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

In the Matter of STUDENT, by and through  
the Parent<sup>1</sup>,

Petitioners,

vs.

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

Respondents.

DOE-SY2223-013

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION

Due Process Hearing: March 16, 30 & 31, 2023  
Hearings Officer: Charlene S.P.T. Murata  
Location: Virtual Hearing

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

**I. JURISDICTION**

<sup>1</sup> Personal identifiable information is provided in the Legend.

This proceeding was invoked in accordance with the Individuals with Disabilities Education Act (“IDEA”), as amended in 2004, codified at 20 U.S.C. §§ 1400, et seq.; the federal regulations implementing IDEA, 34 C.F.R. Part 300; and the Hawaii Administrative Rules §§ 8-60-1, et seq. Additionally, Petitioners reference Section 504 of the Rehabilitation Act of 1973 (“Section 504”), as amended in 1974, codified at 29 U.S.C. §§ 794, et seq.; and the Hawaii Administrative Rules §§ 8-61-1, et seq. in their claims and requests for relief<sup>2</sup>.

## **II. INTRODUCTION**

On August 9, 2022, the Department of Education, State of Hawaii, and Keith T. Hayashi, Superintendent of the Hawaii Public Schools (collectively “Respondents” or “DOE”), received a Complaint and Resolution Proposal from Student, by and through Parent (collectively “Petitioners”) (“8/09/2022 Complaint”). The 8/09/2022 Complaint was assigned case number DOE-SY2223-013.

On November 7, 2022, Respondents received another Complaint and Resolution Proposal, dated November 5, 2022, from Petitioners (“11/07/2022 Complaint”). The 11/07/2022 Complaint was assigned case number DOE-SY2223-019.

Respondents submitted a response to Petitioners’ 8/09/2022 Complaint on August 15, 2022, and a response to Petitioners’ 11/07/2022 Complaint on November 17, 2022.

On September 7, 2022, a Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for September 19, 2022 for the 8/09/2022 Complaint. The prehearing conference took place on September 19, 2022 as scheduled. Present at the prehearing conference was Keith H.S. Peck, Esq. (“Mr. Peck”)

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<sup>2</sup> Petitioners’ 8/09/2022 Complaint and 11/07/2022 Complaint assert Student’s eligibility for rights and protections under Section 504 of the Rehabilitation Act of 1974; however, Petitioners did not present any evidence or argument during the due process hearing and in their closing brief regarding their Section 504 claim. Based on the lack of evidence or argument to support this claim, the undersigned Hearings Officer concludes that Petitioners have effectively abandoned their Section 504 claim and have not met their burden of proof.

appearing on behalf of Petitioners, and Deputy Attorney General Kevin Richardson (“Mr. Richardson”) appearing on behalf of Respondents. During the prehearing conference, the parties agreed to have the due process hearing on December 12-15, 2022. On September 20, 2022, a Prehearing Order was issued to the parties, setting forth the issues and procedures for the due process hearing, and deadlines for submission of substantive motions, witness and exhibit lists, and exhibits. On December 12, 2022, an Amended Prehearing Order was issued for the 8/09/2022 Complaint.

Petitioners filed Petitioners’ Motion for Partial Summary Judgment; Memorandum in Support of Motion on October 7, 2022, and Petitioners’ First Amended Motion for Partial Summary Judgment; Declaration of Counsel; Memorandum in Support of Motion on the same day (“10/07/2022 MPSJ”) for the 8/09/2022 Complaint. On October 14, 2022, Respondents filed Respondents’ Memorandum in Opposition to Petitioners’ First Amended Motion for Partial Summary Judgment filed October 7, 2022; Declaration of Kevin M. Richardson; Exhibit “A”. On October 19, 2022, Petitioners filed Petitioners’ Reply to its First Amended Motion; Declaration of Counsel; Memorandum in Support of Motion. Petitioners’ 10/07/2022 MPSJ was denied on November 9, 2022. See Order Denying Petitioners’ Motion for Partial Summary Judgment issued on November 9, 2022.

On November 23, 2022, a Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for December 8, 2022 for the 11/07/2022 Complaint. The prehearing conference took place on December 8, 2022 as scheduled for the 11/07/2022 Complaint. Present at the prehearing conference was Mr. Peck appearing on behalf of Petitioners, and Mr. Richardson appearing on behalf of Respondents.

During the December 8, 2022 prehearing conference for the 11/07/2022 Complaint, the parties consented to holding a further prehearing conference for the 8/09/2022 Complaint. Over the objection of Respondents, the 8/09/2022 Complaint and 11/07/2022 Complaint were

consolidated for hearing. See Order Consolidating Cases DOE-SY2223-013 and DOE-SY2223-019 for Hearing, issued on December 12, 2022. During the prehearing conference on December 8, 2022, the December 12-15, 2022 hearing for the 8/09/2022 Complaint was set aside, and the parties agreed to have the due process hearing for both cases on February 8-10, 15-17, 2023.

On December 12, 2022, an Amended Prehearing Order and Prehearing Order were issued to the parties, setting forth the issues and procedures for the due process hearing, and deadlines for submission of substantive motions, witness and exhibit lists, and exhibits for the 8/09/2022 Complaint and 11/07/2022 Complaint, respectively.

On December 14, 2022, Petitioners filed Petitioners' Motion for Partial Summary Judgment; Memorandum in Support of Motion; Exhibits "A" – "I"; Declaration of Counsel ("12/14/2022 MPSJ"). On December 22, 2022, Respondents filed Respondents' Memorandum in Opposition to Petitioners' Motion for Partial Summary Judgment filed December 14, 2022; Declaration of Kevin M. Richardson; Exhibit "1". Petitioners did not file a reply. Petitioners' 12/14/2022 MPSJ was denied on January 26, 2023. See Order Denying Petitioners' Motion for Partial Summary Judgment; Memorandum in Support of Motion; Exhibits "A"- "I"; Declaration of Counsel, filed December 14, 2022, issued on January 26, 2023.

On January 5, 2023, an Order Striking Due Process Hearing Date was issued to the parties. The order took February 10, 2023 off calendar as a hearing date at Respondents' request. Petitioners did not object to striking February 10, 2023 from the calendar. After several status conferences with the parties, an Order Striking and Adding Due Process Hearing Dates was issued on February 13, 2023. The order documented the changed hearing dates agreed to by the parties. The due process hearing was now scheduled for February 16-17, 2023 and March 30-31, 2023.

On February 16, 2023, the undersigned Hearings Officer, Mr. Peck, Mr. Richardson and Department of Education District Educational Specialist ("DES") were present for the first day

of the hearing. Parent was not present. Mr. Peck contacted Parent and Parent informed Mr. Peck that Parent thought the hearing was scheduled for March 16, 2023. Respondents made an oral motion to dismiss the cases. Respondents' oral motion was denied without prejudice. Due to Parent's unavailability for a hearing on February 16 and 17, 2023, these two (2) dates were taken off calendar. The hearing was later rescheduled to March 16, 2023 to accommodate Parent's availability.

Both parties timely submitted their respective witness list, exhibit list, and exhibits on February 1, 2023.

The due process hearing took place on March 16, 2023; March 30, 2023; and March 31, 2023 using the Zoom video conferencing platform. All participants in the due process hearing appeared remotely via video and audio. The undersigned Hearings Officer presided over the matter. Petitioners were represented by Mr. Peck, and Respondents were represented by Mr. Richardson. Parent was present at the due process hearing to testify only. Parent's presence was waived for the rest of the hearing. DES was present on behalf of Respondents. The due process hearing was completed on March 31, 2023.

Petitioners called Parent as their only witness. Respondents called SPED Teacher as their only witness.

The following Petitioners' exhibits were admitted into evidence with no objections: Exhibit 1 (pages 22-93), Exhibit 2 (pages 94-200, 246-261), Exhibit 3 (pages 254-261)<sup>3</sup>, and Exhibit 4 (pages 297-320, 328-342, 10/13/2022 Video/Audio file of IEP meeting). Tr. Vol. II, 75:23-80:18; Tr. Vol. III, 275:3-22.

The following Respondents' exhibits were admitted into evidence with no objections: Exhibits 1 (pages 001-007), 6-66 (pages 026-362), 68-69 (pages 365-384), 71-73 (pages 387-

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<sup>3</sup> Petitioners Exhibit pages 254-261 are part of Petitioners' Exhibits 2 and 3.

393), 77 (page 400), 79 (pages 403-404), 82-87 (pages 410-427). Tr. Vol. II, 80:20-81:13; Tr. Vol. III, 203:3-204:11, 275:23-276:10.

On April 21, 2023, Respondents requested an extension of the deadline to submit closing briefs as the transcripts were received later than expected. Petitioners joined in the request. The parties' request was granted, and the deadline to submit closing briefs was extended from April 28, 2023 to May 5, 2023. On May 5, 2023, the parties timely submitted their closing briefs.

The deadline to issue a decision for the 8/09/2022 Complaint and the 11/07/2022 Complaint is June 3, 2023. The initial decision deadline for the 8/09/2022 Complaint was October 23, 2022; and January 21, 2023 for the 11/07/2022 Complaint. The decision deadline was extended from October 23, 2022 to January 21, 2023 (for the 8/09/2022 Complaint only); from January 21, 2023 to March 6, 2023; from March 6, 2023 to April 19, 2023; and from April 19, 2023 to June 3, 2023. See Order Granting Petitioners' Request for an Extension, dated October 20, 2022, filed October 21, 2022; Order Granting Petitioners' Request for an Extension, issued on January 12, 2023; Order Granting Petitioners' Request for an Extensions, issued on February 22, 2023; and Order Granting Petitioners' Request for an Extension, issued on April 13, 2023.

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

### **III. ISSUES PRESENTED**

In their 8/09/2022 Complaint and 11/07/2022 Complaint, Petitioners allege procedural and substantive violations of the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973. Specifically, Petitioners allege that the DOE denied Student a free and appropriate public education ("FAPE").

Petitioners raise one issue in the 8/09/2022 Complaint:

Issue 1 – Whether Student was denied a FAPE when the DOE failed/refused to revise the 11/04/2021 Individualized Education Program (“IEP”) or replace it, prior to the start of the 2022-2023 school year, when the DOE knew that Parent believed the IEP to be inappropriate<sup>4</sup>.

Petitioners raise nine (9) issues in the 11/07/2022 Complaint:

Issue 1 – Whether Student was denied a FAPE when the DOE completed an IEP dated 8/16/2022 on or about 10/13/2022, without Parental Participation when Parent was not in attendance.

Issue 2 – Whether Student was denied a FAPE where the DOE failed to gather sufficient information on Student’s need for Extended School Year services or to have a discussion on the use of Applied Behavior Analysis for the IEP dated 8/16/2022.

Issue 3 – Whether Student was denied a FAPE where Student was deemed ineligible for Extended School Year services for the IEP dated 8/16/2022.

Issue 4 – Whether Student was denied a FAPE when the IEP team failed to discuss and/or describe the behavior interventions Student would be provided and/or incorporate a Behavior Plan into the 8/16/2022 IEP and/or involve Parent in discussion of what the Plan would entail prior to completion of the IEP dated 8/16/2022.

Issue 5 – Whether Student was denied a FAPE where Student has inadequate Supplementary Aids and Supports, Behavior Interventions, Visual aids/schedules, math manipulatives, reverse inclusion skills program, extra time on classwork, positive reinforcers, preferential seating, and/or Applied Behavior Analysis, in his 8/16/2022 IEP offer.

Issue 6 – Whether Student was denied a FAPE when the IEP team failed to discuss the methodology the 1:1 aide would use to manage Student’s behaviors for the IEP dated 8/16/2022<sup>5</sup>.

Issue 7 – Whether Student was denied a FAPE where Student had been placed in an overly restrictive environment (Least Restrictive Environment “LRE”) for the IEP dated 8/16/2022.

Issue 8 – Whether Student was denied a FAPE where the IEP team failed to hold a proper LRE discussion for the IEP dated 8/16/2022.

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<sup>4</sup> Petitioners’ 8/09/2022 Complaint contains a list of seven (7) reasons Parent believed the IEP to be inappropriate. See Amended Prehearing Order issued on December 12, 2022 in case DOE-SY2223-013 for the seven (7) reasons.

<sup>5</sup> The Prehearing Order does not include the word “team,” which the parties understood to be a typographical error. Tr. Vol. I, 7:25-9:1.

Issue 9 – Whether revising the IEP dated 8/16/2022, developed on or about 10/13/2022, without Parental Participation was a denial of FAPE.

Petitioners request the following remedies in both complaints:

Remedy 1 – Order the DOE to reimburse Parent for any private school tuition and related expenses ■■■ paid, including costs of transportation and order the DOE to directly fund Student’s private program;

Remedy 2 – Order compensatory education if Parent was unable to provide all of the services Student required;

Remedy 3 – Order such other relief that is appropriate and justified in equity and/or in law, under the circumstances.

#### **IV. FINDINGS OF FACT**

1. Student is currently ■ years old.
2. Student qualifies for IDEA services under the category of Disability. Pet. Ex. 1 at 085.
3. Student has an IEP dated November 4, 2021 (“11/04/2021 IEP”). The 11/04/2021 IEP states that the “IEP Annual Review Date” is November 4, 2022 and the “Reevaluation Date” is October 22, 2023. Pursuant to the 11/04/2021 IEP, Student would receive 1830 minutes per week of special education; occupational therapy and speech-language therapy services. DOE Ex. 6 at 026-048.
4. A Prior Written Notice of Department Action, dated November 8, 2021, was issued by Principal, principal of Home School (“11/08/2021 PWN”). According to the 11/08/2021 PWN, DOE proposed that Student did not qualify for extended school year (“ESY”) services because “there [was] no data to support the continuation of services over a break, as the student has not received services from [Student’s] public home school at any time.” The DOE also proposed that Student’s LRE should be in a “self-contained classroom” where Student “will participate with disabled peers throughout the day. [Student] will be with non-disabled peers during school-wide events (e.g. recess, assemblies, plays, parades, etc).” Pet. Ex. 1 at 083-084; DOE Ex. 6 at 049-050.



5. On November 26, 2021, Petitioners filed a Complaint and Resolution Proposal, dated November 26, 2021, assigned case no. DOE-SY2122-018 (“11/26/2021 Complaint”). According to the 11/26/2021 Complaint, “Student may attend a private school, [Private School].” The 11/26/2021 Complaint alleged that the 11/04/2021 IEP contained procedural and substantive violations. Pet. Ex. 4 at 303-309; Pet. Ex. 4 at 297-302.
6. On December 8, 2021, DOE filed a response, dated December 7, 2021, with the Office of Dispute Resolution, to Petitioners’ 11/26/2021 Complaint. Pet. Ex. 4 at 318-320.
7. In January of 2022, Student started attending Private School full time. Full time status meant [REDACTED] hours a day for [REDACTED] days a week. DOE Ex. 16 at 124.
8. An Individualized Applied Behavior Analysis Education Plan, dated February 22, 2022 (“2/22/2022 IAEP”), was created by Private School for Student for the 2021-2022 school year. DOE Ex. 16 at 126-132.
9. On March 17, 2022, a settlement agreement was fully executed between the parties to settle the 11/26/2021 Complaint. Some of the terms of the settlement agreement were (1) DOE agreed to pay for Student’s tuition and transportation to Private School for the 2021-2022 school year from December 18, 2021 to July 29, 2022; and (2) the parties agree to meet and participate in an IEP meeting to revise and update Student’s IEP. Pet. Ex. 4 at 297-302.
10. Once the IEP team was made aware of the settlement agreement, the IEP team reached out to Parent to schedule a meeting so that the IEP team could fulfill one of the settlement terms in the agreement, namely, the agreement to meet and participate in an IEP meeting to revise and update Student’s 11/04/2021 IEP. SPED Teacher, Tr. Vol. II, 89:4-90:25.
11. On March 23, 2022, SSC emailed to Parent consent forms, requesting that Parent sign them. The consent forms would allow Home School to conduct observations of Student

and to receive information from Private School and Director's Private Company. SSC also asked Parent for Parent's availability for an IEP meeting in the month of May. Pet. Ex. 2 at 094-098; DOE Ex. 13 at 114-117.

