



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
KISHIMOTO², Superintendent of the Hawai'i
Public Schools,

Respondents.

DOE-SY2021-047

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing:

January 11, 2022,

February 15-18, 2022,

February 28, 2022

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

¹

[REDACTED]

² The current interim superintendent of the Hawaii Public Schools is Keith T. Hayashi.

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 (“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 June 3, 2021, the Department of Education, State of Hawaii and Christina Kishimoto, Superintendent of the Hawaii Public Schools (“Respondents” or “DOE”) received a Complaint and Resolution Proposal (“Complaint”) from Student, by and through Student’s Parent (collectively “Petitioners”).

On June 14, 2021, Respondents filed Department of Education’s Response to Petitioners’ Request for IDEA Impartial Due Process Hearing.

On June 25, 2021, a Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for July 6, 2021. Before the prehearing conference, Petitioners requested permission to amend their Complaint. Respondents did not object to the request and the undersigned granted the request. Petitioners filed a First Amended Complaint and Resolution Proposal on July 6, 2021 (“FAC”). On July 26, 2021, Respondents filed Department of Education’s Response to Petitioners’ [First Amended] Request for IDEA Impartial Due Process Hearing.

On July 29, 2021, an Amended Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for August 6, 2021.

On August 6, 2021, a prehearing conference was held with Keith H.S. Peck, Esq. (“Mr. Peck”) appearing on behalf of Petitioners, and Deputy Attorney General Kris S. Murakami (“Ms.

Murakami”) appearing on behalf of Respondents. During the prehearing conference, the parties agreed to have the due process hearing on September 22-24, 2021.

On August 12, 2021, 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.

On August 19, 2021, Respondents filed a Motion to Dismiss or in the Alternative for Summary Judgment; Memorandum in Support of Motion; Declaration of Kris. S. Murakami; Exhibits “1” – “4”; Notice of Hearing Respondent’s [sic] Motion to Dismiss or in the Alternative for Summary Judgment (“Motion to Dismiss”). On August 26, 2021, Petitioners filed a Memorandum in Opposition to Respondent’s [sic] Motion for [sic] to Dismiss or in the Alternative for Summary Judgment; Declaration of [Parent]; Declaration of Counsel[;] Exhibit “1” to “3” (“Memo in Opp.”). On September 1, 2021, Respondents filed a Reply to Petitioners’ Memo in Opp.

On September 7, 2021, over the objection of Respondents, the undersigned Hearings Officer granted Petitioners’ request to amend their FAC and dismissed Respondents’ Motion to Dismiss as moot. On September 8, 2021, Petitioners filed a Second Amended Complaint and Resolution Proposal (“SAC”).

On September 16, 2021, a Second Amended Notice of Prehearing Conference was issued to the parties, setting a prehearing conference for October 8, 2021. A prehearing conference took place on October 8, 2021 with Mr. Peck and Ms. Murakami in attendance. By agreement, the due process hearing dates were changed to December 1-3 and 6, 2021.

On September 16, 2021, Respondents filed Department of Education’s Response to Petitioners’ [Second Amended] Request for IDEA Impartial Due Process Hearing.

On October 11, 2021, an Amended Prehearing Order was issued to the parties.

On October 11, 2021, Petitioners filed Petitioners' Motion for 'Stay Put'; Memorandum in Support of Motion; Declaration of Counsel Keith H.S. Peck; Exhibit "A" ("Motion for Stay Put"). On October 29, 2021, Respondents filed an opposition to Petitioners' Motion for Stay Put. On November 5, 2021, Petitioners filed a reply in support of their Motion for Stay Put. A hearing on Petitioners' Motion for Stay Put was held on November 10, 2021. An Order Granting Petitioners' Motion for Stay Put, filed on October 11, 2021, was issued on November 17, 2021.

Due to possible health concerns caused by COVID-19, the parties agreed to conduct the due process hearing using a video conferencing platform to ensure the safety of all participants.

On November 12, 2021, 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.

On November 22, 2021, a status conference was held. During the status conference, Deputy Attorney General Stuart N. Fujioka ("Mr. Fujioka") informed Mr. Peck and the undersigned that this case was re-assigned to him. As a professional courtesy, Mr. Peck did not object to re-scheduling the due process hearing so that Mr. Fujioka could have time to prepare. The parties agreed to re-schedule the due process hearing to January 10-13, 2022. A Second Amended Prehearing Order was issued the same day.

On January 3, 2022, Petitioners timely submitted their witness and exhibit lists and exhibits³. Respondents also submitted their witness and exhibit lists and exhibits by the disclosure deadline; however, on January 7, 2022, Respondents filed supplemental exhibits after

³ Petitioners filed two documents entitled "Petitioners' First Amended Witness List, Exhibit List; Supplemental Exhibits." The first document is incomplete because it does not contain exhibit page numbers. There are no supplemental exhibits by Petitioners.

the disclosure deadline. Petitioners did not object to Respondents' supplemental exhibits and chose to begin the due process hearing on January 11, 2022, and they waived their right to the seven-day disclosure period. Tr. Vol. 1, 6:16-7:13⁴.

The due process hearing took place on January 11, 2022, February 15-18, 2022, and February 28, 2022, using the Zoom video conferencing platform⁵. 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 Mr. Fujioka. Deputy Attorney General Catherine Piazza observed the due process hearing but otherwise did not participate. Parent testified on January 11, 2022, and [Parent] waived [Parent's] right to be present for the remaining days of the due process hearing. The Department of Education District Educational Specialist-1 ("DES-1") was present on behalf of Respondents.

Petitioners called Parent and Director as their witnesses during the due process hearing. Respondents called the following witnesses during the due process hearing: District Educational Specialist-2 ("DES-2"); Principal; Speech-Language Coordinator⁶ ("SLC"); District Office Resource Teacher-1 ("DRT-1"); and Contracted Board-Certified Behavior Analyst ("Contracted BCBA"). Petitioners called Director as a rebuttal witness.

⁴ "Tr. Vol. 1, 6:16-7:13" means Transcript of hearing, Volume 1, page 6, line 16 through page 7, line 13. Volume 1 is for hearing date January 11, 2022; Volume 2 is for hearing date February 15, 2022; Volume 3 is for hearing date February 16, 2022; Volume 4 is for hearing date February 17, 2022; Volume 5 is for hearing date February 18, 2022; and Volume 6 is for hearing date February 28, 2022.

⁵ No witness testimony was taken on February 18, 2022.

⁶ Speech-Language Coordinator was named a witness on January 18, 2022 after the disclosure deadline. Petitioners did not object to SLC testifying. See Department of Education, State of Hawaii's Supplemental Witness List, filed on January 18, 2022; Tr. Vol. 4, 493:3-13.

The following Petitioners' exhibits were admitted into evidence without objection: Exhibit 1 (pages 001-064); Exhibit 2 (pages 091-100); Exhibit 3 (pages 106-107, 118, 130); Exhibit 4 (pages 131-209, IEP audio recording link, dated June 23, 2021). Tr. Vol. 6, 666:6-667:4.

The following Respondents' exhibits were admitted into evidence without objection: Exhibits 1-5, 10, 11, 13, 16, 19, 26-29, 32-39, 41, 52-55, 57, 64, 75-88, 91-105, 165-204⁷, 228, 230-280, 301-345, 358-364, 366-376, 399-403, 415-419, 427-434, 436-440, 445-497, 523-532, 572-578, 594-616, 619-629, 640, 641, 643, 644, 646-655, 661, 663-665, 667, 738-744, 752-761, 766, 769-776, and 777⁸. Tr. Vol. 6, 667:5-669:8.

Upon the filing of the SAC on September 8, 2021, the deadline by which a decision must be issued was extended from November 22, 2021 to December 30, 2021; December 30, 2021 to February 13, 2022; February 13, 2022 to March 29, 2022; March 29, 2022 to May 13, 2022. See orders issued on the following dates: November 12, 2021; November 22, 2021; February 11, 2022; and March 22, 2022.

On April 13, 2022, the parties timely submitted their closing briefs⁹.

⁷ Respondents' Exhibit 166 is mislabeled as page 0703 in Respondents' Department of Education, State of Hawaii's Witness List, Exhibit List, and Exhibits. The actual page number is 0704.

⁸ During the due process hearing, the parties agreed, and the undersigned consented, to make part of the record documents offered by Respondents on February 16, 2022. The documents are bated-stamped pages 2948-2950 and designated as DOE Exhibit No. 777. Tr. Vol. 6, 655:20-656:18, 668:19-669:2.

⁹ Parties' closing briefs were originally due April 11, 2022. On April 11, 2022, Petitioners' counsel requested a two-day extension to submit closing briefs due to unexpected health issues. Respondents' counsel did not object, and Petitioners' counsel's request was granted on April 11, 2022.

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.

III. ISSUES PRESENTED

In their September 8, 2021 Second Amended Complaint, 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 6/23/2021, 6/21/2021-IEP (Individualized Education Program) is a denial of FAPE where it was developed without parental involvement.
- Issue 2 – Whether the 6/23/2021, 6/21/2021-IEP is a denial of FAPE where Student is deemed ineligible for Extended School Year services.
- Issue 3 – Whether the 6/23/2021, 6/21/2021-IEP is a denial of FAPE where Student is to receive Individual Instructional Support for 1830 minutes per week “by a Registered Behavior Technician (RBT) *as available*....”
- Issue 4 – Whether the 6/23/2021, 6/21/2021-IEP is a denial of FAPE where there is no transportation service to be provided.
- Issue 5 – Whether the 6/23/2021, 6/21/2021-IEP is a denial of FAPE where there is an inadequate description of behavior interventions listed in Student’s IEP. While the team did discuss Student’s behavioral needs, they did not discuss sufficient behavioral interventions to provide Student classroom supports.
- Issue 6 – Whether the 6/23/2021, 6/21/2021-IEP is a denial of FAPE where Student’s known need for a process or supports to address the needs associated with a change in Student’s program and placement from [REDACTED] private program to the offered DOE program was not discussed during the IEP development meeting and/or described in the written IEP. This discussion was affirmatively put off for a separate non-IEP discussion.
- Issue 7 – Whether the 6/23/2021, 6/21/2021-IEP is a denial of FAPE where the support of “Access to low/high technology communication system” is vague as to the particular *system* to be used.

Petitioners request the following remedies:

Remedy 1 – Order the DOE fund Petitioners’ private program because Stay-Put is in place for Private School and transportation expenses;

Remedy 2 – Order the DOE to revise the IEP to address the allegations herein;

Remedy 3 – Order the DOE to reimburse and/or fund Student’s private school and related expenses (transportation);

Remedy 4 – Order compensatory education if all of Student’s needs are not addressed in full through [REDACTED] private school program;

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

IV. FINDINGS OF FACT

Events before the June 21, 2021 and June 23, 2021 IEP Meetings

1. Student is [REDACTED] years old and in the [REDACTED] grade. Pet. Ex. 1 at 037; Parent, Tr. Vol. 1, 116:17-18.
2. Student is eligible for special education and related services pursuant to the IDEA under the category of [REDACTED]. Student has deficits in [REDACTED] [REDACTED]. Pet. Ex. 1 at 037, 041-042.
3. Student is an only child and is being raised by Parent on Island 1. Parent, Tr. Vol. 1, 18:24-25:4, 29:16-25.
4. On April 19, 2018, an Adaptive Behavior and Social and Emotional Development assessment was administered to Student. During this time, Student was receiving care coordination, speech-language therapy, physical therapy, occupational therapy, and assistive technology services from Agency. DOE Ex. 26 at 0253-0255, Ex. 32 at 0287.

5. On April 23, 2018, Student was given a Speech-Language Assessment and Occupational Therapy Assessment to determine eligibility for special education and related services at Public School-1. DOE Ex. 27 at 0257-0258; DOE Ex. 28 at 0260-0263.
6. On May 9, 2018, a [REDACTED] Evaluation Report was completed. According to the [REDACTED] Evaluation Report, Student met the diagnostic criteria for [REDACTED] [REDACTED] DOE Ex. 29 at 0265-0273.
7. From August 2018 to December 2018, Student attended Public School-1. Student then moved to Island 2 to live with [REDACTED] and continued [REDACTED] 2018-2019 school year at Public School-2. DOE Ex. 32 at 0287.
8. [REDACTED] gave [REDACTED] power of attorney from January 7, 2019 to June 7, 2019 to make decisions regarding Student's needs while Student lived with [REDACTED]. DOE Ex. 83 at 0468, ¶¶16-18.
9. On May 24, 2019, [REDACTED] participated in an annual IEP meeting for Student, which resulted in an IEP dated May 24, 2019 ("5/24/2019-IEP"). Pet. Ex. 1 at 001-014; DOE Ex. 16 at 0172-0186.
10. Pursuant to the 5/24/2019-IEP, Student would receive the following services at Public School-2: Special education in a special education [REDACTED] class; occupational therapy; speech-language therapy; daily transportation; and adult supervision during non-instructional time. Pet. Ex. 1 at 012; DOE Ex. 16 at 0187.
11. According to the 5/24/2019-IEP, Student did not meet the standard for extended school year services. Pet. Ex. 1 at 012.

12. No extension was made to the power of attorney given to [REDACTED] and [REDACTED] resumed legal guardianship of Student in or around July of 2019. DOE Ex. 83 at 0474, ¶50.
13. Student moved back to Island 1 to live with Parent during the 2019-2020 school year. DOE Ex. 32 at 0287.
14. Student attended Pilot Program from August 2019 through March 2020 until a mandatory quarantine was imposed by the State of Hawaii in response to the COVID-19 pandemic, at which point Student stayed at home with Parent. DOE Ex. 83 at 0478-0479, ¶74.
15. On July 15, 2020, Petitioners filed a Complaint and Resolution Proposal against Respondents under case number DOE-SY2021-004. Pet. Ex. 4 at 147-153. Petitioners filed a First Amended Complaint and Resolution Proposal on August 20, 2020 (“8/20/2020-FAC”). The 8/20/2020-FAC alleged that the 5/24/2019-IEP denied Student a FAPE. Pet. Ex. 4 at 157-163.
16. Student attended Private School for the 2020-2021 school year, which ran from August 17, 2020 to July 28, 2021. DOE Ex. 32 at 0287; DOE Ex. 83 at 0480, 0482.
17. On October 18, 2020, Private School developed an Individualized Applied Behavior Analysis Education Plan (“10/18/2020-IABAEP”) for Student. Parent reported that [Parent] was concerned about Student’s problem behaviors that increased during the COVID-19 quarantine and summer. DOE Ex. 182 at 0752-0758.
18. On November 6, 2020, a Functional Behavior Assessment (“FBA”) report was issued for Student by Director in [REDACTED] capacity as a board-certified behavior analyst for Private School (“11/06/2020-FBA”). Pet. Ex. 4 at 132-137; DOE Ex. 32 at 0287-0292; DOE

Ex. 183 at 0778-0783. The overall summary in the 11/06/2020-FBA states that Student demonstrated significant skill deficits and barriers that affect [Student's] ability to function in [Student's] environments. Student "demonstrate[d] mild-moderate daily problem behavior that [was] likely from the reinforcement sources of attention/access to preferred items, escape from tasks/activities and sensory stimulation. Based on the assessment results and therefore [Student's] needs, a behavior treatment plan was developed to be implemented in [Student's] school environment." DOE Ex. 32 at 0291-0292.

19. On November 11, 2020, a Speech and Language Assessment report was issued for Student by Director in [Director's] capacity as a speech-language pathologist for Private School ("11/11/2020-SLP Report"). According to the "Summary & Recommendations" section of the 11/11/2020-SLP Report, Student presented with the following: skills that fall primarily in the [REDACTED] level, with play, social and group skills emerging into the [REDACTED] level, and reading emerging into the [REDACTED] level; deficits in the ability to [REDACTED]; deficits in [REDACTED] [REDACTED]. The 11/11/2020-SLP Report also notes that Student uses [REDACTED] DOE Ex. 33 at 0294-0296; DOE Ex. 182 at 0761-0763.
20. On December 11, 2020, a Findings of Fact, Conclusions of Law and Decision was issued by a hearings officer for Petitioners' 8/20/2020-FAC ("12/11/2020-Decision"). Petitioners were the prevailing party. Pet. Ex. 4 at 165-209¹⁰; DOE Ex. 5 at 0027-0073.

