed seven (7) issues in the complaint, but for purposes of efficiency, the last issue will be addressed first, as it is the most dispositive issue to Petitioners’ case.

Petitioners argue that the IEP-10/12/2020 cannot be implemented at the location where the IEP team placed Student due to the Private School’s refusal to implement the IEP as written.

Respondents have not provided any evidence to show that Private School agreed to implement the IEP-10/12/2020, and based on the evidence presented at the Hearing, this Hearings Officer finds that Petitioners have proven that Student’s IEP-10/12/2020 does not provide Student with a current means to implement the IEP.

It is undisputed that the IEP team intended to place Student at Private School, as Student had been attending Private School for many years and had been making progress.⁸³ Private School had also been able to manage Student’s behaviors and provide both Parents and Student with appropriate interventions to reduce Student’s maladaptive behaviors and allow Student to make progress on post-school transition goals.⁸⁴

While the IEP team very carefully went through the discussion of placement for Student to show that they did not predetermine Student’s placement without Parent input, it was clear from the IEP meeting that the IEP team intended to adopt Private School’s program and write it

⁸² H.A.R. §8-60-48(a)(2)(A); 34 C.F.R. §300.324(a)(2)(i).

⁸³ FOF 24, 29, 31, 44-45, 59.

⁸⁴ FOF 44, 49.

into the IEP.⁸⁵ Respondents, however, did not make sufficient attempts to secure Private School's attendance at the IEP meeting. The only documented evidence related to the scheduling of the IEP meeting was an email from Vice Principal to Parents on October 6, 2020, proposing a single IEP meeting date of October 12, 2020. In that email, Vice Principal requested that Parents assist with scheduling Private School personnel to be present at the meeting, and it appears that Parents did forward the meeting information to Private School RBT and BCBA.⁸⁶ Both of them responded to Parents that they needed more notice to make themselves available for IEP meetings and declined the invitation.⁸⁷ This information was provided at some point to Care Coordinator, who informed the IEP team at the start of the IEP meeting that they needed more notice and would not likely be attending the meeting on October 12, 2020.⁸⁸

The IEP did not have sufficient information about Student's program at Private School at the IEP meeting on October 12, 2020.⁸⁹ While multiple requests were made for Private School to provide progress reports and report cards for Student, the progress reports and report cards were provided just before the meeting.⁹⁰ While it is unclear whether there was miscommunication about the request for "data" in the form of progress reports, the fact remains that the IEP team did not have copies of Student's daily schedule, Student's behavior support plan, or any other written data or documentation of Student's program.⁹¹ Having representatives from Private School at the meeting could have assisted with providing the IEP team with the necessary information.

⁸⁵ FOF 24, 27-29, 31.

⁸⁶ FOF 13.

⁸⁷ FOF 15.

⁸⁸ FOF 16.

⁸⁹ FOF 32.

⁹⁰ FOF 17.

⁹¹ FOF 18, 32.

The IDEA requires that IEP teams that intend to place Student at a private placement have representatives from the private placement at the IEP meeting.⁹² This allows for the private placement to provide input as to what the placement is or is not able to provide. While it does not appear that Respondents predetermined a placement for Student, it was apparent that the most appropriate place for Student was at Private School under the program that Private School was implementing for Student. The IEP team crafted Student's entire IEP-10/12/2020 IEP based entirely upon the little information that they had from Private School.⁹³ Respondents cannot simply request that Parents assist with getting Private School representatives to the IEP meeting, it is Respondents' duty to ensure that the IEP meeting consists of all necessary team members.⁹⁴ Had Respondents made attempts to secure Private School's presence at the meeting but was met with refusals or difficulties created by either Parents or Private School, then that would be an equitable consideration that this Hearings Officer could take into account in fashioning relief for Petitioners. However, in this case, the only evidence is that Vice Principal asked Parents to provide the meeting information to Private School for a meeting that was scheduled six (6) calendar days from the notice provided.⁹⁵ It is not unreasonable for Private School members to require two (2) weeks' notice to attend an IEP meeting.

While Respondents argue that the IEP should be viewed in light of the information that was available to the IEP team at the time the IEP was created,⁹⁶ this does not resolve the situation created by the failure to have Private School representatives present at the IEP meeting.