12. SSC wanted to schedule the IEP meeting in the month of May so that once the consent forms were signed, the school members of the IEP team would have an opportunity to gather information and observe Student at Private School since the school members of the IEP team had never seen or worked with Student before. SPED Teacher, Tr. Vol. II, 91:17-93:21.
13. Observations at Private School were conducted via a live video feed camera. When an observer arrives at Private School, the observer will be taken to a back observation room where a laptop computer is set up with a live video feed. Observations are limited to thirty (30) minutes. Observers are required to complete a COVID survey and sign a waiver stating that the observer will not record any of the live feed or share the information. SPED Teacher, Tr. Vol. II, 107:3-25. Only being able to observe Student for thirty (30) minutes limited what SPED Teacher could observe. There were moments when the camera feed would freeze or pause. SPED Teacher, Tr. Vol. II, 109:6-110:9.
14. On March 24, 2022, DOE-SLP had a scheduled virtual observation for 10:00 a.m. to 10:45 a.m. DOE-SLP was late and started the observation at 10:09 a.m. DOE Ex. 17 at 138-140. Later that day, after the morning observation, DOE-SLP sent an email to Director asking to schedule another observation of Student on April 19, 21, 26 or 28, 2022. DOE Ex. 17 at 137.
15. On March 25, 2022, Parent emailed SSC three (3) signed consent forms: (1) to allow SPED Teacher and SSC to observe Student at Private School; (2) to allow Home School to receive information from Private School<sup>6</sup>; and (3) to allow Home School to receive

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<sup>6</sup> The specific information requested on the form was "Both historic and current [Private School]

information from Director's Private Company.<sup>7</sup> In the same email, Parent also informed SSC that in the month of May, Parent was tentatively available May 23-27 after 3:00 p.m. Pet. Ex. 2 at 095-098; DOE Ex. 13 at 114-117.

16. On March 28, 2022, DOE gave Director the signed consent forms, requesting Student's educational records from Private School and Director's Private Company. DOE Ex. 14 at 118.
17. On March 30, 2022, DOE sent an email to Director, reminding Director that DOE was seeking Student's educational records from Private School and Director's Private Company. DOE Ex. 14 at 118.
18. Also on March 30, 2022, Director responded to DOE-SLP's 3/24/2022 email asking to schedule an observation of Student in April. Director offered April 22, 2022. DOE Ex. 17 at 137.
19. On April 4, 2022, DOE-SLP responded to Director's 3/30/2022 email and stated that DOE-SLP was not available on April 22, 2022 and reiterated that DOE-SLP was available on April 19, 21, 26 and 28. A little while later, Director responded to DOE-SLP's email and offered April 28 in the morning but did not specify the time and stated that Director would get back to DOE-SLP with the time. DOE Ex. 17 at 136-137.
20. On April 7, 2022, DOE-SLP asked Director if the initial observation of Student on April 28, 2022 could be increased to at least thirty (30) minutes. Director declined stating that Private School had other observations on April 28. Director offered DOE-SLP April 22, 2022 as a possible date. DOE-SLP then inquired about May 3 or May 5, 2022. DOE Ex. 17 at 135-136.

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data, formal assessments (including but not limited to FBA), formative assessments, work samples." Pet. Ex. 2 at 097.

<sup>7</sup> The specific information requested on the form was "[Insurance Company] [REDACTED] Provider data, formal assessments (including, but not limited to FBA), formative assessments, work samples dated from April 1, 2021 to current." Pet. Ex. 2 at 098.

21. On April 11, 2022, having not received any records from Private School and Director's Private Company, SSC sent Director a letter, dated April 8, 2022, from Principal, requesting Student's educational records. The 4/8/2022 letter contained a list of records being sought, including attendance records; grades; discipline referrals; schedule of classes; data sheets; informal/formal assessments; behavior rating scales; progress reports; work samples; functional behavior assessments ("FBA"); Behavior Support Plans; Crisis Plans; Medical Records; treatment Plans; Parent Training Progress Reports; Incident Reports; and any other current information relevant to Student's program. DOE Ex. 14 at 118-121; DOE Ex. 15 at 122-123. On the same day, Director responded to the request stating that Private School does not have a front office support staff so it would take some time to process the requests. Director also informed SSC that requests are worked on in their order that they are received and there were several requests ahead of SSC's request. DOE Ex. 15 at 122.
22. On April 13, 2022, having not received a response from Director, DOE-SLP followed up with Director about scheduling an observation of Student on May 3 or May 5. DOE-SLP also asked Director to answer several questions about Student in preparation for the observation. DOE-SLP asked Director the following questions:
- What current communication system(s) does the student use to interact with adults and peers?
  - What pictures, words, and/or signs [Student] currently use to communicate with others?
  - Is [Student] currently using single word utterances, or is [Student] combining words into phrases and sentences?
  - If [Student] is using an AAC device, what program does [Student] use and what are the target words currently begin taught/used?
  - Please share current data on communication goals and objectives[.]
- DOE Ex. 17 at 134-135.
23. On April 14, 2022, Director gave SSC a copy of Student's 2/22/2022 IAEP and a " [REDACTED] Schedule." Director informed SSC that "[t]he other records

our school program includes, that were in your request are being processed and will be sent. Since [Student] began attending school full time in January 2022 [Student's] insurance services were discontinued. It took [Student] weeks to acclimate to █ hours a day for █ days per week for school and it was felt that to add after school services as well would not be appropriate as of yet.” DOE Ex. 16 at 124-133.

24. On April 18, 2022, SPED Teacher sent an email to Parent to gather information about Student for their upcoming IEP meeting. SPED Teacher asked Parent for Parent's concerns about Student in the school setting; what supports are helpful to Student; and what are Student's strengths and challenges in the areas of gross motor skills, fine motor skills, self-help, social and emotional development and behavior, approaches to learning, pre-academic skills, literacy skills, and communication skills. SPED Teacher also asked Parent if Parent was available on May 19, May 23, or May 26, 2022, for a meeting to revise Student's IEP per the settlement agreement. Pet. Ex. 2 at 100; DOE Ex. 18 at 143-144; SPED Teacher, Tr. Vol. II, 104:18-105:14.
25. Also on April 18, 2022, having not received a response from Director, DOE-SLP followed up on DOE-SLP's 4/13/2022 email to Director. DOE Ex. 17 at 134.
26. On April 19, 2022, Parent responded to the questions in SPED Teacher's 4/18/2022 email. Parent responded with Parent's concerns about Student's development and what Student is able and not able to do. Some of Parent's concerns were: “The concerns I have in the school setting are communication (most important), behaviors (can be bad), socializing, academics, having breaks from school[;]” “[t]his is a major concern, [Student] needs a social program and to be around peers to learn to be social[;]” “[m]y concern is that [Student] is extremely behind[;]” “[m]y concern is that [Student] is very behind in this area [pre-academic skills] as well[;]” and [o]f all the disadvantages [Student] has, this [communication skills] is the biggest concern I have.” Parent also

informed SPED Teacher that Parent was available for a virtual meeting on May 26, 2022 after 3:00 p.m. SPED Teacher informed Parent that a Webex link for a meeting on May 26, 2022 will be forthcoming and asked Parent some follow up/clarifying questions to responses Parent had previously provided. Pet. Ex. 2 at 101-104, 105-106; DOE Ex. 18 at 141-143; SPED Teacher, Tr. Vol. II, 105:18-106:16.

27. On April 22, 2022, SPED Teacher observed Student at Private School. After the observation that same day, SPED Teacher sent an email to Director with follow up questions from the observation. SPED Teacher asked: “1. Is the student always with peers throughout the day? Or does [Student] have time without peers?....” SPED Teacher informed Director that SPED Teacher would need to collect more data for an upcoming IEP meeting and asked to schedule a few observations between April 25, 2022 and May 20, 2022. DOE Ex. 20 at 150-151; DOE Ex. 21 at 156; DOE Ex. 23 at 170-171.
28. Later on April 22, 2022, Director provided the following response to SPED Teacher’s 4/22/2022 email: “My responses in blue below: 1. Is the student always with peers throughout the day? Or does [Student] have time without peers? It was difficult to hear if [Student] was vocalizing today with the talking of others at some points on the video feed. [Student] did not vocalize as per the RBT working with [Student] during the time you observed. Peers are in the room throughout the day but [Student] activities include peers interaction off and on through the day. 2. Who is the primary staff...It changes throughout the week. 3. What days does [Student] attend? Monday-Friday[.] 4. What are (if any) the aids, services and other supports that are provided...This was sent to [SSC], I believe you were on the email. 5. What is the program calendar for [Private School]? Is there a summer break?...Our school program is year-round[.] After my observation today, I will need to collect more in person observational data for an

upcoming IEP meeting for the student...I am looking to observe skills that were listed on [Student's] current IEP through HIDEOE, such as counting, coloring, letter identification, and labeling of story components. We do not implement the IEP through the HIDEOE. The skills listed here are not implemented since they are not part of our IAEP..." DOE Ex. 20 at 149-150; DOE Ex. 21 at 155; DOE Ex. 23 at 169-170.

29. Also on April 22, 2022, Parent responded to SPED Teacher's April 19, 2022 at 1:06 p.m. email asking questions about what are Student's interests; what strategies are being used (Parent responded "[Private School] can provide what strategies they use"); how is Student with following safety directions; does Student eat a variety of food; how long does Student attend to activities at home; is Student identifying letters in the alphabet (Parent responded "No"); what [REDACTED] does Student use (Parent responded "[Student] [REDACTED] . [Private School] can provide what strategies they use.") Pet. Ex. 2 at 107-110.
30. On April 27, 2022, [REDACTED] Consulting Teacher asked Director to schedule an observation of Student as soon as possible as [REDACTED] Consulting Teacher had recently been assigned Student's case. DOE Ex. 19 at 145-146.
31. Also on April 27, 2022, SPED Teacher asked Director to send a list of days and times that SPED Teacher could conduct more observations of Student at Private School. DOE Ex. 20 at 149 DOE Ex. 21 at 155; DOE Ex. 23 at 169.
32. On May 2, 2022, having not received a response from Director, SPED Teacher sent another email to Director asking for dates to conduct observations. Director responded the same day and asked SPED Teacher if SPED Teacher would like to observe Student on May 13, 2022 at 9:45 a.m. to 10:15 a.m. SPED Teacher informed Director that the May 13, 2022 date worked for SPED Teacher and asked Director for another date and

time for an observation. DOE Ex. 20 at 148-149; DOE Ex. 21 at 154; DOE Ex. 23 at 168-169.

33. Also on May 2, 2022, Director responded to [REDACTED] Consulting Teacher's 4/27/2022 email and stated that [REDACTED] Consulting Teacher could observe Student on May 13, 2022 from 8:30 a.m. to 9:00 a.m. The next day, [REDACTED] Consulting Teacher confirmed acceptance of the May 13, 2022 observation date. DOE Ex. 19 at 145.
34. On May 3, 2022, SPED Teacher emailed Director to set up a virtual observation for an occupational therapist. The next day, Director responded to SPED Teacher and informed SPED Teacher that the occupational therapist can email Director directly to set up a time and date for an observation. DOE Ex. 20 at 147-148; DOE Ex. 21 at 153-154; DOE Ex. 23 at 168.
35. On May 11, 2022, SSC emailed Director to follow up on Home School's request for data, stating that Director has only given Home School a copy of Student's 2/22/2022 IAEP and a [REDACTED] Schedule. SSC listed the school's numerous attempts at getting information from Director and asked Director to send the information by the end of the week because SPED Teacher needed the information to develop an IEP. DOE Ex. 22 at 157-158.
36. On May 13, 2022, SPED Teacher cancelled a scheduled observation for that day and asked to reschedule the observation for next week<sup>8</sup>. DOE Ex. 21 at 152; DOE Ex. 23 at 166-167. However, DOE-OT conducted an observation of Student on this day. DOE Ex. 8 at 084.
37. Also on May 13, 2022, Director emailed SSC a copy of Student's Attendance Record for the months of January, February, and March 2022; and a list of "Supplemental Supports

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<sup>8</sup> There's contradiction in the evidence. SPED Teacher informed the IEP team during the 10/13/2022 IEP meeting that SPED Teacher observed Student on May 13, 2022. Pet. Ex. 4 (video of 10/13/2022 IEP meeting at 19:07-19:30).



Including Assistive Technologies” dated May 2022 for the 2021-2022 school year (“5/2022 Supplemental Supports”). In the email, Director also listed Student’s school attendance for the month of April. Director confirmed that “the most current data that reflects [Student’s] current levels of functioning is the assessment data in the [2/22/2022] IAEP....” DOE Ex. 22 at 157-165.

38. Some of the supports listed on the 5/2022 Supplemental Supports are: Extra time; Preferential seating; Reverse inclusion opportunities; RBT daily/weekly rotation for generalization; Consistent 1:1 RBT trained in Verbal Behaviors & Student’s program; Sign Language Program; Use of student positive reinforcers; [REDACTED] problem behavior reduction procedures; Verbal Behavior Teaching Procedures; Small class size (3-5 students); Year-round School; and Cross-Environment Behavior Program. DOE Ex. 2 at 165.
39. On May 16, 2022, Director emailed SPED Teacher offering to re-schedule the cancelled observation to May 19 from 9:45 a.m. to 10:15 a.m. Director informed SPED Teacher that Student was currently out sick and that Student may be out for a few days. SPED Teacher asked Director to keep SPED Teacher informed as to whether SPED Teacher will be able to observe Student on May 19, 2022. DOE Ex. 23 at 166.
40. On May 19, 2022, DOE-SLP observed Student from 8:30 a.m. to 9:00 a.m., and SPED Teacher observed Student from 9:45 a.m. to 10:15 a.m. The observations were done via a live camera feed in a separate room at Private School. DOE Ex. 8 at 085; DOE Ex. 12 at 113; DOE Ex. 23 at 166; DOE Ex. 30 at 215.
41. On May 24, 2022, SPED Teacher asked Director for “any progress reports” on Student and that a Webex link for a May 26, 2022 IEP meeting at 3:00 p.m. will be sent out soon. Director responded to SPED Teacher that same day and stated that Private School did not have any progress reports. Director also informed SPED Teacher that Director

would not be able to attend the May 26, 2022 IEP meeting and that Director needed notice of several weeks to be able to attend a meeting. DOE Ex. 30 at 214-215.

42. On May 25, 2022, SPED Teacher emailed Parent explaining that Director was not on the original email used to schedule an IEP meeting date and therefore Director was not available. SPED Teacher then informed Parent that “If you would like to reschedule, please send a list of dates and times that you are available in early June.” DOE Ex. 24 at 172; DOE Ex. 29 at 209; DOE Ex. 29 at 210. Later that day, SPED Teacher sent another email to Parent and Director, stating that the IEP meeting would be rescheduled and asked them to provide their availability in June. Pet. Ex. 2 at 113; DOE Ex. 24 at 172; DOE Ex. 29 at 209. A few minutes later, Parent responded to SPED Teacher’s email stating that it was fine that Director was not available and that they could move forward with the May 26, 2022 IEP meeting. Parent also informed SPED Teacher that Parent had arranged for [REDACTED] people to help Parent at the meeting. DOE Ex. 24 at 172; DOE Ex. 29 at 209. In the evening that same day, SPED Teacher emailed Parent an undated rough draft of an IEP and informed Parent that “some sections of it are kept from the previous IEP while other sections are blank.” Pet. Ex. 2 at 114; DOE Ex. 24 at 172-196; DOE Ex. 29 at 209; Pet. Ex. 2 at 111-112.
43. In the morning on May 26, 2022, SPED Teacher emailed Parent to cancel the IEP meeting scheduled for that day. SPED Teacher explained that the IEP meeting was canceled because the IEP team did not have all the needed information to update the IEP and not all members with knowledge of Student were available to attend the meeting. SPED Teacher asked Parent to provide new dates in June for an IEP meeting. Pet. Ex. 2 at 114; DOE Ex. 29 at 209; DOE Ex. 24 at 172. Later that day, Parent emailed SPED Teacher to express Parent’s disappointment at the cancellation because Parent had agreed to move forward without Director and Parent had arranged for [REDACTED] to

help Parent at the IEP meeting. Pet. Ex. 2 at 114; SPED Teacher, Tr. Vol. II, 114:5-117:1.

