



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 Hawai'i
Public Schools,

Respondents.

DOE-SY2122-004

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing:
October 5-7, 2021

Hearings Officer: Charlene S.P.T. Murata

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

I. JURISDICTION

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

¹ [REDACTED]

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

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 July 19, 2021, the Department of Education, State of Hawaii and Christina Kishimoto, Superintendent of Hawaii Public Schools (“Respondents” or “DOE”) received a Complaint and Resolution Proposal; Exhibit “1” & “3”³ [sic] from Student, by and through Student’s Parent (collectively “Petitioners”). On that same date, with the consent of the undersigned Hearings Office and without any objections from Respondents, Petitioners filed a First Amended Complaint and Resolution Proposal; Exhibit “1” & “3” [sic] (“FAC”).

On July 29, 2021, Respondents responded to the FAC and filed Department of Education’s Response to Petitioners’ Request for IDEA Impartial Due Process Hearing.

On August 16, 2021, a Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for August 23, 2021.

On August 23, 2021, a prehearing conference was held with Keith H.S. Peck, Esq. (“Mr. Peck”) appearing on behalf of Petitioners, and Deputy Attorney General Kunio Kuwabe (“Mr. Kuwabe”) appearing on behalf of Respondents. During the prehearing conference, the parties agreed to have the due process hearing on October 5, 2021 to October 7, 2021, and they requested an extension of the 45-day timeline. The request was granted on September 10, 2021, extending the 45-day timeline to November 16, 2021. See Order Granting in Part and Denying in Part Petitioners’ Request for an Extension, dated September 9, 2021, issued on September 10, 2021.

³ Petitioners’ FAC contains three exhibits. DOE Ex. 2 at 38-72.

On August 24, 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, and exhibits; and witness email addresses. No substantive motions were filed, and the parties timely submitted their witness and exhibit lists, exhibits, and witness email addresses.

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

On September 29, 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.

The due process hearing took place on October 5-7, 2021 using the Zoom video conferencing platform. All participants in the due process hearing appeared remotely via video and audio. The undersigned Hearings Officer presided over the matter. Petitioners were represented by Mr. Peck, and Respondents were represented by Mr. Kuwabe. Parent was present on the first day of the due process hearing, most of the second day⁴, and elected not to participate on the third day of the due process hearing. The Department of Education District Educational Specialist (“DES”) was present on behalf of Respondents for the entire due process hearing.

Petitioners called Director and Parent as their witnesses during the due process hearing. Respondents called the following witnesses during the due process hearing: Speech-Language

⁴ Parent left the due process hearing after Parent was done testifying. Parent, Tr. Vol. II, 333:7-11.

Coordinator (“SLC”); Special Education Teacher (“SPED Teacher”); and Board-Certified Behavior Analyst (“BCBA”). Petitioners did not call any rebuttal witnesses.

All of the exhibits submitted by the parties were admitted into evidence without objection: Petitioners’ Exhibits 1 through 4 (pages 001-190; 1/26/2021 IEP audio recording; and 2/12/2021 IEP audio recording); Respondents’ Exhibits 1 through 113 (pages 001-837; 1/26/2021 Webex Meeting Recording—IEP Meeting; and 2/12/2021 Webex Meeting Recording—IEP Meeting). Tr. Vol. III, 534:18-20.

On October 8, 2021, Respondents submitted a request to the undersigned Hearings Officer to extend the 45-day timeline under HAR § 8-60-69, from November 16, 2021 to December 31, 2021, so that transcripts can be prepared and post-hearing briefs filed. Petitioners stipulated to the request for an extension. An Order Granting Respondents’ request to extend the 45-day timeline was issued on October 13, 2021. The new deadline by which a decision in this matter must be issued is December 31, 2021.

On November 22, 2021, the parties timely submitted their closing briefs.

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

III. ISSUES PRESENTED

In their FAC, Petitioners allege violations of the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973. Specifically, Petitioners allege that Respondents denied Student a free appropriate public education (“FAPE”). The issues for determination regarding the February 12, 2021 Individualized Education Program (“2/12/2021-IEP”) are:

Issue 1 – Whether the 2/12/2021-IEP is appropriate regarding the Extended School Year portion of Student’s IEP:

- (i) Where the DOE found Student ineligible because they stated they needed additional data that would only be available through having Student attend the DOE school. (Procedural Violation).
- (ii) Where Student should have been deemed eligible for ESY services. (Substantive Violation).

Issue 2 – Whether the 2/12/2021-IEP is appropriate when there were insufficient discussions during the IEP meetings of 1/26/2021 and/or 2/12/2021 of the needed supports to address Student’s behavioral needs.

Issue 3 – Whether the 2/12/2021-IEP is appropriate when there is insufficient description in the IEP of the needed supports to address Student’s behavioral needs.

Issue 4 – Whether the 2/12/2021-IEP is appropriate when the current (privately-provided) classroom supports/accommodations were not discussed.

Issue 5 – Whether the 2/12/2021-IEP provides sufficient supports for Student to be successful in the program the IEP developed.

Issue 6 – Whether the 2/12/2021-IEP is appropriate when there was insufficient participation of Student’s current providers and/or insufficient efforts to gain attendance of those providers at the IEP development meetings on 1/26/2021 and/or 2/12/2021, resulting in lost educational opportunity.

Issue 7 – Whether the DOE gathered sufficient information available to them prior to the 1/26/2021 and/or 2/12/2021 IEP meetings to properly determine Student’s needs, services and/or supports.

Issue 8 – Whether failing to discuss Parent’s concern for a 1:1 aide was proper based upon DOE insistence that Student needed to attend the DOE school before such considerations could be made.

Issue 9 – Whether the 2/12/2021-IEP is appropriate when Student’s needs to successfully change from Student’s current private program to the public program was insufficiently discussed and/or insufficiently described in the IEP document. Instead, Parent’s concern was met with a statement that a Transition Plan meeting could be held if Parent first accepted the IEP.

Issue 10 – Whether the IEP team had an appropriate discussion of Student’s least restrictive environment during the 2/12/2021-IEP meeting.

Petitioners request the following remedies:

Remedy 1 – Order the DOE to revise the IEP to address the allegations herein;

Remedy 2 – Find Student’s private school program appropriate and order the DOE to reimburse and/or fund the expenses related to the program including transportation.

Remedy 3 – Order compensatory education if all of Student’s needs not addressed in full through Student’s private school program;

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

IV. FINDINGS OF FACT

Student Background

1. Student was born on [REDACTED] and is [REDACTED] years old. Pet. Ex. 1 at 001.
2. Student is eligible for special education and related services pursuant to the IDEA and Hawaii Administrative Rules Chapter 60 under the category of [REDACTED]. Pet. Ex. 1 at 002; Parent, Tr. Vol. II, 303:20-24⁵.
3. “Due to the adverse effect of [Student’s] speech language functioning including sound articulation, receptive & expressive communication, social interactions, behavior, sensory processing, adaptive behavior, and cognitive functioning, and sensory needs [Student] will have difficulty accessing the general education curricula without specially designed instruction, modifications and accommodations.” Pet. Ex. 1 at 006.
4. Student was medically diagnosed with [REDACTED] on April 30, 2019. Pet. Ex. 4 at 150.

Events Preceding the November 10, 2020 IEP Meeting

⁵ “Parent, Tr. Vol. II, 303:20-24” means Testimony of Parent, Transcript Volume II, page 303, line 20 through line 24.

5. On March 14, 2019, Student received an initial evaluation from the State of Hawaii Department of Health Agency (“DOH Agency”). An initial Individualized Family Support Plan was created for Student on March 27, 2019. DOH Agency is an early intervention program run by the State of Hawaii’s Department of Health. Pet. Ex. 4 at 150; DOE Ex. 107 at 656-682; Parent, Tr. Vol. II, 261:4-22.
6. In June of 2019, Parent contacted Public School with concerns that Student had [REDACTED] and delays in learning. Pet. Ex. 4 at 150.
7. On June 20, 2019, Parent signed a consent form, allowing DOH Agency to provide information to the DOE to support a smooth transition from the early intervention program to a DOE preschool special education program (“2019-DOH Agency Consent form”). On that same date, the following records were sent to the DOE: “Multidisciplinary Evaluation Report,” dated 3/14/2019; and “Individualized Family Support Plan,” dated 3/27/2019 (collectively “DOH Agency Records”). DOE Ex. 58 at 374; DOE Ex. 107 at 656-682.
8. On July 5, 2019, Parent spoke with Student Services Coordinator (“SSC”) and canceled a Student Support Team (“SST”) meeting, scheduled for July 18, 2019, and a Request for Evaluation. Parent stated that Parent was sending Student to a private school. DOE Ex. 13 at 216; Parent, Tr. Vol. II, 289:24-296:13.
9. From August 2019 to mid-March 2020, Student attended Academy-1 for the 2019-2020 school. Director, Tr. Vol. I, 62:8-14.
10. Student’s [REDACTED] also attended Academy-1 for the 2019-2020 school year. Director, Tr. Vol. I, 96:14-97:11.

11. Between mid-March of 2020 and August of 2020, Student was not attending Academy-1, Academy-2, or Academy-3. Director, Tr. Vol. II, 236:2-4.
12. In July of 2020, Parent, through Mr. Peck, filed a complaint against DOE, alleging that DOE failed to evaluate Student for IDEA eligibility when Student turned [REDACTED] in 2019 (“July 2020-Complaint”). The July 2020-Complaint was subsequently withdrawn by Parent through Mr. Peck when Mr. Peck was provided information by the DOE that Parent did not want Student evaluated for special education eligibility when Student turned [REDACTED] and wanted to enroll Student in a private program. Parent, Tr. Vol. II, 289:24-296:21; Director, Tr. Vol. I, 110:18-112:1.
13. From August 2020 until mid-January of 2021, Student attended Academy-2⁶ for the 2020-2021 school year. Director, Tr. Vol. I, 116:3-117:4; Director, Tr. Vol. II, 235:17-20.
14. In early August of 2020, SSC reached out to Parent and asked Parent if Parent would like to have a Student Support Team (“SST”) meeting to determine the need for an evaluation for special education and related services for Student. Parent informed SSC that Parent was interested. While discussing the date of when to have the SST meeting, SSC asked Parent to provide any medical or educational records that would assist the Student Support Team in determining the need for an evaluation for Student. In response to SSC’s request for documents, Parent sent a document from Student’s medical provider showing a diagnosis on April 30, 2019 of [REDACTED]. SSC and Parent agreed to have the SST meeting on August 19, 2020. SSC then emailed

⁶ Academy-2 is not affiliated with the Head Start Program run by the State of Hawaii. Director, Tr. Vol. I, 117:5-118:5.

Parent the Webex information for the SST meeting. SSC also attached to the email (1) a Request for Evaluation form; (2) a Conference Announcement for the August 19, 2020 SST meeting; and (3) Webex directions to join the SST meeting. DOE Ex. 19 at 229; DOE Ex. 20 at 231; DOE Ex. 21 at 233; DOE Ex. 51 at 300-303; DOE Ex. 52 at 305-306; DOE Ex. 53 at 308-313.

15. The Conference Announcement setting the SST meeting for August 19, 2020 was issued on August 17, 2020 (“8/17/2020-CA”). According to the 8/17/2020-CA, the purpose of the meeting was to discuss Student’s needs; determine what additional data, if any, was needed to define Student’s needs; and determine if a 504 or IDEA initial evaluation or reevaluation was warranted. The 8/17/2020-CA listed the following people as being invited to attend the August 19, 2020 meeting: “Speech-Language Pathologist[,] Principal[,] Vice Principal[,] Special Education Teacher[,] [Parent][,] Occupational Therapist[,] School Psychologist [and] SSC/General Education Teacher.” The 8/17/2020-CA also stated that “[y]ou are welcome to invite any person(s) you feel has knowledge about your child who might assist you.” DOE Ex. 4 at 081, 83.
16. On August 19, 2020, shortly before the SST meeting was to begin, Parent emailed SSC a signed Request for Evaluation form, dated August 19, 2020 (“8/19/2020-Request for Evaluation”). Parent indicated on the form that the reasons for the request were behavior, speech/language, and [REDACTED] concerns. DOE Ex. 4 at 082-083; DOE Ex. 55 at 317-318.
17. On August 19, 2020, the SST meeting took place as scheduled. Present at the meeting were the following people: a speech-language pathologist, Principal, SPED Teacher, Parent, an occupational therapist, a school psychologist, and SSC. Pet. Ex. 1 at 002; DOE Ex. 4 at 084.

18. During the August 19, 2020 SST meeting, Parent shared records from DOH Agency and provided information regarding Student's current skills. The Student Support Team determined that an initial evaluation was appropriate due to communication and behavioral concerns. The following assessments were requested for the initial evaluation: cognitive assessment, social/family assessment, behavior/emotional assessment, fine motor (including sensory) assessment, speech language assessment, and student observation. Pet. Ex. 1 at 002, 044; Pet. Ex. 4 at 150.
19. On August 20, 2020, Principal issued a Prior Written Notice of Department Action ("8/20/2020-PWN"). The 8/20/2020-PWN proposed that Student receive an initial evaluation with the assessments requested by the Student Support Team on August 19, 2020. The 8/20/2020-PWN noted that the basis for the proposed action was "Parent's report, [DOH Agency] records, all academic records." DOE Ex. 4 at 086.
20. On August 20, 2020, SSC emailed Parent a copy of various documents including a "Consent for Assessment as Part of an Initial Evaluation" form for Parent's signature ("Consent for Assessment"). SSC informed Parent that once DOE received a signed Consent for Assessment form from Parent, the assessors would contact Parent to schedule the assessments. The Consent for Assessment form notified Parent that DOE would be reviewing the following records: (1) DOH Agency Records, and (2) All academic records. DOE Ex. 56 at 320-367. Parent responded to SSC's email on the same day and inquired how DOE got a copy of Student's DOH Agency Records. Parent also attached a signed Consent for Assessment form, dated August 20, 2020 ("8/20/2020-Consent for Assessment"). DOE Ex. at 369-370; DOE Ex. 4 at 085. SSC responded the same day, informing Parent that Parent had signed a consent form with DOH Agency to share

information with the DOE over a year ago when they were trying to set up an SST meeting to transition Student to a DOE school. SSC attached a copy of the 8/20/2020-Consent for Assessment form and the 2019-DOH Agency Consent form to the email. DOE Ex. 58 at 372-374.

21. On September 9, 2020, an occupational therapist conducted an evaluation of Student and issued an “Occupational Therapy Evaluation Report.” DOE Ex. 5 at 091-096; DOE Ex. 9 at 193-198; DOE Ex. 65 at 405-410.
22. On September 10, 2020, a Conference Announcement was issued, setting a conference for October 15, 2020 (“9/10/2020-CA”). The purpose of the conference was to discuss the results of the initial evaluation and to determine eligibility for 504 or IDEA services. The following people were listed as invitees to the conference: “Speech-Language Pathologist[,] Principal[,] Vice Principal[,] Special Education Teacher[,] [Parent][,] Occupational Therapist[,] School Psychologist [and] SSC/General Education Teacher.” The 9/10/2020-CA also noted that “[y]ou are welcome to invite any person(s) you feel has knowledge about your child who might assist you.” DOE Ex. 5 at 088-089; DOE Ex. 64 at 390-391.
23. On September 14, 2020, a Student Observation was done for the initial evaluation. Pet. Ex. 4 at 152.
24. On October 2, 2020, SSC sent Parent an email entitled “Eligibility Meeting 10/15/2020 @ 2:05 PM.” The email confirmed that an eligibility meeting was scheduled for October 15, 2020 and a copy of the 9/10/2020-CA was attached to the email. DOE Ex. 64 at 386-391.

25. On October 6, 2020, a certified school psychologist issued a “Psychoeducational Evaluation Report.” DOE Ex. 5 at 097-101; DOE Ex. 10 at 200-204; DOE Ex. 64 at 398-402.
26. On October 8, 2020, a speech-language assessment was conducted, and a “Speech and Language Assessment Report” was issued. DOE Ex. 5 at 102-107; DOE Ex. 11 at 206-211; DOE Ex. 64 at 392-397.
27. On October 14, 2020, SSC emailed Parent copies of the Speech and Language Assessment Report, Psychoeducational Evaluation Report, and the Occupational Therapy Evaluation Report. DOE Ex. 64 at 388; DOE Ex. 64 at 389; DOE Ex. 65 at 404.
28. On October 15, 2020, an eligibility meeting was held with the following people: a speech-language pathologist, Principal, SPED Teacher, Parent, an occupational therapist, a school psychologist, and SSC. Student was found eligible for special education and related services. DOE Ex. 5 at 090; Pet. Ex. 1 at 002, 044.
29. On October 20, 2020, following the eligibility meeting, SSC emailed Parent various documents including (1) an initial “Evaluation Summary Report” (“10/20/2020-ESR”); (2) a Prior Written Notice of Department Action, dated October 20, 2020 (“10/20/2020-PWN”); and (3) a “Consent for the Initial Provision of Special Education and Related Services” form for Parent to fill out. DOE Ex. 66 at 412-413; DOE Ex. 22 at 235.
30. According to the 10/20/2020-ESR, the Student Support Team came to a consensus that Student met the eligibility requirements for special education and related services under the category of [REDACTED]. The team also agreed that “[t]he adverse effect this disability has on [Student’s] education is difficulty accessing the general education curricula due to difficulties in speech sound articulation, receptive &

expressive communication, social interactions, behavior, sensory processing, adaptive behavior, and cognitive functioning.” Pet. Ex. 4 at 150-153; DOE Ex. 5 at 108-115; DOE Ex. 66 at 416-464.

31. According to the 10/20/2020-PWN, although Student met the eligibility criteria for the category of [REDACTED], the team agreed that the category of [REDACTED] better represented Student’s needs at the time. The 10/20/2020-PWN also noted that the basis of the proposed action was “Parent’s report, examiners’ reports, [DOH Agency] records, assessment results & data, all academic records.” DOE Ex. 5 at 116; DOE Ex. 66 at 465.
32. On October 28, 2020, Parent emailed SSC a signed Consent for Initial Provision of Special Education and Related Services form (“10/28/2020-Consent for SPED”). DOE Ex. 66 at 415; DOE Ex. 5 at 117; DOE Ex. 66 at 466-468. SSC replied shortly thereafter asking Parent if November 5, 2020 would work for an initial IEP meeting. Parent responded that November 5, 2020 worked for Parent. SSC then sent a copy of a Conference Announcement, dated October 28, 2020, for an initial IEP meeting on November 5, 2020 (“10/28/2020-CA”). DOE Ex. 66 at 414-416.
33. The 10/28/2020-CA states that the purpose of the conference was to develop an IEP for Student and to discuss and determine the impact that the school closure had on Student’s needs and how to address the loss of skills. The following people were listed as invitees to the meeting: “Speech-Language Pathologist[,] Principal[,] Vice Principal[,] Special Education Teacher[,] [Parent][,] Occupational Therapist[, and] Student Services Coordinator (SSC).” The 10/28/2020-CA also informed Parent that Parent was

“welcome to invite any person(s) you feel has knowledge about your child who might assist you.” DOE Ex. 66 at 469-470.

34. On October 30, 2020, SSC mailed enrollment forms to Parent via USPS priority mail. DOE Ex. 25 at 241.
35. On October 31, 2020, SSC emailed Parent to inform Parent that SSC had mailed a packet to Parent on October 30, 2020. Inside the packet were documents needed to enroll Student at Public School. SSC further informed Parent that completed forms and requested documents would need to be dropped off at the office. DOE Ex. 67 at 472.
36. On November 5, 2020, SSC emailed Parent a Conference Announcement, setting a meeting for November 10, 2020⁷ (“11/05/2020-CA”). DOE Ex. 68 at 474.
37. According to the 11/05/2020-CA, the purpose of the conference was to develop an IEP for Student and to discuss and determine the impact that the school closure had on Student’s needs and how to address the loss of skills. The following people were listed as invitees to the conference: “Principal[,] Vice Principal[,] Special Education Teacher[,] [Parent][,] Occupational Therapist[,] Speech Language Therapist [and] General Education Teacher.” The 11/05/2020-CA also informed Parent that Parent was “welcome to invite any person(s) you feel has knowledge about your child who might assist you.” DOE Ex. 6 at 119-120; DOE Ex. 68 at 475-476.

November 10, 2020 IEP Meeting and the resulting November 10, 2020 IEP

38. On November 10, 2020, the IEP team met and created an individualized education program for Student (“11/10/2020-IEP”). Pet. Ex. 1 at 043-059; DOE Ex. 6 at 122-137.

⁷ The record is unclear why the initial IEP meeting date was changed from November 5, 2020 to November 10, 2020.

