



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

In the Matter of STUDENT, by and through  
the [REDACTED]<sup>1</sup>,

Petitioners,

vs.

DEPARTMENT OF EDUCATION, STATE  
OF HAWAII and KEITH T. HAYASHI,  
Superintendent of Hawaii Public Schools,

Respondents.

DOE-SY2223-006

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION

Due Process Hearing:  
October 24-25, 2022 &  
December 9, 2022

Hearings Officer: Charlene S.P.T. Murata

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

**I. JURISDICTION**

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

<sup>1</sup> [REDACTED]

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 August 8, 2022, Respondents Department of Education, State of Hawaii, and Keith T. Hayashi, Superintendent of Hawaii Public Schools (collectively “Respondents” or “DOE”), received a Complaint and Resolution Proposal from Student, by and through Student’s [REDACTED] (collectively “Petitioners”).

On August 12, 2022, DOE filed a response to Petitioners’ Complaint and Resolution Proposal.

On September 2, 2022, a Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for September 13, 2022.

On September 13, 2022, a prehearing conference was held with Keith H.S. Peck, Esq. (“Mr. Peck”) appearing on behalf of Petitioners, and Deputy Attorney General Catherine D. Piazza (“Ms. Piazza”) appearing on behalf of DOE. During the prehearing conference, the parties agreed to have the due process hearing on October 24, 25 and 31, 2022<sup>2</sup>.

On September 13, 2022, a Prehearing Order was issued to the parties, setting forth the issues and procedures for the due process hearing, and deadlines for submission of substantive motions, witness and exhibit lists, exhibits, and witness email addresses. No substantive motions were filed, and the parties timely submitted their witness list, exhibit list, and exhibits.

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<sup>2</sup> On the morning of October 31, 2022, Mr. Peck sent an email to the undersigned and opposing counsel stating that he was too ill to participate in the due process hearing that day. The due process hearing was cancelled for October 31, 2022, and it was re-scheduled to December 9, 2022 by agreement.

Due to potential health concerns caused by COVID-19, the parties agreed to conduct the due process hearing using a video conferencing platform.

The due process hearing took place on October 24 and 25, 2022 and December 9, 2022 using the Zoom video conferencing platform. All participants in the due process hearing appeared remotely via video and audio. The undersigned Hearings Officer presided over the matter. Petitioners were represented by Mr. Peck, and Respondents were represented by Ms. Piazza. Parent was present during ■■■ testimony and ■■■ presence was waived for the remainder of the due process hearing. The Department of Education District Educational Specialist (“DES”) and District Resource Teacher were present on behalf of Respondents. Deputy Attorney General Emma R. Christopherson appeared as co-counsel for DOE and observed the due process hearing. The due process hearing was completed on December 9, 2022.

The initial 45-day decision deadline was October 22, 2022. On September 14, 2022, Respondents submitted a written request seeking an extension of the 45-day decision deadline from October 22, 2022 to December 6, 2022. On December 1, 2022, Petitioners submitted a written request seeking an extension of the 45-day decision deadline from December 6, 2022 to January 20, 2023. Both requests were granted. See Order Granting Respondents’ Request to Extend the 45-Day Decision Deadline from October 22, 2022 to December 6, 2022; Declaration of Catherine D. Piazza, dated September 14, 2022, issued on September 15, 2022; and Order Granting Petitioners’ Request for an Extension, dated December 1, 2022, issued on December 1, 2022. The final deadline by which a decision in this matter must be issued is January 20, 2023.

Petitioners called Parent as their only witness during the due process hearing. Respondents called the following witnesses during the due process hearing: Special Education

Teacher (“SPED Teacher”), Principal, DOE Occupational Therapist (“DOE-OT”) and Student Service Coordinator (“SSC”). Petitioners did not call any rebuttal witnesses.

The following Petitioners’ exhibits were admitted into evidence: Exhibit 1 (pages 001-041), Exhibit 2 (pages 042-051) and Exhibit 3 (052-063, 07/29/2022 IEP Audio File)<sup>3</sup>. Tr. Vol. III, p. 311<sup>45</sup>.

The following Respondents’ exhibits were admitted into evidence<sup>6</sup>: Exhibits 1-3; Exhibit 4 (pages 018-019, 054-055); Exhibits 5-6; Exhibit 7 (pages 103-118, 119-120); Exhibit 8 (pages 121-122, 123, 125-141, 142-143); Exhibit 10; Exhibits 16-18; Exhibit 22; Exhibits 25-26; Exhibit 32; Exhibits 40-42; Exhibits 44-46; Exhibits 48-49; Exhibits 55-56; Exhibit 59; Exhibit 69; Exhibits 71-72; Exhibit 74; Exhibit 80; Exhibits 82-87. Tr. Vol. III, pp. 311-312.

On January 6, 2023, 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 August 8, 2022 Complaint, Petitioners allege procedural and substantive violations of the Individuals with Disabilities Education Act and Section 504 of the

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<sup>3</sup> Petitioners’ Exhibit 3, page 063, is admitted in part. The timestamps are admitted into evidence; however, counsel’s comments and personal summary are excluded and given no weight as they do not comply with the Prehearing Order.

<sup>4</sup> “Tr. Vol. III, p. 311” means Transcript of due process hearing, Volume III, page 311.

<sup>5</sup> Transcript Volume I is a transcription of the due process hearing held on October 24, 2022; Transcript Volume II is a transcription of the due process hearing held on October 25, 2022; and Transcript Volume III is a transcription of the due process hearing held on December 9, 2022.

<sup>6</sup> Unless indicated otherwise, all pages to the exhibits are admitted into evidence.

Rehabilitation Act of 1973<sup>7</sup>. Specifically, Petitioners allege that the DOE denied Student a free appropriate public education (“FAPE”). Petitioners raise the following issues regarding the July 29, 2022 Individualized Education Program (“7/29/2022 IEP”) development and written description:

Issue 1 – Whether the discussion of Student’s eligibility for Extended School Year (“ESY”) services was appropriate and/or whether Student was appropriately denied eligibility for ESY.

Issue 2 – Whether the “Supplementary Aids and Services, Program Modifications and Supports for School Personnel” are sufficiently described in the 7/29/2022 IEP and/or were sufficiently discussed regarding:

- (a) Behavioral Interventions.
- (b) Student’s supports were ■ to move from ■ current program to the program the 7/29/2022 IEP describes.
- (c) Assistive Technology for communication; high technology.
- (d) To address Student’s transition into the 7/29/2022 IEP program from ■ then-current program.

Issue 3 – Whether Parent’s request to discuss the appropriateness of providing Student the services/methodological approach of a Registered Behavior Technician/Applied Behavior Analysis was improperly deferred and/or they were insufficiently described in the 7/29/2022 IEP.

Issue 4 – Whether the discussion regarding Placement for the 7/29/2022 IEP was appropriately conducted.

Issue 5 – Whether the 7/29/2022 IEP describes the Least Restrictive Placement for Student when Student will access non-disabled peers “as appropriate.”

Petitioners request the following remedies:

Remedy 1 – Order the DOE to amend the IEP as necessary to address the violations alleged;

Remedy 2 – Order the DOE to fund (direct funding of private program and/or reimbursement of necessary parental expenditures) the costs of

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<sup>7</sup> Although Petitioners’ Complaint alleges violation of Section 504 of the Rehabilitation Act of 1973, Petitioners did not present any evidence or argument during the due process hearing and their closing brief regarding their Section 504 claim. Based on the lack of evidence or argument to support this claim, the undersigned Hearings Officer concludes that Petitioners have effectively abandoned their Section 504 claim and have not met their burden of proof.

Student's privately contracted/delivered services, including related services such as transportation;

Remedy 3 – Order the DOE to provide compensatory education as demonstrated appropriate at hearing; and

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

1. Student is currently [REDACTED] years old and in the [REDACTED] grade for the 2022-2023 school year. 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]. DOE Ex. 5 at 084-086, 089; DOE Ex. 7 at 104.
3. Student's "developmental delays and deficits in the areas of adaptive living skills, oral communication (expressive and receptive language), visual motor, and fine motor development impact [REDACTED] educational performance...[Student's] delayed receptive language skills may impact [REDACTED] ability to comprehend academic material, follow directions in a classroom setting, and participate in small group discussions with peers. [REDACTED] limited expressive language skills may limit [REDACTED] ability to share [REDACTED] thoughts and ideas, and clearly communicate [REDACTED] wants and needs. [Student] requires specifically designed instruction, accommodations and/or modifications in order to participate and progress in the general education curriculum." DOE Ex. 7 at 108.
4. Student is an only child and lives with Parent and [REDACTED] grandparents. Student has had limited exposure to peers in structured and unstructured settings, and when given opportunities to interact with other children, Student will play by [REDACTED], show no

interest or curiosity towards the other children. Parent, Tr. Vol. I, pp. 69-70; DOE Ex. 7 at 104; DOE Ex. 8 at 126, 128.

5. Student is non-verbal and communicates by using sounds and gestures; an assistive communication device (iPad); non-standardized sign language that has been adapted for [REDACTED] use; grabbing a person by the hand and bringing that person to the item [REDACTED] wants; and screaming. Student is not toilet trained and uses pull-ups. DOE Ex. 5 at 083, 085, 089; DOE Ex. 8 at 126-127, 135.
6. Student was diagnosed with [REDACTED] disorder by a pediatrician in 2015 when Student was [REDACTED] years old. DOE Ex. 7 at 104; Parent, Tr. Vol. I, pp. 23-24.
7. Student attended a [REDACTED] program” through Easter Seal and Hawaii Behavioral Health. [REDACTED] then transitioned to a DOE elementary school for [REDACTED] and was placed in a special needs program in a fully self-contained classroom. Parent was unhappy with this DOE elementary school and looked for an alternative. Parent learned about Private Agency on Facebook, an online social media platform, and enrolled Student at Private Agency in May of 2017 while Student was still in [REDACTED]. DOE Ex. 7 at 104; DOE Ex. 16 at 179; Parent, Tr. Vol. I, pp. 24-26.
8. Private Agency is not a school. Private Agency provides applied behavior analysis (“ABA”) services to [REDACTED] children in a clinical setting. Only disabled or special needs children attend Private Agency. DOE Ex. 16 at 179, 181; DOE Ex. 40 at 344-345; DOE Ex. 41 at 346; SSC, Tr. Vol. III, pp. 307-308; Parent, Tr. Vol. I, p. 70.

9. Parent withdrew Student from [REDACTED] to receive ABA treatment at Private Agency. Prior to starting at Private Agency, Student had never received ABA services. DOE Ex. 16 at 179.
10. When Student started at Private Agency, Private Agency provided forty (40) hours of ABA services per week to Student, Monday through Friday, 8:30 a.m. to 4:30 p.m.; Student had a one-to-one Registered Behavior Technician (“RBT”) with [REDACTED] at all times; Student was not in school; and [REDACTED] did not receive any other related services. DOE Ex. 16 at 179-180; DOE Ex. 17 at 204.
11. In 2020, with the onset of the COVID-19 pandemic, Private Agency closed for in-person services. Student was provided telehealth services from the middle of March through the beginning of May due to the “stay at home, work from home” order issued by the governor of the State of Hawaii<sup>8</sup>. Student remained at home and did not return to the clinic for in-person services. Parent was very concerned about the potential risk of sending Student to the clinic because they spend a lot of time at Student’s [REDACTED] grandparents’ home. Once other clients returned to in-person services at the clinic, Student began home sessions with one RBT two days per week to maintain [REDACTED] targets until [REDACTED] could return to the clinic full time. Private Agency provided ABA services to Student in the home setting at grandparents’ home. Parent did not want to send Student back to the clinic until [REDACTED] was able to receive the COVID-19 vaccine. As a result, [REDACTED] session hours in the home were increased so that Student would not only maintain what [REDACTED] learned, but also work on new acquisition targets. Increased home session hours

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<sup>8</sup> The undersigned Hearings Officer takes judicial notice of the fact that the governor of the State of Hawaii issued a “stay at home, work from home” order during the early stages of the COVID-19 pandemic.