44. On May 27, 2022 at 1:21 pm, SPED Teacher sent the following email to Director:
- “Good Afternoon [Director], We are working to gather as much information as possible for the IEP. We haven’t yet been able to observe [Student] working on these skills: 1. Fine motor tasks including: coloring, scribbling, drawing, holding a marker, scissor, and stacking blocks [;] 2. Independent Play, structured play with a peer or adult, engagement in learning games[;] 3. Academic foundational skills such as identifying shapes, colors, numbers, letters, counting, etc.” Since Director had stated in an email on May 24, 2022 that there were no progress reports for Student, SPED Teacher asked Director to “send the data sheets for [Student’s] objectives on the IAEP dated 2/22/22, so we understand [Student’s] progress on the objectives.” SPED Teacher also asked Director “Has the student been reassessed on the [REDACTED] since 1/24/22 (from the IAEP)? Please send the updated scores.” SPED Teacher also asked to schedule a conference with Private School’s special education teacher. DOE Ex. 30 at 214.
45. On May 27, 2022 at 4:06 p.m. SPED Teacher emailed Parent apologizing for canceling the May 26 IEP meeting and explained that the IEP team needed data from Director. SPED Teacher asked Parent if Student was seeing an occupational therapist either at Private School or privately somewhere else, and if there was any information Parent believed the IEP team should know about Student or gather from Director. SPED Teacher again asked for Parent’s availability for a meeting in June. Pet. Ex. 2 at 115; DOE Ex. 29 at 208-209. Parent responded the next day. Parent informed SPED Teacher that “[Student] does not see an occupational therapist privately. As far as [Private School] goes, I’m not certain if they incorporate OT into [Student’s] day. They would have a better answer for that.” Parent also stated that “I think [Director] needs to

be asked about how much [Student] loses during breaks from school.” Parent then stated that Parent needed to coordinate schedules with the parents Parent wanted present at the meeting and would get back to SPED Teacher later with Parent’s availability. DOE Ex. 29 at 208.

46. On June 2, 2022, SPED Teacher responded to Parent’s 5/28/2022 email: “Thank you for the information. I’ll reach out to [Director] about the OT and loss of skills during a break. Please send a few dates as soon as you have them available!” Pet. Ex. 2 at 116; DOE Ex. 29 at 208.
47. On June 5, 2022, Director responded to SPED Teacher’s questions in SPED Teacher’s 5/27/2022 email. Director responded that Home School was able to observe Student engage in independent play during previous observations, but otherwise, “[f]or the others listed: these are not current objectives/targets we are working on.” Director also stated that Student had not been reassessed on the [REDACTED] since 1/24/2022. Director declined to set up a conference with Student’s Private School special education teacher because the teacher was busy and asked SPED Teacher to give Director questions that SPED Teacher wanted the Private School special education teacher to answer. Director also informed SPED Teacher that “[w]e will work on your other requests” and that Private School was closed last week for a break. DOE Ex. 30 at 213.
48. On June 6, 2022, SPED Teacher responded to Director’s 6/5/2022 email and again asked to set up a conference with Student’s special education teacher. SPED Teacher also wrote that “Per your last email on 5/24/22, if there are no progress reports, please send the data sheets for [Student’s] objectives on the IAEP dated 2/22/22, so we understand [Student’s] progress on the objectives....We would also like the data from before and after this recent break.” DOE Ex. 30 at 213.

49. On June 7, 2022, Parent informed SPED Teacher that Parent was available on June 27, 2022 after 3:00 p.m. for a virtual IEP meeting. Pet. Ex. 2 at 116; DOE Ex. 29 at 207.
50. On June 8, 2022, SPED Teacher emailed Director, asking Director if Director could attend a virtual IEP meeting on June 27 at 3:00 p.m. DOE Ex. 25 at 197; DOE Ex. 28 at 205-206. About half an hour later, Director responded to SPED Teacher's 6/6/2022 email regarding setting up a time to have a conference with Private School's special education teacher but did not respond to SPED Teacher's question about Director's availability for a June 27 IEP meeting. Director informed SPED Teacher that Director would find out when the special education teacher will be available on June 14, 2022. Director asked for the topic areas SPED Teacher would like to speak to the special education teacher about so that the special education teacher could prepare. Director also stated that "[w]e will work on the other requests." DOE Ex. 30 at 212.
51. On June 13, 2022, SPED Teacher emailed Director (cc-ing Parent), asking Director for a date and time before June 24, 2022 when DOE-OT can observe Student working on stacking; stringing; lacing card; imitate drawing vertical and horizontal lines, O, +; turning pages; twisting open a bottle cap; pouring out items from a bottle; snipping; cutting; and scooping marbles. Director responded to SPED Teacher's request, stating that Private School did not work on these tasks with Student and therefore DOE-OT would not be able to observe Student engaging in these tasks at school. DOE Ex. 26 at 199.
52. On June 14, 2022, SPED Teacher responded to Director's 6/8/2022 email: "Please let me know another day this week that will work for the teacher. The topic areas include progress on [Student's] current programs, social skills and foundational cognitive skills." DOE Ex. 30 at 212. Director responded to SPED Teacher's request for another day, and informed SPED Teacher that the special education teacher was extremely busy

and this week was not going to work for the special education teacher for a phone conversation. Director also stated that “We will work on your request and please remember that our program is an [REDACTED] program so our IAEP is based on the [REDACTED]. You have all the objectives we are working on for this student, however many questions continue to be regarding things we are not working on with [Student]. Please email your questions for the teacher so we can share what applies to our program and what we work on for this student and what doesn’t in order to save you and the teacher time....” DOE Ex. 30 at 211.

53. On June 15, 2022, Director responded to SPED Teacher’s 6/8/2022 email regarding Director’s availability for a June 27 IEP meeting. Director responded that Director was not available to attend the meeting. DOE Ex. 25 at 197; DOE Ex. 28 at 205.
54. On June 16, 2022, DOE-OT asked Director if DOE-OT could conduct an assessment on June 17, 2022 at 10:00 a.m. DOE Ex. 26 at 200.
55. Also on June 16, 2022, SPED Teacher informed Parent that Director was not available for an IEP meeting on June 27 and asked Parent if Parent would like to proceed without Director. Parent responded to SPED Teacher the next day stating that Parent wanted to proceed with the June 27 IEP meeting without Director. DOE Ex. 29 at 207.
56. On June 20, 2022, SPED Teacher asked Director for a time on June 24 for DOE-OT to observe Student working on fine motor skills. DOE Ex. 26 at 200, 201.
57. On June 21, 2022, Director informed DOE-OT that DOE-OT could observe Student on June 24, 2022 at 10:00 a.m. Shortly thereafter, DOE-OT confirmed with Director that DOE-OT would like to conduct an occupational therapy observation of Student on June 24, 2022 at 10:00 a.m. to 10:30 a.m. DOE Ex. 26 at 200-202.
58. Also on June 21, 2022, SPED Teacher asked Director for current data to determine Student’s progress on the IAEP objectives and asked Director questions about Director’s

process in determining if Student was meeting Student's objectives in the IAEP. SPED Teacher also asked if a report about Student's progress towards the IAEP objectives was given to Parent, and if one was, SPED Teacher would like a copy. SPED Teacher also asked Director to provide "data to help us determine if [Student] demonstrates regression after a break with significant difficulty with recoupment of skills that regressed. Please send the data for the dates from May 2-June 17<sup>th</sup>." DOE Ex. 30 at 211.

59. On June 24, 2022, SPED Teacher emailed Parent a copy of a draft IEP in preparation for a 6/27/2022 IEP meeting. SPED Teacher informed Parent that the draft IEP was the same as the draft IEP that was sent to Parent on May 25, 2022. SPED Teacher informed Parent that DOE-OT was currently observing Student, and that the fine motor portion of the IEP would be worked on after DOE-OT was done with the observation. SPED Teacher asked Parent to share any information or updates Parent may have on Student's IAEP or progress on objectives because Home School had not received anything from Private School. Pet. Ex. 2 at 118; DOE Ex. 31 at 216-240.
60. Also on June 24, 2022, DOE-OT observed Student at Private School. After the observation, DOE-OT emailed SPED Teacher, Parent, and others that "After my observation of [Student] today everything would stay the same on [Student's] IEP from last year EXCEPT that [Student] is bringing food to mouth once it has been placed on the fork." DOE Ex. 31 at 216; Pet. Ex. 4 (video of 10/13/2022 IEP meeting at 16:26-17:00).
61. On June 26, 2022 at 7:54 p.m. (Sunday), Director emailed SPED Teacher and Parent a brief 2-page progress report, dated June 26, 2022 ("6/26/2022 Progress Report"). The 6/26/2022 Progress Report listed the same Target Behaviors as the 2/22/2022 IAEP with updated "Objectives." DOE Ex. 73 at 391-393.

62. On June 27, 2022, right before the IEP meeting was to start, SPED Teacher included into the Present Levels of Educational Performance (“PLEP”) section of the draft IEP some information from the 6/26/2022 Progress Report. At 3:00 p.m., SPED Teacher and the other members of the IEP team logged into the IEP meeting. As the IEP team went through the PLEPs, Parent stopped the discussion stating that Parent was not familiar with the information from the 6/26/2022 Progress Report. At 3:14 p.m., during the IEP meeting, SPED Teacher emailed to Parent a copy of an updated draft IEP that contained information from the 6/26/2022 Progress Report. Parent requested that the IEP meeting be stopped so that Parent could review the information. The IEP meeting ended while the IEP team was still discussing the PLEPs. SPED Teacher, Tr. Vol. II, 123:12-125:25; DOE Ex. 32 at 241-269.
63. On June 28, 2022, Parent sent the following email to SPED Teacher: “I don’t appreciate that even after rescheduling I wasn’t provided with all the information prior to the meeting. Sending me the newly revised IEP at 3:14p[m.] when our meeting began at 3p[m.] doesn’t give me enough time to review the new information is unacceptable and has caused yet another unnecessary delay. Please remind me again of the dates you are all available, so I can send you tentative dates I can be available.” Pet. Ex. 2 at 119, 121, 122; DOE Ex. 32 at 241. SPED Teacher responded to Parent’s email and apologized. SPED Teacher then provided three dates that were discussed during the IEP meeting for a continued IEP meeting: July 12, 14, and 15, 2022. Later that evening, Parent responded, “Unfortunately, those dates won’t work for me. I am tentatively available on 7/18 after 3p[m.]” Pet. Ex. 2 at 120, 122; DOE Ex. 32 at 241-242.
64. On June 30, 2022, SPED Teacher informed Parent that July 18, 2022 would not work for some of the IEP team members and asked Parent for alternative dates for the IEP meeting. Pet. Ex. 2 at 124; DOE Ex. 32 at 242.



65. On July 1, 2022, Parent informed SPED Teacher that due to work constraints, Parent was available after 3:00 p.m. on July 18, 2022. Otherwise, Parent was tentatively available after 5:00 p.m. on July 17-23, 2022. Pet. Ex. 2 at 124; DOE Ex. 32 at 242-243.
66. On July 8, 2022, SPED Teacher asked Parent if Parent was available at 3:00 p.m. on July 25 or 26, 2022 or August 1, 2022. DOE Ex. 32 at 243.
67. On July 13, 2022, having not received a response from Parent, SPED Teacher again asked Parent if Parent was available at 3:00 p.m. on July 25 or 26, 2022 or August 1, 2022. DOE Ex. 32 at 243. Later that day, Parent provided the following response: “I have already given you my availability. I am not available on those days as I will be at work. I could find someone to speak for me using my notes and I would be on the call but not talking most of the time. If this works for you. I will be able to listen in with an airpod, but not able to give much input. July 25<sup>th</sup>.” DOE Ex. 32 at 243.
68. On July 18, 2022, SPED Teacher emailed Parent a Webex meeting link for that afternoon at 3:00 p.m. to 4:00 p.m. SPED Teacher also attached a draft IEP to the email and informed Parent that they would continue where they had left off on June 27, 2022. Pet. Ex. 2 at 127; DOE Ex. 32 at 244. Parent responded to SPED Teacher that Parent had gone to work because Parent did not receive confirmation that the IEP meeting was scheduled for July 18, 2022. Parent informed SPED Teacher that Parent Advocate will be present at the IEP meeting with Parent’s notes, and that while Parent will be present, Parent will have little input. Pet. Ex. 2 at 127; DOE Ex. 32 at 244. SPED Teacher informed Parent that scheduling with all the team members has been difficult and that Parent’s participation and contribution in the IEP meeting was a priority. SPED Teacher then informed Parent that the IEP meeting would be rescheduled to July 25, 2022 at 3:00 p.m. so that Parent could contribute during the meeting. SPED Teacher also informed Parent that “Our system indicates we do not have a working phone number to reach you,

please provide one so that we may contact you and provide notifications in a way other than email.” DOE Ex. 32 at 245. Parent responded to SPED Teacher that Parent was available on July 25, 2022 but would be at work and would have a parent support help Parent during the meeting. DOE Ex. 32 at 245.

69. On July 25, 2022, DOE cancelled the IEP meeting because DOE-OT did not sign onto the virtual IEP meeting and DOE wanted DOE-OT present in the event that Parent or Parent’s advocate had any questions. SPED Teacher, Tr. Vol. II, 133:22-135:19. After the cancelled IEP meeting, SPED Teacher emailed Parent to apologize. SPED Teacher asked Parent that “Before our next meeting, could you please share your input/concerns regarding the draft IEP that your advocate has. This way, we can appropriately address them in the meeting in an effort to finalize the IEP.” Pet. Ex. 2 at 131; DOE Ex. 33 at 270. Parent informed SPED Teacher that “I only provided my support with what I want on the part of the IEP that is blank (ESY, OT, Speech, and general education classes.)” Pet. Ex. 2 at 132; DOE Ex. 33 at 270.
70. On July 26, 2022, SPED Teacher sent a Webex link to Parent for an IEP meeting on August 8, 2022 at 3:00 p.m. Pet. Ex. 2 at 134, 135, 154; DOE Ex. 33 at 271.
71. August 6, 2022, Parent emailed SPED Teacher: “I haven’t heard anything from you since the OT didn’t show up last meeting. I wanted to confirm that our scheduled meeting on the 8<sup>th</sup> is still happening, so I can properly inform my support. I’d hate to have [her/his] time wasted again.” Pet. Ex. 2 at 133; DOE Ex. 33 at 270.
72. On the morning of August 8, 2022, SPED Teacher sent an email to Parent to remind Parent that they were scheduled for an IEP meeting that afternoon at 3:00 p.m. and that a Webex link was sent on July 26, 2022. SPED Teacher resent the Webex link to Parent. Pet. Ex. 2 at 134, 135, 154; DOE Ex. 33 at 271.