39. Present at the 11/10/2020-IEP meeting were the following people: a speech-language therapist; Principal; SPED Teacher; Parent; an occupational therapist; and SSC who participated in SSC's capacity as a general education teacher. Pet. Ex. 1 at 059; DOE Ex. 6 at 121; DOE Ex. 6 at 138.
40. The 11/10/2020-IEP lists November 10, 2021 as the IEP Annual Review Date and October 15, 2023 as the Reevaluation Date. Pet. Ex. 1 at 043.
41. The 11/10/2020-IEP has a section entitled "Special Factors," which lists "Behavior" and "Communication." Under the Behavior factor, the 11/10/2020-IEP reads: "Behavior— [Student] does have behavioral concerns that will be addressed in the goals and objectives in the IEP. Classroom supports will be put in place in the program to address these needs." Pet. Ex. 1 at 044.
42. Student's Present Levels of Educational Performance ("PLEPS") in the 11/10/2020-IEP consists of five (5) domains: (1) Physical Well-Being, Health, Motor Development; (2) Social and Emotional Development/Behavior; (3) Approaches to Learning; (4) Cognitive and General Knowledge; and (5) English Language and Literacy. Pet. Ex. 1 at 044-047.
43. In Domain I: Physical Well-Being, Health, Motor Development, it is noted that Parent did not have any other concerns beyond what was covered in the 11/10/2020-IEP. Pet. Ex. 1 at 044-045.
44. In Domain II: Social and Emotional Development/Behavior, Parent reported that Student typically played by Student's self; had difficulty developing and maintaining relationships with other children and adults; and had difficulty communicating with other children and adults. Student was also "known to [REDACTED]" [REDACTED]

When frustrated due to denial or delayed access to a preferred item, or the inability to communicate wants or needs, [Student] will [REDACTED].”

Parent stated that this section was covered well and did not have any other concerns beyond what was covered in the 11/10/2021-IEP. Pet. Ex. 1 at 045.

45. In Domain III: Approaches to Learning, it is noted that Parent stated that this section was covered well and did not have any other concerns beyond what was covered in the 11/10/2021-IEP. Pet. 1 at 045-046.

46. In Domain IV: Cognitive and General Knowledge, it is noted that Parent stated that this section was covered well and did not have any other concerns beyond what was covered in the 11/10/2020-IEP. Pet. Ex. 1 at 046.

47. In Domain V: English Language and Literacy, it is noted that Parent stated that this section was covered well and did not have any other concerns beyond what was covered in the 11/10/2020-IEP. Pet. Ex. 1 at 046-047.

48. The Impact Statement in the 11/10/2020-IEP reads: “Due to the adverse effect of [Student’s] speech language functioning including sound articulation, receptive & expressive communication, social interactions, behavior, sensory processing, adaptive behavior, and cognitive functioning, and sensory needs [Student] will have difficulty accessing the general education curricula without specially designed instruction, modifications and accommodations.” Pet. Ex. 1 at 047.

49. The 11/10/2020-IEP team developed Annual Goals in the following standard areas: (1) Social and Emotional Development: 48 to KE⁸ (3 goals); (2) Physical Well-Being,

⁸ “48 to KE” stands for 48 months to kindergarten. SPED Teacher, Tr. Vol. III, 478:13-20.

Health, and Motor Development: 48 to KE; (3) English Language Arts and Literacy: 48 to KE (3 goals); and (4) Non-Core: Physical Education. Pet. Ex. 1 at 049-056.

50. The 11/10/2020-IEP developed Annual Goals to address Student's Social and Emotional Development by teaching Student to: (1) Regulate emotions and begin to show self-control in handling frustration and disappointment; express emotions through socially appropriate actions and words; and recognize and describe own feelings (Pet. Ex. 1 at 049; DOE Ex. 6 at 128); (2) Follow schedule and typical classroom routines (come when called, sit attentively at circle, participate in clean-up (Pet. Ex. 1 at 051; DOE Ex. 6 at 130); and (3) Sometimes use appropriate social conventions in greetings, in introductions, and in conversations; use turn-taking in conversations and in play; shares material, toys and ideas during play (Pet. Ex. 1 at 054; DOE Ex. 6 at 133); SPED Teacher, Tr. Vol. III, 400:19-405:12.
51. Student did not meet the standard for extended school year ("ESY") services during for the 11/10/2020-IEP. Pet. Ex. 1 at 057.
52. The 11/10/2020-IEP offered the following "Services": 1200 minutes per week of special education; 270 minutes per quarter of speech-language therapy; 90 minutes per quarter of occupational therapy ("OT") services; and twice per day of transportation. All the Services were projected to begin on November 10, 2020 and end on November 10, 2021. Pet. Ex. 1 at 057.
53. The 11/10/2020-IEP offered the following "Supplementary Aids and Services, Program Modifications and Supports for School Personnel" ("Supplementary Aids and Supports"): 30 minutes per quarter of OT Consultation with teacher; daily Close Adult Supervision; daily Teacher Parent Communication Log; daily Sensory Supports; daily Visual

Schedule; daily First/Then Language; and one time per week for 15 minutes of speech-language pathologist (“SLP”) and Parent Consultation. All Supplementary Aids and Supports were projected to begin on November 10, 2020 and end November 10, 2021. Pet. Ex. 1 at 057.

54. The 11/10/2020-IEP team determined that the following Supplementary Aids and Supports would assist with Student’s behavioral needs: Visual Schedule (Pet. Ex. 1 at 051, 057; DOE Ex. 6 at 130, 136); First/Then Language (Pet. Ex. 1 at 057, 061; DOE Ex. 6 at 136, 140); Close Adult Supervision (Pet. Ex. 1 at 057, 061; DOE Ex. 6 at 136, 140); and Sensory Supports (Pet. Ex. 1 at 057; DOE Ex. 6 at 136). SPED Teacher, Tr. Vol. III, 405:17-25, 467:1-469:7.
55. During the 11/10/2020-IEP meeting, in explaining to Parent what “close adult supervision” meant, the IEP team discussed the number of students in SPED Teacher’s classroom in November of 2020 when Student would have started school. At that time, SPED Teacher had an aide in SPED Teacher’s special education classroom, which would have resulted in a one-to-one teacher-student ratio. The school members of the IEP team told Parent that the DOE’s definition of “close adult supervision” was a maximum of three students to one adult. Parent did not state that Parent did not understand what “close adult supervision” meant during the 11/20/2020-IEP meeting. SPED Teacher, Tr. Vol. III, 407:10-21, 409:1-4; Parent, Tr. Vol. II, 303:25-304:20.
56. According to the 11/10/2020-IEP, “[Student] will be placed in the [REDACTED] [sic] [REDACTED] special education program. [Student] will participate with non-disabled peers during school wide activities deemed appropriate by special education teacher and parent, and will not participate with [Student’s] non-disabled peers for most

of the school day including instructional time, meal times, and during transport to and from school.” Pet. Ex. 1 at 058.

57. During the 11/10/2020-IEP meeting, the IEP team discussed placing Student in a general education setting, but due to Parent’s concerns with behavior, the IEP team decided that a general education setting was not appropriate for Student. The IEP team then considered a special education setting, which the IEP team agreed was the proper setting for Student. Parent did not object to placing Student in a special education [REDACTED] classroom. SPED Teacher, Tr. Vol. III, 409:15-412:25.
58. On November 10, 2020, SPED Teacher sent Parent a [REDACTED] schedule and supply list and asked if Parent had any questions. SPED Teacher asked Parent for documents of Student’s “current treatment plan from past ABA providers.” Parent verbally agreed to provide those documents. DOE Ex. 26 at 243-244.

Events Preceding the January 26, 2021 IEP Revision Meeting

59. On November 13, 2020, SPED Teacher wrote in an event log: “[Parent] replied to email stating [Parent] would not be attending school until [Parent] had more time to review IEP.” DOE Ex. 27 at 246.
60. On November 17, 2020, Principal issued a “Prior Written Notice of Department Action” for the 11/10/2020-IEP team meeting (“11/17/2020-PWN”). Pet. Ex. 1 at 060-062; DOE Ex. 6 at 139-141. The 11/17/2020-PWN explained that “Close Adult Supervision will be provide [sic] to [Student] daily to insure safety and support as needed” and that “[Student] does not meet the requirements for ESY services at this time. Data will be taken to determine rate of loss and recoupment after upcoming extended breaks for IEP team to review.” Pet. Ex. 1 at 061. The 11/17/2020-PWN listed the following evaluation

procedures, test, records, and reports used as a basis for the proposed/refused action:

Adaptive Behavior Assessment System-3; Parent input; OT Clinical Observations; The Sensory Profile 2nd Edition: Toddler; SLP Assessment; and Goldman Fristoe Test of Articulation-Third Edition (GFTA-3). Pet. Ex. 1 at 062.

61. On November 17, 2020, a copy of the 11/10/2020-IEP and 11/17/2020-PWN were emailed to Parent and mailed to the home address. DOE Ex. 28 at 248-249.
62. On November 20, 2020, Parent requested a copy of the recording of the 11/10/2020-IEP meeting that was conducted via Webex. SPED Teacher informed Parent that the meeting was not recorded and that recording the IEP meeting would require the DOE to inform Parent beforehand. DOE Ex. 29 at 251.
63. On December 22, 2020, Parent emailed SSC and SPED Teacher informing them Parent had shown Student's 11/10/2020-IEP to Director and Director informed Parent that the 11/10/2020-IEP would not be successful for Student. Director informed Parent that without applied behavior analysis ("ABA") services Student would not be able to progress and would regress. Parent informed SSC and SPED Teacher: "I would like to have another IEP meeting and have someone from [Academy-1] to help improve the IEP. I hope this can happen so [Student] can start at [Public School] in January." DOE Ex. 72 at 484.
64. On December 28, 2020, Principal emailed Parent acknowledging Parent's request for another IEP meeting and proposed dates for the meeting. Parent agreed to have another IEP meeting on January 26, 2021. DOE Ex. 73 at 486; DOE Ex. 74 at 488.

65. Academy-2 ended in January of 2021. Between January of 2021 to September 27, 2021, Student was not attending Academy-1, Academy-2, or Academy-3. Director, Tr. Vol. II, 242:10-20.
66. On January 6, 2021, SSC emailed Parent a conference announcement for a January 26, 2021 IEP (“1/26/2021-IEP”) revision meeting that would be held via Webex (“1/06/2021-CA”). SSC asked Parent in the email, “In the meantime, do you have any data, treatment plans, or progress reports for [Student] that you can share with the team? You can either email any information you’d like to share with the team to me or you can bring in documents to the school and we can make copies. Any information you can share with the team will be helpful. Thank you, and we’ll see you soon!” DOE Ex. 75 at 490-493.
67. According to the 1/06/2021-CA, the purpose of the 1/26/2021-IEP revision meeting was to review the IEP’s effectiveness/appropriateness in meeting Student’s needs and revise it, if needed. The 1/06/2021-CA listed the following invitees to the meeting: “Principal[,]Vice Principal[,] Special Education Teacher[,] [Parent][,] General Education Teacher[,] Behavior Analyst (BA)[,] Speech-Language Pathologist [and] Occupational Therapist.” The 1/06/2021-CA also states that Parent was “welcome to invite any person(s) you feel has knowledge about your child who might assist you.” DOE Ex. 7 at 143-144.
68. On January 14, 2021, SSC emailed Parent to ask if Parent would be completing the enrollment packet SSC had mailed to Parent on October 30, 2020. SSC informed Parent that the DOE had an IEP in place for Student, that the school was ready to deliver Student’s special education and related services, and that the school was following all

safety/COVID-19 protocols. SSC informed Parent that if Parent was not comfortable with Student being on campus due to COVID-19 or other concerns, Student's services could be delivered at home or virtually. SSC further informed Parent that DOE "would like to begin collecting data to further inform and develop [Student's] program." SSC asked Parent "[i]f you have documents or information for the team to assist in that meeting, please let me know you'd like to share that information with us." DOE Ex. 34 at 262; DOE Ex. 78 at 499.

69. On January 19, 2021, SSC emailed Parent to see if Parent needed assistance with completing the enrollment forms for Student. SSC again confirmed that they would "talk...next Tuesday, January 26, 2021, at 2:05 PM via Webex for the IEP revision meeting [Parent had] requested." DOE Ex. 34 at 262; DOE Ex. 79 at 501.
70. On January 21, 2021, SSC emailed Parent information about the upcoming 1/26/2021-IEP revision meeting, conference announcement with a list of invited attendees, and Webex meeting information to Parent. DOE Ex. 35 at 264. SSC wrote in the email: "I know you said you would work on gathering any treatment plans, data, or progress notes from [Student's] service provider(s), so I'm just checking in to see how that's going." SSC offered to contact Student's service providers to gather the information for the IEP team if that were easier for Parent. SSC informed Parent that SSC would need service provider information to create the consent forms for Parent to sign. Pet. Ex. 2 at 064.
71. On January 22, 2021, Parent emailed SSC, thanking SSC for the information and informing SSC that Parent was working on gathering the information SSC had requested. Pet. Ex. 2 at 063, 067. Parent later emailed SSC and indicated that Parent had second thoughts, and asked SSC to create a consent form for Parent to sign so that DOE could

obtain the information from Student's service providers. Pet. Ex. 2 at 063, 067. SSC responded that SSC needed the provider name/agency to create the consent form. Pet. Ex. 2 at 063, 068. Parent then emailed SSC the following information: "The name and address: [Academy-3]/[Program Address]." Pet. Ex. 2 at 063, 068. SSC in turn emailed Parent two consent forms and explained to Parent the difference between the two consent forms. SSC also requested that Parent confirm whether or not SSC had the right phone number for "Academy-1." Pet. Ex. 2 at 063, 068; DOE Ex. 36 at 266, 267.

72. On January 24, 2021, Parent emailed SSC two signed "Consent for Release of Information" forms. Pet. Ex. 2 at 063, 068-072. The two consent forms authorized DOE to receive and release information from/to Academy-3 with the phone number (808) xxx-xxxx. The Receive form states: "DOE personnel to receive information and documents such as, but not limited to, treatment plans, progresses notes, and other student performance data." The Release form states: "DOE personnel to release information for the purpose of obtaining information and documents such as, but not limited to, treatment plans, progresses [sic] notes, and other student performance data." Pet. Ex. 2 at 071-072; DOE Ex. 12 at 213-214⁹.

73. On January 25, 2021, SSC received Parent's signed consent forms. On the same day, SSC sent two emails to Academy Email. The first email stated that SSC had signed consent forms from Parent to receive information about Student for a meeting scheduled for January 26, 2021. SSC inquired what was the best way to send the consent forms to the private program. In the second email, SSC emailed the consent forms signed by

⁹ DOE's Exhibit page 213 is not indicated in DOE's Exhibit List, however, it is the same exhibit as Petitioners' Exhibit page 071.

Parent on January 24, 2021 to the private program and asked the private program to provide DOE with whatever information it had about Student before the January 26, 2021 meeting. DOE Ex. 80 at 503; DOE Ex. 81 at 505-507; DOE Ex. 37 at 269. Director testified that Director did not receive these emails at the time that it was sent because the email address--Academy Email--was not being monitored at that time. Director, Tr. Vol. I, 66:13-68:5.

74. On January 25, 2021 at 6:29 p.m.¹⁰, Parent emailed SSC a list of concerns Parent wanted addressed at the upcoming IEP revision meeting (“1/25/2021-Email of Concerns”). The 1/25/2021-Email of Concerns reads as follows: “I hope this email finds you well. I’ve attached the information I received from [Academy¹¹] for [Student], and hope you were able to get additional information from [Academy] for our meeting. I look forward to improving my [child]’s IEP at our meeting tomorrow. I want to show the team what I am concerned about since talking with [Academy] about [Student’s] IEP from the DOE. In preparation, and in case I am too shy to speak up or overwhelmed by the meeting like the last time: 1. I don’t understand why [Student] is not getting services year-round. [Director] (from [Academy]) said that is what the DOE calls ESY. My [child] is so disabled that [Student] should get ESY. I know that when [Student] has a week with no services forgets what [Student’s] learned and has to start back all over. I can’t imagine if [Student] was given no services for all summer and all the progress [Student] would lose

¹⁰ According to the exhibits submitted by Petitioners, there are two timestamps for this email: 6:29 p.m. (Pet. Ex. 2 at 069) and 8:29 p.m. (Pet. Ex. 2 at 066). The undersigned finds that this email was sent at 6:29 p.m. because SSC forwarded this email to the IEP team at 7:21 p.m. (DOE Ex. 82 at 509).

¹¹ The undersigned will refer to the private program as “Academy” when it is unclear from the record whether the parties are referring to Academy-1, Academy-2 or Academy-3.

as a result. That would be a terrible loss to [Student's] development at this critical point of early intervention. 2. [Student] needs speech services, [Student] gets much more at [Academy] and they would not be giving them if [Student] did not need them. 3. I don't understand what the DOE would consider 'close adult supervision.' I would expect that there always would be someone in the room with [Student] but [Student] requires more than supervision. [Director] said [Student] really needs a 1:1 RBT¹² aide. [Director] said that [Student] is a child that really needs this service because of [Student's] behavioral problems. 4. [Student] thrives around children that don't have problems and are developmentally normal. At [Academy] [Student] gets this reverse inclusion. [Student] needs to get this kind of therapy to grow....I really appreciate us having another IEP meeting for my [child], at the last one I was admittedly overwhelmed and did not feel comfortable." Three attachments were included with Parent's 1/25/2021-Email of Concerns: (1) Academy-1 Educational Accommodations Utilized (including Assistive Technology) for the 2019-2020 school year ("List of Accommodations"); (2) Academy-1 Individualized Applied Behavior Analysis Education Plan, dated September 20, 2019 ("2019-IAEP"); and (3) Academy-1 Re-assessment & Individualized Applied Behavior Analysis Education Plan, dated February 19, 2020 ("2020-IAEP") (Collectively "Academy-1 Records"). Pet. Ex. 2 at 066, 069, 073-087.

75. Later that evening, on January 25, 2021 at 7:21 p.m., SSC sent an email to Principal, SPED Teacher, SLC, BCBA, DES, and others, informing them that SSC had received signed consent forms from Parent to get more information from Academy-1; however, Academy-1 had not yet responded to SSC's two voicemail messages and two emails.

¹² "RBT" stands for registered behavior technician.

SSC also attached to SSC's email a copy of Parent's 1/25/2021-Email of Concerns and the Academy-1 Records. DOE Ex. 82 at 509-524.

76. SLC received the Academy-1 Records from SSC and reviewed them before the 1/26/2021-IEP revision meeting. SLC, Tr. Vol. II, 353:18-356:24.
77. SPED Teacher received the Academy-1 Records from SSC and reviewed them with Principal before the 1/26/2021-IEP revision meeting. SPED Teacher, Tr. Vol. III, 413:16-416:17, 451:9-453:7.
78. BCBA received and reviewed the Academy-1 Records before the 1/26/2021-IEP revision meeting. BCBA, Tr. Vol. III, 504:24-507:15.

January 26, 2021 IEP Revision Meeting and the resulting January 26, 2021 IEP

79. On January 26, 2021 at 11:53 a.m., SSC emailed Parent: "Thank you so much for these documents and your list of concerns. The documents will be helpful in our meeting today, and we will be sure to address your concerns. I reached out to [Academy-1] via phone and email twice yesterday, and once again today, but I have not heard back from them. I will keep trying! See you soon!" Pet. Ex. 2 at 069.
80. On January 26, 2021 at 11:54 a.m., SSC emailed Academy Email: "Aloha, I look forward to a response from you folks as soon as possible. Thank you!" DOE Ex. 83 at 526.
81. On January 26, 2021 at 2:05 p.m., the IEP team met to discuss the concerns Parent had raised in Parent's 1/25/2021-Email of Concerns and to revise Student's 11/20/2020-IEP. Following the meeting, a revised IEP, dated January 26, 2021, was drafted ("1/26/2021-IEP"). Pet. Ex. 1 at 022-039; DOE Ex. 7 at 143; DOE Ex. 7 at 145-163; SPED Teacher, Tr. Vol. III, 417:4-418:9.

82. Present at the 1/26/2021-IEP revision meeting were the following people: BCBA; Principal; SPED Teacher; SLC; Parent; SSC in SSC's capacity as a general education teacher; and an occupational therapist. Pet. Ex. 1 at 039; DOE Ex. 7 at 145.
83. During the 1/26/2021-IEP revision meeting, the IEP team discussed the Academy-1 Records; the services that Student was getting at Academy-1 and Academy-2; and a copy of the Academy-1 Records was displayed on a shared screen on Webex. SLC, Tr. Vol. II, 375:22-377:3; DOE Ex. 110, 1/26/2021-Video Recording at 00:29:30-00:30:02, 00:56:48-01:00:28, 01:03:47-01:05:51, 01:16:47-01:20:18, 01:59:00-02:02:49 (Academy-1 Records displayed), 02:05:50-02:07:02.
84. The 1/26/2021-IEP lists November 10, 2021 as the IEP Annual Review Date and October 15, 2023 as the Reevaluation Date. Pet. Ex. 1 at 022.
85. The 1/26/2021-IEP has the same five (5) domains as the 11/10/2020-IEP. Pet. Ex. 1 at 023-026.
86. In Domain I: Physical Well-Being, Health, Motor Development, unlike during the 11/20/2020-IEP meeting when Parent had no concerns, Parent now expressed concerns about large gross motor movements when Student is angry or upset (such as [REDACTED] [REDACTED] when Student doesn't get what Student wants); [REDACTED] when Student is upset; 90 minutes of direct OT services not being enough; and bathroom safety procedures. Pet. Ex. 1 at 023-024.
87. In Domain II: Social and Emotional Development/Behavior, Parent elaborated that "[w]hen frustrated due to denial or delayed access to a preferred item, or the inability to communicate wants or needs, [Student] will [REDACTED], and or sometimes [REDACTED]." Parent expressed concerns about what the main classroom

behavioral supports will be; close adult supervision not being enough; Student may hurt other children or adults; the need for a 1-on-1¹³ RBT to provide ABA services; and Student [REDACTED] or trying to [REDACTED] from the classroom and school campus. Pet. Ex. 1 at 024-025.

