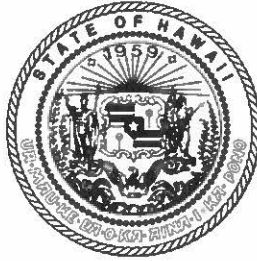


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OFFICE OF DISPUTE RESOLUTION
DEPARTMENT OF THE ATTORNEY GENERAL
STATE OF HAWAII

In the Matter of STUDENT, by and through
the Mother¹,

Petitioners,

vs.

DEPARTMENT OF EDUCATION, STATE
OF HAWAII,

Respondent.

DOE-SY2223-043

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing:

September 7, 14, 21, 29, 2023;

October 5, 2023; and

November 3, 7, 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 §§ 8-60-1, et seq.

¹ Personal identifiable information is provided in the Legend.

II. INTRODUCTION

On June 13, 2023, the Department of Education, State of Hawaii (“Respondent” or “DOE”), received a Request for IDEA Impartial Due Process Hearing Complaint (“Complaint”) from Student, by and through Student’s [REDACTED] (collectively “Petitioners”).

On June 23, 2023, DOE filed a response to Petitioners’ Complaint.

On July 3, 2023, a Notice of Prehearing Conference; Subjects to be Considered; Hearing Process Guidelines was issued to the parties, setting a prehearing conference for July 19, 2023.

On July 19 and 26, 2023, a prehearing conference was held with Parent and Grandparent appearing on behalf of Petitioners, and District Educational Specialist (“DES”) and Resource Teacher appearing on behalf of DOE. During the prehearing conference, Petitioners requested that the due process hearing be conducted via a videoconferencing platform. The parties agreed to have the due process hearing on September 7, 8, 12, 14 and 15, 2023.

On July 27, 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 (“July 2023 PHO”). The July 2023 PHO also provided the parties with three (3) business days to review the prehearing order and to advise the undersigned Hearings Officer of any items that may have been overlooked or misstated in the July 2023 PHO. No substantive motions were filed, and the parties timely submitted their witness and exhibit lists; exhibits; and witness email addresses.

On July 30, 2023, Petitioners requested via email that the individualized education program (“IEP”) dates for their failure to implement claim be clarified in the July 2023 PHO. Petitioners requested that the following IEPs be identified in the prehearing order: February 3, 2023; April 19, 2023; May 15, 2023; and July 5, 2023. Petitioners’ request was granted in part

and denied in part. Petitioners' request to include the 7/05/2023 IEP was denied as this IEP was developed after the Complaint was received by DOE.

On August 7, 2023, an Amended Prehearing Order was issued to the parties, amending an issue to clarify the dates of the IEPs that are the subject of Petitioners' failure to implement claim.

On September 1, 2023, an Order Regarding Mandatory Procedures for the Due Process Hearing was issued to the parties, setting forth the procedures that would be implemented during the due process hearing using a video conferencing platform.

On September 7, 2023, the due process hearing started as scheduled using Zoom, a video conferencing platform, while Parent was at work. Parent's oral request to conduct the rest of due process hearing while at work was denied. The remaining days of the due process hearing were rescheduled so that Parent could fully participate in the due process hearing. The parties agreed to strike from the calendar September 8, 12, and 15, 2023; and add to the calendar September 21 and 29, 2023 and October 5 and 19, 2023. On October 19, 2023, due to health concerns, Parent requested that the due process hearing scheduled for that day be postponed. Although DOE was prepared to proceed with the hearing, DOE did not object to the postponement. Therefore, October 19, 2023 was taken off calendar and November 3, 2023 was added to the calendar. See Order Striking and Adding Due Process Hearing Dates issued on October 20, 2023. On November 3, 2023, the parties and the undersigned Hearings Officer discussed which exhibits would be admitted into evidence. Over Respondent's objection, no witness testimony was taken on November 3, 2023 to allow Petitioners time to review a transcript of the due process hearing that Respondent received but Petitioners did not receive. An additional day of hearing was scheduled for November 7, 2023. All participants in the due

process hearing appeared remotely via video and audio, with the exception of November 7, 2023 when Grandparent appeared by telephone only. The undersigned Hearings Officer presided over the matter. Petitioners were represented by Parent, and Respondent was represented by DES. Grandparent was present to assist Parent; and Resource Teacher was present to assist DES. The due process hearing was completed on November 7, 2023.

The deadline by which a decision in this matter must be issued is November 25, 2023. The decision deadline was originally August 27, 2023, but was extended to October 11, 2023 at the request of Respondent and over Petitioners' objection. The October 11, 2023 decision deadline was extended to November 25, 2023 at Petitioners' request. See Order Granting Respondent's Request for an Extension, dated July 19, 2023, issued on July 27, 2023; and Order Granting Petitioners' Oral Request for an Extension, issued on September 8, 2023.

Petitioners called Clinical Director, Private Therapist, SPED Teacher-1, Principal-1, Clinical Psychologist-1, and Grandparent as their witnesses during the due process hearing. Respondent called the following witnesses during the due process hearing: Clinical Psychologist-2, School Psychologist, Vice Principal, SPED Teacher-2. Petitioners' requests to call an employee from Private School (10/5) and Clinical Director (11/3) as rebuttal witnesses were denied. Tr. Vol. 5, 150:24-153:11²; Tr. Vol. 6, 36:20-40:19.

² "Tr. Vol. 5, 150:24-153:11" means Transcript Volume 5, page 150, line 24 to page 153, line 11. Transcript Volume 1 is a transcript of the September 7, 2023 due process hearing; Transcript Volume 2 is a transcript of the September 14, 2023 due process hearing; Transcript Volume 3 is a transcript of the September 21, 2023 due process hearing; Transcript Volume 4 is a transcript of the September 29, 2023 due process hearing; Transcript Volume 5 is a transcript of the October 5, 2023 due process hearing; Transcript Volume 6 is a transcript of the November 3, 2023 due process hearing; and Transcript Volume 7 is a transcript of the November 7, 2023 due process hearing.

Petitioners' Exhibits 1-15 were admitted into evidence³. Tr. Vol. 7, 162:22-163:20.

The following Respondent's exhibits were admitted into evidence: 1-15, 20-21, 24-25, 27-28, 30, 32-33, 38, 43-44, 48-49, 51, 55-60, 62, 64-67, 69, 71-73, 75-76, 79, 81-88. Tr. Vol. 7, 174:22-175:14.

On November 20, 2023, the parties timely submitted their closing briefs.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the undersigned Hearings Officer renders the following findings of fact, conclusions of law and decision. Although all evidence was reviewed and considered, only those necessary to address the issues are contained in the findings of fact.

III. ISSUES PRESENTED

In their June 13, 2023 Complaint, Petitioners allege substantive and implementation violations of the IDEA. Specifically, Petitioners allege that the DOE denied Student a free appropriate public education ("FAPE"). Petitioners raise the following issues:

Issue 1 – Whether DOE denied Student a free and appropriate public education when they placed Student in an Intensive Learning Center (Public Separate Facility) without the appropriate data to support the decision.

Issue 2 – Whether DOE was obligated to provide transportation to Student in the following situations:

- (a) From home to Public School-2;
- (b) From Public School-2 to home;
- (c) From home to Private Center, and from Private Center back home;
- (d) From home to Public School-2 then the Private Center, and then back

³ Petitioners' Exhibits 1-3 are mislabeled in Petitioners' exhibit list. Exhibit 1 contains the following: Prior Written Notice of Department Action, dated 5/11/2022 (pages 1-2); Prior Written Notice of Department Action, dated 5/09/2022 (page 3); IEP – Progress Report for IEP Date: 5/09/2022 (pages 4-14); and IEP dated 2/15/2022 (pages 15-28). Petitioners' Exhibit 2 contains the following: IEP – Progress Report for IEP Date: 4/19/2023 (pages 29-41); Meeting Sign-In Sheet, dated 4/19/2023 (page 42); Prior Written Notice of Department Action, dated 4/26/2023 (pages 43-44); and IEP dated 4/19/2023 (pages 45-61). Petitioners' Exhibit 3 contains the following: Prior Written Notice of Department Action, dated 5/04/2023 (pages 65-66); and IEP dated 5/08/2023, 4/28/2023, 4/19/2023 (pages 67-94). Tr. Vol. 1, 22:8-27:2.

- to Public School-2 then home;
(e) From Public School-2 to an alternative site (such as an afterschool program in a different school).

Issue 3 – Whether DOE materially failed to implement Student’s February 3, 2023 Individualized Education Program (“IEP”), April 19, 2023 IEP, and May 15, 2023 IEP by not letting Student be with general education students.

Petitioners request the following remedy: Order DOE to pay for Private School.

IV. FINDINGS OF FACT

Witnesses and Individuals Providing Services to Student

1. [REDACTED]
[REDACTED]
[REDACTED] Grandparent, Tr. Vol. 3, 75:7-20, 83:16-84:1, 99:18-100:1.
[REDACTED]
2. Clinical Director is the clinical director of Private Center. Clinical Director has been working with children with [REDACTED] disabilities since 1999. In 2009, Clinical Director became a board-certified assistant behavior analyst; and in 2013, Clinical Director became a board-certified behavior analyst. Clinical Director has a master’s degree in human behavior and will be attending the University of Kansas’ Ph.D. Program in January of 2024, studying behavior analysis. Clinical Director is the owner and founder of Private Center, which opened in 2010. Clinical Director, Tr. Vol. 1, 103:1-105:8.
3. Private Therapist is an expert in [REDACTED] Private Therapist is not an expert in trauma. Private Therapist is not a licensed behavior analyst. Private Therapist saw Student a couple of times in March and has never seen Student in a school

setting at Public School-2. Private Therapist, Tr. Vol. 2, 15:24-16:9, 17:12-20, 21:22-22:17.

4. SPED Teacher-1 is a special education teacher at Public School-1 and has been in this position since 2007. SPED Teacher-1 was Student's special education teacher for [REDACTED] before Student transferred to Public School-2. SPED Teacher-1 was present at a transition meeting to discuss Student's transition from Public School-1 to Public School-2. SPED Teacher-1, Tr. Vol. 2, 28:16-30:22, 55:4-6.
5. Principal-1 is the principal of Public School-1 and has been in that position since 2013. Principal-1 was present at a transition meeting to discuss Student's transition from Public School-1 to Public School-2. Principal-1 has never seen Student at Public School-2. Principal-1, Tr. Vol. 2, 62:18-63:14, 71:23-72:1.
6. Clinical Psychologist-1 is a clinical psychologist for the Hawaii DOE's City-1 complex. Clinical Psychologist-1 has a bachelor's degree in [REDACTED] education, and master's and Ph.D. degrees in counseling psychology. Clinical Psychologist-1 began as a school psychologist for the Hawaii DOE in 2002 and then became a clinical psychologist in 2008. CP-1, Tr. Vol. 2, 80:2-12, 109:10-110:4.
7. Clinical Psychologist-2 is a licensed clinical psychologist and is employed by the DOE as a clinical psychologist in the City-2 district. Clinical Psychologist-2 has been a clinical psychologist with the DOE for twelve (12) years and has been practicing in the field of psychology for about thirty (30) years. Clinical Psychologist-2 has a master's degree in education, specializing in counseling, and a Ph.D. in counseling psychology. As a clinical psychologist for the DOE, Clinical Psychologist-2's responsibilities include

providing clinical consultation and supervision over Public Separate Facility, which includes supervision of behavioral health specialists who are onsite at Public Separate Facility; providing consultation about students who are in Public Separate Facility's program; and participating in IEP meetings and progress meetings. CP-2, Tr. Vol. 3, 105:24-107:4.

8. School Psychologist is a clinical psychologist for the DOE. School Psychologist received his/her clinical psychology doctoral degree and state license in 2015. School Psychologist has worked as a clinical psychologist for approximately seven (7) and half to eight (8) years. School Psychologist's responsibilities include conducting evaluations, consultations, and supervising behavioral health specialists. School Psychologist, Tr. Vol. 4, 27:11-28:6.
9. Vice Principal is the vice principal at Public School-2. Vice Principal has a bachelor's degree in psychology, a master's degree in education and school counseling, and has a school counseling license and a Hawaii administrator's license. Vice Principal was a school counselor for nineteen (19) years, and is currently serving his/her second year as a vice principal. As a vice principal at Public School-2, Vice Principal oversees school operations, student learning, health and safety of students and staff, and student discipline. Vice Principal, Tr. Vol. 5, 22:5-23:5.
10. SPED Teacher-2 is Student's special education teacher and care coordinator. SPED Teacher-2 has a bachelor's degree in [REDACTED] education and special education. SPED Teacher-2 is licensed in the state of Hawaii for [REDACTED] and special education for grades [REDACTED]. SPED Teacher-2 has been a special education teacher for four (4) years. As a special education teacher, SPED Teacher-2 works with students

who have special needs, drafts IEPs, implements IEPs in the classroom, provides supports to students, and works with adult supports to help best support the students in SPED Teacher-2's classroom. SPED Teacher-2 has known Student since [REDACTED] [REDACTED] when Student transferred to Public School-2, and became Student's care coordinator in January of 2023 when Student's then-care coordinator went out on sick leave. SPED Teacher-2, Tr. Vol. 7, 54:11-55:16.

