



OFFICE OF DISPUTE RESOLUTION
DEPARTMENT OF THE ATTORNEY GENERAL
STATE OF HAWAII

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

Petitioner(s),

vs.

DEPARTMENT OF EDUCATION, STATE
OF HAWAII,

Respondents.

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

Petitioner(s),

vs.

DEPARTMENT OF EDUCATION, STATE
OF HAWAII,

Respondents.

DOE-SY2122-011

DOE-SY2223-012

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing:
January 19-20, 23-24, 27, 30, 2023
February 2-3, 22-24, 2023
March 23, 30, 2023

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On August 16, 2021, the Department of Education, State of Hawai`i (hereinafter “Respondents” or “DOE”) received a Request for IDEA Impartial Due Process Hearing (hereinafter “Complaint”) dated August 13, 2021, under the Hawai`i Administrative Rules Title 8, Chapter 60, in accordance with the Individuals with Disabilities Education Act, from Student, by and through Parent (hereinafter “Petitioners”).² The Complaint was received by the Office of Dispute Resolution and filed under DOE-SY2122-011. Respondents submitted a response to Petitioners’ Complaint on August 26, 2021.

Between September 2021 and December 2021, status conferences were held with Petitioners, Respondents, and this Hearings Officer regarding how the parties would proceed on Petitioners’ Complaint. Due to the length of Petitioners’ Complaint and the numerous issues alleged in the Complaint, Petitioners were granted leave to amend their Complaint in September 2021. In December 2021, an Order Setting Deadlines for Motion Hearing was issued, which provided a timeline for Petitioners to file any substantive motions and/or their amended complaint. In January and February 2022, these deadlines were adjusted at the request of Petitioners for various reasons. On January 24, 2022, Petitioners filed a Motion for Stay Put and

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a hearing was held on the Motion for Stay Put on February 15, 2022. After review of the Motion for Stay Put and exhibits submitted by Petitioners, the DOE's opposition and exhibits, and Petitioners' reply, this Hearings Officer issued an Order Granting Petitioners' Motion for Stay Put on February 23, 2022.

Petitioners were thereafter granted leave to submit an amended Request for IDEA Impartial Due Process Hearing and it was received by Respondents on May 20, 2022 under DOE-SY2122-011. Respondents filed DOE's Response to Petitioners' Amended Request for IDEA Impartial Due Process Hearing on June 16, 2022.

A prehearing conference in DOE-SY2122-011 was held on July 28, 2022. At the prehearing conference, dates for the Due Process Hearing (hereinafter "Hearing") were set for October 19-25, 2022.

On August 8, 2022, Petitioners filed a Request for IDEA Impartial Due Process Hearing under DOE-SY2223-012, along with a request to consolidate the case with DOE-SY2122-011. A prehearing conference was held on September 12, 2022 for DOE-SY2223-012. At the prehearing conference, the request to consolidate was granted and the dates of the Hearing for both cases were rescheduled to December 5, 6, 7, 9, 12, 14, and 15, 2022, at the request of Petitioners.

At a status conference on December 7, 2022, Petitioners requested to reschedule the due Due Process Hearing dates for the consolidated cases due to medical reasons. Based on a medical doctor's note presented by Petitioners, Respondents did not object to rescheduling the Due Process Hearing. The new Hearing dates were confirmed as follows: January 19-20, 23-24, 27, 30, 2023, and February 2-3, 2023. An extension request was made by Petitioners due to the hearing dates being set after the deadline of January 20, 2023. The extension request by

Petitioners was granted and the deadline for the decision in these consolidated cases was March 6, 2023.

Due to the coronavirus 2019 global pandemic, the parties stipulated to the Hearing being conducted via video conferencing to ensure safety for all the participants in the Hearing. Both parties agreed to the following: a court reporter would participate in the video conference hearing, swear in the witnesses, and transcribe the proceedings; all witnesses were required to participate in the Hearing using both the video and audio functions of the Zoom platform; and witnesses and parties would ensure confidentiality of the proceedings by participating in a private setting.

The Due Process Hearing began on January 19, 2023. Present at the Hearing were Parent, Parent Advocate (hereinafter “Advocate”), and Parent Friend (hereinafter “Friend”), on behalf of Petitioners; District Educational Specialist (hereinafter “DES”) and District Resource Teacher, on behalf of Respondents; this Hearings Officer; and the assigned court reporter. Petitioners called DOE ██████████ Consulting Teacher (hereinafter “DOE ACT”) and ██████████ ██████████ (hereinafter “████████ Specialist”) to testify. ██████████ Specialist’s testimony continued to January 23, 2022. On January 20, 2023, Petitioners called Occupational Therapist Doctorate Level (hereinafter “OT-D”) to testify but OT-D’s testimony was not completed. OT-D’s schedule only allowed OT-D’s testimony to continue onto February 22, 2023, and OT-D’s testimony was completed on that date. On January 20, 2023, Petitioners also called Clinical Psychologist (hereinafter “CP”), whose testimony was also not completed. CP’s testimony continued onto February 23 and 24, 2023. On January 23, 2023, Petitioners called Current Board-Certified Behavior Analyst (hereinafter “Current BCBA”) and Prior Student Services Coordinator (hereinafter “Prior SSC”) to testify and their testimony was completed on that date.

On January 24 and 27, 2023, Petitioners called Caregiver Board-Certified Behavior Analyst (hereinafter “Caregiver”) to testify. On January 27, 2023, Parent also began Parent’s testimony, which continued onto January 30, 2023 and February 2 and 3, 2023.

Due to the testimony of OT-D and CP not being completed until late February, Respondents requested an extension of the deadline from March 6, 2023 to April 20, 2023. This Hearings Officer granted the extension and issued an Order Granting Respondents’ Request to Extend the Decision Deadline on January 25, 2023, which extended the deadline to April 20, 2023.

On February 22, 2023, OT-D’s testimony was completed and on February 24, 2023, CP’s testimony was completed. Petitioners rested their case-in-chief on February 24, 2023.

Respondents noted that Respondents’ witnesses were not available to testify until March 23, 30, and 31, 2023. Respondents submitted another request for an extension of the decision deadline to accommodate Respondents’ witness’ schedules. The Hearing continued on March 23, 2023, where Respondents called Retired District Resource Teacher (hereinafter “Retired DRT”) and Vice Principal (hereinafter “VP”) and their testimony was completed on that date. On March 30, 2023, Respondents called DOE Psychologist, whose testimony was completed on that date. Respondents rested their case and Petitioners did not have any rebuttal evidence to present, so the hearing was completed on March 30, 2023.

Each party submitted their exhibits for the Hearing by the disclosure deadline of January 11, 2023. Both parties were informed that any exhibits that were discussed or mentioned during the proceeding would be received for consideration in the Decision in this case, but that this Hearings Officer would allow the parties to propose additional exhibits after the Hearing was completed.

On April 3, 2023, a list of exhibits that were discussed during the hearing was provided to the parties by this Hearings Officer. Both parties were allowed to propose additional exhibits from their previously disclosed documents that were not discussed at the Hearing to be received as evidence in this matter. The lists of proposed additional exhibits were due on April 14, 2023. Any objections to the proposed exhibits were due on April 19, 2022. Respondents timely submitted their list of additional exhibits to be reviewed as part of the decision in this case.

Respondents requested the following additional exhibits for consideration in the Decision in this case: Respondents' Exhibit 9, pages 12178-12181; Exhibit 9, audio/video recordings titled 2021-9-30 IEP Meeting; 2022-10-19 Team Meeting; and 2022-11-1 Team Meeting.

On April 14, 2023, Petitioners submitted Petitioners' Motion for Admittance of All Petitioners' and Respondents' Exhibits (hereinafter "Petitioners' Motion"), wherein Petitioners' claimed that the numerous audio/video recordings and tens of thousands of pages of documents submitted by both parties are all relevant to the issues in this case. This Hearings Officer denied Petitioners' Motion as to all additional exhibits from Respondents' disclosures that were not previously introduced at the Hearing or requested by Respondents. This Hearings Officer notes that the exhibits submitted by Respondents totaled twelve thousand one hundred eighty-eight (12,188) pages and over one hundred fifty (150) audio/video recordings. The total exhibits submitted by Petitioners totaled five thousand seven hundred seventy-one (5,771) pages and seventy-six (76) audio/video recordings. This Hearings Officer granted Petitioners' Motion as to most of Petitioners' exhibits, with some specific exhibits being excluded as being irrelevant to the issues in this case. An Order Granting in Part and Denying in Part Petitioners' Motion for Admittance of All Petitioners' and Respondents Exhibits was issued on April 20,

2023, outlining the specific reasons why certain exhibits from Petitioners are being excluded.

Petitioners' exhibits submitted in this case were admitted into evidence based on Petitioners' Motion, **except** Petitioners' Exhibit 136, pages 3012-3018; Exhibits 140-146, pages 3069-3174; and Exhibit 178, pages 3514-3522.

Additionally, this Hearings Officer notes that one issue³ raised by Petitioner in the DOE-SY2223-012 Complaint is the DOE's failure to abide by the Order Granting Petitioners' Motion for Stay-Put, issued on February 23, 2022. For the Petitioners' Motion for Stay-Put (hereinafter "Petitioners' Motion"), numerous exhibits were submitted by Petitioners and Respondents in support of their positions on Motion and were all received without objection into the record for purposes of the Motion.⁴ The Order Granting Petitioners' Motion for Stay-Put states that "Student's 'current educational placement' is the special education and related services as provided in the PWN dated August 12, 2021, to be provided by [Recent Clinic] during the pendency of this litigation." Neither Petitioners nor Respondents submitted the Prior Written Notice (hereinafter "PWN"), dated August 12, 2021 with their disclosures, so for clarity of the record, this Hearings Officer is including the PWN from August 12, 2021 on which the stay-put order is based, into the record as Petitioners' Exhibit 287, pages 5773-5774.

On April 24, 2023, a List of Exhibits Received at Due Process Hearing was filed with the final list of exhibits submitted and received by the parties for consideration in this Decision.

Petitioners' exhibits that were received and considered as part of this Decision are as follows: Exhibits 1-135, pages 0001-3011; Exhibits 137-139, pages 3019-3068; Exhibits 147-

³ This issue is under subsection (a) of Issue #5 in the Prehearing Order dated September 13, 2022, which states "DOE failed to comply with the provision of stay-put"

⁴ See Order Granting Petitioners' Motion for Stay Put, filed February 23, 2022.

205, pages 3175-5195; Exhibits 206-278, audio/video recordings of various dates; and Exhibits 279-287, pages 5196-5774.

Respondents' exhibits that were received and considered as part of this Decision are as follows: Exhibit 2, pages 179-180; Exhibit 3, pages 981-983, 1339-1403, 1668, 1670-1693, 1696, 1698-1774, 2022-2081; Exhibit 4, pages 2346-2350, 2363-2373, 2422-2432; Exhibit 6, pages 2781-2782, 2840-2819, 2887-2888, 2894, 2910-2912, 2914, 2942-2943, 2950-2951, 2953, 2973-2982, 3159, 5644-5648, 6088-6147, 6315-6317, 6453-6454, 6457-6503, 6777-6778, 6896, 7048, 7131, 7171-7173, 7204-7206, 7241-7242, 7246-7248, 7319, 7337-7338, 7370-7373, 7411-7412, 7625-7702, 7776, 7885, 8139-8140, 8179-8180, 8194-8227, 8239-8240, 9255-9258, 9365-9369, 9462-9464; Exhibit 8, pages 10197-10199, 10275-10281, 10630-10785; Exhibit 9, pages 10786-10836, 10870-10872, 10909-10918, 12066-12115, 12152, 12178-12181; and Exhibit 9, eight (8) audio/video recordings: 2021-8-10 – IEP Meeting; 2021-8-17 – IEP Meeting; 2021-9-14 – Meeting with RBT; 2021-9-30 – IEP Meeting; 2021-11-17 – IEP Meeting; 2021-12-13 – IEP; 2022-10-19 – Team Meeting; 2022-11-1 – Team Meeting.

Both parties wanted the opportunity to submit written closing briefs regarding the numerous issues with the list of final exhibits and the use of the transcripts of the thirteen (13) day Hearing to prepare their written briefs. Based on the request by the parties for written closing briefs with the use of the transcripts, Respondents requested an extension of the deadline from April 20, 2023 to June 4, 2023. Based on the anticipated timeline for the transcripts to be prepared and to provide the parties ample time to write their closing briefs, Respondents' request to extend the deadline was granted and the Order Granting Respondents' Request to Extend the 45-Day Decision Deadline was issued on March 30, 2023.

Regarding the written closing briefs, Petitioners orally moved to prevent Respondents from arguing the issues that Petitioners believe Respondents did not address in their case-in-chief, however, that motion was denied orally by this Hearings Officer. The deadline for written closing briefs to be submitted by both parties was Monday, May 1, 2023 to allow for the transcripts to be prepared and provided to both parties. Both Petitioners and Respondents timely submitted their briefs on that date.

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

II. JURISDICTION

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

III. ISSUES PRESENTED

Petitioners assert nineteen (19) issues in the Complaint to be addressed at the Hearing that involve the individualized education program (hereinafter “IEP”) meetings between August 20, 2020 and August 10, 2021 (DOE-SY2122-011) and between August 11, 2021 through August 8, 2022 (DOE-SY2223-012), and written IEP(s) developed therefrom.

Procedural violations:

1. Respondents denied Student a free appropriate public education (hereinafter “FAPE”) by failing to timely and appropriately assess Student.
 - a. DOE failed to conduct assessments in all suspected areas of disability.
 - b. DOE failed to adequately or timely assess Student.
 - c. DOE failed to respond to Petitioners’ request for an independent educational evaluation (hereinafter “IEE”).

- d. DOE failed to respond to Student's lack of progress and intervene on Student's behalf.
 - e. DOE failed to reevaluate Student in a timely manner across all areas of need.
 - f. DOE failed to provide informed consent to Petitioners.
 - g. DOE failed to consider all available evaluations and data.
 - h. DOE failed to appropriately assess loss, determine compensatory education, and review of the IEP, including but not limited to, COVID plans as determined by the Hawai'i DOE State office.
2. Respondents denied Student a FAPE by failing to timely and appropriately develop Student's IEP.
 - a. The DOE caused undue delay in developing Student's IEP.
 - b. As a result of Student's IEP delay, the provision of services under stay put has not changed to meet Student's needs.
 - c. DOE failed to offer or provide appropriate intensive, skilled, participants in the development of Student's IEP, nor did they include members with current information about Student.
 - d. DOE failed to include DOE members knowledgeable about Student's unique needs at the IEP meetings.
 - e. DOE predetermined the offer of FAPE.
 - f. DOE failed to understand the severity of Student's needs.
 - g. DOE failed to provide appropriate personnel to participate in the development of Student's IEP.
 - h. DOE allowed untrained personnel to remain of Student's IEP team despite being made aware that the information provided by that member was incorrect and/or did not have the qualifications/experience to appropriately participate on Student's behalf.
 - i. DOE failed to properly facilitate and complete timely IEP meetings on Student's behalf.
3. Respondents denied Student a FAPE by denying Parents meaningful participation in Student's IEP development process.
 - a. DOE limited Petitioners' ability to provide input into the IEP.
 - b. DOE limited input from Student's then-current providers into the IEP.
 - c. DOE failed to allow Petitioners and Student's providers meaningful participation.
 - d. DOE failed to consider information shared in team meetings or respond to concerns regarding Student's needs.
 - e. DOE withheld information from Petitioners throughout the IEP process.
4. Respondents denied Student a FAPE by failing to provide Petitioners with Student's educational records.
 - a. DOE refused to make Student's record available for Petitioners' review and did not provide a list of locations of educational records.
5. Respondents denied Student a FAPE by materially failing to implement Student's IEP.
 - a. DOE failed to comply with the provision of stay-put.
 - b. DOE failed to provide services with the agreed-upon providers.

- c. DOE failed to provide appropriate extended school year (hereinafter “ESY”) services.
- d. DOE failed to deliver specialized speech language services, including but not limited to, what is outlined in the IEP.
- e. DOE failed to provide appropriate assistive technology/augmentative and alternative communication (hereinafter “AAC”) device(s).
- f. DOE refused to provide compensatory services after terminating Student’s related service providers, resulting in an interruption in service provision.
- g. DOE refused and delayed to provide compensatory services after inappropriate and/or interrupted delivery of services documented in the IEP.
- h. DOE failed to provide appropriate and ethical applied behavior analysis (hereinafter “ABA”) services by appropriate staff (a licensed behavior analyst (hereinafter “LBA”) and registered behavior technician (hereinafter “RBT”).
- i. DOE failed to appropriately assess loss, determine compensatory education, and review of the IEP, including but not limited to, COVID plans as determined by the Hawai’i DOE State office.

Substantive violations:

- 6. DOE failed to identify all Student’s needs.
- 7. DOE failed to develop appropriate goals and objectives to address Student’s deficits, including Student’s significant communication and behavioral deficits.
- 8. DOE failed to provide appropriate services and supports to address Student’s deficits.
- 9. DOE failed to identify and address through an appropriate program and services the manifestation of problem behaviors as Student’s disability.
- 10. DOE failed to timely create an appropriate transition plan including, but not limited to, appropriate post-secondary outcomes based on Student’s needs, services, placements, and including appropriate agency linkages.
- 11. DOE failed to appropriately include Student and/or Student’s input in transition to adulthood planning including but not limited to self-advocacy goals and objectives.
- 12. DOE failed to consider the continuum of placements and identify the least restrictive environment for Student.
- 13. DOE failed to offer appropriate ESY services.
- 14. DOE failed to provide Student with appropriate mental health services to address Student’s needs.
- 15. DOE failed to identify Student’s functional communication system and develop appropriate goals and services.
- 16. DOE failed to consider and provide appropriate placement and services.
- 17. DOE failed to provide appropriate and ethical ABA services by appropriate staff (LBA and RBT).