¹⁰ Petitioners' copy of the 12/11/2020-Decision is missing the second page of the Legend.

21. On January 14, 2021, Student Services Coordinator (“SSC”) at Current Public School contacted a student services coordinator at Public School-2 to get Student’s confidential file. DOE Ex. 84 at 0506.
22. On January 14, 2021 and January 19, 2021, SSC attempted to get signed Consent for Release of Information forms from Parent so that Current Public School could obtain information about Student from private program and Student’s doctors that would be used in Student’s educational planning and programming. SSC also asked Parent to enroll Student at Current Public School so that Current Public School could gain access to Student’s file from Public School-2. DOE Ex. 54 at 0384; DOE Ex. 55 at 0387; DOE Ex. 86 at 0511-0513; DOE Ex. 91 at 0523-0525; DOE Ex. 92 at 0527-0528; DOE Ex. 93 at 0530.
23. A Treatment Plan, dated February 2021, was created for Student by Director for the 2020-2021 school year (“February 2021-Treatment Plan”). The February 2021-Treatment Plan was based on the results of the 11/06/2020-FBA and data collected in February 2021. According to the February 2021-Treatment Plan, Student’s problem behaviors consisted of [REDACTED]; leaving [Student’s] assigned seat without permission; [REDACTED]; noncompliance; [REDACTED] when [Student] does not gain access to something [Student] wants, when a demand is placed on [Student], or when [Student] is alone or not interacting with others. DOE Ex. 34 at 0298-0303.
24. On February 1, 2021, SSC requested from Director that the following information/documents be sent to Current Public School on a monthly basis: Student’s schedule; Student’s attendance records; service providers’ information; all plans

(including, but not limited to, Individualized Applied Behavior Analysis Education Plan (“IABAEP”), behavior plan, and treatment plan); Student Progress Report that included all services, goals and objectives; behavior data – both raw and charted; data/evidence of frequency of inclusion with appropriate nondisabled peers; assessments (VB-MAPP¹¹, “PBA,” academic, cognitive, speech/language, fine motor/sensory, gross motor); work samples; data on any other services being provided; and any other relevant data. SSC also asked that Current Public School be able to conduct monthly observations of Student at Private School. At Director’s request, SSC emailed to Director a picture of an executed Consent for Release of Information form [REDACTED] received from Parent. SSC included Parent on the email so that Director could confirm Parent’s consent with Parent since the picture was of poor quality. DOE Ex. 165 at 0702; DOE Ex. 167 at 0706-0708; DOE Ex. 171 at 0719-0720; DOE Ex. 254 at 1038-1039; Principal, Tr. Vol. 3, 405:8-12.

25. On February 2, 2021, Parent attended a Student Support Team (“SST”) meeting at Current Public School. Parent, Tr. Vol. I, 81:1-21. On the same day, a Prior Written Notice of Department Action (“Prior Written Notice”) was issued by Principal for Current Public School (“2/02/2021-PWN”). According to the 2/02/2021-PWN, DOE proposed that Student be given a reevaluation as a part of a triennial evaluation to determine eligibility for special education services, and [Student] would be assessed in the following areas: academic, sensory processing, fine motor, cognitive, adaptive, behavior, and speech-language (to include hearing screening). DOE would also conduct

¹¹ “VB-MAPP” is an abbreviation of Verbal Behavior Milestones Assessment and Placement Program, which is used as a guide to determine a student’s level of current functioning based on achievement of milestones by neurotypical children of the same age. Pet. Ex. 4 at 172, ¶ 13.

observations of Student at [Student's] current program. The 2/02/2021-PWN noted that DOE considered requesting an FBA but rejected this option as there were no reports of classroom behaviors disrupting Student's access to education. Under a section entitled "Other relevant factors," the 2/02/2021-PWN noted that Principal asked Parent to enroll Student at Current Public School and that Parent stated that [Parent] would drop off hard copies of Consent for Release of Information forms, consenting to the release of information from Private School and Student's doctors. The 2/02/2021-PWN also noted that at the time of this meeting, DOE had not received the requested records from Private School¹². DOE Ex. 199 at 0873-0874; DOE Ex. 166 at 0704.

26. On February 2, 2021, Director acknowledged SSC's February 1, 2021 request for information/documents. Director also informed SSC that due to concerns surrounding the COVID-19 pandemic, observations of students will be through live video. DOE Ex. 167 at 0706.
27. On February 2, 2021, SSC renewed [SSC's] request for information/documents from Director, citing H.R.S. § 302A-443(h)¹³. SSC requested the information/documents be sent to [SSC] by February 4, 2021. SSC also requested that Director provide the

¹² On February 5, 2021, the principal of Public School-2 issued the same Prior Written Notice ("2/05/2021-PWN"). DOE Ex. 190 at 0830-0831.

¹³ H.A.R. § 302A-443(h) reads: "Any private school or placement that receives funds from the department, whether by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian, shall provide copies of a student's records to the department within three business days of receipt of a request for such records." It appears that while DOE was requesting information/documents regarding Student in order to develop an IEP for [REDACTED], DOE was also requesting information/documents about students who were placed at Private School through administrative decisions, which included Student. DOE Ex. 170 at 0715; DOE Ex. 171 at 0718; DOE Ex. 173 at 0725; DOE Ex. 176 at 0732-0733; DOE Ex. 179 at 0740; DOE Ex. 180 at 0743; DOE Ex. 181 at 0746; Director, Tr. Vol. 2, 208:14-213:5.

- information/documents to DOE by the 5th of each month and asked to observe Student at Private School every month. DOE Ex. 165 at 0701-0702; DOE Ex. 168 at 0710-0711.
28. On February 4, 2021, Director emailed to SSC the following documents: IABAEP, dated 10/18/2020; January Class Schedule; Reverse Inclusion Log for January 2021; Speech and Language Assessment, dated 11/11/2020; Manding¹⁴ Data, dated January 2021 (DOE Ex. 182 at 0749-0769); Written summaries by staff of Student's daily activities for January 2021; Functional Behavior Assessment, dated 11/06/2020 by Director (DOE Ex. 183 at 0771-0783); Student's attendance record for January 2021 (DOE Ex. 184 at 0785); data for Tangible, Escape, Attention and Sensory for January 2021; and two sets of Structured ABC (Antecedent-Behavior-Consequence) Analysis for January 2021 (DOE Ex. 185 at 0791-0802; DOE Ex. 186 at 0804-0821).
29. On February 5, 2021, SSC emailed Parent a Consent for Assessment as Part of a Reevaluation form. In the email, SSC explained to Parent that the consent form will give DOE permission to conduct the assessments they requested on February 2, 2021. SSC also explained to Parent that since DOE received new information from Private School, DOE would like to schedule another SST meeting with Parent to discuss the new information and the need for an FBA. An SST meeting was then scheduled for February 24, 2021. DOE Ex. 10 at 0100; DOE Ex. 190 at 0829-032; DOE Ex. 191 at 0834; DOE Ex. 199 at 0876-0877; DOE Ex. 231 at 0974; DOE Ex. 271 at 1084-1085.
30. On February 5, 2021, SSC emailed the school members of the IEP team the following six (6) documents: (1) "[Student] SST meeting"; (2) an Adaptive and Social Skills assessment, dated April 19, 2018 (two copies); (3) Speech-Language Assessment

¹⁴ "Manding" means asking or protesting. DOE Ex. 32 at 287.

- Report, dated April 23, 2018; (4) Occupational Therapy Assessment report, dated April 23, 2018; and (5) Preschool Evaluation Report, dated May 9, 2018. DOE Ex. 194 at 0840-0862; DOE Ex. 194 at 0840-0862.
31. On February 8, 2021, SSC submitted a “Request for Evaluation” form for Student. The form indicated that the reason for the request was concern over Student’s behavior. DOE Ex. 10 at 0101.
 32. On February 8, 2021, SSC emailed Parent a revised Prior Written Notice, dated February 2, 2021; Consent for Assessment as Part of a Reevaluation form; and a Conference Announcement for the February 24, 2021 SST meeting. SSC again asked Parent to enroll Student at Current Public School. DOE Ex. 199 at 0872-0877; DOE Ex. 236 at 0997.
 33. On February 11, 2021, SSC followed up with Parent on the consent forms and enrollment at Current Public School. DOE Ex. 236 at 0997.
 34. On February 12, 2021, Parent emailed to SSC an executed consent form. Parent, however, did not enroll Student at Current Public School. DOE Ex. 236 at 0996; DOE Ex. 245 at 1016; DOE Ex. 257 at 1047.
 35. On February 16, 2021, School Psychologist informed Parent that [Parent] will be getting a link to an [REDACTED] Rating Scale for Student’s evaluation and requested that Parent fill out the rating scale. DOE Ex. 276 at 1095; DOE Ex. 278 at 1099.
 36. On February 17, 2021, SSC emailed a letter, dated February 16, 2021, from Principal to Director. Principal’s letter confirmed receiving documents from Director on February 4, 2021 and listed the documents received. The letter also listed the information/documents that Current Public School had not yet received that were

requested on February 1, 2021¹⁵. The letter also requested additional information/documents for the month of December 2020. The letter concludes by requesting that Director submit all requested information/documents no later than February 19, 2021. DOE Ex. 246 at 1018-1020.

37. On February 17, 2021, SSC resent the February 1, 2021 email to Director, which contained a list of documents SSC had requested from Director. DOE Ex. 254 at 1037-1039. Director responded on the same day explaining that nothing was missing from what Private School had provided for January. DOE Ex. 259 at 1052.
38. On February 19, 2021, SSC followed up with Parent regarding enrolling Student at Current Public School and submitting the signed Release of Information forms for Private School and Student's doctors that Parent had emailed to SSC. DOE Ex. 271 at 1081.
39. On February 19, 2021, School Psychologist emailed Parent a link for an Adaptive Behavior Rating Scale for Student's evaluation. School Psychologist asked Parent to complete the Adaptive Behavior Rating Scale and [REDACTED] Rating Scale by March 8, 2021. DOE Ex. 277 at 1097; DOE Ex. 278 at 1099.
40. On February 19, 2021, Director emailed to SSC the following documents: [REDACTED] Class Schedule; December 2020 Attendance Sheet; December 2020 Reverse Inclusion Log; Nov/Dec. and December 2020 Structured ABC (Antecedent-Behavior-Consequences) Analysis; December 2020 Tangible, Escape, Sensory Charts; Mands charts for December 2020. DOE Ex. 280 at 1103-1122.

¹⁵ The letter also references the request being sent to another email address on January 26, 2021. Director did not receive the January 26, 2021 email because the email address belonged to an inactive entity and was not being used. DOE Ex. 171 at 0719-0720; DOE Ex. 254 at 1038-1039.

41. On February 24, 2021, Parent participated in an SST meeting with Principal, Contracted BCBA, School Psychologist, DES-2, SSC, and others. During the meeting, it was decided that Contracted BCBA would conduct an FBA of Student. Parent, Tr. Vol. I, 82:5-83:17; DOE Ex. 10 at 0102.
42. On February 24, 2021, School Psychologist requested that Director have the Private School staff complete an Adaptive Behavior Rating Scale for Student by March 4, 2021. The Adaptive Behavior Rating Scale was emailed to Director on February 25, 2021 and it was completed and sent back to School Psychologist on or before March 4, 2021. DOE Ex. 302 at 1168; DOE Ex. 314 at 1192; DOE Ex. 316 at 1196; DOE Ex. 317 at 1198-1200; DOE Ex. 318 at 1202-1203; DOE Ex. 320 at 1207; DOE Ex. 345 at 1276; DOE Ex. 368 at 1330; DOE Ex. 371 at 1337.
43. On February 25, 2021, a Prior Written Notice was issued by Principal of Current Public School (“2/25/2021-PWN”). The 2/25/2021-PWN states that an FBA would be conducted. The 2/25/2021-PWN also states that the “reevaluation is proposed as the school received data and information on February 4, 2021, from [Private School], regarding [Student’s] behavioral challenges in an academic setting. The FBA will provide data to address behavioral concerns that prevent [Student] from accessing education and provide the team with updated and current information in this area.” DOE Ex. 10 at 0103; DOE Ex. 326 at 1222-1223.
44. On February 25, 2021, SSC emailed Parent a copy of the 2/25/2021-PWN and a Consent for Assessment as Part of a Reevaluation form to be filled out by Parent. DOE Ex. 326 at 1221-1227.

45. On February 26, 2021, DRT-1 emailed Director asking that Director provide additional information about Student's program at Private School. Having not received a response from Director, DRT-1 followed up with another email on March 2, 2021 asking for an update on when Director would be able to provide the requested information. DOE Ex. 331 at 1240; DOE Ex. 363 at 1320; DOE Ex. 403 at 1483. Between March 2, 2021 and March 29, 2021, Director and DRT-1 engaged in a back and forth email debate about the purpose of DRT-1's questions posed in DRT-1's February 26, 2021 email; whether Director had already responded to DRT-1's request for information; and the need for additional time to comply when Current Public School wants the requested information in a particular format or Private School does not have the information as part of its program. DOE Ex. 364 at 1322; DOE Ex. 376 at 1348; DOE Ex. 402 at 1480; DOE Ex. 403 at 1482-1483; DOE Ex. 416 at 1538-1541; DOE Ex. 418 at 1545; DOE Ex. 434 at 1581.
46. On February 26, 2021, SSC and Parent agreed to an eligibility meeting on April 12, 2021, and if found eligible, an IEP meeting on April 23, 2021. DOE Ex. 338 at 1258; DOE Ex. 339 at 1260; DOE Ex. 341 at 1265; DOE Ex. 342 at 1268.
47. On February 26, 2021, Parent sent SSC an executed Consent for Assessment as Part of a Reevaluation, dated February 26, 2021 ("2/26/2021-Consent for Assessment"). DOE Ex. 342 at 1267; DOE Ex. 343 at 1270-1272. The 2/26/2021-Consent for Assessment made it possible for Contracted BCBA to proceed with the FBA. DOE Ex. 344 at 1274; DOE Ex. 319 at 1205.
48. On March 2, 2021, SSC emailed a student services coordinator at Public School-2, asking the student services coordinator to request access to Student's file again for SSC

because Parent still had not registered Student at Current Public School. DOE Ex. 358 at 1309. The student services coordinator at Public School-2 requested access till the end of April for SSC. DOE Ex. 360 at 1314; DOE Ex. 361 at 1316.

49. On March 2, 2021, Principal requested that Director provide information/documents about Student for the month of February 2021. Principal provided a similar list as the one sent on February 1, 2021. Principal requested that the information/documents be submitted no later than March 9, 2021. DOE Ex. 359 at 1311-1312; DOE Ex. 369 at 1332.
50. A “Speech and Language Assessment Report,” with a date of March 4, 2021, was issued by Speech-Language Pathologist (“SLP”) (“3/04/2021-SLP Report”)¹⁶. The purpose of the report was to assess Student’s speech and language skills in the areas of functional communication, speech sound production, expressive language, and receptive language. The 3/04/2021-SLP Report cites the 11/11/2020-SLP Report as stating that Student used [REDACTED] Parent was interviewed and provided information about Student’s communication in the home environment and the information is incorporated throughout the report. Records from Private School were reviewed and information about Student’s progress at Private School is incorporated throughout this report. The report states that “[Student] is not yet [REDACTED] with others. [Student] knows a few [REDACTED] that [Student] will use to request preferred items at home and at [Private School]. According to an email communication from [Private School] received on 3/29/2021, [Student] uses standard

¹⁶ It is unclear if the March 4, 2021 date refers to when SLP assessed Student or if it is a typographical error because the body of the report refers to an email dated March 29, 2021.