88. Domain III: Approaches to Learning remains the same as the 11/10/2020-IEP. Pet. Ex. 1 at 025.
89. Domain IV: Cognitive and General Knowledge remains the same as the 11/10/2020-IEP. Pet. Ex. 1 at 025.
90. Domain V: English Language and Literacy, Parent reported additional information, such as “[Student] communicates by pulling adults towards items [Student] wants, by [REDACTED], and by using several vocal approximations.” Student’s 11/20/2020-IEP, on the other hand, states that “[Student] communicates by pulling adults towards items [Student] wants.” Parent expressed concerns that 270 minutes of direct speech-language services was not sufficient and that Student received more speech-language services at private program. Pet. Ex. 1 at 026, 047.
91. The Annual Goals in the 1/26/2021-IEP is the same as the 11/10/2020-IEP, except in the standard area of Non-Core: Physical Education the short-term objective changed from “[Student] will sequence a multi-step art or classroom activity...” to “[Student] will sequence a 2-3 step art or classroom activity....” Pet. Ex. 1 at 033, 053.
92. In the 1/26/2021-IEP, Student continues to not meet the eligibility standard for ESY services. Pet. Ex. 1 at 037.

¹³ Throughout this decision, the terms “1-on-1”, “one-on-one”, “1-to-1”, “one-to-one” and “1:1” mean the same thing.

93. The 1/26/2021-IEP provides the same services as the 11/10/2020-IEP except that the frequency for Occupational Therapy Services increased from 90 minutes per quarter to 120 minutes per quarter, and the projected begin date was changed to January 26, 2021. Pet. Ex. 1 at 037, 057.
94. The 1/26/2021-IEP provides the same Supplementary Aids and Supports as the 11/10/2020-IEP except that the frequency of OT Consultation with teacher changed from 30 minutes per quarter to 60 minutes per quarter; and 90 minutes per quarter of “Speech/language consultation with team” was added to the 1/26/2021-IEP with a projected begin date of January 26, 2021 and end date of November 10, 2021. Pet. Ex. 1 at 037, 057.
95. SLC made the recommendation to add “Speech/language consultation with team” after SLC had reviewed the additional data in the Academy-1 Records and listening to input from the IEP team members, including Parent. SLC, Tr. Vol. II, 356:25-358:15.
96. Student’s 11/10/2020-IEP contains one speech communication goal specifically for an SLP to target. After SLC reviewed the Academy-1 Records and the Speech-Language Assessment Report, SLC did not feel that it was necessary to add more goals and objectives in the area of communication. SLC, Tr. Vol. II, 358:16-359:21.
97. Based on the available information at the time of the 1/26/2021-IEP revision meeting, including the Academy-1 Records, it was SLC’s professional opinion that additional supports, such as assistive technology, was not necessary for Student. SLC, Tr. Vol. II, 359:22-362:2. Assistive technology is any type of device or technology that a student may need to access his/her education. SLC, Tr. Vol. II, 369:11-370:10.

98. The extent that Student will not participate with students without disabilities in the general education class, extracurricular activities and other non-academic activities is the same as the 11/10/2020-IEP. Pet. Ex. 1 at 038, 058.
99. During the 1/26/2021-IEP revision meeting, no one brought up the fact that Director or someone from Academy was not there.
100. Neither DOE nor Parent asked Director to attend Student's 1/26/2021-IEP revision meeting. Director, Tr. Vol. I, 66:6-12, 72:6-9, 179:5-180:7; Parent, Tr. Vol. II, 316:23-317:2, 318:23-319:23.
101. The 1/26/2021-IEP revision meeting was two hours and ten minutes long. The IEP team was not able to go over all of Parent's concerns listed on Parent's 1/25/2021-Email of Concerns during the revision meeting, so the team agreed to meet again on February 12, 2021. SPED Teacher suggested to Parent that if Parent had more concerns that Parent would like the IEP team to address at the next meeting, to send another email similar Parent's 1/25/2021-Email of Concerns. DOE Ex. 110, 1/26/2021-Video Recording at 02:02:41-02:05:13.

Events Preceding the February 12, 2021 IEP Revision Meeting

102. On January 27, 2021, a Conference Announcement was issued, setting a conference for February 12, 2021 at 2:15 p.m. via Webex ("1/27/2021-CA"). The purpose of the conference was to continue the revision meeting started on January 26, 2021. The 1/27/2021-CA listed the following invitees to the 2/12/2021-IEP revision meeting: "Behavior Analyst (BA)[,] Principal[,], Special Education Teacher[,], Speech-Language Pathologist[,], [Parent][,], Occupational Therapist [and] General Education Teacher." The

1/27/2021-CA also stated that Parent was “welcome to invite any person(s) you feel has knowledge about your child who might assist you.” DOE Ex. 8 at 168-169.

103. On February 2, 2021, Principal issued a Prior Written Notice of Department Action for the 1/26/2021-IEP revision meeting (“2/02/2021-PWN”). The 2/02/2021-PWN largely reflects what is offered in the 1/26/2021-IEP and the disagreements between Parent and the school members of the IEP team. Pet. Ex. 1 at 040-042; DOE Ex. 1 at 029-031; DOE Ex. 7 at 164-166.
104. The 2/02/2021-PWN states that “[Student] does not qualify for ESY. Data will be taken to determine rate of loss and recoupment after upcoming extended breaks for IEP team to review.” Pet. Ex. 1 at 040.
105. The 2/02/2021-PWN noted that the IEP team considered providing Student with more direct service minutes for speech-language therapy and 1-on-1 RBT but rejected these options. The 2/02/2021-PWN stated the following reasons for the rejection: “1.) The IEP team determined that [Student] was initially evaluated this past October by [a speech-language pathologist], and the IEP communication goals reflect [Student’s] current needs (270 minutes per quarter of direct services). Due to the fact that SLP’s provide services based on an educational model, it is expected that communication goals will be targeted across the school day by teachers and support staff, not just during speech/language therapy. This would be a rationale for (once [Student] starts school) taking data on how [Student] responds to interventions/services in a new/different setting prior to making any changes in the initial recommendation agreed upon by the team. The team agreed to add in more consultation minutes to support the teacher in implementing communication systems and targeting language objectives as [Student]

begins DOE services for 90 minutes per quarter. This would ensure [Student's] least restrictive environment as it relates to direct related services, as the SLP supports the teacher and team members in supporting [Student's] needs across the school day. 2.) The IEP team determined updated behavioral and academic data would need to be taken in an educational setting to determine the need for a FBA by a BCBA before assigning a 1-on-1 RBT to allow for [Student] to access [Student's] Least Restrictive Environment.” Pet. Ex. 1 at 041-042.

106. Not all students who have behavioral issues require the intervention and implementation of ABA services by a BCBA and RBT. BCBA, Tr. Vol. III, 497:16-24.
107. The 2/02/2021-PWN listed the following evaluation procedures, test, records, or reports used as a basis for the proposed/refused actions: Parent input; Developmental Profile 3 (DP-3); OT input; SLP input; Speech Language Assessments; and The Sensory Profile 2nd Edition: Child. Pet. Ex. 1 at 042.
108. The 2/02/2021-PWN noted under “Other relevant factors” the following: “Parent does not agree with team determination of SLP direct minutes. Parent does not agree with IEP team determination of 1-on-1 RBT services. HIDOE offer of FAPE was given on current revision of IEP. A meeting was scheduled for February 12, 2021 to continue the revision of the current IEP in place.” Pet. Ex. 1 at 042.
109. On February 4, 2021, SSC emailed Parent a copy of the 1/26/2021-IEP, 1/27/2021-CA, 2/02/2021-PWN, and a Procedural Safeguard Notice. All documents were also mailed via certified mail. DOE Ex. 38 at 271.

110. On February 8, 2021, SSC emailed Parent to remind Parent about the 2/12/2021-IEP revision meeting and attached a copy of the 1/27/2021-CA and the Webex meeting information. Pet. Ex. 2 at 089-090; DOE Ex. 8 at 528-531.
111. On February 11, 2021, SSC emailed Academy Email the following message: “Aloha, just checking in again to see if you have any information you can share with our team per parent request (ie. Treatment plans, daily schedules, data, progress notes). Thank you!” DOE Ex. 85 at 533.

February 12, 2021 IEP Revision Meeting and the resulting February 12, 2021 IEP

112. On February 12, 2021 at 10:51 a.m., SSC emailed Parent the meeting information for the 2/12/2021-IEP revision meeting. Pet. Ex. 2 at 089; DOE Ex. 86 at 535.
113. On February 12, 2021 at 2:06 p.m., Parent responded to SSC’s email. Parent informed SSC that Parent felt overwhelmed during the first revision meeting and felt that the school members of the IEP team gave Parent a hard time. Parent further wrote that Parent was fearful of another meeting and was considering hiring an advocate. Pet. Ex. 2 at 089; DOE Ex. 87 at 537. Parent did not have any additional concerns similar to the ones listed in Parent’s 1/25/2021-Email of Concerns.
114. On February 12, 2021 at 2:15 p.m., the IEP team met to continue reviewing and revising Student’s IEP and created an updated IEP for Student (“2/12/2021-IEP”). Pet. Ex. 1 at 001-018, Pet. Ex. 2 at 089; DOE Ex. 1 at 010-027; DOE Ex. 8 at 171-188; SPED Teacher, Tr. Vol. III, 425:8-24.
115. Present at the 2/12/2021-IEP revision meeting were the following people: BCBA; Principal; SPED Teacher; SLC; Parent; and SSC in SSC’s capacity as a general education teacher. Pet. Ex. 1 at 018; DOE Ex. 8 at 170.

116. During the 2/12/2021-IEP revision meeting, the IEP team discussed Parent's request for a one-to-one RBT. Parent, Tr. Vol. II, 331:17-25; SPED Teacher, Tr. Vol. III, 426:13-21; DOE Ex. 111, 2/12/2021-Video Recording, 00:08:31-00:10:13, 00:32:12-00:43:16.
117. During the 2/12/2021-IEP revision meeting, the IEP team discussed Parent's request to increase the amount of direct speech-language services for Student. DOE Ex. 111, 2/12/2021-Video Recording, 00:18:11-00:25:12.
118. During the 2/12/2021-IEP revision meeting, the IEP team discussed Parent's request for ESY services. Parent informed the school members of the IEP team that Student can handle a weekend without services, but it is difficult for Student to not have services for "weeks." Principal thanked Parent for Parent's input and explained to Parent the need for data on regression and recoupment and how such data could be obtained. Principal explained to Parent that data on regression and recoupment can be obtained not only by Student being on a break from school, but also when Student is not taught a particular skill for a period of time at school. The school members of the IEP team suggested that the team meet again six weeks after Student starts school to discuss ESY eligibility. Parent did not respond to the suggestion of setting another IEP meeting to discuss ESY eligibility. DOE Ex. 111, 2/12/2021-Video Recording at 00:24:57-00:31:35.
119. During the 2/12/2021-IEP revision meeting, the IEP team discussed transitioning Student to Public School. The 2/12/2021-IEP team also discussed different scenarios under which Student could start school. The scenarios suggested to Parent were coming to school two days a week and increasing the days through the weeks until the IEP team meets again at six weeks; Student comes in for one to two hours a day; Parent can go to school, either with or without Student, to see the classroom and meet SPED Teacher and

- the classroom aides; or setting a meeting the next week to give Parent time to think about how Parent wants to transition Student. SPED Teacher, Tr. Vol. III, 430:3-18; DOE Ex. 111, 2/12/2021-Video Recording at 00:32:59-00:33:25, 00:53:17-01:01:06.
120. The 2/12/2021-IEP team also discussed reverse inclusion program. As a result of the discussion, the IEP team modified the inclusion opportunities in Student's IEP. Although Parent asked if there was any general education [REDACTED] at Public School, Parent did not state that Parent wanted to re-visit Student's placement in a special education [REDACTED] [REDACTED] program. No one at the 2/12/2021-IEP revision meeting suggested or mentioned re-visiting Student's least restrictive environment placement. SPED Teacher, Tr. Vol. III, 426:22-430:2; DOE Ex. 111, 2/12/2021-IEP Video Recording at 00:42:48-00:52:12, 01:23:20-01:25:41.
121. During the 2/12/2021-IEP revision meeting, the IEP team continued to discuss the Academy-1 Records, and the services that Student was getting at the Academy. SLC, Tr. Vol. II, 375:22-377:3; DOE Ex. 111, 2/12/2021-Video Recording at 00:21:40-00:24:17, 00:43:18-00:45:39 ("written thing").
122. Parent gets "a written thing of [Student] day everyday" from the Academy. DOE Ex. 111, 2/12/2021-Video Recording at 00:44:26-00:45:42.
123. The 2/12/2021-IEP lists November 10, 2021 as the IEP Annual Review Date and October 15, 2023 as the Reevaluation Date. Pet. Ex. 1 at 001.
124. The Annual Goals in the 2/12/2021-IEP are the same as the Annual Goals in the 1/26/2021-IEP. Pet. Ex. 1 at 008-015, 029-036.
125. Domain I: Physical Well-Being, Health, Motor Development remains unchanged from the 1/26/2021-IEP. Pet. Ex. 1 at 002.

126. Domain II: Social and Emotional Development/Behavior remains unchanged from the 1/26/2021-IEP. Pet. Ex. 1 at 003.
127. In discussing Domain III: Approaches to Learning, Parent expressed that “a one-on-one RBT is necessary to help [Student] with transition in the classroom for behavioral needs in this area. Parent feels this needs to be put in place for [Student] to lean [sic] best in the classroom.” Pet. Ex. 1 at 004.
128. In discussing Domain IV: Cognitive and General Knowledge during the 2/12/2021-IEP revision meeting, “Parent stated a RBT is also needed to help [Student] in this area as well.” Pet. Ex. 1 at 004-005.
129. In discussing Domain V: English Language and Literacy during the 2/12/2021-IEP revision meeting, Parent stated that ESY was important for the success of Student and would like it added into the current IEP before enrolling Student in school. Parent also felt that more direct speech therapy minutes were needed and a 1-on-1 RBT in the classroom was needed before enrolling Student in school. “Parent would like [Student] to have more structured interactions with non disabled [sic] peers throughout the school day for behavior modeling.” Pet. Ex. 1 at 005-006.
130. In the 2/12/2021-IEP, Student continues to not meet the eligibility standard for ESY services. Pet. Ex. 1 at 016.
131. The Services and Supplementary Aids and Supports in the 2/12/2021-IEP are the same as the 1/26/2021-IEP. Pet. Ex. 1 at 016.
132. According to the 2/12/2021-IEP, “[Student] will be placed in the fully self contained [REDACTED] special education program. Student will participate with non-disabled peers during school wide activities deemed appropriate by special education teacher and

parent, as well as have access to general education peers for meal times and recess times. [Student] will not participate with [Student's] non-disabled peers for most of the school day including instructional times, SLP and OT therapy sessions, and during transport to and from school.” Pet. Ex. 1 at 017.

133. According to the 2/12/2021-IEP, Parent told the IEP team that Student typically plays by Student's self and has difficulty communicating with other children and adults. Student is “[redacted] and may overreact to certain sensory experiences ([redacted]).) When frustrated due to denial or delayed access to a preferred item, or the inability to communicate wants or needs, [Student] will [redacted], and or sometimes [redacted] others.” Parent informed the IEP team that Parent was concerned that close adult supervision would not be enough and that Student needed a 1-on-1 RBT to provide ABA services. Parent is also concern about Student [redacted] or [redacted] from the classroom and school campus. Pet. Ex. 1 at 003-004.
134. Parent stated during 2/12/2021-IEP revision meeting that Student was currently receiving more than 270 minutes of direct speech language services at the Academy. Pet. Ex. 1 at 005; DOE Ex. 111, 2/12/2021-Video Recording at 00:21:35-00:22:48.
135. During the 2/12/2021-IEP revision meeting, Principal asked Parent if Student had “an RBT with [Student] now” and Parent stated “yes.” Pet. Ex. 4 at 179 (“Speaker 2 [00:41:22]”); DOE Ex. 111, 2/12/2021-IEP Video Recording at 00:39:50-00:40:54.
136. The 2/12/2021-IEP revision meeting was 1 hour and 25 minutes long. DOE Ex. 111 at 2/12/2021-Video Recording.

137. During the 2/12/2021-IEP meeting, no one questioned why Director or someone from Academy was not at the meeting.
138. Neither DOE nor Parent asked Director to attend Student’s 2/12/2021-IEP revision meeting. Director, Tr. Vol. I, 66:6-12, 72:6-9, 179:5-180:7; Parent, Tr. Vol. II, 316:23-317:2, 318:23-319:23.
139. On February 12, 2021, after the 2/12/2021-IEP revision meeting, SSC emailed Parent a brochure about the Medication Centers. DOE Ex. 88 at 539-541.
140. The concerns raised in Parent’s 1/25/2021-Email of Concerns were fully addressed during the 1/26/2021-IEP and 2/12/2021-IEP revision meetings. The IEP team discussed (1) more direct service minutes for speech-language therapy (DOE Ex. 110, 1/26/2021-Video Recording at 01:29:53-02:02:42; DOE Ex. 111, 2/12/2021-Video Recording at 00:17:28-00:25:13, 01:00:50-01:01:25); (2) “close adult supervision” vs. “1:1 RBT” (DOE Ex. 110, 1/26/2021-Video Recording at 00:53:21-01:05:09, 01:12:36-01:17:00; DOE Ex. 111, 2/12/2021-Video Recording at 00:08:55-00:10:12, 00:54:56-00:57:00); (3) Reverse inclusion (DOE Ex. 111, 2/12/2021-Video Recording at 00:43:09-00:52:32, 01:01:25-01:02:39); and (4) ESY (DOE Ex. 111, 2/12/2021-Video Recording at 00:25:12-00:31:35); SPED Teacher, Tr. Vol. III, 423:2-429:9; BCBA, Tr. Vol. III, 508:8-20. At the end of the 2/12/2021-IEP revision meeting, Parent stated, “Okay, I feel like I talked over quite a few of my talking points” (DOE Ex. 111, 2/12/2021-Video Recording at 01:02:39-01:02:75) and “I think we addressed all my things at least once if not more.” (DOE Ex. 111, 2/12/2021-Video Recording at 01:23:49-01:24:04).

Events Following the February 12, 2021 IEP Revision Meeting

141. On February 17, 2021 at 2:19 p.m., SSC emailed Parent asking Parent if Parent would like SSC to submit a mediation request. SSC also asked if Parent would be enrolling Student soon at school. DOE Ex. 90 at 545; DOE Ex. 39 at 273, 274.
142. On February 17, 2021 at 2:22 p.m., SSC emailed Academy Email the following message: “I am requesting a phone call or response to this email regarding the request for information per [Parent].” DOE Ex. 91 at 547. SSC also left a voicemail message requesting documents per Parent’s signed consent form. DOE Ex. 39 at 273, 274.
143. On February 18, 2021, Principal issued a Prior Written Notice of Department Action for the February 12, 2021 IEP meeting (“2/18/2021-PWN”). Pet. Ex. 1 at 019-021; DOE Ex. 1 at 033-035; DOE Ex. 8 at 189-191.
144. The 2/18/2021-PWN explained that “[Student] does not qualify for ESY. DATA will be taken to determine rate of loss and recoupment after upcoming extended breaks or breaks in direct instruction of topic for IEP team to review.” Pet. Ex. 1 at 020.
145. The 2/18/2021-PWN noted that the IEP team considered the option of providing Student with more than 270 direct service minutes of SLP; however, the IEP team rejected this option for the following reasons: “The IEP team determined that [Student] was initially evaluated this past October by [a speech-language pathologist], and the IEP communication goals reflect [Student’s] current needs (270 minutes per quarter of direct services). Due to the fact that SLP’s provide services based on an education model, it is expected that communication goals will be targeted across the school day by teachers and support staff, not just during speech/language therapy. This would be a rationale for (once [Student] starts school) taking data on how [Student] responds to interventions/services in a new/different setting prior to making any changes in the

initial recommendation agreed upon by the team. The team agreed to add in more consultation minutes to support the teacher in implementing communication systems and targeting language objectives as Student begins DOE services for 90 minutes per quarter. This would ensure [Student's] least restrictive environment as it relates to direct related services, as the SLP supports the teacher and team members in supporting [Student's] needs across the school day." Pet. Ex. 1 at 020-021.