Student Background

11. At the time of the due process hearing, Student was [REDACTED] years old. Pet. Ex. 3 at 067.
12. Student currently qualifies for services under the [REDACTED]
[REDACTED]
13. Student currently qualifies for IDEA services under the category of [REDACTED] Pet. Ex. 3 at 079.
14. Student received IDEA special education and related services at Public School-1 beginning in [REDACTED] when Student was [REDACTED] years old to address Student's verbal and non-verbal communication, socialization, emotional regulation, and academic skills needs. Pet. Ex. 1 at 16, 18; Pet. Ex. 3 at 68.
15. Student attended Public School-1 from [REDACTED] at [REDACTED] years old, to [REDACTED] grade. Principal-1, Tr. Vol. 2, 62:23-63:9.
16. Student transferred to Public School-2 in [REDACTED] when Student was in the [REDACTED] grade. Pet. Ex. 3 at 68; Principal-1, Tr. Vol. 2, 63:6-14; SPED Teacher-1, Tr. Vol. 2, 57:24-58:7.
17. Public School-1 is located in City-1 and Public School-2 is located in City-2.

18. Student has difficulties with changes and transitions. Grandparent, Tr. Vol. 3, 40:24-41:17; SPED Teacher-2, Tr. Vol. 7, 113:3-6.

Public School-1

19. On February 15, 2022, an IEP meeting was held at Public School-1, resulting in an IEP dated February 15, 2022 (“2/15/2022 IEP”). Present at the 2/15/2022 IEP meeting were Parent, Principal-1, SPED Teacher-1, a behavioral health specialist, a speech-language pathologist, and a general education teacher. Pet. Ex. 1 at 28.
20. According to the 2/15/2022 IEP, the IEP Annual Review Date is February 15, 2023, and the Reevaluation Date is February 23, 2024. Pet. Ex. 1 at 15.
21. At the time of the 2/15/2022 IEP meeting, Student was in the [REDACTED] grade and eligible for special education services under the category of [REDACTED]. Pet. Ex. 1 at 15-16.
22. The 2/15/2022 IEP contains six (6) goals with objectives aimed at addressing Student’s reading, writing, math, speech/language, interpersonal communication (dealing with conflict), and self-management (behaving in an appropriate manner during social interactions) skills. Two (2) of the six (6) goals address improving Student’s behavior. Pet. Ex. 1 at 20-25.
23. The 2/15/2022 IEP provides the following Special Education and Related Services to Student: daily transportation; 180 minutes per quarter of counseling; 180 minutes per quarter of speech/language therapy; and 830 minutes per week of special education. Pet. Ex. 1 at 26.
24. The 2/15/2022 IEP provides the following Supplementary Aids and Services, Program Modifications and Supports for School Personnel (“Supplementary Aids and Services”):

- preferential seating; frequent checks for understanding; repeated directions using simplified vocabulary; chunking large portions into smaller sections; use of visuals, song, hands on activities, and/or models; breaking down multi-step directions into 1-step directions; and immediate positive praise and feedback. Pet. Ex. 1 at 26.
25. According to the 2/15/2022 IEP, under the Clarification of Services and Supports section, “[Student] will receive Language Arts and Mathematics in the pull out [sic] resource room setting and Science and Social Studies will be in the general education setting with support.” Pet. Ex. 1 at 26.
26. According to the 2/15/2022 IEP, the extent to which Student would participate in classes and activities with non-disabled students, a.k.a. the least restrictive environment (“LRE”), is stated in the following manner: “Concerns in the areas of communication, reading, writing, mathematics, and behavior/social skills impact [Student’s] ability to independently make gains in the general education setting without special education support. At this time, [Student] will benefit from specialized services to address [Student’s] needs. [Student] will participate with [Student’s] general education peers for science and social studies with special education support, morning business, music, PE, library, world language, field trips, lunch, recess and all other school related activities and events except while attending speech language therapy and counseling services.” Pet. Ex. 1 at 27.
27. On May 9, 2022, an IEP meeting was held at the request of Parent to address Parent’s concerns and to review Student’s progress and educational program. Parent shared concerns about Student’s social interactions and Student’s overall happiness at Public School-1. The IEP team agreed to refocus Student’s counseling services to address peer

interactions in social settings, such as recess and lunch, to develop Student's social skills; and the IEP team agreed to provide positive support to Student in the classroom. At the time, Student was progressing on Student's goals. Pet. Ex. 1 at 1-2.

28. On May 26, 2022, Student's progress on Student's goals and objectives in the 5/09/2022 IEP was assessed. Student was noted as either emerging or progressing on Student's objectives. Pet. Ex. 1 at 4-14.

29. Private Neuropsychologist is a forensic neuropsychologist for Private Company. Private Neuropsychologist has a Ph.D. degree and is a licensed psychologist. Pet. Ex. 13 at 116.

30. On July 13, 2022 and October 4, 2022, Private Neuropsychologist conducted a neuropsychological evaluation of Student and wrote a report indicating "Dates of Evaluation: July 13, 2022, October 4, 2022, Data Synthesis and Report Writing" ("October 2022 Neuropsych. Report"). The October 2022 Neuropsych. Report notes that Student's IQ fell within the [REDACTED] range. Private Neuropsychologist diagnosed Student with [REDACTED]

[REDACTED]
[REDACTED] Private Neuropsychologist recommended that Student receive a psychopharmacological consultation and psychotherapy with a practitioner who is an expert in treating [REDACTED] Pet. Ex. 13 at 111-116.

31. On October 14, 2022, Student's progress on Student's goals and objectives in the 5/09/2022 IEP was assessed. Student was noted as either emerging, progressing, or mastered Student's objectives. Pet. Ex. 1 at 4-14.

32. While attending Public School-1, Student received transportation services. Principal-1, Tr. Vol. 2, 65:23-66:9.

33. While attending Public School-1, Student was not aggressive, did not engage in violent behaviors, and had friends. Student also made progress on Student's report cards and IEP goals and objectives. Principal-1, Tr. Vol. 2, 66:10-72:1; SPED Teacher-1, Tr. Vol. 2, 28:16-30:22.

Public School-2

34. In [REDACTED] while in the middle of [REDACTED] grade, Student transferred to Public School-2. Pet. Ex. 3 at 68; Principal-1, Tr. Vol. 2, 63:6-14; SPED Teacher-1, Tr. Vol. 2, 57:24-58:7.
35. Student Services Coordinator ("SSC") is a student services coordinator at Public School-2. DOE Ex. 13 at 187.
36. On October 20, 2022, a transition meeting took place between Public School-1 and Public School-2. Parent was not able to attend the transition meeting due to a conflict at work. DOE Ex. 15 at 194-197; SPED Teacher-1, Tr. Vol. 2, 29:2-8; Principal-1, Tr. Vol. 2, 63:10-22.
37. After the transition meeting, on October 20, 2022, Parent informed SSC that Student was on a waitlist for the A+ afterschool program at Public School-2. Parent asked SSC if Student could attend the A+ afterschool program at Public School-3 since it was accepting applications, Student's IEP from Public School-1 included transportation, Parent didn't get off work until 4:00 p.m., and Public School-3 was close to Parent's place of employment. DOE Ex. 13 at 186.
38. On October 21, 2022, SSC confirmed that all the registration paperwork had gone through, and Student could start school on October 24, 2022 and Student's teacher would be General Education Teacher ("GE Teacher"). SSC also informed Parent that

- transportation services were requested on October 21, 2022, and that due to processing time, it may take up to two (2) weeks for transportation to start. DOE Ex. 15 at 194-197.
39. GE Teacher is Student's general education teacher. DOE Ex. 43 at 310.
40. In November of 2022, Parent waived transportation services because Student was accepted into the A+ afterschool program at Public School-2. DOE Ex. 43 at 310; DOE Ex. 55 at 357-358; Grandparent, Tr. Vol. 3, 90:17-22; Vice Principal, Tr. Vol. 5, 139:7-11.
41. On November 29, 2022, Private Neuropsychologist wrote the following letter: "This is to confirm the diagnosis of [REDACTED] for [Student]. Please make accommodations as needed by [Parent], including social skills groups and meetings with the school psychologist and any other appropriate accommodations." ("11/29/2022 Letter"). Pet. Ex. 13 at 110. Private Neuropsychologist's 11/29/2022 Letter did not recommend that Student receive Applied Behavior Analysis ("ABA") services.
42. Also on November 29, 2022, Parent emailed to Principal-2 a copy of Private Neuropsychologist's 11/29/2022 Letter and October 2022 Neuropsych. Report. DOE Ex. 25 at 232-240.
43. Principal-2 is principal of Public School-2.
44. SPED Teacher-3 was Student's special education teacher and care coordinator at Public School-2. DOE Ex. 28 at 251-256; Vice Principal, Tr. Vol. 7, 36:11-18; SPED Teacher-2, Tr. Vol. 7, 55:14-16.
45. On [REDACTED] SPED Teacher-3 emailed to Parent a copy of two (2) communication logs for [REDACTED] and informed Parent that "[Student] showed behavior that was angered; but, with praise and support, [Student] was able to

redirect [him/herself]....” According to the 11/29/22 communication log: Student “jump up and down,” “knock things down,” “throw objects,” “verbal protest,” “kicking tables,” “punching on desks,” and “moving desks.” DOE Ex. 24 at 228-230.

46. On [REDACTED] SPED Teacher-3 emailed to Parent a communication log and an additional report. The additional report described [REDACTED] incidents that occurred that day: (1) Student was angry, interrupting the classroom lesson, threw [REDACTED] on the floor, and Vice Principal came in to support Student; and (2) Student became upset when Student lost a token piece, and cried, screamed, and stomped Student’s feet. Principal-2 came into the classroom. [REDACTED] in Student’s desk, while continuing to cry, scream, and stomp Student’s feet. Principal-2 prompted Student to go outside to help calm down Student. Student continued [REDACTED] cry, and scream. Principal-2 physically removed Student from the classroom due to safety concerns for him/herself and others. Once outside Student continued to scream, cry, and stomp Student’s feet. Upon receiving SPED Teacher-3’s communication log and report, Parent was upset. The IEP team agreed to meet for an “emergency IEP meeting” to address the incidents. Principal-2 asked Parent and Grandparent if they wanted to meet on December 5 or December 6. DOE Ex. 27 at 247-249; DOE Ex. 28 at 251-256.
47. On December 3, 2022, Parent confirmed an IEP meeting for December 5, 2022. DOE Ex. 28 at 251-256.
48. On December 4, 2022, Principal-2 confirmed the December 5, 2022 IEP meeting date and informed Parent that the school would try to see if School Psychologist could attend the IEP meeting. DOE Ex. 28 at 251-256.

49. On December 5, 2022, an emergency IEP meeting was held. DOE Ex. 28 at 251-256; DOE Ex. 30 at 261-262.
50. On [REDACTED] Vice Principal informed Parent that Student had an incident with another student at the [REDACTED] program that day and that Vice Principal was working with Student to locate “safe spaces” in school where Student could go to calm down when Student gets angry. DOE Ex. 32 at 267.
51. On December 10, 2022, Private Neuropsychologist conducted a “follow up” wherein Private Neuropsychologist discussed with Parent the “The Initial Version of the Report.” After the December 10, 2022 follow up, Private Neuropsychologist wrote another report that had the following “Dates of Evaluation: July 13, 2022, July 14, 2022, July 15, 2022, October 4, 2022, December 8, 2022, (Data Synthesis and Report Writing), December 10, 2022 (Follow Up)” (“December 2022 Neuropsych. Report”)⁴. The data collection and interpretation between the October 2022 and December 2022 Neuropsych. Reports are similar. Significant changes begin to occur in the Diagnosis and Recommendations section, where the Recommendations in the December 2022 Neuropsych. Report also includes [REDACTED]” and “residential academic services to continue to provide [REDACTED] services and monitoring.” According to the December 2022 Neuropsych. Report, Student “continues to present with a complexity of significant psychiatric and behavioral dysregulation symptoms which have seemingly worsened despite multiple and varied treatment interventions in multiple academic and custodial settings” and “[Student’s] presentation warrants services based on the

⁴ The December 2022 Neuropsych. Report was completed on or after March 1, 2023 as the last email correspondence cited in the report took place on March 1, 2023. Pet. Ex. 14 at 126.

provisions of the Americans with Disabilities Act, specifically [REDACTED] [REDACTED].” Pet. Ex. 14 at 117-127. The December 2022 Neuropsych. Report is of limited value because it appears that the report may have been influenced by Parent (“Could we update this one more time?” and “if you could fix the recommendations so my insurance can approve aba services”⁵) and/or relied on information/data that was not available (“I am also a little concerned as to where you are getting this information to make those recommendations?” and “I’m unsure why the recommendations are so intense and where you’re getting the information to draw that conclusion.”) Private Neuropsychologist appears to defend his/her recommendations in two (2) addendums by explaining that (1) Parent did not complete a Vineland Comprehensive Interview Form, which is an adaptive functioning assessment, that was emailed to Parent in July of 2022; (2) additional data around Student’s genetic contributions on both the maternal and paternal sides were discussed on December 10, 2022; (3) “other previously unknown data were provided, particularly data reasonable to support the diagnosis of [REDACTED] [REDACTED];” (4) Private Neuropsychologist observed Student experiencing “an emotional mood switch similar to a light switch, spontaneously and unexpectedly;” (5) Private Neuropsychologist also noted that Parent provided contradictory emails and “much relevant clinical data had been obfuscated from our clinical team;” (6) “It is clear to us that [Student] is in need of more intensive and specialized psychiatric, psychotherapeutic, and academic services, and that [Student’s] current school is unable to fulfill those needs at this time;” and (7) “Too many indicators

⁵ Despite Parent indicating that Parent wanted Student to have ABA services, ABA services were not part of Private Neuropsychologist’s recommendations.

reflect the need for more robust assessment and treatment for [Student], beyond the request of diagnoses for ADHD and Autism. My not referring [Student] for a higher level of biological as well as psychological scrutiny would not be in [Student's] best interest." Pet. Ex. 13 at 111-116; Pet. Ex. 14 at 117-127; DOE Ex. 88 at 796-806.