Other issues:

- 18. DOE failed to implement the settlement agreement (dated 10/23/2020) causing further harm to Student’s loss arising under the Complaint in DOE-SY2021-022.
- 19. DOE retaliated against parent in various manners, including but not limited to the removal/refusal of services with no basis, threatening to remove Student from private

placement, accusing private placement of IDEA violation, and forcing Student's return back into a less safe environment during COVID.

Petitioners request the following remedies to address the alleged violations above:

1. Finding that the IEPs violate the IDEA and have not offered FAPE to Student for the 2020-2021 school year, 2021 ESY, 2021-2022 school year, and 2022 ESY.
2. Finding that the DOE committed the procedural and substantive violations of the IDEA as listed above.
3. Finding that the DOE failed to implement the settlement agreement.
4. Continued payment of school tuition, services, and related expenses paid to a private placement for Student.
5. Reimbursement to Petitioners for therapeutic services and other out-of-pocket expenses.
6. Reimbursement for assessments conducted to determine Student's educational needs regarding communication and use of AT/AAC, functional life skills, transition to adulthood, and mental health.
7. Order a complete battery of standardized assessments to be completed.
8. Compensatory education, including a fund to be used beyond Student's twenty-second (22nd) birthday.
9. Reimbursement for all program materials and costs.
10. Referral and inclusion of appropriate agencies to support vocational training and work opportunities.

IV. FINDINGS OF FACT⁵

Witness background

1. DOE ACT is a board-certified behavior analyst licensed in the State of Hawai'i and works for the Hawai'i DOE but also has private clients outside of the Hawai'i DOE. DOE ACT has worked for the Hawai'i DOE for approximately [REDACTED] years, and some of DOE ACT's duties include providing ABA services to eligible students, supervising other professionals such as RBTs, and providing consultation to teachers and other team members or service providers. Testimony of DOE ACT, Transcript of

⁵ This Hearings Officer notes that there were thousands of pages of exhibits and over one hundred (100) hours of recordings were submitted as evidence in this case. While all documents and recordings were reviewed, in addition to the thirteen (13) volumes of transcripts, the findings of fact only include information that was considered relevant by this Hearings Officer in making the decision in this case.

Proceedings, Volume 1, page 12, line 3, through page 13, line 22 (hereinafter referenced as “Tr.V1, 12:3-13:22”), 65:18-66:19; Respondents’ Exhibit 9, page 12152 (hereinafter referenced as “R-Ex.9, p.12152”).

2. [REDACTED] Specialist is a Hawai‘i DOE resource teacher for [REDACTED] [REDACTED] for Home School’s district. [REDACTED] Specialist is [REDACTED] [REDACTED] and provides support for students from preschool to age twenty-one (21) to help team members understand the needs of a student based on each student’s [REDACTED] [REDACTED], communication styles, and current supports. Testimony of [REDACTED] Specialist, Tr.V1, 83:17-84:25.
3. OT-D is a licensed occupational therapist in Hawai‘i who has earned a post-educational doctorate degree in occupational therapy. OT-D is also a board-certified behavior analyst that is licensed in the State of Hawai‘i. OT-D is currently in a post-doctorate program in educational psychology. Testimony of OT-D, Tr.V2, 152:15-153:8, 155:10-24; P-Ex.65, p.1210.
4. OT-D has experience in the field of ABA and has extensive experience working with children with disabilities, particularly with [REDACTED] (hereinafter “[REDACTED]”), and has been hired as a consultant across the United States, Canada, and the United Kingdom. OT-D was qualified as an expert witness in the areas of ABA and occupational therapy. Testimony of OT-D, Tr.V2, 153:12-156:9.
5. One area of OT-D’s expertise is in teaching functional communication, including sign language. OT-D’s training and experience in ABA and occupational therapy has helped OT-D understand the fine motor aspects of sign language and how to remediate those in learners with motor deficits. Testimony of OT-D, Tr.V2, 157:10-

- 21.
6. CP is a self-employed clinical neuropsychologist who has been licensed in the State of Hawai'i since 2019. Between March 2019 and August 2021, CP worked for the DOE as a clinical psychologist. CP has a bachelor's of science degree in psychology, a master's of science degree in clinical psychology, and a doctorate in clinical psychology. Testimony of CP, Tr.V2, 286:12-287:15; P-Ex.64, p.1207.
 7. As a clinical psychologist with the DOE, CP worked with schools and school teams and participated in various meetings involving students with disabilities. CP also conducted assessments with students related to CP's neuropsychological background. Testimony of CP, Tr.V2, 288:16-289:3.
 8. CP was qualified as an expert witness in the area of clinical psychology with a specialty in neuropsychology and neurodivergent abilities, as well as in the area of neuropsychological assessments for developmental conditions encompassing [REDACTED], [REDACTED], and [REDACTED]. Testimony of CP, Tr.V2, 291:14-292:23.
 9. Current BCBA is a board-certified behavior analyst and speech-language pathologist, licensed in the State of Hawai'i under both professions. Current BCBA has a bachelor's of science degree in business administration, a master's of science in communicative sciences and disorders, and a certification as a board-certified behavior analyst. Testimony of Current BCBA, Tr.V3, 301:13-302:5; P-Ex.200, p.4771-4774.
 10. Current BCBA is self-employed and has a business that provides clinic-based ABA services and speech-language pathology services to children from preschool to middle

- school. Current BCBA's company has contracts with the DOE to provide consultation for other DOE students, as well as services for Student. Testimony of Current BCBA, Tr.V3, 302:8-14.
11. Current BCBA used to work for the DOE as a speech-language pathologist from 2009 through 2012. During the last year at the DOE, Current BCBA was asked to be a consultant for speech-language and also for ABA and verbal behavior programs. Testimony of Current BCBA, Tr.V3, 308:7-309:12; P-Ex. 200, p.4773.
 12. Current BCBA was qualified as an expert witness in the areas of ABA and speech-language pathology with a specialty in curriculum design and program design. Testimony of Current BCBA, Tr.V3, 315:6-318:3.
 13. Caregiver is a board-certified behavior analyst who is licensed in the State of Hawai'i. Caregiver has a master's degree in special education and has experience working as an RBT for over [REDACTED] years and a special education teacher for [REDACTED] school year in the State of Hawai'i. Testimony of Caregiver, Tr.V4, 427:16-430:9; P-Ex.200, p.4775.
 14. Caregiver was qualified as an expert witness in ABA and special education. Testimony of Caregiver, Tr.V4, 430:15-23.

Background information

15. ABA is the study of behavior based on B.F. Skinner's studies and analysis of behavior. Testimony of Current BCBA, Tr.V3, 305:20-306:23.
16. One area of use of ABA is through discrete trial training, which is sometimes used in ABA clinics to influence a patient's behaviors. Testimony of Current BCBA, Tr.V3, 306:2-20.

17. Verbal behavior is also a field of ABA based off the behavioral theory of language and how language is classified based on certain operants. For example, classifications in verbal behavior include “mand,” which is defined as making a request; and “tact,” which is defined as labeling something. Testimony of Current BCBA, Tr.V3, 309:23-310:25; Testimony of Caregiver, Tr.V4, 434:7-23.
18. Functional communication under the purview of ABA is where a communication is specifically made for a purpose and the communication is reinforced for that purpose. Some children with disabilities, like Student, need consistent and immediate reinforcement of functional communication or they will not learn to associate that communication with its purpose. Testimony of Current BCBA, Tr.V3, 329:4-330:18.
19. Functional communication is also a replacement behavior for problem behavior in that behavior analysts often try to replace a problem behavior by teaching a client to communicate concerns or needs instead of doing the problem behavior to get the same result. Testimony of Caregiver, Tr.V4, 435:14-25.
20. Functional communication under speech-language pathology focuses on the ability to communicate with another person. The difference between functional communication under ABA and speech-language pathology is akin to the “why” or purpose of the communication versus the “how” or method of communication with another. Testimony of Current BCBA, Tr.V3, 330:19-331:9.
21. A behavior intervention plan (hereinafter “BIP”) is a tool used by behavior analysts to identify a target problem behavior and the hypothesized function of the behavior; to determine different strategies to modify the environment around a client to avoid the behavior; to implement replacement behaviors; to provide consequence strategies to

eliminate the target problem behavior; and to provide measurements for collecting data on the behavior. Testimony of Caregiver, Tr.V4, 444:5-445:23.

22. Treatment drift is when a service provider or staff member is not implementing a treatment plan the way it's designed, which creates competing expectations or contingencies. This inconsistent implementation of a treatment plan often leads to problem behaviors. In conformity with the scientific nature of ABA, treatment plans are to be implemented the way they are intended to ensure the effectiveness of the program. Testimony of Caregiver, Tr.V3, 513:8-515:22.
23. The DOE model of ABA practice in public schools differs from DOE-funded practice in a clinical setting. In the DOE model, the ABA strategies are used primarily for behavior reduction and teaching skills is left to the special education or general education teachers. In a clinical setting, ABA is used to provide teaching of new skills as well as behavior reduction practices in reducing problem behaviors and increasing replacement skills. Testimony of Caregiver, Tr.V5, 567:14-568:8, 616:11-24.
24. In the State of Hawai'i, only certified or licensed ABA practitioners can provide ABA services to clients. For example, while teachers can use some ABA-based practices in teaching their classes, only a licensed board-certified behavior analyst can develop an ABA program (i.e., a BIP) for a student. Testimony of Caregiver, Tr.V5, 624:11-625:21; *see also* Hawai'i Revised Statutes (hereinafter "H.R.S.") Section 465D-4.

Prior Due Process Proceeding in DOE-SY2021-022

25. On or about August 17, 2020, Respondents received a Request for IDEA Impartial Due Process Hearing in DOE-SY2021-022 from Petitioners, that was dated August

- 14, 2020. P-Ex.66, p.1214-1232.
26. In October 2020, the parties reached a settlement agreement prior to the case proceeding to an administrative hearing. The settlement agreement was executed by Parent on October 13, 2020; VP on October 14, 2020; and DES on October 23, 2020 (hereinafter referenced as “SA-10/23/2020”). Testimony of Parent, Tr.V6, 738:15-20; P-Ex.68, p.1241-1243.
27. The terms of the SA-10/23/2020 settled “any and all claims arising out of or connected to the student’s education raised in Petitioner’s request for an impartial due process hearing in DOE-SY2021-022 submitted on or about August 14, 2020.” P-Ex.68, p.1241.
28. The SA-10/23/2020 placed Student at Recent Clinic for the 2020-2021 school year including ESY, where the DOE would be responsible for payment of Student’s placement at Recent Clinic. The SA-10/23/2020 stated that the parties will develop an IEP for Student on or before August 13, 2021. P-Ex.68, p.1241.
29. The SA-10/23/2020 stated that the DOE would conduct an AAC evaluation by Hospital to be completed within sixty (60) days following the execution of the agreement. P-Ex.68, p.1241.
30. The SA-10/23/2020 also noted that at the time of the agreement, Student had not been provided two hundred seventy (270) hours of speech services from February 2018 through August 2020 and that in lieu of the missed hours, the DOE would provide consultation by a board-certified behavior analyst that is also a certified speech-language pathologist for two hundred twenty (220) hours over twelve (12) months starting from the date of the contract with the chosen professional. P-Ex.68, p.1241-

1242.

31. The SA-10/23/2020 also noted that speech-language therapy service in the amount of fifty (50) missed hours to be provided by a private, licensed, certified speech-language pathologist would be banked for use as determined by the designated speech-language pathologist, board-certified behavior analyst, and the IEP team. The speech-language service was to be provided in the context of Student's ABA program with an RBT to maintain Student's communication, motivation, and BIP. Testimony of Parent, Tr.V6, 738:21-739:10; P-Ex.68, p.1242.

32. The SA-10/23/2020 also indicated that Student had one hundred twenty (120) hours of missed LBA services and six hundred forty (640) hours of missed non-school service by an RBT. The SA-10/23/2020 provided consultation and direction of an RBT by a board-certified behavior analyst who was also certified as an occupational therapist, for one hundred fifty (150) hours, that would exist as a bank for the board-certified behavior analyst /occupational therapist to draw from. Three hundred (300) hours of missed non-school services was also provided as banked and tracked as they are used. P-Ex.68, p.1242.

33. The SA-10/23/2020 stated "For the purposes of this settlement agreement, stay put/placement is at [Recent Clinic]." P-Ex.68, p.1243.

Student's background

34. Student is [REDACTED] years old and has been diagnosed with [REDACTED] since age [REDACTED]. Student has also had diagnoses of [REDACTED]. [REDACTED] Testimony of Parent, Tr.V5, 652:21-653:16; P-Ex.30, p.585; P-Ex.82, p.1505-1529.

35. Student's original diagnosis at age [REDACTED] noted that as a result of Student's [REDACTED] and cognitive delays, Student displays substantial [REDACTED], marked by significant deficits in social initiation and response, nonverbal communication, social imitation, imaginative play, and interest in peers. P-Ex.82, p.1520.
36. Student also has medical issues that can affect Student's daily living and are being addressed by Student's medical doctors. P-Ex.30, p.585.
37. Student lives with Parent, Student's other parent, and younger sibling. Parent is Student's primary caregiver, but Student's other parent and younger sibling can communicate with Student and assist Parent when they are able. Student's older sibling and grandparent can also communicate with Student and assist in providing care to Student. Testimony of Parent, Tr.V5, 646:20-648:2, 656:9-659:6.
38. Student is eligible for special education and related services under the IDEA category of [REDACTED] P-Ex.30, p.585.
39. From around January 2012 through September 2018, Student was receiving all-day instruction at Previous Clinic. While at Previous Clinic, Student was able to make substantial progress in learning to mand⁶, tact⁷, read, and respond as a listener, in several areas of communication. Testimony of Caregiver, Tr.V4, 449:9-454:25, 454:4-458:2; P-Ex.81, p.1459-1464.
40. The ability to communicate reduced Student's problem behaviors due to Student being able to communicate wants and needs to those interacting with Student.

⁶ Mand is a term used to refer to language for requests. Testimony of Caregiver, Tr.V4, 449:11-452:12.

⁷ Tact is a term used to label things or objects in the environment. Testimony of Caregiver, Tr.V4, 452:15-23.

Testimony of Caregiver, Tr.V4, 451:19-24.

41. Student also worked at Previous Clinic on putting away Student's iPad when it was time to do work, setting up the iPad for use, preparing cereal and eggs, washing dishes, and participating in vocational skills. Testimony of Caregiver, Tr.V4, 461:7-465:23; P-Ex.81, p.1467-1472.
42. The model of teaching Student's program at Previous Clinic, which was described as careful and systematic use of ABA procedures for about forty (40) to forty-five (45) hours a week in a combination of center-based and home programming, was effective for development of Student's functional life skills. Testimony of Caregiver, Tr.V4, 493:4-494:1.
43. Student attended Previous Clinic until around January 2019, after which Student began attending Recent Clinic. *See* P-Ex.50, p.951-952.
44. Recent Clinic conducted an Essential for Living (hereinafter "EFL") Quick Assessment, which reviewed Student's abilities in the areas of making requests, waiting, accepting removal of items and making transitions, completing previously acquired tasks, accepting "no," following directions related to health and safety, completing daily living skills related to health and safety, and tolerating situations that are required for health and safety. P-Ex.50, p.953.
45. In a June 2019 report completed by Recent Clinic Prior Board-Certified Behavior Analyst (hereinafter "Recent Clinic Prior BCBA"), Recent Clinic BCBA noted that Student still needed to achieve mastery on many of the EFL Quick Assessment and had laid out several goals and objectives, as well as programming strategies to help Student attain many of the skills and expand to different environments for use of the

- skills. P-Ex.50, p.953-971.
46. Recent Clinic Prior BCBA recommended that Student receive an ABA treatment program for the entirety of Student's school day/week, to be developed by a board-certified behavior analyst and implemented by an RBT. Recent Clinic Prior BCBA's recommendation was also that an 'eclectic' program that combined many different strategies was not recommended for Student. P-Ex.50, p.971.
47. Student's program was transferred to Home School in the 2019-2020 school year. P-Ex.50, p.951; P-Ex.51, p.979.
48. In Student's progress report from Recent Clinic from December 2019, Student had demonstrated mastery in several goals and objectives that were implemented in June 2019. Many new goals and objectives were also introduced into Student's program based on Student's acquisition of skills. *See* P-Ex.51, p.988, 990, 991, 993, 995-996.
49. In March 2020, the COVID-19 global pandemic disrupted the normal routines of people everywhere, and Student's program under Student's IEP was also affected. Testimony of Parent, Tr.V5, 709:16-23; *see* P-Ex.52, p.1002.
50. Despite the changes in Student's program, Student was still able to make progress in Student's skills in the EFL and the goals and objectives in Student's Recent Clinic program. New goals and objectives were also introduced into Student's program. *See* P-Ex.52, p.1006-1009, 1012-1022.
51. In November 2020, June 2021, November 2021, and June 2022, Recent Clinic provided progress reports on Student's program at Recent Clinic. All progress reports of Student's services at Recent Clinic indicated that Student continued to

- make progress on the goals and objectives set out in Student's plan at Recent Clinic. New goals and objectives continued to be added to continue Student's skill attainment.⁸ *See* P-Ex.56, p.1041-1076; P-Ex.57, p.1077-1112; P-Ex.58, p.1113-1146; P-Ex.60, p.1150-1178.
52. In the June 2022 progress report from Recent Clinic, it was noted that several changes were made to Student's goals and objectives based on the EFL assessment conducted by OT-D in November 2021. P-Ex.60, p.1152-1165.
53. Recent Clinic also maintained a BIP to address Student's problem behaviors. This BIP was updated regularly from April 2019 through May 2022. *See* P-Ex.53, p.1027-1028; P-Ex.54, p.1029-1030; P-Ex.59, p.1147-1149.
54. Student's problem behaviors included self-injury, which included head banging, pinching self, slapping self, flopping; aggression, which included head-butting, pinching, grabbing, scratching, biting; and tantrum, which included verbal protests, contact to self, contact to others, and headbanging. P-Ex.55, p.1029-1040.
55. On August 12, 2022, Recent Clinic notified Parent and the DOE that Student was going to be discharged from Recent Clinic's program due to a lack of appropriate providers for Student's program on September 12, 2022. Testimony of Parent, Tr.V8, 1078:11-1079:21; P-Ex.61, p.1179.
56. Recent Clinic provided an updated list of goals and objectives, along with the status of Student's progress on each goal or objective in September 2022, along with

⁸ This Hearings Officer notes that several goals and objectives in Student's Recent Clinic program were put on hold due to mandates involving COVID-19, such as goals involving Student eating, and other goals were put on hold to work on prerequisite skills that Student needed before working on the goal on hold. *See* P-Ex.56, p.1056-1058; P-Ex.57, p.1091-1092.

