

On April 4, 2017, Respondent's counsel submitted a Declaration to the undersigned Hearings Officer to extend the 45-day period in which a decision is due under HAR §8-60-69, from April 10, 2017 to May 24, 2017, and from May 25, 2017 to July 8, 2017, and from July 9, 2017 to August 22, 2017. The extension was granted on April 7, 2017.

On June 29, 2017, Respondents filed their Witness and Exhibit list and Exhibits.

On June 30, 2017, Petitioners filed their Witness and Exhibit list. On July 3, 2017, Petitioners filed their Supplemental Witness list.

On July 10, 2016, the hearing was commenced by the undersigned Hearings Officer. Petitioners were represented by Ms. Hamman; Parents were present. Respondent was represented by Mr. Mow; the DOE DES was present on behalf of Respondent. The hearing was not concluded by July 14, 2017. The hearing was furthered to July 28, 2017. At the conclusion of the hearing, Ms. Hamman orally requested an extension of the 45-day time limit in which a final decision is due from August 23, 2017 to October 6, 2017. Mr. Mow had no objection. The extension was granted on August 23, 2017.

On August 22, 2017, Ms. Hamman requested an extension to file Petitioners' Closing Brief until September 8, 2017, Respondent's Closing Brief on September 22, 2017, and Petitioners' Reply Brief on September 29, 2017. The Hearings Officer had not received the transcripts at the time of the request, and Mr. Mow had no objection.

On September 19, 2017, Mr. Mow requested an extension to file Respondent's Closing Brief until September 25, 2017. The Hearings Officer also extended the time for Petitioners to file their Reply Brief to October 2, 2017. The Hearings Officer informed the parties that an extension may be necessary to complete the decision based on this new timeline. Respondents replied "[u]nderstood." Ms. Hamman made no objection.

On October 2, 2017, Ms. Hamman requested an extension to file Petitioners' Reply Brief until October 4, 2017. Ms. Hamman requested an extension of the 45-day deadline from October 7, 2017 to November 20, 2017. Mr. Mow objected to the extension, because this was Ms. Hamman's second request. The extension was granted over Respondent's objection on October 3, 2017.

II. ISSUES PRESENTED

In their January 24, 2017 Request, Petitioners allege procedural and substantive violations of the Individuals with Disabilities Education Act ("IDEA"). Specifically, Petitioners

allege that the DOE denied Student a free appropriate public education (“FAPE”). Petitioners raise the following issues:

- A. The DOE failed to provide a staff and other services listed in Student’s May 27, 2015 Individualized Education Program (“IEP”) and September 25, 2015 revised IEP;
- B. The DOE failed to provide the services listed in Student’s August 4, 2016 and September 12, 2016 IEPs; and
- C. The DOE did not permit Parents to directly communicate with the DOE Provider.

Petitioners request the following relief:

- A. Find the private center as the appropriate and stay put placement;
- B. Reimbursement for tuition for private services; and
- C. Compensatory education.

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

III. FINDINGS OF FACT

1. Student was born on _____. Resp. Exh. 1 at 001.
2. Student has been diagnosed with Disability. Pet. Exh. 4 at 121-122.
3. Student was found eligible for IDEA services under Eligibility Category. Resp. Exh. 3 at 112.
4. Student attended the DOE School 2 in the 2013-2014 school year. In July 2013, Parents unilaterally removed Student from the school. TR 15:16 – 16:1.
5. Student started attending the private center in July 2013. Parent 1 testified that _____ after Student came home injured “day after day” in July 2013 and had not received Student’s speech language therapy (“SLT”) for six weeks. A full program was created for Student at the private facility. A private skills trainer and the private SPED teacher was hired. Pet Exh. 4 at 116; TR 15:16 – 17:12.
6. The private facility consists of _____, where Student can jump, run and crash on the equipment to take out Student’s anxieties to enable Student to learn. The _____ was modeled after the private OT’s workspace. There is a _____ with computers, an academic area away from all distractions, a “_____,” and a kitchenette. Approximately _____ children, both disabled and

non-disabled of various ages, visit the private center each week. TR 68:13 – 71:3; TR 143:8-148:9.

7. The private special education (“SPED”) teacher was qualified to testify as an expert in the field of Special Education. TR 259:7-10.