[REDACTED]. [Student] uses individualized [REDACTED]
[REDACTED]. [Student] is not using [Student's] [REDACTED]
for [REDACTED] at this time.” DOE Ex. 35 at 0305-0310; DOE EX. 477 at 1764-
1769.

51. On March 5, 2021, SSC sent Parent an email to follow up on Student’s enrollment at Current Public School. Parent informed SSC that the online registration link SSC had previously sent did not work. SSC then re-sent the online registration link. DOE Ex. 372 at 1339; DOE Ex. 373 at 1341; DOE Ex. 374 at 1343; DOE Ex. 375 at 1345.
52. On March 16, 2021, a Confidential Psychoeducational Evaluation Report was issued by School Psychologist (“3/16/2021-Psych. Eval. Report”). The Confidential Psychoeducational Evaluation was conducted to determine current levels of cognitive, adaptive, and behavioral functioning. The 3/16/2021-Psych. Eval. Report contains the results of the following assessments: (1) [REDACTED] Rating Scales, which indicated that Student was exhibiting many of the associated features characteristic of [REDACTED]; (2) The Developmental Profile 4 (“DP-4”), used to assess Student’s physical, cognitive, social-emotional, communication, and adaptive abilities, which indicated that Student had delayed functioning in all the assessed areas measured, and [Student’s] General Development Score was well below average and in the delayed range; (3) Adaptive Behavior Assessment System-3 (“ABAS-3”), which showed extremely low adaptive functioning. With respect to Student’s [REDACTED], the report indicates that Student did not use [REDACTED], but did use [REDACTED], such as [REDACTED]. Student understood the meaning of “no” and

[REDACTED]. SLC, Tr. Vol. 3, 465:14-20.

sometimes used a nod or smile to show [Student] was listening. In conducting the assessment, Parent was interviewed. DOE Ex. 36 at 0312-0320; DOE Ex. 477 at 1755-1763.

53. On March 18, 2021, an “O.T. Program Report”¹⁸ was issued (“3/18/2021-O.T. Program Report”). The 3/18/2021-O.T. Program Report notes that Student expressed [Student’s] frustration by making a [REDACTED] in the air [REDACTED] [REDACTED] Student made [REDACTED] during “transitional movements in between tasks” and when given an item and [Student] did not know what to do with it. Student “is almost always distressed by changes in [Student’s] routines...and with making friendships. [Student] frequently is uncooperative and has temper tantrums to avoid the new task or situation presented to [Student].” The 3/18/2021-O.T. Program Report states that Student “needs [Student’s] environment and routines adapted so that [Student’s] needs for **seeking** and **registration** can be met through routine intense exercise. [Student] needs [Student’s] classroom set up so that [Student] can participate in a broader variety of activities by having some aspects of [Student’s] environment high-lighted and emphasized so that [Student] can notice (have **sensitivity** to) them. And have other aspects of [Student’s] environment toned down so that it can prevent [Student’s] overwhelming (**avoiding**) response (such as limiting visual fields and sound levels) with others.” (Bold in original). DOE Ex. 37 at 0322-0324; DOE Ex. 477 at 1752-1754.

54. On March 18, 2021, an Educational Evaluation Report was issued by SSC (“3/18/2021-Educ. Eval. Report”). The 3/18/2021-Educ. Eval. Report was conducted over a period

¹⁸ Based on the evidence, “O.T.” means occupational therapy.

imitate a few [REDACTED]. DOE Ex. 428 at 1566; DOE Ex. 430 at 1571.

57. Student's [REDACTED] is an iPad with a software program called [REDACTED]. Private School uses Student's iPad on a daily basis to play highly preferred music to Student as reinforcement while Student is working. Director, Tr. Vol. 2, 283:7-284:5.
58. Director testified that Student is capable of doing [REDACTED]. [REDACTED] Student also communicates by using "approximations," which means either approximations of [REDACTED]. Director testified that once Private School runs out of [REDACTED] that are easy for Student to acquire, [REDACTED] [REDACTED] will then be utilized to augment those [REDACTED]. Director, Tr. Vol. 2, 281:14-284:12.
59. On March 31, 2021, SLC conducted a 45-minute virtual observation of Student. SLC summarized [SLC's] observations in a March 31, 2021 report ("3/31/2021-Observation Report"). SLC was in a separate observation room and observed Student through a camera feed. SLC observed Student independently use modified [REDACTED] for the [REDACTED]; imitating models for approximated [REDACTED]; imitating a model of the [REDACTED]; and did not imitate a model for an approximated sign for "[REDACTED]." SLC observed Student "participate in [Student's] snack routine, a letter-identification task, a book activity, a ball and hammer toy activity, and a number-identification task. The letter, number, and book tasks were each accompanied by music played on an iPad." DOE Ex. 39 at 0332-335; DOE Ex. 477 at 1748-1751; SLC, Tr. Vol. 3, 463:23-.464:21. SLC did not see an [REDACTED] being used during [SLC's] March 31, 2021 observation of Student. SLC, Tr. Vol. 3, 465:14-20.

60. On April 1, 2021, Principal requested that Director provide information/documents regarding Student for the month of March 2021 by April 7, 2021. DOE Ex. 436 at 1586-1587; DOE Ex. 437 at 1589-1590. Director attempted to send the information/documents on April 7, 2021, but [Director] encountered computer problems. DOE Ex. 461 at 1652. On April 8, 2021, Director emailed to SSC documents for the month of March 2021. DOE Ex. 463 at 1657-16650; DOE Ex. 464 at 1667-1675; DOE Ex. 465 at 1677-1685; DOE Ex. 466 at 1687-1695; DOE Ex. 467 at 1697-1705; DOE Ex. 463 at 1658; DOE Ex. 469 at 1712-1720; DOE Ex. 471 at 1724-1728. SSC confirmed receiving 7 emails with 7 attachments from Director. DOE Ex. 474 at 1734.
61. On April 6, 2021, District Resource Teacher-2 (“DRT-2”) signed an Observation Confidentiality and Non-Disclosure Agreement with Private School. The agreement specified that DRT-2 would have 30 minutes to conduct an observation of Student. DOE Ex. 468 at 1708. DRT-2 then conducted a video observation of Student from 9:00 a.m. to 9:34 a.m. at Private School. During this time, DRT-2 observed Student’s interaction with an RBT. While the RBT interacted with Student, the RBT used books, sheets of printed numbers, letters and shapes. The RBT also utilized “PECS symbols” and played a song about numbers on an iPad for Student, to which Student reacted positively. DRT-2’s observation ended when the RBT pulled the plug on the camera. DOE Ex. 468 at 1707-1710; DOE Ex. 486 at 1788-1789.
62. On April 8, 2021, DRT-2 emailed SSC, Contracted BCBA, DES-2 and another individual the following items: a summary of [REDACTED] April 6, 2021 observation of Student entitled “[Student] Observation” (“4/06/2021-Student Observation”); a video of the

- observation area; and a photo of the Observation Confidentiality and Non-Disclosure Agreement DRT-2 signed on April 6, 2021. DOE Ex. 468 at 1707-1710.
63. On April 8, 2021, SSC asked Director to provide the data collected by Private School staff during DRT-2's observation of Student on April 6, 2021. DOE Ex. 476 at 1738; DOE Ex. 491 at 1801; DOE Ex. 491 at 1801.
64. On April 8, 2021, SSC emailed to Principal, DES-2, SLP, SLC, Contracted BCBA, DRT-1, DRT-2, and others the following assessment reports in preparation for the April 12, 2021 eligibility meeting: (1) 4/06/2021-Student Observation; (2) 3/18/2021-Educ. Eval. Report; (3) 3/31/2021-Observation Report; (4) 3/18/2021-O.T. Program Report; (5) 3/16/2021-Psych. Eval. Report; and (6) 3/04/2021-SLP Report. DOE Ex. 477 at 1740-1769. On the same day, Parent was sent the same reports except for the 4/06/2021-Student Observation. DOE Ex. 494 at 1807-1834.
65. In April of 2021, an FBA Report was issued by Contracted BCBA ("April 2021-FBA"). Pet. Ex. 2 at 091-100; DOE Ex. 41 at 0340-0349. Contracted BCBA conducted a Functional Assessment Interview with Parent on April 16, 2021 for the April 2021-FBA. Pet. Ex. 2 at 092-093. Information from the parent interview indicated that Student was displaying tantrum behavior. Tantrums are defined as each instance when Student displays any combination of two (2) or more of the following behaviors: [REDACTED]
- [REDACTED]
- [REDACTED]. It was reported that Student would [REDACTED] if [Student] escalated further during [Student's] tantrum. It was also reported that tantrums could occur from 2-3 times per day and last from 2 seconds up to 30 minutes. Parent reported that the severity of Student's tantrums was "moderate" as [Student's] screaming can

make others' ears ring. Events that can increase the likelihood of tantrums are when [Student's] requests are denied, or when a preferred activity ends or is removed. Pet. Ex. 1 at 039; Pet. Ex. 2 at 093-094. Contracted BCBA was unable to observe Student at Private School, but Contracted BCBA was able to review DRT-2's 4/06/2021-Student Observation Report, which was incorporated into Contracted BCBA's FBA report. The April 2021-FBA hypothesized that Student exhibits problem behavior to gain access to preferred items. Pet. Ex. 2 at 098. The April 2021-FBA recommended the following "replacement behaviors": increase communication using VB-MAPP assessment; and choosing alternative item or activity and/or completing task before preferred item. Pet. Ex. 2 at 099. The April 2021-FBA recommended that Student receive a Behavior Intervention Plan ("BIP") to be implemented by an RBT. Pet. Ex. 2 at 099. Contracted BCBA reviewed the following records: Educational Evaluation (3/18/2021); Observation (2/2021, 4/2021); O.T. Program Report (3/18/2021); Psychoeducational Evaluation (3/16/2021); Speech and Language Assessment Report (4/23/2018, 3/04/2021); Academic Assessment (4/2018); Occupational Therapy Assessment (4/23/2018); and Preschool Evaluation Report (5/09/2018). Pet. Ex. 2 at 093; Contracted BCBA, Tr. Vol. 4, 566:7-571:22.

66. On April 12, 2021, Parent participated in an eligibility meeting with Principal, SLC, School Psychologist, SSC, DRT-1, DRT-2, Contracted BCBA, and others. DOE Ex. 11 at 0106-0107; Principal, Tr. Vol. 3, 396:5-397:13. Student was found to continue being eligible for special education services under the eligibility category of [REDACTED]. DOE Ex. 11 at 0108, 0112.

67. On April 13, 2021, Parent was provided a copy of an Evaluation Summary Report (“4/13/2021-ESR”). The 4/13/2021-ESR summarizes information from a variety of sources, including SLC’s 3/31/2021-Observation Report and DRT-2’s 4/06/2021-Student Observation Report. The 4/13/2021-ESR states that [REDACTED] “impacts [Student’s] ability to maintain grade-level performance” and that Student’s “deficits in academics, adaptive behaviors, communication, fine motor, and social skills greatly impact [Student’s] ability to be successful in the general education setting.” The 4/13/2021-ESR further notes that Student “requires specially designed instruction, accommodations, modifications, and supplemental supports to enable [Student] to access the general education curriculum.” DOE Ex. 11 at 0109-0111.
68. On April 13, 2021, a Prior Written Notice was issued (“4/13/2021-PWN”). The 4/13/2021-PWN states that the DOE determined that Student has [REDACTED] [REDACTED] that significantly affects [Student’s] verbal and nonverbal communication skills and social interactions. DOE further determined that Student continued to be eligible for IDEA services under the category of [REDACTED]. The 4/13/2021-PWN listed numerous evaluation procedures, tests, records and reports DOE used in making its determination, including Private School’s VB-MAPP, dated 08/15/2019, 01/22/2020, and 10/15/2020; Data and information from Private School, December 2020, January 2021, and February 2021; Observation; Adaptive Behavior Assessment System, Third Edition. The 4/13/2021-PWN notes that “Student Medical Data was unavailable for review. The school was unable to obtain usable consent from parent to request information from doctor.” Pet. Ex. 11 at 0112-0113.

69. On April 20, 2021, SSC emailed Parent a copy of Contracted BCBA's April 2021-FBA Report, and informed Parent that they would be reviewing it at a second eligibility meeting before the IEP meeting on April 23, 2021. DOE Ex. 530 at 1961-1971. Another eligibility meeting had to be held because the April 2021-FBA was done and the IEP team needed to determine whether or not Student's eligibility was impacted or changed by the assessment and to update the information the IEP team had about Student. Principal, Tr. Vol. 3, 397:14-398:7.
70. Later that day on April 20, 2021, Parent informed SSC that [Parent] would not be available for the second eligibility meeting. The second eligibility meeting was rescheduled to May 6, 2021. DOE Ex. 532 at 1975; DOE Ex. 577 at 2070; DOE Ex. 596 at 2117.
71. On April 28, 2021, a Conference Announcement was issued by Principal at Current Public School, setting an IEP meeting for May 21, 2021 to develop an IEP for Student. ("4/28/2021-CA"). DOE Ex. 602 at 2145-2146.
72. On May 3, 2021, Principal sent a letter to Director requesting information/documents for the month of April 2021. The letter requested similar documents as in previous months. The letter requested that the information be submitted no later than May 10, 2021. DOE Ex. 600 at 2137; DOE Ex. 628 at 2231-2233; DOE Ex. 594 at 2109-2112; DOE Ex. 595 at 2114-2115. On May 10, 2021, Director informed SSC that due to financial hardship and Private School's operation manager being placed on furlough, there would be a delay in responding to Principal's request for information/documents. DOE Ex. 600 at 2137; DOE Ex. 601 at 2139. On May 21, 2021, SSC sent Director an email message to follow up on the request for information. DOE Ex. 628 at 2231. On May 26, 2021,

Director informed SSC that Private School intended to provide the requested information and would get it to SSC as soon as they were able to. DOE Ex. 641 at 2267.

73. On May 6, 2021, before the second eligibility meeting took place, SSC emailed Parent another copy of the April 2021-FBA Report. DOE Ex. 598 at 2121-2131. Parent participated in the May 6, 2021 eligibility meeting and the team discussed the April 2021-FBA Report during the meeting. DOE Ex. 13 at 0120, 0124, 0125; Parent, Tr. Vol. 1, 87:19-88:9; DOE Ex. 773 (May 6, 2021 Eligibility Meeting). During the eligibility meeting, it was understood that Contracted BCBA would create a draft of a behavior intervention plan (“BIP”)²¹ before the May 21, 2021 IEP meeting; the IEP team would review the BIP during the May 21, 2021 IEP meeting; make adjustments to the BIP, if necessary, and if the services are appropriate, incorporate them into the IEP. DOE Ex. 773 (May 6, 2021 Eligibility Meeting) at 00:21:00-00:21:49. At the conclusion of the eligibility meeting, Parent requested a copy of the forthcoming draft IEP and was told that one would be done by Monday, May 10, 2021, and sent to [Parent] before the May 21, 2021 IEP meeting. Parent, Tr. Vol. 1, 89:15-25; DOE Ex. 773 (May 6, 2021 Eligibility Meeting) at 00:22:30-00:22:50.
74. Contracted BCBA created a draft Behavior Intervention Plan, dated May 2021 (“May 2021-BIP”). The May 2021-BIP states that Student’s problem behavior is tantrums, and it is hypothesized that Student exhibits problem behavior to gain access to preferred items. The May 2021-BIP recommends the following techniques to address Student’s problem behavior: offer alternatives when Student cannot access preferred item/activity;

²¹ Contracted BCBA appears to use the term “behavior improvement plan” and “behavior intervention plan” interchangeably. DOE Ex. at 773 (May 6, 2021 Eligibility Meeting) at 00:09:44- 00:11:25; DOE Ex. 41 at 0348.

keep instructions within 5 second of each other; give prompt that something is going to happen/change/begin/end; use first/then statement; make environmental changes; and use most-to-least and least-to-most prompting. DOE Ex. 776 at 2943-2946; Contracted BCBA, Tr. Vol. 4, 573:25-575:2.