Student's updated BIP and a list of instructional strategies for implementing Student's program. P-Ex.62, p.1180-1206.

IEP meetings from August 2020 through August 2022

57. On August 13, 2020, an IEP meeting was held and what appeared to be an annual IEP was completed for Student. The IEP from the August 13, 2020 meeting noted that the IEP annual review date was August 13, 2021. P-Ex.21, p.312-371.
58. Between August 13, 2020 and August 13, 2021, at least⁹ four (4) IEP revisions were completed over the course of many meetings of Student's IEP team. Parent was present at all meetings involving Student's IEP development. *See e.g.* P-Ex.24, p.377-443; P-Ex.26, p.447-512; P-Ex.28, p.514-579; P-Ex.30, p.582-646.
59. Parent was present at each of the IEP meetings that took place in developing the four (4) IEP revisions, including the March 31, 2021 IEP (hereinafter "IEP-03/31/2021"). Each meeting, except for the December 18, 2020 meeting was at least two (2) hours long. The meeting on December 18, 2020 was over one (1) hour long. P-Ex.24, p.441-443; P-Ex.26, p.512; P-Ex.28, p.579; P-Ex.30, p.646; *see also* P-Ex.217-219; P-Ex.221; P-Ex.223; P-Ex.233.
60. Between August 2020 and August 2021, the IEP team members scheduled meetings for other reasons, i.e., peer review meetings, eligibility meetings, and others. The meetings between August 2020 and August 2021 were held virtually and most were recorded. *See e.g.*, P-Ex.208-233.
61. From October 2020, Student received services from Recent Clinic under the settlement agreement between the parties. The SA-10/23/2020 referenced the speech-

⁹ This number of IEP revisions is based upon the evidence submitted at the Hearing.

- language therapy minutes, the ABA service minutes, and the Individual Instructional Support (hereinafter “IIS”) minutes in the August 13, 2020 IEP. P-Ex.68, p.1241-1242.
62. The August 13, 2020 IEP provided Student with five hundred forty (540) minutes per quarter of physical therapy; one thousand eighty (1080) minutes per quarter of occupational therapy; one thousand six hundred twenty (1620) minutes of speech-language therapy per quarter; two thousand eight hundred eighty (2880) minutes per week of special education; and transportation twice daily. P-Ex.21, p.365.
63. The August 13, 2020 IEP also provided Student with five hundred seventy (570) minutes per week of ABA services, three thousand one hundred eighty (3180) minutes per week of IIS, parent education and training, progress monitoring (including peer review meetings, quarterly monitoring by a DOE clinical psychologist, and annual summative reports). P-Ex.21, p.365.
64. The November 23, 2020 IEP revision reduced the number of speech-language therapy minutes for Student to one thousand eighty (1080) minutes per quarter. All other service and special education minutes, as well as supplementary aids and supports like ABA services, IIS, parent education and training, and progress monitoring remained the same. P-Ex.24, p.435.
65. The two (2) December 2020 revisions and the March 31, 2021 revision kept the same number of service minutes and supplementary aids and supports as the November 23, 2020 revision. P-Ex.30, p.639-640.
66. In May 2021, the IEP team met to determine whether a reevaluation would be necessary to develop Student’s IEP by the August 2021 deadline specified in the SA-

10/23/2020. The team, which included Student's related service providers, Parent, and Student's providers from Recent Clinic, determined that observations in the areas of communication, fine, and gross motor skills would be done for the reevaluation.

Testimony of Parent, Tr.V6, 826:4-18; P-Ex.32, p.650.

67. In July 2021, a reevaluation was done with Student. As part of the reevaluation, a speech-language therapy assessment was done, along with observations by DOE Psychologist, Occupational Therapist (hereinafter "OT"), [REDACTED] Specialist, and Current Physical Therapist (hereinafter "Current PT"). P-Ex.34, p.655-660; P-Ex.109, p.1683-1708; P-Ex.110, p.1709-1710; P-Ex.111, p.1711-1726; P-Ex.113, p.1730-1734; P-Ex.115, p.1738-1748.

68. In August 2021, the IEP team agreed that since the team was still working on developing a new annual IEP for Student, the IEP developed at a March 31, 2021 meeting (hereinafter "IEP-03/31/2021") would be implemented until the new IEP was completed. This agreement was noted in a PWN dated August 12, 2021 (hereinafter "PWN-08/12/2021"). P-Ex.287, p.5773.

69. A series of meetings were held beginning in April 2021 through September 2021 to develop Student's annual IEP. Parent was present at all the meetings that were listed on the IEP document, dated September 30, 2021 (hereinafter "IEP-09/30/2021"). P-Ex.36, p.667-741.

70. At the September 30, 2021 IEP meeting, the team discussed moving Student's placement. At the time of the meeting, Student had been placed "homebound" due to medical concerns related to the COVID-19 pandemic. Parent had informed the team that Student was medically cleared to return to school at Recent Clinic. R-Ex.9,

video recording dated 09/30/2021 approximate time stamp [3:48-1:48:11] (hereinafter referenced as “R-Ex.9, 09/30/2021 video [3:48-1:48:11]”).

71. The IEP team, during the September 30, 2021 meeting, had agreed to revise the placement from the IEP-03/31/2021 while additional assessments were being completed for Student. The plan was to revise the placement so Student would no longer be homebound but wait to revise the IEP until all assessments were completed. R-Ex.9, 09/30/2021 video [13:25-16:00].
72. During the discussion of Student’s placement, or least restrictive environment (hereinafter “LRE”), Parent and Recent Clinic BCBA expressed concerns with the level of intensity that Student would receive in a program at a public-school campus. R-Ex.9, 09/30/2021 video [19:30-1:27:43].
73. The IEP team discussed several placements for Student and narrowed the discussion to a public-school special education classroom and a private separate facility like Recent Clinic. R-Ex.9, 09/30/2021 video [16:00-1:09:22].
74. A question of the role of the special education teacher versus the assigned board-certified behavior analyst in the classroom was raised by Recent Clinic BCBA. Recent Clinic BCBA informed the team that at Recent Clinic, Student’s entire educational program was developed by a board-certified behavior analyst. Retired DRT explained to the team that the special education teacher was responsible for developing Student’s curriculum and that the board-certified behavior analyst would be focusing on Student’s problem behaviors. R-Ex.9, 09/30/2021 video [19:30-30:10].
75. After each team member provided their input as to which environment they believed

the IEP-03/31/2021 could be implemented, the majority of the team members believed that Student's IEP-03/31/2021 could be implemented at either the public-school special education classroom or Recent Clinic. Parent, OT-D, and Recent Clinic BCBA did not agree that Student's IEP-03/31/2021 could be implemented at a public-school special education classroom. R-Ex.9, 09/30/2021 video [1:09:22-1:39:53].

76. Several team members, including DOE Psychologist and VP, noted that while they believed that Student's IEP could be implemented at the public-school special education classroom, the transition from home to the public-school special education classroom might be difficult to Student. At the end of the meeting, VP informed Parent that the DOE's offer for Student's educational placement or LRE would be Home School's special education classroom, however Student would transition from homebound to Recent Clinic first and then the team would begin to transition Student from Recent Clinic to Home School. Parent disagreed with the DOE's offer for Student's educational placement/LRE. R-Ex.9, 09/30/2021 video [1:40:18-1:48:11].
77. At the end of the September 30, 2021 IEP meeting, it was clear that the IEP team agreed that Student should not move directly from the home setting to Home School and that Student's needs would best be met by having Student return to Recent Clinic and once Student was ready to transition, the team would make a plan for Student to transition from Recent Clinic to Home School. No timeline was discussed for the transitions to occur. R-Ex.9, 09/30/2021 video [1:50:32-1:53:58].
78. The resulting IEP-09/30/2021 does not reference Student transitioning from home to Recent Clinic and then to Home School. The IEP-09/30/2021 educational placement

statement reads as follows: “(Addendum IEP Revision 9/30/2021) [Student] will not participate with [Student’s] non-disabled peers for all classes and activities. [Student] will participate in all classes and activities on a public school campus in a special education setting. ... [Student] will not participate with [Student’s] non-disabled peers for all classes and activities.” P-Ex.36, p.731.

79. In the IEP-09/30/2021, Student’s physical therapy, occupational therapy, speech-language, and special education minutes remained the same as the IEP-03/31/2021. The daily transportation, ABA services and IIS minutes also remained the same as the IEP-03/31/2021.
80. The PWN that was sent to Parent regarding the IEP-09/30/2021 also does not explain that Student would be transferred from the home setting to Recent Clinic to Home School. The PWN, dated October 7, 2021 (hereinafter “PWN-10/07/2021”) states that “[Student’s] Least Restrictive Environment (LRE) is the Special Education Setting on a public school campus. A transition plan will be collaboratively discussed and planned by Parent, current ABA Provider ([Recent Clinic]), and the Department of Education (DOE) through ongoing meetings.” P-Ex.37, p.742.

IEP meetings leading up to the February 2022 IEP

81. The IEP team began meetings in April 2021 to develop Student’s annual IEP before the August 13, 2021 deadline set forth in the SA-10/23/2020. These meetings resulted in a few revisions of the IEP-03/31/2021, including the IEP-09/30/2021. The new IEP that the IEP team was developing for Student was not completed until February 10, 2022. *See* P-Ex.38, p.744.
82. After the September 30, 2021 IEP meeting, the IEP team decided to change Student’s

- goals and objectives, as well as the present levels of educational performance (hereinafter “PLEPs”) section of Student’s IEP to align with the results of an EFL assessment that was conducted with Student by OT-D in October 2021. *See* P-Ex.255, video recording dated 11/17/2021 (hereinafter referenced as “P-Ex.255, 11/17/2021 video”).
83. These meetings took place on November 17, 2021, December 1, 2021, December 13, 2021, January 13, 2022, January 20, 2022, January 21, 2022, January 27, 2022, January 28, 2022, and February 10, 2022. P-Ex.38, p.744.
84. In the November 17, 2021 meeting, the IEP team reviewed Student’s goals and objectives under the previous IEP-09/30/2021 and compared them with the recommended goals and objectives from OT-D based on the EFL assessment. *See* P-Ex.255, 11/17/2021 video.
85. The review of the EFL assessment and the revision of Student’s PLEPs, goals, and objectives continued through IEP meetings on December 1, 2021, December 13, 2021, January 13, 2022, January 20, 2022, and January 21, 2022. *See* P-Ex.256, video recording dated 12/1/2021 (hereinafter referenced as “P-Ex.256, 12/1/2021 video”); R-Ex.9, video recording dated 12/13/2021 (hereinafter referenced as R-Ex.9, 12/13/2021 video”); P-Ex.258, video recording dated 1/13/2022 (hereinafter referenced as “P-Ex.258, 1/13/2022 video”); P-Ex.259, video recording dated 1/20/2022 (hereinafter referenced as “P-Ex. 259, 1/20/2022 video”); P-Ex.260, video recording dated 1/21/2022 (hereinafter referenced as “P-Ex.250, 1/21/2022 video”).
86. Throughout the meetings from November 17, 2021 through January 13, 2022, the IEP team had very thorough discussions regarding the revision of the goals and objectives

in Student's new IEP. Parent and the advocate that accompanied Parent were both allowed to provide input and ask questions or for clarifications. The service providers also provided input and clarifications regarding the goals and objectives. *See e.g.*, P-Ex.256, 12/1/2021 video; R-Ex.9, 12/13/2021 video; P-Ex.258, 1/13/2022 video; P-Ex. 259, 1/20/2022 video; P-Ex.250, 1/21/2022 video.

87. At the December 13, 2021 IEP meeting, the IEP team reviewed the revised PLEPs that had been drafted at the previous meeting. The team also briefly discussed the incomplete communication profile that was supposed to be completed by Speech-Language Consultant (hereinafter "SLP Consultant"). Rather than making plans to complete the communication for Student, the IEP team deleted the item from Student's IEP's PLEPs. R-Ex.9, 12/13/2021 video [00:47-30:00].

88. Parent requested that the IEP team have a more thorough discussion of Student's PLEPs, including discussing Student's learning styles and assessments done by previous psychologists, which had been taken out of Student's new IEP. VP denied Parent's request to discuss Student's PLEPs, noting that they had already discussed them. R-Ex.9, 12/13/2021 video [38:39-52:10].

89. Thereafter, the team went through each revised goal and objective to get Recent Clinic BCBA's opinion on whether the goal and objective was consistent with Student's abilities and what they were working on with Student. R-Ex.9, 12/13/2021 video [52:10-1:28:59].

90. At the end of the December 13, 2021 IEP meeting, the IEP team began to discuss Student's special education and related services. Parent and the advocate that accompanied Parent to the IEP meeting both objected to the procedure being followed

- by the IEP team of not re-discussing the PLEPs since the team had revised the PLEPs and goals and objectives. R-Ex.9, 12/13/2021 video [1:41:39-2:00:07].
91. During these revision meetings from November 2021 through January 2022, the IEP team completely revised Student's goals and objectives, reducing the number of goals from twenty-four (24) to thirteen (13), based on the EFL results that noted that Student was lacking in several areas of basic needs for functional life skills. Compare P-Ex.36, p.699-724 and P-Ex.38, p.764-776.
92. At the January 21, 2022 meeting, the IEP team began discussing Student's eligibility for ESY, special education and related services, and supplementary aids and supports to be provided to Student in the new IEP. P-Ex.260, 1/21/2022 video [1:34:00-2:45:40].
93. Based on the revision of the goals and objectives in the new IEP, Care Coordinator (hereinafter "CC") proposed that Student's special education minutes be set at one thousand (1000) minutes per week. CC's justification for this reduction in minutes was based on the ability of a special education teacher to create a curriculum for Student to work on during the school day. CC noted that in a special education classroom, the special education teacher would also be working with other students on their curriculum in the classroom. Testimony of Parent, Tr.V7, 916:9-15; P-Ex.260, 1/21/2022 video [1:58:14-2:04:55].
94. VP noted to the IEP team that the previous minutes (two thousand eight hundred eighty (2880)) was based on the information from Recent Clinic that they used for Student's entire school day. P-Ex.260, 1/21/2022 video [2:04:55-2:07:40].
95. OT recommended a reduction in minutes for Student's occupational therapy for the

- reduced number of goals in the new IEP and suggested ninety (90) minutes per week or eight hundred ten (810) minutes per quarter. P-Ex.260, 1/21/2022 video [2:18:56-2:20:37].
96. 2022 Speech-Language Pathologist (hereinafter “2022 SLP”) informed the team that since Student had no goals and objectives regarding a speech-generating device (hereinafter “SGD”), that Student’s speech-language therapy service minutes should be reduced to four hundred fifty (450) minutes per quarter or fifty (50) minutes per week. P-Ex.260, 1/21/2022 video [2:22:25-2:24:22].
97. The IEP team did not finalize any of the discussions for the special education and related services, ESY, and supplemental aids and supports at the January 21, 2022 IEP meeting and the discussions were continued to January 27, 2022. P-Ex.260, 1/21/2022 video [2:45:40-2:47:40].
98. At the January 27, 2022 IEP meeting, the team continued the discussion regarding Student’s special education services and ESY. Recent Clinic BCBA provided information regarding ESY data and information to the team and Student was determined to be eligible for ESY. P-Ex.261, video recording dated 1/27/2022 approximate time stamp [4:50-18:28] (hereinafter referenced as “P-Ex.261, 1/27/2022 video [4:50-18:28]”).
99. Current PT noted during this meeting that since Student only had one (1) physical therapy goal, the recommended physical therapy service time would be two hundred seventy (270) minutes per quarter. P-Ex.261, 1/27/2022 video [35:16-38:00].
100. The IEP team then discussed Student’s special education service hours and the distinction between ‘school hours’ and ‘non-school hours.’ No one could explain

why the special education service hours were written in that manner and the team continued discussing the recommended one thousand (1000) minutes per week. P-Ex.261, 1/27/2022 video [40:50-1:03:06].