146. The 2/18/2021-PWN also noted that the IEP team considered the option of assigning a 1-on-1 RBT to Student to begin preschool; however, the IEP team rejected this option for the following reason: "The IEP team determined updated behavioral and academic data would need to be taken in an educational setting to determine the need for a FBA by a BCBA before assigning a 1-on-1 RBT to allow for [Student] to access [Student's] Least Restrictive Environment." Pet. Ex. 1 at 020-021.
147. The 2/18/2021-PWN also noted that the IEP team considered the option of "meet[ing] in the near future to discuss a transition plan to enroll and begin coming to school on campus;" however, the IEP team rejected this option because "[t]he IEP team agreed moving to mediation would be the next steps as parent was still uncomfortable enrolling [Student] in school under the current HIDEOE offer of FAPE." Pet. Ex. 1 at 020-2021.
148. The 2/18/2021-PWN also noted that the IEP team considered the option of having an IEP meeting "scheduled 6 weeks out from start of attendance to discuss ESY and possible need for a FBA;" however, this option was rejected because "[t]he IEP team agreed moving to mediation would be the next steps as parent was still uncomfortable enrolling [Student] in school under the current HIDEOE offer of FAPE." Pet. Ex. 1 at 020-2021.

149. According to the 2/18/2021-PWN, the evaluation procedures, test, records, and reports used as a basis for the proposed/refused action in the 2/12/2021-IEP were: Parent input; Developmental Profile 3 (DP-3); OT input; SLP input; Speech Language Assessments; and The Sensory Profile 2nd Edition: Child. Pet. Ex. 1 at 021.
150. In the 2/18/2021-PWN, it is noted under “Other relevant factors” that “Parent does not agree with team determination of SLP direct minutes. Parent does not agree with IEP team determination for 1-on-1 RBT services. HIDOE offer of FAPE was given on current revision of IEP.” Pet. Ex. 1 at 021.
151. On February 18, 2021, SSC sent two emails to Director. In the first email, SSC thanked Director for a phone call, attached a copy of Parent’s signed 1/24/2021-Consent forms, and asked Director to provide SSC with any information that would support Student at Public School, such as daily schedules, progress reports, etc. Pet. Ex. 2 at 094; DOE Ex. 92 at 549-551. In the second email, SSC asked Director to explain again to SSC the difference between the two Academy programs and confirm which one Student was attending. Pet. Ex. 2 at 093; DOE Ex. 93 at 553.
152. On February 18, 2021, SSC wrote in an event log: “I just got off a call from [Director] at [Academy-1]...[Student] attended [Academy-2] (an [REDACTED] setting) from August 2020 through December 2020. The academy has been closed since January 2021 due to funding and COVID, so [Student] is NOT currently attending as the [parent] reported. The program was ‘ABA-influenced’, according to [Director], but was not a true ABA program. Therefore, there is no ABC data, treatment plan, or progress notes. An RBT was not assigned to [Student], however, there was an RBT in the classroom to support all students. [Director] reports that [Student] developed MORE problem

behaviors while [Student] was at the academy and [Student] would not be able to participate were the academy open at this time. I asked [Director] to send us anything that may help support [Student's] program here at [Public] School, such as [Student's] daily schedule and progress reports. [Director] said [Director] would have to think about what [Director] will send us." DOE Ex. 40 at 276, 277.

153. On February 26, 2021, SSC emailed Parent the following message: "[Student's] IEP and Prior Written Notice from our February 12th meeting are attached to this email for your records....If you are interested in starting the mediation process, please let me know and we can get that going. The Special Education Mediation brochure is attached below....I was finally able to connect with [Director] from [Academy-3]. [Director] called my office on February 18, 2021. [Director] reported that [Student] has not attended the center since December 2020. [Director] also reported that [Director] does not have any documents to share with us such as a treatment plan, student data, or progress notes since the program [Student] participated in was only ABA-influenced and [Student] did not have an RBT solely assigned to [Student]. I requested [Student's] daily schedule or any other information that [Director] feels may be helpful to the team, but [Director] said [Director] would have to think about what to send us. I have not heard from [Director] since. Our school team is ready to provide the services in [Student's] plan and we are looking forward to beginning to transition [Student] to our campus and [Student's] program. Will you be completing the enrollment paperwork for [Student]? Do you need assistance with completing the enrollment paperwork? Please let me know. As soon as [Student] enrolls, we will begin collecting data to further inform [Student's] program...." Attached to the email were copies of the 2/12/2021-IEP;

- 2/18/2021-PWN; Procedural Safeguards Notice, dated April 2020; and Special Education Mediation brochure, dated May 2020. Pet. Ex. 2 at 091-092; DOE Ex. 41 at 279; DOE Ex. 95 at 557-625.
154. On March 15, 2021, SSC emailed Parent a “FAPE (Free Appropriate Public Education) letter,” and informed Parent that if Parent would like to enroll Student at Public School, DOE has a current IEP for Student and is ready to provide Student with services. DOE Ex. 96 at 627; DOE Ex. 42 at 281.
155. On March 20, 2021, Director emailed SSC the following message: “I wanted to follow up with you as it has been a while. I spoke to [parent] a few days after we spoke and knowing I had provided [parent] with the documents prior to our conversation, I asked [parent] if [parent] sent them to you. [Parent] checked and confirmed that [parent] had emailed them to you a few weeks before our phone call. [Parent] said [Parent’d] follow up with you and assure you received them which is why I haven’t.” Pet. Ex. 2 at 093; DOE Ex. 43 at 283; DOE Ex. 97 at 629-630; DOE Ex. 43 at 283.
156. On March 22, 2021 at 11:57 a.m., SSC emailed Parent to follow up on Student’s enrollment and to inform Parent that SSC had spoken to Director. SSC stated that Director had informed SSC that Director had given Parent documents and that DOE was looking forward to receiving those documents. DOE Ex. 99 at 634; DOE Ex. 43 at 283.
157. On March 22, 2021 at 5:54 p.m., SSC emailed Director: “I have not received any documents from you via [Parent]. I will check in with [parent] now regarding this. Thank you!” Pet. Ex. 2 at 093; DOE Ex. 98 at 632; DOE Ex. 43 at 283.
158. On March 25, 2021, SSC emailed Parent thanking Parent for speaking with SSC. SSC confirmed with Parent that SSC had gone through all of their email correspondence and

couldn't find any documents from Academy-1 that Parent had shared with SSC. SSC thanked Parent for Parent's willingness to share the documents with SSC again. SSC also wrote: "I understand that you are not satisfied with the current IEP and that you will let us know how you'd like to proceed; whether you'd like another IEP meeting, start the mediation process, or both. Per our conversation, I will be awaiting your decision via email." DOE Ex. 100 at 636.

159. On March 25, 2021, SSC called parent to follow up on the FAPE letter. Parent informed SSC that was not satisfied with the current IEP and would not be enrolling Student. SSC asked Parent if Parent would like to set another IEP meeting or pursue mediation. Parent said Parent would like to consult with someone first. Parent then stated that Parent had provided the DOE with documents from Academy-1 prior to the first IEP meeting. SSC stated that DOE had not received any documents from Academy-1. Parent stated that Parent could share the documents again, if needed. SSC later attempted to find these documents but couldn't find them and asked Parent to share the documents again. DOE Ex. 44 at 285.
160. On April 9, 2021, SSC sent an email to Parent, requesting that Parent share documents from Academy-1. SSC also asked if Parent would like to complete enrollment, schedule an IEP meeting, and/or begin the mediation process. DOE Ex. 101 at 638; DOE Ex. 45 at 287.
161. On April 21, 2021, SSC emailed Parent to inform Parent that the school received confirmation, via certified mail, that Parent had received the FAPE letter on April 8, 2021. SSC asked Parent if Parent would like to complete enrollment, schedule an IEP meeting, and/or start the mediation process. DOE Ex. 102 at 640; DOE Ex. 46 at 289.

162. On May 11, 2021, SSC emailed Parent to inquire whether Parent wanted to complete the enrollment process for Student, schedule an IEP meeting, and/or begin the mediation process. DOE Ex. 47 at 291; DOE Ex. 103 at 642.
163. On June 1, 2021, SSC emailed Parent, informing Parent that they were available this summer to assist with completing enrollment for Student, and/or holding an IEP meeting, and/or assisting with starting mediation. DOE Ex. 104 at 644; DOE Ex. 48 at 293.
164. On June 30, 2021, SSC emailed Parent (with copy to Student Services Coordinator-2 (“SSC-2”)) asking if Parent would like to schedule an IEP meeting, finish enrolling Student at Public School, and/or needed assistance with beginning the mediation process. SSC also introduced Parent to a new student services coordinator, SSC-2, and provided SSC-2’s contact information to Parent. SSC-2 will be Parent’s point of contact beginning on July 1, 2021. DOE Ex. 49 at 295; DOE Ex. 105 at 646.
165. On July 8, 2021, a FAPE letter was sent home via certified/return receipt mail. A deadline of August 1, 2021 was given to Parent to respond¹⁴. DOE Ex. 50 at 297.
166. On July 18, 2021, Parent emailed SSC-2, expressing Parent’s disapproval of the IEP process and the proposed 2/12/2021-IEP. Parent stated that Parent “totally reject[s] the IEP.” Parent stated that Parent rejected the IEP for the following reasons: no ESY services; no one-to-one RBT; close supervision is not sufficient; no behavioral support plan; and no opportunity for Student “to interact in a structured manner with nondisabled peers.” Parent also informed SSC-2 that if SSC-2 thought “mediation or another IEP meeting would result in an IEP that would include what [Student] needs,

¹⁴ A copy of the FAPE letter was not produced in the due process hearing.

then I am open to working this out. I don't want to hear the same responses that we had before of not being able to give [Student] what [Student] needs." Pet. Ex. 2 at 096; DOE Ex. 106 at 651.

167. On July 19, 2021, Petitioners filed the instant Complaint and First Amended Complaint.

168. On July 20, 2021, SSC-2 emailed Parent offering to set up an IEP meeting "to re-evaluate the IEP and revise for any changes the team[,] which includes the parents[,] decides to make. If you would like me to set up a re-evaluation/revision meeting please let me know..." Pet. Ex. 2 at 097; DOE Ex. 106 at 651-652.

169. On July 21, 2021, Parent emailed SSC-2 and asked what SSC-2 meant by "re-evaluation/revision meeting" and whether that includes "need[ing] to find out what additional assessments need to be done." Parent also informed SSC-2 that Parent was trying to schedule a resolution session with DES. DOE Ex. 106 at 652. SSC-2 responded on the same day writing: "[Student] had assessments done in 2020, so it would be a revision but we could re-evaluate and discuss the findings again. If you are trying to schedule a resolution session with [DES] and that process has been started, continue with that, have the meeting and go from there." Pet. Ex. 2 at 098; DOE Ex. 106 at 652.

170. On September 15, 2021, Parent enrolled Student in Academy-3 for the 2021-2022 school year. Pet. Ex. 3 at 106-107.

171. Student has never attended a DOE school. DOE Ex. 111, 2/12/2021-IEP Video Recording at 00:30:56-00:31:14.

Academy-1

172. Academy-1, Academy-2 and Academy-3 were founded by Director. Director, Tr. Vol. I, 24:6-8, 47:13-20; Pet. Ex. 3 at 125¹⁵.
173. Academy-1 is a non-profit program founded by Director in May of 2019. Pet. Ex. 3 at 125. Academy-1 consisted of two programs: a summer program and a pilot program. The summer program was in May of 2019, in which Student participated. The summer program had [REDACTED] to [REDACTED] children. It was an ABA and verbal behavior program with a focus on language and social skills. Director, Tr. Vol. I, 47:13-48:11, 48:14-49:4; Parent, Tr. Vol. II, 261:17-262:9. During June and July, there was a summer break. The pilot program began in August of 2019 and ended early in mid-March of 2020 due to the COVID-19 pandemic. Academy-1¹⁶ pilot program was intended to be a full school year program. Director, Tr. Vol. I, 62:6-14; Director, Tr. Vol. II, 235:12-16, 240:4-241:4.
174. Academy-1 received majority of its funding from donors. Director, Tr. Vol. I, 90:19-91:12.
175. Academy-1 utilizes an applied behavior analysis (“ABA”) and verbal behavior (“VB”) program. Director ran Academy-1 during the 2019-2020 school year to get an idea of how to run a school with trained and certified staff; to learn the cost associated with running an ABA school; and what is needed in an ABA/VB program. Pet. Ex. 3 at 125; Director, Vol. I, 47:13-48:11, 49:5-17, 85:7-16, 126:5-10.
176. Applied behavior analysis is a method of analyzing and modifying behavior to teach skills and reduce problem behavior. ABA analyzes what occurs right before a behavior (antecedent); the behavior itself (behavior); and what happens immediately after the

¹⁵ Director’s curriculum vitae does not contain any information about Academy-2.

¹⁶ Unless otherwise stated, “Academy-1” refers to the pilot program only, and not the summer program.

- behavior (consequence). Verbal behavior is a methodological approach within ABA that uses the same method of antecedent, behavior and consequence to analyze language, which is significant to learning. Director, Vol. I, p. 32:10-37:2, 41:3-10, 42:25-43:10.
177. Verbal Behavior would not be appropriate to address a child's violent behavior. Director, Tr. Vol. I, 42:25-43:10.
178. Academy-1 had between [REDACTED] and [REDACTED] students. The ages of the students were [REDACTED]. Student was one of the students [REDACTED]. Director, Tr. Vol. I, 50:16-51:2, 85:17-86:8.
179. Student attended Academy-1 from August 2019 to mid-March 2020. Director, Tr. Vol. II, 235:12-16.
180. Students received in-person services at Academy-1. Director, Tr. Vol. II, 238:18-20.
181. Director provided the board-certified behavior analyst ("BCBA") and SLP services to the students at Academy-1. Director, Tr. Vol. I, 86:16-18.
182. Director testified that "[Student] came in with more severe problem behavior in terms of intensity. [Student] [REDACTED]. [Student] was [REDACTED]. [Student] was [REDACTED]. [REDACTED]. [Student] had no functional communication. [Student] had no verbal communication. [Student] understood very little...[Student] didn't understand simple directions. So [Student] had very little skills in language, social, and [REDACTED] behavior." Director, Tr. Vol. I, 50:16-51:15.
183. Student received services from RBTs and behavioral technicians at Academy-1. Director, Tr. Vol. I, 61:7-11; Director, Tr. Vol. II, 226:15-227:5.
184. When Academy-1 had [REDACTED] students, it also had [REDACTED] RBTs and [REDACTED] part-time behavioral technicians. Students were not assigned a specific RBT. The RBTs

- rotated between the students and sometimes a student would have a one-to-one behavioral technician when an RBT was not available. Director, Tr. Vol. I, 86:19-88:17.
185. As the board-certified behavior analyst at Academy-1, Director made the decisions as to when an RBT or behavioral technician would be assigned to a particular student. Assignment was based on who was available and whether a student was engaging in problem behavior that would require ABA services to be implemented. If a student has a behavioral technician and starts to engage in problem behavior that required ABA services, an RBT would step in. Sometimes a student would have the services of an RBT for part of the day and a behavioral technician for the other part. Assignment of an RBT or behavioral technician was not necessarily based upon the child or their age. Director, Tr. Vol. I, 88:18-89:9.
186. Parents who enrolled their children in Academy-1 signed registration agreements that itemized the tuition only and nothing else. The services that the students received were paid for by non-profit money. Parent paid about \$100 or \$200 per month for Student and [REDACTED] to attend Academy-1 during the 2019-2020 school year. Director, Tr. Vol. I, 90:11-97:15, 101:2-102:11.
187. Academy-1 did not have a special education consultant. Director, Tr. Vol. I, 100:5-18.
188. Academy-1 did not provide the students with reverse inclusion. Reverse inclusion was developed for Academy-3 during the 2020-2021 school year. Director, Tr. Vol. II, 193:7-23.
189. Student was assessed using the Verbal Behavior Milestones Assessment and Placement Program (“VB-MAPP”). The VB-MAPP was used to develop a program for Student,

implement the program, and modify the program, as needed. Director, Tr. Vol. I, 52:24-53:4.

190. VB-MAPP is an assessment tool used to find out a child’s current level of functioning across language social skills, visual performance skills, motor imitation skills—skills that are needed for learning. The VB-MAPP can help identify a student’s strengths and weaknesses across a variety of critical skills. A VB-MAPP can be a guide for IEPs or programs. Director, Tr. Vol. I, 51:16-52:23, 58:13-23.

191. On September 20, 2019, based on the results of the VB-MAPP assessment, Director issued an “Individualized Applied Behavior Analysis Education Plan” (“2019-IAEP”) for Student. The 2019-IAEP was intended for use during the 2019-2020 school year at Academy-1. Pet. Ex. 2 at 082-087; Pet. Ex. 3 at 108-114; DOE Ex. 82 at 511-516. At the time of the assessment, Student was [REDACTED]. Parent reported to Director that a doctor had diagnosed Student with [REDACTED] and that Parent was concerned about Student’s “lack of communication and problem behavior. [Parent] explained that [Student] has [REDACTED] at times when [Student] doesn’t get something [Student] wants. [And] [w]hen [REDACTED] and [Student] want the same item[,] they may aggress towards each other.” Parent reported to Director that Student can produce approximately three words, but they are infrequently heard, and [Student] uses a few signs inconsistently. Parent also reported to Director that Student “does not follow simple commands and plays with toys for short periods of time. [Student] drinks from a sippy cup and self feeds snacks and foods cut up using [Student’s] fingers. [Student] is not toilet trained.” Pet. Ex. 2 at 082.

192. In the VB-MAPP Milestones Assessment, Student's overall score was [REDACTED] points out of 170 possible points. A higher score on the Milestones Assessment indicates higher skill levels. In the VB-MAPP Barriers Assessment, Student's overall score was [REDACTED] points out of 96 possible points. A lower score on the Barriers Assessment indicates fewer barriers. Student had [REDACTED] barriers that were impeding Student's language and skill acquisition. The 2019-IAEP also states the following: "Behavior Targeted for Reduction: ABC baseline data to be taken and functional behavior assessment if determined appropriate[]" and "Speech Therapy: Spontaneous vocal and echoic skills to be observed and assessed and speech therapy objectives to be developed accordingly." Pet. Ex. 2 at 082-087.

193. On February 19, 2020, Director issued a "Re-assessment & Individualized Applied Behavior Analysis Education Plan" ("2020-IAEP") for the 2019-2020 school year at Academy-1 for Student. Pet. Ex. 2 at 074-081; Pet. Ex. 3 at 115-122; DOE Ex. 82 at 517-523. The 2020-IAEP does not contain any updated background or medical information about Student. Student's overall score on the VB-MAPP Milestones Assessment was [REDACTED] points out of a possible 170 points. The scores in the VB-MAPP Milestones Assessment indicate that Student's skill level improved since attending Academy-1 for the past five (5) months. Student improved in all skill areas except for "LRFFC," "Intraverbal," Math, Reading, Writing and Linguistics. Pet. Ex. 2 at 075-076. Student's overall score on the VB-MAPP Barriers Assessment was [REDACTED] points out of a possible 96 points. Generally, Student's scores either improved or remained the same on the Barriers Assessment, except for "Prompt Dependency," "Impaired Generalization Skills," "Obsessive-Compulsive Behavior," where the scores increased, indicating more

barriers. Student had [REDACTED] barriers impeding Student's language and skill acquisition. Pet. Ex. 2 at 077. Pet. Ex. at 075-081.

194. A list of accommodations, entitled "Educational Accommodations Utilized (including Assistive Technology)" ("List of Accommodations"), was developed for Student in Academy-1. The List of Accommodations contained the following accommodations: Prepare student for upcoming transitions; Sign Language Program; Task analysis; Visual aides; Extra time; Preferential seating; Preferential nap cot location; Access to preferred sensory items and activities; Sensory equipment & supplies; Reversed inclusion opportunities; Echoic program provided by SLP; BCBA consult; ABA programs; and Registered Behavior Technician implementing programs. These accommodations were provided to Student from August 2019 to mid-March 2020. Director, Tr. Vol. I, 62:6-24; Pet. Ex. 3 at 114, 122.

195. While Student was in Academy-1, the school was closed for spring break. While on spring break, Academy-1 closed due to the COVID-19 pandemic and did not reopen for the rest of the school year. From March of 2020 to August of 2020, Student did not attend Academy-1, Academy-2 or Academy-3. Director, Tr. Vol. I, 81:11-23, 112:2-12.