Private Neuropsychologist did not testify at the due process hearing.

52. "In-patient hospitalization" is for an individual who poses an imminent risk of harm to self or others; has psychotic symptoms; or does not know reality. School Psychologist, Tr. Vol. 4, 41:11-42:3, 72:16-10.
53. Neither Private Neuropsychologist's October 2022 and December 2022 Neuropsych. Reports recommend ABA services. School Psychologist, Tr. Vol. 4, 53:15-21.
54. Not all children with [REDACTED] need ABA services because there is a broad spectrum of [REDACTED] CP-2, Tr. Vol. 3, 171:20-23.
55. On January 4, 2023, Vice Principal sent an email to Parent, Grandparent, and other members of Student's IEP team to confirm what was discussed with Parent during a conversation. Vice Principal confirmed that SPED Teacher-3 would be on leave for the rest of the semester, and that SPED Teacher-3's classroom would have substitute teachers until the school was able to find a permanent replacement. In order to provide stability and a certified special education teacher to Student, Public School-2 would move Student to the Grade [REDACTED] special education classroom, and SPED Teacher-2 would be Student's new special education teacher and care coordinator. The IEP team believed that the Grade [REDACTED] special education classroom would be a good fit for Student because Student was academically higher than Student's peers in the Grade [REDACTED] special education classroom and Student appeared to get along well with older children. Vice

Principal also confirmed that Vice Principal would speak with Student the next day about the transition, and Vice Principal and SSC would be there to support Student throughout the transition. Although SPED Teacher-2 was on sick leave until next week, SPED Teacher-2 had created a transition plan for Student. Student was projected to be with SPED Teacher-2 for the remainder of Student's time at Public School-2. GE Teacher would continue as Student's general education teacher. Vice Principal also asked Parent to return a signed copy of a Consent for Assessment as Part of a Reevaluation form so that Public School-2 could start conducting assessments for Student's reevaluation. DOE Ex. 43 at 310.

56. On January 10, 2023, Vice Principal asked Parent to correct the date on the Consent for Assessment as Part of a Reevaluation form because Parent had written the date "01/05/22" on it. Initially, Parent declined to make the correction, but on January 17, 2023, sent another signed Consent for Assessment as Part of a Reevaluation form with the correct date. In addition to the Consent for Assessment form, Parent also sent Public School-2 a Request for IDEA Impartial Due Process Hearing complaint. DOE Ex. 48 at 327-328; DOE Ex. 49 at 330-334.
57. On January 19 and 20, 2023, Student was given an academic assessment as a part of the reevaluation, which resulted in a report entitled Academic Assessment Report ("1/2023 AA Report"). The assessment lasted approximately fifty-five (55) minutes each day. Student was motivated and cooperative during the academic assessment. The academic assessment consisted of a records review and the administering of the Woodcock-Johnson Tests of Achievement, 4th Edition ("WJ-IV Ach"). The academic assessment was requested to determine Student's current strengths and needs in reading, writing,

and mathematics. The results indicated that Student was performing at a low average to average range in Student's skill abilities in reading, writing, and mathematics. The academic assessment was conducted by SSC. Pet. Ex. 3 at 72-73; DOE Ex. 60 at 390-396.

58. On January 23, 2023 and February 24, 2023, a physical therapy assessment was given to Student, resulting in a report dated March 6, 2023 ("3/06/2023 PTA Report"). The physical therapy assessment consisted of an observation and administering of the Bruininks-Oseretsky Test of Motor Proficiency – 2nd Edition ("BOT-2"), a comprehensive standardized test for fine and gross motor skills. Student was happy, able to follow directions, and engaged throughout the assessment. The physical therapist found no gross motor concerns that would adversely impact Student's ability to independently access Student's educational environment. DOE Ex. 58 at 378-380.
59. On January 25, 2023, a classroom observation was conducted as a part of the reevaluation. Student was observed in Student's [REDACTED] grade homeroom class during Science period for approximately thirty (30) minutes. The people present in the classroom during the observation were [REDACTED] students, the classroom teacher, an adult support paraprofessional tutor ("PPT"), SSC (test administrator), and Vice Principal. During the observation, Student sat at Student's desk working on a drawing of Student's choice, unrelated to the science activity, and voiced and expressed he/she did not want to do the science work even though the teacher and Student's PPT continuously asked Student to join the class. Student called SSC over to Student's desk to show SSC Student's drawing, and Student showed other students in Student's group Student's drawing. Although Student refused to join the rest of the class during group

discussion, Student was able to follow along, comprehend the discussion, and answered appropriately without looking at the teacher. A report entitled “Classroom Observation Report,” dated January 25, 2023 (“1/25/2023 Classroom Observation Report”), was issued describing the classroom observation. Pet. Ex. 3 at 73-74; DOE Ex. 55 at 360-362.

60. On January 30, 2023 and February 21, 2023, SLP conducted a speech and language assessment of Student as part of the reevaluation, resulting in a Speech and Language Assessment Report (“2/21/2023 SLA Report”). The assessment took sixty (60) minutes on January 30, 2023 and sixty-five (65) minutes on February 21, 2023. Student was cooperative, engaged, attentive, and occasionally distracted during the 2-day assessment. Student was given the Goldman-Fristoe Test of Articulation, Third Edition (“GFTA-3”), Test of Language Development Primary: Fifth Edition (“TOLD-P:5”), Test of Narrative Language-Second Edition (“TNL-2”), and a speech sample was taken of Student’s answers. It was determined that there was no gap in Student’s performance of speech sounds and language performance and what is expected at Student’s age and grade level. There were no speech or language concerns. DOE Ex. 57 at 370-376; Pet. Ex. 3 at 69-72, 79.
61. On or about February 1, 2023, Parent requested that transportation services to City-1 be reinstated because Student was suspended from the A+ afterschool program. DOE Ex. 55 at 357-358; Vice Principal, Tr. Vol. 5, 138:20-139:11; Vice Principal, Tr. Vol. 7, 6:9-19.
62. On February 1, 2023, an “emergency IEP meeting” was held. Present at the IEP meeting were Parent, Grandparent, Principal-2, and other members of Student’s IEP

team. During the IEP meeting, Parent and Grandparent shared concerns that there was no plan in place to address Student's suspension from the A+ afterschool program; Student needed transportation services to City-1 reinstated; and whether there were opportunities for extended school day. Principal-2 shared that Principal-2 was told that transportation services were for between home address and school, and was waiting for the student bus transportation division to provide more information. Principal-2 also suggested that a licensed behavior analyst conduct an observation of Student to see what type of supports are needed or if further evaluations are needed due to recently observed behaviors and a private report diagnosing Student with [REDACTED] Pet. Ex. 5 at 96-97; DOE Ex. 55 at 357-358.

63. BHS is Student's behavioral health specialist and BHS's supervisor is School Psychologist. School Psychologist, Tr. Vol. 4, 32:16-25.
64. On February 3, 2023, an annual IEP meeting was held with the following people in attendance: Parent, Grandparent, Principal-2, School Psychologist, SPED Teacher-2, SLP, GED Teacher, BHS, and a counselor. The annual IEP meeting resulted in an IEP dated February 3, 2023 ("2/03/2023 IEP"). DOE Ex. 1 at 001-017.
65. According to the 2/03/2023 IEP, the IEP Annual Review Date is February 3, 2024, and the Reevaluation Date is February 23, 2024. DOE Ex. 1 at 001.
66. According to the 2/03/2023 IEP, "[Student] is eligible for IDEA Chapter 60 category [REDACTED] Difficulties in basic reading, reading comprehension, writing, math calculation/reasoning, speech language, and behavior impact ability to be successful in the general education setting without accommodations, modifications and specialized instruction and services." DOE Ex. 1 at 003-004.

67. The 2/03/2023 IEP has ten (10) goals that address language arts (reading, language, writing, speaking, listening), math, interpersonal communication, and self-management skills. Two (2) of the ten (10) goals are aimed at helping Student improve Student's behavior. DOE Ex. 1 at 005-014.
68. The 2/03/2023 IEP provides Student with the following Services: 720 minutes per week of special education; 180 minutes per quarter of speech/language therapy; 270 minutes per quarter of counseling; and daily transportation. DOE Ex. 1 at 015.
69. The 2/03/2023 IEP provides Student with the following Supplementary Aids and Services: preferential seating near source of instruction; frequent checks for understanding; chunking instruction; repeating directions, instruction; use of graphic organizers, checklists, visuals, timers; positive praise and feedback; breaking down/chunking multi-step directions into 1-step directions; token system or reward incentives (breaks, etc.); and 1:1 adult support. DOE Ex. 1 at 015.
70. The 2/03/2023 IEP contains statements in the Clarification of Services and Supports section, such as: (1) "1:1 adult support will be provided to [Student] during instructional blocks in the day in both the resource and general education setting;" (2) "Transportation services are still in discussion and will be resolved with subsequent meetings;" and (3) "Special Education may be in the resource setting for ELA and Math." DOE Ex. 1 at 015.
71. The LRE statement in the 2/03/2023 IEP states: "[Student] will have the opportunity to participate with [Student's] disabled peers for ELA and Math. [Student] will have the opportunity to participate with [Student's] non-disabled peers for Science, Social Studies, Homeroom, Recess, Lunch, Hawaiian Studies, SEL, PE, and Performing Arts.

Field trips, school-wide activities, school-wide assemblies, and any activity deemed appropriate will be with [Student's] non-disabled peers. [Student's] Least-Restrictive Environment will be a combination of the General Education and Special Education setting on a DOE Public School Campus." DOE Ex. 1 at 016.

72. Following the 2/03/2023 IEP meeting, a Prior Written Notice, dated February 7, 2023 ("2/07/2023 PWN"), was issued. According to the 2/07/2023 PWN, information from the following sources were considered in formulating DOE's proposal to Parent: current IEP and assessments; teacher reports (daily work, homework, observation, etc.); and input from teachers (general education and special education), administrator, counselor, speech and language pathologist, behavior health specialist, clinical psychologist, Parent, and Grandparent. DOE Ex. at 019-020.
73. On [REDACTED] Student became upset with a teacher. Student pushed Student's teacher; pushed, kicked, scratched, and punched a counselor; and pushed, kicked, and punched a PPT [REDACTED] Student was suspended [REDACTED] for this incident. DOE Ex. 10 at 095-096.
74. On February 24, 2023, Student was given an occupational therapy assessment, which resulted in a report entitled Occupational Therapy Assessment Report ("2/24/2023 OTA Report"). Student was cooperative and engaging during the assessment. The following tests were administered: BOT-2; Brigance Inventory of Early Development-Cutting Skill Sequence; Beery-Buktenica Developmental Test of Visual Motor Integration (Full Format) – 6th Edition ("Beery VMI"); and a handwriting sample. Student was also given the Child Sensory Profile, 2nd Edition, which contained caregiver and teacher questionnaires. Neither Parent nor Grandparent returned the questionnaires, so

information from the home setting was not included in the report. SPED Teacher-2 completed the questionnaire. The Child Sensory Profile, 2nd Edition, showed elevated scores (mild to moderate) in each sensory pattern (sensation seeking, sensation avoiding, sensory sensitivity, sensory registration) in the school setting when Student appeared dysregulated. Student's fine motor skills were below average to above average in a variety of fine motor and upper body coordination tasks; Student demonstrated accurate cutting skills; and Student had the ability to write legibly. The assessment was conducted by an occupational therapist. Pet. Ex. 3 at 74-75; DOE Ex. 59 at 382-388.