101. Recent Clinic BCBA provided input to the IEP team that Student needed more than one thousand (1000) minutes per week of special education because Student's program needed to be based on an intensive training model in order for Student to learn the skills Student needed. Testimony of Parent, Tr.V7, 919:11-19; P-Ex.261, 1/27/2022 video [1:11:23-1:34:00].
102. At the February 10, 2022 IEP meeting, the IEP began by discussing Student's ESY special education, related services, and supplementary aids and supports. P-Ex.262, video recording dated 2/10/2022, approximate time stamp [1:55-41:00] (hereinafter referenced as "P-Ex.262, 2/10/2022 video [1:55-41:00]).
103. The IEP team did not continue discussions on Student's reduced special education, occupational therapy, speech-language therapy, or physical therapy service minutes. Parent and Recent Clinic BCBA maintained their objections to the reduced number of minutes, particularly in special education, because of the information from Recent Clinic BCBA that Student needed an intensive, all-day special education program. Testimony of Parent, Tr.V7, 919:11-19; *see* P-Ex.262.
104. After the IEP team completed discussion on Student's ESY and supplementary aids and supports, VP moved the team to discuss Student's LRE. Recent Clinic BCBA and Parent both provided their input that Student's LRE was in a program that should be based on Student's home and community settings. The rest of the IEP team all stated that while they believed that Student's IEP could be implemented at both

- Home School's special education classroom setting or at Recent Clinic, the least restrictive environment for Student would be Home School, since Student would have access to both disabled and non-disabled peers. P-Ex.262, 2/10/2022 video [46:07-1:11:45].
105. At the end of the IEP meeting, VP informed Parent that the IEP that had been developed over the November and December 2021 and January and February 2022 IEP meetings would be the DOE's offer of FAPE to Student, including the educational placement of Student at Home School's special education classroom. P-Ex.262, 2/10/2022 video [1:22:43-1:27:00].
106. The resulting IEP dated February 10, 2022 (hereinafter "IEP-02/10/2022") provided Student with one thousand (1000) minutes of special education per week, two hundred seventy (270) minutes of physical therapy services per quarter, eight hundred ten (810) minutes of occupational therapy services per quarter, and four hundred fifty (450) minutes of speech-language therapy per quarter. Student's IIS service minutes was reduced to two thousand two hundred fifty (2250) minutes per week, and the ABA service minutes was five thousand one hundred thirty (5130) minutes per quarter. Student's educational placement was described as "[Student] will not participate with [] non-disabled peers for all classes and activities. [Student] will participate in all classes and activities on a public school campus in a special education setting."
107. During at least some of the meetings between April 2021 and February 2022, Parent and the advocate that accompanied Parent to several of the meetings used additional meeting time to attempt to have the team re-discuss issues that the team had already

discussed. Additionally, since the advocate had come into the team in the middle of the meetings, the advocate would occasionally ask questions just to get ‘caught up’ with what was happening in the meetings, taking additional time from the necessary discussions the IEP team needed to have to develop Student’s IEP. *See e.g.* R-Ex.9, 12/13/2021 video [45:00-52:10], [1:41:39-2:00:07]; P-Ex.260, 1/21/2022 video [16:48-42:10].

The Stay-Put Order in DOE-SY2122-011

108. Petitioners sent their Complaint in DOE-SY2122-011 to Respondents via facsimile on August 13, 2021 after 4:30 p.m. While the DOE and the Office of Dispute Resolution did not receive the Complaint until August 16, 2021, this Hearings Officer determined that the effective date of Student’s stay-put was August 13, 2021. *See* Order Granting Petitioners’ Motion for Stay Put, issued February 23, 2022 (hereinafter “Order-02/23/2022”).
109. At the hearing on Petitioners’ Motion for Stay Put, both Parent and DES agreed that the IEP that the special education and related service providers were implementing at the time (February 23, 2022) was the IEP-03/31/2021.
110. The Order-02/23/2022 determined that Student’s educational program and placement under the stay-put provisions of the IDEA was contained in the August 12, 2021 PWN (hereinafter “PWN-08/12/2021”). The PWN-08/12/2021 provided Student with the special education, speech-language, occupational therapy, and individual instructional services in IEP-03/31/2021.
111. Pursuant to the Order-02/23/2022, Student was to receive two thousand eight hundred eighty (2880) minutes of special education per week, one thousand eighty (1080)

- minutes each of occupational therapy and speech-language therapy per quarter, five hundred forty (540) minutes of physical therapy per quarter, and individual instructional support service (hereinafter “IIS”) minutes of three thousand one hundred eighty (3180) minutes per week. *See* P-Ex.287, p.5773.
112. Pursuant to the Order-02/23/2022, Student’s placement was also to be at Recent Clinic, due to the terms of the SA-10/23/2020 being the last agreed upon placement for Student. P-Ex.68, p.1243.
113. The Order-02/23/2022 was issued just under two (2) weeks after the IEP-02/10/2022 was completed and Parent had not received the final written IEP-02/10/2022 until after February 17, 2022. *See* P-Ex.200, p.4561-4562.
114. While the Order-02/23/2022 informed both parties of the educational placement and special education and related service minutes for Student that should continue through the pendency of this case, the DOE began implementing Student’s IEP-02/10/2022. *See* R-Ex.9, video recordings dated 10/19/2022 and 11/1/2022 (hereinafter referenced as “R-Ex.9, 10/19/2022 video, and R-Ex.9, 11/1/2022 video”).
115. At meetings on October 19, 2022 and November 1, 2022, the IEP team discussed the implementation of Student’s IEP-03/31/2021 versus the IEP-02/10/2022 with the reduced special education and related service minutes. DES admitted that based on a brief mention of not reversing a student’s program to an outdated IEP and based on the IEP team’s agreement to Student’s updated goals and objectives in the IEP-02/10/2022, DES instructed the team to implement Student’s IEP-02/10/2022. Testimony of Parent, Tr.V7, 928:1-5; R-Ex.9, 10/19/2022 video [26:44-40:56], [48:58-57:42]; R-Ex.9, 11/1/2022 video [50:44-1:10:42].

116. In the meeting in October 2022, the administrators informed the team that they could proceed by either abiding by the Order-02/23/2022 and revert all Student's goals, objectives, service minutes, and educational placement back to the IEP-03/31/2021, or proceed with continuing implementation of the IEP-02/10/2022. Testimony of Parent, Tr.V7, 928:5-929:12; *see* R-Ex.9, 10/19/2022 video [39:05-39:24], [1:08:38-1:13:40].
117. Parent strongly objected to any of the special education and related service providers reverting back to Student's old goals and objectives and suggested that they simply continue working on the goals and objectives in the IEP-02/10/2022 but utilize the additional service minutes provided in the IEP-03/31/2021. *See* R-Ex.9, 10/19/2022 video; R-Ex.9, 11/1/2022 video.
118. Most service providers agreed that they could try to work with the additional minutes and Current BCBA suggested that the additional minutes would be welcomed. However, 2022 SLP insisted that the additional service minutes was unnecessary and took Parent's objection to reverting to the IEP-03/31/2021 as a threat and thereafter threatened to discontinue working with Student. *See* R-Ex.9, 10/19/2022 video [1:03:37-1:08:54], [1:11:53-1:12:51], [1:14:19-1:15:55]; R-Ex.9, 11/1/2022 video.
119. Administrators of the IEP meeting maintained based on the disagreements within the team, that the team could either only revert completely back to the IEP-03/31/2021 with the old goals and objectives or proceed to continue implementing the IEP-02/10/2022. Due to Parent's reluctance to revert to Student's outdated goals and objectives in the IEP-03/31/2021, the IEP team continued implementing the IEP-02/10/2022 with the reduced special education and related service minutes. *See* R-

Ex.9, 10/19/2022 video [1:17:10-1:20:27]; R-Ex.9, 11/1/2022 video [50:44-1:10:42].

120. According to the PWN issued on November 18, 2022 (hereinafter “PWN-11/18/2022”), Student’s ‘stay put’ would be homebound and the programming from the IEP-02/10/2022 would be implemented. As of the Hearing dates, Student has still not been receiving the special education and related services as instructed by the Order-02/23/2022. Testimony of Parent, Tr.V7, 927:2-25; P-Ex.44, p.887-888.

Student’s missed IEP services and loss of skills

121. As early as February 2018, Student began experiencing lapses in services provided to Student by the DOE. Lapses in service that occurred prior to the SA-10/23/2020 were covered under the agreement. Other lapses in services occurred periodically throughout the date of the Hearing in this case. Testimony of Current BCBA, Tr.V3, 337:10-338:23; Testimony of Parent, Tr.V5, 708:18-21; P-Ex.118, p.1806.
122. In approximately April 2015, [REDACTED]” was listed in Student’s IEP to be provided by the DOE as part of Student’s educational program. Subsequently, the DOE determined that they were not able to provide [REDACTED] pursuant to “DOE policy.” Due to the DOE making [REDACTED] a part of Student’s educational program, Student was unable to access such therapy through medical insurance thereafter. Testimony of Parent, Tr.V8, 1018:7-1020:6; R-Ex.3, p.981-982.
123. Parent requested that the DOE administrators at the IEP meetings provide the “DOE policy” that prevented the IEP team from including [REDACTED]” into Student’s IEP. The DOE did not provide that information to Parent. Testimony of Parent, Tr.V8, 1093:16-1094:13; *see also* R-Ex.9, p.10762.
124. From at least November 2020 through around June 2021, Student was not receiving

- “non-school hours” ABA services. OT-D was contracted by Respondents to develop a “non-school hours” program for Student that would include working on goals such as showering, brushing teeth, dressing, and other functional life skills. Testimony of OT-D, Tr.V2, 170:14-171:12, 181:4-8, 209:13-211:16.
125. Caregiver began working with Student again in Student’s home setting in October 2022 after a lapse in services from Recent Clinic. Caregiver was only responsible for providing ‘non-school’ hours services to Student. Testimony of Caregiver, Tr.V4, 494:7-12, 528:20-529:6; R-Ex.6, p.9464.
126. Caregiver immediately noticed that Student engaged in problem behaviors and did not stabilize until around one (1) month after Caregiver began working with Student again. Caregiver also noticed that after a shorter break of two (2) weeks during the holidays, it again took two (2) weeks for Student’s behaviors to stabilize. Testimony of Caregiver, Tr.V4, 494:7-495:24, 620:22-621:17.
127. Caregiver observed that Student had regressed on Student’s skills of putting away the iPad to do work and it has caused Student to engage in problem behaviors. Testimony of Caregiver, Tr.V4, 462:2-465:1, 488:17-20.
128. Caregiver also observed that Student experienced regression in Student’s communication, specifically with a decrease in Student’s sign repertoire and Student’s reversion back to pointing to objects instead of using communication to request the object. Caregiver noted that Student has engaged in ‘scrolling’ behavior in communication, which is when Student overgeneralizes a sign to use it to label more than just one request. Testimony of Caregiver, Tr.V4, 502:1-505:19, 530:8-533:5.

129. As a result of Student's regression, Caregiver had to wait for Student's behaviors to stabilize, reteach many of the skills that Student previously had before Caregiver could move on to teaching skills or working on goals and objectives in Student's IEP(s). Testimony of Caregiver, Tr.V4, 462:2-465:1, 488:17-20, 494:7-495:24, 502:1-505:19.
130. Skills that Caregiver had worked on with Student with at Previous Clinic, such as meal prepping, are currently on hold since Student's basic skills of showering, toileting, [REDACTED] and communication, have regressed and need to be addressed first. Testimony of Caregiver, Tr.V5, 638:22-639:10.
131. While Student was at Previous Home School and in the beginning of Student's summer attendance at Home School, Student had been able to communicate with peers, attend some adaptive physical education classes at Previous Home School, attend an assembly, and take bus rides (accompanied by Student's RBT) to and from Recent Clinic to Previous Home School. Student and family were also able to attend a high school football game without significant problem behavior by Student. Testimony of Prior SSC, Tr.V3, 407:21-408:12; Testimony of Parent, Tr.V5, 680:20-682:8; 696:19-703:14.
132. As a result of Student's loss of skills and regression in problem behaviors, Student's and Student's family's ability to engage in day-to-day activities has been substantially limited as of the Hearing. Student lost interest in communicating by sign with Student's family, Student has substantially less tolerance to leaving the family home and being out in the community, Student has displayed more problem behaviors that are more difficult to manage by Parent, and Student needs more hands-on care with

daily functional life skills that Student had previously been able to do. Testimony of Parent, Tr.V7, 930:24-935:11.

133. As of the Hearing dates in February/March 2023, Student was still not receiving “school hour” services after Student’s discharge from Recent Clinic. Testimony of Current BCBA, Tr.V3, 359:3-11; Testimony of Caregiver, Tr.V5, 635:3-637:4.

Student’s identified areas of need-Speech-language/communication

134. Student is non-verbal and has had inconsistent therapy and training in functional communication. Student needs to develop functional communication skills to perform necessary independent life skills.
135. A psychoeducational evaluation was conducted with Student in November 2014 and again from July 2017 through March 2018 by 2018 Psychological Assessor. In both reports, 2018 Psychological Assessor noted that a main focus in Student’s programming should be expanding Student’s communication repertoire, focusing efforts on increasing Student’s ability to communicate with others. 2018 Psychological Assessor also noted that Student still demonstrated significant limitations in the ability to care for Student’s self and needed high levels of assistance in basic issues, such as feeding, dressing, toileting, and social interaction. P-Ex.86, p.1553; P-Ex.87, p.1566-1568.
136. 2018 Psychological Assessor recommended that coordination between Student’s providers to maintain consistency of Student’s functional communication skills and interventions to reduce and prevent problem behaviors. P-Ex.86, p.1554.
137. 2018 Psychological Assessor noted that Student’s “well-structured, sequentially programmed ABA interventions” has helped Student demonstrate significant progress

- in the areas of self-care, language skills, physical functioning and strength, and reduced problem behavior. P-Ex.86, p.1567-1568.
138. Another psychoeducational evaluation of Student was conducted by 2019 Psychological Assessor in September and October 2019. 2019 Psychological Assessor also determined that ABA is an appropriate tool to facilitate development of Student's skills and should be given a central role in analyzing Student's progress and determining next steps. P-Ex.90, p.1588.
139. 2019 Psychological Assessor also recommended continued attempts to increase Student's expressive communication abilities through accurate and broader use of sign and to explore the use of assistive technology to help Student's communicate. P-Ex.90, p.1588-1589.
140. In 2019, a speech-language assessment conducted with Student recommended that Student receive speech-language therapy services two to three (2-3) times per week for sixty (60) minute sessions to improve Student's overall communication skills as well as generalize skills when communicating with peers and adults in all settings. P-Ex.96, p.1613-1614.
141. Observations conducted by [REDACTED] Specialist in 2019 noted that while working at Recent Clinic, the staff had a list of signs that were either in Student's repertoire or that they were working with Student to develop. Student demonstrated progress in signing between observation sessions and the recommendation was to continue to expose Student to [REDACTED] throughout Student's day, across all settings. P-Ex.88, p.1574; P-Ex.92, p.1603-1605; P-Ex.98, p.1620-1621.
142. Student's speech-language notes from January 2020 through December 2020 were

- reviewed by SLP Consultant. SLP Consultant noted that Student's speech-language goals were written without specific types of prompts or cues, the goals were not intensively or consistently targeted at that time of the review, there did not appear to be an explicit teaching plan per goals, and that Student's performance did not approach mastery even with prompts and cues being provided. P-Ex.150, p.3203.
143. A speech-language assessment was done with Student in September 2020, however no significant recommendations or implications for learning were provided as a result of the assessment. The primary recommendation was to preserve Student's current vocabulary and pairing it with the use of an AAC device. P-Ex.100, p.1625-1635.
144. SLP Consultant also noted that the September 2020 speech-language assessment contained results that did not represent Student's skills in other reports (i.e. ABA reports). P-Ex.150, p.3206.
145. Another speech-language pathology evaluation was conducted with Student in October 2020, wherein it was recommended that Student would benefit from the use of a SGD. P-Ex.102, p.1646.
146. As early as October 2020, the parties agreed that a speech-language pathologist, who is also a board-certified behavior analyst, would provide consultation to Student's IEP team. The consultation was to include a focus on coordinating Student's communication profile, goals and objectives, and progress monitoring. The communication profile was also raised at multiple IEP meetings. P-Ex.68, p.1241; P-Ex.121, p.1954-1955 (October 26, 2020 meeting), 1975 (November 9, 2020 meeting), 2002 (December 8, 2020 meeting), 2007 (January 20, 2021 meeting), 2064 (April 15, 2021 meeting), 2085 (April 28, 2021 meeting).

147. A speech-language observation was done again in May 2021, wherein the observer noted that Student used primarily signs with familiar providers and recommended that signs be introduced with novel activities or new providers and that familiar providers and family to collaborate to use the AAC device in varying environments/settings to allow Student to become familiar with use of the device in those settings. P-Ex.109, p.1683-1708.
148. In a speech-language pathology evaluation conducted at Hospital in January 2021, it was determined that Student had significant deficits in cognition and communication characterized by severe deficits in expressive communication, lack of an effective communication method, apraxia-like characteristics resulting in significantly declined oral motor coordination for verbal speech production. P-Ex.74, p.1343.
149. At the time of the evaluation, it was noted that Student was not receiving regular direct speech-language therapy through the DOE. P-Ex.74, p.1343.
150. The recommendations of the evaluation concluded that Student should receive speech-language therapy to explore options for development of a more functional communication system. The report noted that “[c]urrently, there lacks an effective method of communication with caregivers resulting in communicative breakdowns and difficulty in care.” P-Ex.74, p.1345.
151. Additional observations of Student by [REDACTED] Specialist in July 2021 found that Student continued to make progress on using modified signs and would benefit from continued exposure to [REDACTED] along with the signs Student already knows. [REDACTED] Specialist also recommended continuing to have Student learn how to use an AAC device for expressive communication. P-Ex.112, p.1728-1729.

152. As of September 2021, a communication profile was assigned to be completed but there was no estimated completion date. In November 2021, SLP Consultant recommended that Student’s IEP team “continue to explore the most appropriate communication system for [Student] – be it a single system (i.e., [REDACTED] or an SGD) or a combination of the two. Testimony of Parent, Tr.V6, 739:1-10; P-Ex.156, p.3264; P-Ex.161, p.3296.
153. As of January 2023, no communication profile was in place for Student or incorporated into Student’s IEP(s). Testimony of [REDACTED] Specialist, Tr.V3, 381:11-384:16; Testimony of Parent, Tr.V6, 740:14-22, 761:2-7; P-Ex.277, 01/06/2023 video [4:55-7:46].
154. A communication profile for Student should have recommendations for Student’s team of service providers on how to approach Student’s communication needs and goals and include training or teaching procedures to ensure that the entire team is consistent with developing Student’s functional communication. Testimony of OT-D, Tr.V2, 179:5-180:5.