196. Academy-1 had a one-week break for spring break. Director, Tr. Vol. II, 240:4-241:4.

Academy-2

197. Academy-2 was founded by Director and began in August of 2020. Director, Tr. Vol. I, 113:5-25.

198. In the 2020-2021 school year, Academy-2 and Academy-3 were both in operation. Due to Student's age, Parent had the option of enrolling Student in Academy-2 or Academy-3. Although Parent preferred Student to be enrolled in a school, Parent decided to enroll

- Student in Academy-2 due to financial concerns. Director, Tr. Vol. I, 116:3-117:4, 119:14-22, 121:12-122:1, 123:15-25.
199. Academy-2 is a non-profit program that became inactive in mid-January of 2021. Director, Tr. Vol. I, 67:2-13, 117:18-118:5.
200. There was no tuition for Academy-2. Director, Tr. Vol. I, 118:24-119:13.
201. Academy-1 and Academy-2 had different missions. The services that were provided in Academy-1 were not provided in Academy-2. Director, Tr. Vol. I, 118:24-119:13; Director, Tr. Vol. II, 198:4-199:5.
202. Academy-2 was an early intervention program that taught pre-requisite school skills, such as getting children acclimated to a school environment; following simple directions (e.g., to come and go, sit down at a table, sit in a group); and basic language skills (e.g., requesting things). The goal at Academy-2 was not to teach things that were being taught in the school program. Director, Tr. Vol. I, 133:15-135:9.
203. Academy-2 was not a school and did not have students. Academy-2 had between [REDACTED] to [REDACTED] “children” between the ages of [REDACTED]. Director, Tr. Vol. I, 116:3-118:23; Director, Tr. Vol. II, 199:2-22, 226:15-227:5.
204. Academy-2 was not an ABA program or a VB program. It did not have one-to-one RBTs. Director, Tr. Vol. I, 77:20-78:2, 125:22-126:4.
205. In the 2020-2021 school year, Student’s [REDACTED] was enrolled in Academy-3. Parent, Tr. Vol. II, 297:11-21.
206. Student began at Academy-2 in mid-August of 2020. Director, Tr. Vol. I, 112:2-7, 113:5-25. Student stopped attending Academy-2 in mid-January of 2021 when

Academy-2 closed down due to a lack of funding. Academy-2 could not fundraise due to the COVID-19 pandemic. Director, Tr. Vol. I, 124:1-12.

207. While in Academy-2, Student did not receive ABA services and did not have a one-to-one RBT. Student received one-to-one services from a behavior technician who did not utilize ABA services. Director, Tr. Vol. I, 73:14-75:18, 77:20-78:2. An RBT would step in only if needed for safety concerns. Director, Tr. Vol. II, 199:23-200:23, 226:15-227:5.

208. Within the first 2 to 3 weeks at Academy-2, Director became aware that Student was exhibiting learning behavior and behavior problems. Director, Tr. Vol. I, 133:9-137:6. Prior to January of 2021, Student's problem behavior started to become more severe. Student was [REDACTED] staff and attempting to [REDACTED] other children. The intensity of the [REDACTED] was growing, leaving marks on staff. Director felt that it was no longer safe for Student to be in Academy-2. Director, Tr. Vol. I, 134:2-135:9. Director testified that Student started [REDACTED] Student's self, not only other people, while Student was in Academy-2. Director, Tr. Vol. I, 83:5-19.

209. While in Academy-2, Director and Academy-2 staff noticed that Student was not acquiring skills at the same rate as Student had in Academy-1. Director, Tr. Vol. I, 133:1-137:6.

210. Academy-2 had a two-week Christmas break. Director, Tr. Vol. II, 239:16-25.

Academy-3

211. Academy-3 is a for-profit, private school founded by Director in August of 2020. Pet. Ex. 3 at 125; Director, Tr. Vol. I, 75:19-24.

212. Academy-3 is a licensed private elementary school for grades Kindergarten-Grade 1. The license is effective from January 21, 2021 to January 20, 2022. Director is in the

- process of obtaining a license for the preschool. Pet. Ex. 3 at 123; Director, Tr. Vol. II, 245:6-17.
213. Academy-3 is a school that has an ABA program and provides one-to-one RBT services, supports, and reverse inclusion to its students. Director, Tr. Vol. II, 226:15-227:15.
214. All the students in Academy-3 have a one-to-one RBT. Director, Tr. Vol. II, 192:6-13.
215. All the students in Academy-3 have reverse inclusion. Director, Tr. Vol. I, 146:24-147:2, 152:5-7.
216. The ages of the students in Academy-3 are four years old to seven years old. Director, Tr. Vol. II, 236:23-237:3.
217. In the 2021-2022 school year, there are [REDACTED] to [REDACTED] students in Academy-3. Director, Tr. Vol. I, 146:20-23; Director, Tr. Vol. II, 191:14-17.
218. The school program for the 2021-2022 school year at Academy-3 begins on September 28, 2021 and ends on July 29, 2022, and it is a year-round school. Pet. Ex. 3 at 106.
219. On September 15, 2021, Parent signed an agreement with Academy-3 for the 2021-2022 school year to enroll Student in the Preschool ABA classroom program from September 28, 2021 to July 29, 2022 (“9/15/2021-Agreement”). Pet. Ex. 3 at 106-107.
220. During the academic day, Student is in a classroom with [REDACTED] other students. Director, Tr. Vol. II, 191:18-192:5, 238:15-17.
221. Student will be in school for six (6) hours a day at Academy-3. As a preschool student, Student’s schedule may include eating breakfast, teaching time, group circle, snack, recess, and lunch. Director, Tr. Vol. II, 241:5-242:9.

222. The purpose of the reverse inclusion program is generalization. The reverse inclusion program allows students in Academy-3 to practice newly acquired skills with non-disabled peers. Director, Tr. Vol. I, 80:17-81:10, 150:24-151:11.
223. There are [REDACTED] non-disabled peers between [REDACTED] and [REDACTED] years old in the reverse inclusion program. Director, Tr. Vol. II, 238:21-239:15. The non-disabled peers are children who are being home-schooled. According to Director, “[t]he non-disabled peer has a job. So they are trained [by a behavior technician on] what to do, how to say things to their peer. It’s not very natural, I guess, is the best way to describe it because the disabled peers are learning how to facilitate and generalize these skills with other children....So the non-disabled peers is given instructions on what to do also how to respond....So they’re there to guide the child throughout the time they’re socializing and interacting with our students.” Director, Tr. Vol. II, 194:11-195:20.
224. Reverse inclusion usually starts in October. Director, Tr. Vol. II, 195:12-20.
225. The cost of the reverse inclusion program (\$8,080.00 per school year) covers a behavior technician to be with a non-disabled peer who comes in for the reverse inclusion program and the services provided in the reverse inclusion program. Director, Tr. Vol. II, 192:14-21.
226. Student’s reverse inclusion program minutes (9,696 minutes) is an estimate based on Student’s age, Student’s performance in Academy-2, and the goals set for Student. The estimate is the maximum number of minutes Student may need, and Parent will only be charged for minutes provided to Student. Director, Tr. Vol. I, 147:15-150:23.
227. During the 2020-2021 school year at Academy-3, the monthly tuition of \$4,000 included overhead costs. Director, Tr. Vol. I, 141:20-144:1; Director, Tr. Vol. II, 201:12-16. In

- the 2021-2022 school year, the monthly tuition of \$4,200 no longer includes overhead costs. Director, Tr. Vol. I, 144:2-7; Director, Tr. Vol. II, 201:6-11.
228. In the 2021-2022 school year, the annual tuition of \$50,400.00 includes assessments; development of an Individualized Applied Behavior Analysis Education Plan; training of staff to facilitate the assessments; special education programming; ABA programming; materials and supplies; any curriculum that may be required; parent communication and education; and a “margin between expenses and stability.” Director, Tr. Vol. I, 160:22-161:11, 163:22-25, 174:10-14; Director, Tr. Vol. II, 245:18-246:16.
229. An annual tuition of \$50,400.00 (\$4200 x 12 months) is excessive considering Student’s program began on September 28, 2021 and will conclude on July 29, 2022. Student will be receiving approximately ten (10) months of services but is being charged for twelve (12) months. It is unreasonable to charge Student for the entire month of September when Student was in school at most for three days. Pet. Ex. 3 at 106-107.
230. Director will be providing the speech-language therapy services, the BCBA consultation services, the mandatory RBT supervision services, and conducting the functional behavior assessment for Student’s 2021-2022 school year program. Director, Tr. Vol. II, 246:17-247:22, 248:8-12.
231. Speech-language therapy services is 2400 minutes at \$6,320.00 for the entire 2021-2022 school year. Pet. Ex. 3 at 107.
232. BCBA Consultation is 5,040 minutes at \$17,640.00 for the entire 2021-2022 school year. BCBA Consultation is made up of two components: consulting for a child’s ABA verbal behavior program and consulting with a child’s team. Consulting for a child’s ABA/VB program includes creating/developing an ABA/VB program; monitoring the

program; changing the program; guiding the program; and analyzing the data to be able to do all of the above. Consulting with a child's team (which includes an RBT, behavioral technician or anyone else who provides services to the child) means training the team. A BCBA does everything that's needed for a child's ABA programming, which could include such things as reading e-mails, conducting meetings or conferences, and making phone calls. Director, Tr. Vol. I, 155:14-159:9, 164:1-4.

233. Mandatory RBT Supervision is \$14,196.00 for the entire 2021-2022 school year. This consists of the BCBA supervising the RBTs as they implement a child's ABA/VB program. The focus of mandatory RBT supervision is the RBT themselves: their performance and whether they are following the code of ethics. The BCBA will provide the RBT with feedback on the RBT's performance, and how the RBT is collecting data. Director, Tr. Vol. I, 167:15-170:23.
234. Functional Behavior Assessment ("FBA") will cost \$2100.00 per year and will be conducted if needed. The purpose of an FBA is to identify behavior problems and their functions and then create a treatment plan or behavior reduction plan. Pet. Ex. 3 at 107; Director, Tr. Vol. I, 43:11-44:1; Director, Tr. Vol. II, 248:8-23.
235. Special Education Consultation is 720 minutes at \$1,260.00 for the entire 2021-2022 school year. A special education consultation will collaborate and consult with Student's team once Student enters into the preacademic and academic levels. Student is currently not at this level. Director, Tr. Vol. II, 247:8-16; Pet. Ex. 3 at 107.
236. Student's 9/15/2021-Agreement includes RBT services for 6.5 hours per day. The 6.5 hours consists of 6.0 hours for academic time and 0.5 hour for parents who may be late in picking up their children from school. The total cost of RBT services is \$106,808.00

- for the entire 2021-2022 school year. Director, Tr. Vol. I, 171:7-172:6; Pet. Ex. 3 at 107.
237. Distance Bridge Program Assessment will cost \$578.00 per year. This assessment is to determine if Student is a candidate for distance learning. Director, Tr. Vol. II, 247:23-248:7; Pet. Ex. 3 at 107.
238. Administrative Fee includes rent; utilities; legal and accounting fees; administrative salary or administrator salary; school insurance; office supplies; and overhead costs or “cost of running a business.” Director, Tr. Vol. II, 204:15-205:12, 210:22-213:23.
239. In determining how much to charge for Academy-3, Director looked at [REDACTED] which is an ABA service provider. Director, Tr. Vol. I, 76:6-77:2.
240. The 9/15/2021-Agreement is a “cost analysis” which is an estimate of the maximum amount of services Student may need. It does not mean that all the service minutes listed will be used. Parent will receive invoices that will reflect the actual services provided to Student. Director, Tr. Vol. I, 78:17-79:19.
241. The total cost for Student to attend Academy-3 for the 2021-2022 school year is \$248,028.87. Pet. Ex. 3 at 106-107.
242. Student started at Academy-3 on September 28, 2021. At the time of the due process hearing on October 5, 2021, Director testified that “we will be conducting another assessment” for Student. Director, Tr. Vol. I, 77:18-78:2.
243. At the time of Director’s testimony, on October 5, 2021, Student had just started transitioning into Academy-3. Student attended Academy-3 for a couple of days during the last week of September from 8:00 a.m. to 11:00 a.m. Student did not receive educational instruction at the time. During the initial couple of days at Academy-3, the

observation portion of Student's assessment was being done. Student is being completely reassessed because it has been a long time since Student's last assessments, which took place on September 20, 2019 and February 19, 2020. At the time of Director's testimony, a current VB-MAPP had not yet been developed for Student. Director, Tr. Vol. I, 172:14-176:5; Pet. Ex. 2 at 075, 082.

244. The 2021-2022 school year for DOE started on or about August 4, 2021 and will end on or about May 30, 2022. SPED Teacher, Tr. Vol. III, 475:15-22.
245. There is no evidence that Academy-1, Academy-2 or Academy-3 conducted an FBA for Student. BCBA, Tr. Vol. III, 508:8-511:25.
246. A child who has a one-to-one RBT at Academy-3 does not necessarily mean that the child will need a one-to-one RBT at a DOE school setting. BCBA, Tr. Vol. III, 498:6-501:6.
247. A behavior intervention plan ("BIP") is a documented plan to address problem behaviors identified in an FBA. BCBA testified that DOE's educational policy that an FBA be conducted first before a BIP is made is appropriate. BCBA, Tr. Vol. III, 508:12-510:16.
248. Based on BCBA's review of Academy-1 Records and the discussion that took place on January 26, 2021, BCBA testified that BCBA did not see the need to immediately conduct an FBA without having Student go to school first, nor did BCBA see the need to immediately assign a one-to-one RBT to Student. Student receiving an RBT at a center-based program, such as Academy-1 or Academy-3, did not necessitate Student receive an RBT in a DOE school setting. BCBA, Tr. Vol. III, 512:1-514:15.
249. BCBA testified that it was reasonable for the DOE to want to see Student in a school setting to assess how Student is doing, then proceed with an FBA. Once an FBA is

conducted, a BIP can be developed, if necessary, and then, a designated one-to-one RBT can be assigned, if necessary. BCBA, Tr. Vol. III, 514:16-516:18. Based on BCBA's professional experience, children behave differently in a school environment and a home environment. Since Student's behavior problems include having tantrums when Student doesn't get Student's way and Student reportedly [REDACTED] Student's [REDACTED] at home, information about how Student behaves in a school setting is needed to properly assess Student's needs. BCBA, Tr. Vol. III, 527:3-530:10.

Witness Credibility

Director

250. Director is a Hawaii licensed and ASHA¹⁷ certified speech-language pathologist and Hawaii licensed and board-certified behavior analyst. Pet. Ex. 3 at 125; Director, Tr. Vol. I, 24:3-5, 41:23-42:2.
251. Director has practiced as a speech-language pathologist for over [REDACTED] years, and developed, guided and implemented ABA programs for over [REDACTED] years. Pet. Ex. 3 at 125.
252. Director is not a licensed teacher. Director, Tr. Vol. I, 42:3-5.
253. In [REDACTED], an employee of the Hawaii Department of Education contacted Director to ask Director if Director would be the BCBA to guide and create verbal behavior programs in a few preschools for the DOE. Director accepted the job offer and by the end of the [REDACTED] school year, Director had created verbal behavior programs in two preschools for DOE. Director, Tr. Vol. I, 39:9-41:10.
254. Director testified as an expert in the area of "development and maintenance of ABA programs." Director, Tr. Vol. I, 41:11-42:22.

¹⁷ It is unclear from the record what "ASHA" stands for.

Parent

255. Parent is a [REDACTED]. [REDACTED]. Parent, Tr. Vol. II, 255:11-256:1, 259:23-260:11.
256. Parent owns and operates a [REDACTED] company. Parent, Tr. Vol. II, 256:8-9, 257:4-259:10.
257. During the 1/26/2021-IEP revision meeting, while referring to the Academy, Principal asked Parent, “Did [Student] go this week or did [Student] go, like, on a Monday, Tuesday or Thursday?” Parent tells Principal that Student has a 5-day schedule and that “that’s where [Student] gets [Student’s] [REDACTED] services.” Pet. Ex. 4 at 170 (Speaker 2 at 01:19:01); DOE Ex. at 739 (01:17:15.210); DOE Ex. 110, 1/26/2021-Video Recording at 01:16:34-01:20:18. And when Principal asked Parent again, “And has [Student] been going this past week?” Parent avoided answering the question. Pet. Ex. 4 at 170 (Speaker 2 at 01:19:47); DOE Ex. 108 at 739 (01:17:57.359); DOE Ex. 110, 1/26/2021-Video Recording at 01:16:06-01:20:18. Parent misled the school members of the IEP team. First, it is questionable if Student was attending Academy-2 on January 26, 2021 because Academy-2 became inactive in mid-January. (FOF 206). Second, Student was not receiving any ABA services while in Academy-2. (FOF 204).
258. During the 1/26/2021-IEP revision meeting, Principal tried to get Parent to share information about Student’s schedule at Academy-2 but Parent avoided providing information and referred Principal to the consent forms Parent had signed. DOE Ex. 110, 1/26/2021-Video Recording, 01:16:17-01:20:12. Knowing that the IEP team wanted information about Student’s daily schedule, and Parent receives “a written thing of [Student’s] day every day,” there is no evidence that Parent provided copies to the IEP team. DOE Ex. 111, 2/12/2021-Video Recording at 00:45:04-00:45:40).

259. During the 1/26/2021-IEP revision meeting, SPED Teacher asked Parent how much speech therapy Student was “currently” receiving at Student’s private program. Parent stated that Parent did not have that number in front of Parent. DOE Ex. 110, 1/26/2021-Video Recording at 02:00:00-02:02:38. This is misleading because Student was not receiving speech therapy at the time of the 1/26/2021-IEP revision meeting because Academy-2 did not provide ABA services and Academy-2 became inactive in mid-January of 2021. (FOF 13, 65, 202-206).
260. During the 2/12/2021-IEP revision meeting, Principal informed Parent that after reviewing the Academy-1 Records and seeing that Student received speech therapy at Academy-1, Principal wanted to know if Student was still getting speech therapy at the time of the 2/12/2021-IEP revision meeting. Parent responded that Student was still getting speech therapy. When Principal asked if Parent knew how many minutes of speech therapy Student was receiving, Parent avoided answering the question and referred Principal to the signed consent forms Parent had given to Public School. DOE Ex. 111, 2/12/2021-Video Recording at 00:21:39-00:25:12. Parent misled the school members of the IEP team because Student was not receiving speech therapy at the time of the 2/12/2021-IEP revision meeting. Between January of 2021 to September 27, 2021, Student was not attending Academy-1, Academy-2, or Academy-3. (FOF 65).
261. When Principal asked Parent during the 2/12/2021-IEP revision meeting if Student has an RBT with Student “now,” Parent said yes. DOE Ex. 111, 2/12/2021-Video Recording at 00:39:52-00:40:33. This is misleading because Student was not attending Academy-1, Academy-2, or Academy-3 in February of 2021. (FOF 65).

262. Prior to Parent testifying at the due process hearing, Parent listened to the recordings of the 1/26/2021-IEP and 2/12/2021-IEP revision meetings and reviewed the transcripts. Parent, Tr. Vol. II, 267:4-23.
263. Parent testified during the due process hearing that the IEP team did not review during the 1/26/2021-IEP and 2/12/2021-IEP revision meetings the Academy-1 Records Parent had sent to SSC. Parent also testified that the school members of the IEP team informed Parent during the revision meetings that they did not receive anything regarding what was provided to Student at Academy-1. Parent, Tr. Vol. II, 268:11-271:1. The evidence contradicts Parent's testimony. The school members of the IEP team were in possession of the Academy-1 Records, they discussed the contents of the Academy-1 Records (DOE Ex. 110, 1/26/2021-Video Recording at 00:29:27-00:30:09 (Principal); 00:56:58-01:00:17 (BCBA)), and they displayed the Academy-1 Records on a shared screen (DOE Ex. 110, 1/26/2021-Video Recording at 2:01:45-2:02:50).
264. Parent's testimony that Parent sent an email to the DOE asking the DOE to include Director in the IEP revision meeting is misleading. Parent, Tr. Vol. II, 268:3-10. Parent did not ask DOE to include Director in the IEP revision meeting; rather, Parent's email on December 22, 2020 stated that Parent hoped to "have someone from [Academy-1] to help improve the IEP." (FOF 63). Parent did not specifically state that Parent wanted Director to be at the revision meetings, nor did Parent ask DOE to invite someone from Academy to the revision meetings. After DOE essentially informed Parent through the 1/06/2021-CA that Director would not be present (FOF 67), Parent's 1/25/2021-Email of Concerns did not reiterate Parent's desire to have someone from Academy present at the

revision meetings nor did Parent ask DOE to invite Director to the revision meetings. (FOF 76).

265. During cross-examination, Parent was evasive and non-responsive. Parent was not forthcoming in Parent's response to questions about Mr. Peck receiving information from DOE regarding Parent not wanting Student evaluated for special education eligibility in 2019 that was the impetus for the July 2020-Complaint (Parent, Tr. Vol. II, 293:1-296:13); Parent could not recall if Parent had a discussion with Director about enrolling Student in Academy-3 for the 2020-2021 school year (Parent, Tr. Vol. II, 297:11-299:20); Parent gave an evasive answer to whether Parent reviewed a proposed agreement to enroll Student in Academy-3 during the 2020-2021 school year (Parent, Tr. Vol. II, 299:21-302:25); Parent was evasive in responding to questions about whether Parent had asked Director to the 2/12/2021-IEP revision meeting (Parent, Tr. Vol. II, 317:3-319:23); Parent was reluctant to answer questions about whether the IEP team in the 1/16/2021-IEP or 2/12/2021-IEP revision meetings discussed that "close adult supervision" would involve a teacher and an aide in a classroom setting (Parent, Tr. Vol. II, 307:14-315:12); when confronted with evidence that at least one member of the IEP team stated during the 1/26/2021-IEP revision meeting that he/she reviewed the Academy-1 Records, Parent was reluctant to respond to questions about the topic (Parent, Tr. Vol. II, 319:24-324:130); and Parent contradicts Parent's self during Parent's testimony (Parent, Tr. Vol. II, 328:7-20, 329:21-331:16).

