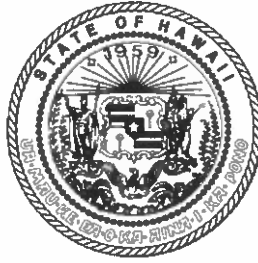


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OFFICE OF DISPUTE RESOLUTION  
DEPARTMENT OF THE ATTORNEY GENERAL  
STATE OF HAWAII

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 Hawaii Public Schools,

Respondents.

DOE-SY2223-037

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION

Due Process Hearing:  
October 23, 25, 26, 27, 2023 &  
November 2, 2023

Hearings Officer: Charlene S.P.T. Murata

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

**I. JURISDICTION**

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

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

60-1, et seq. Additionally, Petitioners reference Section 504 of the Rehabilitation Act of 1973 (“Section 504”), as amended in 1974, codified at 29 U.S.C. §§ 794, et seq.; and the Hawaii Administrative Rules §§ 8-61-1, et seq. in their claims and requests for relief.

## **II. INTRODUCTION**

On April 28, 2023, the Department of Education, State of Hawaii and Keith T. Hayashi, Superintendent of the Hawaii Public Schools (“Respondents” or “DOE”) received a Complaint and Resolution Proposal from Student, by and through Student’s Parent (collectively “Petitioners”).

On May 9, 2023, Respondents filed Department of Education’s Response to Petitioners’ Complaint and Resolution Proposal.

On May 26, 2023, a Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for June 5, 2023.

On June 5, 2023, a prehearing conference was held with Keith H.S. Peck, Esq. (“Mr. Peck”) appearing on behalf of Petitioners, and Deputy Attorney General Kevin M. Richardson (“Mr. Richardson”) appearing on behalf of Respondents. During the prehearing conference, the parties agreed to have the due process hearing on August 14-17 and 21, 2023, and requested an extension of the 45-day decision deadline. Respondents subsequently submitted a written request to extend the 45-day decision deadline on July 7, 2023, and the request was granted on the same day, extending the 45-day decision deadline from July 12, 2023 to August 25, 2023. See Order Granting Respondents’ Request to Extend the 45-Day Decision Deadline from July 12, 2023 to August 25, 2023; Declaration of Kevin M. Richardson, Dated July 7, 2023, issued on July 7, 2023.

On June 5, 2023, a Prehearing Order was issued to the parties, setting forth the issues and procedures for the due process hearing, and deadlines for submission of substantive motions, witness and exhibit lists, exhibits, and witness email addresses. No substantive motions were filed, and the parties timely submitted their witness and exhibit lists, exhibits, and witness email addresses on August 7, 2023.

On August 10, 2023, Respondents submitted a request to extend the 45-day decision deadline from August 25, 2023 to October 9, 2023, which was granted on August 11, 2023. See Order Granting Respondents' Request to Extend the 45-Day Decision Deadline from August 25, 2023 to October 9, 2023; Declaration of Kevin M. Richardson, Dated August 10, 2023, issued on August 11, 2023.

On August 21, 2023, a status conference was held. Present at the status conference were the undersigned Hearings Officer, Mr. Peck and Mr. Richardson. During the status conference, the parties agreed to reschedule the due process hearing to October 23-27, 2023. An Amended Prehearing Order was issued on August 23, 2023 to reflect the change in due process hearing dates and associated prehearing deadlines. See Amended Prehearing Order issued on August 23, 2023.

On October 4, 2023, Respondents submitted Respondents' Third Request to Extend the 45-Day Decision Deadline from October 9, 2023 to November 23, 2023; Declaration of Kevin M. Richardson. Respondents' request was granted on October 9, 2023. See Order Granting Respondents' Third Request to Extend the 45-Day Decision Deadline from October 9, 2023 to November 3, 2023; Declaration of Kevin M. Richardson, Dated October 4, 2023, issued on October 9, 2023.

On October 16, 2023, Petitioners submitted Petitioners' Supplemental Exhibit List and exhibits.

The due process hearing took place on October 23, 25, 26, 27 and November 2, 2023, using Zoom, a videoconferencing platform<sup>2</sup>. All participants in the due process hearing appeared remotely via video and audio, except for Parent who participated by telephone on October 23, 2023. Parent testified on October 25, 2023 via video and audio. After Parent's testimony, Parent's presence was waived for the remainder of the hearing. The undersigned Hearings Officer presided over the matter. Petitioners were represented by Mr. Peck, and Respondents were represented by Mr. Richardson. The Department of Education District Educational Specialist ("DES") was present on behalf of Respondents.

Petitioners called Private RBT, Private SPED Teacher, President, Parent, Caregiver, and Private BCBA as their witnesses during the due process hearing. Respondents called the following witnesses during the due process hearing: Administrator, PSF Teacher, SSC, Contracted BCBA, and PCS SPED Teacher. Petitioners did not call any rebuttal witnesses.

The following Petitioners' exhibits were admitted into evidence during the hearing: Exhibit 1 (pages 1-22, 23-53, 54-89), Exhibit 3<sup>3</sup> (pages 107-113, 114-115, 116-119, 120-121, 122-125, 126-130<sup>4</sup>, 131-144, 145-152, 153-167, 170-196, 197-199, 200-215, 216-227, 228-233),

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<sup>2</sup> The October 24, 2023 hearing date was taken off calendar and the November 2, 2023 hearing date was added by agreement.

<sup>3</sup> Petitioners' oral motion to amend the exhibit number on Petitioners' Witness List, Exhibit List, and Exhibits, filed on August 7, 2023, from "Exhibit 4" to "Exhibit 3" for pages 107-233, was granted. Tr. Vol. III, 296:17-297:7.

<sup>4</sup> Petitioners' oral motion to amend the page numbers on Petitioners' Witness List, Exhibit List and Exhibits, filed on August 7, 2023, for Exhibit 3, from pages 126-230 to pages 126-130 was granted. Tr. Vol. IV, 462:24-463:10.

Exhibit 4 (pages 234, 235-271<sup>5</sup>, 272-277, 278-314, 315-316, 365-383, 384-388, video link dated April 27, 2023). Tr. Vol. II, 166:17-167:6; Tr. Vol. III, 297:8-299:16, 345:21-346:23, 352:2-355:7, 355:22-356:4, 357:5-358:9, 360:22-368:18, 369:20-370:4, 387:21-25, 389:6-13; Tr. Vol. IV, 461:18-464:16.

The following Respondents' exhibits were admitted into evidence during the hearing: Exhibits 1, 4, 5, 10, 16, 17, 27, 28, 29, 34, 35, 39, 41, 42, 43, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 59, 61, 63, 64, 65, 69, 70, 71, 81, 83, 85, 86 and 89. Tr. Vol. III, 299:16-301:17; Tr. Vol. IV, 464:21-465:18; Tr. Vol. V, 602:21-604:2, 764:3-767:7.

On November 21, 2023, Respondents submitted a request to the undersigned Hearings Officer to extend the 45-day period in which a decision is due under HAR § 8-60-69, from November 23, 2023 to January 7, 2024, so that transcripts can be prepared and post-hearing briefs filed. Petitioners stipulated to the request for an extension. Respondents' request was granted on November 21, 2023. The new deadline by which a decision in this matter must be issued is January 7, 2024. See Order Granting Respondents' Fourth Request to Extend the 45-Day Decision Deadline from November 23, 2023 to January 7, 2024; Declaration of Kevin M. Richardson, Dated November 21, 2023, issued on November 21, 2023.

On December 15, 2023, the parties timely submitted their closing briefs<sup>6</sup>.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the undersigned Hearings Officer renders the following

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<sup>5</sup> Exhibit 4, pages 234 and 235-271 were created by Petitioners' counsel at the request of the undersigned Hearings Officer for use during the due process hearing. Caution is advised when reviewing these documents as they are not professional transcriptions of the IEP meeting.

<sup>6</sup> The original closing brief deadline was December 8, 2023. On December 5, 2023, Respondents requested a one-week extension of the deadline. Petitioners did not object. Respondents' request was granted and the new deadline by which the parties must submit their respective closing brief was extended to December 15, 2023.

findings of fact, conclusions of law and decision. Although all the evidence was considered, only evidence relevant to the resolution of the issues are stated in the findings.

### **III. ISSUES PRESENTED**

In their April 28, 2023 Complaint, Petitioners allege procedural and substantive violations of the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973. Specifically, Petitioners allege that the Respondents denied Student a free appropriate public education (“FAPE”). Petitioners raise the following issues:

Issue 1<sup>7</sup> – Whether Parent was afforded sufficient information regarding the program at the Public Separate Facility the DOE proposed as Student’s program/placement to appropriately participate in the discussion and decision the DOE made regarding that placement.

Issue 2 – Whether the Public Separate Facility is the least restrictive placement for Student.

Issue 3 – Whether the discussion regarding Student’s placement/LRE was appropriate where Parent and Parent’s advocate were interrupted when seeking to provide input during the consideration process, and/or the decision was based upon a majority vote and/or where Parent sought a discussion of the behavior intervention Student should receive but this discussion was not addressed but superseded by a placement discussion.

Petitioners request the following remedies:

Remedy 1 – Order the DOE to implement Student’s Stay-Put placement as that described in Student’s 3/09/2023 IEP and implement that program and placement;

Remedy 2 – If the DOE fails to immediately implement Student’s Stay-Put placement and/or if Petitioners prevail in any of their claims, order the DOE to fund and/or reimbursement Parents for any privately obtained services they incur for Student after April 28, 2023;

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<sup>7</sup> The first issue in Petitioners’ Complaint reads as follows: “Whether Student’s Stay-Put placement is the placement described in the IEP offer of 3/09/2023 and whether failure to allow Student access to this placement is a denial of FAPE.” During the PHC, Petitioners withdraw this issue.

Remedy 3 – Provide compensatory educational services as determined appropriate;

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

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

##### **Witnesses and Individuals involved in Student’s Education**

1. PSF Teacher is a district resource teacher and lead teacher at Public Separate Facility (“PSF”). PSF Teacher has been employed with the DOE for approximately twenty-three (23) years. PSF Teacher began with the DOE as a regular classroom teacher, and then in 2007 became a district resource teacher. In October of 2016, PSF Teacher became a teacher at PSF, when PSF first opened. PSF Teacher has a master’s degree in special education with an emphasis in [REDACTED] and is a licensed teacher in the state of Hawaii. PSF Teacher, Tr. Vol. IV, 548:2-18.
2. SSC is a student services coordinator at Public Charter School. As the student services coordinator, SSC is involved in special education services, such as communicating with parents about meetings, documentation, coordinating transportation, and does anything needed to support special needs students. SSC, Tr. Vol. IV, 591:15-22; Administrator, Tr. Vol. IV, 501:2-11.
3. Administrator has been employed at Public Charter School for sixteen (16) years. Administrator was first hired as a classroom teacher and eventually became an administrator and director of the elementary school and special education program. As the director of the elementary school, Administrator oversees two hundred and ten (210) students in grades [REDACTED] through [REDACTED]. As the director of the special education program, Administrator oversees six (6) teachers and attends meetings. Administrator has been the

director of the special education program in Public Charter School for approximately five (5) years. Administrator, Tr. Vol. IV, 469:9-470:5.

4. PCS SPED Teacher was Student's special education teacher at Public Charter School. PCS SPED Teacher has over thirty (30) years of special education administration experience. PCS SPED Teacher has been teaching special education in Hawaii since August of 2014 and joined Public Charter School in November of 2022. PCS SPED Teacher, Tr. Vol. V, 708:7-711:3; Administrator, Tr. Vol. IV, 483:5-7.
5. Care Coordinator is a special education teacher and a care coordinator and writes IEPs for Public Charter School's special education students. Administrator, Tr. Vol. IV, 504:7-10.
6. Contracted BCBA has been a board-certified behavior analyst ("BCBA") since 2012. Contracted BCBA has a graduate degree in applied behavior analysis ("ABA") and a Ph.D. in psychology. As a BCBA, one of Contracted BCBA's duties is to supervise registered behavior technicians ("RBTs"). Contracted BCBA owns a company that provides ABA services to the DOE through a contract. Contracted BCBA has had a contract with the DOE for almost a year and a half. Contracted BCBA first became familiar with Student in 2021 when Contracted BCBA was asked to conduct an observation of Student at Private Center. Contracted BCBA, Tr. Vol. V, 608:10-615:5, 698:1-2.
7. Private RBT has been a registered behavior technician for approximately five (5) and a half year and started working at Private Center around that time period. Private RBT is also a "Floor Manager" and "DDD Service Supervisor" at Private Center. Private RBT worked with Student for Student's "insurance program," and later as part of Student's "DOE program." Private RBT, Tr. Vol. I, 17:11-20:9. Private RBT's role in Student's



programs changed throughout the years—sometimes Private RBT worked directly with Student as Student’s RBT, and sometimes Private RBT supervised one of Student’s programs, although Private RBT is not a BCBA. Private RBT, Tr. Vol. I, 21:11-24. Private RBT worked with Student periodically before Student went to Public Charter School. Private RBT stopped working with Student several months before Student started at Public Charter School. During the [REDACTED] of 2023, Private RBT started working with Student again as Student’s RBT. Private RBT worked with Student in early [REDACTED] to the end of [REDACTED]. Private RBT, Tr. Vol. I, 22:4-20, 24:24-25:10; Pet. Ex. 3 at 110.