Student’s areas of need – Physical and Occupational Therapy

155. Student has demonstrated needs in the areas of physical therapy and occupational therapy.
156. In June 2021, Current Physical Therapist (hereinafter “Current PT”) gross motor observation was conducted with Student while Student was in the home setting. Student demonstrated the ability to navigate Student’s home, however continued to benefit with assisting with sequencing and prompting of activities of daily life, such as balance and awareness of Student’s body in space. P-Ex.110, p.1709-1710.

157. In July 2021, Occupational Therapist (hereinafter “OT”) conducted an occupational therapy observation with Student while Student was at the home setting. OT noted that Student has the ability to complete activities of daily living, however needed assistance to help Student through the sequence of skills rather than initiating the tasks or completing the entire sequence of steps independently. P-Ex.113, p.1730-1734.
158. OT recommended that Student continue to work on using both hands, especially when the non-dominant hand is used to stabilize something; use a more functional and efficient grasp when holding things; use the right amount of pressure when completing tasks; and practicing with real objects to generalize Student’s fine motor skills into functional tasks and routines. P-Ex.113, p.1733-1734.
159. At the time of the Hearing, Student should have been receiving occupational and physical therapy services from OT and Current PT, respectively. No dispute exists as to Student’s needs for both occupational and physical therapy.

Student’s areas of need – intensive, methodical teaching with consistent and immediate reinforcement

160. Student requires an intensive, methodical, scientifically based model of education. Ideally, Student’s educational program would be developed by a board-certified behavior analyst to be implemented initially in a clinical setting and later broadened to places and environments where Student will need to use the skills (i.e., in the home, in the community, in an adult health day program).
161. In the initial evaluation where Student was diagnosed with [REDACTED] and [REDACTED], the recommendations noted by the evaluators were that Student’s educational program should include thirty (30) hours per week of developmentally-appropriate

- structured activities that include one-to-one teaching in the context of a year-round program. The report also included a recommendation to have Student's instruction or teaching done through ABA or discrete trial training with a minimum of four (4) hours per day of one-to-one instruction. P-Ex.82, p.1523-1524.
162. In the 2015 psychoeducational evaluation, 2018 Psychological Assessor determined that the severity of Student's disabilities warranted intensive ABA programming with the Verbal Behavior Milestones Assessment and Placement Program (hereinafter "VB-MAPP") as a guide to develop Student's functional communication, instructional control, reduction of problem behaviors, and core self-care. P-Ex.86, p.1554-1554.
163. In the 2018 psychoeducational evaluation, 2018 Psychological Assessor noted that based on Student's well-structured, sequentially programmed ABA intervention, Student continued to make progress in self-care, language skills, physical functioning and strength, with generally lower levels of problem behaviors. 2018 Psychological Assessor recommended continued intensive ABA programming for Student, with the VB-MAPP and the EFL assessment tool as guides to transition Student toward independent living as an adult. P-Ex.87, p.1567-1568.
164. 2019 Psychological Assessor made consistent findings in an October 2019 psychoeducational evaluation and also recommended that an ABA program based on the EFL or a similar program continue to be utilized for Student's education. 2019 Psychological Assessor noted that as Student continued to age, it was more important for Student to build skills toward adulthood and for the team to identify resources to assist and support Student's transition out of the public-school system. P-Ex.90,

p.1588-1589.

165. In July 2021, DOE Psychologist conducted observations of Student as part of a reevaluation. Based on the observations conducted, DOE Psychologist determined that Student “requires a highly-structured learning environment and consistency of teaching procedures (including reinforcement procedures) across service providers.” DOE Psychologist noted that without such provisions, Student may repeat errors and incorporate incorrect responses in the future, making it difficult to ‘unlearn’ or ‘undo’ incorrect responses, and that it is crucial that a clear and deliberate strengthening of desired or correct responses and purposeful weakening of undesired or incorrect responses be a part of Student’s program. P-Ex.114-115, p.1735-1748.
166. In June 2021, OT-D developed a program for Student to teach Student the basic life skills showering, brushing teeth, and [REDACTED]. OT-D’s program was very detailed and broke down each step of the skills so that it could be replicated by anyone who understands what was written. Testimony of OT-D, Tr.V2, 211:17-212:3; P-Ex.164, p.3359-3361.
167. The program developed by OT-D was helpful for other team members, such as Current BCBA, due to the details in the program, unlike the IEP, which did not specify who would be providing specific services for each intervention, goals, and objectives. This is important because certain professionals like certain procedures that they have experience with, and it may differ from one provider to another. Testimony of Current BCBA, Tr.V3, 341:15-342:8.
168. For example, Student’s showering skill required teaching of first using a washcloth while Student was fully clothed and pumping soap onto the washcloth. Each skill

was to be modeled by the staff with encouragement for Student to copy the action.

Responses to correct and incorrect behavior were specified, along with reinforcement and data collection procedures. P-Ex.164, p.3359-3360.

169. The program developed by OT-D was implemented with Student from June 2021 through September 2021 and Student made progress on the goals that OT-D's program focused on. Testimony of OT-D, Tr.V2, 212:4-213:5; P-Ex.164, p.3362-3378.

170. Caregiver also noted that Student needs an intensive approach to teaching functional life skills. For example, attempts were made to teach Student showering by a backwards chain, where the later parts of the chain are taught to Student first systematically until Student is able to complete the entire chain independently. After some trials with that method, it did not appear it was successful for Student to learn the skill. Another method was tested, which was video modeling, where Student would watch a video of a person doing the parts of the skill and would imitate the model in the video. This method appeared to be more successful and is being monitored by both Caregiver and Current BCBA. Testimony of Caregiver, Tr.V4, 485:12-487:10.

171. Another example of Student's learning style is in meal prepping a bowl of cereal. Student's program at Previous Clinic was to teach each skill in isolation through intensive teaching trials, where Student would first need to be able to identify a bowl or spoon. Then ensuring that Student can identify a missing item that Student would and then communicate the need for a bowl or spoon. Once that skill is obtained, the trainers would then teach Student where in the environment the bowl or spoon would

- be located. Each step of preparing a bowl of cereal, such as identifying the cereal, pouring the correct amount of cereal into the bowl, identifying the milk, opening the milk, and pouring the milk appropriately into the cereal would be taught in a systematic style until the different parts of the chain of events are mastered. Once they are mastered, then Student would be taught the skills in different environments, such as Student's home kitchen. Sometimes other specialists would be necessary to assist with certain skills, such as occupational therapy for the fine motor skills necessary to complete a task. Testimony of Caregiver, Tr.V5, 639:11-640:18.
172. In November 2021, OT-D conducted the EFL assessment with Student and determined that Student had not learned many that were considered 'must have' under the assessment. OT-D provided a number of goals and objectives to the IEP team as a result of the EFL to address Student's 'must-have' needs as soon as possible. Testimony of OT-D, Tr.V2, 238:13-253:20; P-Ex.116, p.1749-1801.
173. OT-D also recommended to the IEP team that since Student has a poor history of generalizing skills, the team should consider teaching Student skills in the environments in which Student will likely use the skills, such as in the home and in community. P-Ex.116, p.1800.
174. OT-D also conducted several other assessments with Student, including preference assessments, and a functional analysis assessment for Student's problem behaviors. Testimony of OT-D, Tr.V2, 254:7-281:15; P-Ex.117, p.1802-1805; R-Ex.9, p.10270-10281.
175. Student's problem behaviors in OT-D's December 2021 functional assessment were identified as nail picking, nail biting, and crotch grabbing. Parent has observed these

- behaviors in Student as of the time of the Hearing and Parent is concerned that these behaviors could lead to unsafe behaviors or consequences to Student. Testimony of Parent, Tr.V7, 901:8-15, 904:2-13; *see* R-Ex.9, p.10270-10281.
176. OT-D's contract with the DOE to provide services for Student ended in January 2022 and was not renewed. Testimony of OT-D, Tr.V2, 261:12-262:23.
177. In November 2022, Student underwent another psychoeducational evaluation with CP while Student was in the home setting after being discharged from Recent Clinic. Overall, CP's findings were consistent with the psychological assessments conducted by 2018 Psychological Assessor and 2019 Psychological Assessor. P-Ex.119, p.1834.
178. CP noted that Student's [REDACTED] can also have an impact on Student's mental health due to Student's inability to communicate. Student's inability to communicate can lead to increased isolation and problem behaviors. It is important for Student to develop functional communication skills. Testimony of CP, Tr.V10, 1155:4-1157:1, 1168:22-1171:10, 1209:6-1210:1, 1217:18-1218:22.
179. CP first pointed out that Student has had little consistency in Student's service and program delivery since 2018. This has affected Student's ability to learn new skills and retain skills that had previously been mastered. A comparison between the 2022 evaluation and 2019 Psychological Assessor's 2019 evaluation showed that Student's scores on at least one assessment was lower in 2022 than in 2019. Testimony of CP, Tr.V10, 1151:19-1152:12, 1212:2-17; P-Ex.116, p.1842-1843.
180. CP recommended that Student be provided services by familiar and consistent service providers being as much as possible. CP suggested that since it is inevitable that

changes in providers will happen, creation of specific training guidelines should be done to help new providers who end up working with Student. P-Ex.116, p.1844.

181. CP also noted that Student has demonstrated the ability to learn and improve upon skills with the use of ABA and that it is important to continue those services in Student's program. CP also noted that Student requires near constant support and supervision during downtime. Testimony of CP, Tr.V10, 1152:25-1153:5, 1214:18-1215:19, 1227:2-1228:9; P-Ex.116, p.1844.
182. CP stated that Student should be placed in a program that can provide consistent treatment for Student and that would also allow Student to learn skills and then practice them in the settings in which they will be used to allow for generalization of those skills by Student. P-Ex.119, p.1844-1845.

V. CONCLUSIONS OF LAW

IDEA framework

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 (D.D.C. 2008) (citing 20 U.S.C. §1400(d)(1)(A)). A FAPE includes both special education and related services. H.A.R. §8-60-2; 20 U.S.C. §1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

Special education means “specially designed instruction to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a student to benefit from their special education. *Id.* To provide a FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine

whether that student is eligible for special education, and formulate and implement an IEP.”

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

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled children.” *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988). It is “a written statement for each child with a disability that is developed, reviewed, and revised” according to specific detailed procedures contained in the statute. H.A.R. §8-60-2; 20 U.S.C. §1401(14); 34 C.F.R §300.22. The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs. H.A.R. §8-60-45; 20 U.S.C. §1414; 34 C.F.R §300.321-300.322.

The DOE is not required to “maximize the potential” of each student; rather, the DOE is required to provide a “basic floor of opportunity” consisting of access to specialized instruction and related services which are individually designed to provide “some educational benefit.” *Rowley*, 458 U.S. at 200-201, 102 S.Ct. at 3047-3048. 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*. 137 S.Ct. 988, 197 L.Ed.2d 335 (2017). 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.*, 137 S.Ct. at 1001, 197 L.Ed.2d 335; *see also, Blake C. ex rel. Tina F. v. Hawai'i Dept. of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Hawai'i 2009).

In deciding if a student was provided a FAPE, the two-prong inquiry is limited to (a) whether the DOE complied with the procedures set forth in IDEA; and (b) whether the student’s IEP is reasonably calculated to enable the student to receive educational benefit. *Rowley*, 458

U.S. at 206-7; 102 S.Ct. at 3050-3051. “A state must meet both requirements to comply with the obligations of the IDEA.” *Doug C. v. Hawai‘i Dept. of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013); *see also, Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001).

Procedural violations do not necessarily constitute a denial of FAPE. *Amanda J.*, 267 F.3d at 892. If procedural violations are found, a further inquiry must be made to determine whether the violations: 1) resulted in a loss of educational opportunity for Student; 2) significantly impeded Parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the Student; or 3) caused Student a deprivation of educational benefits. *Id.*

Burden of Proof

Pursuant to H.A.R. Section 8-60-66(a)(2)(A), “the party initiating the due process complaint has the burden of proof.” The H.A.R. also states 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 to prove, by a preponderance of the evidence, the allegations of the complaint. H.A.R. §8-60-66(a)(2)(B).

This burden was confirmed in *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 58, 126 S.Ct. 528, 535, 163, L.Ed.2d 387 (2005), where the Court concluded that the burden of persuasion in an IDEA case lies “where it usually falls, upon the party seeking relief.”

- A. Petitioners have proven that the DOE committed procedural violations that resulted in a loss of educational opportunity for Student, significant infringement of parental participation, and/or a deprivation of educational benefits and denied Student a FAPE

In the consolidated Complaints, Petitioners raise the following allegations of the DOE violating procedures set forth by the IDEA, 1) the DOE’s failure to properly and timely assess

Student, 2) the DOE's failure to timely develop Student's IEP, 3) the DOE's failure to provide parents with meaningful participation in Student's IEP development process, 4) the DOE's failure to provide Student's educational records, and 5) the DOE's failure to materially implement Student's IEP, including abiding by the provisions of stay-put. Violations by a school district of the procedures under the IDEA only amount to a denial of FAPE to a student if it is demonstrated that the student suffered a loss of educational opportunity, the parent's ability to participate in the development of a student's IEP was significantly impeded, or the student suffered a deprivation of educational benefits. *Amanda J.*, 267 F.3d at 892. Based on the evidence presented at the Hearing and the analysis discussed below, this Hearings Officer finds that Respondents committed procedural violations under the IDEA that resulted in a denial of FAPE.

1. Petitioners have failed to prove that Respondents did not timely and appropriately assess Student's needs to develop an appropriate IEP for Student, resulting in a denial of FAPE

Petitioners' first argument centers on the DOE's failure to appropriately assess Student's needs to develop an appropriate IEP that would allow Student to make progress in light of Student's unique needs. The IDEA provides that an educational agency must conduct an evaluation of Student no more than one (1) time per year and not less than every three (3) years to determine the educational or related services needs of a student. 20 U.S.C. §1414(a)(2); 34 C.F.R. §300.303; H.A.R. 8-60-35. The team must first review all existing evaluation data to determine what, if any, additional assessments are necessary for the team to determine Student's eligibility for special education and related services and Student's needs for development of the IEP. *See* 20 U.S.C. §1414(b)(2); 34 C.F.R. §300.304; H.A.R. 8-60-37.

In this case, in May 2021, the IEP team met to determine that a reevaluation would be done with Student. *FOF 66*. Observations in the areas of communication, fine, and gross motor skills were to be conducted as part of the reevaluation. *FOF 67*. At the time that the reevaluation was ordered, Student was receiving services through a settlement agreement with Respondents at Recent Clinic under the IEP-03/31/2021. *FOF 28-33*. Student's IEP-03/31/2021 included frequent updates and progress monitoring, peer review meetings, and parent education and training, all of which could provide both Petitioners and the rest of the IEP team with necessary information as to Student's needs to develop an appropriate IEP for Student by the August 13, 2021 deadline in the October 2020 settlement. *FOF 63-65*. The IEP team members at the reevaluation meeting included Student's related service providers and service providers from Recent Clinic, most of whom were familiar with Student and Student's needs. *FOF 66*. The team agreed to the areas of assessment for the reevaluation and the record here shows that the reevaluation was conducted. *FOF 67*.

Student was consistently being assessed by Recent Clinic (and prior to Recent Clinic, Student had ongoing assessments by Prior Clinic) regarding EFL assessment and other assessments to determine Student's current needs. *FOF 39-57*. The IEP team had information from Recent Clinic regarding EFL assessment results as of April 2021 through Student's progress reports, as well as updated BIPs. *FOF 51, 53*. Having an outside assessment involving the EFL assessment was not necessary in the reevaluation as the IEP team determined that there was enough information from Recent Clinic from which the IEP team could develop an appropriate IEP for Student.

Petitioners have not proven that Respondents failed to assess Student in all areas of need. The IEP team had a plethora of information at the time of the development of Student's IEP-

02/10/2022, which included assessments, progress reports, and a BIP from Recent Clinic, several speech-language, fine, and gross motor assessments from the reevaluation in May 2021, the EFL assessment done by OT-D in November 2021, observations conducted by [REDACTED] Specialist, Recent Clinic Prior BCBA, Recent Clinic BCBA, OT, and DOE Psychologist. While Petitioners disagree with some of the outcomes of the assessments or the types of assessments or observations conducted, the record in this case shows that Respondents conducted or acquired sufficient assessments, information, and data to develop an appropriate IEP for Student.

2. Petitioners have not proven that Respondents denied Student a FAPE by failing to timely develop Student's IEP(s)

Petitioners' next argument is that Respondents failed to timely develop Student's IEPs, resulting in a denial of FAPE. While it is undisputed in this case that the IEPs for Student often took multiple meetings, which resulted in the IEPs for Student being completed after the 'annual review deadlines,' Petitioners have failed to prove that this was a procedural violation committed by Respondents.

The IDEA envisions that the IEP team will meet and review a student's IEP every year to ensure that the IEP currently reflects the strengths and needs for the student, and that the goals, objectives, and services provided to the student are appropriate for the current school year. *See* HAR §8-60-48(b); 20 U.S.C. §1414(d)(4). However, courts have long recognized that the 'annual review' requirement may be a sub-priority in comparison to ensuring that other requirements under the IDEA, and adjudicators must consider the purpose of the IDEA when determining whether a procedural violation has occurred if the IEP is reviewed after the 'annual review' deadline. *See Doug C.*, 720 F.3d at 1046.