266. Parent was not a credible witness.

Speech-Language Coordinator ("SLC")

267. SLC is employed by DOE and is licensed in Hawaii as a speech-language pathologist for the past [REDACTED] years. During those [REDACTED] years, SLC provided SLP services to DOE on a contractual basis for [REDACTED] years, then as a direct employee for [REDACTED] years. SLC was a licensed speech-language pathologist in [REDACTED] for [REDACTED] year before coming to Hawaii. SLC is also certified by the American Speech-Language-Hearing Association. SLC received SLC's master's degree in Communication, Sciences and Disorders at [REDACTED] SLC, Tr. Vol. II, 337:1-339:6, 344:10-344:20; DOE Ex. 113 at 836-837.

268. During SLC's [REDACTED]-year period as an SLP, SCL provided SLP services to [REDACTED] schools on [REDACTED] and [REDACTED] to [REDACTED] schools on [REDACTED]. SLC provided SLP services to approximately [REDACTED] students. SLC has provided SLP services to non-verbal [REDACTED] [REDACTED] aged students who were found eligible for IDEA services under the [REDACTED] [REDACTED] category. In addition to providing SLP services to students, SLC also provided consultation and technical support to other speech-language pathologists. SLC, Tr. Vol. II, 339:7-342:18; DOE Ex. 113 at 836-837.

269. SLC testified as an expert in the area of speech-language pathology during the due process hearing. SLC, Tr. Vol. II, 350:7-14.

270. SLC was a credible witness.

Special Education Teacher ("SPED Teacher")

271. SPED Teacher is employed by DOE as a special education teacher. SPED Teacher has been a licensed special education teacher for [REDACTED] years and a licensed general education teacher for [REDACTED] years. For the past [REDACTED] years, SPED Teacher has taught [REDACTED] and [REDACTED] students with special needs. SPED Teacher, Tr. Vol. III, 386:8-388:17.

272. SPED Teacher has taught approximately [REDACTED] to [REDACTED] students who were found eligible for special education under the eligibility category of [REDACTED]. Of the [REDACTED] to [REDACTED] students, [REDACTED] to [REDACTED] of them were in [REDACTED]. Of the [REDACTED] to [REDACTED] students, some were non-verbal and/or hand behavioral needs. SPED Teacher, Tr. Vol. III, 389:6-391:1.

273. SPED Teacher was a credible witness.

Board Certified Behavior Analyst (“BCBA”)

274. BCBA has been a board-certified behavior analyst since [REDACTED] and a licensed behavior analyst in the State of Hawaii since [REDACTED]. BCBA, Tr. Vol. III, 485:3-24; DOE Ex. 112 at 833-834.

275. BCBA has Ph.D. in Operant Psychology. BCBA, Tr. Vol. III, 486:9-10.

276. As a part of BCBA’s training, BCBA studied the ABA methodology known as verbal behaviors. BCBA, Tr. Vol. III, 486:11-487:4. Beginning in [REDACTED], BCBA’s clinical experience implementing ABA included: working in group homes; working with children, adolescents, adults with severe behavior problems; writing FBAs for adults with disabilities; in-home programming for kids with [REDACTED], using verbal behavior methodology and the Assessment of Behavior Language and Learning Strategies (“ABLLS”) curriculum, which is a prerequisite to the VB-MAPP; and using the VB-MAPP. BCBA, Tr. Vol. III, 488:11-491:4.

277. BCBA started providing BCBA services to DOE in [REDACTED]. BCBA, Tr. Vol. III, 492:18-20. BCBA was employed with Health Care Company as a board-certified

behavior analyst, and Health Care Company had a contract with DOE's [REDACTED] complex.
BCBA, Tr. Vol. III, 531:18-532:2.

278. In [REDACTED] and [REDACTED], BCBA provided BCBA services as the clinical director to [REDACTED] [REDACTED], an academy for children with [REDACTED] and related disabilities. BCBA, Tr. Vol. III, 492:21-495:7; DOE Ex. 112 at 833.

279. BCBA testified as an expert in the field of Applied Behavior Analysis. BCBA, Tr. Vol. III, 495:8-496:10.

280. BCBA was a credible witness.

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 U.S.C. §§ 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 Hawaii v. Leo W., 226 F.Supp.3d 1081, 1093 (D. Haw.2016).

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

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

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

The mechanism for ensuring a FAPE is through the development of a detailed, individualized instruction plan known as an Individualized Education Program (“IEP”) for each child. 20 U.S.C. §§ 1401(9), 1401(14), and 1414(d). The IEP is a written statement, prepared at a meeting of qualified representatives of the local educational agency, the child’s teacher(s), parent(s), and where appropriate, the child. The IEP contains, among other things, a statement of the child’s present levels of academic achievement and functional performance, a statement of the child’s annual goals and short-term objectives, and a statement of specific educational services to be provided for the child. 20 U.S.C. § 1414(d). The IEP is reviewed and, if appropriate, revised, at least once annually. 20 U.S.C. § 1414(d). The IEP is, in effect, a “comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” Burlington v. 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 2/12/2021-IEP is appropriate regarding the Extended School Year portion of Student's IEP: (i) Where the DOE found Student ineligible because they stated they needed additional data that would only be available through having Student attend the DOE school. (Procedural Violation); and (ii) Where Student should have been deemed eligible for ESY services. (Substantive Violation).
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In this issue, Petitioners are alleging that Respondents committed procedural and substantive violations when the IEP team deemed Student not eligible for ESY services. According to Petitioners, the IEP team's decision-making process was procedurally flawed because they stated that they needed additional data that could only be available by having Student attend a DOE school; and the IEP team's decision was substantively flawed because Student should have been deemed eligible for ESY services. Based on the evidence adduced at the hearing, Respondents did not commit procedural or substantive violations when it determined that Student was not eligible for ESY services.

Respondents did not deny Student a FAPE when DOE stated during the IEP meeting that they needed additional data on Student that could only be available through Student attending a DOE school. Petitioners argue that "[b]y insisting that ESY eligibility must be based upon data collection at the public school, the IEP team prevented a discussion on Student's eligibility for ESY." Pet. Closing Brief at p. 4. The record does not support Petitioners' argument that the IEP

team prevented a discussion on Student's eligibility for ESY services by wanting information about Student while in a school setting. The 11/10/2020-IEP team's decision to find Student not eligible was based on the following information: Adaptive Behavior Assessment System-3; Parent input; OT Clinical Observations; The Sensory Profile 2nd Edition: Toddler; SLP assessment; Goldman Fristoe Test of Articulation-Third Edition (GFTA-3). (FOF 60). Prior to the 1/26/2021-IEP meeting, the IEP team reviewed the Academy-1 Records that Parent had shared the night before. (FOF 74-78). The IEP team discussed Parent's desire for ESY services for Student on the second day of the revision meeting, on February 12, 2021. Parent informed the school members of the 2/12/2021-IEP team that Student was able to handle a weekend without services, but it would be difficult for Student to have no services for "weeks." Principal thanked Parent for Parent's input and explained the need for regression and recoupment data. Principal explained that regression/recoupment data can be obtained not just by Student being on a break from school, but also when Student is not taught a particular skill at school for a period of time. (FOF 118). The 2/12/2021-IEP team considered Parent's input; Developmental Profile 3 (DP-3); OT input; SLP input; Speech Language Assessment; and The Sensory Profile 2nd Edition: Child. (FOF 149). The 2/12/2021-IEP team then concluded that there was still not enough information to establish ESY eligibility and found Student not eligible, against Parent's wishes. (FOF 144). The 2/12/2021-IEP team's decision "was made after the IEP team reviewed reports, assessments, summary statements, resource books, the 'nature and severity' of Student's condition, and information from Student's [REDACTED] program." N.S. v. State of Haw., Dept. of Educ., 2010 WL 2348664, *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 three-year old transitioning from a Department of Health early intervention program to a DOE special education program.)

Petitioners' argument that "[i]f the school prefers to take data on a student's rate of regression and recoupment, they could have specifically requested that information from the private provider¹⁸ ahead of the IEP meeting" is unpersuasive. Pet. Closing Brief at p. 3. First, DOE wanting to look at regression/recoupment data is not a preference but a requirement. 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). By law, the IEP team must consider regression/recoupment data in deciding ESY eligibility. 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). Second, the 2/12/2021-IEP team reviewed Academy-1 Records, albeit outdated, prior to the first revision meeting. Academy-2 was not a school and would not have had information on Student's regression/recoupment of academic knowledge. (FOF 201-204). Although Parent had "a written thing of [Student's] day everyday," the IEP team was not provided copies of these "written thing[s]," and efforts to get additional information from the Academy was not

¹⁸ It is unclear if "private provider" refers to Academy-1, Academy-2, or Academy-3. Student's attendance at the Academy is as follows:

May of 2019: Academy-1 Summer Program (FOF 173).

June 2019 and July 2019: summer break (FOF 173).

August 2019 to mid-March 2020: Academy-1 Pilot Program (FOF 9, 179).

Mid-March 2020 to August 2020: No Academy (FOF 11).

August 2020 to mid-January 2021: Academy-2 (FOF 13, 206).

Mid-January 2021 to 9/27/2021: No Academy (FOF 65).

9/28/2021 to 7/29/2021: Academy-3 (FOF 219, 242).

successful. (FOF (73, 75, 79, 80, 111, 122, 142, 151-153, 155-160). Student had not yet started at Academy-3 at the time of the 2/12/2021-IEP revision meeting and therefore Academy-3 would not have had the necessary information. (FOF 219). DOE had very limited information about Student because Student has never attended a DOE school. (FOF 171). Therefore, DOE wanting to collect data about Student while Student is in an educational setting to inform the IEP team of Student's rate of regression/recoupment during breaks from school and/or instruction, and informing Parent about the need to collect data, are not procedural violations.

Petitioners' argument that the "IEP team could have looked at the severity of Student's disabling condition and used their familiarity with other students with a similar disabling condition to estimate a reasonable duration for ESY services" is also not persuasive. Pet. Closing Brief at p. 4. "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). Petitioners' proposal to assume a need and "estimate a reasonable duration" would result in ESY services that are not individualized to Student. Therefore, DOE not estimating a reasonable duration of ESY services is not a procedural error.

In addition to no procedural error in discussing Student's ESY eligibility, there is also no substantive violation because Petitioners have not shown that ESY services are necessary for the provision of FAPE to Student. Petitioners allege that Student was denied a FAPE because the 2/12/2021-IEP did not provide ESY services to Student; however, Petitioners have not proven that ESY services are necessary for the provision of FAPE to Student. The C.F.R. § 300.106—Extended school year services--states in pertinent part:

(a) General.

- (1) Each public agency must ensure that extended school year services are

available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.

- (2) Extended school years 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.
- (3) In implementing the requirements of this section, a public agency may not—
 - (i) Limit extended school year services to particular categories of disability; or
 - (ii) Unilaterally limit the type, amount, or duration of those services.

(b) Definition. As used in this section, the term extended school year services means special education and related services that—

- (1) Are provided to a child with a disability—
 - (i) Beyond the normal school year of the public agency;
 - (ii) In accordance with the child's IEP; and
 - (iii) At no cost to the parents of the child; and
- (2) Meet the standards of the SEA.

Hawaii Administrative Rule § 8-60-7 is substantively identical to C.F.R. § 300.106.

DOE must provide ESY services only if the Student's IEP team determines that ESY services are necessary for the provision of FAPE to Student. 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 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.

According to Parent, Student needs “year-round” services and “when [Student] has a week with no services forgets what [Student’s] learned and has to start back all over.” (FOF 74). Parent also informed the 2/12/2021-IEP team that Student is fine with having no services for a weekend but not for “weeks.” (FOF 118). However, Parent’s personal observation that Student forgets what Student has learned after a week without services is not enough to meet the burden of showing necessity. Student last received academic instruction from Academy-1 sometime in March of 2020. Between March of 2020 and September 27, 2021, Student was either not attending an Academy or Student was in a non-educational setting at Academy-2. (FOF 9, 11, 13, 65, 179, 206). And although Public School started on or about August 4, 2021, Parent elected not to send Student to Public School and waited until September 28, 2021 until Student could attend Academy-3. (FOF 171, 219, 244). Parent’s personal observations are based on outdated information. While Petitioners are not required to present empirical proof of actual prior regression, there was no evidence that ESY was necessary. There were no expert opinion testimony or opinions from professionals or any reliable documentation showing that ESY is necessary. N.B. v. Hellgate Elementary Sch. Dist., ex rel. Bd. of Directors, Missoula County, 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 his 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 believes that Student regresses a week without services, there is no evidence to corroborate Parent’s position that Student needs ESY services.

“The █████ 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). Furthermore, Academy-1 had a summer break in June and July between its summer program and pilot program, and a 1-week spring break. (FOF 173, 196). Academy-2 had a 2-week Christmas break. (FOF 210). There is no evidence that Student received services, educational or otherwise, during these breaks at Academy-1 and Academy-2.

The testimony of Director does not counter the testimony of the school experts because Director had not provided educational services to Student since March of 2020 and the IEP team was in possession, and reviewed, Director’s 2019-IAEP and 2020-IAEP reports and List of Accommodations. (FOF 75-78). Any additional information that Director may have had that was not in Director’s reports, was not available to the 2/12/2021-IEP team and, pursuant to the “snap-shot” rule¹⁹, the IEP team should not be held responsible for information that was not available to them at the time of the 2/12/2021-IEP revision meeting.

“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 he is not provided with an educational program during the summer months.” N.B. v. Hellgate Elementary Sch. Dist., ex rel. Bd. of Directors, Missoula County, 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 school year will be significantly

¹⁹ “[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)).

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 2/12/2021-IEP did not provide ESY services to Student.

2. Whether the 2/12/2021-IEP is appropriate when there were insufficient discussions during the IEP meetings of 1/26/2021 and/or 2/12/2021 of the needed supports to address Student's behavioral needs.

In this issue, Petitioners are arguing that the 2/12/2021-IEP is not appropriate because the discussions during the 1/26/2021-IEP and 2/12/2021-IEP revision meetings regarding Student's needed supports to address Student's behavioral needs were not sufficient. Petitioners clarified in their Closing Brief that "[w]hile the IEP team did discuss Student [sic] disruptive behaviors during the Present Levels of Performance section of the IEP [during the 1/26/2021-IEP revision meeting], they were not discussed during the Supplementary Aides and services section, at all [during the 2/12/2021-IEP revision meeting]." Pet. Closing Brief at 5. Petitioners fail to meet their burden of showing that Student was denied a FAPE with respect to this issue.

The 1/26/2021-IEP and 2/12/2021-IEP revision meetings were review meetings to address concerns raised by Parent in Parent's 1/25/2021-Email of Concerns regarding Student's IEP that was developed on November 10, 2020. (FOF 74). When Student's IEP was developed on November 10, 2020, the IEP team took into consideration "Special Factors" which included "Behavior—[Student] does have behavioral concerns that will be addressed in the goals and objectives in the IEP. Classroom supports will be put in place in the program to address these needs." (FOF 41). The 11/10/2021-IEP team discussed Student's Social and Emotional Development/Behavior (Domain II), and they were aware that Student may have difficulty developing and maintaining relationships with other children and adults; difficulty communicating with other children and adults; may [REDACTED]; may

overreact to certain experiences; and when frustrated may [REDACTED] others. (FOF 44). The 11/10/2020-IEP team considered how Student's behavioral needs could impact Student's ability to participate in a school setting without especially designed supports and created annual goals to address Student's behavioral needs. (FOF 49, 50). The 11/10/2020-IEP team determined that the following Supplementary Aids and Supports would assist with Student's behavioral needs: Visual Schedule, First/Then Language, Close Adult Supervision, and Sensory Supports. (FOF 54, 60). Petitioners are not alleging that the 11/10/2020-IEP fails to offer Student a FAPE. Petitioners' allegation focuses on the discussion that took place during the revision meetings of the 11/20/2020-IEP. Petitioners also do not allege what other supports or interventions should have been discussed during the revision meetings.

The 1/26/2021-IEP revision meeting was scheduled at the request of Parent on December 22, 2020 because Parent had shown the 11/10/2020-IEP to Director who informed Parent that Student needed ABA services. (FOF 63). Parent wanted "another IEP meeting and have someone from [Academy-1] to help improve the IEP." (FOF 63). Parent later clarified that Parent wanted to discuss ESY, speech services, "close adult supervision" vs. "1:1 RBT aide," and reverse inclusion during the 1/26/2021-IEP meeting. (FOF 74). The IEP team spent two hours and ten minutes on January 26, 2021 and one hour and twenty-five minutes on February 12, 2021 addressing the concerns raised in Parent's 1/25/2021-Email of Concerns. (FOF 101, 136). The IEP team addressed all of the concerns raised in Parent's 1/25/2021-Email of Concerns and Parent stated at the end of the 2/12/2021-IEP revision meeting that "I think we addressed all my things at least once if not more." DOE Ex. 111, 2/12/2021-IEP Video Recording at 01:23:35-01:24:04. Parent may not have agreed with the outcome of the revision meetings, but Parent not getting what Parent wants does not mean that the discussions and the

resulting 2/12/2021-IEP are insufficient. “[T]he mere existence of a difference in opinion between a parent and the rest of the IEP team is not sufficient to show that the parent was denied full participation in the process, nor that the DOE’s determination was incorrect.” Laddie C. ex rel. Joshua C. v. Dept. of Educ., 2009 WL 855966 at *4 (D.Haw. Mar. 27, 2009). Although Petitioners argue that the only support provided to Student to address Student’s behavioral needs is Close Adult Supervision, the 2/12/2021-IEP also provide Sensory Supports, Visual Schedule, and First/Then Language, which also address Student’s behavioral needs. Without any evidence that other supports or interventions should have been discussed and considered by the IEP team, the undersigned will not second guess the IEP team’s decision.

Petitioners also argue that the IEP team did not discuss Student’s disruptive behavior during the Supplementary Aides and Services section of the IEP on February 12, 2021. Pet. Closing Brief at 5. This argument is also unpersuasive. While Petitioners acknowledge that the IEP team discussed Student’s disruptive behavior during the PLEP section on January 26, 2021, they take issue with the IEP team not discussing Student’s disruptive behavior in the Supplementary Aids and Services section on February 12, 2021. As stated above, the meeting that took place on February 12, 2021 was a continuation of the meeting that took place on January 26, 2021, which was scheduled to discuss specific concerns raised by Parent about the 11/10/2020-IEP. Petitioners have put forth no arguments and cited to no legal authority that Student’s disruptive behaviors must be discussed during the Supplementary Aides and Services section as opposed to another section of an IEP during a review meeting.

However, even assuming that the discussion regarding Student’s needed supports to address Student’s behavioral needs was insufficient in some manner, Petitioners do not allege and have not shown, through documentary or testimonial evidence, that the insufficient

discussion resulted in a loss of educational opportunity for Student; significantly impeded Parent's opportunity to participate; or caused Student a deprivation of educational benefits.

Amanda J., 267 F.3d 877, 892 (9th Cir.2001). Therefore, Petitioners fail to meet their burden of showing that the discussions regarding Student's needed supports to address Student's behavioral needs during the 1/26/2021-IEP and 2/12/2021-IEP revision meetings were insufficient.

3. Whether the 2/12/2021-IEP is appropriate when there is insufficient description in the IEP of the needed supports to address Student's behavioral needs.

In this issue, Petitioners are alleging that the 2/12/2021-IEP fails to sufficiently describe the needed supports to address Student's behavioral needs²⁰. Petitioners allege that Student's 2/12/2021-IEP contains "none of the behavior interventions that the L.S. Court found in that student's IEP." Pet. Closing Brief at 7. Petitioners do not argue what behavioral interventions the student in the L.S. case has that Student should also have. Based on Petitioners' Closing Brief, Petitioners appear to be arguing that Student should have had a behavioral support plan ("BSP"); however, Petitioners have not proffered any evidence, documentary or testimonial, to support the need for a BSP.