8. Private SPED Teacher is Student’s special education teacher at Private Center. Private SPED Teacher has a master’s degree in education and has been a special education teacher and administrator of a high school for over thirty (30) years. Private SPED Teacher is a licensed special education and general education teacher in the State of Hawaii. Private SPED Teacher has been working in Hawaii for approximately seven (7) years, and before that, had worked in California. Private SPED Teacher has worked as a teacher for the DOE and has been with Private Center for the past four (4) years. Private SPED Teacher became Student’s special education teacher on [REDACTED] and continues to Student’s special education teacher at Private Center. Private SPED Teacher works with Student [REDACTED] days a week; [REDACTED] hours per day. Private SPED Teacher works with Student for up to [REDACTED] hours per week. Pet. Ex. 3 at 111; Private SPED Teacher, Tr. Vol. I, 56:17-60:21, 62:10-21, 64:21-65:21, 67:11-68:13.

9. President is the owner and president of Parent Company, Private Center, and Private Company. President has a master’s degree in education. President is not with Student on

a day-to-day basis. President is Student and Parent's advocate during IEP meetings. Pet. Ex. 3 at 110; Pet. Ex. 3 at 227; President, Tr. Vol. I, 92:13-21, 119:16-22, 158:8-10.

10. Caregiver is employed by Parent Company, Private Center, and Private Company. Caregiver is an RBT and operations manager at Private Center. Caregiver has been an RBT since 2017. As an operations manager, Caregiver maintains staffing and purchases necessities. Caregiver works approximately twenty (20) to thirty (30) hours a week as an operations manager and provides approximately thirty (30) hours a week of RBT services at Private Center. Caregiver, Tr. Vol. II, 243:8-23. Caregiver is supervised by Private BCBA, Director, and President. Caregiver, Tr. Vol. II, 267:12-14. [REDACTED]

[REDACTED] Caregiver, Tr. Vol. II, 284:4-9. Caregiver provides RBT services to Student through Student's "DOE program;" oversees and provides RBT services through Student's "insurance program;" provides "waiver services" through Student's "DOH program;" and is paid a flat fee [REDACTED] between [REDACTED] to approximately [REDACTED] Pet. Ex. 3 at 110; President, Tr. Vol. I, 91:24-92:6, 113:3-23; Caregiver, Tr. Vol. II, 284:10-286:9.

11. Director is the director of Private Center. As a director, Director coordinates the schedules for the staff. Director and President are married. Caregiver, Tr. Vol. II, 252:10-20.

12. Private BCBA is a BCBA at Private Center and has been there since June of 2022. Private BCBA started working with Student in May of 2023. As a BCBA, Private BCBA supervises clients and RBTs; oversees programs and services; and coordinates

amongst different staff members. Private BCBA has a master's degree in applied behavior analysis. Pet. Ex. 3 at 110. Private BCBA, Tr. Vol. III, 305:8-20, 395:9-20.

**Student**

13. Student is currently [REDACTED] years old.
14. Student has a medical diagnosis of [REDACTED]  
[REDACTED] DOE Ex. 16 at 031.
15. Student was first made eligible for IDEA services under the category of [REDACTED]  
[REDACTED] when Student was [REDACTED] years old, and Student's first IEP was developed on [REDACTED] DOE Ex. 16 at 031, 033.
16. Student is currently eligible for special education and related services pursuant to the IDEA and Hawaii Administrative Rules Chapter 60 under the category of [REDACTED]  
[REDACTED] DOE Ex. 16 at 033.
17. Parent has a [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] President, Tr. Vol. I, 90:15-92:12.
18. For the past [REDACTED] years, Student attended Private Center, except when Student attended a public school for approximately [REDACTED] to [REDACTED] on [REDACTED] separate occasions. After [REDACTED] years at Private Center, Student transferred to Public Charter School where Student stayed from [REDACTED] to [REDACTED]. Student went

back and enrolled at Private Center on [REDACTED], where Student currently attends. President, Tr. Vol. I, 82:1-16, 89:8-90:616, 145:2-17; PCS SPED Teacher, Tr. Vol. V, 710:17-24; Administrator, Tr. Vol. IV, 474:3-476:1.

19. During the pendency of this instant Complaint, Student has “stay-put” at Public Charter School but attends Private Center. President, Tr. Vol. I, 102:5-23.

**Facts of Case**

20. Public Charter School is a public charter school that is governed by a local school board. Public Charter School follows DOE protocols for testing, offers special education, and follows Hawaii Common Core Standards and Next Generation Science Standards. Public Charter School differs from traditional DOE schools in the approach it takes to teach core subjects to its students. Public Charter School is a project-based school and uses collaboration more than traditional DOE schools. Besides special education, the DOE does not govern Public Charter School’s educational process. Administrator, Tr. Vol. IV, 470:6-471:11. Public Charter School contracts with the DOE for services, such as RBT services, and then DOE provides the individuals who will perform those services. Pet. Ex. 4 at 4/27/23 Video Link, 00:18:00-00:18:38.
21. Public Charter School does not offer [REDACTED] or extended school year (“ESY”) services during [REDACTED] and the campus is closed during [REDACTED] President, Tr. Vol. I, 149:4-7; Administrator, Tr. Vol. IV, 516:16-19.
22. Public Charter School consists of a [REDACTED] building, located on [REDACTED]  
[REDACTED]  
[REDACTED] Administrator, Tr. Vol. IV, 471:12-20.

23. There are approximately [REDACTED] students in grades [REDACTED] through [REDACTED] enrolled at Public Charter School. The [REDACTED] school is located mostly on the ground floor with [REDACTED] on the second floor; the [REDACTED] is located on the ground floor and second floor; and [REDACTED] is located on the third floor. There are approximately [REDACTED] classrooms and offices. The building has stairwells and an elevator. The campus has a [REDACTED] that are used by students. Administrator, Tr. Vol. IV, 471:12-473:9.
24. The enrollment period for Public Charter School starts in [REDACTED]. Parents submit applications [REDACTED]. [REDACTED] Public Charter School has open enrollment, and applicants are accepted on a rolling basis based on space availability. Administrator, Tr. Vol. IV, 474:3-475:21.
25. In 2022, [REDACTED] Student applied for open enrollment, was accepted, and enrolled at Public Charter School on or about [REDACTED]. Student did not immediately start school after enrolling at Public Charter School. Administrator, Tr. Vol. IV, 473:13-476:1.
26. After Student enrolled at Public Charter School, Public Charter School's student services coordinator asked Parent if Parent wanted Public Charter School to schedule transportation services for Student. Parent declined the transportation offer and requested an IEP meeting. Administrator, Tr. Vol. IV, 476:2-12.
27. On October 26, 2022, November 1, 2022, and November 15, 2022, IEP meetings were held to develop an IEP for Student ("11/15/2022 IEP"). Pet. Ex. 1 at 001-022.

28. Present at the IEP meeting on October 26, 2022 were Student, Parent, Caregiver, PSF Teacher, Contracted BCBA, Administrator, SSC, District Resource Teacher, Care Coordinator, a special education teacher, a general education teacher, another student services coordinator, a vice principal, a contracted behavior analyst, and a representative from Private Center. Pet. Ex. 1 at 020.
29. Present at the IEP meeting on November 1, 2022 were Student, Parent, Caregiver, PSF Teacher, Contracted BCBA, Administrator, SSC, District Resource Teacher, Care Coordinator, a special education teacher, a general education teacher, a vice principal, a contracted behavior analyst, a speech/language pathologist, and a representative from Private Center. Pet. Ex. 1 at 021.
30. Present at the IEP meeting on November 15, 2022 were Student, Parent, Caregiver, Director, PSF Teacher, Contracted BCBA, Administrator, SSC, District Resource Teacher, Care Coordinator, a vice principal, a contracted behavior analyst, a general education teacher, principal of Public Charter School, principal of Home School, and an advocate for Parent. Pet. Ex. 1 at 022.
31. The 11/15/2022 IEP lists Home School as Student's current school and the "IEP Annual Review Date" as November 15, 2023. Student is listed as being in the [REDACTED] grade. Special education and related services are noted as starting on November 15, 2022. Pet. Ex. 1 at 001, 016-017. Home School is Student's homeschool. Administrator, Tr. Vol. IV, 534:8-11.
32. The 11/15/2022 IEP provides Student with special education services, transportation, ABA services, a behavior intervention plan ("BIP"), two (2) RBTs, a crisis plan,

incident log between school and Parent, and other services and related services. Pet. Ex. 1 at 016-017.

33. According to Student's 11/15/2022 IEP, "due to the nature [REDACTED] of [Student's] communication, behavioral, functional, and academic deficits, [Student] requires ESY services after a break of [REDACTED] calendar days." Pet. Ex. 1 at 015.
34. According to Student's 11/15/2022 IEP, the extent to which Student will not participate with non-disabled students in the general education class, extracurricular activities, and other non-academic activities (known as least restrictive environment or "LRE") is stated in the following manner: "[Student] will participate with [Student's] non-disabled peers during planned structured social groups, lunches, recess activities, sports, and outings in the community. [Student] will access an individualized curriculum, occupational therapy services, speech/language therapy services, extended school year services, and transportation services specifically for students with disabilities, and not with [Student's] non-disabled peers." Pet. Ex. 1 at 019.
35. On [REDACTED] without prior notification to Public Charter School, Student [REDACTED] Parent revoked all special education services. Upon the revocation of special education services, Student attended Public Charter School as a general education student. On Student's first day at school, Student ran around and eloped. DOE Ex. 5 at 014; DOE Ex. 16 at 031; Administrator, Tr. Vol. IV, 474:5-15, 478:22-480:25.
36. Although Student did not have an active IEP, Public Charter School assigned an educational assistant ("EA") to Student to ensure that Student was safe and would go to classes. During the period when Student did not have an active IEP, Student was not

focused in class; would not stay in the classroom; eloped; ran around; and did whatever Student wanted to do. The longer Student attended school without an IEP, the farther [REDACTED] Administrator, Tr. Vol. IV, 480:23-481:16, 488:1-489:11; PCS SPED Teacher, Tr. Vol. V, 722:1-14.

37. During the period when Student did not have an IEP, Caregiver would take Student to school and pick up Student from school. Administrator, Tr. Vol. IV, 493:15-24.
38. Not long after attending school without an IEP, Public Charter School's student services coordinator asked Parent if Parent wanted an initial evaluation conducted so that a new IEP could be developed for Student. Parent agreed. Administrator, Tr. Vol. IV, 521:21-522:2.
39. On December 16, 2022, Parent signed a "Consent for Assessment as Part of an Initial Evaluation" form, authorizing Public Charter School to begin administering assessments to Student. DOE Ex. 10 at 021.
40. On February 9, 2023, Contracted BCBA conducted a functional behavior assessment and issued a report entitled "Functional Behavior Assessment Descriptive Report" ("2/09/2023 FBA"). The 2/09/2023 FBA noted that "[Educational Assistant] reported that the one thing [Student] seems to complain about the most is that [REDACTED] [REDACTED] DOE Ex. 39 at 184-193.
41. After the completion of the evaluation process, an eligibility meeting was held in February of 2023, and Student was found eligible for special education and related services. Administrator, Tr. Vol. IV, 486:16-24.



42. On February 10, 2023, Parent signed a “Consent for Initial Provision of Special Education and Related Services” form, authorizing Public Charter School to provide special education and related services to Student. DOE Ex. 17 at 035.
43. On February 15, 2023, Parent was provided a copy of an Evaluation Summary Report for the initial evaluation (“2/15/2023 ESR”). DOE Ex. 16 at 031-034. The initial evaluation assessed Student’s cognitive, behavior, fine motor, sensory processing, speech/language, and academic skills. Based on the information gathered, it was determined that [REDACTED] adversely affected Student’s educational performance and participation in appropriate activities. It was also determined that “[Student] needs specifically designed instruction, accommodations and/or modifications in the following areas to be involved in and progress in the general education curriculum: Functional reading, functional math, functional writing, expressive and receptive language and pragmatic language skills, fine motor skills and sensory processing support, and behavioral support (Behavioral Intervention Plan).” DOE Ex. 16 at 031-034.
44. On February 16, 2023, a behavior intervention plan was made for Student (“2/16/2023 BIP”). DOE Ex. 57 at 406.
45. On February 24, 2023, March 2, 2023, and March 9, 2023, IEP meetings were held to develop an IEP for Student (“3/09/2023 IEP”). Pet. Ex. 1 at 023-053; DOE Ex. 28 at 058-086.
46. Present at the IEP meeting on February 24, 2023 were Parent, President, Administrator, SSC, Contracted BCBA, Care Coordinator, District Resource Teacher, a vice principal, a representative from the State of Hawaii’s Division of Vocational Rehabilitation, a

“high risk counselor,” a speech/language pathologist, a general education teacher, principal of Public Charter School, and a behavioral health specialist. Pet. Ex. 1 at 051.

47. Present at the IEP meeting on March 2, 2023 were Parent, Contracted BCBA, Administrator, SSC, Care Coordinator, District Resource Teacher, a vice principal, a “high risk counselor,” a speech/language pathologist, a general education teacher, principal of Public Charter School, a behavioral health specialist, and an occupational therapist. Pet. Ex. 1 at 052.
48. Present at the IEP meeting on March 9, 2023 were Student, Parent, President, Caregiver, Contracted BCBA, Administrator, SSC, Care Coordinator, District Resource Teacher, a vice principal, a “high risk counselor,” a speech/language pathologist, principal of Public Charter School, a behavioral health specialist, and a general education teacher. Pet. Ex. 1 at 053.
49. During the development of the 3/09/2023 IEP, the IEP team considered the various settings to implement Student’s IEP: general education setting; special education fully self-contained (“FSC”) setting; public separate facility; private separate facility; and private residential facility or hospital/homebound settings. The IEP team determined that a FSC setting, public separate facility and private separate facility were too restrictive. The IEP team agreed that Student’s LRE would be a combination of general education setting and special education setting. During the IEP meeting, Parent and President stated that Parent wanted Student’s RBTs from Private Center to be Student’s RBTs at Public Charter School to help Student transition from Private Center and Public Charter School. The school members of the IEP team stated that the service is offered, not the person, and could not guarantee who Student’s RBTs would be. Parent also

asked that Student be provided RBT services on the school bus during Student's ride to school. The school members of the IEP team informed Parent that when Student rode the bus and vans during school field trips, Student did not exhibit any behavioral problems. Parent and President also asked that Student's long-term RBT at Private Center work with the new RBTs assigned to Student for training purposes during a transition period, which was rejected. DOE Ex. 27 at 052-057.