The evidence from the record shows that the IEP team conducted multiple meetings to hear from the many service providers and Parent to thoroughly review Student's strengths,

needs, goals, objectives, and necessary services and supports. Each meeting lasted at least two (2) hours and had no less than ten (10) participants. *See e.g.*, P-Ex.238; P-Ex.241-244; P-Ex.246-250; P-Ex.252; P-Ex.254-256; P-Ex.258-262; R-Ex.9, video recordings dated 8/10/2021, 8/17/2021, and 9/30/2021. In the meetings leading up to the IEP-02/10/2022, the IEP team had multiple assessments and observations conducted by team members, after which the team would discuss as part of the IEP development. *FOF 67, 143, 145, 147-148, 151, 156-157, 165.* OT-D conducted the EFL assessment in the midst of the IEP meetings, which resulted in a complete revamping of the PLEP section, as well as a revision of the annual goals and objectives for Student. *FOF 172, 174.*

Additionally, Student's service providers and some IEP team members met regularly during the school year to discuss Student's progress or setbacks, which sometimes led to an adjustment in a service or an objective. Student's IEPs between August 2020 and August 2021 were also reviewed and revised multiple times by the IEP team, resulting in Student having four (4) IEPs, dated November 23, 2020, December 18, 2020, December 8, 2020, and March 31, 2021. *FOF 58.* Between August 2021 and June 2022, Student had four (4) IEPs dated September 30, 2021, February 10, 2022, May 6, 2022, and June 9, 2022. *See e.g.*, P-Ex.36; P-Ex.38; P-Ex.40; P-Ex.42. Even if the IEP team did not fully develop a "new" annual IEP by the given deadline written in the IEPs, it is clear that Student's IEP team reviewed and/or revised Student's IEP multiple times in the year to ensure its current applicability.

Petitioners have not proven that Respondents committed a procedural violation by not timely developing an annual IEP for Student that would result in a denial of FAPE.

3. Petitioners have not proven that Respondents denied Student a FAPE by failing to provide parents with meaningful participation in the IEP development process

Petitioners argue that Respondents denied Student a FAPE by failing to provide parents with meaningful participation in the IEP development process. The IDEA holds a high importance on the ability for parents to participate in the development of the educational programs for their children. In *Doug C.*, the Ninth Circuit Court of Appeals found that “[p]arental participation in the IEP and educational placement process is critical to the organization of the IDEA. ... Indeed, the Supreme Court has stressed that the IDEA’s structure relies upon parental participation to ensure the substantive success in providing quality education to disabled students.” 720 F.3d at 1043.

The record before this Hearings Officer has demonstrated that Respondents have meaningfully included Parent in the entire IEP development process and implementation updates for Student. Parent was present at all IEP meetings, peer review meetings, other team meetings, and was heavily involved during the meetings. Parent’s input was requested, received, and included in all parts of Student’s IEP development, except perhaps the calculation of service minutes to be provided to Student. Several service providers that were suggested to the team by Parent were considered and contracted by the IEP team to work on Student’s case. *See e.g.*, Testimony of Parent, Tr.V8, 1008:25-1009:11, 1011:4-1012:13. Although contractual issues prevented some of the Parent-recommended team members from continuing participation, this fact does not evidence exclusion of Parent from the IEP development process. *See e.g.*, Testimony of OT-D, Tr.V2, 261:16-262:16, Tr.V9, 1132:17-1133:2.

Parent’s input was included in Student’s IEPs, both in the changes made in the IEP during the meetings, as well as in various sections in the IEP. Parent also had an advocate to accompany Parent to some of the later IEP meetings for the IEP-02/10/2022.¹⁰ Some of the

¹⁰ In fact, during the January 21, 2022 IEP meeting, both Parent and IEP Advocate spent a great

reasons that the meetings to develop Student's IEP needed to be continued or extended is due to Parent's request that the team continue discussion on issues with which Parent did not agree. At a certain point toward the end of the IEP-02/10/2022 development meetings, VP and DES both attempted to move the discussions forward when Parent and the advocate that accompanied Parent to the IEP meetings continued to try to have the team re-discuss issues that had already been discussed. While the IEP team could have further discussed some of the items, at that point, the team had met multiple times to develop the IEP over the course of almost nine (9) months. The administrators' insistence that the team move on with the development of the IEP was not unreasonable and allowed the team to complete an IEP for Student. This is not evidence of significantly infringing on Parent's ability to participate in the IEP development process.

Parent was consulted with all changes made to Student's IEPs, whether the changes were accepted by the rest of the team or not. Specifically, while Parent did not agree with Respondents' decision regarding Student's educational placement in the IEP-02/10/2022, both Parent's and Recent Clinic's BCBA's input were discussed at length and considered by the team. *FOF 72, 74-75, 105*. Petitioners have not met their burden of proving by a preponderance of the evidence that Respondents denied Parents meaningful participation in Student's IEP development process.

4. Petitioners have not proven that Respondents failed to provide parents with Student's educational records

Petitioners next argue that Respondents failed to provide parents with Student's educational records. For this issue, Petitioners state that Petitioners requested documents from Respondents in response to some IEP team members telling the IEP team that certain services

deal of time voicing their objections to items that were not being discussed during the meeting and not included in the IEP itself. *See P-Ex.260, 1/21/2022 [16:48-42:10]*.

cannot be provided due to “DOE policy.” *FOF 123*. While Petitioners allege that the failure of Respondents to provide such policies to Petitioners affected their ability to fully participate in the IEP development, this Hearings Officer finds that Petitioners have failed to meet their burden of proof on this issue.

The IDEA provides that “[t]he parents of a child with a disability must be afforded, in accordance with the [relevant procedures], an opportunity to inspect and review all education records with respect to – 1) the identification, evaluation, and educational placement of the child; and 2) the provision of FAPE to the child.” 20 U.S.C. §1415(b)(1); 34 C.F.R. §300.501(a); H.A.R. 8-60-56(a). Educational records are defined as “those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 U.S.C. §1232g(a)(4). Petitioners have not presented evidence that the requested policies that were referred to by IEP team administrators are records directly related to Student. Petitioners have also not proven that there were attempts by Petitioners to access Student’s educational records at Home School that were denied by Respondents.

5. Respondents materially failed to implement Student’s IEP(s), including abiding by stay-put, resulting in a denial of FAPE

Petitioners argue that Respondents materially failed to implement Student’s IEP, resulting in a loss of educational opportunity and deprivation of educational benefit to Student. Based on the evidence presented at the Hearing by Petitioners, this Hearings Officer finds that Respondents failed to abide by Order Granting Petitioners’ Motion for Stay Put, filed on February 23, 2022, which resulted in a denial of FAPE for Student. Respondents also materially failed to implement Student’s IEP-03/31/2021 and IEP-02/10/2022, resulting in a loss of educational opportunity and deprivation of educational benefit to Student.

Stay-Put

The stay-put provision of the IDEA provides that during the pendency of any proceedings for due process, the student shall remain in the then-current educational placement of the child.

20 U.S.C. §1415(j); *A.D. ex rel. L.D. v. Hawaii Dept. of Educ.*, 727 F.3d 911, 914 (9th Cir. 2013);

Susquenita School Dist. v. Raelee S. by and through Heidi S., 96 F.3d 78, 82 (3rd Cir. 1996);

School Committee of Town of Burlington v. Department of Educ., 471 U.S. 359, 361, 105 S.Ct.

1996, 1998, 85 L.Ed.2d 385 (1985). Courts have found that

given the protective purpose underlying the pendant placement provision, it is often invoked by a child's parents in order to maintain a placement where the parents disagree with a change proposed by the school district; the provision is used to block school districts from effecting unilateral change in a child's educational program. In cases of this type, we have directed that the dispositive factor in deciding a child's 'current educational program' should be the Individualized Education Program actually functioning when the stay put is invoked.

Susquenita, 96 F.3d at 83 (citing *Drinker v. Colonial School District*, 78 F.3d 859, 864-865 (3rd

Cir. 1996) (citations and quotations omitted). "Upon entry of a stay-put order, a school district is

obligated to pay the cost of the student's current educational placement pending the resolution of

the judicial proceedings." *Rachel L. v. Hawaii, Dept. of Educ.*, 2012 WL 5383527 (D.Hawaii

2012) (citing *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1040 (9th Cir. 2009)).

While a violation of a stay-put order is not specifically addressed as an implementation violation, as it is in the category of Petitioners' Complaint, such a violation is clearly a violation of procedures set forth by the IDEA. The impetus of the stay-put order is that it acts as an automatic injunction, which does not depend on whether the underlying suit brought by parents is meritorious. *Rachel L.*, 2012 WL 5383527 at *3.

In the Order-02/23/2022, this Hearings Officer very clearly noted that the stay-put placement for Student was at Recent Clinic and under the terms of the PWN-08/12/2021. *FOF*

110-112. The finding was based on the parties' concession that at the time the first Complaint in DOE-SY2122-011 was filed, the IEP that was being implemented was the IEP-03/31/2021, as written in the PWN0--08/12/2021. *FOF 109*. In reviewing the IEPs after the IEP-03/31/2021, none of them changed the terms of Student's placement, Student's goals and objectives, or the special education and related services that were provided to Student in the IEP-03/31/2021, until the IEP-02/10/2022. *FOF 62-65*.

Rather than continuing to implement the IEP-03/31/2021, specifically regarding Student's placement and special education and related services, the IEP team began to implement the newly developed IEP-02/10/2022 at the direction of administration from the DOE, despite Parent having voiced strong objections to the educational placement and reduction in service hours and minutes in the IEP-02/10/2022. *FOF 114-117*. This practice of continued implementation of the IEP-02/10/2022 continued through October 19, 2022, despite the provision of services being provided by Recent Clinic until September 2022. It is unclear from the record whether Recent Clinic was limited to providing the service minutes that was included in the IEP-03/31/2021, but it does appear that the DOE related services providers did reduce their service minutes based on the IEP-02/10/2022.

On August 12, 2022, Recent Clinic notified Respondents and Parents that Student was going to be discharged from their clinic due to staffing issues. Recent Clinic provided one (1) month of advanced notice to Respondents that Student would be discharged. Although Recent Clinic provided Respondents with the program, including goals and objectives, that were being implemented at Recent Clinic at the time of Student's discharge, Respondents have not presented evidence of attempts that were made to find an alternative placement to implement Student's program. *FOF 56*.

Instead, while incorrectly citing the Order-02/23/2022, the DOE stated that Student would be placed homebound and provided services pursuant to the IEP-02/10/2022. In October and November 2022, the IEP team met to discuss the transition of Student's special education and related services to the home setting. *FOF 115*. At that time, Parent voiced a concern that the DOE was not abiding by the Order-02/23/2022 and it was acknowledged that the DOE should not have been implementing the IEP-02/10/2022 but should have continued to implement the IEP-03/31/2021. During the discussion, the IEP team considered implementing the IEP-03/31/2021 but using the goals and objectives in the IEP-02/10/2022 by agreement, so as to not revert Student's program back to an outdated program. *FOF 117*. While the majority of the service providers agreed that they would be able to work on the same goals and objectives with the additional minutes provided in the IEP-03/31/2021, 2022 SLP was the sole service provider who basically refused to provide any additional service minutes to Student, noting that Student only had two (2) speech-language goals in the IEP-02/10/2022 and there would be nothing for 2022 SLP to work on during those additional minutes. *FOF 118*. Rather than advising 2022 SLP to attempt to provide additional service minutes while still working on the new goals and objectives, the IEP team administrators provided the IEP team with two (2) choices, to implement the IEP-03/31/2021 in its entirety, including the outdated goals and objectives, or to implement the IEP-02/10/2022 in its entirety, with the reduced service minutes. *FOF 119*. Parent and some IEP team members were in favor of implementing the IEP-03/31/2021 minutes but still working on the goals and objectives from the IEP-02/10/2022, however, the administration of the IEP team stated that was not an option for the team. Home School eventually issued PWN-11/18/2022, which stated that for 'Stay Put,' the IEP-02/10/2022 would

be implemented with the IEP-02/10/2022 service minutes, and the educational placement being 'homebound.' *FOF 120.*

The evidence presented at the Hearing is that Student did not receive school-day special education minutes from September 2022 through the dates of the Hearing. *FOF 133.* Student also did not receive non-school day special education minutes from approximately November 2020 through June 2021. *FOF 124.* In the IEP-02/10/2022, Student's related service minutes was reduced for occupational therapy by two hundred seventy (270) minutes per quarter, for physical therapy by two hundred seventy (270) minutes per quarter, and for speech-language therapy by six hundred thirty (630) minutes per quarter. *FOF 106.* Based on the PWN-11/18/2022, Student was deprived of one thousand eight hundred eighty (1880) minutes per week of special education services; roughly thirty (30) minutes per week of occupational and physical therapy, and roughly seventy (70) minutes per week of speech-language services by Respondents due to Respondents' failure to abide by the Order-02/23/2022. *FOF 111.*

Student's education was clearly affected by the failure of Respondents to comply with the Order-02/23/2022. Student was provided with less special education and related services minutes since the DOE implemented IEP-02/10/2022, and at some point after Recent Clinic discharged Student, the DOE failed to provide Student with any school hour services and provided Student with drastically reduced services as a whole. Caregiver testified that upon Caregiver's start of services for Student in October 2022, Caregiver noticed that Student had substantially regressed in Student's ability to manage behaviors, ability to communicate, and ability to engage in tasks that Student had previously been able to do while Student was at Recent Clinic. *FOF 125-129.*

Petitioners have proven that Respondents' violation of the IDEA procedures relating to stay-put has resulted in a loss of educational opportunity and deprivation of educational benefits, which resulted in a denial of FAPE to Student.

Implementation of Student's IEP-03/31/2021

Based on the evidence presented at the Hearing, this Hearings Officer also finds that Respondents materially failed to implement Student's IEP-03/31/2021 and/or IEP-02/10/2022, which resulted in a loss of educational opportunity and deprivation of educational benefits and denied Student a FAPE.

Questions of implementation of a student's IEP are procedural in nature and a minor or slight omission of implementation of an IEP will not result in a denial of FAPE. The Ninth Circuit Court of Appeals has reviewed IDEA cases in relation to implementation failures alleged against school districts. In *Van Duyn ex rel. Van Duyn v. Baker School Dist.*, the Court reviewed the IDEA's definition of a free appropriate public education as "special education and related services that ... are provided in conformity with the [child's] individualized education program," and determined that "[t]here is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education." 502 F.3d 811, 821 (9th Cir. 2007). The Ninth Circuit also explored the analysis done by the Fifth Circuit in *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), and recognized the court's conclusion that implementation failures did not violate the IDEA because "the significant provisions of [the child's] IEP were followed, and, as a result, he received an educational benefit." *Van Duyn*, 502 F.3d at 821. Courts hesitate to put forth a standard test to determine implementation because "every child, and every IEP, is different; whether an implementation failure is material will therefore depend on the relevant

provision's place and purpose in the IEP, as well as the overall educational context that the IEP was designed for and the extent and duration of any difference between practice and plan." *L.J. by N.N.J. v. School Board of Broward County*, 927 F.3d 1203, 1214 (11th Cir. 2019) (citing *Andrew F.*, 137 S.Ct. at 998). In determining a failure to implement an IEP case, courts must consider implementation failures both quantitatively and qualitatively to determine how much was withheld and how important the withheld services were in view of the IEP as a whole. *Id.* at 1214.

Petitioners have presented evidence in this case that Student had not been getting appropriate services at least as of September 2022, when Student was discharged from Recent Clinic and returned to the home setting. *FOF 133*. Caregiver testified that Student did not receive services until Caregiver began providing services to Student in the home from October 2022. *FOF 125*. Respondents were provided notice from Recent Clinic of Student's pending discharge from Recent Clinic at least one (1) month prior to Student's discharge and did not find an acceptable replacement school or clinic for Student's school day program. *FOF 55-56*. Failure of Respondents to find alternative services for Student to start after Student's discharge and the resulting failure to provide services for Student from September 2022 to October 2022 was a material failure to implement Student's IEP. The undisputed testimony by Caregiver indicated that when Caregiver began working with Student again in October 2022, Student lost many skills that Student had previously when Caregiver worked with Student at Recent Clinic. *FOF 126-129*. Student had many more behavioral issues that needed to be addressed before Student's could be retaught skills that Student lost. Parent testified that Student had much more problem behaviors as a result in the break in services from both the Recent Clinic's discharge and the break in the non-school day hours. *FOF 132*. Caregiver's observation that Student had

substantially regressed in basic skills such as giving up Student's iPad to begin services and demonstrating substantial behaviors in the sessions demonstrate that the failure to implement the IEP resulted in deprivation of educational benefits to Student during that time.

B. Petitioners have proven that the IEP-02/10/2022 does not appropriately address Student's needs

Petitioners next argument relates to whether the IEP-02/10/2022 was a substantive violation of the IDEA because it does not appropriately address Student's unique needs to allow Student to access Student's education. The flagstone of the IDEA is the idea that school districts shall design and create appropriate education plans that address a child with a disability's unique needs to allow them access to a free appropriate public education. *Rowley*, 458 U.S. at 203-204; 102 S.Ct. at 3050, 73 L.Ed.2d 690; *Endrew F.*, 137 S.Ct. at 1001, 197 L.Ed.2d 335. Petitioners have laid out several areas of Student's IEP-02/10/2022 that they believe are not appropriate for Student, such as failing to identify appropriate goals and objectives, failure to provide appropriate services and supports, failing to address Student's behaviors, failure to create a transition plan, failure to identify the least restrictive environment for Student's educational placement, failure to offer appropriate ESY services, and failure to provide mental health services. Rather than go through each section of the IEP-02/10/2022, this Hearings Officer will discuss below the areas of the IEP-02/10/2022 that do not reasonably address Student's needs, which are the services and supports section of the IEP-02/10/2022 and the educational placement for Student.

1. Student's IEP-02/10/2022 does not provide appropriate special education and related services for Student to access Student's education in light of Student's unique needs

Student's IEP-02/10/2022 was developed in a unique fashion where the IEP team had gathered, drafted the PLEPs, developed goals and objectives for Student, determined the LRE for

Student, conducted an assessment, and thereafter changed all Student's goals and objectives based on the assessment, while not going back to discuss the IEP anew. By the time the final goals and objectives were developed, and the special education and related services was discussed, the IEP team already had discussed and basically determined the LRE for Student for the implementation of Student's IEP.