Pursuant to the IDEA, "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

²⁰ In the Supplementary Aids and Supports section of Student's 2/12/2021-IEP, there are eight (8) items listed. To the extent that Petitioners are alleging that the terms used to describe these eight (8) items are not descriptive enough, Petitioners have failed to meet their burden of proof. Parent was given the opportunity to provide input and state Parent's concerns during the 11/10/2020-IEP meeting. Parent generally felt that Student's PLEPs were covered well and did not have concerns. (FOF 42-47). Although "close adult supervision" was explained to Parent during the 11/10/2020-IEP meeting, Parent raised concerns about what "close adult supervision" meant on January 25, 2021. The IEP team met on January 26, 2021 and February 12, 2021 and explained to Parent what "close adult supervision" meant. (FOF 55, 140).

supports, and other strategies, to address that behavior.” 20 U.S.C. § 1414(d)(3)(B)(i). The 11/10/2020-IEP team created an IEP for Student which contained seven (7) Supplementary Aids and Supports, four (4) of which addressed Student’s behavioral needs—Close Adult Supervision, Visual Schedule, Sensory Support, and First/Then Language. (FOF 54). During the 1/26/2021-IEP revision meeting, after having heard additional input from Parent and considered the Academy-1 Records²¹, the IEP team revised Student’s IEP and added “Speech/Language Consultation with Team” as a Supplementary Aids and Supports and increased the frequency of OT Consultation with Teacher. (FOF 94, 95). The 1/26/2021-IEP considered providing Student with a one-to-one RBT to begin school, but the team decided that updated behavioral and academic data in the educational setting was needed to determine the need for an FBA by a BCBA before assigning a one-to-one RBT to Student (FOF 105), because not all students who have behavioral issues require the intervention and implementation of ABA services by a BCBA and RBT. (FOF 106). All eight (8) Supplementary Aids and Supports carried over to the 2/12/2021-IEP. (FOF 131). Petitioners have not cited to any legal authority that requires all students whose behavior impedes their learning or that of others to have BSPs. Based on the foregoing, Petitioners fail to meet their burden in showing that the 2/12/2021-IEP did not have sufficient description of needed supports to address Student’ behavioral needs and that the 2/12/2021-IEP was not appropriate for that reason.

4. Whether the 2/12/2021-IEP is appropriate when the current (privately-provided) classroom supports/accommodations were not discussed.

In this issue, Petitioners are alleging that the 2/12/2021-IEP is not appropriate because the IEP team did not discuss “the current (privately-provided) classroom supports/accommodations.”

²¹ The Academy-1 Records do not contain a BSP. (FOF 191-194).

The confusion in this issue is that there was no “current” classroom supports/accommodations that was being provided to Student at the time of the 1/26/2021-IEP and 2/12/2021-IEP revision meetings. Student stopped receiving services from Academy-1 in March of 2020. (FOF 179). Academy-2 was not a school and did not provide ABA services to Student. (FOF 203-204). In fact, at the time of the 2/12/2021-IEP revision meeting, Student was not attending any Academy. (FOF 65).

While Petitioners’ Closing Brief mentions Director’s 2019-IAEP, 2020-IAEP, and List of Accommodations, the evidence is clear that the IEP team discussed the Academy-1 Records during the revision meetings. Pet. Closing Brief at 7. (FOF 75-78). Petitioners’ Closing Brief does not state which supports/accommodations in the Academy-1 Records the IEP team did not discuss. Parent wanted to discuss ESY; speech services; “close adult supervision” vs. “1:1 RBT aide;” and reverse inclusion during the revision meetings. (FOF 74). Although Parent did not get what Parent wanted, the IEP team did, during a period of two days, discuss ESY; speech-language therapy services; “close adult supervision” vs. “1:1 RBT aide;” and reverse inclusion. (FOF 117, 118, 120, 134, 135, 140).

Petitioners also argue that “Parent’s concern about the use of assistive technology was never addressed, since Parent had been told that unless Student used a wheelchair or a talk box, assistive technology was unwarranted.” Pet. Closing Brief at 7. Based on the review of the Video Recording of the 1/26/2021-IEP revision meeting when the discussion of assistive technology occurred, the IEP team had a sufficient discussion regarding assistive technology. Parent had asked the IEP team how the determination was made that Student did not need assistive technology. SPED Teacher asked Parent if Student was using assistive technology. Parent responded, “I believe [Student] is using assistive technology.” When Principal asked

Parent to explain the type of assistive technology Student was using, Parent did not respond and reads from an IEP. Because Parent did not respond to the Principal's question, SPED Teacher gave the example of walker or DynoBox to help Student speak. Parent responded that Student did not need a walker or a DynoBox. SPED Teacher then asked Parent if Parent was comfortable to move on, and Parent said yes²². DOE Ex. 110, 1/26/2021-Video Recording at 00:07:57-00:09:59. Based upon the available information at the time of the 1/26/2021-IEP revision meeting, including the Academy-1 Records, it was SLC's professional opinion that additional supports, such as assistive technology, was not necessary for Student. (FOF 97).

Petitioners fail to show that the IEP team did not address Parent's concerns regarding classroom supports, like instructional methodology; supports needed were Student to move from Student's private program to a different one; and behavior interventions and supports. Pet. Closing Brief at 8. It is unclear what Petitioners mean by "instructional methodology;" however, the IEP team discussed Academy-1's use of the VB-MAPP assessment (DOE Ex. 110, 1/26/2021-Video Recording at 00:56:49-01:00:28) and addressed Parent's request for a one-to-one RBT. (FOF 140). Petitioners fail to identify what "behavior interventions" in Director's List of Accommodations the IEP team failed to discuss or that Parent wanted to discuss particular "behavior interventions" but the school members of the IEP team declined to do. With respect to Petitioners' argument that IEP team failed to address Parent's concerns regarding "supports needed were Student to move from [Student's] [sic] private program to a different one," this argument will be addressed in Issue No. 9.

Based on the foregoing, the IEP team considered and discussed the Academy-1 Records,

²² Petitioners' Closing Brief also argues that the IEP team did not discuss Student's use of an iPad. Pet. Closing Brief at 8. An iPad was not one of "the current (privately-provided) classroom supports/accommodations." (FOF 194).

which included the List of Accommodations. Petitioners fail to show which supports/accommodations the IEP team failed to discuss and how that failure significantly infringed upon Parent's participation rights and amounted to lost educational opportunity. Pet. Closing Brief at 8.

5. Whether the 2/12/2021-IEP provides sufficient supports for Student to be successful in the program the IEP developed.
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In this issue, Petitioners are alleging that the supports in Student's 2/12/2021-IEP are not sufficient; however, Petitioners' Closing Brief appears to be arguing about a different case. There is no IEP dated January 25, 2021 in the case before us; Student is repeatedly referred to as [incorrect pronouns]; BCBA did not admit that the supports were insufficient and Petitioners have not cited to any evidence that supports this argument; a behavior improvement plan is not necessary since Student does not have an RBT; it is unclear who [REDACTED] and [REDACTED] [REDACTED] are and what role they play in Student's education; there is no record of an IEP meeting on September 4, 2020; and Petitioners' reference to the following exhibits do not support or have any relation to their arguments: PX/14, PX audio file of 9/04/2020 IEP meeting, PX/78 and PX/82. Pet. Closing Brief at 8-10.

Petitioners do not allege what supports are inappropriate or are missing from Student's 2/12/2021-IEP that are needed for Student to be successful in the program that was developed for Student. Based on a lack of argument and evidence, Petitioners have not met their burden with respect to this issue²³.

6. Whether the 2/12/2021-IEP is appropriate when there was insufficient participation of Student's current providers and/or insufficient efforts to gain attendance of those providers at the IEP development meetings on 1/26/2021 and/or 2/12/2021, resulting in

²³ A possible support that Petitioners could be arguing is a need for a transition plan. Whether a transition plan is necessary will be addressed in Issue No. 9.

lost educational opportunity.

Based on Petitioners' clarification in their Closing Brief, Petitioners are alleging that the 2/12/2021-IEP is not appropriate because someone from the Academy²⁴, in particular Director, did not participate in the 1/26/2021-IEP and 2/12/2021-IEP revision meetings and insufficient effort was made to gain the attendance of Director. Pet. Closing Brief at 12. Based on the evidence presented at the due process hearing, the undersigned finds that DOE did not fail to gain the attendance of Director or someone from Academy for the 1/26/2021-IEP and 2/12/2021-IEP revision meetings.

Parent was aware that Parent was able to bring someone who Parent believed could help Parent to an IEP meeting. Leading up to the 11/10/2020-IEP meeting, Parent was informed twice through conference announcements that Parent was welcome to invite any person Parent felt had knowledge about Student to the meeting. (FOF 33, 37). No one from the Academy, including Director, was present at the 11/10/2020-IEP meeting. (FOF 39).

On December 22, 2020, Parent emailed SSC and SPED Teacher that Parent had shown Director the 11/10/2020-IEP and Director informed Parent that the IEP would not be successful for Student. Parent then informed SSC and SPED Teacher that Parent "would like to have another IEP meeting and have someone from [Academy-1] to help improve the IEP." (FOF 63). Following Parent's request for another IEP meeting, a conference announcement was emailed to Parent on January 6, 2021. (FOF 66-67). The 1/06/2021-CA informed Parent who was invited to the 1/26/2021-IEP revision meeting. Absent from the list of invitees was someone from the Academy. The 1/06/2021-CA informed Parent that Parent was welcome to invite any person

²⁴ Petitioners do not specify which "private program" they are referring to—Academy-1, Academy-2, or Academy-3. Regardless of which Academy Petitioners are referring to, Director is the founder of all three Academies. (FOF 172).

who Parent felt had knowledge about Student who could assist Parent to the meeting. The IEP team met on January 26, 2021 for the first revision meeting. No one from the Academy, including Director, was present at the 1/26/2021-IEP revision meeting. (FOF 82). No one at the 1/26/2021-IEP revision meeting questioned why no one from Academy or Director was present. (FOF 99). The IEP team agreed to meet again on February 12, 2021 to continue discussing Student's IEP. (FOF 101).

On January 27, 2021, a conference announcement was issued for the 2/12/2021-IEP revision meeting. The 1/27/2021-CA informed Parent who was invited to the 2/12/2021-IEP revision meeting. Absent from the list of invitees was someone from Academy. The 1/27/2021-CA also informed Parent that Parent was welcome to invite anyone who Parent felt had knowledge about Student who could assist Parent to the meeting. (FOF 102, 109,110). Although Parent sent an email to SSC to tell SSC that Parent felt overwhelmed and fearful at the 1/26/2021-IEP revision meeting, Parent did not complain that Director or someone from Academy was not at the revision meeting. (FOF 113). The IEP team met as scheduled on February 12, 2021 to continue reviewing and revising Student's IEP. No one invited Director to the 2/12/2021-IEP revision meeting. (FOF 138). No one questioned why Director or someone from Academy was not present at the 2/12/2021-IEP revision meeting. (FOF 137).

The IDEA defines an IEP team as follows:

(B) Individualized education program team

The term "individualized education program team" or "IEP Team" means a group of individuals composed of—

- (i) the parents of a child with a disability;
- (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
- (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;
- (iv) a representative of the local educational agency who—
 - (I) is qualified to provide, or supervise the provision of,

- specifically designed instruction to meet the unique needs of children with disabilities;
- (II) is knowledgeable about the general education curriculum; and
- (III) is knowledgeable about the availability of resources of the local educational agency;
- (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);
- (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- (vii) whenever appropriate, the child with a disability.

20 U.S.C. § 1414(d)(1)(B). See also H.A.R. § 8-60-45, which is almost identical to 20 U.S.C. § 1414(d)(1)(B). Someone from Academy would fall within 20 U.S.C. § 1414(d)(1)(B)(vi).

Although Parent expressed to SSC and SPED Teacher that Parent wanted someone from Academy-1 to be a part of the 1/26/2021-IEP revision meeting, Parent did not ask SSC or SPED Teacher to invite someone from Academy-1. While Parent is under no obligation to invite someone from Academy, neither is DOE. Parent knew beforehand that no one from Academy would be at the 1/26/2021-IEP and 2/12/2021-IEP revision meetings and did nothing about it. When Parent was given notice that no one from Academy would be at the 1/26/2021-IEP revision meeting and did not request that the school members of the IEP team invite someone from Academy, it would indicate that Parent no longer wanted someone from Academy present at the meeting. Also, when Parent did not question why someone from Academy was not at the 1/26/2021-IEP revision meeting and did not request that the school members of the IEP team invite someone from Academy to the 2/12/2021-IEP revision meeting, DOE was under no obligation to invite someone from Academy. Although Parent testified that Parent wanted Director there, the evidence contradicts this testimony: Parent did not ask Director to attend the revision meetings (FOF 100, 138); Parent did not ask the school members of the IEP team to

invite Director (FOF 63); Parent did not question why Director was not present at the 1/26/2021-IEP and 2/12/2021-IEP revision meetings (FOF 99, 137); Parent knew beforehand that Director would not be at any of the revision meetings and did nothing to change that. Again, Parent is under no obligation to invite Director, but Parent cannot blame someone else for Director not being at the revision meetings when Parent did not express to the school members of the IEP team that Parent wanted them to invite Director. Based on the foregoing, someone from Academy was not a required member of the IEP team. Director's presence at any of the revision meetings could have been effectuated by Parent or the school members of the IEP team; however, no one wanted Director there enough to ask Director.

Furthermore, although Director was not present at the revision meetings, the IEP team was in possession of Director's 2019-IAEP, 2020-IAEP and List of Accommodations. It is questionable what additional information Director could have provided the IEP team since Director had not provided any ABA or academic services to Student since March of 2020. (FOF 9, 179). By the time Director saw Student again in August of 2020 in Academy-2, Student had been without any services for approximately five (5) months. And while Student was at Academy-2, Student was only there for approximately five (5) months and Student was not receiving any ABA or academic services²⁵. (FOF 206, 203, 204). Therefore, Petitioners fail to show lost educational opportunity by not having Director or someone from Academy at the revision meetings. Based on the foregoing, Petitioners fail to meet their burden of proof for this

²⁵ Although Director could have provided information about how Director was made aware that Student was █████ in Academy-2 and how Student was not acquiring skills at the same rate as Student had in Academy-1 (FOF 208-209), the IEP team was already aware that Student was █████ (FOF 44). And since Academy-2 was not a school or ABA facility, and there is no evidence that Student was administered any assessments in Academy-2, Director's anecdotal observations have limited value.

issue.

7. Whether the DOE gathered sufficient information available to them prior to the 1/26/2021 and/or 2/12/2021 IEP meetings to properly determine Student's needs, services and/or supports.
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In this issue, Petitioners are alleging that the IEP team did not have or review the information contained in Academy-1 Records that was sent over with Parent's 1/25/2021-Email of Concerns. Pet. Closing Brief at 12-13. The evidence does not support this allegation and Petitioners fail to meet their burden.

First, in developing the 11/10/2020-IEP, the IEP team considered and reviewed the following information: Adaptive Behavior Assessment System-3; Parent input; OT Clinical Observations; The Sensory Profile 2nd Edition: Toddler; SLP Assessment; and Goldman Fristoe Test of Articulation-Third Edition (GFTA-3)²⁶. (FOF 60).

Second, in preparation for 1/26/2021-IEP revision meeting, SLC, SPED Teacher, Principal and BCBA reviewed the Academy-1 Records emailed by Parent on the evening of January 25, 2021. (FOF 75-78). During the 1/26/2021-IEP revision meeting, the IEP team reviewed and discussed the Academy-1 Records and displayed the Academy-1 Records on a shared screen on Webex. (FOF 83). After reviewing the Academy-1 Records and considering Parent's input, the IEP team revised the 11/10/2020-IEP. (FOF 91-95).

During the 2/12/2021-IEP revision meeting, the IEP team continued to discuss Student's IEP and continued to receive input from Parent. As a result of the discussion, the IEP team further revised Student's 11/10/2020-IEP to increase the amount of exposure Student would have

²⁶ It is also noted that during the SST meeting on August 19, 2020, the team, which included Principal, SPED Teacher and SSC, reviewed Student's DOH Agency Records. (FOF 17-19). As such, Principal, SPED Teacher and SSC had some knowledge of Student's needs prior to the 11/10/2020-IEP meeting.

to non-disabled peers by allowing Student to have mealtime and recess time with the general education students. (FOF 56, 132).

With respect to Petitioners' various arguments in their Closing Brief, the undersigned finds that the evidence does not support Petitioners' arguments. Initially, Petitioners argue that "the DOE never spoke with [Director] before the IEP meeting as claimed in the DOE's Response to the instant Complaint." Pet. Closing Brief at 12, citing to FN 12. As DOE's response to the Complaint states, "The DOE team gather information, requesting parent provide information from current provider or release of information so they could speak with current provider." Pet. Ex. 4 at 158. DOE's Response is consistent with the evidence and does not claim to have spoken with Director. Petitioners' argument that "information [from Student's private provider] was not reviewed during either the 1/26/2021 IEP or the 2/12/2021 IEP meeting," is not supported by the evidence. Pet. Closing Brief at 12. As stated above, the IEP team did review the Academy-1 Records prior to the 1/26/2021-IEP revision meeting and discussed the Academy-1 Records during the revision meetings. Lastly, Petitioners' argument that the IEP team did not ask the private program to cease all instruction to Student so that information for ESY services can be obtained is not a failure to collect information. Pet. Closing Brief at 13. At the time of the 1/26/2021-IEP revision meeting, Student was not receiving academic services. (FOF 203-204). By the time the IEP team met on January 26, 2021, Student had not received any ABA or educational services for nine (9) months. (FOF 179, 199, 203-204, 206). At the time of the 2/12/2021-IEP revision meeting, Student was not attending Academy-1, Academy-2, or Academy-3. (FOF 65). The undersigned fails to see the point of asking the "private program" to cease providing services to Student when Student had not been getting ABA or educational services since March of 2020. Based on the foregoing, Petitioners fail to show that the DOE did

not gather sufficient information available to them prior to the 1/26/2021-IEP and 2/12/2021-IEP revision meetings to properly determine Student's needs, services and/or supports.

Even assuming that the DOE committed a procedural violation by failing to gather sufficient information available to them prior to the revision meetings, Petitioners fail to allege or show how not having this information seriously infringed upon Parent's participation rights or resulted in loss of educational opportunity.

8. Whether failing to discuss Parent's concern for a 1:1 aide was proper based upon DOE insistence that Student needed to attend the DOE school before such considerations could be made.
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In this issue, Petitioners are alleging that the DOE committed a procedural violation by failing to discuss Parent's concern for a one-to-one aide, and such procedural violation seriously infringed upon Parent's participation rights and resulted in loss educational opportunity. Pet. Closing Brief at 14-15. As discussed below, Petitioners fail to meet their burden of showing that the IEP team failed to discuss Parent's concern for a one-to-one aide and that such failure resulted in serious infringement upon Parent's participation rights and loss educational opportunity.

When the 11/10/2020-IEP was created, Parent shared Parent's concerns about Student having difficulty in forming relationships, communicating, [REDACTED], overreacting to certain sensory experiences, [REDACTED] when Student did not get what Student wanted²⁷. Parent also did not have any objections to the PLEPS and felt that they were covered well. (FOF 42-47). Parent developed concerns about the 11/10/2020-IEP after showing it to Director on or around December 22, 2020. (FOF 63). Parent sent an email to

²⁷ When Director spoke to Parent to develop the 2019-IAEP and 2020-IAEP, Parent did not inform Director that Student was [REDACTED]. Parent also did not report to Director that Student would [REDACTED]. (FOF 191-194).

SSC and SPED Teacher stating that Director informed Parent that without ABA services Student would not be able to progress and Student would regress. (FOF 63). On January 25, 2021, Parent clarified that “[Director] said [Student] really needs a 1:1 RBT aide. [Director] said that [Student] is a child that really needs this service because of [Student’s] behavioral problems.” (FOF 74).

During the 1/26/2021-IEP revision meeting, the IEP team discussed Student’s behavioral problems and listened to Parent’s concerns and desire to have a one-to-one RBT for Student. (FOF 87, 105, 108, 140). After discussing whether a one-to-one RBT would be assigned to Student, the “IEP team determined updated behavioral and academic data would need to be taken in an educational setting to determine the need for a FBA by a BCBA before assigning a 1-on-1 RBT to allow for [Student] to access [Student’s] Least Restrictive Environment.” (FOF 105). Parent’s disagreement with the IEP team determination was noted in the 2/02/2021-PWN. (FOF 108).

On February 12, 2021, the IEP team continued to discuss Parent’s request to have a one-to-one RBT assigned to Student. (FOF 116, 129, 133, 135, 140). The school members of the IEP team and Parent continued to disagree about whether Student should receive a one-to-one RBT with the school members of the IEP team maintaining that “updated behavioral and academic data would need to be taken in an educational setting to determine the need for a FBA by a BCBA before assigning a 1-on-1 RBT to allow for [Student] to access Student’s Least Restrictive Environment.” (FOF 146). Parent’s disagreement with the decision to not provide Student with a one-on-one RBT was noted in the 2/18/2021-PWN. (FOF 150). Based on the foregoing, the school members of the IEP team did not fail to discuss Parent’s concern for a “1:1 aide.” Parent and the school members of the IEP team disagreeing is not sufficient to show that

Parent was denied full participation in the process or that the DOE's decision was incorrect.

Laddie C. ex rel. Joshua C. v. Dept. of Educ., 2009 WL 855966 at *4 (D.Haw. Mar. 27, 2009).

With respect to Petitioners' argument that "the DOE has its own policies that prevent an IEP team from providing 1:1 aides without an FBA," the undersigned will not second-guess the school's educational policy. According to BCBA, the school's educational policy of wanting to see Student in a school setting to assess how Student is doing, then proceed with an FBA and, if necessary, assign a one-to-one RBT, is a reasonable policy. (FOF 247-249). Petitioners have not produced any documentary or testimonial evidence to refute the appropriateness of such an educational policy. Petitioners' argument that Director "testified that an FBA is not necessary unless Student was to be in need of a Behavior Reduction program," is not persuasive. Director testified as follows:

Correct. And before I said correct when you said functional behavior analysis. That is one type of assessment that could lead to a behavior reduction program. But a functional behavior assessment would be considered first. So there's a little bit of a difference. But yes, an FBA, a functional behavior assessment, would lead to a behavior reduction plan. But to answer your question, yes.