75. On May 7, 2021, an Evaluation Summary Report was provided to Parent for Student's re-evaluation. ("5/07/2021-ESR"). The 5/07/2021-ESR notes that "[Student] continues to have difficulties in the areas of adaptive skills, communication, academic, social skills, and fine motor skills despite targeted interventions and supports as outlined in [Student's] Individualized Applied Behavior Analysis Education Program, dated 10/18/2020." The 5/07/2021-ESR summarizes the FBA and states that Student continues to meet the eligibility criteria of [REDACTED] and qualifies for special education and related services. DOE Ex. 13 at 0121-0123.
76. On May 13, 2021, a Prior Written Notice was issued ("5/13/2021-PWN"). According to the 5/13/2021-PWN, DOE determined that Student "has a [REDACTED] that significantly affects [Student's] verbal and nonverbal communication skills and social interactions. [Student] is unable to perform academic, social, adaptive, behavioral, and communication skills expected of [Student's] age despite intensive interventions. [Student] continues to be eligible for IDEA/Ch. 60 services under the category of [REDACTED]." DOE Ex. 13 at 0124-0125.
77. On May 13, 2021, Parent again asked SSC for a draft of the IEP so that [Parent] could look at it before the May 21, 2021 IEP meeting. DOE Ex. 603 at 2148; DOE Ex. 605 at 2152; DOE Ex. 606 at 2155; DOE Ex. 607 at 2158; DOE Ex. 608 at 2161; DOE Ex. 609 at 2163; DOE Ex. 610 at 2165.

78. On May 14, 2021, Parent received a draft copy of Student's IEP from SSC. SSC informed Parent that the IEP was in draft form and that changes may be made to the draft before the May 21, 2021 IEP meeting. DOE Ex. 615 at 2178-2199; Parent, Tr. Vol. 1, 91:11-21, 109:7-9.
79. On May 21, 2021, before the IEP meeting was scheduled to begin, Parent sent SSC an email asking to reschedule the May 21, 2021 IEP meeting because Parent needed more time to review the draft IEP. According to Parent, the "PLEPS" (Present Levels of Educational Performance) were inaccurate, and the "NEEDS" section was too general thus making the objectives under-developed. Parent informed SSC that [Parent] was "going to go through this draft IEP and send [SSC] an email with what [Parent] believe[s] needs to be adjusted accordingly." DOE Ex. 620 at 2213.
80. Besides the May 21, 2021 email, Parent did not have any communication with Current Public School about the content of the draft IEP between May 14, 2021 and June 3, 2021. Parent, Tr. Vol. I, 109:7-110:13.
81. On May 26, 2021, SSC sent Parent an email to reschedule the May 21, 2021 IEP meeting. SSC informed Parent that the draft IEP was a starting point for discussion and was not finalized. SSC asked Parent to send an email to the IEP team with Parent's thoughts and suggestions about the draft IEP. DOE Ex. 640 at 2264-2265. Parent did not respond to this email. Parent, Tr. Vol. I, 93:11-25.
82. On June 1, 2021, Principal sent a letter to Director requesting information/documents regarding Student for the month of May 2021. DOE Ex. 643 at 2274.
83. On June 1, 2021, SSC followed up on [SSC's] May 26, 2021 email to Parent, asking Parent about rescheduling the IEP meeting and for Parent's suggestions regarding the

draft IEP. DOE Ex. 644 at 2278. Parent did not respond to SSC's June 1, 2021 email. Parent, Tr. Vol. I, 94:1-8.

84. On June 3, 2021, a Complaint and Resolution Proposal was filed in this matter under case number DOE-SY2021-047. DOE Ex. 1 at 0001-0007.
85. On June 8, 2021, Principal sent Parent a letter to reschedule Student's IEP meeting that was postponed, per Parent's request, from April 23, 2021, May 6, 2021, and May 21, 2021. The letter informed Parent that if the school did not hear from [REDACTED], the IEP meeting would be held on June 21, 2021. DOE Ex. 649 at 2297-2299; DOE Ex. 653 at 2307-2309. Parent received the June 8, 2021 letter from Principal. Parent, Tr. Vol. I, 96:5-15.
86. A copy of a Conference Announcement, dated June 8, 2021, setting an IEP meeting for June 21, 2021, was sent to Parent on June 8, 2021 and June 15, 2021. DOE Ex. 19 at 0194; DOE Ex. 661 at 2326-2327. Parent received the June 8, 2021 Conference Announcement. Parent, Tr. Vol. I, 97:1-12; DOE Ex. 661 at 2325-2330; Principal, Tr. Vol. 3, 402:11-403:2.

June 21 and 23, 2021 IEP Meetings and the Resulting June 2021-IEP

87. On June 21, 2021, an IEP meeting took place with the following people: Principal, SSC, DES-2, SLC, DRT-1, DRT-2, a board-certified behavior analyst from a private company, and others. Pet. Ex. 1 at 059. Parent was not present during the June 21, 2021 IEP meeting. Parent spoke to SSC on the phone during the June 21, 2021 IEP meeting and consented to the IEP team proceeding without [Parent]. Parent, Tr. Vol. I, 116:19-25; DOE Ex. 663 at 2337. The June 21, 2021 IEP meeting was approximately one hour and fifty-four minutes long. DOE Ex. 774 (June 21, 2021 IEP meeting).

88. During the June 21, 2021 IEP meeting, the IEP team discussed how Student is frequently distressed by change and has temper tantrums to avoid tasks. They discussed how Student gets frustrated easily and [Student] is almost always “oblivious” to [Student’s] messy hands or face and frequently needs help finding things that are obvious to others or seems to be accident prone. The IEP team discussed that Student was receptive to calming activities, such as exercising or having less items. The IEP team discussed limiting Student’s visual fields to a few items; providing calming activities, and periodic movement breaks. DOE Ex. 774 (June 21, 2021 IEP meeting) at 1:40:39-1:54:00.
89. The school members of the IEP team were not able to finish developing an IEP on June 21, 2021, and they continued the IEP meeting to June 23, 2021. On June 21, 2021, Parent was informed that the IEP team was not able to finish on June 21, 2021 and that the IEP meeting was continued to June 23, 2021. DOE Ex. 19 at 0195-0196; DOE Ex. 663 at 2337.
90. On June 22, 2021, SSC emailed Parent an updated draft IEP, reflecting some changes made during the June 21, 2021 IEP meeting. SSC informed Parent that the occupational therapist would be making additional changes before they reconvened on June 23, 2021. SSC encouraged Parent to participate in the upcoming IEP meeting. DOE Ex. 663 at 2337-2359. Parent received SSC’s June 22, 2021 email and responded the same day with [Parent’s] new phone number. Parent, Tr. Vol. I, 98:9-16; DOE Ex. 664 at 2361. At the time that Parent responded to SSC’s email, Parent had no intention of going to the June 23, 2021 IEP meeting due to it conflicting with [Parent’s] work schedule; however, Parent did not inform SSC of [Parent’s] intention. Parent, Tr. Vol. I, 98:17-25.

91. The draft IEP does not list any Special Education and Related Services, does not list any Supplementary Aids and Services, and does not contain any Clarification of Services and Supports. DOE Ex. 663 at 2357.
92. On June 23, 2021, the school members of the IEP team met again to continue developing Student's IEP. Pet. Ex. 1 at 060. Parent did not attend the June 23, 2021 IEP meeting and gave the rest of the IEP team verbal consent to proceed with the meeting without [Parent]. Pet. Ex. 1 at 037; Parent, Tr. Vol. 1, 73:15-74:1, 117:1-4. The June 23, 2021 IEP meeting was approximately two hours and seven minutes long. DOE Ex. 775 (June 23, 2021, IEP meeting).
93. During the June 23, 2021 IEP meeting, the IEP team continued to discuss Student's behavioral needs and ways to assist Student when [Student] gets nervous or excited. The IEP team brainstormed about what could help Student, such as providing [Student] with activities to calm [Student]; use visual support (such as choice board, visual schedule); use of a visual chart since [Student] is [REDACTED]; ABA services; daily access to a BIP; RBT services throughout the day; access to headphones even though they were not sure if [Student] would tolerate it; and for occupational therapy purposes, access to headphones and stretch bands. DOE Ex. 775 (June 23, 2021 IEP meeting) at 00:20:35-00:23:30, 00:31:05-00:44:00, 1:58:00-2:01:20.
94. During the June 23, 2021 IEP meeting, in the context of deciding which educational setting was best for Student, the IEP team discussed developing a transition plan to move Student from a more restrictive environment to a less restrictive environment²².

²² Although Petitioners disagree that Private School is a more restrictive environment than the offered DOE setting, the undersigned need not decide this issue because (1) it is not an issue

The IEP team discussed that any time a child is moved from a more restrictive environment to a less restrictive environment, a transition plan should be in place. A transition plan would give the IEP team the flexibility and the ability to give Student additional supports until Student has transitioned. One member of the IEP team stated that a transition plan can be developed at a “separate meeting.” During the discussion, the IEP team acknowledged that Student has difficulty with transition. The transition would be at Student’s pace and the transition plan could take days or months or even years. The IEP team contemplated having more than one transition plan and decided that a transition plan would be developed to move Student from a more restrictive environment to a less restrictive environment, and they left open the possibility of having another transition meeting to discuss transitioning Student from a special education setting to a general education setting within the DOE school in the event that Student did extremely well in the special education setting. One member of the IEP team stated that in the forthcoming Prior Written Notice, it should be noted that a transition meeting needed to be scheduled. DOE Ex. at 775 (June 23, 2021 IEP meeting) at 00:40:00-00:40:20, 1:04:50-1:32:20, 1:58:30-2:06:59.

95. Principal testified that the school members of the IEP team discussed having a transition plan for Student during the June 23, 2021 IEP meeting, but they did not develop one at that time because the school members of the IEP team wanted Parent’s input and that a transition plan can be developed at a later date with Parent’s input. Principal, Tr. Vol. 3, 421:18-423:9, 433:13-22.

identified in the FAC; and (2) the undersigned is able to decide the issue regarding a transition plan without having to decide which setting is more restrictive.

96. During the June 23, 2021 IEP meeting, the IEP team spent approximately twenty (20) minutes discussing whether Student was eligible for ESY services. The IEP team discussed the eligibility requirements for ESY services—regression/recoupment, nature and severity of Student’s condition. The IEP team looked at the data provided by Private School and tried to discern whether the data showed a need for ESY services. Looking at the VB-MAPP provided by Private School, the IEP team did not see any regression, and noted that Student got better after a break in some instances (for example, after a particular break Student engaged in less problem behavior; and Student’s use of the “ [REDACTED] ” for “music” increased after a break (1:54:12-1:54:36)). One member noted that while Student was progressing slowly and making limited progress, the data did not show regression. No one could recall Parent reporting concerns of regression in any of the assessments. The IEP team ultimately decided that there was no data to suggest that ESY services were needed, but that they could revisit this issue. The IEP team also noted that they needed to take data during various breaks while Student was at Current Public School. DOE Ex. 775 (June 23, 2021 IEP meeting) at 1:37:45-1:58:10; Parent, Tr. Vol. 1, 47:21-48:13.
97. Principal testified that during the June 23, 2021 IEP meeting, they “had determined that the child would not be eligible for extended school year at that time, but we would continue to collect data because we can come back to the table at any time to include ESY services.” There were two reasons for determining that Student did not qualify for ESY services: (1) the data provided by Private School indicated that there was no regression after breaks and there were no recoupment issues; and (2) DOE wanted to

collect its own data to confirm what Private School's data was showing. Principal, Tr. Vol. 3, 407:18-410:13.

98. During the June 21, 2021 and June 23, 2021 IEP meetings, the IEP team discussed what type of "communication system" or device Student needed. At the time of the discussion, the IEP team was not able to determine what supports Student needed for [Student's] communication needs, but the IEP team knew that Student needed something since [Student] did not have a consistent "communication system" and [Student] was not fluent in speech. The IEP team reasoned that they would offer "[REDACTED] [REDACTED]"²³ to Student so that it would give the IEP team the ability to explore a variety of equipment (from simple pictures to higher level technology) with Student to figure out what was best for [Student]. The IEP team deliberately chose to use the word "system" and not "[REDACTED]." The IEP team also discussed offering speech and language consultation minutes so that the team could work on a "communication system" together and implement it consistently across providers. The IEP team reasoned that as they worked with Student, they could revise and be more specific. Although Student was not using an [REDACTED], the IEP team wanted to keep that as an option. DOE Ex. 774 (June 21, 2021 IEP meeting) at 1:23:00-1:27:00; DOE Ex. 775 (June 23, 2021 IEP meeting) at 00:44:00- 00:49:25; SLC, Tr. Vol. 3, 465:14-469:13.

23 [REDACTED]

[REDACTED] SLC, Tr. Vol. 3, 466:8-467:3, 469:22-471:16, 482:25-484:2; DOE Ex. 775 (June 23, 2021 IEP meeting) 00:44:00 – 00:49:25.

99. The result of the June 21, 2021 and June 23, 2021 IEP meetings was an IEP dated “06/23/2021, 06/21/2021” (“June 2021-IEP”). Pet. Ex. 1 at 036-060; DOE Ex. 19 at 0197-0221.
100. Relying on information provided by Student’s private program²⁴, the June 2021-IEP states that Student engages in problem behaviors in the classroom, such as [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. Pet. Ex. 1 at 039.
101. Under the “Adaptive Skills” section of the June 2021-IEP, it notes that the type of prompts the private program used to help Student transition between classroom activities is unclear because Student’s private program did not provide the information. Pet. Ex. 1 at 039-040.
102. Under the “Sensory” section of the June 2021-IEP, it is notes that Student is “almost always distressed by changes in routines and is frequently uncooperative and has temper tantrums to avoid a new task or situation presented to [Student]. [Student] almost always shows distress during grooming tasks and misses eye contact with family members and seems unaware of messy hands or face.” Pet. Ex. 1 at 040.
103. Under the “Communication” section of the June 2021-IEP, it cites to the most recent Speech-Language Assessment (3/04/2021-SLP Report) and Private School as the sources of information upon which the June 2021-IEP relies on to determine Student’s

²⁴ The term “private program” is being used to refer to either Pilot Program or Private School. The June 2021-IEP appears to use the designation “Pilot Program” to refer to both entities as the names are very similar.

communication needs. With respect to information from Private School, the June 2021-IEP relied on information such as Director's March 29, 2021 email, VB-MAPP administered on January 22, 2020, and February 2021 records. The June 2021-IEP notes that Student was not yet using speech to say words or imitate sounds/words of others, and that, according to Director's March 29, 2021 email, Student's [REDACTED] [REDACTED] was not being used for communication purposes while at Private School. Pet. Ex. 1 at 041.

104. According to the June 2021-IEP, Student is eligible for special education and related services under the category of [REDACTED], "which impacts [REDACTED] ability to maintain grade-level performance." The June 2021-IEP states that "[Student's] deficits in academics, adaptive behaviors, communication, fine motor, and social skills greatly impact [Student's] ability to be successful in the general education setting. [Student] requires specially designed instruction, accommodations, modifications, and supplemental supports to enable [REDACTED] to access the general education curriculum." Pet. Ex. 1 at 041-042.
105. The June 2021-IEP contains Annual Goals for the following areas: Language Arts (reading); Language Arts (writing); Mathematics; Health (behavior/social/emotional) (three goals); Health (adaptive); Physical Education (fine motor) (two goals); Physical Education (sensory); and Language Arts (speech and language) (three goals). Pet. Ex. 1 at 044-056.
106. According to the June 2021-IEP, Student did not meet the standard for ESY services. Pet. Ex. 1 at 057.