⁹² H.A.R. §8-60-49(a); 34 C.F.R. §300.325(a).

⁹³ FOF 34-35, 37, 39.

⁹⁴ *Anchorage School Dist. v. M.P.*, 689 F.3d 1047, 1055 (9th Cir. 2012)(holding that educational agencies "cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents"); see H.A.R. §8-60-49(a); 34 C.F.R. §300.325(a).

⁹⁵ FOF 13.

⁹⁶ See *Respondents' Closing Brief*, filed June 18, 2021, page 16.

Both Care Coordinator and Vice Principal testified that the IEP team had enough information to create a substantial IEP for Student, since they received progress reports, occupational therapy reports, and speech-language therapy reports from Private School.⁹⁷ However, the testimony of both Care Coordinator and Vice Principal show that the IEP team did not have Student's daily schedule information, Student's behavioral support plan, data relating to Student's behaviors, or any other aspects of Student's program.⁹⁸ Because of the failure of Respondents to secure Private School's participation in the IEP meeting, Respondents cannot then simply argue that they did what they could based on what they had at the time. Particularly for Student, who has a history of maladaptive behaviors,⁹⁹ the IEP team should have had a discussion on the behavioral supports and interventions needed for Student to make progress at Private School. The IEP team could not have any such discussion because the team had neither information directly from the Private School representatives nor the behavioral plan or data from Private School to have a meaningful discussion regarding Student's behaviors and the supports needed to address them.

This Hearings Officer concludes that Respondents denied Student a FAPE by failing to secure the attendance of Private School representatives for the IEP meeting, and as a result, not having sufficient information to develop an appropriate IEP for Student that could be implemented at Student's placement at Private School.

This Hearings Officer declines to address each of Petitioners' other issues, as they all relate to the development of the IEP-10/12/2020 without sufficient information that the IEP team would have had if Private School's representatives were present at the meeting to provide input and data for Student's program.

⁹⁷ FOF 32.

⁹⁸ FOF 32.

⁹⁹ FOF 3.

B. Petitioners' request for placement of Student at Private School and reimbursement

Based on the evidence in this case, it is undisputed that Private School's program is the most appropriate way for Student to access Student's education in light of Student's unique circumstances. Both Parents and the DOE made it clear in the IEP meeting and in the Hearing that Student has made progress based on the services and supports that Student is receiving at Private School. The IEP-10/12/2020 was even designed to place Student at Private School using whatever data Respondents had received from Private School to write Student's IEP.¹⁰⁰ This Hearings Officer agrees that Private School is an appropriate placement for Student under the current program.

Respondents' concerns, particularly the risk of unreasonable cost increases and Private School operating without necessary DOE oversight are also important.¹⁰¹ The IDEA provides that Student have necessary supports and services to access their education, however, they are not entitled to the best possible education available.¹⁰² An additional concern of this Hearings Officer is that Parents no longer appear interested in working with the DOE to create an IEP that would be suitable to meet Student's needs, and would rather have a "guarantee" that Student would be able to attend Private School under Private School's program until Student turns twenty-two (22).¹⁰³ Private School has also been less than cooperative with the DOE, in not

¹⁰⁰ FOF 24, 27-29, 34.

¹⁰¹ See *Respondents' Closing Brief*, filed June 18, 2021, page 16.

¹⁰² *Rowley*, 458 U.S. at 198, 102 S.Ct. at 3046-3047, 73 L.Ed.2d 690 (holding "that the requirement that a State provide specialized education and services to handicapped children generates *no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'*") (emphasis added); and *Andrew*, 137 S.Ct. at 998, 197 L.Ed.2d 335 (holding that "the IDEA cannot and does not promise 'any particular [educational] outcome'") (quoting *Rowley*).