75. Also on [REDACTED] Student loudly told another student, "I want to take you out like how I erase this. I want to kill you." A few minutes later [Student] walked by [the] student and kicked [REDACTED]. The student ran out and [Student] chased [REDACTED] to the playground. [Student] then punched, kicked, scratched and bit [the] student. Student then ran to the office and [Student] grabbed [REDACTED] shirt. The student then made it to the health room. Counselor and PPT were trying to get [Student] away from [the] student in the health room. [Student] then scratched, kicked and punched counselor. [Student] pushed and hit PPT. [Student] left the office to return to [Student's] homeroom. Students were being dismissed and [Student] walked with PPT to go home. Along the route to the parking lot, [Student] saw a [REDACTED] student and pushed [REDACTED] onto the stairs. [Student] started to walk to the parking lot and then reversed direction and went after the student again. [Student] tried to grab [REDACTED] student's arm and leg. However, teacher stood in between [REDACTED] student and [Student]. [Student] kicked and punched teachers [sic] lower back." Student was suspended [REDACTED] for this incident. DOE Ex. 10 at 095.

76. In March of 2023, School Psychologist met with Student at the request of Public School-2. Public School-2 reached out to School Psychologist to start a consultation because Public School-2 had concerns about Student's recent behaviors in the classroom, such as Student's emotional regulation, verbal outbursts, and physical safety of Student and other students. School Psychologist, Tr. Vol. 4, 28:7-29:3.
77. On March 5, 2023, Student was given the Adaptive Behavior Assessment System – Third Edition as a part of the reevaluation. Student scored in the extremely low range compared to same-aged peers. Pet. Ex. 3 at 68-69.
78. On March 7, 2023, School Psychologist conducted an emotional behavioral assessment, issuing a report dated March 13, 2023 ("3/13/2023 EBA Report"). The emotional behavioral assessment consisted of interviews, observation of Student, and administering to Student the Gilliam [REDACTED] Rating Scale, Third Edition ("GARS-3") and [REDACTED] Diagnostic Observation Schedule, Second Edition ("ADOS-2"), Module 2. The GARS-3 assists in identifying [REDACTED] in individuals and estimating its severity. The GARS-3 resulted in a very likely diagnosis of [REDACTED] and placed Student in the Level [REDACTED] severity range. The ADOS-2 is a semi-structured assessment of an individual's communication, social interaction, and play/imaginative use of materials. "[Student's] score [in the ADOS-2, Module 2], place[d] [Student] in the range of functioning consistent with [REDACTED]" School Psychologist's diagnostic impressions were [REDACTED] Level [REDACTED] requiring substantial support, and [REDACTED] [REDACTED] School Psychologist recommended, among other things, that Student be placed in a highly structured educational program with an emphasis on shaping Student's behavior and increasing Student's ability to attend to education programming;

and continued counseling services with an emphasis on shaping Student's behavior and teaching skills such as emotional regulation and mindfulness. Pet. Ex. 3 at 72; DOE Ex. 56 at 364-368; School Psychologist, Tr. Vol. 4, 55:25-56:5.

79.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] School Psychologist, Tr.

Vol. 4, 124:1-24.

80.

On [REDACTED] Student left Public School-2 and never returned. Between [REDACTED]
[REDACTED] Student was suspended [REDACTED] and frequently absent from
Public School-2. DOE Ex. 9 at 091-093; DOE Ex. 15 at 194; Vice Principal, Tr. Vol. 5,
65:8-21.

81.

On March 14, 2023, Principal-2 approved a "Request for IEP-Approved Special
Education Transportation other than Normal Curb to Curb." Pursuant to this
transportation approval, Student would be picked up at Public School-2 in the afternoon
and dropped off at Grandparent's house at Address No. 1 in City-1. Transportation
services would be provided [REDACTED] days a week. DOE's District Transportation Office

received the request on April 20, 2023, and the start date was noted as “ASAP.” Pet. Ex. 10 at 107.

82. On March 28, 2023, an eligibility meeting was held to discuss the results of the reevaluation and to determine if Student continued to be eligible for special education and related services. It was determined that Student continued to be eligible for special education and related services under the category of [REDACTED]. The IEP team also considered [REDACTED] but rejected these eligibility categories. The basis for DOE’s proposed/refused actions were past and current assessments; Private Neuropsychologist’s October 2022 Neuropsych. Report; Student’s IEP; and input from Parent, Grandparent, related services team members (social worker, speech pathologist, clinical psychologist, occupational therapist, physical therapist, behavior health specialist), administrator, special education teacher, general education teacher, and student services coordinator. Pet. Ex. 9 at 102-106; DOE Ex. 62 at 419-420; School Psychologist, Tr. Vol. 4, 44:4-46:6.
83. On March 31, 2023, a copy of an Evaluation Summary Report for Student’s reevaluation was provided to Parent (“3/31/2023 ESR”). The 3/31/2023 ESR noted that “[Student] continues to show a need for support with [Student’s] verbal and non-verbal communication, socialization, emotional regulation, and academic skills.” The 3/31/2023 ESR provided a summary of the 3/05/2023 Adaptive Behavior Assessment; 2/21/2023 SLA Report; 3/13/2023 EBA Report; 1/2023 AA Report; 1/25/2023 Classroom Observation Report; 2/24/2023 OTA Report; and the 3/06/2023 PTA Report. At the end of the 3/31/2023 ESR, Student’s eligibility determination was as follows: “Information gathered from assessments, teachers, and parent indicates that [Student]

meets the eligibility criterion under the category of [REDACTED]
[Student] has a [REDACTED] significantly affecting [Student's] verbal and
nonverbal communication skills generally evident before the age of [REDACTED] and a
[REDACTED] significantly affecting social interaction generally evident
before the age of [REDACTED] [Student] also exhibits the following characteristics often
associated with [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] Based on this information, the conferees recommend
eligibility for special education and related services based on [REDACTED]
[REDACTED] DOE Ex. 62 at 421-429.

84. On April 4, 2023, Student's progress on the goals and objectives in the 2/03/2023 IEP was assessed. SPED Teacher-2 noted that Student made no progress on Student's academic objectives because Student chose not to complete the work so the skill could not be assessed. SPED Teacher-2 also noted that Student made no progress with the objectives relating to interpersonal communication skills (to deal with conflict) and appropriate behavior during social interactions. SPED Teacher-2 noted that "[Student] was not able to respond with appropriate strategies when social situations arose, that made [Student] feel upset, angry, or annoyed. [Student] has difficulty responding with appropriate strategies within social situation to resolve peer disagreements. Counseling and mediation was [sic] provided but not effective." Student, however, was progressing on Student's language objectives. Pet. Ex. 2 at 29-41; Vice Principal, Tr. Vol. 5, 60:1-61:12.

85. Also on April 4, 2023, SPED Teacher-2 emailed to Parent copies of Student's report card and progress report. A few minutes later, Parent responded to SPED Teacher-2 that "absence is an issue for capturing results. Let's call an IEP for transportation so [Student] can get to and from home and school...." Pet. Ex. 6 at 98.
86. On April 19, 2023, an IEP meeting was held to develop an IEP for Student due to the reevaluation and Student's IDEA eligibility under a new category: [REDACTED] Present at the 4/19/2023 IEP meeting were Parent, Grandparent, SPED Teacher-2, Principal-2, Vice Principal, GE Teacher, SLP, Clinical Psychologist-2, School Psychologist, an occupational therapist, and a counselor. Pet. Ex. 2 at 42, 61; Pet. Ex. 3 at 92; DOE Ex. 4 at 051-052; DOE Ex. 65 at 513-514.
87. During the 4/19/2023 IEP meeting, the IEP team discussed pages 1-13 of a draft IEP, the present levels of educational performance ("PLEP"), transportation, and extended school year ("ESY"). The school members of the IEP team proposed that afternoon transportation from Public School-2 to Address No. 1 start immediately, and they decided that Student was not eligible for ESY services. The IEP team couldn't finish drafting the IEP and scheduled another IEP meeting for April 28, 2023 to continue drafting the IEP. In the meantime, Student's 2/03/2023 IEP continued to be implemented. Vice Principal, Tr. Vol. 5, 60:1-61:12; Pet. Ex. 2 at 43-44; DOE Ex. 4 at 051-052; DOE Ex. 65 at 513-514, 532-533.
88. Although an IEP was not completed during the 4/19/2023 IEP meeting, a draft of the 4/19/2023 IEP contains the following LRE statement: "[Student] will have the opportunity to participate with [Student's] disabled peers for ELA and Math. [Student] will have the opportunity to participate with [Student's] non-disabled peers for Science,

Social Studies, Homeroom, Recess, Lunch, Hawaiian Studies, SEL, PE, and Performing Arts. Field trips, school-wide activities, school-wide assemblies, and any activity deemed appropriate will be with [Student's] non-disabled peers. [Student's] Least-Restrictive Environment will be a combination of the General Education and Special Education setting on a DOE Public School Campus." Pet. Ex. 2 at 60.

89. On April 19, 2023, following the IEP meeting, pursuant to Parent's request, Vice Principal sent an email to Parent to inform Parent that Vice Principal and SPED Teacher-2 could meet Parent and Grandparent on April 21, 2023 to review the changes made to the PLEP during the IEP meeting and finish the PLEP before they reconvene for the next IEP meeting. Vice Principal confirmed that the school "will follow up with bus transportation tomorrow. Your request for transportation was to [City-1]. We currently have this address on file: [Address No. 2]. If you would like it to go to [City-1], can you please provide that address instead?" The next day, Parent responded, "Confirming meeting. As far as the transportation, I'm not changing addresses. Let's add [Address No. 1] for the bus. Please provide the time of pickup/drop off." Vice Principal replied, "The pm transportation route is set. Transportation will pick [Student] up at [Public School-2] at 2:30pm and take [Student] directly to the [City-1] address. A [Public School-2] staff member will be with [Student] from when school ends until the bus arrives. Transportation said they will call you with the start date." DOE Ex. 64 at 482-510.
90. Bus Co. Employee is an employee of Roberts Hawaii, a bus company. DOE Ex. 75 at 690-693.
91. STO is a Student Transportation Officer with the DOE. DOE Ex. 75 at 690-693.

92. On April 20, 2023, STO sent the following email to Bus Co. Employee: “Drop off will be at [Grandparent’s] house in [City-1]. The student’s situation involves SPED bus requirements per [Student’s] IEP and also in a situation of MVA status. [SSC] has been informed of potential out of district concerns that may arise because of a longer bus ride from [City-1]...please make contact with the [Parent] to advise [Parent] of the start of transportation services. We have also been advised that there may be a change in the transportation to add morning pick up from [City-1], no start date yet.” DOE Ex. 83 at 760-761.
93. On April 25, 2023, Roberts Hawaii called Parent and left a message. Parent did not call back. DOE Ex. 83 at 758-761. Parent, however, stated that Parent did not receive a call from the bus company. DOE Ex. 83 at 760-761. Vice Principal then informed Parent and Grandparent that the bus company confirmed that afternoon transportation services from Public School-2 to City-1 would start on April 26, 2023. Vice Principal asked Parent if Parent wanted morning pick-up, and if so, from what location. Grandparent later informed Vice Principal that “The bus did call and [Student] is not well. We should start when [Student] is well.” DOE Ex. 64 at 484-485.
94. On April 28, 2023, Roberts Hawaii called Parent and left a message. DOE Ex. 67 at 554.
95. Also on April 28, 2023, the IEP team met again to continue the IEP meeting they had started on April 19, 2023. Present at the 4/28/2023 IEP meeting were Parent, Grandparent, Principal-2, Vice Principal, Clinical Psychologist-2, SLP, GE Teacher, School Psychologist, SPED Teacher-2, and a counselor. Pet. Ex. 3 at 93.

96. During the 4/28/2023 IEP meeting, the IEP team discussed changes to the PLEP; IEP goals and objectives; accommodations; statewide assessment; and Student's LRE. In discussing Student's placement, the IEP team considered resource setting, fully self-contained ("FSC") setting, public separate facility, and private separate facility. DOE proposed that Student be placed in a public separate facility—Public Separate Facility—for the following reasons: (1) Student had an increase in behavioral needs that occurred during academic instruction which impeded Student's learning and the learning of others; (2) Student's need to resolve current or old conflicts, which linger on Student's mind throughout the day, impedes Student's learning and the learning of others; and (3) Student often needs time to calm down with trusted adults or Student's 1:1 adult support. The IEP team was not able to complete the LRE discussion because Parent left the IEP meeting. Grandparent recommended that the IEP team reconvene at another time to continue the discussion. Pet. Ex. 3 at 65-66; DOE Ex. 5 at 054-055; DOE Ex. 71 at 571-572; Vice Principal, Tr. Vol. 5, 61:5-63:6.
97. After the 4/28/2023 IEP meeting, the school continued to implement Student's 2/03/2023 IEP. Vice Principal, Tr. Vol. 5, 62:24-63:4.
98. On April 28, 2023, following the IEP meeting, SPED Teacher-2 emailed to Parent and Grandparent a brochure about Public Separate Facility and informed them that another email will be sent to them to set up another IEP meeting. Parent responded to SPED Teacher-2's email, stating that "If you don't [sic] enough data to support extended school year or day then you don't have enough data to suggest [Student] be anywhere else." DOE Ex. 66 at 535-552.
99. On May 1, 2023, Roberts Hawaii called Parent and left a message. DOE Ex. 67 at 554.