50. The 3/09/2023 IEP lists Public Charter School as Student's current school and the "IEP Annual Review Date" as March 9, 2024. Student is listed as being in the [REDACTED] grade. Pet. Ex. 1 at 023.

51. According to the 3/09/2023 IEP, "[d]ue to the nature [REDACTED] of [Student's] communication, behavioral, functional, and academic deficits, [Student] requires ESY services after a break of [REDACTED] calendar days." Pursuant to the 3/09/2023 IEP, Student will receive ESY services during the summer of 2023, which runs from [REDACTED] to [REDACTED] [REDACTED] each day. Pet. Ex. 1 at 046-047.

52. Transportation was included in the 3/09/2023 IEP at the request of Parent and Caregiver. Administrator, Tr. Vol. IV, 494:6-8.

53. The 3/09/2023 IEP will provide Student with the following Special Education and Related Services: 765 minutes per week of special education in a special education setting; 765 minutes per week of special education in a general education setting; occupational therapy; speech/language therapy; and transportation twice a day. Pet. Ex. 1 at 047.

54. The 3/09/2023 IEP will provide Student with the following Supplementary Aids and Services, Program Modifications and Supports for School Personnel ("Supplementary

Aids and Services”): ABA services; Behavior Intervention Plan; Individual Instructional Support; Occupational Therapy Consultation; Speech/Language Consultation; frequent rest, movement, or sensory breaks throughout the day; access to an adaptive pencil grip; access to a specialized reading curriculum; access to low or no-tech communication system; a daily visual schedule; incident log between school and Parent; a safety identification card; and visual supports. Pet. Ex. 1 at 047.

55. The 3/09/2023 IEP states Student’s LRE in the following manner: “The Least Restrictive Environment as determined by a majority of the IEP team is that [Student] will receive [Student’s] education in a combination of the general education setting and the special education setting to provide [his/her] individualized curriculum as well as socialization that is best suited to [Student’s] needs as well as access to certified teachers and trained personnel. [Student] will participate with [Student’s] non-disabled peers to the greatest extent possible, except during the implementation of [Student’s] individualized core curriculum, occupational therapy services, speech/language therapy services, extended school year services, and transportation services specifically for students with disabilities.” Pet. Ex. 1 at 050.
56. According to a Prior Written Notice, dated March 10, 2023, “The Special Education Administrator made the offer of a FAPE through the IEP...” DOE Ex. 27 at 057.
57. On March 21, 2023, after returning from spring break, special education and related services began pursuant to the 3/09/2023 IEP. Administrator, Tr. Vol. IV, 493:3-14; Pet. Ex. 1 at 047.
58. “Elopement is defined as leaving a designated area without permission.” DOE Ex. 50 at 332-337.

59. On [REDACTED], during school, Student eloped and “escaped” several times when Student was taken into a new class and during attempts to prompt Student back. DOE Ex. 50 at 332-337.
60. Immediately, bus transportation became a problem. Public Charter School received several written reports from Bus Company in [REDACTED] that [REDACTED]  
[REDACTED]  
[REDACTED] DOE Ex. 54 at 360-362.
61. On [REDACTED], Student eloped multiple times when Student could not get Student’s preferred item or activity, or when Student was told “no” or to wait. DOE Ex. 50 at 332-337.
62. On [REDACTED], Student and an RBT were in the school cafeteria. When it was time for Student to transition away from Student’s preferred activity and into a classroom, Student wanted more time, and more time was given. The RBT later redirected Student to transition and removed a preferred item. In response, Student eloped from the cafeteria, and went through a gate that was left open to an area off campus. The RBT and a teacher followed and remained with Student. When directed by the RBT to return to campus, Student did not comply. The RBT and Student’s teacher utilized “QBS Safety Care Supportive Guide” to get Student back onto campus. DOE Ex. 42 at 313; DOE Ex. 46 at 323-328.
63. On [REDACTED], during lunch time, Student engaged in elopement, open hand hitting, and refusal. DOE Ex. 50 at 332-337.

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<sup>8</sup> Bus Company also made reports that no one was at school to receive Student in the morning, but Bus Company had erroneously been dropping off Student before 8:30 a.m., which was too early. DOE Ex. 55 at 367.

64. On [REDACTED], Bus Company submitted to Public Charter School the following incident report about the morning bus ride: “[Student] showed signs of stress such as vocal whining, hitting the bus seats [and] window sides...When I would say ‘No’ to [Student] hitting the seat in front of [Student] or windows [Student] appeared to either become frustrated/want to hit more or almost fearful. [REDACTED]

[REDACTED]

[REDACTED] Multiple instances of [Student] hitting the seat in front [and] trying to grab the student in front’s [sic] clothes or head. I would again tell [Student] ‘No [and] to keep [Student’s] hands to [him/herself].’ The only thing that seemed to work was allowing [Student] to hold my hands. If [Student] started hitting things again I would tell [Student] that [Student] can’t hold hands anymore. [Student] would then stop.. [REDACTED]

[REDACTED]

[REDACTED] DOE Ex. 54 at 365-366.

65. On [REDACTED] while at school, Student eloped [REDACTED] times and attempted to elope [REDACTED] times. Student tore off the [REDACTED] and threw it over the [REDACTED] balcony where [REDACTED] were located. Student also threw [REDACTED] over the [REDACTED] balcony. In addition, Student ran away when asked to do something Student did not want to do, and had [REDACTED] minor “behavioral escalations” by dropping to floor. DOE Ex. 47 at 329; DOE Ex. 48 at 330; DOE Ex. 50 at 332-337; PCS SPED Teacher, Tr. Vol. V, 725:13-728:4.

66. Also on [REDACTED], at the end of the school day, Student refused to go to the bus stop and missed the bus to go home. DOE Ex. 49 at 331; DOE Ex. 54 at 363.
67. On [REDACTED] Student eloped while going to class; RBT had to repeat him/herself throughout the day in order for Student to follow cues; Student ran away when asked to go to class; PCS SPED Teacher had to assist with getting Student to class; and Student threw a [REDACTED] over the [REDACTED] balcony [REDACTED] DOE Ex. 83 at 515.
68. On [REDACTED], Student's RBT had to repeat him/herself throughout the day to get Student to follow cues; Student ran away when asked to perform nonpreferred activities; and Student eloped [REDACTED] times throughout the day. DOE Ex. 83 at 515.
69. Also on [REDACTED], Bus Company had to wait until [REDACTED] until an [REDACTED] came home to receive Student. DOE Ex. 54 at 359.
70. On [REDACTED] while on the way to school, Student yelled and stomped Student's feet hard on the floor throughout the bus ride. DOE Ex. 54 at 360.
71. On or about [REDACTED], Student's RBT reported that Student ran "...away from [REDACTED] department of education employees as [Student] did not want to transition back to class and instead would sit in cafeteria, attempt to talk to other classmates, attempt to talk to other teachers, or would run outside. This took up over an [REDACTED]" DOE Ex. 83 at 514-515.
72. At the end of the school day on [REDACTED] Bus Company arrived at Student's house at [REDACTED] but no one was home. Bus Company took Student back to school. DOE Ex. 54 at 359.
73. Also on [REDACTED] the school members of the IEP team agreed to hold weekly team meetings with Student's RBT to review the BIP procedures and to debrief the team on

what was happening on a weekly basis and to discuss potential solutions to problems the school was having with Student. DOE Ex. 51 at 338-347.

74. On April 6, 2023, at the request of SSC, Contracted BCBA agreed to share with Public Charter School weekly notes written by the RBTs and suggested that they review the notes during their weekly team meetings. SSC expressed concern that Student continued to steal food from other students and that “Some of [Student’s] behavior has been teetering on being a threat to [him/herself], as well as our student body.” DOE Ex. 50 at 332-337.

75. On [REDACTED], two (2) RBTs were assigned to Student. When Student was told to play the piano keys softly, Student attempted to run away and cry. Student struck the second RBT several times when the RBT told Student to play the piano softly. Although Student was able to eat lunch well with two (2) RBTs, Student was having increasing difficulty transitioning to Student’s next class. At the end of the school day, [REDACTED] people were needed to escort Student to the bus to stop Student from running away. Student eloped [REDACTED] times throughout the day. DOE Ex. 83 at 514.

76. On April 10, 2023, Contracted BCBA emailed to the school members of the IEP team a copy of a plan to address elopement, transitions, and rules when riding the school bus. DOE Ex. 51 at 338-347.

77. On [REDACTED], while on the school bus in the morning, Student hit the bus window and seat; yelled; [REDACTED] and tried to take off Student’s seatbelt. Bus driver spoke to Student over [REDACTED] times. On the bus ride back home, Student [REDACTED] [REDACTED] DOE Ex. 54 at 363-364.



78. On [REDACTED], while riding the school bus in the morning, Student became agitated and [REDACTED]. [REDACTED] The bus driver stopped the school bus at a park and Caregiver was called to pick up Student. SSC informed Contracted BCBA, Administrator, and others of the incident and expressed concerns that Student also screams on the school bus, making it difficult for the bus driver to concentrate and disrupting other students. SSC suggested that a revision IEP meeting be scheduled to discuss adding RBT services during the bus ride. DOE Ex. 53 at 351-352. SSC then attempted to schedule a revision IEP meeting with Parent to discuss adding RBT services during the bus ride and to discuss what the school had been observing, but Parent did not want a revision IEP meeting and was willing to sign a consent form to allow the IEP to be revised without a meeting. DOE Ex. 53 at 351-352; DOE Ex. 54 at 353-357; DOE Ex. 55 at 367.
79. On April 12, 2023, Contracted BCBA updated Student's BIP ("4/12/2023 BIP"). DOE Ex. 57 at 403-412.
80. On April 13, 2022, Parent signed a "Consent to Amend the Annual IEP" form, allowing the DOE to amend Student's 3/09/2023 IEP to add RBT services during the bus ride to and from school without an IEP meeting, creating an IEP dated April 13, 2023 ("4/13/2023 IEP"). DOE Ex. 29 at 087-114; DOE Ex. 56 at 368-402; DOE Ex. 61 at 418-448; Administrator, Tr. Vol. IV, 504:9-505:13.
81. The LRE statement in the 4/13/2023 IEP was not changed from the 3/09/2023 IEP and reads: "The Least Restrictive Environment as determined by a majority of the IEP team is that [Student] will receive [Student's] education in a combination of the general education setting and the special education setting to provide [his/her] individualized

curriculum as well as socialization that is best suited to [Student's] needs as well as access to certified teachers and trained personnel. [Student] will participate with [Student's] non-disabled peers to the greatest extent possible, except during the implementation of [Student's] individualized core curriculum, occupational therapy services, speech/language therapy services, extended school year services, and transportation services specifically for students with disabilities.” DOE Ex. 29 at 114.

82. Student's eligibility for ESY services under the 4/13/2023 IEP remained the same as the 3/09/2023 IEP and states, “[d]ue to the nature and [REDACTED] of [Student's] communication, behavioral, functional, and academic deficits, [Student] requires ESY services after a break of [REDACTED] calendar days.” DOE Ex. 29 at 110.

83. ABA Agency-RBT is an RBT for ABA Agency. ABA Agency is a contracted ABA service provider like Contracted BCBA's company. Contracted BCBA, Tr. Vol. V, 697:11-22; DOE Ex. 59 at 415.

84. On [REDACTED], during physical education class, Student walked off campus with the general education class to go for a walk. ABA Agency-RBT and Educational Assistant went with Student on the walk. During the walk, Student ran into the road where cars were approaching. ABA Agency-RBT prompted Student to return to the sidewalk, but Student refused. ABA Agency-RBT [REDACTED] prevent Student from getting hit by a car. [REDACTED] [REDACTED] but Student then threw [REDACTED] at Educational Assistant, ABA Agency-RBT, and cars. This escalated [REDACTED] ABA Agency-RBT [REDACTED] multiple times. ABA Agency-RBT [REDACTED] [REDACTED] at which time Student [REDACTED] ABA Agency-RBT on the [REDACTED] in ABA

Agency-RBT's [REDACTED] on ABA Agency-RBT's [REDACTED] at ABA Agency-RBT. Two (2) additional staff members were called for assistance. Student was brought back to campus with the assistance of four (4) staff members. While back at school, Student threw a [REDACTED] at a group of [REDACTED] in the cafeteria; threw [REDACTED] in the school parking lot in the direction of parked cars; and when verbally prompted upstairs by ABA Agency-RBT, Student dropped to the floor in the hallway under water fountains. DOE Ex. 64 at 454; DOE Ex. 65 at 468. Due to the events of the day, ABA Agency-RBT had to see a doctor the next day. [REDACTED] [REDACTED] DOE Ex. 57 at 403-412; DOE Ex. 59 at 414-416.