Director, Tr. Vol. I, 43:19-44:1. Director's policies at Director's clinic does not invalidate DOE's policies. Director's policy of doing an FBA first before developing a behavior reduction plan does not make inappropriate DOE's policy of doing an FBA first before assigning a one-to-one RBT.

In addition to not producing any evidence to undermine the school's educational policy, Petitioners also have not shown that the need for updated behavioral and academic data in an educational setting in Student's case is unreasonable or a violation of IDEA. Although the school conducted an occupational therapy evaluation, psychoeducational evaluation, speech language assessment, and Student Observation as a part of an initial evaluation to determine

eligibility (FOF 18, 21, 23, 25, 26), Student had never attended a DOE school and had not been in an educational setting since March of 2020. (FOF 171). The IEP team's understanding of Student's behavioral problems and needs was based on large part by information shared by Parent at the various IEP meetings. Director's 2019-IAEP and 2020-IAEP do not report the various behavioral problems that Parent reported to the IEP team. (FOF 191-193). Student's behavioral problems, as reported to Director by Parent, was that Student "has 'melt downs' at times when Student doesn't get something Student wants. When [REDACTED] and Student want the same item they may aggress towards each other." (FOF 191). As BCBA credibly testified, how a child behaves at home is different from how a child behaves at school. (FOF 249). Furthermore, Director's most recent assessment of Student was done on February 19, 2020, almost a year before the 2/12/2021-IEP revision meeting, and Student had stopped receiving ABA services from Academy-1 in March of 2020. When Student attended Academy-2, which is not a school, Student did not have an RBT. (FOF 204). As such, needing updated behavioral and academic data about Student, which is only possible if Student goes to school, is reasonable. The discussion and decision regarding a one-to-one aide for Student, while not the outcome Parent wanted, did not deny Parent Parent's right to participate in the IEP process nor did it result in lost educational opportunity for Student. Based on the foregoing, DOE did not fail to discuss Parent's concerns for a 1:1 aide, and DOE wanting updated behavior and academic data about Student in a school setting is reasonable.

9. Whether the 2/12/2021-IEP is appropriate when Student's needs to successfully change from Student's current private program to the public program was insufficiently discussed and/or insufficiently described in the IEP document. Instead, Parent's concern was met with a statement that a Transition Plan meeting could be held if Parent first accepted the IEP.
-

In this issue, Petitioners are alleging that the 2/12/2021-IEP is not appropriate because (1) the IEP team did not have a sufficient discussion about Student's transition from Student's "current private program" to a public program at Public School, and (2) the 2/12/2021-IEP "does not contain any reference to a transition plan at all." Pet. Closing Brief at 16. Due to this alleged failure, Petitioners argue that Parent's participation rights were seriously infringed upon and Student suffered lost educational opportunity. Pet. Closing Brief at 19. After considering the evidence and watching the video of the two revision meetings, the undersigned finds that Petitioners have not met their burden in proving this issue.

According to the "snapshot rule," an IEP must be evaluated based on the information that was reasonably available to the parties at the time the IEP was developed. 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). In the instant case, the IEP was developed on November 10, 2020 and revised in January and February of 2021. On November 10, 2020 and perhaps January 26, 2021, Student was attending Academy-2, which was not a school and was not providing ABA services to Student. (FOF 203-204, 206). Had Parent accepted DOE's offer of FAPE in November or January, Student would have transitioned from a non-academic program to an academic program at Public School. At the time of the 2/12/2021-IEP revision meeting, Student was not attending Academy-1, Academy-2, or Academy-3. (FOF 65). Had Parent accepted the 2/12/2021-IEP, Student would not have been transitioning from a private program to a public program.

After reviewing the videos of the revision meetings, the undersigned finds that the IEP team had a sufficient discussion during the revision meetings about Student's transition from Academy-2 to Public School. During the 1/26/2021-IEP revision meeting, the school members of the IEP team explained to Parent that Student could transition into Public School on a

modified schedule (DOE Ex. 110, 1/26/2021-Video Recording at 01:05:15-01:10:21); and they attempted to get information from Parent about Student's schedule so that the IEP team could "mirror" the private program to ease the transition (DOE Ex. 110, 1/26/2021-Video Recording at 01:16:34-01:20:17). During the 2/12/2021-IEP revision meeting, Principal asked Parent if Parent wanted a transition plan or a modified schedule to transition Student to Public School and described different ways Student's schedule could be modified (DOE Ex. 111, 2/12/2021-Video Recording at 00:32:52-00:38:34, 00:53:13-01:01:09); and the team discussed scheduling a transition meeting (DOE Ex. 111, 2/12/2021-Video Recording at 01:04:35-01:07:38, 01:08:32-01:09:38). When Parent expressed that Parent was uncomfortable with having a transition meeting, the IEP team discussed going through mediation. (DOE Ex. 111, 2/12/2021-Video Recording at 01:15:57-01:16:34, 01:19:52-01:20:32) (FOF 147-148, 153). Based on the evidence, the IEP team's discussion regarding Student's transition from a private program to a public program was sufficient.

Similarly, the undersigned finds that the 2/12/2021-IEP is not insufficient because it does not contain any reference to a transition plan. Petitioners have not cited to any legal authority that requires a transition plan to be in an IEP. Contrary to Petitioners' argument, Hawaii courts have on several occasions held that a transition plan from a private school to a public school is not required to be in an IEP. See Dept. of Educ., Haw. v. C.B. ex rel. Donna B., 2012 WL 1537454, Civ. No. 11-00576 SOM/RLP, *5 (U.S.D.C. Haw. May 1, 2012) ("[A]s previously stated by this 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"); M.N. v. State of Haw., Dept. of Educ., 2011 WL 6020861, Civ. No. 11-00121 SOM/BMK, *FN 1 (U.S.D.C. Haw. Dec. 1, 2011) ("This court questions without deciding whether the AHO could impose a legal requirement

(such as the inclusion of a transition plan in an IEP) that the IDEA itself clearly does not require”); James M. ex rel. Sherry M. v. Hawaii, 803 F.Supp.2d 1150, 1164 (D. Haw.2011) (“School District was under no obligation to provide transition services” for a student moving from a private school to a public school).

Based on the foregoing, the 2/12/2021-IEP team sufficiently discussed Student’s transition from a private school to public school and a transition plan was not required to be a part of Student’s IEP. As such, Parent’s participation rights were not significantly infringed upon and Student did not experience loss of educational opportunity. Petitioners fail to meet their burden of proof with respect to this issue.

10. Whether the IEP team had an appropriate discussion of Student’s least restrictive environment during the 2/12/2021-IEP meeting.

In this issue, Petitioners are alleging that on February 12, 2021 the IEP team did not have an appropriate discussion about Student’s least restrictive environment because the discussion did not satisfy the requirements set forth in Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H., by and through Holland, 14 F.3d 1398, 1404 (9th Cir.1994)²⁸. Pet. Closing Brief at

20. Petitioners argue that not having an appropriate discussion about Student’s LRE significantly undermined Parent’s ability to participate. Pet. Closing Brief at 22. To be clear,

Petitioners are not alleging that the placement (a [REDACTED] special

²⁸ In considering whether Respondents proposed an appropriate placement for a student, the following facts must be examined: (1) the educational benefits available to student in a regular classroom, supplemented with appropriate aids and services, as compared with the educational benefits of a special education classroom; (2) the non-academic benefits of interaction with children who were not disabled; (3) the effect of student’s presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming student in a regular classroom. Sacramento City Unified School Dist., Bd. Of Educ. v. Rachel H., 14 F.3d 1398,1400-1401 (9th Cir.1994).

education program) offered in the 2/12/2021-IEP is inappropriate; Petitioners are only alleging that the discussion on February 12, 2021 about Student's LRE was inappropriate. The undersigned finds that Petitioners fail to meet their burden of proof in this issue.

The LRE requirement states that DOE shall ensure that:

- (1) To the maximum extent appropriate, students with disabilities, including students in public or private institutions or other care facilities, are educated with students who are nondisabled, and
- (2) Special classes, separate schooling, or other removal of students with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Haw. Admin. Rules §8-60-15. See also 20 U.S.C. §1412(a)(5).

According to the 11/10/2020-IEP, Student's LRE/placement statement reads:

[Student] will be placed in the [REDACTED] [sic] [REDACTED] special education program. [Student] will participate with non-disabled peers during school wide activities deemed appropriate by special education teacher and parent, and will not participate with [Student's] non-disabled peers for most of the school day including instructional times, meal times, and during transport to and from school.

On December 22, 2020, Parent emailed SSC and SPED Teacher informing them that Parent had shown the 11/10/2020-IEP to Director and Director informed Parent that without ABA services, Student would not be able to progress and would regress. Parent then requested another IEP meeting so that they could "improve the IEP." (FOF 63). On January 25, 2021, Parent sent an email to SSC listing four specific concerns that Parent wanted to discuss at the 1/26/2021-IEP revision meeting: (1) ESY services; (2) more speech services; (3) "close adult supervision" vs. "1:1 RBT aide"; and (4) "[Student] thrives around children that don't have problems and are developmentally normal. At [Academy] [Student] gets this reverse inclusion. [Student] needs this kind of therapy to grow." (FOF 74). In Parent's 1/25/2021-Email of Concerns, Parent did

not ask to discuss or review Student's placement in a fully self-contained early childhood special education program.

At the end of the IEP revision meeting on January 26, 2021, the IEP team agreed to continue the revision meeting on February 12, 2021. At the end of the 1/26/2021-IEP revision meeting, SPED Teacher asked Parent to send the team another email similar to Parent's 1/25/2021-Email of Concerns if Parent had additional concerns Parent wanted to address at the 2/12/2021-IEP revision meeting. Although Parent sent an email to SSC expressing Parent's disapproval of how the 1/26/2021-IEP revision meeting was conducted, Parent did not have additional concerns that Parent wanted to discuss during the 2/12/2021-IEP revision meeting. (FOF 101, 113).

During the 2/12/2021-IEP revision meeting, as described by Petitioners in their Closing Brief, "Parent expressed [Parent's] preference that Student have more opportunities to be with non-disabled children." Pet. Closing Brief at 21. Following the 2/12/2021-IEP revision meeting, Student's LRE/placement statement was revised to read:

[Student] will be placed in the [REDACTED] [sic] [REDACTED] special education program. [Student] will participate with non-disabled peers during school wide activities deemed appropriate by special education teacher and parent, as well as have access to general education peers for meal times and recess times. [Student] will not participate with [Student's] non-disabled peers for most of the school day including instructional times, SLP and OT therapy sessions, and during transport to and from school.

The revision to Student's LRE/placement statement came after the 2/12/2021-IEP team discussed, at Parent's request, Academy-3's reverse inclusion program²⁹. (FOF 74, 120, 140).

²⁹ Parent gave the school members of the IEP team misleading information. First, Student was not receiving reverse inclusion at the time that Parent wrote Parent's 1/25/2021-Email of Concerns. Director developed the reverse inclusion program for Academy-3 during the 2020-2021 school year. (FOF 188). Second, at the time of the 2/12/2021-IEP revision meeting,

During the 2/12/2021-IEP revision meeting, Parent did not ask to review Student's placement in a [REDACTED] special education program and Student's placement was not changed. The following changes were made to Student's LRE/placement statement: the 2/12/2021-IEP would allow Student to have mealtime and recess time with non-disabled peers, while the 11/10/2020-IEP states that Student would not have mealtime and recess time with non-disabled peers; and the 2/12/2021-IEP states that Student would not participate with Student's non-disabled peers during Student's SLP and OT therapy sessions, while the 11/10/2020-IEP was silent about this. Providing Student more opportunities to be with non-disabled peers and clarifying that Student would not be receiving Student's SLP and OT therapy services with non-disabled peers is not a change in Student's placement that would require the IEP team to discuss the factors outlined in Rachel H. Parent wanted DOE to provide Student with something similar to the reverse inclusion program—exposure to non-disabled peers--and the IEP was ultimately changed to reflect Parent's request.

With respect to Petitioners' argument that "Parent specifically asked if there was a non special education [REDACTED] on campus and was told that there was a [REDACTED], but parent would have to apply for that program separately,"³⁰ Parent asking about the existence of a non-special education [REDACTED] on campus does not mean that Parent objected to Student's placement and wanted to re-visit this aspect of Student's IEP. DOE cannot be expected to anticipate what Parent might have concerns about. The IDEA requires that parents be afforded the opportunity to participate in the IEP process. H.A.R. § 8-60-46. Parent was afforded such opportunity. See Dept. of Educ., Hawaii v. C.B., Civil No. 11-00576 SOM/RLP, 2012 WL

Student was not attending any sort of program because Academy-2 became inactive in mid-January of 2021. (FOF 199).

³⁰ Pet. Closing Brief at 21.

1537454, *11 (D.Haw. May 1, 2012) (“The court declines to place upon a school the burden of recognizing a parent’s concern about the inadequacy of a school’s response to the parent’s inquiry when the parent has given no indication of concern.”) Based on the evidence, the 2/12/2021-IEP team was not required to have a discussion that included the Rachel H. factors and the discussion that the 2/12/2021-IEP team had was appropriate.

Even assuming that the 2/12/2021-IEP team committed a procedural violation by not having a discussion that satisfies the Rachel H. factors, Petitioners are not alleging that the placement decision in the 2/12/2021-IEP is not appropriate. Under the IDEA, harmless procedural errors do not constitute a denial of FAPE; however, procedural inadequacies that result in the loss of educational opportunity or significantly impede the parent’s opportunity to participate in the IEP formulation process will result in the denial of a FAPE. W.G. v. Bd. of Trustees of Target Range School District, 960 F.2d 1479 (9th Cir.1992). “A procedural error results in the denial of an educational opportunity where, absent the error, there is a ‘strong likelihood’ that alternative educational possibilities for the student ‘would have been bettered considered.’” Doug C. v. Hawaii Dept. of Educ., 720 F.3d 1038, 1046 (9th Cir.2013) (quoting M.L. v. Federal Way Sch. Dist., 394 F.3d 634, 657 (9th Cir.2005)). Petitioners are not alleging that Student suffered a loss of educational opportunity by the alleged inappropriate discussion of Student’s LRE on February 12, 2021. Petitioners also do not allege that Student’s LRE/placement in the 2/12/2021-IEP is inappropriate nor did they present any evidence that another placement is more appropriate. Petitioners fail to show how specifically addressing Parent’s concern (reverse inclusion) significantly impeded Parent’s opportunity to participate in the IEP formulation process. Therefore, Petitioners fail to meet their burden with respect to this issue.

D. REIMBURSEMENT FOR ACADEMY-3 WARRANTS REDUCTION

Petitioners fail to meet their burden of proof in establishing a denial of FAPE; however, in the event that a reviewing court finds otherwise, the undersigned will address Petitioners' request for reimbursement for Academy-3. The undersigned finds that Petitioners are not entitled to the full tuition reimbursement or funding they seek in their FAC.

Petitioners seek funding to Academy-3 for the 2021-2022 school year pursuant to the 9/15/2021-Agreement entered into between Parent and Director. The annual cost of Academy-3 is \$248,028.87. 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 Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 126 L.Ed.2d 284 (1993)). 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. ex rel. Baquerizo v. Garden Grove Unified School Dist., 635 F.3d 1155, 1159 (9th Cir.2011) (citing Frank G. v. Bd. Of Educ., 459 F.3d at 365). Parental placement can be appropriate, even if it does not meet state standards. 34 C.F.R. 300.148(c). See e.g., Florence County Sch. Dist. Four v. Carter, 20 IDELR 532 (U.S. 1993).

In this case, Academy-3 will be able to provide educational instruction specially designed to meet the unique needs of Student, supported by such services as are necessary to permit Student to benefit from instruction. (FOF 211-243). Under IDEA, if Petitioners succeed in meeting their burden of proving that the DOE violated the IDEA and denied Student a FAPE, which they did not, 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 Academy-3’s total cost to be unreasonable because it includes redundant and unreasonable charges. Id., at *15. The annual tuition of \$50,400.00 (\$4200 x 12) is excessive. Student will be receiving ten (10) months of services, but Student is being charged for twelve (12) months.

(FOF 229). The annual tuition shall be reduced by two (2) months. The annual tuition shall not exceed \$42,000.00. The annual tuition includes assessments, but Student will be charged \$2100.00 for a Functional Behavior Assessment and \$578.00 for a Distance Bridge Program Assessment. (FOF 228, 234, 237). The FBA and Distance Bridge Program Assessment are redundant and shall be excluded from the reimbursement. Student will be provided six (6) hours of academic-time per day but the 9/15/2021-Agreement provides for 0.5 hour of RBT service to account for Parent being late to pick up Student. (FOF 236). In the event that Parent is late, Parent should take responsibility for this. It is unreasonable to make DOE be responsible for Parent's tardiness. RBT services shall be capped at six (6) hours per day.

In addition to the reduction stated above, Parent's actions have been unreasonable and warrants further reduction of the cost of reimbursement. 20 U.S.C. §1412(a)(10)(C)(iii)(III) ("The cost of reimbursement...may be reduced or denied—...(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.") Parent's actions before the revision meetings, during the revision meetings, and in the due process hearing were unreasonable.

Parent is a businessperson who owns and operates a [REDACTED] company. (FOF 256). In watching the video of the revision meetings, it is clear that Parent loves Student and wants what is best for Student; however, Parent uses undesirable tactics to get what Parent wants. Before the 1/26/2021-IEP revision meeting, Parent misled the IEP team to believe that Student was receiving reverse inclusion and speech services, when reverse inclusion and speech-language therapy services were not available to Student. (FOF 74, 200-201, 203-204, 206-207).

During the 1/26/2021-IEP revision meeting, Parent avoided answering questions about Academy-1 and Academy-2. (FOF 257-259). When Principal tried to get Parent to share

information about Student's schedule at Academy-2, Parent avoided answering the question and referred Principal to consent forms Parent had signed. (FOF 258). Knowing that the IEP team wanted information about Student's daily schedule, and Parent receives "a written thing for [Student's] day everyday," Parent did not provide copies to the IEP team. (FOF 258). And while Parent is under no obligation to share these daily "written things," reviewing courts have held that "[b]efore they can fairly argue that the best that the school authorities had to offer was or is not good enough, the critical pre-requisite is that the parents must have cooperated with the school authorities...to try to develop the IEP." M.D. v. Hawaii, Dept. of Educ., 864 F.Supp.2d 993, 1007 (D.Haw. March 29, 2012) (bracket in original) (quoting S.M. v. Weast, 240 F.Supp.2d 426, 436 (D.Md.2003)). During the first revision meeting, Parent also told Principal that Student was getting [REDACTED] services at Academy-2, which is not true (FOF 257); and Parent misleads the school members of the IEP team into believing that Student was currently getting speech therapy. (FOF 259).

During the 2/12/2021-IEP revision meeting, Parent again misleads the rest of the IEP team into thinking that Student was receiving speech therapy and RBT services at Academy-2 when that was not true. (FOF 260-261). During the second revision meeting, Parent further avoided answering questions about Academy-2. (FOF 260). It is difficult to believe that Parent could have been mistaken in believing that Student was receiving all these services when Parent was not paying anything; Academy-2 was not a school; Student was not attending any Academy on February 12, 2021; and Parent's level of involvement with the development of the IEP suggests that Parent would be equally involved in the development of Student's private program.

During the due process hearing, Parent testified that the IEP team did not review the Academy-1 Records when in fact they did. (FOF 263). Parent testified that Parent sent an email

to DOE asking DOE to include Director in the 1/26/2021-IEP revision meeting, which was misleading. Parent did not ask DOE to include Director, Parent's email on December 22, 2020 stated that Parent hoped to have someone from Academy-1 to help improve the IEP. (FOF 63, 264). Parent was also evasive and non-responsive during cross-examination. (FOF 265).

Based on Parent's unreasonable actions before the revision meetings, during the revision meetings, and during the due process hearing, Petitioners' reimbursement request should be reduced by 40% after the stated reductions for excessive and redundant fees.

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

Petitioners' First Amended Complaint and Resolution Proposal "assert[s] Student's eligibility for rights and protections under Section 504 of the Rehabilitation Act of 1974." First Amended Complaint and Resolution Proposal, p. 2. Petitioners, however, did not present any evidence or argument during the due process hearing and in their Closing Brief regarding their Section 504 claim. Based on the lack of evidence or argument to support this claim, the undersigned 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 finds that Petitioners have not met their burden of proving the issues raised in their July 19, 2021 First Amended Complaint and Resolution Proposal by a preponderance of the evidence. As Petitioners have failed to prove that DOE denied Student a FAPE, Petitioners' request for reimbursement of all educational and related expenses and other relief that is appropriate and justified in equity and/or in law are denied.

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 issue 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 H.A.R. § 8-60-70(b).

DATED: Honolulu, Hawai'i, December 30, 2021.

/s/ Charlene S.P.T. Murata
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