Parent strongly objected to this procedure that the IEP team followed, noting that the after the completion of the EFL, the IEP team should review each part of the IEP to include information and any discussion from the EFL to develop an IEP based on the additional information they obtained through the assessment. Having had multiple meetings to develop this already overdue IEP, the administrators in the IEP team declined to review each section of the IEP. While this Hearings Officer makes no finding of the appropriateness¹¹ of this highly unusual method of IEP development, a review of the IEP-02/10/2022 and the record of Student's educational needs presented in this case demonstrates that the IEP-02/10/2022 does not provide appropriate special education and related services to Student that would allow Student to access Student's education.

Special education services

Student's IEP-02/10/2022 provides Student with one thousand (1000) minutes per week of special education services. Prior to the IEP-02/10/2022, Student's IEPs provided two thousand eight hundred eighty (2880) minutes of special education services per week. The prior

¹¹ This Hearings Officer notes that while no conclusions are being made about the appropriateness of Student's IEP being developed in this manner, the fact that Student's goals and objectives and special education and related services and supports were determined after the IEP team had discussed and determined Student's LRE, are highly irregular and could lead to arguments being upheld regarding predetermination or other violation of IDEA procedures in other cases.

IEPs special education included school and non-school hours, which provided Student with a full day of education. In the meetings leading up to the IEP-02/10/2022, the IEP team was informed through the EFL assessment that Student was lacking in basic skills that are required for independent living. The IEP team also explained that since there were less goals and objectives, Student would only need approximately one thousand (1000) minutes of special education per week. Parent and Recent Clinic BCBA both questioned the purpose and intent of the one thousand (1000) minutes of special education minutes were and why they were so drastically reduced from Student's previous IEPs. The IEP team explained that the one thousand (1000) minutes were for the special education teacher to run Student's special education curriculum in the school setting and that Student's RBT would be able to have Student practice or review the curriculum with Student during the remaining school day hours.

Recent Clinic BCBA noted that in Student's previous IEPs, the special education minutes were based on the need for Student to have an intensive ABA program throughout both the school day and during non-school day hours. Due to Student's needs, Recent Clinic BCBA informed the team that Student's needs and unique learning style would not be addressed if there were two (2) separate programs being run, namely by the special education teacher and the board-certified behavior analyst that would be assigned to Student. The IEP team told Recent Clinic BCBA and Parent that the DOE's practice of utilizing the board-certified behavior analyst was only to manage behaviors of Student and that Student's education would be provided solely by the special education teacher.

Petitioners have proven that Student has unique needs when it comes to Student's ability to learn and retain information. All the psychologists that have evaluated Student determined that Student requires teaching through intensive ABA. *FOF 162-169*. While the IEP team did

not have the clinical report of CP at the time the IEP-02/10/2022 was developed, CP's recommendations are consistent with both 2018 Psychological Assessor and 2019 Psychological Assessor in that Student learns best using such intensive ABA programming. *FOF 177-182.* Student's prior IEPs, including the IEP-03/31/2021, recognized this need of Student and clearly outlined the need for "highly structured, individualized evidence-based practices that includes, but is not limited to ABA, that provides specifically designed implementation, and ongoing evaluation of instructional and environmental modifications to produce socially significant behaviors..." *See e.g., P-Ex.30, p.640.*

The IEP team's sudden shift to a DOE-model of special education curriculum taught by the teacher and the board-certified behavior analyst only addressing problem behavior did not comport with any of the information that the IEP team had about Student and Student's learning style. The IEP team's determination that a special education teacher could design a non-ABA curriculum to teach Student the goals and objectives listed in the IEP within the one thousand (1000) minutes a week was unsupported by any information that the team had. Further, the IEP team was well aware that Student's programming had been inconsistent, to say the least, since at least the shut-down created by COVID-19. The DOE also acknowledged in the SA-10/23/2020 that Student had not received a number of hours of speech-language therapy, board-certified behavior analyst services, and RBT services dating back from 2018. *FOF 30-32.*

Nothing that was presented at either the Hearing or in any of the IEP meetings leading up to the IEP-02/10/2022 supported the switch from an intensive ABA-model of teaching, where Student's entire curriculum was developed by a licensed board-certified behavior analyst, to a DOE-model of teaching where the special education teacher would develop a curriculum for

Student's educational goals and objectives, and the board-certified behavior analyst would only be addressing problem behaviors.

Speech-language services

Student's IEP-02/10/2022 also drastically reduces the number of speech-language therapy minutes that are provided to Student each quarter. The reasoning behind the reduction in minutes is that based on the new goals and objectives from the EFL assessment results, 2022 SLP determined that Student only needed four hundred fifty (450) minutes per quarter based on the two (2) goals and objectives that focused on speech-language and some other goals that could be related to speech-language. 2022 SLP noted that since Student was no longer working on goals related to the SGD for communication, 2022 SLP needed less time to work on the goals that were related to speech-language.

It is undisputed that Student is non-verbal and has varying degrees of success in communicating by modified [REDACTED] and AAC device. The IEP team was also aware that since 2018 through 2020, Student did not receive the appropriate number of speech-language service minutes provided in previous IEPs. *FOF 30-31*. It is difficult to understand how the IEP team did not seriously consider the need for additional speech-language services, especially in light of the IEP team's acknowledgement that a functional communication plan should have been developed for Student so that Student's service providers and any other staff with whom Student interacts would understand how best to communicate with Student to encourage Student's learning in that regard. Rather than pursuing the development of the functional communication plan for Student, the IEP team simply deleted it from the IEP during the development process. *FOF 87, 152-154*.

The reduction of speech-language direct service minutes may have been appropriate if the IEP team and Student's related services providers had a clear understanding of how to interact with Student to further develop Student's speech and communication skills in the form of a functional communication plan. Speech-language services are often thought of as supplementary since all service providers and teachers need to communicate with a student throughout the day to deliver the rest of the special education and related services. However, such a plan was never completed, and the IEP team subsequently reduced the direct speech-language therapy service minutes that was provided to Student in the IEP-02/10/2022. With no guidance on how to best encourage communication with Student, reduced speech-language service minutes, and a DOE-model of special education teaching being provided by a special education teacher, rather than an ABA-model plan for Student, it is difficult to understand how Student's needs, being non-verbal and using mostly modified signs, were being appropriately addressed in the IEP-02/10/2022.

Student's IEP-02/10/2022 does not appropriately address Student's need for intensive ABA services and/or speech-language services, at least as of the time of the filing of the Complaints in this case, especially given the inconsistency of the services provided to Student since before March 2020. The records presented by Petitioners demonstrate that Student does not learn through traditional DOE methods of teaching where only problem behaviors are addressed through ABA. Petitioners have proven that Student requires intensive ABA teaching throughout the school day and should have been provided the amount of special education service minutes that would be equivalent to a full school day. Petitioners have also proven that Student's speech-language concerns are not properly being addressed without any functional communication plan for Student's service providers and a reduction in speech-language therapy minutes.

2. Student's IEP-02/10/2022 did not appropriately describe Student's LRE

Petitioners argue that Respondents did not appropriately address Student's educational placement in Student's IEP-02/10/2022. Student's educational placement in the IEP-02/10/2022 was determined to be a public-school special education setting, where Student would not be participating with non-disabled students for all classes and activities.

The purpose of the IDEA was to ensure that children with disabilities be mainstreamed into the general education population to the maximum extent possible to afford them opportunities of being education by and around their similar-aged peers. 34 C.F.R. §300.114(a)(2); *see also Rowley*, 458 U.S. at 202-203, 102 S.Ct. at 3039, 73 L.Ed.2d 690; 20 U.S.C. §1412(a)(5); 34 C.F.R. §300.550; H.A.R. §8-60-44. The determination of the extent to which a child is educated with non-disabled peers is commonly referred to as the "least restrictive environment" or "LRE." In determining whether an educational placement is the LRE for Student, this Hearings Officer reviews a four-factor test adopted by the Ninth Circuit which examines the academic and non-academic benefits for Student in the general education setting, the effect of Student being in the general education classroom environment has on other students or the teacher, and the cost of mainstreaming Student. *Sacramento City Unified School District, Board of Education v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994). In each IEP, the IDEA requires "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class." 34 C.F.R. §300.320(a)(5).

In the IEP development meetings for the IEP-02/10/2022, the IEP team had two primary discussions regarding the educational placement for Student. The first meeting, on September 30, 2021, was prior to the IEP team integrating the results of the EFL assessment into the IEP

draft. The second discussion that occurred regarding the educational placement for Student was on February 10, 2022.

At the time of the first discussion regarding Student's educational placement on September 30, 2021, Student was receiving some services at home due to medical concerns related to COVID-19. *FOF 70*. The IEP team had agreed that since Student had been placed 'homebound' based on medical concerns related to COVID-19, the team would be revising the IEP-03/31/2021 just to change the educational placement since Student had been medically cleared to return to school outside of the home. The team discussed the different possible placements for Student, including the general education setting, the special education setting, a public separate facility, and a private separate facility, such as Recent Clinic. The team agreed that Student was not in need of more restrictive placements and ended the discussion there. Over the course of at least one and a half (1.5) hours, the team narrowed the possible placements to the special education setting at Home School and a private separate facility such as Recent Clinic. Ultimately, the educational placement offered to Student as a revision of the IEP-03/31/2021 IEP was placement in the special education setting at Home School. *FOF 76*. However, all IEP team members at that meeting agreed that Student would go from the home setting to Recent Clinic to transition back to Home School's special education setting. *FOF 77*. This decision by the IEP team is concerning because while the majority of IEP team members were insisting that Student's IEP(s) could be implemented at Home School, no one thought that it was a good idea for Student to return to Home School from Student's home and that a transition plan was necessary for Student's success.

The fact that the IEP team did not believe that Student could return to Home School's setting directly from Student's home, even with a transition plan, indicates to this Hearings

Officer that Home School's special education setting was not the appropriate setting for Student to be written into Student's IEP. The IDEA envisions that if a student were to transfer to a different school or location, another IEP team at that student's new school could pick up the student's IEP from the old school to provide the student with as many services as they are able to and appropriate placement of the student until the new team can determine what program would meet the student's needs at the new school. *See* 20 U.S.C. §1414(d)(2)(C)(i). The language of the revision of the IEP-03/31/2021 for Student's educational placement would lead a new school to believe that Student could enter directly into the public-school setting. Based on the discussions at the IEP team meeting on September 30, 2021, no one from the IEP team believed that it would be in the best interest of Student for Student to begin services directly from the home setting to a public-school special education setting. The discussions at the meeting make it clear that the IEP team thought that based on Student's needs and behaviors, Student's appropriate placement from the home setting was Recent Clinic, or a private separate facility.

At the meetings on January 21 and 27, 2022, when the team discussed the special education and related service minutes based on the revised goals and objectives from the EFL assessment, the IEP team was already discussing the IEP program that was being developed as being implemented in the public-school setting. *FOF 93*. When questions were raised by Parent and Recent Clinic BCBA, they were informed that the special education teacher in the classroom would be developing Student's curriculum and that the one thousand (1000) minutes was sufficient to meet Student's needs based on the goals and objectives. The IEP team also noted that Student's program would be different regarding the ABA services, as the board-certified behavior analyst would only be addressing Student's problem behavior and not creating the curriculum for Student in the classroom. *FOF 73*. Recent Clinic BCBA explained that was not

how Student's program at Recent Clinic is currently run and would be a different model of teaching from how Student's special education hours were currently used. *FOF 101*.

Student's educational placement in the IEP-02/10/2022 was based on the IEP team's determination that Student's needs could be met with a DOE-model of teaching, as discussed *supra*. The goals and objectives in Student's IEP-02/10/2022 are based on Student's lack of necessary skills in daily functional living. The DOE-model of teaching envisions that a student will participate in curriculum taught by the special education teacher in the classroom and the ABA practices would be implemented just to address problem behaviors by the student. *FOF 23*. As discussed above, Student requires an intensive ABA teaching model, where a board-certified behavior analyst needs to design a rigorous program to implement constant reinforcing techniques just to enable Student to learn these daily life skills. Respondents have not shown that Home School has the ability to implement that kind of program for Student in the FSC classroom.

Nonetheless, a review of the four-factor test set forth in *Rachel H.*, also demonstrates that the least restrictive environment for Student is a placement in a separate facility. 14 F.3d at 1404. First, placement in a general education or non-ABA education environment would not lead to academic benefits to Student. Student has not demonstrated the ability to learn without rigorous ABA methodology because Student needs to be taught each facet of an exercise or skill before the ultimate exercise or skill can be taught. *See e.g. FOF 170-171*. The IEP team correctly pointed out that there could be some non-academic benefits to Student with placement in a public-school special education setting, namely the presence of other disabled students as well as non-disabled students on campus; activities with Student's similar-aged peers; and community-based programs. These non-academic benefits could be helpful to Student if Student

were at the point that Student could access those programs, but based on the testimony provided at the Hearing, Student is not at the point where Student could access those programs, having had multiple changes in Student's programming since 2020. The third factor, the effect of Student on the other students and teachers in the classroom is of particular concern, as one of Student's goals and objectives concentrates on Student's behavior of grabbing at Student's privates. The risks of Student doing these behaviors on a public-school campus or some of Student's other behaviors weighs against Student's placement in a public-school setting. Finally, the cost of mainstreaming Student has not been raised as an issue in this case, so it is not of concern to this Hearings Officer regarding Student's educational placement.

Based on the four-factor test, the only positive factor for placement in the public-school setting is the possibility of non-academic benefits, such as Student engaging with other peers, in activities for high school students, and/or community-based instruction. Nothing in the record has demonstrated that Student was in a position at the time of the development of the IEP-02/10/2022, or at the time of the Hearing, to participate in these non-academic benefits. This is not to say that Student will not later be able to benefit from placement at or the receipt of some services at Home School. The evidence in the record from Student's experience with Previous Home School, related services being provided on Home School's campus, brief participation in the adaptive physical education class, and the football game attended by Student's family shows that the IEP team can later discuss the possible benefits of transferring Student from a private facility to Home School's campus. *FOF 131*. However, based on the record of Student's regression due to multiple changes in Student's program over the years, Petitioners have proven that Home School's special education setting is not the appropriate educational placement for Student at this time.

C. Petitioners' Requested Remedies/Equitable Considerations

As Petitioners have proven that Respondents have failed to abide by the Order-02/23/2022, materially failed to implement Student's IEP(s), and have failed to develop an appropriate IEP for Student that addresses Student's unique needs and would allow Student to access Student's education, this Hearings Officer declines to address Petitioners' remaining issues.

When a child with a disability is deprived of a FAPE in violation of the IDEA, a court and/or hearing officer fashioning appropriate relief may order compensatory education. *See* 20 *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 103 LRP 37667 (1985); *see also R.P. ex rel. C.P. v. Prescott Unified School Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011) (*citing Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 522-523 (D.C.Cir. 2005); U.S.C. 1415(i)(2)(C)(iii); 34 C.F.R. 300.516(c)(3). Compensatory education is an equitable remedy that attempts to account for the educational deficit caused by a deprivation of educational services that a student should have received in the first place. *Department of Educ., Hawaii v. R.H. ex rel. K.R.*, 2013 WL 3338581 *7 (D. Hawai'i 2013) (*citing R.P.*, 631 F.3d at 1125). The goal of compensatory education is to "place disabled children in the same position they would have occupied but for the school district's violation of the IDEA." *R.P.*, 631 F.3d at 1125. An award of compensatory education "must be reasonably calculated to provide the educational benefits that likely would have accrued." *Reid*, 401 F.3d at 524. "This standard 'carries a qualitative rather than quantitative focus,' and must be applied with '[f]lexibility rather than rigidity.'" *Mary McLeod Bethune Day Academy Pub. Charter Sch. v. Bland*, 555 F. Supp. 2d 130, 135, 50 IDELR 134 (D.D.C. 2008) (*quoting Reid*, 401 F.3d at 524). In crafting the remedy, the court or hearing officer is charged with the responsibility of engaging in "a fact-intensive analysis that includes

individualized assessments of the student so that the ultimate award is tailored to the student's unique needs." *Mary McLeod*, 555 F. Supp. 2d at 135 (citing *Reid*, 401 F.3d at 524). For some students, the compensatory education services can be short, and others may require extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE. *Id.*

Compensatory education can come in many forms and both hearing officers and courts have fashioned varying awards of services to compensate for denials of FAPE. Awards have included, but are not limited to, prospective tuition award, reimbursement for out-of-pocket educational expenses, and private placement. *Draper v. Atlanta Indep. Sch. System*, 518 F.3d 1275, 49 IDELR 211 (11th Cir. 2008, *cert. denied*, 131 S. Ct. 342, 110 LRP 57266 (2010)); *Foster v. Bd. of Educ. of the City of Chicago*, 611 F. App'x 874, 65 IDELR 161 (7th Cir. 2015) (unpublished).

Petitioners have proven that Student has had, at best, inconsistent provision of special education and related services since 2018. While this Hearings Officer notes that the DOE did its best to implement the services it was able to during the COVID-19 pandemic and resulting shut-downs, the lack of consistent services before and after the DOE opened up their campuses for general education students was a failure to provide Student with a free appropriate public education.

This Hearings Officer notes that it does appear that it was and is still an uphill battle for Respondents to find appropriately credentialed and trained personnel to provide services to Student in a consistent manner. However, the IDEA does not consider a lack of resources a valid excuse or reason not to provide services to a special education student. *See Matanuska Susitna Borough School District*, 83 IDELR 50 (Alaska 2023) (citing Office of Special Education Programs ("OSEP") Memorandum 95-9 (OSEP 1994) (finding that "a shortage of resources,

whether in the form of personnel or equipment, is never a valid excuse for a school's failure to provide special education and related services").