- began on October 2, 2020. DOE Ex. 7 at 104; DOE Ex. 17 at 204; DOE Ex. 84 at 561; DOE Ex. 86 at 00:11:40-00:12:21; Parent, Tr. Vol. I, p. 117.
12. While Student was receiving services at home, ■ did not interact with any other children. Parent, Tr. Vol. I, p. 70.
  13. Private Agency has a policy of working with a child for a maximum of one year on a full-time basis. Once Student exceeded this time frame, Private Agency gradually decreased the number of hours of behavioral interventions it provided to Student. DOE Ex. 7 at 104; DOE Ex. 8 at 126.
  14. On August 5, 2022, Private Agency stopped providing services to Student. Parent, Tr. Vol. I, p. 122; DOE Ex. 84 at 575; DOE Ex. 86 at 00:28:50-00:29:25.
  15. Student's ABA services were paid by insurance. Student stopped receiving Private Agency services because insurance coverage ended. Parent, Tr. Vol. I, pp. 69, 72.
  16. During the early stages of COVID-19, Parent began homeschooling Student. There was no set time or set length of time when Parent would homeschool Student. Parent would teach Student "throughout" the day. Parent made cards and flashcards, and ■ would use colors to teach Student. Parent read to Student every night; practiced signing throughout the day and at night; and sang to reinforce what Student had learned. Parent continues to homeschool Student. Parent, Tr. Vol. I, pp. 118-119.
  17. Parent testified that Student is "rarely aggressive towards others"; "■ not physical"; and ■ is not a "hitter" or "biter." When Student is presented with something ■ does not want to do or when something is wrong, ■ would make a "peep" or "ahh" sound. Parent, Tr. Vol. I, p. 79.

18. Although Student has not attended a DOE school since [REDACTED], an IEP was developed for Student every year. DOE Ex. 84 at 565; DOE Ex. 86 at 00:16:28-00:17:21; DOE Ex. 7 at 104.

**Private Agency Progress Reports**

19. On November 15, 2016, Private Agency conducted an initial assessment of Student. DOE Ex. 16 at 179. Private-BCBA, a board-certified behavior analyst for Private Agency, conducted a re-assessment on February 5 and 20, 2020 and wrote a report entitled “March 2020 Progress Report.” DOE Ex. 16 at 179-202. On August 22 and 24, 2021, Private-BCBA conducted another re-assessment of Student and wrote a report entitled “Updated Treatment Report September 2021.” DOE Ex. 17 at 203-233. On March 8, 2022, Private-BCBA conducted another re-assessment and wrote a report entitled “Updated Treatment Report March 2022.” DOE Ex. 18 at 234-262; DOE Ex. 46 at 358-386.
20. According to Private Agency’s March 2020 Progress Report, behavioral concerns reported at home included putting toys and other objects in [REDACTED] mouth; biting [REDACTED] nails; and leaving highly preferred activities with and without problem behavior, such as screaming or crying. Since Student started services at Private Agency and has learned some functional communication, crying and screaming were greatly reduced. Major goals Student’s family wanted to see [REDACTED] meet were to increase communication; increase independence in activities of daily living; and to play independently. The March 2020 Progress Report had a Behavior Intervention Plan (“BIP”) for Student to address [REDACTED] screaming and mouthing/inserting non-food items in [REDACTED] mouth. DOE Ex. 16 at 180, 196-197.

21. According to the Updated Treatment Report September 2021, Parent did not report any new behavioral concerns except that Student had started playing with and throwing [REDACTED] spit. Student would generally leave highly preferred activities without problem behaviors, but Student would sometimes engage in behaviors such as screaming or crying. The major goals that Student's family wanted to see [REDACTED] meet were to increase communication; increase independence in activities of daily living; play independently; decrease throwing spit; and increase functional fine motor skills. DOE Ex. 17 at 204-205. Student's BIP targeted the following behaviors: crying, vocal protest, and spitting saliva. DOE Ex. 17 at 226, 228.
22. Private Agency's Updated Treatment Report March 2022 did not change much. Parent did not report any new behavioral concerns; and the major goals that Student's family wanted for [REDACTED] remained the same. Student's BIP targeted vocal protest and spitting saliva. DOE Ex. 18 at 235, 236, 254-256.
23. By the time the Updated Treatment Report March 2022 was written, Student had not received in-person clinical services at Private Agency for two (2) years due to COVID-19 restrictions and family preferences. DOE Ex. 18 at 261.

**Events Before the May 19, 2022 IEP Meeting**

24. SSC is the student services coordinator at Home School. Pet. Ex. 2 at 048.
25. On February 13, 2022, SSC sent an email to Parent to initiate the triennial reevaluation process, which was due May of 2022. SSC suggested an IEP meeting for March 3, 2022 or March 4, 2022 to start the process. Parent requested a virtual IEP meeting on March 3, 2022 because Parent wanted to "limit public exposure to essential duties." DOE Ex. 22 at 269-271.

26. On February 14, 2022, SSC agreed to Parent's request for a virtual IEP meeting and asked Parent if Student was still attending Private Agency and if Private Agency would be willing to share Student's progress with the IEP team. Parent responded that if the IEP team lets Parent know what they wanted from Private Agency, Parent would provide the information. DOE Ex. 22 at 271.
27. On March 3, 2022, a Student Focus Team ("3/03/2022 SFT") meeting took place for Student's triennial reevaluation. The purpose of the SFT meeting was to gather information on Parent and teachers' concerns about Student; determine if a reevaluation would be conducted; and if so, determine what assessments would be needed. DOE Ex. 4 at 018-019.
28. During the 3/03/2022 SFT meeting, DOE proposed that a triennial reevaluation be conducted, which would consist of a social/family history update, cognitive assessment, academic assessment, speech/language assessment, fine motor assessment, adaptive assessment, and classroom observation. The proposed action was based on a review of the following information: Early Learning and Development questionnaire; progress report from Private Agency; previous assessment reports; and input from teachers, Parent, a speech pathologist, an occupational therapist, and a physical therapist aide. DOE Ex. 4 at 054-055.
29. During the 3/03/2022 SFT meeting, the team also considered conducting a gross motor assessment, sensory profile, and observation but rejected these options because a 2019 gross motor assessment reported proficient gross motor skills; and reports from Parent and Private Agency did not indicate significant sensory concerns. An observation was

- rejected as being imprudent because Student was receiving therapy at home and household members were at high risk if exposed to COVID-19. DOE Ex. 4 at 054-055.
30. A Prior Written Notice of Department Action, dated March 4, 2022, was issued following the 3/03/2022 SFT meeting (“3/04/2022 PWN”). The 3/04/2022 PWN states that “[Student] is being serviced by [Private Agency] in the home due to family concerns of exposure to COVID 19 since household members are at high risk. [REDACTED] has not been enrolled in the DOE since [REDACTED]. Data needs to be gathered to determine [Student’s] current levels of performance in the areas of cognition, academics, fine motor, speech/language and adaptive skills to assist in eligibility and designing appropriate programming.” DOE Ex. 4 at 054-055.
31. On March 4, 2022, SSC gave Parent a consent form to sign so that DOE could administer the assessments to Student; a copy of the 3/04/2022 PWN; and some questionnaires. DOE Ex. 25 at 275; DOE Ex. 26 at 295.
32. On March 14, 2022, SSC sent a text message to Parent inquiring about whether Parent had signed the consent form. DOE Ex. 25 at 275.
33. On March 19, 2022, SSC sent an email to Parent again informing Parent that DOE needed a signed consent form from Parent before DOE could start administering the assessments to Student. SSC also informed Parent that “[i]f you do not want [REDACTED] reevaluated, that is your choice as a parent. If you rather go through the process of reevaluation with no assessments, we would have to meet again to discuss if we have enough current data to determine eligibility, but we will consider whatever you feel is best.” DOE Ex. 26 at 295.

34. On March 23, 2022, SSC sent a text message to Parent informing Parent that if Parent did not want to go through with the reevaluation process at this time because Parent did not know if [REDACTED] would be sending Student back to a DOE school, Parent did not have to do it now and they could do “an initial” whenever Parent decides to send Student back to the DOE. However, SSC suggested to Parent that Parent go through with the reevaluation process so that when Parent does want Student to go to a DOE school, DOE would know that Student qualifies for special education services and they would only need to obtain updated information about [REDACTED]. SSC again informed Parent that they couldn’t proceed until they get the consent form back from Parent. DOE Ex. 25 at 275-276.
35. On April 5, 2022, SSC sent an email to Parent, confirming that they had an eligibility meeting on May 2, 2022 and a tentative IEP meeting on May 17, 2022. DOE Ex. 32 at 306.
36. On April 6, 2022, SSC and Parent confirmed April 20 and April 26 as dates to have a speech assessment. DOE Ex. 25 at 281.
37. On April 19, 2022, a Conference Announcement was issued, scheduling a conference for May 2, 2022. The purpose of the meeting was to discuss the results of the reevaluation and determine eligibility or continued eligibility for IDEA services. DOE Ex. 5 at 057-058.
38. On April 20, 2022, an academic assessment was conducted by SSC, resulting in an Academic Assessment Report (“4/20/2022 Academic Assessment”). DOE Ex. 5 at 060-064; DOE Ex. 10 at 151-155. The academic assessment assessed Student’s academic and cognitive skills using an assessment tool that compared Student’s performance to

that of a representative sample of children of the same age on a national level.

According to the 4/20/2022 Academic Assessment, “[Student] demonstrates significant deficits in early literacy and numeracy skills for ■ age. ■ demonstrated skills that fell in the 24 month – Entry Kindergarten range with some skills in the late Kindergarten level.” DOE Ex. 10 at 153-154.

39. Also on April 20, 2022, a speech and language assessment was conducted by DOE Speech/Language Pathologist (“DOE-SLP”), resulting in a Speech and Language Assessment Report (“4/20/2022 Speech/Language Assessment”). DOE Ex. 5 at 067-072.
40. On April 28, 2022, a Cognitive Assessment Report was done (“4/28/2022 Cognitive Assessment”). Student was tested on April 26, 2022 as part of the cognitive assessment. DOE Ex. 5 at 073-075.
41. Student’s personal and social skills were assessed using the Vineland 3 Adaptive Behavior Scales, which resulted in a social/family report dated April 29, 2022 (“4/29/2022 Social/Family Assessment”). The Vineland 3 Adaptive Behavior Scale covered adaptive behavior in three domains: communication, daily living skills, and socialization. Two additional domains were included in the assessment: motor skills and behavior. Student received low scores in all the domains. DOE Ex. 5 at 076-083.
42. On May 2, 2022, DOE-OT submitted an Assessment Report for Student’s fine motor assessment (“5/02/2022 Fine Motor Assessment”). DOE Ex. 5 at 065-066.
43. Also on May 2, 2022, an eligibility meeting took place to review the assessment reports and determine eligibility. Present at the meeting were a vice principal of Home School, Parent, SSC, SPED Teacher, General Education Teacher-1 (“GED Teacher-1”), DOE-

SLP, and DOE-OT. The IEP team reviewed the following assessments: Social/Family History, Adaptive, Cognitive, Academic, Speech/Language, and Fine Motor. DOE Ex. 5 at 059, 084-086.

44. Based on Student's reevaluation, Student was found to continue to be eligible for special education and related services under the category of [REDACTED]. DOE Ex. 5 at 084-086, 089.
45. On May 2, 2022, Parent was provided a copy of an Evaluation Summary Report for the reevaluation ("5/02/2022 ESR"). According to the 5/02/2022 ESR, "[Home School] is [REDACTED] home school. [Parent] elected to exit [Student] from the DOE special education program to enroll [REDACTED] full time in the [Private Agency] program to receive Applied Behavior Analysis (ABA) therapy. [Student] has been attending [Private Agency] since the beginning of 2017. Since the onset of the COVID 19 pandemic, [Student] receives [REDACTED] intensive ABA therapy by [Private Agency] program in [REDACTED] home." The 5/02/2022 ESR states that "[Student] meets the eligibility criteria for [REDACTED]." DOE Ex. 5 at 088-090.
46. A Prior Written Notice of Department Action, dated May 2, 2022 ("5/02/2022 PWN"), was issued, documenting that Student meets the eligibility criteria for [REDACTED] because [REDACTED] ability to fully participate in the general education setting is adversely impacted by behaviors attributed to [REDACTED]. DOE Ex. 5 at 091.



### May 19, 2022 IEP

47. On May 19, 2022, an IEP meeting was held, resulting in an IEP dated May 19, 2022 (“5/19/2022 IEP”). According to the 5/19/2022 IEP, the annual review date is May 19, 2023 and the reevaluation date is May 2, 2025. DOE Ex. 7 at 103-118.
48. Present at the 5/19/2022 IEP meeting were DOE-OT, DOE-SLP, SPED Teacher, Principal, Parent, GED Teacher-1, and General Education Teacher-2 (“GED Teacher-2”). DOE Ex. 7 at 118.
49. GED Teacher-2 sat in for GED Teacher-1 until GED Teacher-1 was done with a meeting ■■■ was attending at the time. DOE Ex. 83 at 503-504; DOE Ex. 85 at 00:00:44-00:00:56.
50. The 5/19/2022 IEP meeting was approximately thirty-nine (39) minutes and nineteen (19) seconds long. DOE Ex. 85.
51. Parent was provided a copy of a draft IEP before the 5/19/2022 IEP meeting, which Parent briefly reviewed before the meeting. DOE Ex. 83 at 505-506; DOE Ex. 85 at 00:03:30-00:03:55.
52. During the 5/19/2022 IEP meeting, the IEP team discussed Student’s use of an assistive technology device or a “high-tech AAC device”<sup>9</sup> to help with ■■■ communication needs. The IEP team discussed using “modeling” to help Student with ■■■ verbal speech and to teach ■■■ how to use ■■■ AAC device to communicate. The 5/19/2022 IEP team discussed that “since ■■■ does not consistently access verbal speech to communicate, it is important for ■■■ to have access to and to learn from a form of augmentative alternative communication.” SPED Teacher went over the “Supports Needed for

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<sup>9</sup> “AAC” stands for augmentative alternative communication.” DOE Ex. 83 at 511.