100. Also on May 1, 2023, Parent sent an email to the rest of the IEP team requesting “an emergency IEP meeting [] [because] [t]his annual IEP was due months ago and it’s almost the end of the school year.” Parent also informed the other members of the IEP team that Parent was “still not in contact with the bus.” Shortly after Parent’s email, Grandparent sent an email stating, “The IEP still unfinished concerns me with the end of the year quickly approaching and the annual due date of February long past. The bus is not in question at this time.” DOE Ex. 69 at 560-561.
101. On May 2, 2023, SPED Teacher-2 informed Parent and Grandparent that SPED Teacher-2 followed up with Roberts Hawaii regarding Parent’s assertion that Roberts Hawaii had not called Parent. SPED Teacher-2 informed them that according to Roberts Hawaii, Roberts Hawaii had made three (3) phone calls to the family: once to Grandparent and twice to Parent, leaving messages on April 28 and May 1 for Parent. SPED Teacher-2 asked Parent to call Roberts Hawaii and ask to speak with Bus Co. Employee. Grandparent later resent the following email: “The IEP still unfinished concerns me with the end of the year quickly approaching and the annual due date of February long past. The bus is not in question at this time.” DOE Ex. 67 at 554-556. Later that day, SPED Teacher-2 informed Parent and Grandparent that May 8, 2023 may be a possible date to reconvene for the IEP meeting, but SPED Teacher-2 needed to confirm everyone’s availability. DOE Ex. 69 at 563-564.
102. On May 2, 2023, Bus Co. Employee called and spoke to Parent. Parent stated that Parent would call the bus company on when to start transportation services. DOE Ex. 83 at 758-760.

103. On May 3, 2023, Bus Co. Employee called Parent at 3:20 p.m. Parent stated that Parent was going into a meeting and would call back Bus Co. Employee. Parent did not call back Bus Co. Employee. DOE Ex. 83 at 758-760.
104. On May 4, 2023, SPED Teacher-2 emailed Parent and Grandparent a copy of a Prior Written Notice for the 4/28/2023 IEP meeting. SPED Teacher-2 also asked Parent and Grandparent to confirm their availability for an IEP meeting on May 8, 2023, which Parent acknowledged. DOE Ex. 71 at 570-572.
105. On May 8, 2023, the IEP team met again to continue developing an IEP for Student. Present at the IEP meeting were Parent, Grandparent, Principal-2, Vice Principal, Clinical Psychologist-2, SLP, GE Teacher, School Psychologist, SPED Teacher-2, and a counselor. Pet. Ex. 3 at 94.
106. During the 5/08/2023 IEP meeting, the IEP team discussed and reviewed, among other things, Student's LRE and considered resource setting, FSC setting, public separate facility, and private separate facility. Based on the data (daily reports, communication logs, clinical data) collected by Public School-2, the school members of the IEP team felt that Student needed a higher level of care than what Student was currently receiving. Student's current placement in a resource room at Public School-2 was not beneficial for Student. The data showed that the interventions Public School-2 used to address Student's behavioral concerns were not successful and did not justify continuing the same course of action. The IEP team considered an FSC classroom, however, the FSC classroom in Public School-2 had very low functioning, non-verbal students. This led some members of the IEP team to consider a public separate facility, which is a more restrictive environment than Student's current placement. The IEP team discussed that

Student's IEP would be implemented on a DOE public school campus, and when the 2023-2024 school year starts, Student's LRE would be at a public separate facility-- Public Separate Facility. Also during the 5/08/2023 IEP meeting, Parent and Grandparent disclosed that Student was attending Private Center, an ABA clinic. Parent requested transportation services to and from Private Center, and that Public School-2 provide the academic component to Student at Private Center. The IEP team scheduled a follow up meeting for May 15, 2023 to discuss Parent's requests. Parent did not agree that Public Separate Facility was appropriate for Student and did not accept the DOE's offer of FAPE. DOE Ex. 6 at 057-058; DOE Ex. 73 at 581-582; CP-2, Tr. Vol. 3, 126:7-19, 127:17-25, 130:3-132:3; School Psychologist, Tr. Vol. 4, 43:1-13, 46:7-48:11, 51:23-11; Vice Principal, Tr. Vol. 7, 42:23-43:13.

107. The May 8, 2023 IEP meeting resulted in an IEP dated "05/08/2023, 04/28/2023, 04/19/2023" ("2023 IEP"). According to the 2023 IEP, the IEP Annual Review Date is May 8, 2024, and the Reevaluation Date is March 28, 2026. Pet. Ex. 3 at 67; DOE Ex. 3 at 022-049.
108. According to the 2023 IEP, "[b]ased on information gathered from a variety of sources, the disability of [REDACTED] adversely affects [Student's] educational performance and participation in appropriate activities in the following manner:
[Student] continues to struggle with verbal and non-verbal communication skills across many different areas towards adults and peers, [Student] continues to show a need to develop social interaction skills with [Student's] peers, [Student] continues to show a need to develop emotion regulation skills, and continues to show progress towards working to grade level standards in [Student's] academics." It was determined that

██████████ was not a primary reason for Student's academic difficulties, but Student needed specifically designed instruction to address "socialization skills, and emotion regulation skills." Pet. Ex. 3 at 76.

109. The Impact Statement in the 2023 IEP reads: "[Student] is eligible for IDEA Chapter 60 category ██████████ [Student] has a ██████████ disability significantly affecting [Student's] verbal and nonverbal communication skills generally evident before the age of ██████████ and a ██████████ disability significantly affecting social interaction generally evident before the age of ██████████ [Student] also exhibits the following characteristics often associated with ██████████
██████████ a resistance to environmental change or change in daily routines, and unusual responses to sensory experiences, all in which adversely affects [Student's] educational performance." Pet. Ex. 3 at 79.
110. The 2023 IEP has nine (9) goals with objectives to address Student's language skills (reading, vocabulary, writing), math skills, and interpersonal communication and self-management skills. Two (2) of the nine (9) goals address improving Student's behavior by helping Student identify and manage overwhelming emotions and utilizing independent work skills when working on a problem. Pet. Ex. 3 at 81-89.
111. The 2023 IEP provides Student with the following Special Education and Related Services: 720 minutes per week of special education (5/15/2023-8/06/2023); 1515 minutes per week of special education (8/07/2023-5/08/2024); 270 minutes per quarter of counseling (5/15/2023-8/06/2023); 1080 minutes per quarter of counseling (8/07/2023-5/08/2024); and daily transportation (5/15/2023-5/08/2024). Pet. Ex. 3 at 90.

112. The 2023 IEP provides Student with the following Supplementary Aids and Services: frequent checks for understanding; chunking instruction; clear repeated instruction, directions; use of visuals, graphic organizers, checklists, timers; positive praise and feedback, continued support to continue working; giving choices when doing work; breaking down/chunking multi-step directions into 1-step directions; token system or reward incentives (breaks, etc.); utilization of wearing Apple watch (from home) to reduce feelings of anxiety; prompting to use calming/coping strategies first; use of safe room/area to alleviate rising frustrations; one-to-one adult support; behavior support plan; and crisis plan. Pet. Ex. 3 at 90.
113. In the Clarification of Services and Supports section of the 2023 IEP, it is noted that “[Public Separate Facility] is a public separate facility. [Student] will not participate with [Student’s] general education peers.” Pet. Ex. 3 at 90.
114. In the 2023 IEP, Student’s LRE statement reads: “[Student] will have the opportunity to participate with [Student’s] disabled peers for all subject areas. [Student’s] Least-Restrictive Environment will be the Public Separate Facility setting on a DOE Public School Campus.” Pet. Ex. 3 at 91.
115. On May 9, 2023, STO sent an email to Parent stating that Roberts Hawaii had made multiple attempts to contact Parent and that Student would be placed on a “will call, pending [P]arent to call and start service.” DOE Ex. 83 at 758-759.
116. On May 10, 2023, SPED Teacher-2 asked Parent and Grandparent if they were available for a meeting on May 15, 2023 to discuss Private Center and Parent’s request for transportation to and from Private Center. Parent agreed to meet on May 15, 2023. DOE Ex. 72 at 574-577.

117. On May 11, 2023, STO confirmed with Roberts Hawaii that morning transportation services were added for Student. Due to Student being picked up in City-1, which is outside of Public School-2's district, Student would be picked up at [REDACTED] DOE Ex. 75 at 690-693; Vice Principal, Tr. Vol. 5, 40:9-42:22, 49:5-50:22.
118. Following the IEP meeting on May 8, 2023, a Prior Written Notice, dated May 12, 2023 ("5/12/2023 PWN"), was issued. According to the 5/12/2023 PWN, the basis for DOE's proposed/refused actions were Student's current IEP and assessments; teacher reports (daily work, homework, observation, etc.); and input from general education teacher, special education teacher, administrator, school services coordinator, speech and language pathologist, clinical psychologist, Parent, and Grandparent. DOE Ex. 6 at 057-058; DOE Ex. 73 at 581-582.
119. On May 12, 2023, SPED Teacher-2 emailed to Parent and Grandparent a copy of the 2023 IEP and 5/12/2023 PWN. Upon receiving the 2023 IEP and 5/12/2023 PWN, Parent replied: "I'm not approving this. In fact I'm reporting this[;]" and "You're literally putting in writing taking away [Student's] access to the general education component and literally inputting only disabled students. It's literally the bottom paragraph." DOE Ex. 73 at 579-610.
120. On May 12, 2023, Principal-2 approved a "Request for IEP-Approved Special Education Transportation other than Normal Curb to Curb." Student would receive morning and afternoon transportation services between Grandparent's house in City-1 and Public School-2, [REDACTED] days a week. The request was approved by DES on May 15, 2023. Pet. Ex. 11 at 108.

121. On May 15, 2023, Principal-2 approved another “Request for IEP-Approved Special Education Transportation other than Normal Curb to Curb.” Student would receive morning and afternoon transportation services between Grandparent’s house in City-1 and Public Separate Facility, [REDACTED] days a week. The request notes: “Requested Return Location (if applicable): [Public School-2].” The request was approved by DES on May 17, 2023. Pet. Ex. 11 at 108.
122. Also on May 15, 2023, an aide from Roberts Hawaii contacted Parent and Parent told the aide that Parent would call them back. DOE Ex. 75 at 690-693.
123. For the remainder of the 2022-2023 school year, the bus was routed to take Student from City-1 to Public School-2, Student, however, never took the bus. Vice Principal, Tr. Vol. 5, 67:3-9.
124. Also on May 15, 2023, an IEP meeting was held with the following people in attendance: Parent, Grandparent, Principal-2, Clinical Psychologist-2, School Psychologist, SPED Teacher-2, SLP, GE Teacher, and a counselor. DOE Ex. 7 at 085.
125. During the 5/15/2023 IEP meeting, the IEP team discussed transportation services to Private Center and Parent’s concerns. Parent’s request for transportation services to Private Center was denied. The school members of the IEP team explained to Parent that transportation services could only be from home to a public school and from a public school to home. No changes were made to the 2023 IEP. Student’s LRE did not change and a public separate facility remained Student’s placement for the 2023-2024 school year⁶. DOE Ex. 8 at 088-089; SPED Teacher-2, Tr. Vol. 7, 76:22-79:18.

⁶ A copy of the IEP drafted on May 15, 2023 is not a part of the record. In the record is a copy of an IEP drafted on “07/05/2023, 05/15/2023.” DOE Ex. 7 at 060-086.

126. On or about May 19, 2023, Principal-2 issued the following letter to Parent: “Dear [Parent], Although it is your decision to allow [Student] to receive a full-time intensive ABA therapy at [Private Center], the school’s offer of a free and appropriate public education remains at [Public School-2] till May 26, 2023 and [Public Separate Facility] starting August 7, 2023. Please be aware that any services that are missed will not be made up.” Pet. Ex. 7 at 99; DOE Ex. 76 at 695, 702.
127. Upon receiving Principal-2’s letter on May 19, 2023, Parent informed Principal-2, Vice Principal and SPED Teacher-2 that “[Student] has a medical condition and is receiving services based off a doctors [sic] report....” Vice Principal then asked Parent for a written doctor’s recommendation that Student attend Private Center or receive outpatient hospitalization services. A written doctor’s recommendation was never given to Public School-2. On May 26, 2023, Parent requested an IEP meeting. DOE Ex. 76 at 695-702; Grandparent, Tr. Vol. 3, 84:2-85:3.
128. May 26, 2023 was the last day of instruction for public school students in Hawaii⁷.
129. On June 1, 2023, Vice Principal sent an email to Parent and Grandparent to thank them for sending Private Neuropsychologist’s December 2022 Neuropsych. Report to the school. Vice Principal asked Parent for written consent to allow School Psychologist and Clinical Psychologist-2 to speak to Private Neuropsychologist and someone from Private Center. DOE Ex. 79 at 729-738.

⁷ The undersigned takes judicial notice of the State of Hawaii Department of Education’s 2022-2023 school year calendar. See <https://www.hawaiipublicschools.org/DOE%20Forms/2022-23calendar.pdf>.