73. When SPED Teacher sets up a WebEx meeting, the setting is such that if the meeting has started, anyone who clicks on a WebEx meeting link will automatically be brought into the main meeting “room.” If the meeting has not started or has ended, anyone who clicks on a WebEx meeting link will cause an email to be sent to SPED Teacher, informing SPED Teacher that someone is waiting for the meeting. SPED Teacher, Tr. Vol. III, 223:1-226:19.
74. On August 8, 2022, DOE-OT, SLP, GED Teacher, and SPED Teacher and a board-certified behavior analyst were present at the virtual IEP meeting scheduled for 3:00 p.m. SPED Teacher was logged on at 2:57 p.m. and logged off at 3:11 p.m. DOE Ex. 77 at 400; DOE Ex. 7 at 077; SPED Teacher, Tr. Vol. II 138:2-139:23. After SPED Teacher logged off, Parent and Parent Advocate logged onto the virtual IEP meeting at 3:13 p.m. SPED Teacher received a notification from Webex informing SPED Teacher that “[Parent Advocate] and [Parent] are waiting in the lobby for the scheduled Webex meeting. Do you want to start this meeting now?” DOE Ex. 79 at 403-404; Parent, Tr. Vol. I, 22:21-23:1. At 3:20 p.m., Parent sent an email to SPED Teacher, claiming “we’ve been waiting for the last 20 mins to start, and my support felt you all weren’t going to show. We’ll need to reschedule.” Pet. Ex. 2 at 135, 154; DOE Ex. 33 at 271.
75. On August 9, 2022 at 8:00 a.m., Complaint and Resolution Proposal in DOE-SY2223-013 was filed with ODR (“8/09/2022 Complaint”). The 8/09/2022 Complaint alleges one issue: whether DOE failed/refused to revise or replace the 11/04/2021 IEP when DOE knew that Parent believed the 11/04/2021 IEP was inappropriate. The 8/09/2022 Complaint then lists the allegations from the 11/26/2021 Complaint as reasons why Parent believed the 11/04/2021 IEP was inappropriate. Pet. Ex. 4 at 303-309; DOE Ex. 1 at 001-007.

76. On August 9, 2022 at 12:15 p.m., SPED Teacher asked Parent if Parent and Parent’s advocate were available on August 16, 2022 at 3:00 p.m. to 4:00 p.m. for a rescheduled IEP meeting. Pet. Ex. 2 at 136, 137; DOE Ex. 33 at 271. Parent agreed to meet on August 16, 2022 and informed SPED Teacher that Parent would speak to Parent’s support to arrange Parent’s support’s attendance. Pet. Ex. 2 at 137; DOE Ex. 33 at 272. The “support” is [REDACTED] not Parent Advocate. Parent, Tr. Vol. I, 45:21-47:2.
77. On August 12, 2022, SPED Teacher asked Parent to confirm Parent’s availability for a meeting on August 16, 2022 at 3:00 p.m. Pet. Ex. 2 at 138, 140, 141, 155; DOE Ex. 33 at 272. On the same day, Parent confirmed that Parent and Parent’s support were available and informed SPED Teacher that Parent would be at work and listening in on the meeting, and Parent’s support would be speaking on Parent’s behalf because the support had notes on what Parent wanted for Student. Pet. Ex. 2 at 139<sup>9</sup>.
78. On August 15, 2022, SPED Teacher emailed Director: “Aloha [Director], I’m emailing to request a few items for the development of our IEP. 1. Data from January 2022 – in the forms of graphs, raw data, or etc. 2. Updated VBMAPP [.] 3. FBA – if the child has an FBA that was conducted [.] Please send all information by 1:00 PM tomorrow. I have also sent you a link for the IEP meeting, tomorrow, at 3:00 PM.” Pet. Ex. 2 at 250; DOE Ex. 34 at 276; DOE Ex. 44 at 293; DOE Ex. 47 at 298; DOE Ex. 48 at 301; DOE Ex. 53 at 313.

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<sup>9</sup> Parent’s confirmation of the August 16, 2022 IEP meeting was sent to Mr. Peck’s email address, but the email message addressed SPED Teacher. Pet. Ex. 2 at 139. On August 15, 2022, Parent sent the exact same email Parent had sent to Mr. Peck to SPED Teacher. While there is no documentary evidence that Parent had sent the confirmation to SPED Teacher on August 12, 2022, the undersigned assumes that it was since a Conference Announcement was issued on August 12, 2022 confirming the August 16, 2022 IEP meeting date. DOE Ex. 7 at 051-052; Pet. Ex. 2 at 140, 141, 155; DOE Ex. 33 at 272.

79. Also on August 15, 2022, SPED Teacher emailed Parent to confirm the August 16, 2022 IEP at 3:00 p.m. and asked Parent what school Student was attending this school year. Pet. Ex. 2 at 140, 141, 155; DOE Ex. 33 at 272-275. Parent responded to SPED Teacher's email, stating: "Well, since [Student] doesn't have a revised IEP because meetings were cancelled a number of times on me... Anyway, the complaint my attorney filed states our position on this subject. The only possible school at this point is [Private School]. Maybe that will change if you actually don't abort the IEP meeting tomorrow and we can complete it." Pet. Ex. 2 at 141, 155; DOE Ex. 33 at 272-273.
80. On August 16, 2022, an IEP meeting was held. Present at the IEP meeting were SSC, Principal, SPED Teacher, Parent, SLP, DOE-OT, GED Teacher, Parent Advocate<sup>10</sup>, and a board-certified behavior analyst. DOE Ex. 7 at 077; Parent, Tr. Vol. I, 47:10-48:13.
81. During the 8/16/2022 IEP meeting, the IEP team picked up where they had stopped on June 27, 2022 when Parent had asked to stop the meeting while discussing the PLEPs. The IEP team continued to discuss the PLEPs; Student's needs and goals; and went through each section of the IEP except for the ESY eligibility section. Parent Advocate did not have any input for the PLEPs or goals but did provide input for the services section. During the discussion about supplementary aids, Parent Advocate stated that Parent wanted a registered behavior technician ("RBT"). The IEP team discussed that Student had behaviors that may require a behavior intervention plan ("BIP") with an RBT to support Student's educational and social emotional development. Parent Advocate, on behalf of Parent, consented and agreed to begin the functional behavior assessment ("FBA") process to determine if an RBT was warranted. The IEP team then decided to provide one-on-one individual instructional support while an FBA was being

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<sup>10</sup> Although Parent Advocate was not listed on the IEP Meeting Information page, the Prior Written Notice of Department Action, dated August 18, 2022, mentions Parent Advocate. DOE Ex. 7 at 078.

conducted. During the 8/16/2022 IEP meeting, Parent Advocate read from notes previously given to Parent Advocate by Parent. The school members of the IEP team found it difficult to ask follow-up questions because Parent Advocate did not deviate from the notes and Parent did not say anything, even though the school members of the IEP team asked Parent for input. SPED Teacher, Tr. Vol. II, 143:17-144:6, 144:19-23, 174:4-181:11; DOE Ex. 7 at 075, 078-079.

82. During the 8/16/2022 IEP meeting, Parent Advocate stated that Parent wanted Student to be in a general education setting with an RBT and pull-out for math and literacy. The IEP team discussed the various placements for Student, looking at the educational and non-academic benefits for Student; the impact Student would have on the teachers and other students; and access to typically developing peers. The IEP team determined that the appropriate placement for Student was a special education setting. SPED Teacher, Tr. Vol. II, 187:1-193:3. The IEP team utilized a worksheet entitled “Least Restrictive Environment Justification for Placement” to determine Student’s LRE, and the IEP team accepted “Special Education Setting.” DOE Ex. 72 at 390.
83. The 8/16/2022 IEP meeting was scheduled for 3:00 p.m. to 4:00 p.m. The IEP team was not able to finish the IEP revision due to time constraints. Parent Advocate wanted to continue and discuss ESY eligibility, which was the only remaining section not discussed, but the school members of the IEP team decided to end the meeting before discussing ESY eligibility. SPED Teacher, Tr. Vol. II, 144:19-145:6, 195:8-15.
84. On August 16, 2022 at 3:53 pm, Director responded to SPED Teacher’s 8/15/2022 email, stating that Director would work on SPED Teacher’s request for information and that Director did not receive a link to the 8/16/2022 IEP meeting. Pet. Ex. 2 at 249; DOE Ex. 44 at 292-293; DOE Ex. 47 at 298; DOE Ex. 48 at 301; DOE Ex. 53 at 312-313; DOE Ex. 57 at 323; DOE Ex. 58 at 329.

85. On August 18, 2022, SSC emailed to Parent documents to begin the process of conducting an FBA: a Consent for Assessment as Part of a Reevaluation form for Parent to sign; a Prior Written Notice of Department Action, dated August 18, 2022 (“8/18/2022 PWN”); and the Procedural Safeguards Notice. Pet. Ex. 2 at 143; DOE Ex. 35 at 277-281; DOE Ex. 37 at 283-284; DOE Ex. 38 at 285.
86. According to the 8/18/2022 PWN, DOE proposed that a FBA be conducted. According to the 8/18/2022 PWN, an FBA was proposed because (1) Student had behaviors that may require a BIP with an RBT to support Student’s educational and social emotional development; (2) Parent felt an RBT was appropriate and the rest of the IEP team did not disagree; (3) an FBA had to be conducted by a licensed behavior analyst or licensed psychologist; (4) Student may require ABA services; and (5) Private School did not provide a copy of their FBA. DOE Ex. 7 at 078-079.
87. Also on August 18, 2022, SPED Teacher asked Parent for Parent’s availability for a continued IEP meeting. Pet. Ex. 2 at 144, 145, 156, 157; DOE Ex. 36 at 282; DOE Ex. 39 at 287; DOE Ex. 49 at 303.
88. On August 19, 2022, Parent responded to SPED Teacher’s 8/18/2022 email, stating, among other things, “The school has canceled 3 meetings and refused to extend that last meeting. My dates of availability are as follows: August 23, 24, 25, 26.” Pet. Ex. 2 at 145, 156, 157; DOE Ex. 39 at 287; DOE Ex. 49 at 303. On August 22, 2022, SPED Teacher informed Parent that not all school members of the IEP team were available on the days indicated by Parent and asked Parent if Parent was available on September 1, 2, 6 or 8, 2022 at 3:00 p.m. Pet. Ex. 2 at 157; DOE Ex. 39 at 287; DOE Ex. 49 at 303.
89. On August 22, 2022, Parent sent SSC a signed copy of a “Consent for Assessment as Part of a Reevaluation” form, giving DOE consent to conduct an FBA. The consent was signed by Parent on 8/19/2022. Pet. Ex. 2 at 146; DOE Ex. 38 at 285-286.

90. Also on August 22, 2022, SPED Teacher asked Director to provide, as soon as possible, the information requested by SPED Teacher on August 15, 2022. SPED Teacher also asked Director for Director's availability for an IEP meeting on September 1, 2, 6 or 8, 2022. Pet. Ex. 2 at 249; DOE Ex. 48 at 301; DOE Ex. 53 at 312; DOE Ex. 57 at 323. Director responded to SPED Teacher the next day, informing SPED Teacher that Private School was working on SPED Teacher's request. Director also informed SPED Teacher that "This student is due to return to school on 8/25. We will know if [Student] is a candidate for an FBA after [Student] returns to school and throughout the school year. There has not been an FBA conducted at [Private School] during [Student's] schooling thus far. Regarding an updated [REDACTED]: [Student] is due to be re-assessed in September 2022. I do not have availability to attend an IEP meeting those dates unfortunately." DOE Ex. 44 at 292; DOE Ex. 47 at 297.
91. Also on August 22, 2022, Parent agreed to an IEP meeting on September 1, 2022 for two (2) hours. Pet. Ex. 2 at 157; DOE Ex. 49 at 303.
92. A Conference Announcement, dated August 23, 2022 ("8/23/2022 CA"), was issued by Principal, setting a meeting for October 13, 2022 at 2:15 to discuss Student's IDEA eligibility. Invited to the meeting was a student services coordinator, a principal, a special education teacher, Parent, a behavior analyst, and a general education teacher. DOE Ex. 8 at 080-081.
93. On August 23, 2022, BCBA sent an email to Parent to inform Parent that BCBA would be conducting an FBA. BCBA asked Parent for Parent's availability for a meeting. DOE Ex. 41 at 289.
94. Also on August 23, 2022, SSC sent an email to Parent, BCBA, Principal, SPED Teacher and Director, asking them if they were available on October 11, 13, or 18 for a meeting. DOE Ex. 42 at 290; DOE Ex. 45 at 295; DOE Ex. 46 at 296; DOE Ex. 50 at 305-306.



95. Also on August 23, 2022, BCBA asked Director for help in setting up an interview with Student's board-certified behavior analyst at Private School; setting up three direct observations of Student via Telehealth; and sitting down with a board-certified behavior analyst to go through some of Student's assessments. DOE Ex. 43 at 291.
96. Also on August 23, 2022, SPED Teacher asked Director if SPED Teacher could observe Student on August 25, 26, 29 or 30, 2022. Director responded that there were "issues with previous observers" who had observed Student and Director would need to discuss these issues with "the CAS prior to scheduling future observations." Director offered to set up tentative dates for an observation in the event that these issues were resolved and informed SPED Teacher that Director would get back to SPED Teacher with the tentative dates. Pet. Ex. 2 at 248-249; DOE Ex. 48 at 300; DOE Ex. 53 at 312; DOE Ex. 57 at 322-323.
97. On August 25, 2022, when Parent asked what would Parent's role be in the meeting SSC was attempting to schedule for October 11, 13 or 18, SSC explained to Parent that Parent's attendance was needed at the meeting as the IEP team "will be going over the FBA report and as a part of that meeting we will discuss if that report information changes [Student's] eligibility status as part of the reevaluation process." The next day, Parent informed SSC, "I just want to finish the IEP. You and the team can hold the FBA meeting without me." Pet. Ex. 2 at 147, 159, 160; DOE Ex. 45 at 295; DOE Ex. 46 at 296; DOE Ex. 50 at 305.
98. Als on August 25, 2022, in response to Director's 8/23/2022 email stating that Student did not have an FBA at Private School, SPED Teacher asked Director if Student had a one-to-one adult assigned to Student while at Private School. SPED Teacher also asked Director to provide Student's attendance data for the months of June, July and August. DOE Ex. 47 at 297. In a separate email to Director, SPED Teacher again asked for an

observation date, stating that DOE would like to conduct an observation as soon as possible prior to an IEP meeting because DOE had not received the data they had requested. Pet. Ex. 2 at 248; DOE Ex. 48 at 300; DOE Ex. 53 at 311-312; DOE Ex. 57 at 322.

99. Also on August 25, 2022, SPED Teacher informed Parent that a virtual meeting was tentatively scheduled for September 1, 2022 from 3:00-5:00 p.m. as requested by Parent on August 22, 2022. DOE Ex. 49 at 303. The next day, SPED Teacher sent out a Webex Invitation for September 1, 2022 to Parent, Principal, DOE-OT, GED Teacher, SLP, and Director. DOE Ex. 82 at 410-413.
100. On August 28, 2022, Director informed SPED Teacher that Director will hold September 12, 2022, 10:00 a.m. to 10:30 a.m., as a tentative date for an observation while Director inquired from the CAS about the issues Private School has been facing during observations of Student. The next day, SPED Teacher asked Director to save the September 12, 2022 date for an observation. SPED Teacher again asked Director to “send over the data requested (data sheets, graphs, etc. for each IAEP goal/objective from January through present) and attendance forms ASAP.” Pet. Ex. 2 at 248; DOE Ex. 53 at 311; DOE Ex. 57 at 321-322.
101. On August 30, 2022, SSC forwarded to BCBA, Principal, SPED Teacher, Director, GED Teacher (cc-ing Parent) Parent’s August 26, 2022 email giving DOE consent to proceed with the FBA meeting without Parent. SSC’s email reads: “[Parent], [Student’s Parent], has elected not to participate in the meeting to go over the FBA report and any related changes regarding IDEA eligibility (please see [Parent’s] email below). I am proposing the date of Thursday, October 13<sup>th</sup> at 2:15. Please confirm your availability.” DOE Ex. 50 at 305.