85. On or about [REDACTED], Administrator asked DOE if DOE had additional RBTs it could provide to Public Charter School [REDACTED] [REDACTED] DOE was able to send a second RBT, but it was not consistent. Administrator, Tr. Vol. IV, 509:9-510:14.
86. On April 14, 2023, Care Coordinator emailed to Parent, Administrator, Contracted BCBA, and others an updated BIP by Contracted BCBA ("4/14/2023 BIP"), a brochure about the use of [REDACTED] and a [REDACTED] [REDACTED] incident. DOE Ex. 65 at 455-468.
87. On April 17, 2023, Parent asked for an IEP meeting. Parent informed Care Coordinator that "[Student] needs someone who is familiar with [Student], as we asked before. The RPTs [sic] that known [Student] for years and had no problems with [Student's] behavior can teach new RPTs [sic] to assist [Student's] education." Parent agreed to have an IEP meeting on April 27, 2023 at 12:00 p.m. DOE Ex. 65 at 455-468; President, Tr. Vol. I, 86:1-17.

88. On [REDACTED], ABA Agency-RBT started riding the school bus with Student. DOE Ex. 63 at 450-453. Having an RBT on the school bus helped with Student's behavioral issues for the morning bus ride to school; however, it was still a challenge to get Student on the school bus to go home. The school would have to start the process of getting Student on the school bus about [REDACTED] minutes before the bus arrived. The process required [REDACTED] adults, who would walk with arms locked around Student, not touching Student, and guiding Student from the [REDACTED] to the bus pickup area [REDACTED] in front of the school. When Student had to get on the bus,

[REDACTED]

[REDACTED] Administrator, Tr. Vol. IV, 507:1-25.

89. On [REDACTED] Student entered a vacant field through a broken barbed wired fence behind the school parking lot. An RBT stayed with Student, while PCS SPED Teacher and another individual were on the outside of the fence trying to get Student to come back. Student then ran further into the field along the barbed wired fence. Educational Assistant and the RBT were able to guide Student to the broken part of the fence where Student had entered. Student grabbed a [REDACTED] and threw it hard across the court. Student then started to walk toward a small field [REDACTED]

[REDACTED] The dean of students at Public Charter School moved the

[REDACTED] Throughout the entire incident, Student

was screaming and saying, [REDACTED] became angry, and did not follow the directions given by any of the adults. DOE Ex. 69 at 477-478.

90. On [REDACTED] it took [REDACTED] minutes and [REDACTED] adults to move Student [REDACTED] to the school bus. DOE Ex. 71 at 480-481.

91. On April 24, 2023, Administrator sent an email to Contracted BCBA expressing Administrator’s concern and need for help. The email states: “The student’s behavior has escalated to the point where the one person in the support role is not sufficient. The violent tantrums, eloping off campus and refusal to get on the bus in the afternoon have escalated. Today, [Student] went on a rant throwing [REDACTED] [REDACTED] out of the room and into the hallway where other students were walking to and from classes. [ABA Agency-RBT] blocked the doorway so that [Student] couldn’t throw [REDACTED] onto the [REDACTED] [REDACTED]. It was very unsafe to say the least.... I am going to request that the district send another RBT – permanently [for] support...” DOE Ex. 71 at 480-481.
92. On or about [REDACTED], Student engaged in elopement, throwing [REDACTED] spitting, and attempted to hit. DOE Ex. 83 at 514.
93. On or about April 26, 2023, Contracted BCBA updated Student’s BIP again and finalized a crisis plan. DOE Ex. 81 at 507-509.
94. On or about [REDACTED] two (2) RBTs were assigned to Student. Student engaged in elopement attempts and throwing of items. DOE Ex. 83 at 514.
95. Public Charter School is “a full inclusion school.” When Student first started at Public Charter School in November of 2022, the school did not have pull-out classrooms for special education. At some point, Public Charter School made available pull-out classrooms for special education students. Other special education students, who were not as academically behind as Student, worked in the inclusion classrooms with their respective special education teachers and EAs. Initially, Student was also in an

inclusion classroom, working on Student's own curriculum with Student's special education teacher and/or EA. Around [REDACTED] Student started to go to the special education pull-out classroom where Student would work with Student's special education teacher. As time progressed, Student went to the special education classroom more and more. Towards the end of Student's attendance at Public Charter School, Student was in the special education pull-out classroom more often than not due to Student's dangerous behaviors. Administrator, Tr. Vol. IV, 524:17-526:21.

96. When Student started school at Public Charter School, except for physical education, Student had difficulty staying in the general education classroom. As the weeks went by, Student stayed in the general education classroom less and less and would elope from the general education classroom. PCS SPED Teacher, Tr. Vol. V, 717:16-718:11.

97. Student was less likely to leave the special education classroom at Public Charter School, especially when it was closer to the end of the school day. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PCS SPED Teacher, Tr. Vol. V, 720:13-721:22.

98. According to PCS SPED Teacher, Student wanted to stay longer in a special education classroom than a general education classroom because Student enjoyed working on some of the IEP goals; got points to use for rewards; was able to work on academics that Student was familiar with; and there was less stimuli in the special education classroom because it was not full of students like the general education classroom, allowing Student to focus and receive more attention. PCS SPED Teacher, Tr. Vol. V, 723:2-

724:6.

99. When Student first started working on IEP goals, Student made progress on the goals and was even further along than the goals had indicated for letter recognition, numbers, and some basic sight word reading; however, Student's behavior interfered with Student's schoolwork and Student lost interest in Student's preferred activities. PCS SPED Teacher, Tr. Vol. V, 719:19-720:12, 737:1-741:13.
100. With respect to Student's relationship with Student's peers, at times, other students were a distraction to Student, and Student was a distraction to the other students. Student initially had a positive relationship with the other students on campus, however, as Student's behavior worsened, the other students pulled back and interacted with Student less. PCS SPED Teacher, Tr. Vol. V, 724:1-725:12, 727:18-728:4, 731:14-23.
101. PCS SPED Teacher testified that the cause of Student's change in behavior may have been connected to riding the school bus and the demands of having to work on IEP goals, which Student did not have when Student started at Public Charter School without an IEP and had significantly more freedom during the school day and could do whatever Student wanted to do. PCS SPED Teacher, Tr. Vol. V, 721:23-723:1.
102. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Administrator, Tr. Vol. IV, 497:5-18, 540:1-20.
103. In an effort to address Student's maladaptive behaviors, the school removed objects and school supplies from the classrooms, but could not remove all objects, such as

██████████ that were left in hallways by other students. The school also moved Student into a classroom that adjoined the other classrooms but that didn't give Student direct access to ██████████. This worked for a little while, until Student found objects in that classroom to take, run to the door, and throw over the railing. At one point, Student tried to move the chairs and desk out of the classroom. Administrator, Tr. Vol. IV, 495:14-498:3; Contracted BCBA, Tr. Vol. V, 641:9-644:6.

104. PCS SPED Teacher testified that by the time of the 4/27/2023 IEP meeting, Student's problematic behaviors were becoming more frequent in the general education and special education classrooms. Student would take things off the walls and throw them; Student had thrown a ██████████ that hit ABA Agency-RBT ██████████ causing injury; and Student had lifted and flipped a desk to its side, causing all the items on the desk to fall to the floor, which Student then picked up and threw into the hallway where other students were walking. Public Charter School tried to address Student's behavioral problems by taking items out of the classrooms to prevent Student from throwing them, but it was not possible to clear a classroom of all objects, especially in a general education classroom where items were needed to educate Student and other students. Interventions, such as an additional RBT and use of a "point system," were not effective. The school also tried to lessen the demands on Student but lessening the demands on Student slowed down Student's progress on Student's IEP goals. The different behavioral strategies that the school tried were not successful. PCS SPED Teacher, Tr. Vol. V, 725:13-733:8, 739:12-740:10.



105. On April 27, 2023, a revision IEP meeting was held, resulting in an IEP with the same date (“4/27/2023 IEP”). The IEP Annual Review Date remained at March 9, 2024. Pet. Ex. 1 at 054-089; DOE Ex. 35 at 126-161.
106. Present at the 4/27/2023 IEP meeting were the following eighteen (18) individuals: Student, Parent, President, Caregiver, Contracted BCBA, Administrator, SSC, PSF Teacher, ABA Agency-RBT, PCS SPED Teacher, Care Coordinator, District Resource Teacher, a vice principal, a “high risk counselor,” principal of Public Charter School, a behavioral health specialist, an RBT, and a general education teacher. Pet. Ex. 1 at 089. Caregiver participated by audio only; District Resource Teacher, PSF Teacher, Contracted BCBA, and President participated by video and audio; and all other members, including Parent and Student, participated in-person. The 4/27/2023 IEP meeting last for approximately one hour and thirty minutes. Pet. Ex. 4 at 4/27/23 Video Link.
107. Before the IEP meeting started on April 27, 2023, Student was quiet, excited, and waited patiently in the meeting room. [REDACTED]  
[REDACTED] Student threw a tantrum--going outside; kicking doors; going into a corner and screaming and yelling. [REDACTED]  
Administrator, Tr. Vol. IV, 510:17-511:6.
108. Administrator was at the 4/27/2023 IEP meeting in Administrator’s capacity as an administrator and designee of Public Charter School. Pet. Ex. 1 at 089.
109. During the 4/27/2023 IEP meeting, the IEP team started the discussion with Student’s behavioral problems and the behavioral interventions that had been used. Parent then asked that Student be assigned two (2) RBTs, which Contracted BCBA did not feel was

necessary and that Student's behavior would be better addressed if Student were placed in a setting similar to Private Center. President then requested that Public Charter School utilize Private Center's staff to help Student transition to Public Charter School, which Public Charter School had declined to do in the past and again declined to do at the IEP meeting. After declining President's request to use Private Center's staff, the IEP team moved on to discuss changing the setting. Pet. Ex. 4 at 4/27/23 Video Link, 00:05:11-00:19:30. President's repeated request during the 4/27/2023 IEP meeting to use Private Center's staff to help Student transition to Public Charter School was denied, and Administrator explained that as a charter school, Public Charter School contracts with the DOE for specific services, and DOE in turn provides the people to perform those services. Pet. Ex. 4 at 4/27/23 Video Link, 00:21:49-00:24:03. During the IEP meeting, President and Caregiver asked for a daily communication log, food log, and behavioral data taken by the RBTs at school. Public Charter School agreed to provide a communication log and food log, but it did not outright agree to provide behavioral data taken by the RBTs because Contracted BCBA needed to discuss with Parent, and possibly PSF Teacher, what behavioral data Private Center would like, the frequency of the reporting, and a form and an agreement to convey the requested behavioral data. Pet. Ex. 4 at 4/27/23 Video Link, 1:23:35-1:25:52.

110. During the 4/27/2023 IEP meeting, the IEP team discussed the various placement options—general education, FSC special education, combination of general and special education, public separate facility, and private separate facility. DOE Ex. 34 at 122-125; President, Tr. Vol. I, 99:17-100:14.

111. During the 4/27/2023 IEP meeting, Administrator stated that Administrator proposed that Student be temporarily placed in a public separate facility to get Student's behavior under control before slowly reintegrating Student back to Public Charter School. Pet. Ex. 4 at 4/27/2023 Video Link, 1:13:57-1:14:27. After Administrator stated Administrator's proposal, the IEP team voted on their positions, Administrator tallied the votes, took them into consideration, and stated that "if we go with the majority," then a public separate facility with the goal of transitioning back to Public Charter School would be Student's placement. Pet. Ex. 4 at 4/27/23 Video Link, 1:18:58-1:20:10.
112. Administrator testified that during the 4/27/2023 IEP meeting, there was lot of discussion about the behaviors in school. "We had a chance to see what two RBT's might look like. And [Parent] was under the impression that that would be a good idea to have two RBT's. But in that time that I had seen the two RBT's, the behaviors did not decrease. They became more combative. It seemed there were a lot of questions floating around...The advocate that was online interjecting reasons why they thought that [Student] was having such a hard time. The meeting seemed to be going in different directions. So [voting] was my way of getting a concise feeling of the team...And so my intention was to get an idea of where everybody thought would be the best – what would be in [Student's] best interest...[The IEP team voted on] the LRE, the continuum...And I needed input from everyone...So we all voted, for lack of a better word, on what would be the best placement for [Student] to keep [Student] safe and keep [Student] learning...The consensus was to get the behaviors in check was to put [Student] in a public separate setting...Parent disagreed...[Student will] never go to a public separate setting. And [Parent] named the place...And I didn't base my decision

- on the consensus. But I wanted to make sure that, you know, I was in line with what was in the best interest of [Student].” Administrator, Tr. Vol. IV, 511:9-514:14.
113. During the 4/27/2023 IEP meeting, Parent provided input and the other IEP team members listened. Pet. Ex. 4 at 4/27/23 Video Link, 00:15:10-00:16:05, 00:23:47-00:24:46, 00:35:19-00:35:31, 00:56:00-00:58:42, 1:02:28-1:03:45, 1:12:16-1:16:58, 1:26:38-1:29:28.
114. During the 4/27/2023 IEP meeting, Parent did not inform the IEP team that Parent intended to enroll Student at Private Center, or any other private school, at public expense. Administrator, Tr. Vol. IV, 515:4-10; Pet. Ex. 4 at 4/27/23 Video Link.
115. After the 4/27/2023 IEP meeting ended but before leaving, Parent reiterated that Student would never go to PSF. Administrator, Tr. Vol. IV, 514:15-515:3.
116. After the 4/27/2023 IEP meeting, Student did not return to Public Charter School again. Parent, Tr. Vol. II, 193:20-194:2; Administrator, Tr. Vol. IV, 514:15-515:3.
117. According to Student’s 4/27/2023 IEP, “[d]ue to the nature [REDACTED] of [Student’s] communication, behavioral, functional, and academic deficits, [Student] requires ESY services after a break of [REDACTED] calendar days.” Pet. Ex. 1 at 084.
118. The LRE statement in the 4/27/2023 IEP states as follows: “The Least Restrictive Environment as determined by a majority of the IEP team is that [Student] will receive [Student’s] education in a public separate facility to provide [his/her] individualized curriculum that is best suited to [Student’s] needs as well as access to certified teachers and trained personnel. [Student] may participate with [Student’s] non-disabled peers during planned structured social groups, structured lunches, and structured recess activities. [Student] will not participate with [Student’s] non-disabled peers during the