107. According to the June 2021-IEP, Student will be provided with the following services: 1050 minutes per week of special education; 350 minutes per quarter of speech-language therapy; and 160 minutes per quarter of occupational therapy services. Pet. Ex. 1 at 057.
108. According to the June 2021-IEP, Student will be provided the following Supplementary Aids and Supports: daily Movement/regulation breaks, at least 3x throughout the day; daily Limit visual field; daily Access to headphones; 400 minutes per month of ABA services; 1830 minutes per week of Individual Instructional Support; daily Behavior Intervention Plan (BIP); 60 minutes per quarter of Speech Language consultation to the team; daily Visual Supports; and daily Access to low/high technology communication system. Pet. Ex. 1 at 057.
109. The “Clarification of Services and Supports” section of the June 2021-IEP states, *inter alia*, the following: (1) “ABA Services to be provided by a Board Certified Behavior Analyst (BCBA or BAaBA) [sic]. ABA services include, but are not limited to, Teacher Consultation, RBT Training and Supervision, BIP Development/Revision, Program Implementation, Parent Education and Training, Monitoring of Data collection, Analysis of Data, and Developing reports and other appropriate documentation[;]” and (2) “Individual Instructional Support will be provided by a Registered Behavior Technician (RBT) as available under the supervision of a licensed Board Certified Behavior Analyst (BCBA or BCaBA).” Pet. Ex. 1 at 057.
110. According to the June 2021-IEP, Student “will not participate with non-disabled peers for academic instruction. [Student] will have opportunities to participate with [Student’s] non-disabled peers during non-academic academic [sic] activities such as recess, lunch, school-wide activities, special classes (such as PE, Music, art, library),

and field trips for the purposes of practicing and generalizing ■ IEP goals. Student will attend [Student's] home school.” Pet. Ex. 1 at 058.

111. The June 2021-IEP did not include transportation. Principal testified that transportation was not offered because “transportation is a very personal choice for the parent” and Parent was not present at the IEP meetings to express whether [Parent] wanted transportation for Student. The IEP team defaulted to not putting it in the IEP with the understanding that it could be added on at a later date. Principal, Tr. Vol. 3, 416:13-418:6, 433:13-22; DOE Ex. 774 (June 21, 2021 IEP meeting) at 1:19:40-1:21:50.

Events After the June 23, 2021 IEP Meeting

112. On July 1, 2021, Principal sent Director a letter requesting the same information/documents as requested in previous months for the month of June 2021. The letter also states that information/documents requested for the months of April and May 2021 were outstanding. DOE Ex. 665 at 2363-2365.
113. On July 6, 2021, a First Amended Complaint and Resolution Proposal was filed in this matter under case number DOE-SY2021-047. DOE Ex. 3 at 0014-0020.
114. On July 7, 2021, a Prior Written Notice was issued by Principal (“7/07/2021-PWN”). The 7/07/2021-PWN contains the same information as the June 2021-IEP with additional information as to why certain actions were proposed or refused. Pet. Ex. at 061-064; DOE Ex. 19 at 0222-0225.
115. Under the “Explanation of why the action is proposed or refused” section in the 7/07/2021-PWN, it explains that Student will be given “movement/regulation breaks at

least 3x throughout the day...to address [Student's] sensory needs for seeking and registration." Examples of movement/regulation breaks include exercise with "deep pressure" or "isometric quality" such as push-hands, chair push-ups, stretch band pulls with hands/feet. Student's visual field will be limited to prevent [redacted] environment from becoming overwhelming and to assist [Student] in focusing. Student will be given access to headphones to prevent [Student's] environment from becoming overwhelming. Pet. Ex. 1 at 061. Visual supports will be provided to support Student during transitions. The visual supports include choice boards, visual schedule, and may include first/then and visual task analysis of routines. Pet. Ex. 1 at 062.

116. Under the "Explanation of why the action is proposed or refused" section in the 7/07/2021-PWN, it states "Behavior Intervention (BIP) to address [Student's] behavioral needs." Pet. Ex. 1 at 062.
117. Under the "Explanation of why the action is proposed or refused" section in the 7/07/2021-PWN, it states that "Speech language consultation to the team to assist with [redacted];" and "[redacted] as [Student] does not have a consistent communication system." Pet. Ex. 1 at 061-064.
118. The 7/07/2021-PWN notes that the IEP team considered and discussed transportation, and "[t]he IEP team decided not to add transportation at this time. The team was unsure if [Student's] family would be able to or prefer to transport [Student] to and from school at this time." Pet. Ex. 1 at 062-063.
119. The 7/07/2021-PWN notes that the IEP team considered and discussed ESY eligibility and "[t]he IEP team decided [Student] does not qualify for an Extended School Year

(ESY) at this time. Based on the data received from [private program] in March 2021, the IEP team determined that [Student] does not meet the criteria of an extended school year at this time. There was no regression after a break and the IEP team noticed the data indicated there were increases in skills after returning from the break. The data received from [private program] does not indicate a need for ESY at this time. Data will continue to be collected. To arrive at this decision, the IEP team took into consideration the nature and severity of the disabling condition, areas of learning crucial to attaining self-sufficiency and independence from caregivers, the extent of regression caused by interruption of educational programming and the rate of recoupment following interruption of educational programming.” Pet. Ex. 1 at 062-063.

120. The 7/07/2021-PWN noted that the proposed or refused actions were based on the following evaluation procedures, tests, records and reports: Observation; Kaufman Survey of Early Academic and Language Skills (K-SEALS); Records Review; Parent Report; Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP), dated 8/15/2019, 01/22/2020, and 10/15/2020, completed at Private School; Data and Information from Private School, February 2021; Speech and Language Assessment Report; Speech and Language Observation; Peabody Development Motor Scales (PDMS-2); Sensory Profile 2 Caregiver Questionnaire; Development Profile, Fourth Edition; Adaptive Behavior Assessment Systems, Third Edition; [REDACTED] Rating Scales; and Teacher input. Pet. Ex. 1 at 063.
121. The 7/07/2021-PWN also notes that a “transition plan and a meeting to review the Behavior Intervention Plan (BIP) needs to be scheduled with [Parent].” Pet. Ex. 1 at 064.

122. The 7/07/2021-PWN mirrors the June 2021-IEP in its description of Individual Instructional Support. It does not contain an explanation of why the phrase “as available” is being used to describe the provision of RBT services. Pet. Ex. 1 at 062.
123. Principal testified about the phrase “Individual instructional support will be provided by an RBT as available under the supervision of a licensed BCBA or BCaBA.” Principal explained why the phrase “RBT as available” was written in the June 2021-IEP in the following manner: “When we have a RBT, they could be contracted outside of the Department of Education which gives us very limited control over their availability....[I]f they’re out, then a substitute would be available. And since [Parent] was not at this meeting, we were trying to be very crystal clear so that we could—because [Parent] wasn’t there, if you’ll notice throughout the IEP, we were—we extensively explained things for [Parent’s] benefit. So the intent, I recall this discussion because we were talking about staffing shortages at the time, and we just wanted to be clear that, yes, this child should have someone every day, but we cannot guarantee that someone’s going to be available if we don’t have control over the contracted service.” Principal, Tr. Vol. 3, 412:13-415:10. Principal further testified that the phrase “under the supervision of a licensed BCBA or BCaBA” was meant to only apply to an RBT. Principal testified that when an RBT is not available, someone else would provide the behavioral support or the instructional support: “We try as often as possible, especially this year with our staff shortages, we’re becoming pro at it. If a student’s one-to-one person is not available, we try to first work with the agency to see if they can send a substitute. And sometimes they can, sometimes the[y] cannot. And then we have our own DOE-employed people who can fill in, but those people would not be under the

supervision of a BCBA. They would be working with a student for that day. You know, we would expect it would be a very short period of time.” Principal, Tr. Vol. 3, 415:12-416:4.

124. On July 7, 2021, SSC emailed Parent a copy of the June 2021-IEP and 7/07/2021-PWN. SSC informed Parent that if there was anything [Parent] wanted to discuss, a meeting could be scheduled. DOE Ex. 667 at 2372-2405; Principal, Tr. Vol. 3, 404:25-405:7.
125. On September 8, 2021, a Second Amended Complaint and Resolution Proposal was filed.
126. An IEP meeting was scheduled for Student for November 8, 2021; however, the meeting was cancelled by DOE due to unknown circumstances beyond their control. DOE Ex. 738 at 2644; DOE Ex. 739 at 2646; DOE Ex. 740 at 2648-2663; DOE Ex. 741 at 2665; DOE Ex. 742 at 2667; DOE Ex. 743 at 2669; DOE Ex. 744 at 2671; Pet. Ex. 3 at 130.

Private School

127. Director was hired by the DOE in late 2017 as an Applied Behavior Analysis (“ABA”) Verbal Behavior consultant. Director, Tr. Vol. 2, 168:13-176:16, 178:9-14, 179:4-13. ABA is a behavioral modification methodology which involves the analysis of specific types of learned behavior, how the environment affects the behavior, and how the environment can be manipulated to change the behavior. “Verbal behavior” is a type of applied behavior analysis. It is the analysis of language using the same unit of analysis as behavior. Director, Tr. Vol. 2, 161:1-167:21.
128. In January 2018 through May 2018, Director provided consultation services and RBT services to DOE to help create ABA Verbal Behavior Programs in a few preschools on Island 1. Director, Tr. Vol. 2, 168:13-176:16, 178:9-14, 179:4-13.

129. In the summer of 2019, Director developed a two-week summer camp that provided basic social and language skills programming for special needs children. The summer camp was not affiliated with DOE. Director, Tr. Vol. 2, 179:4-180:12. Student did not attend the summer camp. Director, Tr. Vol. 2, 259:3-15.
130. Following the two-week summer camp, Director founded a nonprofit pilot program for preschool and kindergarten (“Pilot Program”) for the 2019-2020 school year. The purpose of the Pilot Program was to learn the feasibility of opening and operating an ABA school for profit, including effective teaching methodologies and the cost associated with running such a school. Although the intent was to run the Pilot Program for a whole school year, the Pilot Program was only in operation from August of 2019 to mid-March of 2020 due to mandatory state quarantine associated with the COVID-19 pandemic. Director, Tr. Vol. 2, 182:4-183:8, 257:22-258:19, 259:19-22, 301:25-302:6.
131. Student participated in the Pilot Program. Director, Tr. Vol. 2, 182:21-183:18, 193:2-4, 257:22-258:10.
132. Following the Pilot Program, Director developed Private School, a for-profit private school. Director, Tr. Vol. 2, 183:15-24, 195:2-196:2.
133. Private School became a licensed private school for [REDACTED] and [REDACTED] grade on January 21, 2021 in the State of Hawaii. Private School currently goes up to the [REDACTED] grade and there are plans to expand to the [REDACTED] grade. Private School is a licensed private school through 2023. Pet. Ex. 4 at 131; Director, Tr. Vol. 2, 256:10-257:8, 291:24-292:6.

134. Private School was in operation for the 2020-2021 school year and is in operation for the 2021-2022 school year. Director, Tr. Vol. 2, 258:20-22, 259:19-22. The school year begins in August and ends in July. Director, Tr. Vol. 2, 302:7-12.
135. Student attended Private School during the 2020-2021 school year, which ran from August 2020 until July 2021. Parent, Tr. Vol. 1, 60:8-13.
136. On September 11, 2020, Parent signed an enrollment contract with itemized costs for Student to attend Private School for the 2020-2021 school year. The total cost of Student's program for the 2020-2021 school year was two hundred twenty-four thousand three hundred nine dollars and eighty cents (\$224,309.80). Pet. Ex. 4 at 185.
137. During the 2020-2021 school year, Student received the following services at Private School: Speech-Language Therapy, BCBA Consultation, RBT Services, Special Education Teacher Consultation, Reverse Inclusion Program, Distance Bridge Program Assessment and Program and Supplies, and Assistive Technologies. Pet. Ex. 4 at 187, ¶ 90.
138. On June 21, 2021, Parent met with Director and signed a contract to enroll Student at Private School for the 2021-2022 school year ("6/21/2021-Contract")²⁵. Director, Tr. Vol. 2, 196:13-197:6, 286:15-21. Director testified that [REDACTED] "believes" the 6/21/2021-Contract amount is approximately two hundred thirty-two thousand dollars (\$232,000.00). Director, Tr. Vol. 2, 221:18-222:5, 298:10-19.

²⁵ A copy of the 6/21/2021-Contract was not offered as evidence by either party. Director, Tr. Vol. 2, 214:17-216:8.

139. The 6/21/2021-Contract contains substantially the same terms, obligations, and representations as the contract Parent signed for the 2020-2021 school year. Director, Tr. Vol. 2, 216:9-17; Parent, Tr. Vol. 1, 66:7-13, 103:5-7.
140. Student began the 2021-2022 school year at Private School during the second week of August 2021. Parent, Tr. Vol. 1, 59:16-20.
141. The 6/21/2021-Contract sets the maximum number of minutes or hours for each service that Private School anticipates providing to Student; however, Parent will only be invoiced for services provided, which may be less than the maximum number of minutes or hours stated in the 6/21/2021-Contract. Director, Tr. Vol. 2, 197:1-198:12, 219:4-220:7.
142. The 6/21/2021-Contract amount includes monthly tuition, 15% administration fee, and 4% Hawaii tax. Director, Tr. Vol. 2, 298:18-23.
143. Tuition, which is \$4200 a month, covers ABA programming, special education programming, parent education and communication, the IABAEP process, all the assessments, materials and supplies for the school, data software program, and staff training. Director, Tr. Vol. 2, 299:10-21.
144. The 15% administration fee covers administrative salaries, accounting and legal services, insurances (professional liability, general liability, school), licensing fees, rent, utilities, bills (internet, etc.). Director, Tr. Vol. 2, 298:24-299:9.
145. Director is not a special education teacher and Private School does not have a special education teacher on campus. Private School has a special education consultant located outside of Hawaii; however, Student's program is all ABA based and the special

- education consultant is not being utilized for Student. Director, Tr. Vol. 2, 253:18-256:9.
146. Student is currently receiving the following services at Private School: ABA services; BCBA; RBT; speech language services (direct therapy and consultation); special education consultation, if needed; and reverse inclusion. Director, Tr. Vol. 2, 292:7-24.
147. Director testified that Student currently receives approximately two and a half hours²⁶ a month of speech-language services, consisting of direct services and consultation services. Direct services mean speech therapy that is given directly to Student by Director, while consultation services mean monitoring and training of teachers by Director. At the time of the due process hearing, the speech-language services provided by Director was more consultation than direct. Director, Tr. Vol. 2, 292:14-294:14.
148. Director could not recall the number of minutes of special education consultation Student could receive under the 6/21/2021-Contract. Director testified that Student has not had special education consultation for this whole year so far because [Student] has not needed it. Director, Tr. Vol. 2, 294:19-296:9.
149. Under the 6/21/2021-Contract, Student receives approximately two and a half hours a week of reverse inclusion. Director, Tr. Vol. 2, 296:10-18.
150. Student receives approximately six and a half (6.5) hours of RBT services a day. While the school day is six (6) hours, an additional half hour is added to the 6/21/2021-

²⁶ Director could not recall with certainty the amount of speech-language services Student is receiving under the enrollment contract because the amount is stated in minutes in the enrollment contract and a copy of the enrollment contract was not available for [REDACTED] to review at the due process hearing. Director, Tr. Vol. 2, 292:14-294:14.