102. On August 31, 2022, SPED Teacher asked Director if the data being requested will be sent today. Pet. Ex. 2 at 247; DOE Ex. 53 at 311; DOE Ex. 57 at 321.
103. Also on August 31, 2022, SPED Teacher sent a reminder to Parent that an “IEP continuation meeting” will be held on September 1, 2022 at 3:00 p.m. to 5:00 p.m. Pet. Ex. 2 at 148, 150, 161, 162; DOE Ex. 59 at 332.
104. On September 1, 2022, DOE-OT, BCBA, SLP, GED Teacher and SPED Teacher logged into the virtual IEP meeting. SPED Teacher was present from 2:59 p.m. to 3:25 p.m. Parent did not log into the 9/01/2022 IEP meeting. DOE Ex. 83 at 414; SPED Teacher, Tr. Vol. II, 155:15-156:18. Two days after the 9/01/2022 IEP meeting, on September 3, 2022, Parent sent an email to SPED Teacher stating, “We were again waiting for the meeting to start, but it never happened. Is this is [sic] being done purposely so the IEP stays incomplete?” Pet. Ex. 2 at 148, 150, 161, 162; DOE Ex. 54 at 314; DOE Ex. 59 at 332.
105. On September 12, 2022, Director informed SPED Teacher that the tentatively scheduled observation for that day would need to be rescheduled. SPED Teacher asked Director if Student was absent and asked Director to let SPED Teacher know a date and time within the next two (2) weeks that the observation can be reschedule to. DOE Ex. 55 at 315; DOE Ex. 56 at 318. The next day, Director responded, “Yes I will get back to you with date/time for an observation.”<sup>11</sup> SPED Teacher also asked Director to provide the requested data on Student. DOE Ex. 56 at 318.
106. On September 14, 2022, Director sent Student’s attendance information to SPED Teacher. Director also informed SPED Teacher that “We have initiated [Student’s] re-assessment and will provide the results when this process is completed. We will work

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<sup>11</sup> On September 15, 2022, Director listed the days that Student was in school and September 12, 2022 was a day that Student was in school. Pet. Ex. 2 at 246; DOE Ex. 58 at 326.

- on your additional requests. I have an observation date 9/23 from 9:30-10am.” SPED Teacher responded to Director and asked for one more observation date. Pet. Ex. 2 at 247; DOE Ex. 57 at 321.
107. On September 15, 2022, Director sent an email to SPED Teacher listing Student’s attendance information for the months of August and September during the 2022-2023 school year. Director asked SPED Teacher who will be attending the observation on September 23, 2022 and who is the additional observation request for. Pet. Ex. 2 at 246; DOE Ex. 58 at 326. SPED Teacher sent the following response to Director: “Thank you for sending the attendance information, please also send the requested data. I plan on attending tomorrow’s observation and I will communicate if something happens where I am not able to attend. The second observation request is also for myself.”<sup>12</sup> DOE Ex. 58 at 326; Pet. Ex. 2 at 246.
108. On September 20, 2022, Parent sent an email to SPED Teacher, following up on Parent’s 9/03/2022 email and asking whether the IEP meeting will be rescheduled and whether the IEP will be completed. Pet. Ex. 2 at 149, 150, 162; DOE Ex. 59 at 332; DOE Ex. 60 at 334. Three days later, SPED Teacher responded to Parent that Home School was working on finding a date and time to reschedule the IEP meeting. Pet. Ex. 2 at 150, 162; DOE Ex. 60 at 334.
109. On September 23, 2022, SPED Teacher observed Student at Private School. Pet. Ex. 4 (video of 10/13/2022 IEP meeting at 19:54-20:25, 21:50-22:50).
110. On or about October 5, 2022, Parent received the following letter from Principal (“10/05/2022 Letter”): “I am writing to inform you of a meeting for your child, [Student], on October 13, 2022 at 2:15pm. The purpose of the meeting will be to review the results of a recently completed Functional Behavior Assessment and to revise and

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<sup>12</sup> It is unclear from the record if there was an observation scheduled for September 16, 2022.

update your child’s Individualized Education Program (IEP)...We have attempted to schedule a meeting to complete your child’s IEP on numerous occasions. Please contact our Student Services Coordinator, [SSC,] if the date and time proposed is not feasible for you....If we do not hear from you by October 12, 2022 at 12:00pm, we will be holding the eligibility meeting and IEP [sic] at this time without you. As of the date of this letter, we do not have your current phone number on file. We are asking that you please provide the number to our office...Please feel free to contact me should you have questions or concerns.” Pet. Ex. 2 at 164-165; DOE Ex. 61 at 336-339; Parent, Tr. Vol. I, 36:19-38:8.

111. Parent received the 10/05/2022 Letter and knew the 10/12/2022 IEP meeting was to discuss the FBA and update Student’s IEP. Parent, Tr. Vol. I, 38:9-39:5.
112. From October 5, 2022 to October 13, 2022, Parent did not speak or write to any DOE employees. Parent, Tr. Vol. I, 40:6-42:21; SPED Teacher, Tr. Vol. II, 161:2-14, 162:11-17.
113. On October 10, 2022, BCBA completed an FBA for Student and wrote a “Functional Behavior Assessment Descriptive Report,” with the same date (“10/10/2022 FBA”). Pet. Ex. 1 at 071-080; DOE Ex. 65 at 349-358; DOE Ex. 68 at 365-374.
114. On October 12, 2022, SPED Teacher sent Parent an email to remind Parent that an IEP meeting was scheduled for October 13, 2022 at 2:15 p.m. SPED Teacher then sent a Webex invitation to Parent which stated: “Invitation: [SPED Teacher’s] meeting @ Thu Oct 13, 2022 2:15 pm-4:15pm (HST)” and “1. FBA Meeting [and] 2. Continuation and finalizing IEP meeting.” DOE Ex. 62 at 340; DOE Ex. 84 at 415-418.
115. On October 13, 2022 at 5:00 a.m., Parent declined the Webex invitation to the 10/13/2022 IEP meeting. DOE Ex. 63 at 341-343; DOE Ex. 85 at 419-422. Twenty

- (20) minutes later, Parent accepted the Webex invitation to the 10/13/2022 IEP meeting. DOE Ex. 64 at 344-346; DOE Ex. 86 at 423-426; Parent, Tr. Vol. I, 35:22-36:15.
116. Parent informed Parent's attorney before the 10/13/2022 IEP meeting that Parent would be at work at the time of the 10/13/2022 IEP meeting. Parent, Tr. Vol. I, 42:3-21.
117. On October 13, 2022, Parent did not attempt to log into the IEP meeting because Parent was at work. Parent, Tr. Vol. I, 41:21-42:4.
118. On October 13, 2022, SPED Teacher, SSC, DOE-OT, BCBA, SLP, Principal, and GED Teacher participated in a virtual IEP meeting. DOE Ex. 8 at 082; DOE Ex. 87 at 427.
119. During the 10/13/2022 IEP meeting, the IEP team started the meeting with a review of the 10/10/2022 FBA conducted by BCBA. Once the review of the FBA was completed, the IEP team discussed Student's eligibility for special education services. The IEP team determined that Disability remained Student's primary eligibility category. As a result of the eligibility meeting, the IEP team proceeded to develop a "new IEP" for Student, and since Student's annual review date was approaching, the IEP team decided that the new IEP would also be Student's "annual IEP." The IEP team conducted the IEP meeting using the 8/16/2022 IEP, going over the PLEPs; goals and objectives; Services; Supplementary Aids and Services; Student's LRE; and lastly ESY eligibility. Pet. Ex. 4 (video of 10/13/2022 IEP meeting); SPED Teacher, Tr. Vol. III, 212:12-220:14. Besides using the 8/16/2022 IEP to guide the discussion on October 13, 2022, the IEP team made no mention of completing the 8/16/2022 IEP, specifically completing the ESY eligibility determination for the 8/16/2022 IEP.
120. Although the IEP team did not specifically mention completing the ESY eligibility portion for the 8/16/2022 IEP, the IEP team did discuss ESY eligibility, and the determination was applied to both the 8/16/2022 IEP and the 10/13/2022 IEP. The IEP team completed the 8/16/2022 IEP and 10/13/2022 IEP on October 13, 2022.

121. After going over the results of the FBA, the IEP team discussed supplementary aids and services and the IEP team determined that the one-on-one adult support would be an RBT. SPED Teacher, Tr. Vol. II, 165:11-167:3.
122. The 8/16/2022 IEP provides Student with the following Services: 1830 minutes per week of special education; speech/language therapy; and occupational therapy. The 8/16/2022 IEP provides the following Supplementary Aids and Services: Speech/Language Consultation with Team; Use of timers; Warnings prior to transitions; Access to preferred sensory items and activities; Parent communication system; and Individual Instructional Support for 1830 minutes per week. DOE Ex. 7 at 075.
123. The 10/13/2022 IEP provides Student with the following Services: 1830 minutes per week of special education; speech/language therapy; and occupational therapy. The 10/13/2022 IEP provides the following Supplementary Aids and Services: Speech-Language Consultation with Team; Use of timers; Warnings prior to transitions; Access to preferred sensory items and activities; Parent communication system; Individual Instructional Support in the form of an RBT for 1830 minutes per week; and a Behavior Intervention Plan (“BIP”). As of October 13, 2022, the BIP had not yet been developed. DOE Ex. 8 at 083-106.
124. Student’s LRE statement in the 8/16/2022 IEP and 10/13/2022 IEP both read: “The student will not participate with [Student’s] non-disabled peers while receiving special education services in a special education setting. [Student] will have access to participate with [Student’s] non-disabled peers during specials [sic] classes (such as P.E., art, music, etc).” DOE Ex. 7 at 076; DOE Ex. 8 at 105.
125. According to the 8/16/2022 IEP, the IEP Annual Review Date is November 4, 2022, and the Reevaluation Date is October 22, 2023. DOE Ex. 7 at 053.

126. According to the 10/13/2022 IEP, the IEP Annual Review Date is October 13, 2023, and the Reevaluation Date is October 13, 2025. DOE Ex. 8 at 083.
127. SPED Teacher testified that the difference between the 8/16/2022 IEP and the 10/13/2022 IEP is that the 8/16/2022 IEP is the product of a revision meeting for the 11/04/2021 IEP with Parent to satisfy the settlement agreement that they had started on June 27, 2022. Then based on having opened an evaluation for an FBA and then subsequently having an FBA meeting, the IEP team opened up a new IEP for Student with the knowledge that Student's annual IEP was also due for review in November. Therefore, the 8/16/2022 IEP is a revision to the 11/04/2021 IEP and the 10/13/2022 IEP was an IEP generated based on the results of the FBA report and meeting the timeline for the annual IEP that was due in November of 2022. The 8/16/2022 IEP provided Student with one-on-one adult support, while the 10/13/2022 IEP provides an RBT. SPED Teacher, Tr. Vol. II, 168:4-170:10.
128. On October 14, 2022, SSC emailed to Parent four (4) documents: Prior Written Notice of Department Action, dated October 14, 2022 ("10/14/2022 PWN"); 10/10/2022 FBA; Evaluation Summary Report, dated October 14, 2022 ("10/14/2022 ESR"); and a Procedural Safeguards Notice. Pet. Ex. 2 at 152, 166; DOE Ex. 65 at 347-361; DOE Ex. 66 at 362.
129. According to the 10/14/2022 PWN, the 10/10/2022 FBA supports Student's continued eligibility for special education services under the category of Disability. Pet. Ex. 1 at 085; DOE Ex. 65 at 348.
130. According to the 10/14/2022 ESR, Student "was referred for a re-evaluation to include a Functional Behavior Assessment (FBA) during an IEP meeting" to determine the need for ABA services. "[Student] has attended [Private School] during [REDACTED] and currently in [REDACTED]. [Student] was first eligible for special education services



beginning in September, 2020...[Student] had received private ABA services from [Director] beginning in December 2019 until January 2022.” According to the 10/14/2022 ESR, “The behaviors of concern identified in the FBA do adversely impact the [Student’s] learning and the learning of others, and less restrictive or intensive interventions have been, and are not expected to be successful. [Student’s] behaviors are not dangerous to [Student]. However, behavior replacement skills should be taught to the student to learn to use instead of the challenging behavior as well as skills to get the same reinforcer or functional response, as well as implementing antecedent strategies to minimize dangerous behaviors.” The recommendation was for the “IEP Team to meet to consider the development of a Behavior Intervention Plan.” “Based on all of the information [Student] meets the eligibility criteria for [Disability].” “[Student] needs specifically designed instruction, accommodation and/or modifications in the following areas to be involved in and progress in the general education curriculum: Pre-academics, social skill development, communication, life skills development.” Pet. Ex. 1 at 081-082; DOE Ex. 65 at 359-360.

131. On October 16, 2022, Parent sent an email to SSC, confirming that Parent did tell the IEP team that they could hold the FBA meeting without Parent. However, Parent also wrote: “I also asked when, if ever, you plan on completing the IEP. The last email I received from [SPED Teacher] was on Sept[ember] 23 saying that you guys were working on finding a date and time and [sic] would get [sic] email as soon as a date was in place, that is the meeting I have been trying to have for months.” Pet. Ex. 2 at 152-153, 166-167, 168; DOE Ex. 66 at 362.
132. A Prior Written Notice of Department Action, dated October 20, 2022, was issued (“10/20/2022 PWN”), stating that Student did not “qualify for ESY services at this time as there [was] not sufficient data to support the continuation of services over a break, as

the student has not received services from [Student's] public home school at any time and the requested data from [Student's] current private school has not been received after multiple requests.” The 10/20/2022 PWN listed the same Services and Supplementary Aids and Services as the 8/16/2022 IEP; documented the various settings discussed (general education, inclusion general education, special education, private setting) and the decision to place Student in a special education setting over Parent's objection; and documented an agreement to add 1:1 adult supervision and proceed with an FBA. The 10/20/2022 PWN noted that the 8/16/2022 IEP meeting ended with a follow up meeting to discuss ESY eligibility, and an IEP meeting was scheduled for September 1, 2022, but Parent was not present, and the meeting was rescheduled. The 10/20/2022 PWN further noted that on October 13, 2022, Parent was not present and the school members of the IEP team completed the discussion about ESY eligibility. Pet. Ex. 1 at 086-088, 089-091; DOE Ex. 8 at 107-109.

133. On October 20, 2022, SPED Teacher sent the following email to Parent: “Attached are the documents from the IEP meeting that followed the eligibility meeting on 10/13/2022. Tomorrow I will send additional documents from the meeting held on 10/13/2022.” Two attachments are noted on the email: “[Student] Revision PWN” and “[Student] IEP Revision.” Pet. Ex. 2 at 169; DOE Ex. 71 at 387<sup>13</sup>.
134. On October 22, 2022, Parent sent the following email to SPED Teacher: “Obviously I don't agree to the IEP that you developed as I didn't agree to many of the things written in the IEP as it was developing, but at least I now have an option from paying for services at [Private School]. Which I can't afford. I definitely still don't agree to not having an RBT. If I do send [Student] to the DOE now, are you ready to take [REDACTED]? The IEP has the word draft on it.” Pet. Ex. 2 at 170; DOE Ex. 71 at 387.

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<sup>13</sup> Both parties did not include the attachments in their respective exhibits.