- Speech/Language/Communication” section of the draft 5/19/2022 IEP and asked Parent if ■ had any questions, concerns, or input. Parent said ■ did not. DOE Ex. 83 at 507, 509-511; DOE Ex. 85 at 00:05:00-00:05:15, 00:07:30-00:09:45, 00:23:57-00:25:40.
53. During the 5/19/2022 IEP meeting, SPED Teacher asked Parent whether one (1) minute was a reasonable amount of time for Student to transition from a preferred to nonpreferred task, looking one year ahead. Parent replied that ■ was not sure. SPED Teacher informed Parent that the IEP document is “fluid” and that they could “meet anytime for anything” relating to the IEP and make revisions to it. DOE Ex. 83 at 512-513; DOE Ex. 85, 00:11:30-00:12:26.
54. As SPED Teacher went over sections of the draft 5/19/2022 IEP, SPED Teacher asked Parent if Parent had any questions, input or concerns after each section. Parent informed SPED Teacher that SPED Teacher did not have to ask ■ that question after each section and that Parent would say something if ■ had any questions, input, or concerns. DOE Ex. 83 at 515; DOE Ex. 85 at 00:14:30-00:15:05.
55. Parent was an active participant in the 5/19/2022 IEP meeting. See example: DOE Ex. 85 at 00:15:20-00:18:15.
56. In discussing the proposed Supplementary Aids and Services, SPED Teacher explained that DOE proposes “adult support service for the full week...mean[ing] every day for the whole school day” and that the adult support would help with Student’s behavior, communicating ■ wants and needs, and ■ AAC device. DOE Ex. 83 at 526-528; DOE Ex. 85 at 00:28:03-00:31:20.

57. Reading from a draft IEP, SPED Teacher stated that a proposed supplementary aid and service offered to Student is “modeling language on the AAC device.” DOE Ex. 83 at 526; DOE Ex. 85 at 00:28:19-00:28:54.
58. During the 5/19/2022 IEP meeting, Parent did not request that Student be assigned an RBT or be provided ABA services.
59. The 5/19/2022 IEP team discussed positive reinforcement strategies and behavioral management techniques, which included a token system, praise, first/then contingencies, visual schedules, setting routines, adult support, noise cancelling headphones as loud noise can be a trigger for Student, counting backwards from 10, and a timer. DOE Ex. 83 at 526-528; DOE Ex. 85 at 00:28:00-00:31:19; DOE Ex. 7 at 113.
60. During the 5/19/2022 IEP meeting, SPED Teacher explained to Parent the purpose of extended school year (“ESY”), the need for data regarding regression and recoupment, the process in determining the need for ESY services, and why Student did not meet the criteria for ESY services. Parent did not have any questions, input, or concerns. DOE Ex. 83 at 528-529; DOE Ex. 85 at 00:31:17-00:32:40.
61. During the 5/19/2022 IEP meeting, SPED Teacher used a chart to explain to Parent what the least restrictive environment (“LRE”) is. The chart showed in a row from left to right: “General Ed. Setting,” “Special Ed. Setting,” “Special School,” “Homebound,” and “Hospital/Residential.” Above “General Ed. Setting” is the term “Least Restrictive” with an arrow pointing left. Above “Hospital/Residential” is the term “Most Restrictive” with an arrow pointing right. Below the chart were percentages that showed how much of the school day a student will be in a general education setting. SPED Teacher explained that in a special education setting, Student would be in the general

education setting for less than 40% of the school day. SPED Teacher explained the general education and special education settings and proposed that Student be placed in special education. Parent agreed that Student belonged in special education. DOE Ex. 83 at 530-531; DOE Ex. 85 at 00:33:10-00:34:56.

62. During the 5/19/2022 IEP meeting, Parent asked DOE to allow Private Agency to go on campus at Home School to help with the transition to Home School. Principal informed Parent that they could talk about it once Parent accepted DOE's offer of FAPE and that [REDACTED] would like to hear from Private Agency before determining whether it would be appropriate. DOE Ex. 83 at 531-533; DOE Ex. 85 at 00:34:50-00:38:00.
63. In developing the 5/19/2022 IEP, the IEP team relied on the following sources for information: 4/29/2022 Social/Family Assessment; 4/20/2022 Speech/Language Assessment; 4/28/2022 Cognitive Assessment; "5/19/2022 Academic Assessment"<sup>10</sup>; 5/02/2022 Fine Motor Assessment; Updated Treatment Report September 2021; 5/02/2022 ESR; and 4/29/2019 Gross Motor Assessment. DOE Ex. 7 at 104.
64. The 5/19/2022 IEP provides the following services to Student: 1830 minutes per week of special education and daily transportation. DOE Ex. 7 at 116.
65. The 5/19/2022 IEP provides Student numerous "Supplementary Aids and Services, Program Modifications and Supports for School Personnel" ("Supplementary Aids and Services"), some of which are: 1830 minutes per week of adult support; model language on AAC device daily; use of visual supports for communication purposes (i.e. PECS or other visual icons); gaining Student's attention prior to providing oral directions; use of

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<sup>10</sup> It is unclear if there is an error in the date. The exhibits contain a 4/20/2022 Academic Assessment (DOE Ex. 5 at 060-064; DOE Ex. 10 at 151-155) and there is no evidence of a "5/19/2022 Academic Assessment."

first/then contingency; visual schedule; provide consistent and immediate positive reinforcement; provide clear expectations and set routines; provide a structured learning environment; noise cancelling headphones; and use of calming strategies. DOE Ex. 7 at 116.

66. Under a section entitled “Clarification of Services and Supports,” the 5/19/2022 IEP provides the following explanations: “Adult support services are to help with behaviors in addition to assistance with life skills such as on-task behaviors, helping ■■■ regulate ■■■ behavior, developing appropriate socialization skills, academic readiness, communicating ■■■ wants/needs, maintaining safe boundaries, and managing and assisting with assistive technology. Calming strategies – [Parent] shared behavioral management techniques such as counting back from 10 and a timer that have proved successful in the home setting.” DOE Ex. 7 at 116.
67. The extent to which Student would be participating with nondisabled students, the 5/19/2022 IEP reads: “[Student] will not participate in the general education class for all academic and non-academic activities except during recess, lunch, school-wide activities, classroom/school celebrations, specials (i.e. PE, music, art), as appropriate, and any other activities deemed appropriate. Placement will be in a special education setting.” DOE Ex. 7 at 117.
68. Student did not meet the standard for extended school year in the 5/19/2022 IEP. DOE Ex. 7 at 116.

### **Events Before the July 29, 2022 IEP Meeting**

69. A Prior Written Notice of Department Action, dated May 24, 2022, was issued (“5/24/2022 PWN”), documenting DOE’s proposed actions. For Student’s placement,

the 5/24/2022 PWN reads: “[Student] will participate in a special education program for all academic and non-academic activities, except when integrated into the general education setting with non-disabled peers for activities such as: recess, lunch, school-wide assemblies, celebrations, activities, field trips and any other activities deemed appropriate. Placement is on a DOE public school campus where [Student’s] IEP can be access and implemented and where [redacted] will have opportunities to interact with age-appropriate, typically developing peers.” DOE Ex. 7 at 119-120.

70. The 5/24/2022 PWN also explained why ESY services was not proposed: “Once [Student] is enrolled, attends in-person class and teachers are able to work with [redacted], data will be collected and reassessed after each break in service to include extended weekends, Fall Break and Winter Break.” DOE Ex. 7 at 119-120.
71. On May 26, 2022, SSC sent an email to Parent, asking Parent if [redacted] will be enrolling Student at Home School for the upcoming school year. If [redacted] was, SSC asked Parent to register Student at Home School. If [redacted] was not, SSC asked Parent to fill out a 4140 form, which would indicate that Parent was choosing to educate Student at home and not in a school setting. DOE Ex. 40 at 343. Later that day, Parent responded to SSC’s email and informed SSC that Student will remain with Private Agency and that Parent will let SSC know “when the time is near or when I have more of an idea of transitioning [redacted] to the DOE.” DOE Ex. 40 at 344.
72. On May 27, 2022, SSC sent an email Parent, informing Parent that Parent did not have to register Student at Home School until Parent decides to enroll Student with the DOE. SSC again asked Parent to complete a 4140 form, explaining that the 4140 form “indicate[s] that you are choosing to educate your child in a nonschool setting. It

protects you as well so that the State has confirmation that your child is being educated outside of the DOE or private school setting. [Private Agency] is considered a therapy versus a school.” DOE Ex. 40 at 344-345.

73. On June 7, 2022, SSC sent a text message to Parent asking Parent if [REDACTED] would be enrolling Student with the DOE for the upcoming school year. DOE Ex. 25 at 284-285.
74. On July 16, 2022, SSC sent an email to Parent stating in part: “Since [Student] will not be enrolling at [Home School], we will be sending home a 4140 form for you to fill out. It protects you by informing the state that your child is being educated at home by your choice. [Private Agency] is not considered a ‘school’ by the State but a form of therapy.” DOE Ex. 41 at 346.
75. On July 17, 2022, Parent responded to SSC’s 7/16/2022 email. Parent informed SSC that [REDACTED] will be meeting with Private Agency to plan for a transition to Home School and asked SSC to “Lmk [let me know] what the process is.” DOE Ex. 41 at 346.
76. On July 18, 2022, SSC sent an email to Parent, asking: “Are you planning on having [Student] start school on August 1st or start the transition? Can we meet to discuss timelines and how you feel we can facilitate a smooth transition? What role the [Private Agency] therapists would play in the transition? I believe a meeting with all the team members would be helpful so that everyone is on the same page on how to best support [Student].” DOE Ex. 42 at 347.
77. On July 22, 2022, SSC sent a text message to Parent, asking: “please let me know when it’s a good time to talk. We want to understand your timeline in getting [Student] back in school at [Home School].” Parent responded later that day stating that [REDACTED] was

available to talk “now” and that [REDACTED] had just finished speaking to Student’s “supervisor” at Private Agency. DOE Ex. 25 at 285.

78. SSC offered to have a transition meeting, but Parent requested that it be an IEP meeting instead. The IEP team decided that they would have an IEP meeting to discuss Student’s transition to Home School. SSC, Tr. Vol. III, 263.
79. On July 26, 2022, SSC sent an email to Parent, confirming an IEP meeting for July 29, 2022 via Webex. SSC also asked Parent for the name of the Private Agency therapist who would be attending the meeting so that SSC could add this person to the conference announcement. A conference announcement was then issued that day. DOE Ex. 8 at 121-122; DOE Ex. 44 at 349.
80. Later that day, on July 26, 2022, SSC and Parent exchanged text messages regarding Parent’s request that DOE allow Private Agency’s RBT to work with Student on campus at Home School from August 1, 2022 to August 5, 2022 as part of the transition process, at no expense to Home School. SSC informed Parent that Home School will be meeting with an [REDACTED] District Educational Specialist to get guidance on DOE regulations on outside agency providers working with students in the classroom setting. SSC suggested that Private Agency “inservice [DOE] staff after school hours with Student.” SSC informed Parent that there are DOE and federal regulations, such as the Family Educational Right Privacy Act (“FERPA”), that protect the rights of other students and that Home School needed guidance because it had never been confronted with such a request. Pet. Ex. 2 at 042-043; DOE Ex. 25 at 290-292.
81. On July 27, 2022, Parent sent a text message to SSC asking for a response to [REDACTED] request that DOE allow Private Agency’s RBT to go to Home School. DOE Ex. 25 at 293-294.



SSC responded that “DOE policy states that, ‘services provided by anyone other than a Department employee or Department...may not be delivered during the school day on a school campus or at a site where the Department is implementing a student[‘s IEP]...we welcome [Private Agency] to share with our teachers and staff interventions and strategies that have proved successful with [Student and]...give us current information on ■ strengths and needs....” DOE Ex. 45 at 350.

82. On July 28, 2022, Parent informed SSC that Private-Director and Private-BCBA would like to attend the July 29, 2022 meeting and provided their email addresses to SSC. DOE Ex. 25 at 294.