- Contract to account for Parent being late to pick up Student. Director, Tr. Vol. 2, 296:19-297:19.
151. Director testified that [REDACTED] “believes” Student can receive up to 84 hours of BCBA services the whole school year. Director, Tr. Vol. 2, 297:20-298:7.
152. Director testified that Private School has a one-week break for winter break and spring break. Upon returning to school after these breaks, Student demonstrated regression in skills that [Student] had acquired/mastered; however, within a few days to a week, Student was able to recoup those skills with the assistance of prompts or repetition and was then able to be independent again. Director, Tr. Vol. 2, 231:11-233:21.
153. Private School does not provide transportation to Student. Director, Tr. Vol. 2, 298:8-9; Parent, Tr. Vol. 1, 43:15-45:10.
154. Parent testified that geographically Current Public School is very similar to Private School; however, getting in and out of Current Public School is more difficult due to traffic. Parent, Tr. Vol. 1, 42:6-43:14.
155. Parent works at the [REDACTED] on Island 1 from 8:30 a.m. to 5:00 p.m. Parent, Tr. Vol. 1, 20:2-9, 43:15-17.
156. Student attends Private School 5-days a week. Parent drops Student off at 8:15 a.m., and picks [Student] up at 2:15 p.m. Parent, Tr. Vol. 1, 57:3-10. Student is picked up from Private School by either Parent’s friend, a paid babysitter, or Parent, who will then have to adjust [Parent’s] work hours and work later. Parent, Tr. Vol. 1, 43:15-45:10
157. Parent receives parent education and training from Private School. Parent is able to observe Student while [Student] is in school and [Parent] is able to discuss with Director any concerns and opinions [Parent] may have. Parent, Tr. Vol. 1, 58:16-59:15.

158. Parent testified that over the course of the 2020-2021 school year period, [Parent] noticed a huge improvement in Student’s abilities to take care of [themselves] and communicate: Student is better able to communicate through [REDACTED]; improved knowledge of the ABCs and 123s; able to flip a page in a book without ripping the page; tolerates brushing [Student’s] teeth and brushing [Student’s] hair; and able to wash [Student’s] hands independently. Parent, Tr. Vol. 1, 60:14-61:6.
159. Parent testified that during the 2021-2022 school year, between August 2021 to December 2021, Student made gains: Student uses [REDACTED] more and uses them outside of class; looks at the person with whom [Student] is communicating; did not throw a tantrum when [Student] was not able to communicate; makes different noises (such a “uh-huh” to say yes); goes on the swings; opens and closes a door; more independent and needs less prompting to wash [Student’s] hands; Student picks [Student’s] fingers and throws [themselves] around less frequently. Parent, Tr. Vol. 1, 61:4-65:15.
160. Parent testified that Student is doing well: Student now tolerates being on a toilet; [Student] is able to take off and pull up [Student’s] own pants and pull-ups; [Student’s] repertoire of [REDACTED] increased from 1-5 a year ago to 10; making progress in learning to use a fork eat. Parent, Tr. Vol. 1, 106:23-109:6. Student knows letters and numbers. Parent, Tr. Vol. 1, 112:18-113:7.

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.” Dept. of Educ. of Haw. 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. Dept. of Educ. of the Commonwealth of Massachusetts, 471 U.S. 359, 368, 105 S. Ct. 1996, 2002 (1985). An IEP must be evaluated prospectively as of the time it was created. Retrospective evidence that materially alters the IEP is not permissible. R.E. v. New York City Dept. of Educ., 694 F.3d 167 (2nd Cir.2012).

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. Whether the 6/23/2021, 6/21/2021-IEP is a denial of FAPE where it was developed without parental involvement.

Petitioners waive Issue No. 1. Petitioners’ Closing Brief, p. 6.

2. Whether the 6/23/2021, 6/21/2021-IEP is a denial of FAPE where Student is deemed ineligible for Extended School Year services.

In this issue, Petitioners are alleging that Respondents committed procedural and substantive violations when the IEP team failed to gather sufficient information to discuss Student’s need for ESY services and then finding Student not eligible for ESY services.

Petitioners’ Closing Brief, pp. 6-7. Based on the evidence adduced at the due process hearing,

Respondents did not commit a procedural or substantive violation in the gathering of information to discuss Student's needs and when it determined that Student was not eligible for ESY services.

“Extended school year services must be provided only if a child’s IEP Team determines, on an individual basis, in accordance with §§ 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.” 34 C.F.R. § 300.106(a)(2); Haw. Admin. Rules § 8-60-7(a)(2); Dept. of Educ., State of Haw. v. Leo W., by and through his Parent Veronica W., 226 F.Supp.3d 1081, 1112, 344 Ed. Law Rep. 246 (D. Haw. Dec. 29, 2016).

The ESY eligibility standard consists of four parts: nature and severity of Student’s disability; self-sufficiency/independence; regression; and recoupment. Dept. of Educ., State of Haw. v. Leo W., by and through his Parent Veronica W., 226 F.Supp.3d 1081, 1111, 1113, 344 Ed. Law Rep. 246 (D. Haw. Dec. 29, 2016).

Petitioners’ argument that “[n]owhere does [Respondents] demonstrate that it sought [sic] gather information applicable to the question of whether Student needed Extended School Year services based upon the severity of [Student’s] disabling condition” is unpersuasive. Pet. Closing Brief, p. 7. Student attended Pilot Program beginning in August of 2019 and then transitioned to Private School for the 2020-2021 school year. (FOF 14, 135). DOE diligently and methodically requested consents from Parent to obtain information from Private School and Student’s doctors; requested information from Private School and through other means; and conducted assessments and observations of Student. (FOF 21, 22, 24, 26-29, 32-40, 42-45, 47-56, 59-61, 63, 65, 72, 79, 81-83). It is unclear from Petitioners’ argument what other types of information DOE should have sought or gathered but did not. DOE’s attempts at gathering information to develop an IEP for Student was reasonable and sufficient.

While Petitioners argue that “[m]erely reviewing data from [Private School] describing a 2 week break and analysis [sic] that information based upon a regression recoupment analysis was legally insufficient,” Petitioners do not cite to any legal authority for this argument. The IEP team reviewed the information available to them and made an eligibility determination based on that review. (FOF 96, 97, 119). An IEP team’s decision to not provide ESY services is justified when the decision is “made after the IEP team review[s] reports, assessments, summary statements, resource books, the ‘nature and severity’ of Student’s condition, and information from Student’s early intervention program.” N.S. v. State of Haw., Dept. of Educ., 2010 WL 2348664, at *5, Civ. No. 09-00343 SOM/KSC (U.S.D.C. Haw. June 9, 2010) (finding that DOE did not deny a student a FAPE when it denied parent’s request for occupational therapy and speech services during an ESY period when there was no data indicating a need and proposing that data collection be done between breaks to determine such need for a [REDACTED] year old transitioning from a Department of Health early intervention program to a DOE special education program.)

Petitioners’ argument that “No discussion occurred regarding how Student’s severe communication deficits effected [Student’s] ESY eligibility beyand [sic] the mere mention that it might. PX4, audio of 6/23/2021 IEP meting [sic] at 1:46:00-1:51:00” is not supported by the evidence. Pet. Closing Brief, p. 6. When the IEP team looked at the information provided by Private School, not only did they not see any regression, but they noted that Student’s use of the “[REDACTED]” for “music” increased after a break (1:54:12-1:54:36). (FOF 96). Based on the foregoing, Respondents did not commit a procedural violation in the gathering of information and the discussion that occurred regarding ESY eligibility.

Respondents also did not commit a substantive violation by determining that Student was not eligible for ESY services. “The burden is on the parents to establish that ESY services are necessary.” Virginia S. ex rel. Rachael M. v. Dept. of Educ., Hawaii, 2007 WL 80814 at *13, Civil No. 06-00128 JMS/LEK (D.Haw. Jan. 8, 2007). “[A] claimant seeking an ESY must satisfy an even stricter test, because “providing an ESY is the exception and not the rule under the regulatory scheme.”” N.B. v. Hellgate Elementary Sch. Dist., ex rel. Bd. of Directors, Missoula County, 541 F.3d 1202, 1211 (9th Cir.2008) (citations omitted). Therefore, the burden is on Petitioners to establish by a preponderance of the evidence that ESY services are necessary for Student. Petitioners have failed to meet this burden.

While Petitioners are not required to present empirical proof of actual prior regression, there was no evidence that ESY was necessary. Other than Director, there were no expert opinion testimony or opinions from professionals or any reliable documentation showing that ESY is necessary. N.B., 541 F.3d 1202, 1212 (9th Cir.2008) (A claimant can rely on expert opinion testimony to make the showing that ESY is necessary to permit a child to benefit from ■ instructions and is not required to present empirical proof of actual prior regression). See also, Virginia S. ex rel. Rachael M. v. Dept. of Educ., Hawaii, 2007 WL 80814 at *12, Civil No. 06-00128 JMS/LEK (D.Haw. Jan. 8, 2007) (“the state should consider the likelihood of regression, slow recoupment, and predictive data based upon the opinion of professionals.”) Todd v. Duneland Sch. Corp., 299 F.3d 899 (7th Cir. 2002)).

Although Parent and Director testified that Student regressed when he did not have services for 1-2 weeks, regression alone is not sufficient to establish a need for ESY services, especially since Director also testified that Student was able to recoup [Student’s] skills after a few days to a week of instructions. (FOF 152). Furthermore, Petitioners have not cited to any

part of the record that would indicate that the school members of the IEP team knew or should have known that Student regressed during a 1 to 2-week break. Also, Parent’s testimony that Student “fell apart” when [Student] did not receive ABA services for several months during the “COVID break” and during a one or two week break in March 2021²⁷ does not establish a need for ESY services. Pursuant to the “snap-shot” rule²⁸, an IEP team should not be held responsible for information that was not available to them at the time of the IEP meeting. Parent was not present at the IEP meeting to inform the school members of the IEP team that Student “fell apart” when [Student] did not have ABA services for several months due to the “COVID break” or when [Student] did not receive services for 1-2 weeks in March of 2021. And although Parent testified that Student regressed after 1-2 weeks without services, there is no evidence to corroborate Parent’s position that Student needs ESY services. “The [Parent’s] conclusion, without more, does not counter the testimony of the experts who reviewed the reports and determined that services were not necessary.” N.S. v. State of Haw., Dept. of Educ., 2010 WL 234664, *5, Civ. No. 09-00343 SOM/KSC (U.S.D.C. Haw. June 9, 2010).

“ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if [Student] is not provided with an educational program during the summer months.” N.B., 541 F.3d 1202, 1211 (9th Cir.2008) (quoting MM ex rel. DM v. Sch. Dist. of Greenville County, 303 F.3d 523, 537-38 (4th Cir.2002)). Based on the lack of evidence that the benefits Student will gain during a regular

²⁷ Parent, Tr. Vol. I, 48:7-50:9.

²⁸ “[A]n IEP must be evaluated in light of the ‘snapshot’ rule, ‘which instructs us to judge an IEP not in hindsight, but instead based on the information that was reasonably available to the parties at the time of the IEP.’” Dept. of Educ., State of Haw. v. Leo W., 226 F.Supp.3d 1081, 1099, 344 Ed. Law Rep. 246 (D. Haw. Dec. 29, 2016) (citing Baquerizo v. Garden Grove Unified Sch. Dist., 826 F.3d 1179, 1187 (9th Cir.2016)).

school year will be significantly jeopardized if Student is not provided ESY services, Petitioners have failed to meet their burden. As such, DOE did not deny Student a FAPE because the IEP did not provide ESY services to Student.

3. Whether the 6/23/2021, 6/21/2021-IEP is a denial of FAPE where Student is to receive Individual Instructional Support for 1830 minutes per week “by a Registered Behavior Technician (RBT) as available...”

In this issue, Petitioners are alleging that the June 2021-IEP denies Student a FAPE because the statement that Student will receive Individual Instructional Support “by a Registered Behavior Technician (RBT) as available” renders “[t]he offer...illusory.” Petitioners take exception with the phrase “as available” because the phrase means that “[t]here are no guarantees [that DOE will] provide this service.” Pet. Closing Brief, p. 7. As discussed below, the June 2021-IEP denies Student a FAPE by conditioning RBT services on staffing availability.

According to Principal, the IEP team decided to include the phrase “as available” in the June 2021-IEP to explain to Parent that there was a possibility that Student may not have an RBT due to staffing issues that are beyond the DOE’s control. (FOF 122, 123). Respondents’ closing brief elaborates on Principal’s explanation of why the phrase “as available” was included in Student’s IEP: “The IEP team recognized the realities of contracting for services during a pandemic and attempted to clarify the support with a limiting qualification.” DOE Closing Brief, p. 17. While the inclusion of the phrase “as available” was intended to “explain” or “clarify” the services to Parent, the explanation or clarification essentially created an escape clause for DOE when it was reduced to writing in the IEP²⁹. An IEP must contain, among other things, a statement of specific educational services to be provided to a student. 20 U.S.C. § 1414(d). An

²⁹ If DOE wanted to “explain” or “clarify” to Parent that the DOE could not guarantee that an RBT will be available because they did not have control over contracted services, this explanation could have been made in a prior written notice, but it was not. (FOF 122).

IEP is a “comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.”

Burlington v. Dept. of Educ. of the Commonwealth of Massachusetts, 471 U.S. 359, 368, 105 S. Ct. 1996, 2002 (1985). By including the phrase “as available,” regardless of what the IEP team’s intention may have been, there is no guarantee that RBT services will be provided to Student and places Student at a disadvantage. The following three scenarios are examples of Student being placed at a disadvantage: (1) a claim that DOE is failing to implement the June 2021-IEP will be more difficult to prove than if the IEP were to simply state that Student will receive RBT services; (2) in the event that Student transfers to another school, the new school must provide “services comparable to those described in the child’s IEP from the previous public agency....” 34 C.F.R. § 300.323(e); see also 20 USC § 1414(d)(2)(C). Student’s June 2021-IEP would allow the new school to provide Student with RBT services only when the new school has RBTs available; and (3) in the event that the school has two students in need of RBT services and the school only has one RBT, Student’s right to an RBT is arguably inferior to a student whose IEP does not condition his/her RBT services on the basis of availability.

Lastly, staffing shortage does not excuse DOE from providing special education services. See e.g., In re: Student with a Disability, 121 LRP 38674, (Kan. SEA Oct. 20, 2021) (complaint investigator found that staffing shortage and inability to fill vacancy did not excuse the district from providing student with the special education services called for in student’s IEP); Elmira City Sch. Dist. V. New York State Educ. Dept. and Carolyn K., as Parent of E.K., --- N.Y.S.3d --- (2022), 2022 WL 1037791, at *3 (New York Supreme Court, Appellate Division, April 7, 2022) (“[District’s] inability to secure an RN who could provide one-to-one services for the child resulted in a material deviation from the IEP so as to constitute a denial of a FAPE during this

period.”)³⁰ While staffing issues are legitimate concerns, unquestionably exacerbated by the COVID-19 pandemic in recent years, this does not justify the “limiting qualification” in Student’s June 2021-IEP.

Based on the foregoing, Petitioners have met their burden in showing that Respondents committed a substantive violation by conditioning RBT services on availability, and therefore the June 2021-IEP denies Student a FAPE.

4. Whether the 6/23/2021, 6/21/2021-IEP is a denial of FAPE where there is no transportation service to be provided.

In this issue, Petitioners are alleging that the June 2021-IEP denies Student a FAPE because it does not include transportation services. Petitioners fail to meet their burden in showing that the June 2021-IEP did not provide Student a FAPE when it does not provide Student with transportation services to and from home and Current Public School.

“The [D]epartment [of Education] may provide suitable transportation to and from school and for educational field trips for all children in grades kindergarten to twelve and in special education classes.” H.R.S. § 302A-406(a). “Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education...” 34 C.F.R. § 300.34(a) (2006); 20 U.S.C. §1401(26)(A) (“The term ‘related services’ means transportation...and other supportive services...as may be required to assist a child with a disability to benefit from special education....”) Based on the language of the foregoing statute and regulation, transportation

³⁰ In finding a denial of FAPE, the Appellate Division in Elmira City Sch. Dist. further explained, “Indeed the IDEA contains specific situations in which ‘[t]he obligation to make a [FAPE] available to all children with disabilities does not apply’ and the inability to secure needed services is not included in that list (20 USC § 1412[a][1][B]).” Elmira City Sch. Dist., 2022 WL 1037791, at *5.

services are not automatically given to all special education students. Transportation services are provided to special education students who require it to assist them to benefit from special education.