- implementation of [Student's] individualized core curriculum, occupational therapy services, speech/language therapy services, extended school year services, and transportation services specifically for students with disabilities.” Pet. Ex. 1 at 088.
119. On April 28, 2023 at 8:08 a.m., the Office of Dispute Resolution filed the instant Complaint. DOE Ex. 1 at 001-008.
120. On April 28, 2023, Parent signed a contract with Private Center for services from [REDACTED] (“April Contract”) to complete the 2022-2023 school year and for services during the summer. Pet. Ex. 3 at 228-230; Pet. Ex. 1 at 046-047.
121. Parent testified that Parent informed the DOE that Student would be attending Private Center through the filing of the instant Complaint. Parent also informed someone at “the desk,” that Student was attending Private Center because Parent kept receiving automated messages from Public Charter School that Student was not in school and Parent wanted those automated messages to stop. Parent, Tr. Vol. II, 1978:19-200:2.
122. A Prior Written Notice, dated May 1, 2023 (“5/01/2023 PWN”), was issued, summarizing what happened at the 4/27/2023 IEP meeting. According to DOE’s 5/01/2023 PWN, “[Private Center] is able to provide services for [Student] for [Student’s] educational benefit, but it was determined that a private separate facility would be more restrictive on the LRE Continuum due to the lack of access to other general education peers on a HIDOE campus for structured social activities.” DOE Ex. 34 at 122-125.
123. On May 9, 2023, a resolution meeting was held. Present at the resolution meeting were Parent, Administrator, Mr. Peck, Mr. Richardson, and others. DOE Ex. 4 at 013. During the resolution meeting, DOE offered “stay-put” at Public Charter School.

Parent, Tr. Vol. II, 228:14-229:2. After the resolution period, the attorneys engaged in settlement discussions, and Parent may have been given two settlement offers by the DOE, but Parent is not sure because Parent did not read all the settlement offers. Parent, Tr. Vol. II, 229:12-231:13. Based on the parties' agreement to attempt to resolve the Complaint during the resolution meeting, Public Charter School did not believe that a follow-up IEP was needed. Administrator, Tr. Vol. IV, 518:3-519:14, 539:4-17.

124. Following the resolution meeting, a Resolution Session Summary, dated May 9, 2023, was issued, stating that "The DOE and the Parent will continue to work together to make a plan for the provision of services for the student, including Extended School Year (ESY) during the summer of 2023." DOE Ex. 4 at 013.

125. On [REDACTED] was paid to a private school for Student to participate in its [REDACTED] during the summer. Pet. Ex. 3 at 122-125.

126. Student's 2023 summer program at Private Center ran from [REDACTED] to [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] Pet. Ex. 3 at 117-119. Private Center's summer program ran during the same time as DOE's ESY program, which was [REDACTED] to [REDACTED] Pet. Ex. 1 at 046-047.

127. From [REDACTED] to [REDACTED] Student participated in [REDACTED] at a private school. Student participated in lunchtime [REDACTED] [REDACTED] Pet. Ex. 3 at 117-118. Private RBT drove Student to [REDACTED] where Student would interact with nondisabled children during lunch and play with them for a little while before leaving to go back to Private Center. Private RBT, Tr. Vol. I, 24:24-27:13. Once [REDACTED] was over, Private RBT was no longer assigned to

Student, but would occasionally provide RBT coverage at Private Center. Private RBT, Tr. Vol. I, 28:8-17.

128. On July 30, 2023, Private SPED Teacher issued an “Academic Progress Report Dated 7/30/2023.” Pet. Ex. 3 at 129-130.
129. On July 31, 2023, Parent signed a contract with Private Center for services from [REDACTED] to [REDACTED] (“July Contract”). Pet. Ex. 3 at 231-233.
130. On August 1, 2023, Private BCBA issued an “IEP Progress Report.” Pet. Ex. 3 at 126-128.
131. On August 1, 2023, Parent received the following letter (“8/01/2023 Letter”): “[Public] Charter School is ready for your [son/daughter], [Student], to join us for the 2023-2024 school year. The first day of school is [REDACTED]. Both [Public] Charter School and the DOE acknowledge that [Student’s] stay-put placement is [Public] Charter School. [Public] Charter School will implement the stay-put IEP at [Public] Charter School. Please let us know as soon as possible if [Student] plans on attending [Public] Charter School and confirm the current address for pick up for [Student’s] curb-to-curb transportation.” Pet. Ex. 3 at 197; DOE Ex. 85 at 613.
132. Parent did not respond to the 8/01/2023 Letter. Parent, Tr. Vol. II, 203:3-204:24.
133. On August 7, 2023, the regular session began at Private Center. Student’s schedule during regular session is [REDACTED] [REDACTED] Pet. Ex. 3 at 119.
134. On August 7, 2023, SSC sent an email to Parent to ask Parent if Parent would like SSC to schedule transportation for Student because the new school year was starting. Parent told SSC to ask Caregiver. Caregiver told SSC that because the IEP had not addressed

some of Student's behavioral concerns, Parent did not want to send Student back to Public Charter School until those concerns were addressed. In response, SSC asked Caregiver and Parent if an IEP meeting should be scheduled to discuss revising Student's IEP. SSC did not receive a response from Parent or Caregiver. Caregiver, Tr. Vol. II, 287:2-288:5; SSC, Tr. Vol. IV, 591:25-593:10.

135. On October 5, 2023, Private BCBA issued a report entitled "[Student] IEP Progress Report." The report documents Student's progress at Private Center from August 1, 2023 to October 4, 2023. According to the report, "[Student] continues to make progress with [Student's] IEP goals along with [Student's] ability to regulate [him/herself] in times of frustration or excitement," and that Student engages neurotypical peers at a youth community center. The report notes that "While [Student] has been attending [Private Center], [Student's] maladaptive behaviors of eloping, aggression, property destruction, and throwing items have reduced to almost zero incidents per day[;]" however, the report also notes that "As [Student] becomes more comfortable and familiar with staff individuals, [Student] engages in more maladaptive behaviors and 'tests the boundaries' to see how much [Student] can get away with for each different staff member." Pet. Ex. 4 at 365-368.

**Public Separate Facility or "PSF"**

136. PSF is a public separate facility that is located on the campus of Public School-1. PSF Teacher, Tr. Vol. IV, 549:2-6.
137. PSF accepts students who are eligible for special education under various eligibility categories, [REDACTED] PSF



- follows students' IEPs created by their respective homeschools, focusing on their functional and communication skills. PSF Teacher, Tr. Vol. IV, 548:19-549:1.
138. The main purpose of PSF is to decrease students' aggressive or maladaptive behaviors so that they can be reintroduced back into their respective homeschools and be able to function with their peers. The length of time students stay at PSF before returning to their respective homeschools varies. While PSF Teacher has been a teacher at PSF, PSF Teacher had reintroduced [REDACTED] students back to their respective homeschools, and none of them have returned to PSF. The length of time these students stayed at PSF ranged from [REDACTED] to [REDACTED] PSF Teacher, Tr. Vol. IV, 551:22-552:24.
139. PSF does not develop IEPs for their students. PSF implements IEPs developed by the students' respective homeschools. As the lead teacher at PSF, PSF Teacher participates in the development of IEPs with the students' homeschools, coordinates transportation services, among other duties and responsibilities. PSF Teacher, Tr. Vol. IV, 550:1-11.
140. PSF has a BCBA and two (2) RBTs. PSF Teacher, Tr. Vol. IV, 550:12-15.
141. Before Student attended Public Charter School, other IEP teams had decided on [REDACTED] different occasions that Student should go to PSF, but Student has never attended PSF. PSF Teacher, Tr. Vol. IV, 556:8-13, 559:4-19.
142. Had Student attended PSF pursuant to the 4/27/2023 IEP, Student would have had his/her own RBT assigned to Student. PSF Teacher, Tr. Vol. IV, 586:22-25.
143. The student population at PSF fluctuates. [REDACTED]  
[REDACTED]  
[REDACTED] PSF Teacher, Tr. Vol. IV, 550:16-18, 571:11.

144. Students who attend PSF will have opportunities to interact with nondisabled, age-appropriate peers. These nondisabled peers come from Public School-1, where PSF is located, and/or the students' homeschools. Students at PSF also receive community-based instruction where they go into the community and learn functional life skills, such as going to a store, shopping for items, and paying for items. PSF Teacher, Tr. Vol. IV, 552:25-555:3.
145. The decision of whether a student should go to PSF is determined during an IEP meeting. The IEP team will look at various factors, such as the student's past behavior; the school's past experiences with the student; whether the school has been doing as much as it could for the past six (6) months; whether the school tried various interventions, and the student was still not making much progress. PSF Teacher, Tr. Vol. IV, 551:5-21. In a situation where the student could be a danger to him/herself or other people, an IEP team could consider sending the student to PSF even though the school does not have six (6) months' worth of data about the student and the interventions tried by the student's homeschool. PSF Teacher, Tr. Vol. IV, 582:1-583:8.
146. In January of 2020, Parent, along with a BCBA and RBT, visited PSF. PSF Teacher showed them the facilities; they asked questions regarding the facility's restroom and refrigerator, and inclusion opportunities for Student; and PSF Teacher answered their questions. PSF Teacher, Tr. Vol. IV, 559:20-561:14.
147. A few months before Student started at Public Charter School, Parent and Director were at a school meeting about Student where they talked about PSF. President, Tr. Vol. I, 133:20-134:4, 158:11-159:7.

148. Parent testified that in 2020, Parent visited PSF with Caregiver and a person from the school district when PSF was located in another school. [REDACTED]

[REDACTED]

Parent spoke to PSF Teacher during this visit and PSF Teacher told Parent that “we’re going to do this and we’re going to do that.” Parent, Tr. Vol. II, 186:5-12, 205:16-208:1, 209:4-17, 210:23-211:25.

### Private Center

149. Parent Company is the parent company of Private Company and Private Center. When Student is going to Private Center, Student receives services [REDACTED] [REDACTED] from Parent Company and its subsidiaries through an “insurance program,” “DOH program,” and “DOE program.” Parent Company manages Student’s “insurance services,” which are paid for by insurance. Private Company provides Student with “waiver services,” which are paid for by the Hawaii Department of Health (“DOH”). Private Center implements Student’s educational program or “DOE program.” President, Tr. Vol. I, 92:13-93:8, 110:5-112:2, 157:17-158:7. Before Student went to Public Separate Facility, Caregiver was the primary provider of services to Student for [REDACTED] President, Tr. Vol. I, 92:25-93:8, 93:9-20.

150. “Waiver services” through the DOH occur during the weekends and/or in the evenings and include “respite” and “community living skills” services. “Respite” services provide help and support to Parent by having someone present to help with Student. Waiver services that address “community living skills” include helping Student work on getting dressed, brushing teeth, making the bed, taking out the trash, or going out into

- the community. DOH pays Private Company for [REDACTED] a week of waiver services, at a rate of [REDACTED] per hour. President, Tr. Vol. I, 127:12-128:8, 156:2-157:16.
151. “Insurance services” consists of ABA services. Reimbursement for “insurance services” is approximately [REDACTED] per hour for [REDACTED] a week. President, Tr. Vol. I, 112:3-113:2, 128:9-17; Caregiver, Tr. Vol. II, 245:3-18.
152. Student’s educational program at Private Center is referred to as Student’s “DOE program” because Private Center implements the services and goals outlined in the IEPs created by DOE schools. For example, if Student has RBT, speech, and occupational therapy services listed on Student’s IEP, Student will receive those services at Private Center. Private Center “run[s] IEP goals during [Student’s] education time,” and if Student meets an IEP goal, Private Center will keep going and exceed that goal. President, Tr. Vol. I, 153:11-15; Parent, Tr. Vol. II, 233:25-234:8; Caregiver, Tr. Vol. II, 275:15-25.
153. Private Center only works with individuals who have [REDACTED] Pet. Ex. 3 at 107-108.
154. Private Center employs BCBA’s, RBTs, a special education teacher, a teacher for the deaf, an educational assistant, and a physical therapist. Private Center also has consultants for speech/language pathology, occupational therapy, and a registered Spelling to Communicate practitioner. Pet. Ex. 3 at 110-113; Pet. Ex. 3 at 216.
155. Private Center has [REDACTED] clients, [REDACTED] of which are DOE students. There are [REDACTED] [REDACTED] between the ages of [REDACTED] [REDACTED] [REDACTED] Private BCBA, Tr. Vol. III, 402:13-404:21.

156. Private Center does not have neurotypical peers on campus; however, Private Center enrolls Student in outside programs so that Student can have access to neurotypical peers. President, Tr. Vol. I, 136:2-12.