83. Private-Director is the Clinical Director of Private Agency; and Private-BCBA is a board-certified behavior analyst at Private Agency and ■ is the direct supervisor of Student’s team at Private Agency. Pet. Ex. 1 at 017; DOE Ex. 8 at 141; DOE Ex. 25 at 294.

84. On July 28, 2022 at 12:18 p.m., SSC sent an email to Private-Director and Private-BCBA (copying Parent on email) asking them to email ■ Student’s latest progress reports and assessments. SSC then wrote: “We look forward to learning more about [Student] to assist ■ smooth transition into the classroom setting.” DOE Ex. 46 at 351. Parent responded to SSC’s request and informed SSC that any request for information should go through Parent and not Private Agency. DOE Ex. 46 at 351. SSC then asked Parent for any recent data so that they could add it to Student’s present levels of educational performance (“PLEP”). DOE Ex. 46 at 352. Private-BCBA also responded to SSC’s email, stating: “Hi [SSC], We are looking forward to working with you all to make the transition as smooth as possible!” Private-BCBA also informed SSC that any

information DOE needed can be requested through Parent since Private Agency does not have Parent's consent to share Student's information. DOE Ex. 46 at 352-353.

85. On July 28, 2022 at 7:10 p.m., Parent sent the following email to SSC: "I'm very concerned about what you told me that [Student] will not be getting an RBT and [redacted] even won't have an EA or 1:1 assigned to [redacted]. I think I am going to home school [redacted], if this happens. I also now don't want [redacted] in all day special ed class....[Private Agency] has offered to bring an RBT for certain days and hours for the week of [A]ugust 1<sup>st</sup> till the 5<sup>th</sup>, during school hours and daily school classes. For the days or times that [Private Agency's] RBT is not there, I will be removing [Student] from school. Please allow [Private Agency] to work with us on the transition process, until you have an RBT or 1:1 dedicated for [Student] full-time. [Private Agency] transition process for the week of August 1<sup>st</sup> till the 5<sup>th</sup> will not be billed to [Home School]...." Pet. Ex. 2 at 044; DOE Ex. 48 at 392. SSC then responded to Parent: "I want to stress that we will honor [redacted] IEP which calls for adult support. [redacted] will be provided with adult support. As a team it was agreed upon at [redacted] IEP meeting that [redacted] requires this service to participate in the classroom setting and move toward mastering [redacted] goals and objectives. We understand that it is a big step to come back into a classroom setting and we will use our resources and expertise to make this transition smooth for [redacted]." DOE Ex. 48 at 393; DOE Ex. 84 at 563-565; DOE Ex. 86 at 00:14:10-00:18:20. Parent and SSC continued to correspond that evening about Parent's willingness and cooperativeness in sharing information with DOE. DOE Ex. 49 at 394; DOE Ex. 49 at 395-396.

## **July 29, 2022 IEP**

86. On July 29, 2022, an IEP revision meeting was held which resulted in an IEP dated July 29, 2022 (“7/29/2022 IEP”). The annual review and reevaluation dates did not change from the 5/19/2022 IEP. Pet. Ex. 1 at 001-017; DOE Ex. 8 at 123, 125-141.
87. Present at the 7/29/2022 IEP revision meeting were SPED Teacher, Principal, Parent, Private-BCBA, Private-Director, SSC, and General Education Teacher-3 (“GED Teacher-3”). Pet. Ex. 1 at 017; DOE Ex. 8 at 141.
88. The 7/29/2022 IEP revision meeting lasted approximately two (2) hours twenty-three (23) minutes and thirty-eight (38) seconds. DOE Ex. 86.
89. The IEP team received a March report<sup>11</sup> by Private Agency that morning before the start of the 7/29/2022 IEP revision meeting. DOE Ex. 84 at 555; DOE Ex. 86 at 00:03:00-00:03:20.
90. Parent was an active participant in the 7/29/2022 IEP revision meeting. See examples at DOE Ex. 84 at 575-576, 586, 609-614, 641; DOE Ex. 86 at 29:00-29:20, 29:30-30:09, 43:22-44:37, 1:12:00-1:17:41, 1:53:21-1:54:14.
91. During the 7/29/2022 IEP revision meeting, Parent read the 5/19/2022 IEP. DOE Ex. 84 at 655; DOE Ex. 86 at 2:11:30-2:13:00.
92. Private-Director and Private-BCBA’s input were actively sought and listened to during the 7/29/2022 IEP revision meeting. See examples at DOE Ex. 84 at 558, 560-561<sup>12</sup>,

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<sup>11</sup> It is unclear from the record which March report the IEP team is referring to--the March 2020 Progress Report or Updated Treatment Report March 2022. (FOF 20, 22).

<sup>12</sup> There are errors in the transcripts. For example, the discussion regarding Student’s potty training is between SPED Teacher and Private-BCBA, not SPED Teacher and SSC (DOE Ex. 84 at 561; DOE Ex. 86 at 00:11:00-00:12:21); the comment “When [REDACTED] starts to wander” was made by Parent and not Private-Director (DOE Ex. 84 at 596; DOE Ex. 86 at 00:56:00-00:56:18); Private-BCBA states, “Yeah. I think that’s definitely important one,” and not “Yeah. I think

602-604, 609; DOE Ex. 86 at 00:06:25-00:07:16, 00:11:00-00:12:21, 1:02:53-1:06:15, 1:11:35-1:12:15. Private-BCBA's knowledge of Student is not current as [REDACTED] has not seen Student for "a while." DOE Ex. 84 at 604; DOE Ex. 86 at 1:05:25-1:06:15.

93. The 7/29/2022 IEP team had further discussions regarding the type of programs (Proloquo or Dynavox) Student was using with [REDACTED] AAC device, which is an iPad. The 7/29/2022 IEP team discussed that Proloquo will be used at Home School because Private Agency was using Proloquo with [REDACTED]. Parent informed the DOE members of the IEP team that DOE would need to provide an AAC device to Student when Private Agency services end on August 5, 2022 and they will take back Student's AAC device. SPED Teacher informed Parent that Home School was getting an AAC device that day and it would be available on Monday. DOE Ex. 84 at 556-557, 570-572, 574-577; DOE Ex. 86 at 00:05:05-00:05:50, 00:23:00-00:26:00, 00:27:09-00:29:37, 00:31:35-00:32:12.
94. The 7/29/2022 IEP team reviewed the 5/19/2022 IEP. SPED Teacher summarized Student's behavior, which included clapping, chewing on items, and loud noise being a trigger. SPED Teacher also summarized how counting backwards and using a timer can help Student with transition. DOE Ex. 84 at 557-559; DOE Ex. 86 at 00:06:25-00:08:10. The IEP team discussed Student's behavioral difficulties with transitioning from preferred to non-preferred tasks, such as crying, whining, dropping; and wandering away when someone is not watching. They discussed ways to address these behaviors, such as using a visual schedule, token board<sup>13</sup>, breaks, and physical prompt. The IEP

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that's definitely probably one" (DOE Ex. 84 at 598; DOE Ex. 86 at 00:58:01-00:58:25). The use of the transcripts is cautioned.

<sup>13</sup> "Tokens" can be in the form of physical tokens (DOE Ex. 84 at 622-623; DOE Ex. 86 at 1:30:08-1:30:29) or virtual tokens in the Proloquo program on [REDACTED] iPad (DOE Ex. 84 at 596-597; DOE Ex. 86 at 00:56:18-00:57:19).

team discussed whether taking one minute to transition from a preferred to non-preferred task is a reasonable amount of time when Student will be in a new setting with new people and doing new tasks. Parent and Private-BCBA suggested that DOE use a smaller token board than what Private Agency used and the “work period” be shorter at Home School than at Private Agency because Student will be in a new environment. DOE Ex. 84 at 595-599, 602, 622-624; DOE Ex. 86 at 00:53:37-00:59:25, 1:02:35-1:04:10, 1:29:33-1:31:43.

95. Parent raised [REDACTED] concern that “it was decided” that Student did not need a “1:1 aide or an RBT full time.” SSC explained to Parent that Student has adult support in [REDACTED] service grid and that “throughout every IEP that we did every year, we always included adult support, because we are aware, and as a team we did agree that [REDACTED] does – you’re right. [REDACTED] does need that adult support.” The school members of the IEP team explained to Parent the process of obtaining an RBT for Student, which would include an observation and recommendation by a licensed behavior analyst, and the creation of a functional behavior assessment (“FBA”) and BIP. Parent did not agree. DOE Ex. 84 at 563-569, 633-635, 641, 653-655; DOE Ex. 86 at 00:14:10-00:22:00, 1:44:04-1:46:13, 1:53:21-1:54:14, 2:09:16-2:11:49.
96. During the 7/29/2022 IEP revision meeting, Parent informed the school members of the IEP team that Student should have qualified for ESY services. Parent stated that [REDACTED] wanted Student to receive ESY services after five (5) days without services because Student would regress after a fall or Christmas break and that it would take [REDACTED] weeks to “recover...from [REDACTED] behaviors.” The school members of the IEP team explained to Parent the need for data regarding Student’s independence from a caretaker, regression

and recoupment during breaks without services since Home School had never worked with Student before, and that an ESY determination can be re-visited once the school had some data. The discussion regarding ESY ended when Parent stated that ■ did not “want to be arguing about this over and over, you know, because I’ve already just told you I don’t agree with it.” DOE Ex. 84 at 564, 625-633; DOE Ex. 86 at 00:15:18-00:16:00, 1:33:23-1:44:04.

97. The 7/29/2022 IEP team discussed Student’s LRE at length; however, the IEP team was not able to come to a consensus. DOE Ex. 84 at 638-652, 658-662; DOE Ex. 86 at 1:49:40-2:08:19, 2:15:45-2:21:05. The IEP team again explained to Parent what LRE is and the different settings available to students with special needs: general education, special education, special school, homebound, and hospital. Parent stated that ■ wanted Student in the general education class with an RBT and be pulled out for math and English. DOE Ex. 84 at 641-643; DOE Ex. 86 at 1:54:14-1:57:27. The IEP team discussed the demands of a general education class and how Student would be affected being in a general education setting, and how other children would be affected by Student. After a lengthy discussion, Parent told SSC, “Totally get what you’re saying, but I just don’t – I just don’t agree...” DOE Ex. 84 at 651-652; DOE Ex. 86 at 2:07:41-2:08:02.
98. During the 7/29/2022 IEP revision meeting, Parent again requested that Private Agency be allowed to be on campus during class time and not after school to help with the transition. Principal explained that pursuant to DOE policy, services provided by individuals who are not DOE employees or contracted with DOE may not be delivered during the school day on a school campus. Principal then denied Parent’s request to

allow Private Agency to be on campus during school hours. DOE Ex. 84 at 599-601; DOE Ex. 86 at 00:59:20-1:02:32.

99. Parent did not ask the other IEP team members what the phrase “as appropriate” in the LRE statement of the 7/29/2022 IEP meant.
100. Student did not meet the standard for ESY in the 7/29/2022 IEP. Pet. Ex. 1 at 015.
101. The 7/29/2022 IEP states that “[s]ince [Student] does not consistently access verbal speech to communicate, it is important for [REDACTED] to have access to and to learn a form of augmentative alternative communication (AAC) system or device.” The 7/29/2022 IEP also notes that “[Parent] would like [Student] to have [REDACTED] device available with [REDACTED] at all times throughout the day.” DOE Ex. 8 at 128.
102. Although not a complete list, the 7/29/2022 IEP provides the following Supplementary Aids and Services: 1830 minutes per week of adult support; model language on AAC device; use of visual supports for communication purposes (i.e. PECS or other visual icons); use of first/then contingency; provide visual schedule to help with transitions; provide consistent and immediate positive reinforcement; provide clear expectations and set routines; visual support; noise cancelling headphones; and use of calming strategies. Pet. Ex. 1 at 015.
103. In the “Clarification of Services and Supports” section of the 7/29/2022 IEP, it provides the following explanation for the adult support and calming strategies in the Supplementary Aids and Services: “Adult support services are to help with behaviors in addition to assistance with life skills such as on-task behaviors, helping [REDACTED] regulate [REDACTED] behavior, developing appropriate socialization skills, academic readiness, communicating [REDACTED] wants/needs, maintaining safe boundaries, and managing and

assisting with assistive technology”; and “Calming strategies – [Parent] shared behavioral management techniques such as counting back from 10 and a timer that have proved successful in the home setting.” Pet. Ex. 1 at 015.

104. According to the 7/29/2022 IEP, the extent to which Student will participate with other students who do not have disabilities is as follows: “[Student] will not participate in the general education class for all academic and non-academic activities except during recess, lunch, school-wide activities, classroom/school celebrations, specials (i.e., PE, music, culture, Hawaiiana, dance, sustainability), as appropriate, and any other activities deemed appropriate. Placement will be in a special education setting.” Pet. Ex. 1 at 016.