Transportation as a related service under the IDEA includes travel to and from school and between schools; travel in and around school buildings; and specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability. 34 C.F.R. § 300.34(c)(16). See also, H.A.R. §8-60-2, “Related services,” ¶16. An IEP team is responsible for determining whether transportation services is necessary in order for a student to receive a FAPE³¹. If an IEP team determines that supports or modifications are needed in order for a student to be transported so that the student can receive a FAPE, the student must receive the necessary transportation and supports at no cost to the parents³². 71 Fed. Reg. 46576 (August 14, 2006). “[I]f a child’s IEP team determines that the child does not need transportation as a related service, and the public agency transports only those children whose

³¹ Haw. Admin. Rules § 8-60-25, “Location of services and transportation,” governs the DOE’s responsibility in providing transportation services to students who have been parentally-placed at private schools. The rule states:

(b) Transportation: General.

- (1) If necessary for the student to benefit from or participate in the services provided, a parentally-placed private school student with a disability shall be provided transportation:
 - (A) From the student’s school or the student’s home to a site other than the private school; and
 - (B) From the service site to the private school, or to the student’s home, depending on the timing of the services.
- (2) The department is not required to provide transportation from the student’s home to the private school.

Student currently attends a private school and Petitioners are not alleging that Respondents should be providing transportation to another service site. Pursuant to this rule, Student is not entitled to transportation.

³² Students with disabilities who receive transportation services will receive transportation at no cost. Haw. Admin. Rules § 8-27-5(1).

IEPs specify transportation as a related service, and does not transport nondisabled children, the public agency would not be required to provide transportation to a disabled child.”

See Appendix A to 34 C.F.R. Part 300, Question 33 (July 1, 1999).

During the IEP meetings on June 21, 2021 and June 23, 2021, Parent was not present. The June 2021-IEP team proceeded with the information that was available to them at the meeting and “decided not to add transportation at this time [because] [t]he team was unsure if [Student’s] family would be able to or prefer to transport [Student] to and from school at this time.” (FOF 111, 118). Although Student received transportation services when he was attending Public School-2 on Island 2, the reasons behind why the IEP team at Public School-2 provided transportation services was not provided at the due process hearing. Based on the information that was available to the June 2021-IEP team, the IEP team did not deny Student a FAPE by concluding that there was insufficient information to add transportation to Student’s IEP.

However, even assuming that Parent was present at either of the IEP meetings and requested transportation services for Student, the basis for Parent’s request would not have been sufficient to find that DOE denied Student a FAPE by not including transportation services in Student’s June 2021-IEP. Parent testified during the due process hearing that Student needed transportation because Parent could not pick up/drop off Student as easily as [Parent] could pick up/drop off Student at Private School. Parent did not testify that Student needed transportation services to assist Student to benefit from special education. (FOF 153-156). Based on Parent’s testimony, the transportation services would be for the convenience of Parent, not to address Student’s educational needs. Petitioners have not cited to any legal authority that requires the DOE to provide transportation services for the convenience of a parent. Although not binding

legal authority in this jurisdiction, Hawaii's sister state of California opined on a school's obligation to provide transportation services for the convenience of parents in Los Angeles Unified Sch. Dist. (CA SEA October 21, 2013) (11 ECLRP 37, 113 LRP 43695). In Los Angeles Unified Sch. Dist., an Administrative Law Judge ("ALJ") found that a student did not prove that an IEP team denied [redacted] a FAPE by declining to provide [Student] with home to school transportation because the student's medical history did not support a finding that [Student] needed such service. The ALJ also found that the student's [Parent] not being able to drive and needing to care for another disabled child and the student's [Parent] having difficulty dropping off and picking up student each day due to [Parent's] work schedule did not justify offering student transportation services. Los Angeles Unified Sch. Dist., 11 ECLRP 37, 113 LRP 43695, at FOF ¶21, Legal Conclusion ¶8 (SEA CA October 21, 2013)³³.

Other jurisdictions have similarly found that mere convenience or preference by parents, absent educational needs, did not justify providing transportation services to students. The Eighth Circuit found that "a school district may apply a facially neutral transportation policy³⁴ to a disabled child without violating the law when the request for a deviation from the policy is not based on the child's educational needs, but on the parents' convenience or preference." Fick v.

³³ The ALJ, however, did find that the school denied the student a FAPE by failing to provide transportation from student's home school (Santana Arts Academy) to a Capacity Adjustment Program ("CAP") school (Lassen Elementary School), in violation of the District's Transportation Guidelines and the District's Procedures for Capping School Enrollment. FOF 8, 11; Legal Conclusion 9. The Capacity Adjustment Program was designed to relieve school overcrowding. Students attending CAP schools, regardless of whether the students are special education or regular education, were entitled to home school to CAP school transportation. Legal Conclusion 9. This alternative legal theory of finding a denial of FAPE is not applicable to the instant case.

³⁴ State of Hawaii Department of Education's facially neutral transportation policy can be found at H.A.R. §§ 8-27-1 through 8-27-10. Petitioners do not argue, and fail to establish, that Student is entitled to transportation services based on this policy.

Sioux Falls Sch. Dist. 49-5, 337 F.3d 968, 970 (8th Cir.2003). A case in the United States District Court, D. Maine, which sits in the First Circuit, opined that a parent's request for accommodations based on personal reasons (i.e., unable to have an adult at home to ensure that a child gets home from school) may be beyond the reach of the IDEA if it is made for personal reasons unrelated to the student's educational needs. Ms. S. ex rel. L.S. v. Scarborough Sch. Committee, 366 F.Supp.2d 98, 99-100 (U.S.D.C. Maine Feb. 7, 2005).

Based on the evidence presented at the due process hearing, Petitioners fail to prove by preponderance of the evidence that the June 2021-IEP denied Student a FAPE by not providing transportation services to Student.

5. Whether the 6/23/2021, 6/21/2021-IEP is a denial of FAPE where there is an inadequate description of behavior interventions listed in Student's IEP. While the team did discuss Student's behavioral needs, they did not discuss sufficient behavioral interventions to provide Student classroom supports.

In Issue No. 5, Petitioners are alleging that Respondents committed procedural and substantive violations because (1) the June 2021-IEP team did not discuss sufficient behavioral interventions; and (2) "there is no description of behavior interventions" in Student's June 2021-IEP. Pet. Closing Brief, p. 11. As explained below, Petitioners fail to show by preponderance of the evidence that Respondents committed either a procedural or substantive violation in formulating Student's June 2021-IEP regarding Student's behavioral needs.

While Petitioners acknowledge that the IEP "team did discuss Student's behavioral needs," Petitioners allege that Respondents committed a procedural violation when "no discussion occurred during the meeting regarding the specific behavior interventions Student would be afforded." Pet. Closing Brief, pp. 8-9; SAC, p. 5, FN 2. Petitioners further allege that this procedural violation infringed upon Parent's opportunity to participate. Pet. Closing Brief, p. 9. After reviewing the audio recording of the June 21, 2021 and June 23, 2021 IEP meetings,

the undersigned Hearings Officer finds that Petitioners' allegations lack merit.

First, the undersigned finds that the June 2021-IEP team discussed Student's behavioral needs and discussed sufficient behavioral interventions to address those needs. The June 2021-IEP team discussed offering Student calming activities (such as exercise); limiting visual fields by reducing the number of items; periodic movement breaks; visual supports (such as choice board, visual schedule); visual charts because he is non-verbal; provide access to headphones and stretch bands; ABA services; BIP; and RBT services throughout the day. (FOF 88, 93). However, even assuming that the IEP team did not discuss sufficient behavioral interventions, Petitioners fail to show how the discussion significantly infringed upon Parent's participation rights when Parent gave the school members of the IEP team consent to proceed without [Parent] on June 21, 2021 and June 23, 2021. (FOF 87, 92). The June 2021-IEP team discussed sufficient behavior interventions that would be given to Student to address [Student's] behavioral needs and Respondents did not commit a procedural violation.

Second, the undersigned is not convinced by Petitioners' argument that Student's June 2021-IEP does not have a description or has an inadequate description of the behavior interventions. The June 2021-IEP describes the following behavior interventions: choice board; movement breaks; limiting visual and auditory fields; ABA services with an RBT; and a BIP. (FOF 108, 109). Petitioners appear to argue that the June 2021-IEP should have at least made "a reference to a behavior plan that would later be developed." Pet. Closing Brief, p. 11. The undersigned assumes that "behavior plan" means a "behavioral support plan" since a behavior intervention plan is referenced in Student's June 2021-IEP and Petitioners' argument that a "behavior plan" should have been referenced in the June 2021-IEP is made after a lengthy quote from Dept. of Educ., Hawaii v. L.S., Civil No. 18-CV-00223 JAO-RT, 2019 WL 1421752

(D.Haw.2019). Petitioners fail to provide applicable legal authority for their argument that Student should have had a behavioral support plan (“BSP”), and Dept. of Educ., Hawaii v. L.S. does not support Petitioners’ argument.

In Dept. of Educ., Hawaii v. L.S. the District Court found that an IEP team’s failure to address a student’s behavioral needs in the student’s IEP was a denial of FAPE. The student in L.S. had major behavioral problems that affected the student’s ability to access [Student’s] education. Dept. of Educ. Hawaii v. L.S., 2019 WL 1421752, at *12. The IEP team did not provide a draft IEP or a draft BSP to the parent prior to the IEP meeting. Id. Components of the BSP was not included in the student’s IEP and the District Court found that the school district could amend or curtail the BSP at any time without the parent’s knowledge or input, and therefore it infringed on the parent’s ability to meaningfully participate in the development of the student’s IEP. Id., at *11-12.

The case before us is distinguishable from L.S. First, in L.S., the IEP team developed a BSP to address the student’s behavioral needs. In the instant case, Contracted BCBA developed a BIP. (FOF 73-74). The IEP team in L.S. developed a BSP for the student that the District Court held should have been made a part of the student’s IEP because “the district was free to amend or curtail the BSP without Parent’s knowledge or input...” Id. at *12. A BIP, on the other hand, is a plan developed by a board-certified behavior analyst after completing an FBA. (FOF 47, 65). A BIP is implemented by an RBT. (FOF 65). Unlike a BSP, the BIP cannot be amended or curtailed without a parent’s knowledge and input, since the FBA required to change the BIP must be consented to by a parent. (FOF 29, 41, 43, 44, 47). See H.A.R. §8-60-31(c)(1). In the development of an IEP, the IDEA requires that “in the case of a child whose behavior impedes the child’s learning or that of others, [the IEP team shall] consider the use of positive

behavioral interventions and supports, and other strategies, to address that behavior.” 20 U.S.C. § 1414(d)(3)(B)(i). There is no requirement that the IEP team develop both a BSP and BIP. In this case, the June 2021-IEP team considered the use of positive behavioral interventions and supports, and other strategies, to address Student’s behavioral needs. Although Parent chose not to participate in the June 2021-IEP meetings where [REDACTED] could have commented on the BIP, the IEP team acknowledged in the 7/07/2021-PWN that “a meeting to review the Behavior Intervention Plan (BIP) need[ed] to be scheduled with [Parent].” (FOF 121). Based on the foregoing, Petitioners fail to meet their burden in showing that the school members of the IEP team did not discuss sufficient behavior interventions and that there is an inadequate description of behavior interventions in Student’s June 2021-IEP.

6. Whether the 6/23/2021, 6/21/2021-IEP is a denial of FAPE where Student’s known need for a process or supports to address the needs associated with a change in Student’s program and placement from [REDACTED] private program to the offered DOE program was not discussed during the IEP development meeting and/or described in the written IEP. This discussion was affirmatively put off for a separate non-IEP discussion.

In this issue, Petitioners are alleging two things: (1) the IEP team did not discuss during the IEP meetings the supports Student would need to transition from a private program to a DOE program; and (2) the June 2021-IEP does not contain supports to address Student’s needs associated with transitioning from a private program to a DOE program. Based on the evidence, Petitioners fail to meet their burden in showing that the June 2021-IEP team failed to discuss supports to address Student’s needs associated with transitioning from a private program to a DOE program because the discussion was put off for a separate non-IEP discussion. Petitioners also fail to meet their burden in showing that the June 2021-IEP does not contain supports to

address Student's needs in transitioning from a private program to a DOE program.

Pursuant to the Hawaii Administrative Rules, an IEP shall include the following:

- (1) A statement of the student's present levels of academic achievement and functional performance;
- (2) A statement of measurable annual goals, including academic and functional goals and a description of short-term objectives or benchmarks;
- (3) A description of how the student's progress toward meeting the annual goals will be measured; and when periodic reports on the progress the student is making toward meeting the annual goals will be provided;
- (4) A statement of the special education and related services and supplementary aids and services, to be provided to the student, or on behalf of the student, and a statement of the program modifications or supports for school personnel;
- (5) An explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class;
- (6) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the student on statewide assessments; and if the IEP team determines that the student shall take an alternate assessment instead of a particular regular State assessment of student achievement, a statement of why the student cannot participate in the regular assessment; and the particular alternate assessment selected is appropriate for the student; and
- (7) The projected date for the beginning of the services and modifications, and the anticipated frequency, location, and duration of those services and modifications.

H.A.R. § 8-60-44(a). See also, 20 U.S.C. § 1414(d)(1)(A). The Haw. Admin. Rules do not require a transition plan from a private program to a public school program to be included in an IEP. As stated by the Hawaii District Court, "the DOE is not required to include a transition plan in an IEP whenever a child moves from a private institution to a public school." Dept. of Educ., Hawaii v. C.B., Civil No. 11-00576 SOM/RLP, 2012 WL 1537454, at *5 (D.Haw. May 1, 2012) (citing to L.I. v. Hawaii, Dept. of Educ., Civil No. 10-00731 SOM/BMK, 2011 WL 6002623, at *6 (D.Haw. Nov. 30, 2011); M.N. v. Hawaii, Dept. of Educ., Civil No. 11-00121 SOM/BMK, 2011 WL 6020861, at *4 n.1 (D.Haw. Dec. 1, 2011)). See also James M. v. State of Haw., Dept. of Educ., 803 F.Supp.2d 1150, 1163-1164 (D. Haw.2011) (holding that a school district was

under no obligation to provide transition services for a student moving from a private school to a public school); B.B. v. Haw. Dept. of Educ., 486 F.Supp.2d 1042, 1056-1057 (D. Haw.2006) (holding that the IDEA requires an IEP to have a statement of needed transition services in some circumstances but does not mandate such services when a transition from private to public school takes place).

The Hawaii District Court recently reiterated that the DOE is not required to include a transition plan in an IEP for a child moving from a private program to a public school in Dept. of Educ., Hawaii v. L.S., Civil No. 18-CV-00223 JAO-RT, 2019 WL 1421752 (D.Hawaii 03/29/2019). The L.S. Court wrote:

DOE challenges the Decision's conclusion that DOE violated the IDEA when it failed to provide a sufficient transition plan for Student to transition back to public school after several months at the Tyson Program [citation omitted]. The Court agrees that the AHO erred in this regard.

The Decision correctly noted that the IDEA does not specifically require a plan to ease the transition between placements [citation omitted]. The IDEA lists requirements to be included in an IEP and states that no additional information is required to be included in an IEP that is not "explicitly required in this section." 20 USC §1414(d)(1)(A)(ii). The question of whether the IDEA otherwise requires transition plans to be included in an IEP is unsettled.

L.S., 2019 WL 1421752, at *8³⁵.