135. On October 25, 2022, SSC asked Parent whether or not Parent was available to meet on December 1, 2022 at 2:15 p.m. to develop a BIP for Student. SSC asked Parent to provide alternative dates and times if Parent was not available. Pet. Ex. 2 at 172.
136. On October 26, 2022, Parent sent the following email to SPED Teacher: “I haven’t heard anything back from you. Just wanted to check and confirm that the IEP has been completed? The IEP you sent still has draft on it.” Pet. Ex. 2 at 171; DOE Ex. 71 at 388.
137. A draft BIP was created by BCBA with an “Initial Date of Plan: 10-26-22.” DOE Ex. 69 at 375-384.
138. A Prior Written Notice of Department Action, dated October 27, 2022, was issued (“10/27/2022 PWN”), containing very similar information as the 10/20/2022 PWN except that the 10/27/2022 PWN includes the services of an RBT and BIP. The 10/27/2022 PWN contains the same services as those listed in the 10/13/2022 IEP. Pet. Ex. 1 at 092-093.
139. On October 27, 2022, SPED Teacher sent the following email to Parent: “Attached are the documents from the meeting held on 10/13/2022. I’m still working out why one of them has ‘draft’ and will send once it is resolved...” The email indicates four (4) attachments: “[Student] PWN Revision,” “[Student] IEP Revision,” “[Student] PWN 10:13:2022,” and “[Student] IEP 10:13:2022.” DOE Ex. 71 at 388-389<sup>14</sup>.
140. SPED Teacher testified that after the 10/13/2022 IEP meeting, SPED Teacher sent Parent a copy of the 8/16/2022 IEP with the word “draft” on it. SPED Teacher then removed the word “draft” and resent it to Parent. SPED Teacher then sent a copy the 10/13/2022 IEP to Parent. SPED Teacher sent the finalized 8/16/2022 IEP to Parent in October and later sent the 10/13/2022 IEP to Parent. SPED Teacher could not

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<sup>14</sup> Attachments were not included in DOE’s exhibit.

remember if the two IEPs were sent one or two weeks apart. SPED Teacher, Tr. Vol. III, 227:17-228:2, 267:20-268:14, 270:7-271:3.

141. On October 29, 2022 and November 3, 2022, Parent asked SPED Teacher if Parent could access the audio recording for the 10/13/2022 IEP meeting. DOE Ex. 71 at 389.
142. On November 3, 2022, SSC again asked Parent whether or not Parent was available on December 1, 2022 to meet to develop a BIP. SSC asked Parent to provide three (3) dates and times if Parent was not available on December 1, 2022. Pet. Ex. 2 at 172. Parent responded to SSC on the same day, stating, “I don’t need to be a part of these evaluations meetings. IEP’s I want to be a part of, but as I mentioned before the evaluation meeting can be done without me.” Pet. Ex. 2 at 172.
143. On November 7, 2022, Petitioners filed a second due process complaint (DOE-SY2223-019).
144. On November 28, 2022, Director emailed SPED Teacher a copy of Student’s a new IAEP, dated November 2022 (“11/2022 IAEP”); and a “Supplemental Supports Including Assistive Technologies” list, also dated November 2022 (“11/2022 Supplemental Supports”) for the 2022-2023 school year. Pet. Ex. 2 at 246, 254-261.
145. The IEP team did not have the November 2022 IAEP report during the 8/16/2022 IEP meeting and 10/13/2022 IEP meeting. SPED Teacher, Tr. Vol. III, 259:17-261:6; Pet. Ex. 2 at 254-260.
146. Parent stopped sending Student to Private School sometime in November or December of 2022. Parent, Tr. Vol. I, 55:7-11.

### **Private School**

147. During the 2021-2022 school year, from [REDACTED] to [REDACTED], DOE paid for Student to attend Private School. Pet. Ex. 4 at 297-302.

148. During the 2021-2022 school year, Student was attending Private School for full days: [REDACTED] a.m. to [REDACTED] p.m., Monday through Friday. Parent, Tr. Vol. I, 62:23-63:18.
149. During the period that DOE was paying for services, Parent was satisfied with Private School and Parent saw Student making progress. Parent, Tr. Vol. I, 29:7-23.
150. Parent did not know what Student’s program entailed for the 2021-2022 school year, but Parent knows that Student had one-on-one services. Parent, Tr. Vol. I, 64:4-16.
151. Student stopped receiving full services at Private School at the end of the 2021-2022 school year. Parent, Tr. Vol. I, 51:7-52:12.
152. For the 2022-2023 school year, Parent did not sign a contract with Private School and did not pay any money to Private School. Parent, Tr. Vol. I, 25:21-23, 50:10-15.
153. Parent testified that Student “attended” Private School during the 2022-2023 school year, but that Student was not “enrolled” at Private School for the 2022-2023 school year. Parent, Tr. Vol. I, 52:17-53:12.
154. When Student started attending Private School for the 2022-2023 school year, Parent did not inform the DOE. Parent did inform Parent’s attorney that Student would be attending Private School for the 2022-2023 school year. Parent, Tr. Vol. I, 54:15-55:6.
155. Beginning in mid-August of 2022 through the date Parent stopped sending Student to Private School, Student was at Private School for [REDACTED] hours a day and received less services. Parent, Tr. Vol. I, 26:5-12. When Student was attending Private School for [REDACTED] hours a day, Parent was dissatisfied with Private School because Student had become “stagnant” and made “no progress.” Parent removed Student from Private School around [REDACTED] of 2022. Parent, Tr. Vol. I, 26:13-18, 51:7-52:15, 55:7-11, 64:21-25.
156. Parent testified that when Student received less services, Student became “stagnant” or “not progressing,” but not necessarily regressing. Parent, Tr. Vol. I, 51:14-52:15.

157. At the time that Parent was dissatisfied with Private School, Student was not receiving [REDACTED] services through private insurance. In November of 2022, Student started to get [REDACTED] services through health insurance again. Parent, Tr. Vol. I, 26:19-27:2.
158. Although the 5/2022 Supplementary Supports and 11/2022 Supplementary Supports are in evidence, there is no evidence as to what these supports mean; no explanation as to why Student needed these supports; and no evidence that these supports were actually provided to Student. DOE Ex. 22 at 165; Pet. Ex. 2 at 261; SPED Teacher, Tr. Vol. II, 184:11-185:8.
159. As of May 28, 2022, Parent did not know whether Student was receiving occupational therapy services at Private School. DOE Ex. 29 at 208.
160. There is no information about who works at Private School; how many and what type of students attend Private School; who Director is and what Director's qualifications are.

### **Witnesses**

161. Parent is a [REDACTED]. Parent, Tr. Vol. I, 19:5-10.
162. SPED Teacher is a special education [REDACTED] teacher at Home School, where SPED Teacher has worked for the past three (3) years. SPED Teacher, Tr. Vol. II, 85:2-10.
163. SPED Teacher graduated from the University of Washington with a master's degree in education in 2007 and has been in the special education field since then. SPED Teacher taught in Washington State in the classroom for seven (7) years and then became a resource teacher. SPED Teacher moved back to the State of Hawaii in 2020. SPED Teacher went back to working in the classroom as a special education teacher at Home School beginning in the 2020-2021 school year. SPED Teacher, Tr. Vol. II, 85:11-24.
164. SPED Teacher is also a care coordinator and has held this position for approximately three (3) years in the State of Hawaii. As a care coordinator, SPED Teacher manages

- students' IEPs. SPED Teacher is currently the care coordinator for six (6) students, one of which is Student. SPED Teacher, Tr. Vol. II, 86:11-87:5, 88:2-3.
165. SPED Teacher has never met Student and has only been able to observe Student at Private School. SPED Teacher, Tr. Vol. II, 88:4-7.
166. Parent Advocate is [REDACTED] and Parent's advocate. Parent, Tr. Vol. I, 22:21-23.
167. Director is the head of the Private School. SPED Teacher, Tr. Vol. II, 91:11-16.
168. SSC is a student services coordinator and SSC's duties include helping to get the IEP process started by reaching out to families or connecting care coordinators with families. SPED Teacher, Tr. Vol. II, 92:1-11.
169. DOE-OT is an occupational therapist. SPED Teacher, Tr. Vol. II, 122:10-16.
170. GED Teacher is a general education teacher. SPED Teacher, Tr. Vol. II, 155:17-23.
171. DOE-SLP is a speech-language pathologist with the DOE. SPED Teacher, Tr. Vol. III, 242:12-14.

## V. **CONCLUSIONS OF LAW**

### A. **BURDEN OF PROOF**

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

The Supreme Court held in Schaffer that "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005). The Court "conclude[d] that the burden of persuasion lies where it usually falls, upon the party seeking relief." Id. at 535. Neither Schaffer

nor the text of the IDEA supports imposing a different burden in IEP implementation cases than in formulation cases.

## **B. IDEA REQUIREMENTS**

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

Special education means “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.34; 34 C.F.R. § 300.39; 20 USC § 1401(26) and (29). To provide FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP.” Dept. of Educ. of Hawaii v. Leo W., 226 F.Supp.3d 1081, 1093 (D.Haw.2016).

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

Procedural violations do not necessarily constitute a denial of FAPE. Amanda J. v.



Clark County Sch. Dist., 267 F.3d 877, 892 (9th Cir.2001). If procedural violations are found, a further inquiry must be made to determine whether the violations: (1) resulted in a loss of educational opportunity for Student; (2) significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the Student; or (3) caused Student a deprivation of educational benefits. Amanda J., 267 F.3d at 892.

The school is not required to "maximize the potential" of each student; rather, the school is required to provide a "basic floor of opportunity" consisting of access to specialized instruction and related services which are individually designed to provide "some educational benefit." Rowley, 458 U.S. at 200. However, the United States Supreme Court in Andrew F. v. Douglas County School Dist. held that the educational benefit must be more than *de minimus*. The Court held that the IDEA requires "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Andrew F. v. Douglas County School Dist., 137 S. Ct. 988, 1001 (2017). See also, Blake C. v. Hawaii Dept. of Educ., 593 F.Supp.2d 1199, 1206 (D. Haw. 2009).

The mechanism for ensuring a FAPE is through the development of a detailed, individualized instruction plan known as an Individualized Education Program ("IEP") for each child. 20 U.S.C. §§ 1401(9), 1401(14), and 1414(d). The IEP is a written statement, prepared at a meeting of qualified representatives of the local educational agency, the child's teacher, parent(s), and where appropriate, the child. The IEP contains, among other things, a statement of the child's present levels of academic achievement and functional performance; a statement of the child's annual goals and short-term objectives; and a statement of specific educational services to be provided to the child. 20 U.S.C. § 1414(d). The IEP is reviewed and, if appropriate, revised, at least once each year. 20 U.S.C. § 1414(d). The IEP is, in effect, a "comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." Burlington v.

Dept. of Educ. of the Commonwealth of Massachusetts, 471 U.S. 359, 368, 105 S. Ct. 1996, 2002 (1985). An IEP must be evaluated prospectively as of the time it was created.

Retrospective evidence that materially alters the IEP is not permissible. R.E. v. New York City Dept. of Educ., 694 F.3d 167 (2012).

### C. ISSUES FOR DETERMINATION

#### (a) Issue in the 8/09/2022 Complaint:

**Issue 1.** Whether Student was denied a FAPE when the DOE failed/refused to revise the 11/04/2021 IEP or replace it, prior to the start of the 2022-2023 school year, when the DOE knew that Parent believed the IEP to be inappropriate.

In this issue, Petitioners are alleging that Student was denied a FAPE when DOE failed or refused to revise the 11/04/2021 IEP or to replace the 11/04/2021 IEP before the start of the 2022-2023 school year, knowing that Parent believed the 11/04/2021 IEP was inappropriate. The new school year started on August 1, 2022<sup>15</sup>, approximately eight (8) days before Petitioners filed the instant Complaint. Petitioners allege that “Parent had informed the DOE, through a prior legal action, that there were major concerns with the [11/04/2021] IEP.” Pet. Closing Brief, p. 1. Petitioners further allege that the “11/04/2021 IEP remained [sic] only IEP offer until 10/13/2023.” Pet. Closing Brief, p. 6. Petitioners did not meet their burden in showing that DOE refused to revise or replace the 11/04/2021 IEP; however, Petitioners did meet their burden in showing that DOE failed to revise or replace the 11/04/2021 IEP before the start of the 2022-2023 school year.

On November 26, 2021, Petitioners filed a due process complaint alleging that the 11/04/2021 IEP contained procedural and substantive violations. (FOF 5). After Petitioners filed their 11/26/2021 Complaint, the parties were required by federal regulation to engage in a resolution meeting to try to resolve the 11/26/2021 Complaint to the satisfaction of Parent. 34

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<sup>15</sup> The undersigned takes judicial notice of the fact that the 2022-2023 school year starts on August 1, 2022 and ends on May 26, 2023 in the State of Hawaii. See <https://www.hawaiipublicschools.org/DOE%20Forms/2022-23calendar.pdf>.

C.F.R. § 300.510(b); H.A.R. § 8-60-64(b). There is no allegation that DOE refused to engage in the resolution process. After the 30-day resolution period, the parties reached a settlement in the 11/26/2021 Complaint and a settlement agreement was fully executed on March 17, 2022. (FOF 9). Within a week of the settlement agreement being executed, SSC reached out to Parent on March 23, 2022 to begin the process of collecting data on Student and to set up a meeting to revise the 11/04/2021 IEP. (FOF 10, 11). DOE's repeated attempts to collect data and set up IEP meetings show that DOE did not refuse to revise or replace the 11/04/2021 IEP. See Issue 2 under the 11/07/2022 Complaint for DOE's efforts to collect data.

The next question is whether DOE failed to revise or replace the 11/04/2021 IEP before the start of the 2022-2023 school year. According to federal regulations, “[a]t the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320.” 34 C.F.R. § 300.323(a); H.A.R. § 8-60-47(a). The undersigned finds that DOE failed to have in effect an IEP at the start of the 2022-2023 school year. Although DOE made efforts to gather data to update the 11/04/2021 IEP, DOE has a legal obligation to make sure that an IEP is in effect for Student on or about August 1, 2022, which it did not because an IEP was not completed until two (2) months after the start of the new school year. (FOF 120).

Contrary to Respondents' argument that “no evidence was presented by Petitioners that Parent had provided information or identified specific concerns in the November 4, 2021 IEP and relayed such concerns to the DOE, or that Parent raised concerns that warranted immediate revisions to the IEP,” the undersigned respectfully disagrees and finds that there was evidence that Parent informed DOE of Parent's specific concerns regarding the 11/04/2021 IEP. DOE Closing Brief, p. 21. Parent testified that Parent had initiated a due process hearing regarding the 11/04/2021 IEP because the IEP meeting was held without Parent and to question the sufficiency of the services in the 11/04/2021 IEP. Parent, Tr. Vol. I, 19:20-21:8. The 11/26/2021 Complaint

filed by Petitioners regarding the procedural and substantive violations in the 11/04/2021 IEP is in evidence as is the settlement agreement for the 11/26/2021 Complaint. See Pet. Ex. 4 at 297-309. Knowing that Parent did not approve of the 11/04/2021 IEP and the school year would be starting on August 1, 2022, it was incumbent upon DOE to ensure that an IEP would be in effect on August 1, 2022. Completing an IEP on October 13, 2022 is too late. Therefore, it was a procedural violation for DOE to not have in place an IEP for Student at the start of the 2022-2023 school year.

Student not having an IEP in place at the start of the 2022-2023 school year resulted in a loss of educational opportunity for Student. Amanda J., 267 F.3d at 892; Pet. Closing Brief, p. 7. Although Respondents argue that “blame cannot be placed solely on the DOE for not holding a revision IEP meeting in a timely manner,”<sup>16</sup> Parent’s contribution in the delay goes to the remedy, but it does not absolve DOE of its responsibility to have in effect an IEP at the beginning of each school year—a responsibility that solely belongs to DOE. Based on the foregoing, Petitioners have met their burden in showing that Student was denied a FAPE when DOE did not have in effect an IEP at the beginning of the 2022-2023 school year.

(b) **Issues in the 11/07/2022 Complaint:**

**Issue 1.** Whether Student was denied a FAPE when the DOE completed an IEP dated 8/16/2022 on or about 10/13/2022, without Parental Participation when Parent was not in attendance.

AND

**Issue 9.** Whether revising the IEP dated 8/16/2022, developed on or about 10/13/2022, without Parental Participation was a denial of FAPE<sup>17</sup>.

In these two issues, Petitioners are alleging that Student was denied a FAPE when DOE completed the 8/16/2022 IEP and 10/13/2022 IEP on October 13, 2022 without Parent being

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<sup>16</sup> DOE Closing Brief, pp. 20-21.