130. On June 8, 2023, Parent signed Consent for Release of Information forms for Public School-2 to release and receive information from Private Neuropsychologist and Private Center. DOE Ex. 81 at 746-749.
131. On June 13, 2023, DOE received the instant Request for IDEA Impartial Due Process Hearing.
132. On June 16, 2023, Parent revoked the Consent for Release of Information Parent had signed on June 8, 2023. DOE Ex. 81 at 744-749.
133. On June 20, 2023, Parent signed Consent for Release of Information forms allowing Public School-2 to release and receive information from Private Neuropsychologist and Private Center with the condition that Parent or Grandparent be present for all communications. DOE Ex. 82 at 751-756.
134. On July 5, 2023, the IEP team drafted an IEP dated “07/05/2023, 05/15/2023” (“7/05/2023 IEP”). The LRE in the 7/05/2023 IEP is the same as the 2023 IEP. DOE Ex. 7 at 060-086.
135. On August 15 and 16, 2023, the bus arrived in the morning at the time Parent agreed to with Roberts Hawaii at the City-1 location, and Student was not there to catch the bus. DOE Ex. 84 at 765-780; DOE Ex. 86 at 784-787.
136. In the afternoon of August 16, 2023, SPED Teacher-2 sent an email to Parent and Grandparent, informing them that, per the SPED transportation parent booklet, transportation services for Student were suspended due to [REDACTED] dates of “no call, no show,” and informed them to call Roberts Hawaii to resume transportation services. DOE Ex. 85 at 782.

Public Separate Facility

137. Public Separate Facility was formerly called [REDACTED] (“[REDACTED]”). Six (6) to seven (7) years ago, it was revamped and renamed Public Separate Facility. CP-2, Tr. Vol. 3, 107:23-108:3.
138. Public Separate Facility is located on three (3) public school campuses: the elementary school level (preschool to fifth or sixth grade) is located within a public elementary school campus; the middle school level (sixth or seventh grade to eighth grade) is located within a public middle school campus; and the high school level (ninth to twelfth grade) is located within a public high school campus. CP-2, Tr. Vol. 3, 108:1-17, 171:2-13.
139. The public separate facility Student would have attended is located on Public School-4. DOE Ex. 86 at 788.
140. Public Separate Facility’s school hours are [REDACTED] on Monday, Tuesday, Thursday, and Friday; and [REDACTED] on Wednesday. DOE Ex. 86 at 788.
141. The purpose of Public Separate Facility is to work with students who have behavioral issues. All students at Public Separate Facility are special education students, eligible under various categories, [REDACTED]
[REDACTED]-IDEA eligibility category is not a factor for admission. Public Separate Facility helps to “resocialize” students and work with them on their behaviors; change their behaviors; teach them how to self-regulate their emotions; guide them in problem solving; and help them work toward transitioning back to their homeschools where they can utilize what they have learned at Public Separate Facility to be successful in their homeschools. Public Separate Facility will implement each students’ respective IEP and

academic coursework from their homeschools. Students who attend Public Separate Facility are not transferred to another school; they remain students in their respective homeschools. The environment at Public Separate Facility is supportive, safe, and therapeutic. CP-2, Tr. Vol. 3, 107:23-109:24, 132:4-16.

142. Usually when a student goes to Public Separate Facility and has a one-to-one assigned to the student on his/her IEP, the one-to-one is usually taken off because Public Separate Facility already has [REDACTED] adults on staff; however, this would be a decision for parents to make. If parents decide that they want their child to keep their one-to-one from their homeschool, Public Separate Facility can accommodate this. CP-2, Tr. Vol. 3, 9-19.
143. Had Student attended Public Separate Facility, Student would have been with [REDACTED] other students. CP-2, Tr. Vol. 3, 171:14-19.
144. Public Separate Facility can provide the needed supports and services to Student to give Student the tools to manage Student's behavior. Public School-2 chose Public Separate Facility because Public Separate Facility could provide transportation, had an academic component, and was not permanent. CP-2, Tr. Vol. 3, 107:23-109:24; School Psychologist, Tr. Vol. 4, 52:15-53:1, 121:23-122:11.

Private Center

145. Private Center is located in City-3. DOE Ex. 81 at 748; Grandparent, Tr. Vol. 3, 81:3-7.
146. Private Center is not a school. Clinical Director, Tr. Vol. 1, 47:5-18.
147. Private Center is not a hospital setting. Clinical Director, Tr. Vol. 1, 85:23-25; School Psychologist, Tr. Vol. 4, 42:12-13.

148. Private Center is a clinic that provides ABA services. All the children attending Private Center have been diagnosed with [REDACTED]. There are no non-disabled children at Private Center. The age range of the children attending Private Center is [REDACTED] months to [REDACTED] years old. Clinical Director, Tr. Vol. 1, 47:10-18, 86:1-5, 122:2-8.
149. Private Center does not offer occupational therapy, physical therapy, or speech-language therapy; however, Private Center will allow parents to provide their children with these services by allowing outside providers to go into Private Center. These outside providers are not Private Center employees, nor are they considered staff members of Private Center. Clinical Director, Tr. Vol. 1, 86:6-23.
150. Private Center is open to allowing tutors to go into Private Center to provide academic services. Clinical Director, Tr. Vol. 1, 47:20-48:19.
151. Private Center has registered behavior technicians ("RBTs") and [REDACTED] board-certified behavior analysts ("BCBAs") on staff. Private Center does not have teachers. Clinical Director, Tr. Vol. 1, 48:4-10, 85:5-20, 103:17-104:1.
152. Student's services at Private Center are covered by private insurance. Clinical Director, Tr. Vol. 1, 44:23-45:5.
153. Student only receives ABA and RBT services at Private Center. Grandparent, Tr. Vol. 3, 98:10-99:6; Clinical Director, Tr. Vol. 1, 125:5-11.
154. Private Center does not provide transportation to Student. Student is dropped off by Parent, Grandparent, Uber, or the HandiVan. Clinical Director, Tr. Vol. 1, 99:21-100:12.

155. Children at Private Center are grouped based on developmental level. Student's group consists of children between the ages of [REDACTED] years old. Clinical Director, Tr. Vol. 1, 121:25-122:16.
156. Student was assessed at Private Center on March 24, 28 and 31, 2023, and began getting [REDACTED] hours per day of RBT services on May 15, 2023. There was a delay of approximately two (2) weeks between receiving insurance approval and providing full time services to Student because Student could not be paired with "regular" RBTs and needed RBTs who had higher levels of expertise. Clinical Director, Tr. Vol. 1, 81:8-82:25.
157. When Student first started at Private Center, Student could not be placed with other children for the first few weeks due to Student's aggressive behaviors. During Student's first and second weeks at Private Center, Student's violent outbursts sometimes required [REDACTED] adults to maintain Student because Student engaged in property destruction and aggressive behaviors. Student would throw chairs and desks; scratch Clinical Director and other adults, causing them to bleed; bite, kick, hit other people; pull people's hair; and threaten to kill people. Student verbally protested a lot, screamed, and yelled. Student, however, did not hurt him/herself. After the first few weeks, although Student continued to engage in aggressive behaviors, Student's behavior improved and continues to improve. Clinical Director, Tr. Vol. 1, 50:14-52:19, 66:14-67:12, 117:23-120:11.
158. At Private Center, Student has a behavior support plan that includes a crisis management plan. The crisis management plan is used in situations where Student's one-to-one cannot safely redirect Student by him/herself. The one-to-one will call Clinical Director and/or others for assistance. The crisis management plan also states that if no one can

- safely deescalate Student, then 911 would be called. If 911 is called, Parent and/or Grandparent would be informed. Based on Clinical Director's experience with other children, when 911 is called, families usually take their children to a hospital. Clinical Director, Tr. Vol. 1, 120:12-121:19.
159. Student receives [REDACTED] hours of ABA services per week: Monday through Friday, [REDACTED] hours per day. Student has three (3) RBTs with Student throughout the day: the first RBT watches Student from the time Student is dropped off at Private Center to 11:30 a.m.; the second RBT watches Student from 11:30 a.m. to 2:00 p.m.; and the third RBT watches Student from 2:00 p.m. to 5:30 p.m. All three (3) RBTs are in a master's program pursuing BCBA certification. Due to the severity of Student's behavior, an RBT with less experience cannot be paired with Student. Clinical Director, Tr. Vol. 1, 60:25-62:11, 81:8-82:25; Grandparent, Tr. Vol. 3, 99:7-17.
160. Clinical Director has never observed Student in a school setting. Clinical Director, Tr. Vol. 1, 59:11-14.
161. According to Clinical Director, Student's behavioral challenges during the first few weeks at Private Center would make it appropriate to place Student in a school setting where Student is always working with a one-to-one and separated from other children. After attending Private Center for approximately four (4) months, Clinical Director recommends that Student be placed in an environment with children who are at a very similar level of development or typically developing children in small classrooms. Clinical Director, Tr. Vol. 1, 65:23-68:20, 124:19-125:4.
162. The IEP team did not place Student at Private Center. School Psychologist, Tr. Vol. 4, 49:21-24.

V. CONCLUSIONS OF LAW

A. BURDEN OF PROOF

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

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

B. IDEA REQUIREMENTS

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

Special education means “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability” and related services are the supportive

services required to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.34; 34 C.F.R. § 300.39; 20 USC § 1401(26) and (29). To provide FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP.” Dept. of Educ. of Hawaii v. Leo W., 226 F.Supp.3d 1081, 1093 (D.Haw.2016).

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

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

The mechanism for ensuring a FAPE is through the development of a detailed, individualized instruction plan known as an Individualized Education Program (“IEP”) for each

child. 20 U.S.C. §§ 1401(9), 1401(14), and 1414(d). The IEP is a written statement, prepared at a meeting of qualified representatives of the local educational agency, the child's teacher, parent(s), and where appropriate, the child. The IEP contains, among other things, a statement of the child's present levels of academic achievement and functional performance, a statement of the child's annual goals and short-term objectives, and a statement of specific educational services to be provided for the child. 20 U.S.C. § 1414(d). The IEP is reviewed and, if appropriate, revised, at least once each year. 20 U.S.C. § 1414(d). The IEP is, in effect, a "comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." Burlington v. Dep't 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 Dep't of Educ., 694 F.3d 167 (2012).

Procedural violations do not necessarily constitute a denial of FAPE. Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 892 (9th Cir.2001). If procedural violations are found, a further inquiry must be made to determine whether the violations: (1) resulted in a loss of educational opportunity for Student; (2) significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the Student; or (3) caused Student a deprivation of educational benefits. Amanda J., 267 F.3d 877, 892 (9th Cir.2001).

C. ISSUES FOR DETERMINATION

- 1. Whether DOE denied Student a free and appropriate public education when they placed Student in an Intensive Learning Center (Public Separate Facility) without the appropriate data to support the decision.**
-

In this issue, Petitioners allege that DOE placed Student in a public separate facility—Public Separate Facility—without the appropriate data to support this placement. Based on the evidence adduced during the due process hearing, the undersigned Hearings Officer finds that Petitioners fail to meet their burden of proof with respect to this issue.

Pursuant to the IDEA, the DOE 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. Student attended Public School-1 from [REDACTED] to [REDACTED] grade. (FOF 15). In [REDACTED] while in [REDACTED] grade, Student transferred to Public School-2. (FOF 16). While at Public School-1, Student did not have aggressive or violent behaviors, had friends, and made progress in Student's report cards and IEP goals. (FOF 33). While Student did not have any aggressive behaviors at Public School-1, Student had aggressive and violent behaviors at Public School-2. (FOF 45, 46, 73, 75). It is known that Student has difficulties with changes and transitions. (FOF 18).

While in [REDACTED] grade, Student's reevaluation for special education eligibility was due. (FOF 55). As a part of the reevaluation, Student was given the following assessments: academic, speech/language, occupational therapy, physical therapy, adaptive behavior, and emotional behavioral. (FOF 57, 58, 60, 74, 77, 78). A classroom observation was also conducted as a part of the reevaluation. (FOF 59).

After the reevaluation, the IEP team met on March 28, 2023 to discuss the results. (FOF 82). Based on the reevaluation, the IEP team determined that Student continued to qualify for

special education services under the IDEA, although the category of eligibility changed from [REDACTED] (FOF 66, 82, 83). Following the eligibility determination, the IEP team met in a series of IEP meetings to formulate a new IEP for Student—April 19, April 28, and May 8, 2023. (FOF 87, 95, 105). The IEP team discussed the various placement options and determined that the appropriate placement for Student was in a public separate facility for students with behavioral problems. (FOF 96, 106). The school members of the IEP team determined that the severity of Student’s behavioral needs and the unsuccessful results of the current interventions warranted placing Student in a public separate facility. (FOF 106).