#### **Events After the July 29, 2022 IEP Meeting**

105. On August 1, 2022, Parent sent an email to SSC, stating: “I understand that [Home School] won’t let [Private Agency] help with the transition unless they come for only after school because of FERPA and not being under contract by the DOE.” Parent then suggested that DOE hire Private Agency as a contract provider during school hours for a month for the transition period. Pet. Ex. 2 at 045; DOE Ex. 55 at 408. SSC responded that day and informed Parent that [REDACTED] will forward Parent’s suggestion to Principal. Pet. Ex. 2 at 045; DOE Ex. 55 at 409.
106. Principal sent a letter, dated August 3, 2022, to Parent confirming what was discussed during the 7/29/2022 IEP revision meeting. Principal confirmed that revisions were made to the IEP with the new information that was shared regarding Student’s PLEP and parental concerns. Principal also confirmed that Parent disagreed with the following areas of the IEP: ESY eligibility; LRE; DOE’s process to procure RBT support; direct



services for speech/language and occupational therapy; and DOE's policy regarding outside agencies working with students in the classroom setting. Principal maintained that DOE's offer of FAPE would be at Home School. Principal proposed that an SFT meeting be scheduled to determine if an FBA is warranted since Parent is requesting ABA/RBT services in the classroom setting. Attached to the email was a copy of a Prior Written Notice dated August 5, 2022 ("8/05/2022 PWN") and a copy of the 7/29/2022 IEP. Pet. Ex. 2 at 047; DOE Ex. 56 at 410-430; Pet. Ex. 1 at 036-037; DOE Ex. 8 at 142-143. On August 5, 2022, SSC contacted Parent to set up an SFT meeting. Pet. Ex. 2 at 048-049; DOE Ex. 59 at 450-451.

107. Although not a complete list, the 8/05/2022 PWN provided the following explanations for DOE's proposed actions: "Speech/Language consultation is to provide training to the team on the implementation of the augmentative and alternative communication (AAC) device and to assist the team in making classroom based accommodations related to communication to meet [Student's] needs"; and "[Student's] program will be implemented in a special education setting on a DOE public school campus where [REDACTED] will have multiple opportunities to interact with age-appropriate peers." Pet. Ex. 1 at 036; DOE Ex. 8 at 142.

108. The 8/05/2022 PWN documented options that were considered by the 7/29/2022 IEP team but were ultimately rejected. One of options was "ESY services." This option was rejected because "Once [Student] is enrolled, attends in-person class and teachers are able to work with [REDACTED], data will be collected and reassessed after each break in service to include extended weekends, Fall Break and Winter Break." Pet. Ex. 1 at 036-037; DOE Ex. 8 at 142-143.

109. The 8/05/2022 PWN also documented that another option considered and rejected by the 7/29/2022 IEP team was to “Provide applied behavior analysis (ABA) services through a registered behavior technician (RBT).” This option was rejected because “[Student] has not attended a DOE school since 2016 and there is insufficient data to determine if a functional behavior analysis, behavior intervention plan and an RBT, who will implement the plan, are warranted at this time.” Pet. Ex. 1 at 036-037; DOE Ex. 8 at 142-143.
110. The 8/05/2022 PWN also documented that another option considered and rejected by the 7/29/2022 IEP team was to “Allow current RBT from the [Private Agency] to demonstrate how to work with [Student] during school hours on a DOE public school campus.” This option was rejected because “The Department is required to provide the services delineated in the IEP during the school day and/or extended school day/year. Services provided by anyone other than a Department employee or Department contracted provider may not be delivered during the school day on a school campus or at a site where the Department is implementing a student’s IEP as this would interfere with the Department’s obligation to implement the student’s IEP and to provide special education and related services under the IDEA.” Pet. Ex. 1 at 036-037; DOE Ex. 8 at 142-143.
111. The 8/05/2022 PWN also documented Parent’s disagreement with the ESY determination, the Supplementary Aids and Services provided, and Student’s LRE; the IEP team’s agreement to meet after Fall break to determine if Student meets the criteria for ESY services; Parent’s request for ABA/RBT services and a private Licensed Behavior Analysis/RBT to provide direct services to Student during school hours at

Home School; and DOE's offer to provide the opportunity for requested service providers to conduct an observation of Student during school hours in order to continue to collaborate with DOE team in supporting Student. Pet. Ex. 1 at 037; DOE Ex. 8 at 143.

112. On August 8, 2022, the Office of Dispute Resolution ("ODR") filed the instant Complaint and Resolution Proposal, dated August 5, 2022. DOE Ex. 1 at 002-008.
113. On August 12, 2022, ODR filed Department of Education's Response to Petitioners' Complaint and Resolution Proposal. Pet. Ex. 3 at 052-055; DOE Ex. 2 at 009-013.
114. On August 15, 2022, a Conference Announcement was issued, setting an SFT meeting for August 18, 2022. DOE Ex. 6 at 092-094; DOE Ex. 69 at 463.
115. On August 15, 2022, Principal sent an email to Parent seeking consent to allow DOE's licensed behavior analyst ("LBA") to review Student's records for the SFT meeting. Principal attached a consent form for Parent to sign. DOE Ex. 69 at 463. On the same day, Parent consented to DOE sharing information with an LBA without signing the consent form. DOE Ex. 69 at 464.
116. On August 16, 2022, Parent emailed Principal a signed consent form, giving Parent's consent for indirect assessment procedures to be conducted. DOE Ex. 69 at 466-468; DOE Ex. 74 at 480-481. LBA was then provided Private Agency's records of Student for LBA to review. Principal, Tr. Vol. II, p. 202-203.
117. On August 18, 2022, an SFT meeting was held. Present were Parent, Principal, SPED Teacher, GED Teacher-3, DOE-OT, DES, LBA, a speech/language pathologist, and the vice principal of Home School. Pet. Ex. 3 at 056-058.

118. Generally, for an RBT to be assigned to a student, a licensed behavior analyst would collect data on certain behaviors to determine if an FBA is needed. If the licensed behavior analyst determines that an FBA is needed, the licensed behavior analyst would conduct the FBA. Once an FBA is completed, a BIP may be done. If a BIP is done, an RBT would implement the BIP under the supervision of a BCBA or licensed behavior analyst. SPED Teacher, Tr. Vol. I, p. 159; DOE Ex. 87 at 12:24-14:35, 34:10-38:17.
119. During the 8/18/2022 SFT meeting, LBA recommended that an FBA was not warranted. LBA's recommendation was based on existing information from Private Agency and what was shared during the 8/18/2022 SFT meeting. Based on LBA's recommendation, the school members of the IEP team determined that an FBA was not needed. Parent disagreed. DOE Ex. 87 at 08:14-12:17, 15:18-17:11, 34:10-38:17.
120. According to LBA, who reviewed Private Agency's report in preparation for the 8/18/2022 SFT meeting, Student displayed behaviors, such as crying and vocal protest, that were brought down by applying Private Agency strategies. Parent contributed that Student wanders off and does not know what is not safe. When asked if there was anything else Parent wanted to add regarding Student's behavior, Parent stated that [REDACTED] could not think of anything else beyond what was contained in the Private Agency documents. LBA described Student's behavior as "mild in intensity" and occurring less than before. DOE Ex. 87 at 8:12-12:17.
121. A Prior Written Notice of Department Action, dated August 26, 2022, was issued following the 8/18/2022 SFT meeting ("8/26/2022 PWN"). According to the 8/26/2022 PWN, DOE proposed that no further assessments be done and determined that an

- evaluation was not warranted at this time. Parent disagreed with DOE's determination not to conduct an evaluation. Pet. Ex. 1 at 038-039; DOE Ex. 6 at 095-096.
122. On September 12, 2022, a revision IEP meeting took place, resulting in an IEP dated September 12, 2022 ("9/12/2022 IEP"). Present at the 9/12/2022 IEP meeting were DOE-OT, SPED Teacher, GED Teacher-3, Principal, Parent, a speech/language pathologist, and counsel for Petitioners and Respondents. Pet. Ex. 1 at 018-035; Pet. Ex. 3 at 061-062.
123. Student continued to not meet the standard for ESY in the 9/12/2022 IEP. Pet. Ex. 1 at 032.
124. The 9/12/2022 IEP contains the same Supplementary Aids and Services as the 7/29/2022 IEP with two additional aids and services: daily AAC Device and 60 minutes per quarter of Speech Consultation. Pet. Ex. 1 at 032.
125. The 9/12/2022 IEP included three additional explanations in the "Clarification of Services and Supports" section of the IEP, one of which states: "9/12/2022: Addition of AAC Device to grid is to clarify, separately from 'Model language on AAC Device,' that a device will be accessible to [Student] at all times during the school day." Pet. Ex. 1 at 033.
126. A Prior Written Notice of Department Action, dated September 21, 2022, was issued following the 9/12/2022 IEP meeting ("9/21/2022 PWN"). Pet. Ex. 1 at 040-041.
127. On September 21, 2022, Principal sent Parent a letter informing Parent that someone will be contacting [REDACTED] to schedule a revision IEP meeting to address the need for parent training on the use of Student's AAC device when the device is taken home from school. Pet. Ex. 2 at 050.

128. On September 26, 2022, SPED Teacher sent an email to Parent to schedule a revision IEP meeting to address the need for parent training on the use of Student’s AAC device. SPED Teacher suggested October 18 and October 19 for a meeting. Pet. Ex. 2 at 051.
129. On September 30, 2022, Parent responded to SPED Teacher’s 9/26/2022 email and asked SPED Teacher to “create a PWN to amend the IEP, so I can sign a consent to allow the agreed services that the DOE has agreed upon without holding another meeting.” Pet. Ex. 2 at 051.
130. Petitioners are not seeking reimbursement for services provided by Private Agency in this due process hearing. Parent’s counsel, Tr. Vol. I, pp. 70-71.

**V. CONCLUSIONS OF LAW**

**A. BURDEN OF PROOF**

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

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

## **B. IDEA REQUIREMENTS**

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

Special education means “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.34; 34 C.F.R. § 300.39; 20 USC § 1401(26) and (29). To provide FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP.” Dept. of Educ. of 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. Bd. of Educ. v. 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 Endrew F. v. Douglas County School 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.” Endrew F. v. Douglas County School Dist., 137 S. Ct. 988, 1001 (2017). See also, Blake C. ex rel. Tina F. 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, 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 each year. 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 (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 the 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 the student a deprivation of educational benefits. Amanda J., 267 F.3d 877, 892 (9th Cir.2001).

### C. ISSUES FOR DETERMINATION

#### 1. **Whether the discussion of Student's eligibility for Extended School Year ("ESY") services was appropriate and/or whether Student was appropriately denied eligibility for ESY.**

In this issue, Petitioners are alleging that the discussion and ineligibility determination made by the 7/29/2022 IEP team denied Student a FAPE. As an initial matter, the purpose of the 7/29/2022 IEP revision meeting must be addressed. The meeting on July 29, 2022 was not an annual IEP meeting. The IEP team had recently completed a triennial reevaluation of Student and Student's IEP was completed on May 19, 2022. (FOF 25, 27, 28, 43, 44, 47). An annual review of Student's 5/19/2022 IEP is not until May 19, 2023. (FOF 47). Although the annual review deadline is May 19, 2023, the IEP team can, and should if warranted, periodically review and revise Student's IEP. An IEP team shall review, at least annually, a student's IEP to determine whether the annual goals are being achieved and revise the IEP, as appropriate, to address:

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

- (B) The results of any reevaluation conducted under § 300.303;
- (C) Information about the child provided to, or by, the parents, as described under subsection § 300.305(a)(2);
- (D) The child's anticipated needs; or
- (E) other matters.