157. Student receives educational services at Private Center [REDACTED] days a week. On [REDACTED] Student is at Private Center from [REDACTED] to [REDACTED]. On [REDACTED] Student is at Private Center from [REDACTED] to [REDACTED]. Caregiver, Tr. Vol. II, 245:19-24, 261:20-262:2.

158. Student is in the insurance program from [REDACTED] to [REDACTED] and [REDACTED] to [REDACTED] at Private Center. While in the insurance program, Student receives ABA services from Caregiver and four (4) other RBTs. Caregiver, Tr. Vol. II, 245:3-18. After the insurance program, Student receives waiver services through DOH from [REDACTED] to [REDACTED] in the community. Caregiver, Tr. Vol. II, 262:3-264:13. After [REDACTED], Student is not receiving any services through the insurance program or DOH program. [REDACTED] [REDACTED] Caregiver, Tr. Vol. II, 264:14-18, 284:10-286:9. Caregiver [REDACTED] and sometimes provides Student with insurance program or DOH program services and is paid for those services. Caregiver, Tr. Vol. II, 248:20-7, 265:4-22; President, Tr. Vol. I, 112:3-113:2

159. It is possible for Caregiver to be paid for [REDACTED] a day to take care of Student by providing services during the DOE program, insurance program, DOH program, [REDACTED] Caregiver, Tr. Vol. II, 261:16-19, 286:2-9.

160. After leaving Public Charter School, Student receives the following services at Private Center: special education, EA, RBT, BCBA, speech/language therapy, occupational therapy, and has opportunities to go into the community and engage nondisabled peers. Caregiver, Tr. Vol. II, 245:25-247:10, 248:8-19; Pet. Ex. 3 at 131, 132, 133, 134, 135, 136. Private Center follows Student's IEP and uses the IEP as a "baseline." Currently, Student not only fulfilled some of the goals in the IEP but achieved more goals. President, Tr. Vol. I, 103:6-104:17, 116:25-118:6.

161. [REDACTED]  
[REDACTED]  
[REDACTED] Caregiver, Tr. Vol. II, 250:6-18.

162. [REDACTED]  
[REDACTED]  
[REDACTED] Caregiver, Tr. Vol. II, 249:8-250:5, 264:19-265:3.

163. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Private BCAB,  
Tr. Vol. III, 396:2-397:16.

164. When Student was [REDACTED] years old, Student attended Private Center for approximately [REDACTED] before transferring to Public School-2 where Student stayed for approximately [REDACTED] before Parent filed a due process complaint. Parent prevailed on the due process complaint, and Student enrolled at Private Center full-time when Student was [REDACTED] years old. Student's tuition at Private Center was initially paid by DOE, and once DOE was no longer obligated to pay, Parent paid the tuition for a [REDACTED]. It eventually became too expensive for Parent so Parent enrolled Student at Public School-3. Student went to Public School-3 for approximately [REDACTED] to [REDACTED] before Parent filed another due process complaint. Parent also prevailed on this due process complaint and Student went back to Private Center where Student stayed for [REDACTED]. During that time, DOE paid for Private Center under "stay-put." When "stay-put" ended, Student enrolled at Public Charter School. President, Tr. Vol. I, 91:12-16, 124:2-126:8. Student went to Public Charter School for approximately [REDACTED]—and then went back to Private Center and the instant due process complaint was filed. President, Tr. Vol. I, 82:1-16, 89:8-90:616, 145:2-17.

165. Student was at Private Center for approximately [REDACTED] were paid by DOE; and [REDACTED] were paid by Parent. Parent last paid for Private Center

about [REDACTED] ago. Parent, Tr. Vol. I, 143:17-24, 145:2-16. When Parent was paying for services, Student had one (1) RBT and was receiving less services. Parent paid a total of [REDACTED] over the course of [REDACTED] years. Parent, Tr. Vol. II, 216:11-217:16.

166. Parent testified that Parent has not received a bill for the April Contract or the July Contract, and Parent has not made any payments to Private Center. Parent, Tr. Vol. II, 215:21-216:5.

## V. CONCLUSIONS OF LAW

### A. BURDEN OF PROOF

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

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

### B. IDEA REQUIREMENTS

The purpose of the IDEA is to “ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related



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

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

In Bd. of Educ. v. Rowley, the Court set out a two-part test for determining whether the school offered a FAPE: (1) whether there has been compliance with the procedural requirements of the IDEA; and (2) whether the IEP is reasonably calculated to enable the student to receive educational benefits. 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 877, 892 (9th Cir.2001).

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

The mechanism for ensuring a FAPE is through the development of a detailed, individualized instruction plan known as an Individualized Education Program (“IEP”) for each child. 20 U.S.C. §§ 1401(9), 1401(14), and 1414(d). The IEP is a written statement, prepared at a meeting of qualified representatives of the local educational agency, the child’s teacher(s), parent(s), and where appropriate, the child. The IEP contains, among other things, a statement of the child’s present levels of academic achievement and functional performance, a statement of the child’s annual goals and short-term objectives, and a statement of specific educational services to be provided for the child. 20 U.S.C. § 1414(d). The IEP is reviewed and, if appropriate, revised, at least once annually. 20 U.S.C. § 1414(d). The IEP is, in effect, a “comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” Burlington v. Dept. of Educ. of the Commonwealth of Massachusetts, 471 U.S. 359, 368, 105 S. Ct. 1996,

2002 (1985). An IEP must be evaluated prospectively as of the time it was created.

Retrospective evidence that materially alters the IEP is not permissible. R.E. v. New York City Dept. of Educ., 694 F.3d 167 (2nd Cir.2012).

### C. ISSUES FOR DETERMINATION

**1. Whether Parent was afforded sufficient information regarding the program at the Public Separate Facility the DOE proposed as Student’s program/placement to appropriately participate in the discussion and decision the DOE made regarding that placement.**

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In this allegation, Petitioners allege that the IEP team did not provide Parent with sufficient information about PSF’s program, and without sufficient information, Parent could not appropriately participate in the discussion and the decision DOE made about placing Student in a public separate facility. In Petitioners’ closing brief, Petitioners argue that “[PSF] was not the placement the team voted on. They voted on a generic PSF[;]” “No one on the team was informed about the details of the [PSF] program since the vote was proposed as a generic PSF and not for [PSF] specif[i]cally[;]” and “The school avoided to entirely by voting on a generic FSC [sic], hiding the specifics of [PSF] from the IEP team.” Pet. Closing Brief, p. 3, 4, 5. Petitioners’ attempt to equate PSF to a placement that needed to be discussed in detail during the 4/27/2023 IEP is unpersuasive. PSF is the location of where Student’s IEP will be implemented; and the discussion about a public separate facility setting (described as “a generic PSF” by Petitioners) was appropriate. As explained below, Parent had sufficient information about the program at PSF, and PSF itself, to appropriately participate in the discussion at the 4/27/2023 IEP meeting.

First, with respect to the “program at the Public Separate Facility,” the program that would be implemented at PSF is Student’s IEP from Public Charter School. (FOF 137, 139). Parent participated in the development of the 3/09/2023 IEP. (FOF 45-48). Parent consented to

the revision of the 3/09/2023 IEP without an IEP meeting to formulate the 4/13/2023 IEP. (FOF 78, 80). Parent was present to revise the 4/13/2023 IEP on April 27, 2023. (FOF 105, 106). Except for the change in educational setting from a combination of general education/special education to a public separate facility, and Public Charter School's refusal to use Private Center's RBTs to assist Student in transitioning to Public Charter School, there are no other allegations that Student's 4/27/2023 IEP is deficient. Therefore, while Parent may not entirely agree with the "program" offered in the 4/27/2023 IEP, which would be implemented at PSF, Parent had sufficient information about the "program at the Public Separate Facility" to appropriately participate in the discussion.

Second, Parent had sufficient information about the location—PSF—itsself. Parent knew about PSF at least since [REDACTED] when Parent visited PSF with Caregiver, albeit PSF was located at a different school. (FOF 146-148). Parent met and spoke to PSF Teacher in [REDACTED]; walked around the facilities; and questioned PSF Teacher about PSF. (FOF 146, 148). Lastly, the 4/27/2023 IEP is not the first IEP where an IEP team had decided that Student should go to PSF. Before Student attended Public Charter School, other IEP teams had decided on [REDACTED] different occasions that Student should go to PSF. (FOF 141). Therefore, Parent did not come to the 4/27/2023 IEP meeting without any knowledge about PSF.

Although there were eighteen (18) people at the 4/27/2023 IEP meeting, some participating in-person and some via videoconferencing, everyone was able to provide input, or had the opportunity to provide input, during the IEP meeting. While sometimes the IEP team members talked over one another, there is no evidence that the school members of the IEP team prevented Parent from asking questions or speaking. (FOF 113). "[P]arents must talk, or complain, when given the chance. Timely input can allow a school district to respond

meaningfully to parental requests. A disabled child’s parents are not entitled to reimbursement for an inappropriate IEP when their input may have made the plan appropriate.” Schoenbach v. D.C., 309 F.Supp.2d 71, 89 (U.S.D. Dist. of Columbia March 25, 2004). See also, Dept. of Educ., Hawaii v. C.B., Civil No. 11-00576 SOM/RLP, 2012 WL 1537454, \*11 (D.Haw. May 1, 2012) (“The court declines to place upon a school the burden of recognizing a parent’s concern about the inadequacy of a school’s response to the parent’s inquiry when the parent has given no indication of concern.”). In this case, Parent had the opportunity to ask questions about PSF during the 4/27/2023 IEP meeting but chose not to because Parent did not want Student going to PSF. So, while the 4/27/2023 IEP team may not have discussed the other children at PSF; the size and layout of PSF; or whether a special education teacher would be provided to Student<sup>9</sup>, these were questions that Parent could have asked if they wanted to have these specific information<sup>10</sup>. Pet. Closing Brief, p. 6.

In addition to Parent having the opportunity to ask questions about PSF, Parent was also assisted by President and Caregiver on April 27, 2023, and they were also able to ask questions. (FOF 109). In fact, President testified that Contracted BCBA stated during the 4/27/2023 IEP meeting that PSF had a smaller setting and PSF was the only public separate facility on their island. President, Tr. Vol. I, 97:10-14, 101:15-21.

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<sup>9</sup> Sometimes information can be so obvious that many would not think of stating it or asking a question to solicit the information. For example, whether Student would be provided a special education teacher at PSF when PSF only has special needs students and Student’s 4/27/2023 IEP states that Student will have 1675 minutes per week of special education is information that would not occur to many as needing to be stated (Pet. Ex. 1 at 085).

<sup>10</sup> Interestingly, in Petitioners’ closing brief, under Issue 2, Petitioners’ argument regarding whether a public separate facility is Student’s LRE, Petitioners argue that “the potential for the PSF to utilize proximity to another school does not inherently make it less restrictive. It is a category, and not the particulars of the program when analyzed as a placement.” Pet. Closing Brief, p. 14.

Based on the foregoing, Petitioners fail to meet their burden in proving their allegation that Parent was not afforded sufficient information regarding the program at the Public Separate Facility the DOE proposed as Student’s program/placement to appropriately participate in the IEP discussion and decision the DOE made regarding that placement. Parent’s opportunity to participate in the decision-making process was not significantly impeded, nor was there a loss of educational opportunity for Student because Student was committed to going to Private Center the day after the 4/27/2023 IEP meeting was held and Private Center uses DOE’s IEP for Student’s educational program. (FOF 120, 152); Pet. Closing Brief, at p. 6. And, while Student could have gone to Public Charter School under “stay-put” to mitigate any loss of educational opportunity, Student did not. (FOF 19, 123).

**2. Whether the Public Separate Facility is the least restrictive placement for Student.**

In this allegation, Petitioners allege that placing Student in a public separate facility was too restrictive, and that “Parent, [Caregiver], and [President] believed that the current placement [of] 50% special education and 50% general education would be appropriate with the proper supports...” Pet. Closing Brief, p. 3. The proper supports, according to Petitioners, would be “combining the [Private Center] program<sup>11</sup> with the [Public Charter School] program to achieve a less restrictive placement while providing Student with the proven behavioral interventions [Student] has and is currently receiving through insurance and the DOH.” Pet. Closing Brief, p. 11. Petitioners also argue in their closing brief that “an all special education placement” and “[a]

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<sup>11</sup> Petitioners’ closing brief does not define what “[Private Center] program” is; however, based on the evidence, it could be one of two things: (1) Public Charter School contracts with and utilizes Private Center’s RBTs to help Student transition to Public Charter School (DOE Ex. 34 at 123, 125) or (2) implement the 4/27/2023 IEP 50% of the time at Private Center and 50% of the time at Public Charter School (DOE Ex. 1 at 006, 007). Private Center did not create an educational program for Student, but uses IEPs developed by the DOE as Student’s educational program. (FOF 152).

placement that allows for more interaction with non-disabled peers, such as an FSC<sup>12</sup>, should be considered to align with the IDEA’s mandate for the least restrictive environment.” Pet. Closing Brief, pp. 14, 15. Petitioners fail to meet their burden in proving that a combination special education/general education setting using Private Center’s RBT is a less restrictive placement; or that a special education fully self-contained classroom (“FSC”) setting is appropriate for Student.

When determining a child’s placement, 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. To ensure that a disabled child is educated, to the maximum extent appropriate, with children who are nondisabled, the Ninth Circuit Court of Appeals established the following four-factor balancing test to determine whether a school district has complied with the IDEA’s LRE requirement:

- (1) The educational benefits of placement full-time in a regular class;
- (2) The non-academic benefits of such placement;
- (3) The effect the disabled child had on the teacher and children in the regular class; and
- (4) The costs of mainstreaming the disabled child.

Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1404 (9th Cir.1994).

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<sup>12</sup> According to Petitioners, FSC stands for “Facility Support Classroom.” Pet. Closing Brief, p. 14. There is no testimony about “Facility Support Classroom,” and such a setting is not within the continuum of alternative placements. H.A.R. § 8-60-16. Therefore, a Facility Support Classroom as Student’s LRE is not supported by the evidence. The IEP team did discuss “Special Education Fully Self-Contained (FSC) classroom setting,” (DOE Ex. 34 at 123) which will be addressed in this section of the decision.

In applying the facts of this case to the test articulated in Rachel H., the undersigned finds that the factors weigh in favor of a change in placement from combination special education/general education setting to a public separate facility.

The first factor weighs in favor of a public separate facility placement. Student was in a regular class setting full-time between [REDACTED] and [REDACTED] when Parent revoked special education services. (FOF 35). During this period, Student was not focused in class; would not stay in the classroom; eloped; ran around; and did whatever Student wanted to do. (FOF 36). As the weeks went on, Student stayed in the general education classroom less and less and would elope from the general education classroom. (FOF 96). When Student was placed in a combination special education/general education setting pursuant to the 3/09/2023 IEP, Student was less likely to leave the special education classroom than the general education classroom, especially when it was closer to the end of the school day [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (FOF 97). When Student first started working on IEP goals, Student was making progress on the goals and was even further along than the goals had indicated for letter recognition, numbers, and some basic sight word reading; however, Student's behavior started to interfere with Student's schoolwork and Student lost interest in preferred activities. Student was not able to meet certain goals, such as riding the bus and making purchases in a store. (FOF 99). Furthermore, Public Charter School's attempts at addressing Student's behavioral problems were not successful. The removal of items from classrooms affected not only the quality of education for Student, but also those who share the classroom with Student. (FOF 103, 104). The lessening of demands on Student to address Student's behavior affected Student's progress



towards IEP goals. (FOF 104).

The second factor weighs in favor of a combination of special education/general education setting on Public Charter School campus because Student will have more opportunities to interact with nondisabled peers—a non-academic benefit highly important when selecting a setting. However, the benefits of being exposed to nondisabled peers is tempered by the third factor. Coupled with the opportunity for Student to interact with nondisabled peers at Public School-1, the weight in favor of a combination setting is not much. (FOF 144).

The third factor weighs in favor of a public separate facility. Student initially had a positive relationship with other students on Public Charter School's campus, however, as Student's behavior worsened, Student's peers pulled back and interacted with Student less. In addition to the decline in relationship between Student and peers, other students were a distraction to Student, and Student was a distraction to them. (FOF 100). Furthermore, Student's behavioral problems posed a safety concern for Student, peers, and adults who worked with Student. (FOF 63, 65, 77, 84, 89, 102, 104).

The fourth factor--costs of mainstreaming Student—weighs neither in favor nor against either setting.

The four-factor balancing test weighs in favor of a public separate facility placement. Petitioners' argument that a combination of special education/general education setting using the "Private Center program" with Public Charter School's program would provide Student with a less restrictive environment is not persuasive. Except for placement, Petitioners do not allege that the special education and services offered in the 4/27/2023 IEP are inappropriate. Using Private Center's RBTs to assist with transition is unpersuasive because staffing is within the

DOE's discretion<sup>13</sup>. N.D. v. State of Hawaii, Dept. of Educ., 600 F.3d 1104, 1114 (9th Cir.2010) ("the IDEA does not require the exact same vendors to provide the services"). Implementing the 4/27/2023 IEP half the time at Private Center and the other half at Public Charter School is simply changing the location of where the 4/27/2023 IEP will be implemented, which is also within the DOE's discretion. N.S. v. State of Hawaii, Dept. of Educ., Civil No. 09-00343

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<sup>13</sup> Petitioners' argument that "The Student attended [Public Charter School] without an RBT and later experienced behavioral problems. The private school, [Private Center], was able to bring the Student under instructional control, indicating its effectiveness" is not persuasive. Pet. Closing Brief, p. 22. First, no one disputes that Student's behavior became increasingly unmanageable with time, especially when Public Charter School took away Student's ability to do whatever Student wanted to do by implementing an IEP that gave structure and placed demands on Student. Petitioners' arguments that Public Charter School somehow caused the increase in behavioral problems or that Public Charter School's personnel were incapable of providing services to Student, the undersigned finds that the evidence does not support these arguments. It is difficult to definitively say what caused Student's increased behavioral problems. What the evidence does show is that Student was in a private separate facility for approximately [REDACTED] years before being transitioned to a general education setting without any special education and related services to address Student's behavioral needs from [REDACTED] to [REDACTED] (FOF 35, 57, 165). When Student attends Public Charter School for approximately [REDACTED] without an IEP, it is expected that Student's behavior will regress. According to the 11/15/2022 IEP, Student needed ESY services after a break of [REDACTED] calendar days, and according to the 3/09/2023 IEP, 4/13/2023 IEP and 4/27/2023 IEP, after a break of [REDACTED] days, in part, due to the nature and severity of Student's behavioral deficits. (FOF 33, 51, 82, 117). While Parent has the right to waive special education services for whatever reasons, the consequences of such a waiver falls on everyone's shoulders, not just Public Charter School. No one knows whether Student's behavioral problems would have manifested as it did if Student had special education and related services when Student first started at Public Charter School in [REDACTED]. Furthermore, Public Charter School made reasonable efforts to address Student's behavioral problems. For example, Public Charter School appropriately addressed Student's transportation problem. First, there is no evidence that getting Student on the school bus at home to go to school was an issue. Student's maladaptive behaviors while on the school bus was addressed by assigning an RBT to ride the school bus with Student (FOF 80, 88); however, the difficulty of getting Student on the school bus to go home remained an issue. (FOF 88, 90). [REDACTED]

[REDACTED] (FOF 40, 64, 75, 88, 97). [REDACTED]

[REDACTED] (FOF 163). [REDACTED]

SOM/KSC, 2010 WL 2348664, \*8 (D.Haw. June 9, 2010) (“the physical location where a placement will be implemented is an administrative decision made by the DOE”).

Also, Petitioners’ argument that Student should have been placed in an all-special education FSC setting is not persuasive. While Student was not placed in an all-special education setting during the 4/27/2023 IEP meeting, Student’s behavioral problems while at Public Charter School was not confined to the general education setting, but also the special education setting. (FOF 97, 103, 104). There is no credible evidence that being in a special education setting 100% of the time (versus 50%) will address Student’s behavioral problems, especially since Public Charter School had tried numerous interventions with little to no success in the special education setting. (FOF 103, 104).

The IEP team discussed the various placement options on April 27, 2023, and determined that the appropriate placement for Student was in a public separate facility. (FOF 110). 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.”) Although President testified<sup>14</sup> that a public separate facility is too restrictive for Student, President has never personally worked with Student and is not a professional RBT or BCBA. (FOF 9). Also, the setting at Private Center is like PSF, where all the students have special needs. Both will give Student opportunities to interact with nondisabled peers—Private Center will enroll Student into outside programs or take Student out into the community, while PSF brings in nondisabled students from Public School-1 and Public Charter School. (FOF 144, 156).

Based on the foregoing, Petitioners fail to meet their burden in showing that Student was placed in an overly restrictive environment pursuant to the 4/27/2023 IEP.

**3. Whether the discussion regarding Student’s placement/LRE was appropriate where Parent and Parent’s advocate were interrupted when seeking to provide input during the consideration process, and/or the decision was based upon a majority vote and/or where Parent sought a discussion of the behavior intervention Student should receive but this discussion was not addressed but superseded by a placement discussion.**

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In this allegation, Petitioners allege that the discussion regarding Student’s placement/LRE during the IEP meeting on April 27, 2023 was procedurally flawed because (1) Parent and President were interrupted, (2) the placement/LRE decision was based upon a majority voting process, and (3) the discuss about placement overshadowed the discussion about

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<sup>14</sup> President, Tr. Vol. I, 103:1-5. President also testified, “I’m not qualified to talk about what happens with [Student] throughout [Student’s] day because I don’t work with [Student] throughout [Student’s] day. And I have not reviewed [Student’s] data sheets.” President, Tr. Vol. I, 121:21-122:5.

behavioral interventions. Pet. Closing Brief, p. 16. Petitioners fail to meet their burden in showing a procedural violation; however, even assuming that there was a procedural violation in the discussion process, there is no substantive violation.

The 4/27/2023 IEP meeting lasted for approximately one hour and thirty minutes. There were eighteen (18) participants at the 4/27/2023 IEP meeting. Caregiver participated by audio only; District Resource Teacher, PSF Teacher, Contracted BCBA, and President participated by video and audio; and all other members, including Parent and Student, participated in-person. (FOF 106).

Parent and President were given opportunities to speak and did speak. Although it is difficult to hear on the video what Parent is saying, members who were in the same room as Parent appeared to understand what Parent was saying<sup>15</sup>. Parent did not speak much, but President and Caregiver were both very vocal participants during the IEP meeting. When Parent did speak, the other members of the IEP team were attentive and listened to what Parent had to say. See examples at Pet. Ex. 4 at 4/27/23 Video Link, 00:15:10-00:16:05, 00:23:47-00:24:46, 00:35:19-00:35:31, 00:56:00-00:58:42, 1:02:28-1:03:45<sup>16</sup>, 1:12:16-1:16:58, 1:26:38-1:29:28.

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<sup>15</sup> While the quality of the entire video recording is poor, the audio recording for Parent is particularly bad--the volume is low, and the words are garbled. It is difficult to understand Parent because [REDACTED] and Parent was seated on the opposite end of the video camera and microphone.

<sup>16</sup> Although the school members of the IEP team did not address Parent's statement that Parent did not receive "incident logs" about Student's problem behaviors at this point of the 4/27/2023 IEP meeting, the IEP team had earlier discussed Public Charter School providing Parent with "incident logs," which is part of the 3/09/2023 IEP (FOF 54), but Caregiver and President wanted daily "communication logs" and "food logs." Pet. Ex. 4 at 4/27/23 Video Link, 00:27:32-00:33:36. Also, context is important. While the undersigned to tasked with evaluating the appropriateness of the 4/27/2023 IEP Meeting and only has a video of the 4/27/2023 IEP meeting, it is worth noting that some of the participants in the 4/27/2023 IEP meeting had previously met on October 26, 2022, November 1, 2022, November 15, 2022 (FOF 27-30), February 24, 2023, March 2, 2023 and March 9, 2023 (FOF 45-48) to create IEPs for Student. President on multiple occasions during the 4/27/2023 IEP meeting stated that President did not

President and Caregiver were vocal participants during the IEP meeting and were given opportunities to speak, did speak, and provided a lot of input during the placement consideration process and IEP meeting. See examples, Pet. Ex. 4 at 4/27/23 Video Link, 00:35:31-00:40:46, 00:47:42-00:52:22, 1:06:44-1:12:26. Although there were moments when President was interrupted, President was still able to express President's thoughts and opinions. There were no moments when Parent and/or President were interrupted to the point where Parent's participation rights was significantly denied.

Now, turning to Petitioners' allegation regarding "majority vote." The Ninth Circuit Court of Appeals addressed making placement decisions based on a "majority rule" in Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir.1986). The Ninth Circuit Court in Maier expressed that "[t]he majority-rule view draws no express support from any relevant authorities." Doe by Gonzales v. Maher, 793 F.2d 1470, 1488 (9th Cir.1986). The Ninth Circuit Court explained that since parents and DOE may, at their discretion, invite additional persons to attend IEP meetings, a majority rule would encourage both sides to attempt to invite numerous additional participants who shared their same views. Doe by Gonzales v. Maher, 793 F.2d 1470, 1489 (9th Cir.1986). Ideally, members of an IEP team can reach a consensus, but if that is not possible, "the agency has the duty to formulate the plan to the best of its ability in accordance with information developed at the prior IEP meetings, but must afford the parents a due process hearing in regard to that plan." Doe by Gonzales v. Maher, 793 F.2d 1470, 1490 (9th Cir.1986). In the event that an IEP is formulated sans consensus, "nowhere [in the regulations] explicitly vests [parents] with a veto power over any proposal or determination advanced by the educational agency regarding a

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want to repeat him/herself. See examples, Pet. Ex. 4 at 4/27/23 Video Link, 00:16:20-00:18:38, 00:21:48-00:24:03, 00:47:45-00:48:38, 00:50:08-00:50:50.

change in placement.” Doe by Gonzales v. Maher, 793 F.2d 1470, 1489 (9th Cir.1986). (9th Cir.1986).

In the instant case, the evidence supports the finding that Student’s placement was not determined based on a majority vote. Administrator, who is in charge of the special education program at Public Charter School and is Public Charter School’s designee, made the offer of FAPE. (FOF 3, 56, 108, 111, 112). Although the members of the IEP team raised their hands to indicate whether they supported a particular setting, this does not mean that the placement decision was decided by a majority vote. With eighteen (18) members at the 4/27/2023 IEP meeting, and some members being more vocal than others, asking each person to state their position is an effective means to clearly know what each person thought regarding Student’s placement. (FOF 112). Administrator being Public Charter School’s “designee” with the authority and responsibility of making placement decisions, it was acceptable for Administrator to use a method that will provide Administrator with clear information. As Administrator testified, “The meeting seemed to be going in different directions. So [voting] was my way of getting a concise feeling of the team...And I needed input from everyone...Parent disagreed...” Administrator further testified, “I didn’t base my decision on the consensus....” (FOF 112). As the video recording of the 4/27/2023 IEP meeting shows, Administrator stated that Administrator proposed that Student be temporarily placed in a public separate facility to get Student’s behavior under control and then slowly reintegrate Student back to Public Charter School. (FOF 111). After Administrator stated Administrator’s proposal, the IEP team voted on their positions, Administrator tallied the votes, took them into consideration, and stated that “if we go with the majority,” then a public separate facility with the goal of transitioning back to Public Charter School would be Student’s placement. (FOF 111). Clearly, Administrator did not simply go

along with the majority vote, but used the majority vote to confirm what Administrator believed was the best decision for Student. It was therefore appropriate for Administrator to ask each member of the IEP team for their opinions before Administrator made Administrator's final decision and offer of FAPE.