School Psychologist testified that Student had behavioral concerns and the services Public School-2 had been providing to Student was not sufficient. (FOF 106). School Psychologist opined that Student needed a higher level of care than what Student was originally receiving at Public School-2. (FOF 106). Although Parent alleges that placement at a public separate facility is not appropriate and too restrictive, Parent did not offer any credible evidence, either through testimony or documents, to support Parent’s position. 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.”) Based on the testimonies of school experts who worked with and/or observed Student in the school setting, the educational benefits and non-academic benefits of Student being placed in the general education setting are outweighed by the benefits of placing Student in a public separate facility because Student does not listen to authority, and is aggressive and violent towards other students and adults, which disrupts other students from learning and the teacher from teaching. (FOF 45, 46, 59, 73, 75). Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. ex rel. Holland, 14 F.3d 1398, 1404 (9th Cir.1994). Furthermore, although there is evidence that Student was not aggressive and made progress towards Student’s IEP goals at Public School-1 (FOF 33), this does not make DOE’s offer of FAPE at a public separate facility not appropriate, especially when it is known that Student has difficulties with changes and transitions, and Student had transitioned from a school that Student had been attending since Student was [REDACTED] years old. (FOF 18).

DOE’s proposal to place Student at Public Separate Facility is supported by Private Neuropsychologist’s December 2022 Neuropsych. Report and Clinical Director’s testimony. Based on the December 2022 Neuropsych. Report, Private Neuropsychologist recommended that Student receive “inpatient hospitalization” and “residential academic services to continue to

provide psychiatric and psychotherapeutic services and monitoring,” which are more restrictive than a public separate facility⁸. (FOF 51). “Inpatient hospitalization” is for an individual who poses an imminent risk of harm to self or others or has psychotic symptoms or doesn’t know reality. (FOF 52). While attending Public Separate Facility, Student would continue to be a student at Public School-2; would be able to go home after school; receive transportation and an education; and Student’s attendance at Public Separate Facility would be temporary because the goal is to equip Student with the necessary social and emotional skills to transition back to Public School-2. (FOF 140, 141, 144). Although Public Separate Facility does not have general education students, neither does Private Center, where Parent wants Student to attend. (FOF 148).

According to Clinical Director, when Student started at Private Center on May 15, 2023, Student’s aggressive behavior was such that Student could not be paired with “regular” RBTs, which delayed providing services to Student because Private Center could not find RBTs who were experienced enough to be with Student. (FOF 156). The RBTs who were paired with Student were very experienced and in the process of getting their master’s degree as board-certified behavior analysts. (FOF 159). Clinical Director testified that when Student first started at Private Center, there were times when they needed [REDACTED] adults to maintain Student’s safety and the safety of the environment because Student engaged in property destruction and aggressive behaviors. (FOF 157). Clinical Director testified that when Student started at Private Center, Student was aggressive—throwing desks and chairs; scratching Clinical Director and other adults; biting and hitting other people; pulling people’s hair; threatening to kill people; and

⁸ The continuum of alternative placements include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. H.A.R. §8-60-16; Vice Principal, Tr. Vol. 7, 42:23-43:13.

frequently protested, screamed, and yelled. (FOF 157).

Based on the foregoing, Petitioners fail to meet their burden in showing that a public separate facility, like Public Separate Facility, is an overly restrictive environment or that DOE did not have sufficient data to place Student in a public separate facility.

2. **Whether DOE was obligated to provide transportation to Student in the following situations:**
- (a) From home to Public School-2;**
 - (b) From Public School-2 to home;**
 - (c) From home to Private Center, and from Private Center back home;**
 - (d) From home to Public School-2 then Private Center, and then back to Public School-2 then home;**
 - (e) From Public School-2 to an alternate site (such as an after-school program in a different school).**

Petitioners allege that DOE was obligated to provide transportation to Student and DOE's refusal to do so denied a FAPE to Student. It is important to note that there are two separate legal theories under which Petitioners may be entitled to transportation services from the DOE: (1) under the MVA; and (2) under the IDEA if transportation is needed to provide Student with an education. The undersigned Hearings Officer is without jurisdiction to determine if there has been a violation of the MVA with respect to the provision of transportation services, and Petitioners fail to meet their burden in showing that Student was denied a FAPE under the IDEA in the situations listed above.

(i) **[REDACTED] Act**

Petitioners argue in their Closing Brief that "Transportation was withheld against the MV act." Petitioners' Closing Brief, p. 4. According to the MVA, in order for the State to be eligible for federal fundings, the State must "implement a coordinated system for ensuring that [REDACTED] children and youths...are promptly provided necessary services..., including transportation, to allow [REDACTED] children and youths to exercise their choices of schools...." 42

U.S. Code § 11432(e)(3)(E)(i)(III). However, unlike “the IDEA, which [was]...implemented to protect the rights of individuals with disabilities, the [REDACTED] Act was implemented by Congress for a different purpose – to protect the rights of individuals who are [REDACTED]” S.C. by and through his Next Friend Melissa C., et al. v. Riverview Gardens Sch. Dist., et al., 2:18-CV-04162-NKL, 119 LRP 5835, 73 IDELR 258, page 6 (U.S.D. West. Dist. of Missouri Feb. 25, 2019). “IDEA administrative hearing officers lack jurisdiction over [REDACTED] claims.” S.C. by and through his Next Friend Melissa C., et al. v. Riverview Gardens Sch. Dist., et al., 2:18-CV-04162-NKL, 119 LRP 5835, 73 IDELR 258, page 7 (U.S.D. West. Dist. of Missouri Feb. 25, 2019). Therefore, to the extent that this issue relies on the MVA, the undersigned Hearings Officer is without authority to decide whether DOE was obligated to provide transportation services to Student to allow Student to exercise Student’s choice of schools.

(ii) Individuals with Disabilities Education Act

Now, turning to whether the DOE was obligated to provide transportation services to Student under the IDEA. The rules and regulations regarding transportation services for students with disabilities state: “The [D]epartment [of Education] **may** provide suitable transportation to and from school and for educational field trips for all children in grades kindergarten to twelve and in special education classes.” H.R.S. § 302A-406(a) (bold added); “Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education....” 34 C.F.R. § 300.34(a) (2006); and “The term ‘related services’ means transportation, and such developmental, corrective, and other supportive services...as **may** be required to assist a child with a disability to benefit from special education....” 20 U.S.C. § 1401(26)(A) (bold added). Based on the language of the foregoing rules and regulations, transportation services are not automatically

given to all special education students. Transportation services are provided to special education students who require it to assist them to benefit from special education.

Transportation as a related service under the IDEA includes travel to and from school and between schools; travel in and around school buildings; and specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability. 34 C.F.R. § 300.34(c)(16). See also, H.A.R. §8-60-2, “Related services,” ¶16. An IEP team is responsible for determining whether transportation services is necessary in order for a student to receive a FAPE. If an IEP team determines that supports or modifications are needed in order for a student to be transported so that the student can receive a FAPE, the student must receive the necessary transportation and supports at no cost to the parents. H.A.R. § 8-27-5(1); 71 Fed. Reg. 46576 (August 14, 2006). “[I]f a child’s IEP team determines that the child does not need transportation as a related service, and the public agency transports only those children whose IEPs specify transportation as a related service, and does not transport nondisabled children, the public agency would not be required to provide transportation to a disabled child.” See Appendix A to 34 C.F.R. Part 300, Question 33 (July 1, 1999).

In the instant case, Student’s 2/15/2022 IEP included transportation services when Student was attending Public School-1. (FOF 23). Student started at Public School-2 on October 24, 2022 and in November of 2022, Parent waived transportation services because Student was accepted into the A+ afterschool program at Public School-2. (FOF 38, 40). On or about February 1, 2023, when Student was suspended from the A+ afterschool program, Parent requested that transportation services to City-1 be reinstated. (FOF 61, 62). Student’s 2/03/2023 IEP provides Student with daily transportation. (FOF 68). On March 14, 2023, Principal-2 approved daily afternoon transportation services from Public School-2 to Grandparent’s house in

City-1. (FOF 81). On April 4, 2023, Parent requested an IEP meeting to discuss getting transportation services “to and from home and school.” (FOF 85). On April 25, 2023, Vice Principal asked Parent if Parent wanted morning transportation services to school, and if yes, from which location should the bus pick up Student. (FOF 93). Transportation services from Public School-2 to City-1 was scheduled to start on April 26, 2023, but Student did not need transportation services at that time because Student was not feeling well. (FOF 93). Due to Student’s reevaluation and a finding of continued eligibility for special education services, IEP meetings were held on April 19, April 28, and May 8, 2023 to create a new IEP for Student, resulting in the 2023 IEP. (FOF 86-88, 95-97, 105-114). One of the related services provided to Student in the 2023 IEP is daily transportation. (FOF 111). On May 12, 2023, Principal-2 approved daily morning and afternoon transportation services between Grandparent’s house in City-1 and Public School-2. (FOF 120). On May 15, 2023, Principal-2 approved daily morning and afternoon transportation services between Grandparent’s house and Public Separate Facility. (FOF 121). Parent’s request for transportation services to and from Private Center was denied. (FOF 106, 125).

(1) From home to Public School-2; From Public School-2 to home.

Petitioners fail to meet their burden of proof in showing that DOE failed to provide transportation services from home to Public School-2 and from Public School-2 to home. Transportation services are listed in the 2/15/2022 IEP, 2/03/203 IEP, and 2023 IEP. (FOF 23, 68, 111). Daily afternoon transportation services from Public School-2 to Grandparent’s house in City-1 were approved on March 14, 2023. (FOF 81). On April 25, 2023, Vice Principal sought clarification as to whether Parent also wanted transportation services in the morning, and daily morning transportation services from City-1 to Public School-2 and Public Separate

Facility were subsequently approved on May 12 and 15, 2023, respectively, by Principal-2. (FOF 93, 120, 121). Although there was testimony that there were issues with implementation of the transportation services, the issue presented in this due process hearing concerns DOE's obligation to provide transportation services, not whether DOE failed to implement the transportation services; therefore, failure to implement transportation services is not within the issues in this due process hearing, and the undersigned Hearings Officer is without authority to decide the issue.

However, even assuming that this issue encompasses allegations of failure to implement transportation services, Petitioners would also have failed to prove this issue. An implementation failure occurs when a school materially fails to implement a student's IEP. Van Duyn v. Baker School Dist. 5J, 502 F.3d 811, 815 (9th Cir.2007)⁹. Student was able to start school at Public School-2 on October 24, 2022. (FOF 38). Shortly after Student started school, sometime in November of 2022, Parent waived transportation services because Student was accepted into the A+ afterschool program at Public School-2. (FOF 40). Parent sought to reinstate transportation services to City-1 around February 1, 2023 when Student was suspended from the A+ afterschool program. (FOF 61, 62). On March 14, 2023, Principal-2 approved afternoon transportation to City-1. (FOF 81). On April 19, 2023, Vice Principal inquired and received confirmation from Parent on where Student should be dropped off in the afternoon. (FOF 89). Roberts Hawaii called Parent on April 25, 2023 and transportation services were available to Student beginning on April 26, 2023. (FOF 93). Although it took over two (2) months for transportation services to be available, this is a minor discrepancy considering Public School-2 is located in City-2 and Grandparent's house is located in City-1, creating out-of-

⁹ See Issue 3, below, for further legal authority on implementation standard.

district complications for the DOE. (FOF 92, 117). Once transportation services were available, Roberts Hawaii called Parent on April 28 (FOF 94), May 1 (FOF 99), May 2 (FOF 102), May 3 (FOF 103), and May 15 (FOF 122) to begin the services. On May 9, 2023, STO also informed Parent that Roberts Hawaii had been trying to get in touch with Parent. (FOF 115). Parent declined to use the transportation services and the transportation services were suspended pending Parent calling Roberts Hawaii to resume the services. (FOF 135, 136). Therefore, the minor discrepancy did not amount to a material failure to implement the 2/03/2023 IEP. Also, a one-and-a-half-month delay in receiving morning transportation services is a minor discrepancy, and does not amount to a material failure to implement the 2/03/2023 IEP: Parent asked for morning transportation services on April 4, 2023, and it was approved and available for Student by mid-May. (FOF 85, 120, 121). There is also no implementation failure of the 2023 IEP since the 2023 IEP was completed and implemented on May 8, 2023, a week before morning transportation services were approved and available, and afternoon transportation services was already available to Student by that time. (FOF 107, 120, 121).

(2) From home to Private Center, and from Private Center back home; From Public School-2 to an alternate site.

None of Student's IEPs state that DOE will provide transportation services to and from home and Private Center, and from Public School-2 to an alternate site. In fact, DOE declined Parent's request for transportation services to Private Center. (FOF 125). Based on IDEA regulations, the DOE is not obligated to provide transportation services to and from home and Private Center, and from Public School-2 to an alternate site. Haw. Admin. Rules § 8-60-25, "Location of services and transportation," governs the DOE's responsibility in providing transportation services to students who have been parentally-placed at private schools. The rule states:

(b) Transportation: General.

- (1) If necessary for the student to benefit from or participate in the services provided, a parentally-placed private school student with a disability shall be provided transportation:
 - (A) From the student's school or the student's home to a site other than the private school; and
 - (B) From the service site to the private school, or to the student's home, depending on the timing of the services.
- (2) The department is not required to provide transportation from the student's home to the private school.