34 C.F.R. § 300.324(b). See also, H.A.R. § 8-60-48(b).

A week after the 5/19/2022 IEP meeting, on May 26, 2022, SSC began to inquire from Parent whether or not Parent would be enrolling Student at Home School. (FOF 71). Parent responded on the same day that Student would remain at Private Agency until Parent makes a decision about transitioning Student to Home School. (FOF 71). On June 7, 2022, SSC again inquired from Parent whether or not Student would be enrolling at Home School. (FOF 73). On or about July 17, 2022, Parent informed SSC that Student would be transitioning to Home School and asked SSC to explain the process. (FOF 75). SSC then sought clarification from Parent as to whether Parent wanted Student to start school on August 1, 2022 or start the transition. SSC then asked Parent "Can we meet to discuss timelines and how you feel we can facilitate a smooth transition?" (FOF 76). Although SSC's intention was to set a meeting to discuss transition, Parent requested that the meeting be an IEP meeting. DOE agreed to have an IEP meeting to discuss transitioning Student to Home School. (FOF 78). On July 26, 2022, SSC confirmed a meeting date of July 29, 2022 with Parent. (FOF 79). Following SSC's meeting date confirmation, Parent sent an email to SSC seeking permission to have an RBT from Private Agency attend Home School from August 1, 2022 to August 5, 2022 as part of Student's transition to Home School. (FOF 80). SSC informed Parent that Home School did not know if that was allowed and was seeking clarification on DOE's regulations regarding outside agency providers working with students in the classroom setting, and suggested that Private Agency "inservice [DOE] staff after school hours with [Student]." (FOF 80). On the evening of July 28,

2022, Parent sent an email to SSC stating that [REDACTED] was concerned that Student would not be getting an RBT, EA (educational assistant), or a one-to-one (“1:1”) assigned to [REDACTED]. Parent also wrote that [REDACTED] did not want Student in special education class all day. Parent again asked SSC to “allow [Private Agency] to work with us on the transition process, until you have an RBT or 1:1 dedicated for [Student] full-time.” (FOF 85). On July 29, 2022, the IEP team met to discuss Student’s transition to Home School and the concerns raised in Parent’s 7/28/2022 email. During the 7/29/2022 IEP revision meeting, Parent also objected to Student not being eligible for ESY services. (FOF 96).

Now turning to the issue of whether the discussion about ESY and the resulting determination was appropriate. The undersigned finds that the IEP team conducted an appropriate discussion and Petitioners fail to meet their burden in showing that the IEP team’s ESY eligibility determination was not appropriate.

During the 5/19/2022 IEP meeting, the IEP team explained to Parent the purpose of ESY, the need for data regarding regression and recoupment, and the process in determining the need for ESY services. Parent did not object to the DOE’s proposed determination that Student did not meet the eligibility criteria for ESY services during the 5/19/2022 IEP meeting. (FOF 60). After the 5/19/2022 IEP meeting, DOE issued the 5/24/2022 PWN which explained why the DOE was not proposing ESY services. (FOF 70).

There is no evidence that Parent objected to the ESY determination prior to the 7/29/2022 IEP revision meeting; however, Parent stated during the 7/29/2022 IEP revision meeting that Student should have qualified for ESY and that [REDACTED] wanted Student to receive ESY services after five (5) days without services. (FOF 96). The school members of the IEP team explained to Parent the need for data regarding Student’s independence from a caretaker,

regression and recoupment during breaks without services since DOE had not worked with Student yet, and that the ESY determination can be re-visited once the school had some data. (FOF 96). The 7/29/2022 IEP team was not able to come to an agreement regarding ESY eligibility.

Petitioners are not alleging that the discussion on May 19, 2022 regarding ESY services was insufficient, nor would the evidence support such an allegation. The 5/19/2022 IEP team's discussion regarding ESY eligibility was sufficient and the follow up discussion during the 7/29/2022 IEP revision meeting was also sufficient. 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., 226 F.Supp.3d 1081, 1111, 1113, 344 Ed. Law Rep. 246 (D. Haw. Dec. 29, 2016). During the 7/29/2022 IEP revision meeting, the IEP team discussed the nature and severity of Student's disability; self-sufficiency/independence; regression; and recoupment. While the nature and severity of Student's disability was discussed throughout the IEP meeting, Parent specifically talked about it when ■ explained to the school members of the IEP team that Student needed ESY services after five (5) days because Student will regress after a fall or Christmas break and that it will take ■ weeks to "recover...from ■ behaviors." (FOF 96). The school members of the IEP team explained to Parent the need for data to assess Student's independence from a caretaker, regression, and recoupment. (FOF 96).

However, even assuming that there were procedural errors in discussing Student's ESY eligibility, there was no substantive violation because Petitioners have not shown that ESY services are necessary for the provision of FAPE to Student. There was no substantive error because 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.

H.A.R. § 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., 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. Department 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 School Dist., ex rel. Bd. of Directors, Missoula County, 541 F.3d 1202, 1211 (9th Cir.2008) (citations omitted). Therefore, the burden is on Petitioners to establish by a preponderance of the evidence that ESY services are necessary for Student. Petitioners have failed to meet this burden.

While Petitioners are not required to present empirical proof of actual prior regression, there was no evidence that ESY was necessary. 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 [REDACTED] instructions, and are 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)).

“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)). In the present case, there is no evidence of what Student gained during a regular school year because Student has not been to a regular school since 2017. (FOF 7, 18). Although Student is being homeschooled by Parent, there is a lack of evidence that the benefits Student gains during homeschooling will be significantly jeopardized if Student is not provided ESY services. (FOF 16). Parent’s concern that Student will regress after five (5) days without services, without more, is not sufficient to show that Student needs ESY services. Therefore, Petitioners have failed to meet their burden. As such, DOE did not deny Student a FAPE because the 7/29/2022 IEP did not provide ESY services to Student.

2. **Whether the “Supplementary Aids and Services, Program Modifications and Supports for School Personnel” are sufficiently described in the 7/29/2022 IEP and/or were sufficiently discussed regarding:**

(a) **Behavioral Interventions.**

(b) **Student’s supports were [REDACTED] to move from [REDACTED] current program to the program the 7/29/2022 IEP describes.**

- (c) Assistive Technology for communication; high technology.**  
**(d) To address Student's transition into the 7/29/2022 IEP program from [REDACTED] then-current program.**
- 

In this issue, Petitioners are alleging that the Supplementary Aids and Services in the 7/29/2022 IEP are insufficient regarding behavioral interventions; supports if Student were to move from [REDACTED] "current program" to the program described in the 7/29/2022 IEP; assistive technology for communication or "high technology"; and supports to address Student's transition from [REDACTED] "then-current program" to the program described in the 7/29/2022 IEP. Petitioners also allege that the discussion regarding these Supplementary Aids and Services was insufficient during the 7/29/2022 IEP revision meeting. Based on the evidence presented at the hearing, the undersigned finds that Petitioners fail to meet their burden of proof for this issue.

- (a) The Discussion Regarding Behavior Interventions and the Resulting Supplementary Aids and Services are Sufficient**
- 

In Issue 2(a), Petitioners are alleging that Respondents committed procedural and substantive violations because (1) the discussion about behavioral interventions was insufficient; and (2) the behavioral interventions contained in the 7/29/2022 IEP are insufficient. As explained below, Petitioners fail to show by preponderance of the evidence that Respondents committed either a procedural or substantive violation in formulating Student's 7/29/2022 IEP regarding Student's behavioral needs.

In the development of an IEP, the IDEA requires that "in the case of a child whose behavior impedes the child's learning or that of others, [the IEP team shall] consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i). In this case, the 7/29/2022 IEP team considered the use of positive behavioral interventions and supports, and other strategies, to address Student's behavioral needs. During the 5/19/2022 IEP meeting, the IEP team discussed positive reinforcement

strategies and behavioral management techniques or calming strategies, which included a token system, praise, first/then contingencies, visual schedules, setting routines, noise cancelling headphones, counting backwards from ten (10), and a timer. (FOF 59). The IEP team also discussed providing Student with an adult support who would be with Student “every day for the whole school day” to help with Student’s behavior, communicating ■ wants and needs, and ■ AAC device. (FOF 56). These behavioral interventions are listed in the 5/19/2022 IEP<sup>14</sup>.

During the 7/29/2022 IEP revision meeting, the IEP team reviewed the 5/19/2022 IEP and SPED Teacher summarized Student’s behavior, which included clapping, chewing on items, crying, whining, dropping, and loud noise being a trigger. The IEP team discussed ways to address these behaviors, such as using a timer, a visual schedule, token board, breaks, and counting backwards. (FOF 94). Petitioners’ argument that it is a denial of FAPE that the “IEP did not include additional behavior interventions as described by [Private Agency]” is not persuasive. Petitioners’ Closing Brief, p. 5. First, Petitioners do not state what behavioral interventions Private Agency described that are not included in the 7/29/2022 IEP<sup>15</sup>. Second, the 7/29/2022 IEP provides Student with numerous behavioral interventions, such as consistent and immediate positive reinforcement, which includes a token system; adult support; visual supports and schedule; first/then contingency; noise cancelling headphones; and calming strategies.

(Footnote 12; DOE Ex. 8 at 136; FOF 102). And although not listed in the Supplementary Aids

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<sup>14</sup> Positive reinforcement includes token system and praise. DOE Ex. 83 at 526; DOE Ex. 85 at 00:28:19-00:29:19; DOE Ex. 7 at 113.

<sup>15</sup> To the extent that Petitioners are arguing that Student should have had a behavioral support plan (“BSP”) or behavioral intervention plan (“BIP”), Petitioners fail to show, through testimonial or documentary evidence, that a BSP or BIP is needed for Student or that a BSP or BIP is required when a student has behavioral needs. The IEP team was required to consider the use of positive behavioral interventions and supports, and other strategies, which the IEP team did. Petitioners’ Closing Brief, pp. 5-7.



and Services section, Home School will also use “prompting” with Student. See DOE Ex. 8 at 133, 134, 136. Petitioners do not state what behavioral interventions are needed but are not listed in the 7/29/2022 IEP or how the listed behavioral interventions are not sufficient.

Furthermore, with the exception of adult support, Parent did not object to the behavioral interventions during the 5/19/2022 IEP meeting or the 7/29/2022 IEP revision meeting. Parent disagreed with DOE’s proposal for an adult support and wanted an RBT, but Parent did not express disapproval of the other behavioral interventions. The school members of the IEP team declined to agree with Parent’s request for an RBT, feeling that an adult support could address Student’s behavioral needs and explained the process of obtaining an RBT for a student with behavioral needs. (FOF 95). “[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). As such, although the IEP team did not come to an agreement regarding all the behavioral interventions, namely adult support vs. RBT, the school members of the IEP team took into consideration the comments and suggestions made by Parent, Private-Director and Private-BCBA during the 7/29/2022 IEP revision meeting, and Parent meaningfully participated in the discussion regarding Student’s behavioral needs and interventions. (FOF 90, 92).

Based on the evidence, the IEP team considered the use of positive behavioral interventions and supports, and other strategies, to address Student’s behavior. Therefore, Petitioners fail to meet their burden in showing that the school members of the IEP team did not discuss sufficient behavioral interventions and that there is an inadequate description of behavioral interventions in Student’s 7/29/2022 IEP.

- (b) The Discussion Regarding Supports to Help Student Move or Transition from Student’s “Current Program” or “Then-Current Program” to the 7/29/2022 IEP Program and the Resulting Supplementary Aids and Services are Sufficient

This section addresses two sub-issues raised in Petitioners’ Due Process Complaint but not addressed in Petitioners’ Closing Brief. Petitioners’ decision to not argue Issues 2(b) and 2(d) is a waiver of these issues; however, in the event that a reviewing court may determine otherwise, the undersigned will attempt to address them without the benefit of knowing why Petitioners believe the discussion and Supplementary Aids and Services regarding the move/transition from Student’s “current program” or “then-current program” to the program described in the 7/29/2022 IEP are insufficient. After reviewing the evidence, the undersigned finds that Petitioners fail to meet their burden of proof with respect to Issues 2(b) and 2(d).

Based on the evidence, the undersigned deduces that Student’s “current program” is what Parent is providing at home to Student with ABA services being provided by Private Agency; and Student’s “then-current program” is what Student was getting while attending Private Agency in-person before the onset of COVID-19. (FOF 8, 10, 11, 12, 14, 16). Although Parent testified that ■ is providing Student with academic instructions, grandparents’ home is not a school with other students. (FOF 4, 12). Private Agency is also not a school; it is an ABA clinic. (FOF 8). Student had stopped attending Private Agency in-person in 2020 and was receiving ■ ABA services at Student’s grandparents’ home. (FOF 11). Private Agency had been decreasing the amount of ABA services it was providing to Student before the 7/29/2022 IEP revision meeting and ceased providing ABA services on August 5, 2022. (FOF 13, 14, 15).