<sup>17</sup> This issue relates to the 10/13/2022 IEP that was developed on October 13, 2022. Petitioners’ 11/07/2022 Complaint states that this issue “applies to the IEP dated 10/13/2022, that was a revised IEP provided to Parent on or about 11/04/2022.” Pet. Ex. 4 at 314-315.

present. As an initial matter, on October 13, 2022, DOE developed two (2) IEPs for Student: 8/16/2022 IEP and 10/13/2022 IEP. The 8/16/2022 IEP is a “revision IEP” that was started on June 27, 2022 and completed on October 13, 2022 (FOF 62, 80-83, 120, 122, 124, 125); and the 10/13/2022 IEP is an “annual IEP” that was started and completed on October 13, 2022 (FOF 117-121, 123, 124, 126). Based on the evidence, Petitioners met their burden in showing that DOE committed a procedural violation in completing the IEPs on October 13, 2022 without Parent being present; however, Petitioners did not meet their burden in showing that the procedural violation significantly infringed upon Parent’s participation rights.

The DOE “shall take steps to ensure that one or both of the parents of a student with a disability are present at each IEP team meeting or are afforded the opportunity to participate.” H.A.R. § 8-60-46(a). The DOE must notify parents of the meeting early enough to ensure that parents will have an opportunity to attend, and the meeting should be scheduled at a mutually agreed on time and place. H.A.R. § 8-60-46(a)(1), (2). “A meeting may be conducted without a parent in attendance if the department is unable to convince the parents that they should attend.” H.A.R. § 8-60-46(d).

The parties reached a settlement on the 11/26/2021 Complaint on March 17, 2022. (FOF 9). One of the terms of the settlement agreement was that the parties would meet and participate in an IEP meeting to revise and update Student’s 11/04/2021 IEP. (FOF 9). The parties agreed to meet on May 26, 2022 to begin fulfilling this settlement term; however, on the day of the IEP meeting, DOE cancelled the meeting because Director could not make it, even though Parent had consented to proceeding without Director being present. (FOF 42, 43). The IEP team agreed to reschedule the IEP meeting to June 27, 2022, even though Director was not available that day. (FOF 49, 53, 62).

On June 24, 2022, SPED Teacher sent Parent a draft IEP to be used during the 6/27/2022 IEP meeting. (FOF 59). On Sunday, June 26, 2022, at 7:54 p.m., Director emailed a fairly brief

2-page progress report to SPED Teacher and Parent. (FOF 61). On June 27, 2022, before the IEP meeting was to start at 3:00 p.m., SPED Teacher updated the PLEPs section of the draft IEP with information from the 6/26/2022 Progress Report. The 6/27/2022 IEP meeting started with a discussion about Student's PLEPs. (FOF 62). Approximately fourteen (14) minutes into the IEP meeting, SPED Teacher emailed Parent a copy of an updated draft IEP. (FOF 62). Although Parent received the 6/26/2022 Progress Report at the same time as SPED Teacher, Parent did not feel comfortable proceeding with the IEP meeting on June 27, 2022 because the updated draft IEP contained information from the 6/26/2022 Progress Report and Parent wanted to review the information. (FOF 62). Parent asked to stop the IEP meeting. (FOF 62). The 6/27/2022 IEP meeting ended while the IEP team was still discussing the PLEPs. (FOF 62). The IEP meeting was rescheduled to July 25, 2022. (FOF 67, 68).

On July 25, 2022, everyone on the IEP team was present except for DOE-OT. Due to DOE-OT not being present, DOE cancelled the 7/25/2022 IEP meeting. (FOF 69). The IEP meeting was rescheduled to August 8, 2022. (FOF 70-72).

On August 8, 2022, the school members of the IEP team logged into the virtual IEP meeting at 3:00 p.m. (FOF 74). After waiting for approximately 10 minutes for Parent to log on, the school members of the IEP team logged off. (FOF 74). After the school members of the IEP team logged off, Parent and Parent Advocate logged on at 3:13 p.m. (FOF 74). The IEP meeting was rescheduled to August 16, 2022. (FOF 76-77).

On August 16, 2022, the IEP team met and picked up where they had left off on June 24, 2022. (FOF 80, 81). The IEP team continued to discuss the PLEPs; Student's needs and goals; and went through each section of the IEP. The IEP team went through the entire IEP except for the ESY eligibility section. (FOF 81-83). During the 8/16/2022 IEP meeting, Parent Advocate stated that Parent wanted Student to have RBT services. Parent, through Parent Advocate, consented to an FBA being done to determine if Student needed a BIP and RBT services. (FOF

81). Although Parent Advocate wanted to discuss ESY eligibility and complete the IEP on August 16, 2022, the school members of the IEP team decided to end the IEP meeting due to time constraints. (FOF 83). The IEP meeting was continued to September 1, 2022. (FOF 88, 91).

On September 1, 2022, the school members of the IEP team logged into the virtual IEP meeting. Parent was not present. (FOF 103, 104). Two days after the 9/01/2022 IEP meeting, Parent sent an email to SPED Teacher stating, “We were again waiting for the meeting to start, but it never happened.” (FOF 104).

On October 5, 2022, Parent received a letter from DOE, informing Parent that a meeting would be held on October 13, 2022 to discuss the results of an FBA, Student’s eligibility, and to revise Student’s IEP. (FOF 110). Parent was informed that if Parent was not available on October 13, 2022, Parent should contact SSC; and if Home School did not hear from Parent, the 10/13/2022 IEP meeting would proceed without Parent. (FOF 110, 111). Parent did not inform Home School that Parent would not be attending the 10/13/2022 IEP meeting because Parent would be at work. (FOF 112). On October 13, 2022, the school members of the IEP team met and reviewed the 10/10/2022 FBA; discussed Student’s eligibility; and developed a new IEP for Student. (FOF 117, 118). Because the IEP Annual Review Date was November 4, 2022, the IEP team decided that the “new IEP” meeting would also be considered an “annual IEP” meeting. (FOF 3, 119). The IEP team then used the 8/16/2022 IEP to develop the 10/13/2022 IEP, and the IEP team included a BIP and RBT services in the 10/13/2022 IEP as the 10/10/2022 FBA was completed at that point. (FOF 113, 119, 123).

Based on the evidence, it cannot be said that Parent “refused” to attend the 10/13/2022 IEP meeting. See Doug C. v. Hawaii Dept. of Educ., 720 F.3d 1038, 1044 (9th Cir.2013) (“We held that parental ‘involvement in the “creation process” requires the [agency] to include the [parents in an IEP meeting] unless they affirmatively refused to attend.’”) (citing Shapiro v.

Paradise Valley Unified Sch. Dist., 317 F.3d 1072, 1078 (9th Cir.2003)). Both parties were responsible for the cancellation of IEP meetings: DOE cancelled the 5/26/2022 IEP meeting; Parent stopped the 6/27/2022 IEP meeting; DOE cancelled the 7/25/2022 IEP meeting; Parent logged into the 8/08/2022 IEP meeting late; DOE ended the 8/16/2022 IEP meeting even though Parent Advocate wanted to continue; and Parent did not log into the 9/01/2022 IEP meeting. DOE did not work with Parent in setting the 10/13/2022 IEP meeting. In fact, DOE scheduled the 10/13/2022 IEP meeting for 2:15 p.m., knowing that Parent was most likely available after 3:00 p.m. as most, if not all, previous IEP meetings were scheduled for 3:00 p.m.<sup>18</sup> Based on the foregoing, DOE committed a procedural violation when it proceeded to finish the 8/16/2022 IEP and developed the 10/13/2022 IEP on October 13, 2022 without Parent.

Although Petitioners were able to establish a procedural violation, Petitioners fail to show that the violation significantly impeded Parent's opportunity to participate in the decision-making process. Amanda J., 267 F.3d at 892. Parent received the 10/05/2022 Letter informing Parent that the IEP team would be going over a completed FBA and having an eligibility meeting and an IEP meeting on October 13, 2022. (FOF 110). Parent testified that Parent received an email telling Parent that the 10/13/2022 IEP meeting will be an eligibility meeting to review an FBA and to complete the revision of the 11/04/2021 IEP. Parent, Tr. Vol. I, 24:15-19; FOF 111. Parent made no effort to contact DOE to reschedule and informed Petitioners' counsel before the 10/13/2022 IEP meeting that Parent was not going to attend the meeting because Parent was going to be at work. (FOF 112, 116). The procedural violation did not significantly impede Parent's opportunity to participate because Parent had no intention of participating. Therefore, Petitioners fail to meet their burden in showing a denial of FAPE when DOE completed the revision of the 8/16/2022 IEP and developed the 10/13/2022 IEP on October 13, 2022 without

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<sup>18</sup> SPED Teacher testified that to accommodate Parent's work schedule, IEP meetings were scheduled after 3:00 p.m. SPED Teacher, Tr. Vol. II, 125:24-126:5.



Parent.

**Issue 2.** Whether Student was denied a FAPE where the DOE failed to gather sufficient information on Student’s need for Extended School Year services or to have a discussion on the use of Applied Behavior Analysis for the IEP dated 8/16/2022.

Petitioners did not present any arguments during the due process hearing and in their closing brief regarding Issue 2<sup>19</sup>. Based on the lack of argument to support this claim, the undersigned Hearings Officer concludes that Petitioners have abandoned this claim and find that Petitioners have not met their burden of proof. However, in the event that a reviewing court determines otherwise, the undersigned will address this issue.

In this issue, Petitioners allege that DOE failed to gather sufficient information (1) on Student’s need for ESY services and (2) to have a discussion on the use of Applied Behavior Analysis (“ABA”) for the 8/16/2022 IEP. Petitioners fail to meet their burden in showing that DOE did not gather sufficient information on Student’s ESY services or to have a discussion on the use of ABA services for the 8/16/2022 IEP.

After the settlement on March 17, 2022, DOE diligently sought information from Private School, Director’s Private Company, and Parent about Student’s needs, including information relating to ESY and ABA. Within a week of the settlement, SSC sent consent forms to Parent to sign so that DOE could gather information and conduct observations. (FOF 10, 11).

DOE requested Student’s educational records from Director on the following days: March 28, 2022 (FOF 16); March 30, 2022 (FOF 17); April 11, 2022 (FOF 21); May 11, 2022 (FOF 35); May 24, 2022 (SPED Teacher asked for “progress reports” but Director informed SPED Teacher that Private School did not have any progress reports) (FOF 41); May 27, 2022 (FOF 44); June 6, 2022 (request for “data from before and after this recent break”) (FOF 47, 48);

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<sup>19</sup> During opening statement, Petitioners’ counsel stated the following, “We’re here with a simple remedy request, and that is to have the DOE find that that meeting on October 13, 2022, just like the IEP meeting on November 4th, 2021, held without the parent was improper.” Tr. Vol. I, 13:23-14:6.

June 21, 2022 (request for “data...[on] regression after a break with significant difficulty with recoupment of skills”) (FOF 58); August 15, 2022 (request for updated [REDACTED] and Private School’s FBA) (FOF 78); August 22, 2022 (SPED Teacher follows up on requests and Director informs SPED Teacher that Student was never given an FBA at Private School) (FOF 90); August 25, 2022 (FOF 98); August 29 (FOF 100); and August 31, 2022 (FOF 102).

DOE tried to gather information from Director by asking questions about Student’s private program on the following days: April 13, 2022 (FOF 22); April 18 (FOF 25); April 22, 2022 (FOF 27, 28).

DOE tried to gather information from Parent on the following days: April 18, 2022 (FOF 24); April 19, 2022 (FOF 26); and June 24, 2022 (FOF 59).

DOE conducted observations of Student on the following days: March 24, 2022 by DOE-SLP (FOF 14); April 22, 2022 by SPED Teacher (FOF 27); May 19, 2022 by DOE-SLP (FOF 40); June 24, 2022 by DOE-OT (FOF 60); and September 23 by SPED Teacher (FOF 109).

On May 27 and June 6, 2022, SPED Teacher attempted to schedule a conference with Private School’s special education teacher to talk about Student. (FOF 44, 47, 48, 50, 52).

After much effort, Director gave DOE the following educational records: (1) 2/22/2022 IAEP and [REDACTED] Schedule (received on April 14, 2022) (FOF 23); (2) Attendance Record for January-April, 2022 and 5/2022 Supplemental Supports (received on May 13, 2022) (FOF 37); 6/26/2022 Progress Report (FOF 61); Student’s attendance information (received on September 14, 2022) (FOF 106); and August 2022 and September 2022 attendance information (received on September 15, 2022) (FOF 107).

Petitioners do not argue what information DOE should have gathered but did not. DOE specifically asked for regression/recoupment data when Student returned from a break and information on an updated [REDACTED] and an FBA—which Director did not provide or they did not exist. (FOF 47, 48, 58, 78). Based on the foregoing, DOE did not fail to gather sufficient

information on Student's need for ESY services or to have a discussion on the use of ABA.

**Issue 3.** Whether Student was denied a FAPE where Student was deemed ineligible for Extended School Year services for the IEP dated 8/16/2022.

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Petitioners did not present any arguments during the due process hearing and in their closing brief regarding Issue 3. Based on the lack of argument to support this claim, the undersigned Hearings Officer concludes that Petitioners have abandoned this claim and find that Petitioners have not met their burden of proof. However, in the event that a reviewing court determines otherwise, the undersigned will address this issue.

In Issue 3, Petitioners allege that Student was denied a FAPE because Student was found not eligible for ESY services in the 8/16/2022 IEP. Petitioners fail to show that DOE's eligibility determination was wrong or that Student needs ESY services.

As discussed in Issue 2, DOE did not fail to gather sufficient information on Student's need for ESY services. DOE made attempts to obtain information about Student's regression/recoupment after a break, but DOE was not provided the information by Private School and Director's Private Company. Even assuming that DOE committed a procedural error by not putting in more effort to get Private School and Director's Private Company to provide regression/recoupment information, there was no substantive error because Petitioners have not shown that ESY services are necessary for the provision of FAPE to Student. "Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with §§ 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child." 34 C.F.R. § 300.106(a)(2). See also H.A.R. § 8-60-7(a)(2). "[T]he mere existence of a difference in opinion between a parent and the rest of the IEP team is not sufficient to show that the parent was denied full participation in the process, nor that the DOE's determination was incorrect." Laddie C. ex rel. Joshua C. v. Dept. of Educ., 2009 WL 855966 at \*4 (D.Haw. Mar. 27, 2009).

DOE must provide ESY services only if Student's IEP team determines that ESY services are necessary for the provision of FAPE to Student. Dept. of Educ., State of Haw. v. Leo W., 226 F.Supp.3d 1081, 1112, 344 Ed. Law Rep. 246 (D. Haw. Dec. 29, 2016). "The burden is on the parents to establish that ESY services are necessary." Virginia S. ex rel. Rachael M. v. Dept. of Educ., Hawaii, Civil No. 06-00128 JMS/LEK, 2007 WL 80814, at \*13 (D.Haw. Jan. 8, 2007). "[A] claimant seeking an ESY must satisfy an even stricter test, because "providing an ESY is the exception and not the rule under the regulatory scheme."” N.B. v. Hellgate Elementary Sch. Dist., ex rel. Bd. of Directors, Missoula County, 541 F.3d 1202, 1211 (9th Cir.2008) (citations omitted). Therefore, the burden is on Petitioners to establish by a preponderance of the evidence that ESY services are necessary for Student. Petitioners have failed to meet this burden.