This Hearings Officer also considers the fact that Petitioners, along with their advocates, at times during the IEP development process raised discussions on issues that the IEP team had already discussed at several different meetings. This, accompanied by the fact that Student's IEP team has a large amount of team members, factored into the reason why Student's IEP-02/10/2022 took too long to develop. This Hearings Officer does recognize that each meeting lasted approximately two (2) hours or more and were held alongside other meetings regarding peer reviews or other matters. Respondents did make every effort to address Parent's concerns regarding Student's program and this Hearings Officer finds that Respondents acted in good faith throughout Student's IEP development process.

Compensatory education award

This Hearings Officer finds that due to Respondents failure to comply with procedures under the IDEA which resulted in a denial of FAPE to Student, an award to Petitioners of compensatory education is appropriate.

In this case, Respondents failed to abide by the Order-02/23/2022 and failed to appropriately implement Student's IEP due to Student's discharge from Recent Clinic. Student suffered regression in basic skills that had been previously mastered by Student and set Student back in Student's goal of becoming a functional adult. The Order-02/23/2022 clearly laid out that Student was to receive two thousand eight hundred eighty (2880) minutes per week of special education (which included two thousand four hundred (2400) minutes of school hours and four hundred eighty (480) minutes of non-school hours); one thousand eighty (1080) minutes of occupational therapy; five hundred forty (540) minutes of physical therapy; one thousand

eighty (1080) minutes of speech-language therapy, and three thousand one hundred eighty (3180) minutes per week of individual instructional support. The record shows that Respondents did not comply with the Order-02/23/2022 and pressured Parent into agreeing to the terms of the new IEP-02/10/2022 during the pendency of these proceedings by threatening to revert back to Student's old goals and objectives, thereby setting Student back in Student's educational progress at that point. It is unclear at this time whether Student's special education and related service providers are providing services according to the minutes in the Order-02/23/2022 or the IEP-02/10/2022.

Since the exact number of minutes provided to Student was not presented at the Hearing, this Hearings Officer will order Respondents to provide an accounting of special education, speech-language, occupational therapy, and individual instructional support services provided to Student from February 23, 2022 through the date of this Decision, as well as an accounting of the number of special education, speech-language, occupational therapy, and individual instructional support service minutes that should have been provided under the Order-02/23/2022 (as noted above). This accounting shall be due no later than ninety (90) calendar days after this Decision date. Any time less than what should have been provided under the Order-02/23/2022 shall be maintained in a 'bank' of service minutes/hours to be provided to Student as needed. Since Student requires all-day services to address Student's needs, the likelihood of these 'banked' hours being used prior to Student turning age [REDACTED] is low. Therefore, the 'banked' hours owed to Student pursuant to this Decision shall be valid for use by Student after Student's [REDACTED] birthday through Student's [REDACTED] birthday.¹² Respondents

¹² Because this Hearings Officer does not know the total amount of minutes that will be owed to Petitioners, a two (2) year period for Petitioners to use the minutes is reasonable to ensure that Student shall receive as much of the services owed as possible [REDACTED]

shall provide Petitioners an updated accounting of the ‘banked’ hours every quarter until the hours are depleted. Petitioners may use these ‘banked’ hours of services to have the DOE provide Student with special education, speech-language, occupational therapy, and/or individual instructional support services.¹³ Individual instructional support services, per ABA ethical codes, also require five percent (5%) supervision by a board-certified behavior analyst that shall also be included in the ‘banked’ hours. This Hearings Officer notes that any service hours or minutes that are not provided due to Petitioners’ cancellation of services (i.e., for a trip, illness, or other) or school holidays, are not to be included in the banked hours.

Additionally, because this Hearings Officer finds that the IEP-02/10/2022 educational placement for Student and services are not appropriate to address Student’s needs, this Hearings Officer also orders that Student’s special education, related services, and educational placement in the IEP-03/31/2021 is to be implemented by the DOE until the completion of a new IEP for Student. This Hearings Officer notes that this order DOES NOT require any of Student’s service providers to resort to old goals in the IEP-03/31/2021. The purpose of this provision is to allow Student to continue to work on goals and objectives that Student is currently working on in the environment that Student is currently in. At the time of the Hearing in this case, Student was receiving educational services in Student’s home due to the discharge from Recent Clinic. Student’s service providers were working on agreed upon life-skills goals from the IEP-02/10/2022 to provide Student with foundations toward independence as an adult. If Student’s program, goals, objectives, or placement have changed *with agreement and consent of*

DOE’s responsibility while not requiring Respondents to be responsible for Student for an undetermined period [REDACTED].

¹³ This Hearings Officer notes that the Order-02/23/2022 also provided Student with three (3) monthly consultations with an [REDACTED] consulting teacher, however that is not being made a part of this compensatory education award.

Petitioners since the end of the Hearing on March 30, 2023, then the program, goals, objectives, and placement on the date of this Decision shall continue until the development of the new IEP or until the IEP team, including *Petitioners*, agree otherwise. This Hearings Officer reiterates that *Student's program should remain the same as it is as of the date of this Decision, except that the service providers may increase demands or further Student's progress on skills that Student is learning.* Respondents shall ensure, to the maximum extent possible, that Student's program does not drastically change during the development of Student's new IEP unless *Petitioners* agree to the terms of the change. This includes finding appropriate replacement professional service providers and/or private separate facility if necessary, during the development of the new IEP.

Because some service providers expressed concern that the additional minutes in the IEP-03/31/2021 was not necessary for the goals and objectives that Student was working on in the IEP-02/10/2022, these unused minutes may be added to the 'banked' minutes¹⁴ for Student to access as necessary. Service minutes for direct speech-language therapy may also be used to develop Student's functional communication profile that will be included in Student's new IEP.

Revision of Student's IEP

This Hearings Officer also finds that due to the denial of FAPE to Student for the failure to appropriately identify and address Student's needs in Student's IEP-02/10/2022, this Hearings Officer finds that an award to *Petitioners* of a comprehensive reevaluation and the development of a new IEP for Student is appropriate.

¹⁴ These unused minutes are to be combined with the minutes/hours that will be provided to *Petitioners* in the accounting of minutes not provided from February 23, 2022 to the date of this Decision as discussed above.

Since most of Student's assessments and observations took place at least one (1) year ago and prior to Student's discharge from Recent Clinic, this Hearings Officer finds that it would be appropriate for the IEP team to conduct a reevaluation for Student. The reevaluation should be fully comprehensive and include assessments that cover all areas of Student's needs, including but not limited to, speech-language, occupational therapy, physical therapy, an EFL assessment, and observations of Student by a psychologist. By committing resources to conduct all assessments prior to the start of the IEP development, it should prevent the unusual circumstances of what happened in the development of the IEP-02/10/2022.

Student needs a functional communication system or plan to assure that all Student's current and possibly future service providers know the best way to encourage Student to communicate. This can be accomplished through a speech-language pathologist, a board-certified behavior analyst, or someone similarly qualified to prepare such a system or plan. This plan should be conducted alongside or as part of the reevaluation so that it may be included with the new IEP developed for Student. The time used to develop the functional communication system or plan may be counted toward speech-language direct service minutes provided to Student.

In this case, Student's appropriate educational placement for the time being is a private separate facility that can provide intensive ABA services to Student for the full day. Petitioners have demonstrated that Student's disabilities affect Student's ability to learn in a typical manner and that ABA programming to develop each of Student's necessary skills is the best way for Student to attain these skills. The private separate facility should also include community-based services and skills training to allow Student to develop the necessary skills that would allow Student to function as an adult. The record in this case demonstrates that Student cannot just fit

into a DOE-model of education, where a special education teacher designs a curriculum for Student and a board-certified behavior analyst only addresses Student's maladaptive behaviors. Student requires methodical step-by-step skill learning with immediate, appropriate reinforcement to allow Student to build necessary skills for Student to function as an adult. Petitioners have demonstrated a need for Student to learn in the environment in which Student will ultimately use the skills learned, as Student has difficulty generalizing skills across people and environments.

The IEP team should make every attempt to complete the reevaluation and Student's new IEP as soon as possible to address Student's needs in a timely manner. The new IEP should be based on the information, assessments, observations, data, etc., obtained through the reevaluation done with Student. Any concerns or objections by Petitioners regarding the results of the reevaluation are to be addressed separately through a request for an IEE, etc., and shall not delay the IEP development based on the reevaluation done as a result of this Order.¹⁵ Additional information gathering to develop a new IEP for Student shall only delay the development of the IEP by agreement with the IEP team administrators.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have met their burden of proving two (2) of the allegations in the Complaint by a preponderance of the evidence. Petitioners have proven that Respondents denied Student a FAPE by failing to address Student's needs in Student's IEP-02/10/2022 by not providing the appropriate special education and related services to Student

¹⁵ This provision shall not supersede any subsequent order or decision that may be issued by another Hearings Officer or reviewing authority.

and by not determining Student's appropriate educational placement. Petitioners have also proven that Respondents denied Student a FAPE by committing procedural violations under the IDEA that resulted in a loss of educational opportunity and deprivation of educational benefit by failing to abide by the Order-02/23/2022 and by materially failing to implement Student's IEP(s). Based on the comprehensive nature of the violations and denial of FAPE proven by Petitioners, this Hearings Officer does not address any further issues raised in Petitioners' Complaints.

This Hearings Officer finds that the equitable considerations in this case allow for an award of some of the remedies requested by Petitioners.

For the reasons stated above, IT IS ORDERED –

1. For the period from the issue date of this Decision until the completion of Student's new IEP, Respondents shall provide Student with the special education, occupational therapy, physical therapy, speech-language therapy minutes, individual instructional support and required board-certified behavior analyst supervision minutes, as outlined in the IEP-03/31/2021.
2. Student's special education and related service providers should continue to work on the goals and objectives that they are working on with Student at the time of this Decision. Student's special education and related service providers can, with agreement of the IEP team, expand on the current goals and objectives in the event that Student has mastered and can generalize the skills. This provision allows the special education and related service providers to continue to work with Student to make progress on skills without the need to continue working on goals and objectives that have been mastered and generalized.¹⁶ The order for the DOE to provide the

¹⁶ This Hearings Officer recognizes that the development of a new IEP for Student in light of the

service minutes/hours in the IEP-03/31/2021 DOES NOT require the service providers to revert to the old goals and objectives in the IEP-03/31/2021.

3. The special education minutes in the IEP-03/31/2021 may be provided as part of Student's intensive ABA program at a private separate facility or by a private ABA provider to provide a full-day of services.¹⁷
4. The additional speech-language direct therapy service minutes to be provided based on the IEP-03/31/2021 may be used by the DOE to have an appropriate speech-language pathologist, board-certified behavior analyst, or other professional with similar credentials develop a comprehensive functional communication plan for Student. This functional communication plan shall be included in Student's new IEP and will provide guidance for current and/or new service providers for Student to understand the best way to encourage communication with Student during the provision of their services.
5. If the service providers do not use all the minutes/hours that are provided in the IEP-03/31/2021,¹⁸ Respondents shall keep a 'bank' of the minutes/hours that are unused

reevaluation that is being ordered will likely take several months, during which Student may achieve mastery of skills that are currently being worked on at the time of this Decision. This Hearings Officer DOES NOT intend for Student to continue working on goals and objectives that have been mastered. The purpose of this specific item of the Order is to allow Student's service providers to continue progressing Student's steps toward independence and education while the IEP team develops an appropriate IEP for Student based on a fully comprehensive reevaluation.

¹⁷ This Hearings Officer notes that at the time of the Hearing, Current BCBA was working on an intensive ABA program for Student for "non-school hours." The special education minutes from the IEP-03/31/2021 may include the hours provided by Current BCBA for Student's entire day program if that is what is currently in place at the time of the Decision. The ABA service minutes listed in the IEP-03/31/2021 would include the required mandatory supervision of RBT hours.

¹⁸ This Hearings Officer notes that some service providers did not believe that they did not have enough goals or objectives to work on with the extended time in the IEP-03/31/2021 based on

to be provided to Student as needed at a later time. This 'bank' of unused minutes/hours may be used by Student even after Student attains the age of [REDACTED] through Student's [REDACTED] birthday, due to Respondents' failure to provide the appropriate services to Student as outlined in the Order-02/23/2022. Special education and IIS service minutes/hours not provided due to an absence, trip, or any other reason by Student and/or Student's family, or due to DOE school holidays will not count toward banked hours.¹⁹ Absences, trips, or other cancellations of Student's services by Student and/or Student's family will result in a forfeiture of service minutes/hours.

6. Within ninety (90) calendar days of this Decision, Respondents shall also calculate the total amount of minutes/hours that were not provided to Student from February 23, 2022 and provide the full accounting to Petitioners. This accounting shall include the difference in service minutes/hours that were provided to Student under the IEP-02/10/2022 and what was supposed to be provided to Student under the Order-02/23/2022 (based on the IEP-03/31/2021). This accounting shall also include any service minutes/hours not provided to Student due to lack of service providers or Student's discharge from Recent Clinic, and any other hours under the IEP-02/10/2022 that were not provided to Student due to lack of resources. This

what Student is currently working on. If that is the case, the service provider and/or DOE may log the extra time that was not provided and collect it for later use.

¹⁹ Special Education and IIS services are the only minutes that are provided daily/weekly, whereas other services (i.e., occupational therapy, physical therapy, and ABA services) are provided quarterly and/or based on a formula and can be adjusted to accommodate absences or trips, etc.

accounting shall also include any service minutes not provided to Student from the date of this Decision as outlined in paragraph 5 above.

7. The total amount of minutes/hours in Respondents' accounting shall be included in the 'bank' of service minutes/hours that will be available to Student even after Student reaches the age of [REDACTED] through Student's [REDACTED] birthday, to be provided at the DOE's expense until the minutes/hours are used. Respondents shall provide a quarterly accounting to Petitioners of the 'banked' hours, including any minutes/hours used from the 'bank,' until the hours are depleted.
8. Student's educational placement from the issue date of this Decision until the completion of Student's new IEP shall be a private separate facility that can provide intensive ABA programming for Student. If Student is currently receiving intensive ABA services from a qualified provider in Student's home setting, the DOE may continue to provide Student with ABA, special education, and/or related services to be provided at the location where Student is currently receiving them until a suitable placement is located.²⁰
9. Respondents shall arrange for the IEP team to have a meeting within thirty (30) calendar days of this Decision, to discuss the DOE conducting a comprehensive

²⁰ At the time of Hearing, Student had been discharged by Recent Clinic and had moved back to receiving services at Student's home. If the home setting is where Student is receiving services at the time of this Decision, then services may be continued to be provided there, so as not to disrupt Student's education while a new IEP is being developed. Student's educational placement is NOT homebound, even if services are being provided there. Student may receive services at the home only because Recent Clinic terminated Student's services and a new private separate facility has not been found. If Student is currently at another private separate facility, then Student is to remain there during the development of Student's new IEP. If an appropriate private separate facility is located by the DOE during the development of the new IEP, Student may be placed there at the IEP team's discretion.

- reevaluation of Student. The reevaluation shall consist of any assessments, observations, and data collection the team determines to be necessary including, but not limited to speech-language assessment, occupational therapy assessment, physical therapy assessment, observations of Student by a psychologist, and an EFL assessment. If any of these assessments have been conducted since January 1, 2023, they need not be conducted again for the reevaluation.
10. Within fifteen (15) calendar days of the completion of the reevaluation meeting, the DOE shall provide Parent with a prior written notice of the assessments to be conducted as part of Student's reevaluation along with consent forms for the assessments and/or observations to be conducted as part of the reevaluation. The consent form may also be for records requests from relevant private providers, such as Student's physicians or any other private (non-DOE funded) providers.
 11. Within fifteen (15) calendar days of the receipt of the prior written notice and consent forms, Parent shall execute and return the consent forms to the DOE.
 12. Within sixty (60) calendar days starting the first business day after the DOE receives a fully executed copy of the consent forms from Parent, the IEP team shall hold an eligibility meeting based on the reevaluation. All copies of completed assessments/reports to be considered in the eligibility meeting shall be provided to Petitioners no less than seven (7) days prior to the meeting.
 13. Within thirty (30) calendar days of the eligibility meeting, the IEP team shall meet to develop Student's new IEP. The IEP team need not complete the IEP at that initial meeting but should strive to complete Student's IEP within sixty (60) calendar days of the initial IEP development meeting.

14. The IEP team developing Student's new IEP shall include someone who is knowledgeable with transition services²¹ that may be available to Student to provide the team with information to assist with a plan to transition Student for post-high school living. Petitioners shall sign the appropriate consent forms to allow the transition services team member to attend Student's IEP development meetings.
15. Any delays in the scheduling of meetings, provision of consents, scheduling of assessments or observations of Student, or for any other reason caused by Petitioners and/or Petitioners' advocates or representatives shall be carefully documented by Respondents and shall extend the timelines set herein by the number of days attributable to Petitioners and/or Petitioners' advocates or representatives.
16. Respondents shall make Student's complete educational record available to Petitioners within sixty (60) days of this Decision. Petitioners may view the records at Home School on date(s) and time(s) agreed to by both parties. Respondents may, but are not required to, provide the educational record via electronic means (i.e. via a link to a secured drive). Respondents may, but are not required to, make copies of the educational record for a fee to be paid by Petitioners, only if requested by Petitioners after they are informed of the estimated total cost of the copying fees. Due to the anticipated volume of documents in Student's educational record, the copying fee may also include a reasonable charge for labor for hours spent copying and organizing the documents.

RIGHT TO APPEAL

²¹ Examples of potential new team members could include representatives/social workers from the State of Hawai'i Department of Human Services Division of Vocational Rehabilitation.

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

DATED: Honolulu, Hawai‘i, June 2, 2023.

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