¹⁰³ FOF 53-54.

providing progress reports or information on Student's program at Private School for the development of an IEP in a timely fashion.¹⁰⁴

Based on the IEP team's attempt to place Student at Private School to address Student's needs and the undisputed evidence that Private School is an appropriate placement for Student, this Hearings Officer is going to grant Petitioners' request and place Student at Private School for the 2021-2022 school year under Private School's program. This placement invokes the requirement of Hawaii Revised Statutes Section 302A-443(f) that Respondents are authorized to monitor Student's education at Private School, including but not limited to, monitoring of Student's curriculum and instruction; the direct observation of Student; review of records, notes, or documentation related to Student; and the right of the DOE to speak with Student's teachers at Private School.¹⁰⁵ This Hearings Officer notes that H.R.S. §302A-443(j) indicates that "subsections (f) through (i) shall not apply to those schools that are full and accredited members in good standing of the Hawaii Association of Independent Schools; ***provided that the department may monitor any child at such schools eligible to receive special education and related services at the department's expense.***"¹⁰⁶ To clarify, this Hearings Officer reads this highlighted section to give the DOE the authority to continue monitoring Student at Private School, even though Private School is a full accredited member of the HAIS.

Petitioners provided some evidence of additional expenses that Parents have paid out-of-pocket related to Student's education at Private School. The testimony at the Hearing was that these expenses were vaguely related to purchasing food and coffee on school-based outings

¹⁰⁴ FOF 11-12, 17.

¹⁰⁵ Haw. Rev. Stat. §302A-443(f)(2011).

¹⁰⁶ Haw. Rev. Stat. §302A-443(j)(2011) (emphasis added).

when Student engages in community-based learning.¹⁰⁷ This Hearings Officer declines to order reimbursement to Parent for those expenses. Expenditures on food and beverages ordered at Starbucks or any other restaurant to assist Student in learning to interact appropriately are akin to parents paying for field trip expenses and/or packing lunch for students at public school placements and do not need to be reimbursed under the IDEA.

Even if they were necessary expenses for Student to access or obtain Student's education, this Hearings Officer finds that the equities in this case turn in favor of not awarding reimbursement for these expenses to Parents. As stated earlier, it is concerning to this Hearings Officer that Parents are no longer interested in working with Respondents to create an appropriate IEP for Student and instead want a legal document that provides a guarantee for Student's education at Private School. This is not in the spirit of cooperation that the IDEA envisions or that justifies an award of tuition reimbursement. However, this Hearings Officer does recognize that all the parties agree that Private School is the most suitable placement for Student to transition into post-IDEA living. Therefore, this Hearings Officer declines to reduce any other portions of the award to Parents relating to reimbursement.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have proven that Respondents denied Student a FAPE by failing to develop an IEP for Student that could be implemented at the private placement where Student was placed.

For the reasons stated above, IT IS HEREBY ORDERED –

¹⁰⁷ FOF 57.

1. Respondents shall pay for Student's attendance at Private School under the Private School's Program for the 2021-2022 school year. Private School shall submit invoices based on current rates¹⁰⁸ and shall account for services provided to Student as part of Student's DOE program (not any services provided by the Department of Health).
2. Prior to the end of the regular 2021-2022 school year in May 2022, the IEP team shall meet to develop an IEP for Student. This Order in no way restricts the IEP team from revising or developing an IEP for Student at any earlier time.
3. Respondents shall make reasonable efforts to obtain the presence of representatives of Private School who have knowledge of Student's program at Private School for the IEP meeting. Respondents shall document any correspondence in the efforts to obtain the presence of Private School representatives, as well as any requests to reschedule or cancel scheduled meetings, or the non-appearance of persons scheduled to be at the meeting.
4. Respondents shall make reasonable efforts to request information from Private School for Student's program in order to properly develop Student's IEP. Respondents shall document any correspondence in their attempts to obtain records, data, behavior plans, schedules, assessments, and other information from Private School regarding Student's program.
5. Parents are expected to sign any consent forms necessary for Respondents to obtain Student's records, data, schedules, assessments, and other information regarding Student's program at Private School, including consent for observations of Student at

¹⁰⁸ FOF 51-52.

Private School by DOE personnel. Any refusals of either Parents, Private School, or any of their representatives to provide necessary information to the DOE to prepare Student's IEP shall be documented by Respondents.

RIGHT TO APPEAL

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

DATED: Honolulu, Hawai'i, July 8, 2021.

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