Student was not placed at Private Center. (FOF 162). There is no credible evidence that Student needs the services provided by Private Center, and Private Center is therefore not a "service site" as contemplated by H.A.R. § 8-60-25(b)(1). (FOF 41, 53). Even assuming that Private Center is a school, which it is not, Student would still not be entitled to transportation services to Private Center. H.A.R. § 8-60-25(b)(2). And even assuming that Private Center is a hospital setting, which Petitioners argue but no credible evidence supports, Private Center would not be considered a "service site" because Student was not placed at Private Center¹⁰.

Similarly, there is no credible evidence that Student needs the services provided by an alternate site (such as an afterschool program in a different school). "When transportation other than to and from school and a location other than a student's home is requested, it shall be referred to the department. The department **may** provide transportation if there are no additional costs involved." H.A.R. § 8-27-4(c) (bold added). Student receiving transportation services to an alternate site that is not a part of Student's IEP is at the discretion of the DOE.

Furthermore, Student attending an alternate site after school would be for the convenience of Parent; however, convenience for a parent is not a reason to provide transportation services. Although not binding legal authority in this jurisdiction, Hawaii's sister

¹⁰ State of Hawaii Department of Education's transportation policy can be found at H.A.R. §§ 8-27-1 through 8-27-10.

state of California opined on a school's obligation to provide transportation services for the convenience of parents in Los Angeles Unified Sch. Dist. (CA SEA October 21, 2013) (11 ECLRP 37, 113 LRP 43695). In Los Angeles Unified Sch. Dist., an Administrative Law Judge ("ALJ") found that a student did not prove that an IEP team denied him a FAPE by declining to provide him with home to school transportation because the student's medical history did not support a finding that he needed such service. The ALJ also found that the student's mother not being able to drive and needing to care for another disabled child and the student's father having difficulty dropping off and picking up student each day due to his work schedule did not justify offering student transportation services. Los Angeles Unified Sch. Dist., 11 ECLRP 37, 113 LRP 43695, at FOF ¶21, Legal Conclusion ¶8 (SEA CA October 21, 2013)¹¹. Another example is a case from the United States District Court, D. Maine, which sits in the First Circuit, that opined that a parent's request for accommodations based on personal reasons (i.e., unable to have an adult at home to ensure that a child gets home from school) may be beyond the reach of the IDEA if it is made for personal reasons unrelated to the student's educational needs. Ms. S. ex rel. L.S. v. Scarborough Sch. Committee, 366 F.Supp.2d 98, 99-100 (U.S.D.C. Maine Feb. 7, 2005).

Based on the evidence presented at the due process hearing, Petitioners fail to prove by preponderance of the evidence that the IEP denied Student a FAPE by not providing

¹¹ The ALJ, however, did find that the school denied the student a FAPE by failing to provide transportation from student's home school (Santana Arts Academy) to a Capacity Adjustment Program ("CAP") school (Lassen Elementary School), in violation of the District's Transportation Guidelines and the District's Procedures for Capping School Enrollment. FOF 8, 11; Legal Conclusion 9. The Capacity Adjustment Program was designed to relieve school overcrowding. Students attending CAP schools, regardless of whether the students are special education or regular education, were entitled to home school to CAP school transportation. Legal Conclusion 9. This alternative legal theory of finding a denial of FAPE is not applicable to the instant case.

transportation services to Student in the following situations: (1) from home to Private Center, and from Private Center back home; and (2) from Public School-2 to an alternate site (such as an afterschool program in a different school).

(3) From home to Public School-2 then Private Center, and then back to Public School-2 then home;

For the reasons articulated in paragraphs (1) and (2), above, DOE did not deny Student a FAPE in this scenario. As indicated in Student's IEPs, transportation services were provided to and from home and Public School-2, and DOE is not required to provide transportation services to and from Public School-2 and Private Center.

Based on the foregoing, Petitioners did not meet their burden of proof with respect to this issue.

3. Whether DOE materially failed to implement Student's February 3, 2023 IEP, April 19, 2023 IEP, and May 15, 2023 IEP by not letting Student be with general education students.

Petitioners allege that the DOE materially failed to implement Student's 2/03/2023 IEP, 4/19/2023 IEP and 5/15/2023 IEP by not letting Student be with general education students.

Based on the evidence adduced at the due process hearing, the undersigned Hearings Officer finds that Petitioners did not meet their burden with respect to this issue.

The Ninth Circuit Court of Appeals in Van Duyn v. Baker School Dist. 5J held that "when a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." Van Duyn v. Baker School Dist. 5J, 502 F.3d 811, 815 (9th Cir.2007). "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational

progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.” Van Duyn, 502 F.3d at 822.

The term FAPE means special education and related services that are provided in conformity with an IEP. 20 U.S.C. § 1401(9)(D). Special education and related services “need only be provided ‘in conformity with’ the IEP. There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.” Van Duyn, 502 F.3d at 821.

To properly apply the *Van Duyn* standard, the Hearings Officer must analyze whether the DOE failed to implement specific provisions of C.J.’s IEP. *See Van Duyn*, 502 F.3d at 822. If the DOE has failed to implement specific provisions of C.J.’s IEP, the Hearings Officer must decide whether the failure was material. *Id.* In doing so, the Hearings Officer is required to determine whether “there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” *Id.* In this case, the Hearings Officer must determine whether the DOE materially failed to implement specific provisions of C.J.’s IEP despite its efforts after furloughs began.

Dept. of Educ., Hawaii v. C.J., 2011 WL 6002621, CV. No. 10-00257 AWT-BMK, at *4

(D.Haw. Nov. 29, 2011). The Ninth Circuit Court held that “the overarching goal of the IDEA is to prevent the isolation and exclusion of disabled children, and provide them with a classroom setting as similar to non-disabled children as possible.” N.D., 600 F.3d at 1115. The Ninth Circuit Court affirmed the district court’s denial of a preliminary injunction because disabled and non-disabled students were equally affected.

For the reasons stated below, the undersigned Hearings Officer finds that Petitioners have not met their burden in showing that DOE failed to materially implement Student’s 2/03/2023 IEP, 4/19/2023 IEP and 5/15/2023 IEP “by not letting Student be with general education students.”

(1) 2/03/2023 IEP

According to Student's 2/03/2023 IEP, "[Student] will have the opportunity to participate with [Student's] disabled peers for ELA and Math. [Student] will have the opportunity to participate with [Student's] non-disabled peers for Science, Social Studies, Homeroom, Recess, Lunch, Hawaiian Studies, SEL, PE, and Performing Arts. Field trips, school-wide activities, school-wide assemblies, and any activity deemed appropriate will be with [Student's] non-disabled peers. [Student's] Least-Restrictive Environment will be a combination of the General Education and Special Education setting on a DOE Public School Campus." (FOF 71). It is unclear from Petitioners' arguments how Public School-2 materially failed to implement the 2/03/2023 IEP by not letting Student be with general education students. In review of the evidence, Student was not allowed to be with general education students when Student was suspended on February 14, 2023 (FOF 73) and February 24, 2023 (FOF 75); however, suspension for kicking, scratching, punching other people, and threatening other people is not a failure to implement Student's LRE.

Also, Student not being able to be with general education students because Student did not have transportation services was not a failure to implement Student's 2/03/2023 IEP. Parent requested that afternoon transportation services be reinstated on or about February 1, 2023 when Student was suspended from the A+ afterschool program. (FOF 61, 62). Afternoon transportation services from Public School-2 to City-1 were available to Student beginning April 26, 2023. (FOF 93). On April 4, 2023, Parent asked for morning transportation services, and on April 25, 2023, Vice Principal asked from which location since Student has [REDACTED] addresses on file—[REDACTED] in City-1 and [REDACTED] in City-2. (FOF 85, 89). Morning transportation services were added on May 11, 2023 from City-1 to Public School-2. (FOF 120). By the time Parent asked

for morning transportation, Student had already stopped going to Public School-2 on March 9, 2023 (FOF 80) and started assessments at Private Center on March 24, 2023. (FOF 156). At the point when Student stopped going to Public School-2 on March 9, 2023, Public School-2 could not implement any part of Student's 2/03/2023 IEP.

(2) 4/19/2023 IEP

The IEP drafted on April 19, 2023 was not a complete IEP, but the first day of a 3-day IEP meeting to formulate the 2023 IEP. (FOF 107). Although there is a draft 4/19/2023 IEP, this IEP was never implemented. (FOF 87, 88). For the purposes of this issue, the undersigned will address the 2023 IEP, formulated on April 19, April 28, and May 8, 2023. (FOF 107).

According to the 2023 IEP, "[Student] will have the opportunity to participate with [Student's] disabled peers for all subject areas. [Student's] Least-Restrictive Environment will be the Public Separate Facility setting on a DOE Public School Campus." (FOF 114). Student's placement at a public separate facility will provide Student with no opportunity to participate with general education students. As discussed above in Issue 1, Student's placement in a public separate facility was appropriate. Public School-2 did not have an opportunity to implement the 2023 IEP, which was completed on May 8, 2023, because Student did not go to school and was attending Private Center full time since May 15, 2023. Therefore, DOE could not have failed to implement the 2023 IEP by not letting Student be with general education students.

(3) 5/15/2023 IEP

There is no stand-alone IEP dated May 15, 2023 in the record. No changes to the 2023 IEP was made during the 5/15/2023 IEP meeting, and Student's LRE remained the same. (FOF 125). There is an IEP dated "07/05/2023, 05/15/2023" ("7/05/2023 IEP"). (FOF 134). While the 7/05/2023 IEP is beyond the scope of this due process hearing as it was completed after the

filing of the instant due process complaint, the undersigned will note that the LRE statement in the 7/05/2023 IEP is the same as the 2023 IEP. (FOF 134). DOE did not materially fail to implement Student's 5/15/2023 IEP by not letting Student be with general education students. Student's LRE after the 5/15/2023 IEP meeting did not change and did not include opportunities to be with general education students. Student's LRE is to have all classes with other disabled children. Parent's disagreement with placing Student in a public separate facility that only has disabled children is addressed in Issue 1. Furthermore, Student not going to school at Public School-2 prevented the DOE from implementing Student's 5/15/2023 IEP.

Based on the foregoing, DOE did not fail to implement the LRE provision of Student's 2/03/2023 IEP, 2023 IEP, and 5/15/2023 IEP.

F. PETITIONERS FAIL TO MEET THEIR BURDEN IN SHOWING THAT PRIVATE CENTER IS AN APPROPRIATE PLACEMENT

The U.S. Supreme Court has recognized the rights of parents who disagree with a proposed IEP to unilaterally withdraw their child from public school and place the child in a private school and request reimbursement for tuition at said private school from the local educational agency. Florence County School Dist. Four v. Carter, 510 U.S. 7, 12, 114 S. Ct. 361, 364-365, 126 L.Ed.2d 284 (1993) (citing School Comm. of Burlington v. Department of Ed. of Mass., 471 U.S. 359, 369-370, 105 S. Ct. 1996, 2002-2003, 85 L.Ed.2d 385 (1985)), see also 20 U.S.C. § 1415(b)(6), (f)(1)(A). A parent who unilaterally places a child in private school pending review proceedings under the IDEA is entitled to reimbursement if the parent can establish that (1) the public placement violated the IDEA, and (2) the private school placement was proper under the IDEA. Doug C., 720 F.3d 1038, 1041, 1047-1048 (9th Cir.2013) (citing Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 126 L.Ed.2d 284 (1993)). If both are met, "the district court must then exercise its 'broad discretion' and weigh

‘equitable considerations’ to determine whether, and how much, reimbursement is necessary.”

C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist., 635 F.3d 1155, 1159 (9th Cir.2011) (citing Carter, 510 U.S. at 15-16, 114 S. Ct. 361).

The Ninth Circuit Court of Appeals has adopted the standard put forth by the Second Circuit in Frank G. v. Bd. Of Educ., 459 F.3d 356, 365 (2nd Cir.2006), where “to qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child’s potential. They need only demonstrate that the placement provides **educational instruction** specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.” C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist., 635 F.3d 1155, 1159 (9th Cir.2011) (citing Frank G. v. Bd. Of Educ., 459 F.3d at 365) (bold added). Parental placement can be appropriate, even if it does not meet state standards. 34 C.F.R. 300.148(c). See e.g., Florence County Sch. Dist. Four v. Carter, 20 IDELR 532 (U.S. 1993).

In this case, Petitioners have failed to prove that DOE denied Student a FAPE. However, even assuming that Petitioners did meet their burden, Petitioners also failed to show that Private Center is an appropriate placement for Student. The evidence shows that Private Center is not a school; does not provide educational instruction; and has no teachers. (FOF 146, 148, 151). Private Center only has RBTs and BCBAs. (FOF 151, 153). Private Center is not able to provide educational instruction specially designed to meet the unique needs of Student, supported by such services as are necessary to permit Student to benefit from instruction. DOE providing educational instruction at Private Center will not make Private Center appropriate. Reimbursement is also not an issue because the services provided by Private Center are being paid for by private insurance. FOF 152; Petitioners’ Closing Brief, p. 6.

Based on the foregoing reasons, Petitioners have not proven that Private Center placement was proper under the IDEA.

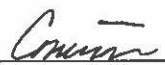
V. DECISION

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

RIGHT TO APPEAL

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

DATED: Honolulu, Hawaii, November 24, 2023.



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