Petitioners’ argument that the 7/29/2022 IEP does not contain sufficient Supplementary Aids and Services to address the transition from homeschooling or Private Agency to the program offered in the 7/29/2022 IEP is basically an argument that there is no transition plan for

Student. Pursuant to the IDEA, an IEP shall include the following: (1) a statement of the child's present levels of academic achievement and functional performance; (2) a statement of measurable annual goals, including academic and functional goals; (3) a description of how the child's progress toward meeting the annual goals will be measured and when progress reports will be provided; (4) a statement of the special education and related services and supplementary aids and services, and a statement of the program modifications or supports for school personnel; (5) an explanation of the extent, if any, to which the child will not participate with nondisabled students in the regular class and activities; (6) a statement regarding the child's participation in statewide assessments; (7) the projected date for the beginning of the services and modifications, and the anticipated frequency, location, and duration of those services and modifications; and (8) measurable postsecondary goals and transition services needed to reach those goals. 20 U.S.C. § 1414(d)(1)(A). See also, H.A.R. § 8-60-44(a), which also requires a description of short-term objectives or benchmarks. The IDEA does not require a transition plan from homeschooling or an ABA clinic to a public school to be included in an IEP. As stated by the Hawaii District Court, "the DOE is not required to include a transition plan in an IEP whenever a child moves from a private institution to a public school." Dept. of Educ., Hawaii v. C.B., Civil No. 11-00576 SOM/RLP, 2012 WL 1537454, at \*5 (D.Haw. May 1, 2012) (citing to L.I. v. Hawaii, Dept. of Educ., Civil No. 10-00731 SOM/BMK, 2011 WL 6002623, at \*6 (D.Haw. Nov. 30, 2011); M.N. v. Hawaii, Dept. of Educ., Civil No. 11-00121 SOM/BMK, 2011 WL 6020861, at \*4 n.1 (D.Haw. Dec. 1, 2011)). Furthermore, the IDEA also states:

Rule of construction

Nothing in this section shall be construed to require--

- (I) that additional information be included in a child's IEP beyond what is explicitly required in this section; and
- (II) the IEP team to include information under 1 component of a child's IEP that is already contained under another component of such IEP.

20 U.S.C. § 1414(d)(1)(A)(ii). See also Haw. Admin. Rules § 8-60-44. Petitioners have not cited to any persuasive legal authority that would require Respondents to include a transition plan in Student's 7/29/2022 IEP. In Dept. of Educ., State of Hawaii v. L.S., the District Court of Hawaii addresses transition plans in its decision. The L.S. Court wrote:

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

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

Dept. of Educ., State of Hawaii v. L.S., Civil No. 18-CV-00223 JAO-RT, 2019 WL 1421752, \*8 (Hawaii Dist. Court 3/29/2019). The rules do not require transition plans to be in an IEP, and Petitioners have not put forth any argument as to why the instant case should be an exception to the rule.

Furthermore, the 7/29/2022 IEP team took into consideration challenges that Student may face with transition from a home setting to Home School. (FOF 94). The 7/29/2022 IEP will provide Student with adult support, visual schedule, calming strategies, all of which are meant to make transition easier for Student. (FOF 94, 102, 103). Therefore, the undersigned finds that Petitioners fail to meet their burden in showing that the supports and services in the 7/29/2022 IEP do not address Student's transition from a home or clinical setting to the program outlined in Student's 7/29/2022 IEP or that the discussion during the 7/29/2022 IEP revision meeting was insufficient.

(c) The Discussion Regarding Assistive Technology for Communication or “High Technology” and the Resulting Supplementary Aids and Services are Sufficient

This section discusses Issue 2(c) raised in Petitioners’ Due Process Complaint but not addressed in Petitioners’ Closing Brief. Petitioners’ decision to not argue Issue 2(c) is a waiver of this issue; however, in the event that a reviewing court may determine otherwise, the undersigned will attempt to address Issue 2(c) without the benefit of knowing why Petitioners believe the discussion and Supplementary Aids and Services regarding assistive technology for communication or “high technology” in the 7/29/2022 IEP are insufficient. After reviewing the evidence, the undersigned finds that Petitioners fail to meet their burden of proof with respect to Issue 2(c).

Petitioners’ argument that the 7/29/2022 IEP team did not sufficiently discuss assistive technology or “high technology” to assist Student in communication is without merit. The IEP team discussed Student’s use of an assistive technology device or an AAC device during the 5/19/2022 IEP meeting. (FOF 52). The 5/19/2022 IEP team went over the “Supports Needed for Speech/Language Communication,” which included “modeling” to help Student with verbal speech and to teach how to use this AAC device to communicate. (FOF 52, 57). The 5/19/2022 IEP team discussed that “since does not consistently access verbal speech to communicate, it is important for to have access to and to learn from a form of augmentative alternative communication.” (FOF 52). Parent was asked during the 5/19/2022 IEP meeting if had any questions, concerns, or input, to which Parent said no. (FOF 52). Following the 5/19/2022 IEP meeting, Parent was given a copy of the 5/19/2022 IEP. Student’s 5/19/2022 IEP states that Student will be provided with “Model language on AAC Device” and the frequency would be “daily.” (FOF 65).

During the 7/29/2022 IEP revision meeting, the IEP team again discussed Student's AAC device. The 7/29/2022 IEP team discussed that Proloquo will be used since Private Agency uses Proloquo with [REDACTED]. Parent's concern that Private Agency would be taking away Student's AAC device, which is an iPad, was alleviated by the school's acquisition of an AAC device for Student that day and would be available on Monday<sup>16</sup>. (FOF 93). During the 7/29/2022 IEP revision meeting, Parent did not raise any concerns or ask any questions about what "assistive technology," "high technology," or "Model language on AAC Device" meant. DOE cannot be expected to know a parent's concern if a parent does not state it. Parent was afforded the opportunity to ask questions about Student's AAC device during the 5/19/2022 IEP meeting and the 7/29/2022 IEP revision meeting and [REDACTED] questions were answered to [REDACTED] satisfaction. The IEP team was respectful towards each other and there is no evidence that the school members of the IEP team prevented Parent from talking. To the contrary, SPED Teacher was very patient, professional and engaged during the 7/29/2022 IEP revision meeting. See Dept. of Educ., Hawaii v. C.B., Civil No. 11-00576 SOM/RLP, 2012 WL 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 foregoing, the Supplementary Aids and Services proposed to address Student's communication needs, in particular an assistive technology device, is appropriate and the discussion regarding Student's communication needs and [REDACTED] AAC device was appropriate.

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<sup>16</sup> The undersigned takes judicial notice of the fact that July 29, 2022 falls on a Friday.

**3. Whether Parent’s request to discuss the appropriateness of providing Student the services/methodological approach of a Registered Behavior Technician/Applied Behavior Analysis was improperly deferred and/or they were insufficiently described in the 7/29/2022 IEP.**

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In this issue, Petitioners are alleging that DOE denied Student a FAPE when the school members of the IEP team “deferred” Parent’s request to discuss the appropriateness of providing Student with an RBT or ABA services, and that Student should have been provided an RBT in the 7/29/2022 IEP. After reviewing the video recording of the 5/19/2022 IEP meeting and 7/29/2022 IEP revision meeting, the undersigned finds that Petitioners fail to meet their burden.

During the 5/19/2022 IEP meeting, the IEP team discussed providing Student with an adult support “every day for the whole school day.” (FOF 56). During the 5/19/2022 IEP meeting, Parent did not have any questions or concerns about Student being assigned an adult support; and Parent did not request that Student be assigned an RBT or be provided ABA services. (FOF 54, 55, 58).

On July 28, 2022 at 7:10 p.m., Parent sent an email to SSC stating that [REDACTED] was concerned that Student “will not be getting an RBT and [REDACTED] even won’t have an EA or 1:1 assigned to [REDACTED]” and asked DOE to allow Private Agency “to work with us on the transition process, until you have an RBT or 1:1 dedicated for [Student] full-time.” (FOF 85). SSC then responded to Parent’s email stressing that Student will have an adult support, as they had agreed upon at Student’s 5/19/2022 IEP meeting. (FOF 85).

During the 7/29/2022 IEP revision meeting, Parent raised concerns that “it was decided” that Student did not need a “1:1 aide or a RBT full time.” (FOF 95). SSC explained to Parent that Student will be assigned an adult support and that an adult support had always been available to Student for “every IEP that we did every year.” (FOF 95). The school members of the IEP team also explained to Parent the process of getting an RBT assigned to Student. (FOF

95). Parent did not agree with the school members of the IEP team that an adult support was appropriate and maintained that Student needed an RBT. (FOF 95).

Following the 7/29/2022 IEP revision meeting, a letter dated August 3, 2022 was sent to Parent from Principal, stating that since Parent requested ABA/RBT services in the classroom setting during the 7/29/2022 IEP revision meeting, Home School would like to have an SFT meeting to determine if an FBA is warranted. (FOF 106). SSC contacted Parent on August 5, 2022 to set up an SFT meeting. (FOF 106). On August 18, 2022, an SFT meeting was held. (FOF 117). During the 8/18/2022 SFT meeting, LBA recommended that an FBA was not warranted. (FOF 119). An FBA is a pre-requisite to obtaining an RBT. (FOF 118).

First, Parent's request to discuss the appropriateness of providing Student with an RBT was not deferred. Parent raised the issue of having an "RBT or 1:1 dedicated for [Student] full-time" the night before the 7/29/2022 IEP revision meeting. During the course of the 7/29/2022 IEP revision meeting, Parent made clear that [REDACTED] wanted an RBT, not simply a "1:1 aide." The school members of the IEP team explained to Parent the process of obtaining an RBT for Student, and the process was put into motion three (3) business days after the 7/29/2022 IEP revision meeting<sup>17</sup>. In less than one month, an SFT meeting was held to determine if an FBA was warranted. Although the LBA's recommendation was not what Parent wanted, based on the LBA's professional opinion, an FBA was not warranted.

Petitioners did not offer an alternative expert opinion or any expert opinion to refute the appropriateness of the LBA's professional opinion. During the 8/18/2022 SFT meeting, the team was presented with the LBA's recommendation. The IEP team decided to adopt the

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<sup>17</sup> July 29, 2022 was a Friday and the 7/29/2022 IEP revision meeting concluded a little after 4:00 p.m. DOE Ex. 84 at 663; DOE Ex. 86 at 2:21:50-2:22:30.



recommendations of the expert. The undersigned Hearings Officer will not second-guess the LBA's professional opinion (when no contradictory expert opinion exists), nor will the undersigned second-guess the IEP team's provision of special education services. N.S. v. Hawaii, Dept. of Educ., Civil No. 09-00343 SOM/KSC, 2010 WL 2348664, \*5 (D.Haw. June 9, 2010) ("The [REDACTED] conclusion, without more, does not counter the testimony of the experts who reviewed the reports and determined that services were not necessary.")

Plaintiffs presented no data, expert opinion, or other evidence that the IEP's provision...[of special education] was insufficient. The Court will not second-guess the IEP team's provision of special education services, absent contrary evidence. The IDEA relies heavily upon the expertise of school districts to meet its goals and this Court will not substitute its own judgment of sound educational policy for that of the educational authorities. [Citation omitted]. Although Plaintiffs are not satisfied with the DOE's offer of FAPE, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. District of Columbia*, 238 F.Supp.2d 127, 139 (D.D.C.2002) (stating that the IDEA does not provide for an "education...designed according to the parent's desires") (citation omitted).

G.A. v. Hawaii, Dept. of Educ., Civil No. 10-00730 LEK-BMK, 2011 WL 3861431, \*14 (D.Haw. Aug. 31, 2011). Based on the foregoing, Petitioners have failed to meet their burden of proof that the 7/29/2022 IEP team improperly deferred the discussion of the appropriateness of providing Student with an RBT or ABA services. Petitioners also fail to meet their burden in proving that an RBT or ABA services was necessary to meet Student's educational needs.

Furthermore, the undersigned finds Respondents' following argument persuasive: "Petitioners have not presented any evidence to support that Student's behavioral concerns need to be addressed with a Registered Behavior Technician rather than an adult support, especially since [REDACTED] testified that [REDACTED] is not a Registered Behavior Technician and is now implementing the interventions Student received at [Private Agency]. (Vol. I pg. 72-73)." Respondents' Closing Brief, p. 21. See also, Parent, Tr. Vol. I, pp. 81-83. Since Parent is not a trained RBT

but is able to implement the techniques taught to [REDACTED] by Private Agency, this would contradict Petitioners' argument that Student needs an RBT.

Now, addressing some of Petitioners' arguments. First, Petitioners argue that Respondents refused to discuss Parent's request for ABA services by repeatedly telling Parent that there is a policy of collecting data for six (6) weeks before a discussion can be held, but then proceeded to hold a meeting on August 18, 2022 without the six (6) weeks of data collection. Pet. Closing Brief, p. 8. This argument is not persuasive. As Principal stated in [REDACTED] explanation of why the school members of the IEP team could not agree to Parent's request for an RBT during the 7/29/2022 IEP revision meeting, [REDACTED] was providing an explanation that was a "little bit simplified" and that it is "normally based after several weeks, sometimes six to eight weeks of data collection within the school setting." DOE Ex. 84 at 566-567; DOE Ex. 86 at 00:17:43-00:21:50. Principal did not state that they must take six (6) weeks of data, but gave six (6) weeks as an example. Holding the SFT meeting on August 18, 2022 to determine whether an FBA is warranted does not mean that "the DOE reveals that data collection and the process it told parent was required is as flexible as the DOE decides it can be." Pet. Closing Brief, p. 8. DOE needed data within the school setting. In order for data in the school setting to be obtained, Student must attend school, which Student was not doing. (FOF 16). Regardless of how many weeks of data the IEP team wanted or needed, they could not get any data in the school setting because Student was not attending Home School. Therefore, holding the 8/18/2022 SFT meeting is not evidence that DOE improperly deferred discussion on Parent's request for RBT services.