³⁵ Haw. Admin. Rules § 8-60-44 states:

- (d) Construction. Nothing in this section shall be construed to require:
- (1) That additional information be included in a student's IEP beyond what is explicitly required in section 614 of the Act; or
 - (2) The IEP team to include information under one component of a student's IEP that is already contained under another component of the student's IEP.

Petitioners cite to 34 C.F.R. §§ 300.324(a)(1)(ii) and (iv), and 34 C.F.R. § 300.116(d) for their argument that a “discussion of needed modifications to offset the changes anticipated in Student’s program...are both statutorily appropriate topics for discussion” and “was required to occur during the IEP development process.” Pet. Closing Brief, pp. 11-12. After careful consideration, the undersigned is not persuaded by Petitioners’ argument. First, 34 C.F.R. §§ 300.324(a)(1) must be read with 34 C.F.R. § 300.22. Title 34 of the Code of Federal Regulations Part 300, Subpart D, Sec. 300.324(a)(1) delineates factors that an IEP team must consider in developing, reviewing and revising an IEP. An IEP is defined under 34 C.F.R. § 300.22, which reads: “IEP means a written statement for a child with a disability that is developed, reviewed, and revised in accordance with §§ 300.320 through **300.324**” (bold added for emphasis). As stated above, an IEP does not require a transition plan.

Second, 34 C.F.R. § 300.116(d) states that when an IEP team is selecting a least restrictive environment (“LRE”) for a child, it must take into “consideration...any potential harmful effect on the child or on the quality of services that he or [REDACTED] needs.” The “potential harmful effect” consideration is for determining LRE, which in turn is a component of placement. A transition plan or transition services is not a student’s placement, but rather, it is the bridge between two “placements” (private program vs. public school program). Therefore, this regulation does not create an obligation for DOE to discuss transition services during an IEP meeting. Furthermore, “the fact that DOE elected to address the transition services at a separate meeting with Parent would at most constitute a procedural violation.” L.S., 2019 WL 142752, at *9. Petitioners fail to show how this procedural violation resulted in lost educational opportunity or significantly infringed upon Parent’s participation rights. Petitioners did not provide any persuasive argument or legal authority to establish that postponing the transition plan discussion

to a later date resulted in lost educational opportunity for Student. Although Petitioners cite to Doug C. v. Haw. Dept. of Educ., 720 F.3d 1038 (9th Cir.2013), Petitioners do not make any arguments about how postponing the transition plan discussion is a failure to consider an alternative educational plan or alternative educational possibilities. Petitioners also fail to show how postponing the transition plan discussion to a later date significantly infringed upon Parent's right to participate when Parent elected to not participate in the June 21, 2021 and June 23, 2021 IEP meetings. Lastly, the IEP team ultimately not having a transition plan meeting did not result in lost educational opportunity or significantly infringed upon Parent's participation rights because Parent had already signed an enrollment agreement with Private School on June 21, 2021 before the IEP was even completed. (FOF 138).

Therefore, the undersigned finds that Petitioners fail to meet their burden in showing that Student was denied a FAPE when the June 2021-IEP team did not discuss and/or write in the June 2021-IEP supports to address Student's needs to transition from Private School to Current Public School.

7. Whether the 6/23/2021, 6/21/2021-IEP is a denial of FAPE where the support of "Access to low/high technology communication system" is vague as to the particular *system* to be used.

In Issue No. 7, Petitioners allege that the June 2021-IEP denies Student a FAPE because the support of "Access to low/high technology communication system" is vague as to the particular communication system that will be used. Petitioners further argue that "[p]recedent commands that this issue be deemed a denial of FAPE under the current interpretation of procedural denial that results in a denial of FAPE." Pet. Closing Brief, p. 16. Although Petitioners acknowledge that a poorly written IEP is a procedural violation, they do not argue that the procedural violation significantly infringed on Parent's opportunity to participate in the

IEP formulation process or resulted in a loss of educational opportunity. Therefore, Petitioners fail to show a denial of FAPE even though the support of “access to low/high technology communication system” does not identify a particular system.

In determining whether an inadequate or vague description in an IEP resulted in a denial of FAPE, the Ninth Circuit has provided guidance that a reviewing authority examine the deficiency as a procedural violation. See Union School Dist. v. Smith, 15 F.3d 1519, 1526 (9th Cir.1994) (holding that a failure to formally provide a written offer for an appropriate educational placement to parents was a procedural violation under the IDEA); M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1195 (9th Cir.2017) (holding that the school district’s failure to properly document the offer of visually impaired services was a procedural violation that precluded parents from meaningful participation in the IEP process); William Hart Union Sch. Dist. California State Educational Agency, 119 LRP 32329, 14 (2019) (holding that failure to make a clear written offer of FAPE is a procedural violation). While the IDEA does envision that the written IEP offer would constitute a “formal, specific offer from a school district [that] will greatly assist parents in presenting complaints with respect to any matter relating to the educational placement of the child,” M.C. v. Antelope, 858 F.3d at 1197, omissions or imprecise language do not always amount to a denial of FAPE. Assuming that a procedural violation occurred, the review must then continue onto whether the procedural violation amounted to a loss of educational opportunity, significantly impeded parent’s opportunity to participate or a deprived Student of educational benefits. Amanda J., 267 F.3d at 892.

“Each public agency must ensure that assistive technology devices or assistive

technology services³⁶, or both, as those terms are defined in §§ 300.5 and 300.6, respectively, are made available to a child with a disability....” 34 C.F.R. § 300.105(a). Assistive technology device is defined as:

Assistive technology device means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device.

34 C.F.R. § 300.5.

An IEP must include “a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child. . . .” 20 U.S.C. §1414(d)(1)(A)(i)(IV). The June 2021-IEP team was tasked with figuring out what supplementary aids and services Student would need without the benefit of parental input and limited information from Student’s private program. Student has been in a private program since August of 2019. (FOF 14). As stated in Issue No. 2, DOE made reasonable efforts to get information about Student’s educational needs, but with limited success. During the June 2021-IEP meeting, the IEP team was aware that Student knew very little [REDACTED]; used “approximations” of [REDACTED] or individualized signs; [Student] was not fluent in speech; and [Student] had an [REDACTED] at Private School that [Student] was not using. (FOF 50, 56, 59, 98). The IEP team knew that Student needed something to help with [Student’s] communication, but they did not know what it was. While the IEP team wanted, and needed, to explore using a variety of technology with Student (FOF 98), the IEP team deliberately chose to

³⁶ Petitioners are not alleging that “assistive technology services” is vague. “*Assistive technology services* means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device.” 34 C.F.R. § 300.6.

use the word “system” and not “[REDACTED].” During the June 21, 2021 IEP meeting, SLC suggested that Student be given “access to [REDACTED], I would say system, not necessarily [REDACTED].” DOE Ex. 774 (June 21, 2021 IEP meeting) at 1:23:00-1:27:00. After listening to the audio recording of the June 21, 2021 IEP meeting, it is unclear why the word “system” was used instead of “[REDACTED].” Although the IEP team discussed using a range of [REDACTED], such as [REDACTED], it is unclear what “system” the IEP team would be using if not a [REDACTED]. “[REDACTED]” means any item, including simple pictures and iPads. It did not appear that the IEP team intended to include [REDACTED] (whether it be [REDACTED] or approximated) in the word “system” and, according to SLC, [REDACTED] is a language like English and Spanish (FOF 56, FN 20), and not a [REDACTED]. Therefore, the supplementary aids and services of “[REDACTED]” is vague as to what particular “system” is being offered to Student.

However, DOE’s poorly described support is a procedural violation that requires Petitioners to show that there was a loss of educational opportunity, Parent’s opportunity to participate was significantly infringed upon or Student was deprived of an educational benefit, which Petitioners do not allege, and therefore fail to prove. Even assuming that Petitioners had alleged the procedural violation amounted to a loss of educational opportunity or significantly infringed on Parent’s opportunity to participate, the record does not support that argument. Parent’s participation opportunity was not significantly infringed upon because Parent consented to the school members of the IEP team to proceed without [Parent] on both days. Student did not loss any educational opportunity because Parent had already committed Student to attending Private School before the IEP was completed. Based on the foregoing, Petitioners fail to meet

their burden of showing a denial of FAPE when the support “ [REDACTED] [REDACTED] ” does not identify the particular system that will be used.

D. TUITION REIMBURSEMENT FOR PRIVATE SCHOOL

Petitioners seek an order requiring DOE to pay for Student’s private educational and related expenses during the 2021-2020 contract year and reimburse Parent for expenses, such as transportation. Pet. Closing Brief, p. 26. 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); see also L.S., 2019 WL 1421752, at *14 (“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.”) 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).

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 in the 2021-2022 school year was proper under the IDEA.

(1) Private School is an Appropriate Placement

Private School is a licensed private school in the State of Hawaii and serves students in [REDACTED] grade. (FOF 133). Student attended Private School during the 2020-2021 school year. (FOF 135). During the 2020-2021 school year, Student received the following services at Private School: Speech-Language Therapy, BCBA Consultation, RBT Services, Special Education Teacher Consultation, Reverse Inclusion Program, Distance Bridge Program Assessment and Program and Supplies, and Assistive Technologies. (FOF 137). The 6/21/2021-Contract that Parent signed to enroll Student at Private School for the 2021-2022 school year contains substantially the same terms, obligations, and representations as the contract

Parent signed for the 2020-2021 school year. (FOF 139). During the 2021-2022 school year, Student is receiving the following services at Private School: ABA services, BCBA, RBT, Speech-Language Therapy, Speech-Language Consultation, Special Education Consultation (available if needed), and Reverse Inclusion. (FOF 146). According to Parent, since the 2020-2021 school year, Student has made gains in [Student's] ability to self-care and communicate; [Student's] independence has increased; and [Student] has improved knowledge of the ABCs and 123s. (FOF 158-160). A school member of the IEP team noted that Student was making progress at Private School, albeit limited and slowly. (FOF 96). Based on the foregoing reasons, Petitioners have proven that Parent's unilateral placement of Student at Private School for the 2021-2022 school year was proper and Private School continues to be an appropriate placement for Student.

(2) Equitable Considerations

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's tuition fees and costs are excessive and the conduct of Parent warrants a reduction. Id., at *15.

Neither party submitted a copy of the 6/21/2021-Contract as an exhibit for the due process hearing. There is no evidence regarding the exact number of minutes or hours for each

service Private School anticipates providing to Student or the cost of each service. Although Director attempted, as best as [Director] could, to recall what the 6/21/2021-Contract specifies in terms of costs and minutes/hours of each service, the undersigned declines to order DOE to reimbursement Parent or pay for tuition that is based on what Director “believes” the contract amount and service minutes might be. (FOF 138, 148, 151). Therefore, the reimbursement amount shall not exceed the amount awarded in the 12/11/2020-Decision, which is \$224,309.80 (“capped amount”), subject to the reductions explained below.

Pursuant to the 6/21/2021-Contract, Private School will provide Special Education Consultation. Director testified that Student “is just entering into like math, reading, and some prewriting skills. So this specific student’s program is all ABA programming and not—you know, just starting to get into special education so we don’t really utilize the special education teacher consultant. We haven’t in quite a while. Just initially for this child.” Director, Tr. Vol. 2, 256:2-9; FOF 148. Therefore, the capped amount shall be reduced by the amount itemized for Special Education Consultant in the 6/21/2021-Contract.

The 6/21/2021-Contract includes six and a half (6.5) hours of RBT services per day. The school day is six (6) hours long. A half (0.5) an hour of RBT services is included to account for Parent being late to pick up Student. (FOF 150). DOE should not be responsible for Parent’s tardiness. If Parent is late, Parent should be held responsible, not DOE. The capped amount shall be reduced by half (0.5) an hour of RBT services.

Lastly, Parent’s unreasonable conduct justifies a reduction in the capped amount. On January 14, 2021, SSC asked Parent to sign Consent for Release of Information forms and to enroll Student at Current Public School, both of which would allow Current Public School to obtain information to use in formulating Student’s IEP. (FOF 22). Although Parent signed a

consent form, Parent sent SSC an unusable picture of the signed consent form instead of giving it to the IEP team when they met for an SST meeting on February 2, 2021. (FOF 24, 25). On February 12, 2021, Parent emailed SSC a copy of an executed consent form but did not enroll Student at Current Public School. (FOF 34). On February 19, 2021, SSC had to follow up with Parent about enrolling Student at Current Public School and submitting the signed consent forms. (FOF 38). On March 5, 2021, Parent still had not enrolled Student. (FOF 51). On March 18, 2021, SSC again emailed Parent a Consent for Release of Information form to allow Current Public School to request information from Student's doctors. (FOF 55). By April 13, 2021, the school was still unable to get usable consent forms from Parent to request information from Student's doctors. (FOF 68).

Although Parent participated in two SST meetings (February 2, 2021 and February 24, 2021) and two eligibility meetings (April 12, 2021 and May 6, 2021), Parent did not participate in any IEP meetings where the actual IEP was to be formulated for Student. (FOF 25, 41, 66, 73, 87, 92). On the day of the IEP meeting, May 21, 2021, Parent canceled and asked to reschedule the IEP meeting because [Parent] wanted more time to review the draft IEP and email SSC what [Parent] believed needed to be adjusted. (FOF 79). The May 21, 2021 IEP was canceled, but Parent did not send an email stating [Parent's] concerns about the draft IEP like [Parent] said [Parent] would. [Parent] did not respond to SSC's emails (on May 26, 2021 and June 1, 2021) asking for [Parent's] thoughts and suggestions on the draft IEP. (FOF 81, 83). Instead of speaking with SSC, or emailing SSC about how the draft IEP should be adjusted, or re-scheduling the IEP meeting, Parent filed a Complaint on June 3, 2021. (FOF 84). Although Parent received a letter from Principal on June 8, 2021 and a Conference Announcement on June 8 and 15, 2021, stating that an IEP meeting will be scheduled for June 21, 2021, there is no

evidence that Parent responded. (FOF 85, 86). Lastly, instead of attending the IEP meeting on June 21, 2021, Parent met with Director and signed the 6/21/2021-Contract. (FOF 138). Parent made no attempt to participate in the formulation of Student's IEP prior to signing a contract that would obligate either ■ or DOE to pay Private School almost a quarter of a million dollars. Based on Parent's conduct, the reimbursement or payment shall be reduced by twenty-five percent (25%). The twenty-five (25%) reduction will occur after the aforementioned reductions are applied to the capped amount ("final amount").

Petitioners' request for transportation reimbursement to Parent is denied. As explained above, DOE did not commit a procedural or substantive violation by not offering transportation services to Student. Furthermore, Private School does not provide transportation to Student. (FOF 153). There is no basis for Petitioners to be reimbursed for transportation.

Respondents denied Student a FAPE when it offered an IEP that conditioned RBT services on availability. Student is entitled to have ■ private placement funded by DOE; however, a reduction in funding is warranted because the tuition and fees charged by Private School are excessive and Parent did not diligently and genuinely try to participate in the IEP formulation process.

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

Petitioners' SAC "assert[s] Student's eligibility for rights and protections under Section 504 of the Rehabilitation Act of 1974." SAC, p. 2. Petitioners, however, did not present any evidence or argument during the due process hearing and 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 when DOE conditioned Student's RBT services on an "as available" basis. Petitioners have also proven that Private School 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 for the 2021-2022 school year. The undersigned Hearings Officer finds that the equitable considerations in this case warrants a reduction in the reimbursement for tuition and related expenses or direct tuition payment to Private School for the 2021-2022 school year.

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 for services rendered, Respondents shall make payment, less any payment due to Parent pursuant to paragraph 5 herein, for Student's tuition for the 2021-2022 school year. Private School'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) 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 the final amount.
 7. Parent shall provide DOE a copy of the 6/21/2021-Contract within fourteen (14) calendar days this Order.

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, May 13, 2022.

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Redacted Hearing Decision