While Petitioners are not required to present empirical proof of actual prior regression, there was no evidence that ESY was necessary. There were no expert opinion testimony or opinions from professionals or any reliable documentation showing that ESY is necessary. N.B. v. Hellgate Elemen. Sch. Dist., ex rel. Bd. of Directors, Missoula County, 541 F.3d 1202, 1212 (9th Cir.2008) (A claimant can rely on expert opinion testimony to make the showing that ESY is necessary to permit a child to benefit from his instructions, and are not required to present empirical proof of actual prior regression). See also, Virginia S. ex rel. Rachael M. v. Dept. of Educ., Hawaii, Civil No. 06-00128 JMS/LEK, 2007 WL 80814, at \*12 (D.Haw. Jan. 8, 2007) (“the state should consider the likelihood of regression, slow recoupment, and predictive data based upon the opinion of professionals.”) Todd v. Duneland Sch. Corp., 299 F.3d 899 (7th Cir. 2002)); Kenton County Sch. Dist. v. Hunt, 384 F.3d 269, 279 (6th Cir.2004) (confirming that “it is the proponent of ESY that bears the burden of proof either through the use of data or the use of expert testimony.”)

“ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.” N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County, 541 F.3d 1202, 1211 (9th Cir.2008) (quoting MM ex rel. DM v. Sch. Dist. of Greenville County, 303 F.3d 523, 537-38 (4th Cir.2002)). Private School being a “year-round” school does not mean that Student needs ESY services. (FOF 28). In fact, Parent testified that when Student’s program was reduced to [REDACTED] hours a day during the 2022-2023 school year, Student became “stagnant” or “did not progress,” but did not necessarily regress. (FOF 156). Based on the lack of evidence that the benefits Student will gain during a regular school year will be significantly jeopardized if Student is not provided ESY services, Petitioners have failed to meet their burden. As such, DOE did not deny Student a FAPE because the 8/16/2022 IEP did not provide ESY services to Student.

**Issue 4.** Whether Student was denied a FAPE when the IEP team failed to discuss and/or describe the behavior interventions Student would be provided and/or incorporate a Behavior Plan into the 8/16/2022 IEP and/or involve Parent in discussion of what the Plan would entail prior to completion of the IEP dated 8/16/2022.

Petitioners did not present any argument during the due process hearing and in their closing brief regarding Issue 4. Based on the lack of argument to support this claim, the undersigned Hearings Officer concludes that Petitioners have abandoned this claim and find that Petitioners have not met their burden of proof. However, in the event that a reviewing court determines otherwise, the undersigned will address this issue.

In this issue, Petitioners are alleging that the IEP team failed to (1) discuss “behavior interventions” during the development of the 8/16/2022 IEP; (2) include “behavior interventions” and a “behavior plan” in the 8/16/2022 IEP; and (3) involve Parent in a discussion of what the behavior plan would entail before the completion of the 8/16/2022 IEP. The undersigned finds that Petitioners fail to meet their burden in proving all three allegations in this

issue.

During the IEP meeting on August 16, 2022, the IEP team discussed all aspects of the IEP except for Student's eligibility for ESY services. (FOF 81-83). During the IEP meeting on August 16, 2022, Parent requested that Student be given an RBT. (FOF 81, 82). The IEP team discussed that Student had behaviors that may require a BIP and RBT services and agreed to conduct an FBA, which Private School had not done. (FOF 81, 89). In the meantime, the IEP team agreed to provide Student with one-on-one individual instructional support while an FBA was being completed. (FOF 81). Petitioners do not argue, and the undersigned declines to guess, what other "behavior interventions" should have been discussed on August 16, 2022, but was not. Similarly, Petitioners do not argue, and the undersigned declines to guess, what other "behavior interventions" and what "behavior plan" should have been in the 8/16/2022 IEP but was not.

As to the third allegation, the 8/16/2022 IEP was nearly complete on August 16, 2022, except for an ESY eligibility determination. (FOF 81). When the IEP team was discussing Student's needs on August 16, 2022, there was no evidence that Student needed a "behavior plan" or that Parent requested a "behavior plan" and the request was denied. The 10/10/2022 FBA, which recommended a BIP, was completed after the 8/16/2022 IEP meeting. There is no evidence that there was a proposed behavior plan before the completion of the 8/16/2022 IEP that would require a discussion with Parent.

**Issue 5.** Whether Student was denied a FAPE where Student has inadequate Supplementary Aids and Supports, Behavior Interventions, Visual aids/schedules, math manipulatives, reverse inclusion skills program, extra time on classwork, positive reinforcers, preferential seating, and/or Applied Behavior Analysis, in Student's 8/16/2022 IEP offer.

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Petitioners did not present any argument during the due process hearing and in their closing brief regarding Issue 5. Based on the lack of argument to support this claim, the undersigned Hearings Officer concludes that Petitioners have abandoned this issue and have not

met their burden of proof. However, in the event that a reviewing court determines otherwise, the undersigned will address this issue.

There is no evidence that the Supplementary Aids and Supports in the 8/16/2022 IEP was inadequate at the time it was being discussed and developed on August 16, 2022. There is no evidence that when the 8/16/2022 IEP was being developed on August 16, 2022, Student needed Behavior Interventions, Visual aids/schedules, math manipulatives, reverse inclusion skills program, extra time on classwork, positive reinforcers, preferential seating, and/or [REDACTED]. Although some of these supports (reverse inclusion opportunities, extra time, positive reinforcers, preferential seating, [REDACTED] services) are listed in Private School's 5/2022 Supplemental Supports (FOF 38), there is no evidence that Student was actually given these supports or that these supports were needed for Student to access Student's education.

Based on the foregoing, Petitioners fail to meet their burden with respect to this issue.

**Issue 6.** Whether Student was denied a FAPE when the IEP team failed to discuss the methodology the 1:1 aide would use to manage Student's behaviors for the IEP dated 8/16/2022.

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Petitioners did not present any argument during the due process hearing and in their closing brief regarding Issue 6. Based on the lack of argument to support this claim, the undersigned Hearings Officer concludes that Petitioners have abandoned this claim and have not met their burden of proof. However, in the event that a reviewing court determines otherwise, the undersigned will address this issue. Petitioners fail to meet their burden in showing that the IEP team failed to discuss the methodology the 1:1 aide would use to manage Student's behaviors in the development of the 8/16/2022 IEP.

On August 16, 2022, the IEP team discussed the PLEPs; Student's needs and goals; and went through each section of the IEP except for the ESY section. (FOF 81). Parent wanted an RBT and the IEP team, including Parent, agreed to conduct an FBA to determine if an RBT was warranted. (FOF 81). Petitioners do not state what methodology the IEP team should have

discussed, but they did not; nor do Petitioners argue that Parent wanted to discuss a particular type of methodology, but the IEP team did not. There is no evidence that the IEP team should have discussed a methodology the one-to-one aide would use to manage Student's behaviors.

Even assuming that the IEP team failed to discuss a methodology that the one-to-one aide would use to manage Student's behaviors, Petitioners fail to argue or show how this procedural violation resulted in a loss of educational opportunity for Student; significantly impeded Parent's opportunity to participate in the decision-making process; or caused Student a deprivation of educational benefits. Amanda J., 267 F.3d at 892. Therefore, Petitioners fail to meet their burden of proof in this issue.

**Issue 7.** Whether Student was denied a FAPE where Student had been placed in an overly restrictive environment (Least Restrictive Environment "LRE") for the IEP dated 8/16/2022.

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Petitioners did not present any argument during the due process hearing and in their closing brief regarding Issue 7. Based on the lack of argument to support this claim, the undersigned Hearings Officer concludes that Petitioners have abandoned this claim and have not met their burden of proof. However, in the event that a reviewing court determines otherwise, the undersigned will address this issue.

Petitioners presented no evidence that Student's placement in the 8/16/2022 IEP is overly restrictive.

Each public agency must ensure that –

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

34 C.F.R. § 300.114(a)(2). See also H.A.R. § 8-60-15.

Even though Parent Advocate stated on August 16, 2022 that Parent wanted Student to be



in a general education setting with an RBT with pull-out for math and literacy, there is no evidence that this setting is appropriate for Student. The IEP team discussed the various placement options and determined that the appropriate placement for Student was in a special education setting. (FOF 82). The undersigned Hearings Officer will not second-guess the IEP team's provision of special education services when no contradictory expert opinion exists.

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

G.A. v. Hawaii, Dept. of Educ., Civil No. 10-00730 LEK-BMK, 2011 WL 3861431, \*14 (D.Haw. Aug. 31, 2011). See also N.S. v. Hawaii, Dept. of Educ., Civil No. 09-00343 SOM/KSC, 2010 WL 2348664, \*5 (D.Haw. June 9, 2010) ("The mother's conclusion, without more, does not counter the testimony of the experts who reviewed the reports and determined that services were not necessary."); Laddie C. ex rel. Joshua C. v. Dept. of Educ., 2009 WL 855966 at \*4 (D.Haw. Mar. 27, 2009) ("the mere existence of a difference in opinion between a parent and the rest of the IEP team is not sufficient to show that the parent was denied full participation in the process, nor that the DOE's determination was incorrect.")

In addition, while there is no evidence that the services listed in Private School's 5/2022 Supplemental Supports were actually provided to Student, the 5/2022 Supplemental Supports indicate that Student would be in a small class size (3-5 students) in Private School and there is no evidence that the 3-5 students are nondisabled children. (FOF 38). It appears that a special education setting is consistent with the environment Student was in at Private School. Based on the foregoing, Petitioners fail to meet their burden in showing that Student was placed in an

overly restrictive environment pursuant to the 8/16/2022 IEP.

**Issue 8.** Whether Student was denied a FAPE where the IEP team failed to hold a proper LRE discussion for the IEP dated 8/16/2022.

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Petitioners did not present any argument during the due process hearing and in their closing brief regarding Issue 8. Based on the lack of argument to support this claim, the undersigned Hearings Officer concludes that Petitioners abandoned this claim and have not met their burden of proof. However, in the event that a reviewing court determines otherwise, the undersigned will address this issue.

On August 16, 2022, the IEP team discussed the various placement options for Student before concluding that Student's placement should be in a special education setting. (FOF 82). The IEP team looked at the educational and non-academic benefits for Student; the impact Student would have on the teachers and other students; and Student's access to typically developing peers. The IEP team utilized a worksheet entitled "Least Restrictive Environment Justification for Placement" to guide the IEP team in the discussion. Parent, through Parent Advocate, voiced Parent's desire to have Student placed in a general education setting with pull-out classes. Although Parent's request was not granted, the mere existence of a difference in opinion between Parent and the rest of the IEP team is not sufficient to show that Parent was denied full participation in the process, nor that the DOE's determination was incorrect.

Based on the foregoing, Petitioners fail to meet their burden in showing that the IEP team failed to hold a proper LRE discussion for the IEP dated 8/16/2022.

#### **D. TUITION REIMBURSEMENT FOR PRIVATE SCHOOL**

In both complaints, Petitioners seek reimbursement for private school tuition and related expenses for Private School, and compensatory education. See Complaints. Petitioners also seek money damages, which is beyond the scope of the Hearings Officer's authority and therefore is denied. Pet. Closing Brief, p. 15. The U.S. Supreme Court has recognized the rights of parents who disagree with a proposed IEP to unilaterally withdraw their child from public

school and place the child in a private school and request reimbursement for tuition at said private school from the local educational agency. Florence County School Dist. Four v. Carter, 510 U.S. 7, 12, 114 S. Ct. 361, 364-365, 126 L.Ed.2d 284 (1993) (citing School Comm. of Burlington v. Department of Ed. of Mass., 471 U.S. 359, 369-370, 105 S. Ct. 1996, 2002-2003, 85 L.Ed.2d 385 (1985)); see also 20 U.S.C. § 1415(b)(6), (f)(1)(A). A parent who unilaterally places a child in private school pending review proceedings under the IDEA is entitled to reimbursement if the parent can establish that (1) the public placement violated the IDEA, and (2) the private school placement was proper under the IDEA. Doug C., 720 F.3d 1038, 1041, 1047-1048 (9th Cir.2013) (citing Carter, 510 U.S. at 15, 114 S. Ct. 361). If both are met, “the district court must then exercise its ‘broad discretion’ and weigh ‘equitable considerations’ to determine whether, and how much, reimbursement is necessary.” C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist., 635 F.3d 1155, 1159 (9th Cir.2011) (citing Carter, 510 U.S. at 15-16, 114 S. Ct. 361).

The Ninth Circuit Court of Appeals has adopted the standard put forth by the Second Circuit in Frank G. v. Bd. Of Educ., 459 F.3d 356, 365 (2nd Cir.2006), where “to qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child’s potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.” C.B., 635 F.3d at 1159 (citing Frank G., 459 F.3d at 365). Parental placement can be appropriate, even if it does not meet state standards. 34 C.F.R. §300.148(c).

In this case, Petitioners proved that Student was denied a FAPE; however, Petitioners fail to show that the unilateral placement of Student at Private School in the 2022-2023 school year was proper under the IDEA. First, for the 2021-2022 school year, Parent did not know what Student’s program entitled. (FOF 150). There is also no evidence as to what Student’s program

entailed during the 2022-2023 school year—there is no evidence that the supports in the 5/2022 Supplemental Supports and the 11/2022 Supplemental Supports were actually used with Student; or that that the [REDACTED] Schedule is a generic schedule for all students or specifically designed for Student. No one testified as to what type of school Private School is; who works at Private School; whether the students are disabled, nondisabled, or a mix of both; and who Director is, what Director’s qualifications are, and whether Director was trained to evaluate children with disabilities and write IAEP plans.

For the 2022-2023 school year, Parent did not sign a contract with Private School nor was Student enrolled at Private School. (FOF 152-153). Student “attended” Private School for a few hours a day during the 2022-2023 school year. (FOF 153, 155). There is no evidence that Parent incurred any sort of financial obligation or liability that warrants reimbursement. (FOF 152).

Petitioners further fail to show that compensatory education is appropriate. Although Petitioners’ closing brief argues that “Student regressed and failed to gain the skills [Student] would have during this period, [August through October 2022],” there is no evidence that Student regressed or failed to gain certain skills. Pet. Closing Brief, p. 15. During the months of August through October of 2022, Student was attending Private School [REDACTED] hours a day and received less services. Parent testified that Student was “stagnant” and there was “no progress” when Student was at Private School [REDACTED] hours a day. (FOF 158, 159). Parent did not testify that Student regressed between August and October of 2022. Lastly, Parent testified that Parent was not satisfied with Private School and pulled Student out of Private School in [REDACTED] [REDACTED] of 2022. (FOF 155). There is insufficient evidence to establish a need for compensatory education.

Without more evidence, it is difficult to determine whether Private School was able to meet some of Student’s unique educational needs and whether Private School was providing an

educational program that enabled Student to make educational progress in light of Student's circumstances. Based on the foregoing reasons, Petitioners have not proven that Private School placement was proper under the IDEA and Petitioners' requests for reimbursement for the 2022-2023 school year and compensatory education are denied.

## **VI. DECISION**

Based upon the above-stated Findings of Fact and Conclusions of Law, the undersigned Hearings Officer concludes that Petitioners have proven a denial of FAPE when the DOE failed to revise or replace the 11/04/2021 IEP prior to the start of the 2022-2023 school year.

For the reasons stated above, IT IS HEREBY ORDERED --

1. The IEP team, including Parent, shall, within thirty (30) calendar days of this Decision, meet to review and/or revise Student's most current IEP.
2. All members of the IEP team, including Parent, shall work cooperatively to schedule an IEP meeting. Any delay in meeting the deadline in this Order because of an act or acts of Parent and/or Parent's representatives and/or Parent's private providers, will extend the deadline set herein by the number of days attributable to Parent and/or Parent's representatives and/or Parent's private providers. Respondents shall document in writing any delays caused by Parent and/or Parent's representatives and/or Parent's private providers. Parent's failure to appear, absent justifiable cause, can be considered in any subsequent due process complaint filing.

## **RIGHT TO APPEAL**

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

DATED: Honolulu, Hawaii, June 2, 2023.



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CHARLENE S.P.T. MURATA  
Hearings Officer  
707 Richards Street, Suite 520  
Honolulu, Hawaii 96813  
Phone: (808) 587-7680  
Fax: (808) 587-7682  
atg.odr@hawaii.gov