Second, Petitioners' argument that "DOE also knew that Student communicate primarily using sign language. DX-614:17-25, 615:1-8. Yet this is not reflected in [REDACTED] IEP regarding supplemental supports. PX-15." Petitioners' Closing Brief, p. 8. It is unclear what sign

language has to do with RBT and ABA services. While it is true that sign language is not listed in the Supplementary Aids and Services section of the 7/29/2022 IEP, the undersigned will not second-guess the IEP team's provision of special education services, absent contrary evidence. Student is non-verbal and communicates using an AAC device; non-standardized sign language that has been adapted for [REDACTED] use; grabbing a person by the hand to direct that person; screaming; and sounds and gestures. (FOF 5). The various ways that Student communicates is collectively referred to as "modes of communication." DOE Ex. 8 at 126. The 7/29/2022 IEP consistently allows Student to communicate using "[REDACTED] preferred mode of communication." See e.g., DOE Ex. 8 at 134, 135, 137. The undersigned does not find the 7/29/2022 IEP to be substantively deficient because it does not list one of Student's modes of communication in the Supplementary Aids and Services section.

**4. Whether the discussion regarding Placement for the 7/29/2022 IEP was appropriately conducted.**

In this issue, Petitioners are alleging that the discussion about Student's placement was not appropriately conducted on July 29, 2022. After reviewing the video recording of the 5/19/2022 IEP meeting and 7/29/2022 IEP revision meeting, the undersigned finds Petitioners' allegation is without merit.

"Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." 34 C.F.R. § 300.115(a). Pursuant to H.A.R. § 8-60-2, "placement" means an appropriate educational setting for the implementation of the program for a student with a disability based upon the IEP; it does not mean the specific location or school but the type of placement on the continuum of placement options (e.g., regular classroom with support, special class, special school, etc.). In determining the educational placement of a student with a disability, each public

agency must ensure that the placement decision is made in conformity with the LRE provisions. 34 C.F.R. § 300.116(a)(2). The IDEA requires that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled. 34 C.F.R. § 300.114(a)(2)(i). The Ninth Circuit Court in Sacramento City Unified Sch. Dist., Bd. Of Educ. v. Rachel H. articulates a four-factor balancing test for determining compliance with this mainstreaming requirement: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the child with disabilities will have on the teacher and children in the regular class; and (4) the costs of mainstreaming the child with disabilities. Sacramento City Unified Sch. Dist., Bd. Of Educ. v. Rachel H., by and through her guardian ad litem, Robert Holland, et al., 14 F.3d 1398, 1404 (9th Cir.1994).

The IEP team discussed Student's placement during the 5/19/2022 IEP meeting. In addition to displaying a draft IEP on a shared screen during the meeting, SPED Teacher used a chart to explain to Parent what the LRE is and the different settings available to special needs students. SPED Teacher explained that Student would be in the general education setting less than 40% of the school day if ■ were placed in special education. SPED Teacher proposed that Student be placed in special education and Parent agreed. (FOF 61).

During the 7/29/2022 IEP revision meeting, the IEP team again explained to Parent what LRE is and the different settings available to students with special needs: general education, special education, special school, homebound, and hospital. Parent stated that ■ wanted Student in the general education class with an RBT and be pulled out for math and English. The IEP team discussed the demands of a general education class and how Student would be affected being in a general education setting, and how other children would be affected by Student. After a lengthy discussion, Parent told SSC, "Totally get what you're saying, but I just don't – I just

don't agree..." (FOF 97). Therefore, the undersigned is not convinced by Petitioners' argument that the "IEP team never reviewed the Holland Factors when determining Students [sic] placement." Pet. Closing Brief, p. 11. Parent's disagreement with the rest of the IEP team's decision, without more, is not sufficient to show that parental participation was significantly impeded or that the IEP team's decision was incorrect. Laddie C., 2009 WL 855966 at \*4. As such, the undersigned finds that the discussion about Student's placement during the 7/29/2022 IEP revision meeting was conducted appropriately.

**5. Whether the 7/29/2022 IEP describes the Least Restrictive Placement for Student when Student will access non-disabled peers "as appropriate."**

In this issue, Petitioners are arguing that the phrase "as appropriate" in the LRE statement (Item No. 23) in the 7/29/2022 IEP gives DOE the discretion to decide when Student may participate with ■ nondisabled peers, resulting in an LRE statement that is not enforceable for Parent. Pet. Closing Brief, p. 11. Petitioners argue that the 7/29/2022 IEP does not contain parameters for when the "as appropriate" phrase will be triggered, leaving DOE with the sole discretion to decide when Student may participate with ■ nondisabled peers. Petitioners' Opening Statement, Tr. Vol. I, pp. 16-17. Based on the evidence, the undersigned finds that the phrase "as appropriate" does not make the LRE statement not the least restrictive environment or unenforceable.

The 5/19/2022 IEP and 7/29/2022 IEP both contain the same "as appropriate" phrase. Parent was provided a copy of the 5/19/2022 IEP before the 7/29/2022 IEP revision meeting. Although Petitioners' opening statement during the due process hearing states that "[Parent] specifically sent them a set of concerns that ■ had, one of which was that in the least restrictive environment statement they used the word as appropriate, as appropriate," this correspondence is not in evidence. What is in evidence is an email from Parent to SSC on July 28, 2022, stating, "I

also now don't want [REDACTED] in all day special ed class." (FOF 85). There is no evidence that prior to the 7/29/2022 IEP revision meeting that Parent objected to or did not understand the phrase "as appropriate" that was contained in the 5/19/2022 IEP.

During the 7/29/2022 IEP revision meeting, Parent informed the school members of the IEP team that [REDACTED] did not agree with placing Student "in a special education class and only with normal peers as appropriate" and that "[REDACTED] needs to be in a general education class at least 50 percent of the time, not as appropriate." DOE Ex. 84 at 564; DOE Ex. 86 at 00:14:10-00:15:30. As the school members of the IEP team tried to explain to Parent that Student will likely make progress in a special education setting than a general education setting, Parent reiterated that [REDACTED] wanted Student in the general education setting: "Well, as far as, like, general education, I do want [REDACTED] in general education classes, but with an RBT..." (DOE Ex. 84 at 641; DOE Ex. 86 at 1:53:21-1:54:14); "Well, you know, [REDACTED] could be in a general education class and maybe pulled out from math and English. But I still want [REDACTED] to be around non-disabled kids for most of the day"; and "You know, I totally disagree. [REDACTED] could still be in the general education with an RBT and still get what [REDACTED] needs. [REDACTED] can be pulled out for math and English, and that's fine." (DOE Ex. 84 at 642-643; DOE Ex. 86 at 1:55:00-1:57:27). Parent attempted to convince the rest of the IEP team that Student should be placed in a general education setting and not special education setting; Parent did not express that [REDACTED] did not understand what the phrase "as appropriate" meant. "The court [in C.B.] decline[d] 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." Dept. of Educ., Hawaii v. C.B., Civil No. 11-00576 SOM/RLP, 2012 WL 1537454, at \*11 (D.Haw. May 1, 2012). Likewise, in this instant case, the undersigned declines to place upon Home School the burden of recognizing that Parent did not

understand what the phrase meant when Parent did not raise [REDACTED] concerns or lack of understanding.

Now, turning to Petitioners' argument that "a DOE employee stated [while [REDACTED] was testifying] that Parent will be called when Student accesses [REDACTED] non-academic activities with non-disabled peers to see if [REDACTED] wants [REDACTED] to do so...This is not what the IEP states. This is only [REDACTED] testimony, it is nowhere found in the IEP or PWN." Pet. Closing Brief, pp. 9-10. The DOE witness Petitioners are referring to is SSC. Petitioners are correct that this is only SSC's testimony. SSC also testified that [REDACTED] could not speak to the intent of the phrase "as appropriate" because [REDACTED] was not the author of the 7/29/2022 IEP and it is not [REDACTED] position to implement the IEP. SSC, Tr. Vol. III, pp. 293, 295. While SSC testified to what [REDACTED] believed "as appropriate" might mean, [REDACTED] also testified that "I don't even recall that as appropriate being questioned at that meeting, the wording. I don't recall the [REDACTED] questioning it or us bringing it up." SSC, Tr. Vol. III, pp. 295-296. SSC's inartful attempt at explaining the phrase "as appropriate" during cross-examination does not render the LRE statement not the least restrictive placement for Student. In R.E.B. v. Dept. of Educ., the Ninth Circuit Court held that a similar phrase—"as deemed appropriate"—to be acceptable. In R.E.B. v. Dept. of Educ., the IEP states that the student will "receive specialized instruction in the general instruction setting for Science and Social Studies activities as deemed appropriate by [REDACTED] Special Education teacher/Care Coordinator and General Education teacher." R.E.B. v. Dept. of Educ., 770 Fed. Appx. 796, 799 (9th Cir.2019). The Ninth Circuit Court of Appeals held that "[t]his nuanced determination was reasonable because, as part of the Science and Social Studies curriculums, elementary school students often perform experiments, simulations, and field trips—the activities to which the IEP alluded. Given [REDACTED], it was reasonable for the IEP team to conclude that [REDACTED] would be

able to participate successfully with nondisabled peers for some of these activities, but not for others, and that those activities that would be proper for [REDACTED] could not be determined at an IEP meeting months or years before those activities happened.” R.E.B. v. Dept. of Educ., 770 Fed. Appx. 796, 799 (9th Cir.2019). Although Student’s LRE statement does not specify who would make the “as appropriate” determination, the reasoning provided in R.E.B. is still applicable to the instant case. As SPED Teacher testified, since Student had not been in a school setting since 2017, the “as appropriate” language would allow for a slow transition, based on Student’s tolerance, into the various activities and classes<sup>18</sup>. SPED Teacher, Tr. Vol. I, pp. 150-154. Similar to R.E.B., it cannot be determined during the 7/29/2022 IEP revision meeting whether the activities will be proper for Student until [REDACTED] is exposed to them, which could be months after the IEP meeting. Furthermore, allowing Student to participate with [REDACTED] nondisabled peers “as appropriate” is a reasonable condition. Student will be in the [REDACTED] grade, [REDACTED] is non-verbal, has behavioral problems, wears pull-ups, and has not been in a school setting or educated with other students since [REDACTED]. Being in a classroom with other students will be a new experience for Student. There is no historical data to inform DOE personnel of how Student will react in [REDACTED] new environment. Allowing DOE personnel some flexibility to accommodate Student’s reaction to [REDACTED] new environment is reasonable. Therefore, Student was not denied a FAPE when [REDACTED] LRE statement contains the phrase “as appropriate.”

Assuming, however, that the phrase “as appropriate” makes the LRE statement vague because it does not contain parameters, as argued by Petitioners, this alone does not deny Student a FAPE. Pet. Closing Brief, pp. 9-11. When determining whether an inadequate or vague

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<sup>18</sup> Although SPED Teacher was referring to the 5/19/2022 IEP during [REDACTED] testimony, [REDACTED] testimony is relevant to and applies to the 7/29/2022 IEP as the LRE statements in the two IEPs are almost identical.



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

Petitioners fail to establish how the phrase significantly impeded Parent’s opportunity to participate. The record shows that Parent was aware Student would be participating with ■■■ nondisabled peers in certain activities when deemed “as appropriate.” The LRE statement in the 5/19/2022 IEP and 7/29/2022 IEP are similar—both contain the “as appropriate” phrase. Parent was provided a draft copy of the 5/19/2022 IEP before the 5/19/2022 IEP meeting, which ■■■ skimmed. (FOF 51). Parent read the 5/19/2022 IEP for the 7/29/2022 IEP revision meeting. (FOF 91). Parent was an active participant at the 7/29/2022 IEP revision meeting. (FOF 90). Parent, however, did not ask the other IEP team members what the phrase meant. (FOF 99).

And while not alleged by Petitioners, the record does not support that Student missed an educational opportunity or was denied an educational benefit.

Based on the foregoing, Petitioners fail to meet their burden of proof that DOE denied Student a FAPE when the LRE statement contains the phrase “as appropriate.”

**V. DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have not met their burden of proving the issues in the Complaint by a preponderance of the evidence. As Petitioners have failed to prove that DOE denied Student a FAPE, Petitioners’ request for the relief sought in the Complaint, including funding of a private program, reimbursement for parental expenditures, and compensatory education, is 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 issues presented at the due process hearing, in a district court of the United States or a State court of competent jurisdiction, as provided in 20 U.S.C. § 1415 (i)(2) and H.A.R. § 8-60-70(b).

DATED: Honolulu, Hawaii, January 20, 2023.

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