Lastly, Parent's desire to discuss behavioral interventions was not superseded by a discussion about placement. Based on the evidence, the IEP team started the discussion with Student's behavioral problems and the behavioral interventions that had been used. Parent then asked that Student be assigned two (2) RBTs, which Contracted BCBA did not feel was necessary and that Student's behavior would be better addressed if Student were placed in a setting similar to Private Center. President then repeatedly requested that Public Charter School utilize the Private Center's staff to help Student transition to Public Charter School, which Public Charter School had declined to do in the past and again declined to do. After declining President's request to use Private Center's staff, the IEP team turned to discussing a change in setting. (FOF 109). During the IEP meeting, President and Caregiver asked for a daily communication log, food log, and behavioral data taken by the RBTs at school. Public Charter School agreed to provide a communication log and food log, but it did not outright agree to provide behavioral data taken by the RBTs because Contracted BCBA needed to discuss with Parent, and possibly PSF Teacher, what behavioral data Private Center would like, the frequency of the reporting, and a form and an agreement to convey the requested behavioral data. (FOF 109). "Parents' participation does not require school authorities automatically to defer to their concerns." Capistrano Unified Sch. Dist. v. S.W., 21 F.4th 1125, 1134 (9th Cir.2021). Therefore, Petitioners fail to prove their claim that the discussion during the 4/27/2023 IEP meeting was not appropriate when Parent sought a discussion of the behavior intervention



Student should receive but this discussion was not addressed but superseded by a placement discussion.

Based on the foregoing, Petitioners fail to meet their burden of proof that the discussion regarding Student's placement/LRE was not appropriate because Parent and Parent's advocate were interrupted, the decision was based on a majority vote, and a discussion about behavior intervention was superseded by a discussion about placement. However, even if Petitioners had met their burden in proving a procedural violation during the discussion of Student's placement/LRE, Petitioners have not shown that this resulted in a substantive violation—Parent's participation rights was not significantly infringed upon and there was no loss of educational opportunity.

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

In this case, Petitioners have failed to prove that DOE denied Student a FAPE; however, in the event that a reviewing court decides otherwise, an analysis of Petitioners' right to reimbursement is set forth below.

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).

### **Private Center**

Petitioners have met their burden in showing that Private Center provides educational instruction specially designed to meet Student’s unique needs, supported by such services as are necessary to permit Student to benefit from instruction. Private Center can provide Student with educational services five (5) days a week. (FOF 152, 157). Private Center can provide Student speech/language therapy and occupational therapy services; educational assistant, RBT and BCBA services; and an education from a special education teacher. (FOF 154, 160). Private Center is also able to provide Student with opportunities to interact with nondisabled peers and will implement Student’s IEP at Private Center. (FOF 156, 160). Student has been attending Private Center for the past [REDACTED] years, with the exception of occasional [REDACTED]

██████ breaks to attend a public school. (FOF 164). The DOE paid for most of Student's tuition to Private Center. (FOF 165). DOE further knows that Private Center is able to provide services to Student, albeit in a more restrictive environment than PSF. (FOF 122). Private Center being a more restrictive environment does not make it inappropriate because "the Ninth Circuit [has] held that a private program does not need to meet all of a student's educational needs, and merely needs to provide specially designed educational instruction for the unique needs of the student." L.S., 2019 WL 1421752, at \*14 (citing C.B., 635 F.3d at 1159). With respect to Respondents' LRE argument, the "Supreme Court has held that the IDEA's requirements of public schools are not applicable to private school placement." Id. at \*15 (citing Carter, 510 U.S. at 13-14, 114 S.Ct. 361). Parental placement can be appropriate even if it does not meet state standards. 34 C.F.R. § 300.148(c). Based on the foregoing reasons, Petitioners have proven that Private Center placement was proper under the IDEA.

### **Equitable Considerations**

Under IDEA, if Petitioners succeed in meeting their burden of proving that the DOE violated the IDEA and denied Student a FAPE, which they did not, and that the private placement is proper, the reviewing body has the authority to consider equity in determining whether and in what amount tuition reimbursement is to be awarded to a parent that unilaterally places a child at a private program. C.B., 635 F.3d at 1159. "Regarding reimbursement, courts may consider any relevant factor, including the reasonableness of the private tuition, [citation omitted], and the conduct of parents in the IEP formulation process." LS, 2019 WL 1421752, at \*14. The undersigned Hearings Officer finds that Petitioners are not entitled to reimbursement because they failed to comply with the written notice requirement for reimbursement and Parent's conduct was unreasonable; and even if they were entitled to reimbursement, the

reimbursement amount should be reduced because Petitioners fail to establish the reasonableness of the charges.

Petitioners are not entitled to reimbursement because Petitioners failed to comply with the notice provision of 20 U.S.C. § 1412(a)(10)(C)(iii). According to 20 U.S.C. § 1412(a)(10)(C)(iii), reimbursement may be reduced or denied and states in pertinent part:

The cost of reimbursement described in clause (ii) may be reduced or denied—

- (I) if—
  - (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
  - (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa); [or]

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- (III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

Although Parent informed the school members of the IEP team on April 27, 2023 that Parent was rejecting Public Charter School’s proposed placement, Parent did not inform them of Parent’s intent to enroll Student in a private school at public expense. In fact, Parent misleadingly stated that Parent would file a due process complaint and invoke “stay-put” so that Student would stay at Public Charter School. Pet. Ex. 4 at 4/27/23 Video Link, 1:27:10-1:27:56. The 4/27/2023 IEP meeting started at 12:00 p.m., lasted for one (1) and half hour, and ended around 1:30 p.m. (FOF 87, 106). The next day, the instant Complaint was filed at 8:08 a.m. (FOF 119) and Parent signed the April Contract with Private Center for services to complete the remainder of the 2022-2023 school year and for the summer of 2023 with services beginning on

██████████ (FOF 120). Student was withdrawn from Public Charter School on ██████████  
██████████ and never re-enrolled at Public Charter School or any other DOE school.

Also, there is no evidence that ten (10) business days prior to the removal of Student from Public Charter School that Parent gave a written notice to Public Charter School that Parent was rejecting the placement proposed by Public Charter School, including stating Parent's concerns and Parent's intent to enroll Student in a private school at public expense. While Parent testified that the instant Complaint served as written notice of Parent's rejection of Public Charter School's proposed placement and enrollment of Student at a private school at public expense, assuming that this qualifies as a written notice by Parent pursuant to 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb), the Complaint was filed on April 28, 2023, which is less than "10 business days...prior to the removal of the child from the public school" because Student was removed from Public Charter School on ██████████. As such, Parent failed to comply with the notice requirement for reimbursement.

Furthermore, the actions taken by Parent were unreasonable. First, Parent is not a naïve participant in the IEP and administrative hearing processes. Parent is experienced in the IEP formulation process as Student has had IEPs since ██████████ (FOF 15) and is experienced in the administrative hearing process having filed and prevailed in ██████████ previous hearings (FOF 164). Parent had participated in previous IEP meetings and knew that Student regresses when Student is without services. According to the 11/15/2022 IEP, Student regresses after ██████████  
██████████ calendar days without services (FOF 33). Yet, on ██████████ on Student's first day at a new school, Parent revoked all special education services for Student. (FOF 35). And to complicate the situation, Parent did not provide Public Charter School with advance notice that

Student would attend school on that day. (FOF 35). Parent's actions set up Student and Public Charter School for failure.

Next, a resolution meeting was held on May 9, 2023. Present at the resolution meeting were Parent, Administrator, Mr. Peck, Mr. Richardson, and others. (FOF 123). According to the Resolution Session Summary, "The DOE and the Parent will continue to work together to make a plan for the provision of services for the student, including Extended School Year (ESY) during the summer of 2023." (FOF 124). During the resolution meeting, the DOE offered "stay-put" at Public Charter School. (FOF 123). After the resolution period, the attorneys engaged in settlement discussions, Parent may have been given two settlement offers by the DOE, but Parent is not sure because Parent did not read all the offers. (FOF 123). Based on the parties' agreement to attempt to resolve the Complaint during the resolution meeting, Public Charter School did not believe that a follow-up IEP was needed. (FOF 123). Parent was not sincere about resolving the Complaint and misled the participants at the resolution meeting. Parent had already signed the April Contract that would provide Student with services during the summer of 2023 (FOF 120); payment was made to a private school [REDACTED] on [REDACTED] (a week after the resolution meeting) (FOF 125); and Parent did not even read all the settlement offers given to Parent. (FOF 123).

Lastly, Parent had no intention of letting Student attend Public Charter School as Parent signed another contract with Private Center for the 2023-2024 school year on [REDACTED] (FOF 129); did not respond to Public Charter School's 8/01/2023 Letter that confirmed that Student had "stay-put" at Public Charter School and that Public Charter School was ready to receive Student for the 2023-2024 school year (FOF 131, 132); and did not respond SSC's offer to set up an IEP meeting on [REDACTED] (FOF 134).

Based on Parent's failure to timely inform Public Charter School that Parent would be withdrawing Student from Public Charter School and enrolling Student at a private school at public expense and the unreasonable actions taken by Parent, private school reimbursement should be denied in its entirety.

In addition, Petitioners fail to meet their burden of proof in establishing that the reimbursement amount is reasonable. None of Petitioners' witnesses could establish the reasonableness of the costs of the services rendered to Student. See examples, President, Tr. Vol. I, 128:18-129:19; Caregiver, Tr. Vol. II, 283:3-8; Private BCBA, Tr. Vol. III, 371:17-374:9. Petitioners' exhibits have different invoice amounts for the services provided to Student. For example, for services rendered between [REDACTED] and [REDACTED] one invoice states [REDACTED] while another invoice states [REDACTED] Pet. Ex. 4 at 213, 273. See also, Pet. Ex. 4 at 214, 274 (June 12-30, 2023); and Pet. Ex. 4 at 215, 275 (July 1-31, 2023). Also, there is no testimony about what services are included in "Tuition" and "Admin Fee." According to Merriam-Webster's Dictionary, "tuition" means "the price of or payment for instruction" and "the act or profession of teaching: instruction."<sup>17</sup> Tuition therefore includes services from a teacher, such as a special education teacher and a "Facilitated Communication Teacher." Yet, Private Center seeks reimbursement for tuition and services from teachers. Pet. Ex. 4 at 274-277. There was no testimony about what "Admin Fee" entails or how "Admin Fee" is different from Tuition since, according to invoices, Tuition does not include educational instruction. And assuming that tuition includes special education services, the [REDACTED] fee must include other services besides special education, otherwise special education services would cost [REDACTED]

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<sup>17</sup> <https://www.merriam-webster.com/dictionary/tuition#:~:text=%3A%20the%20price%20of%20or%20payment,his%20studies%20under%20private%20tuition>

████████████████████ which is unreasonable. Pet. Ex. 4 at 200, 214 and 201, 215. Therefore, whatever services are included in “Tuition” and “Admin Fee” appear duplicative. As such, the charges for “Special Education Teacher inclusive of ██████ instruction,” “Facilitated Communication Teacher,” and “Admin Fee” should be eliminated from any reimbursement.

Lastly, although Student was receiving less services during the period when Parent was paying for services at Private Center, the amount that Parent paid, between ██████ and ██████ over a ██████ year period, appears significantly less than the current monthly invoices that are in evidence. Due to the huge difference in what Parent paid and what is in the invoices, Private BCBA’s testimony that the invoices in evidence do not accurately represent the hours Private BCBA worked (Private BCBA, Tr. Vol. III, 371:17-374:9), and the duplicative billing of services (as discussed above), a clear itemization of services<sup>18</sup> is warranted if any reimbursement is awarded, which this Hearings Officer is not recommending.

**E. PETITIONERS’ SECTION 504 OF THE REHABILITATION ACT OF 1974 CLAIM**

Petitioners’ Complaint “assert[s] Student’s eligibility for rights and protections under Section 504 of the Rehabilitation Act of 1974.” Petitioners’ Complaint, p. 2. Petitioners, however, did not present any evidence or argument during the due process hearing and in their closing brief regarding their Section 504 claim. Based on the lack of evidence or argument to support this claim, the undersigned Hearings Officer concludes that Petitioners have effectively abandoned their Section 504 claim and have not met their burden of proof.

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<sup>18</sup> At a minimum, each service provided to Student should include when the service was provided, how many hours of the service was provided each day, and by whom. Clear documentation is important especially when there are two other entities (insurance and DOH) who are paying for similar types of services.




**VI. DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have not met their burden of proving the issues in the Complaint by a preponderance of the evidence. As Petitioners have failed to prove that DOE denied Student a FAPE, Petitioners' request for the relief sought in the Complaint, including reimbursement of expenses, fees, and costs, is denied.

**RIGHT TO APPEAL**

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

DATED: Honolulu, Hawai'i, January 5, 2024.

  
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