8. The private SPED teacher started working with Student as _____ in March of 2007. Private SPED teacher worked with Student for over five years in another capacity. The private SPED teacher then became Student’s SPED teacher from 2013 to 2014 at the private facility. The private SPED teacher was _____. TR 259:22 - 261:4.

9. The private SPED teacher is the Vice President of the private facility according to its business registration files at the Department of Commerce and Consumer Affairs.¹ Resp. Exh. 9 at 1286.

10. The private SPED teacher planned Student’s curriculum, helped Student to work on and achieve the goals in Student’s IEP, and consulted with the private skills trainers so that they could reinforce some of the skills and continue working on the goals when private SPED teacher was not present. Private SPED teacher worked every Friday for two hours and consulted with the assigned skills trainer on a daily basis. TR 261:7-16.

11. The private SPED teacher testified that Student made good progress with private SPED teacher. When private SPED teacher started working with Student, Student was not used to the “structure of learning” or being in a learning environment. Private SPED teacher designated a certain area in the private facility to be Student’s learning center. The learning center held a variety of manipulatives, activities, and computer technology. TR 261:17-25.

12. District Teacher 1 testified as an expert. TR 468:20-23.

13. District Teacher 1 testified that the private facility utilized the _____. The _____ is based on _____.² The _____ is not evidence-based, it does not teach new behaviors or skills, and it can reinforce negative behaviors. TR 469:6 – 487:9.

14. Parent 2 testified that they track and observe what works best for Student. They found success in using certain methods of _____ program, _____, and the _____. TR 979:15 – 980:11.

¹ _____. Resp. Exh. 9 at 1286.

² District Teacher 1’s knowledge of _____ was from its website and conversations with Parent 1 six to eight years ago. TR 496:23 – 497:16.

15. District Teacher 1 testified that ___ and Program could not be used simultaneously because their philosophies and methodologies are different. ___ introduces new behaviors to reduce problem behaviors, the Program does not. TR 469:6 – 487:9.

16. The private speech language pathologist (“SLP”) was qualified to testify as an expert in the field of speech/language pathology. TR 152:13-17.

17. The private SLP worked with Student from 2013 to 2015. Private SLP focused on increasing Student’s expressive and receptive language, and Student’s pragmatic and social skills. During the time private SLP worked with Student private SLP “saw a major increase in Student’s expressive language and really in Student’s pragmatic abilities to interact with people and use Student’s language to express ___self, even something as simple as following directions and being more independent.” TR 153:1 – 153:19.

18. The private SLP testified that having a consistent SLP and routine is extremely important for children. If a child has multiple SLPs, it is hard to build trust, rapport, and to make a connection with them. It could impact their development, and how they use and understand their language. TR 156:1 – 157:8.

19. Parent 1 testified that when they removed Student from the DOE Home School, Student spoke no words. By August 2013, Student was up to 198 words; by February 2014, Student was speaking 700 words. Parent 1 compiled the words to help the private SLP. Pet. Exh. 1 at 52-54; TR 92:17 – 93:19; TR 103:7-10.

20. SPED teacher 2 testified as an expert in the field of Special Education. TR 520:5-8.

21. In February or March of 2015, Parent 1 and the private SPED teacher went to the Home School to register Student there. They met with SPED teacher 2, and SPED teacher 2 conducted a tour of the campus. SPED teacher 2 offered Parent 1 IEP meeting dates. TR 520:20 – 521:13.

22. SPED teacher 2 observed Student at the private facility two times prior to the May 27, 2015 IEP meeting. SPED teacher 2 also brought Student’s previous SPED teacher 3, and a DOE SLP to the private facility to meet with Parents and discuss Student’s program. SPED teacher 2 wanted to have baseline data to make sure Student’s IEP would be appropriate. SPED teacher 2 discussed the full range of placement options with Parents. TR 521:13 – 525:7.

23. On May 27, 2015, the Home School conducted an IEP meeting. Parents, private SPED teacher, Principal 1, DES 2, DOE SLP 3, Health Service Provider (“HSP”), SPED teacher 2, and a general education teacher participated. Pet. Exh.7 at 315.

24. The Behavior/Social Emotional Skills section noted that Student's "anxiety manifests itself in the following ways: increase _____, _____, wanting to leave, avoidance, isolating ___self from others, crying, showing frustration by hitting or throwing items onto the wall, SIB (self-injurious behaviors) hitting self, repetitive motions such as: rubbing Student's ___ to bleed...A crisis plan has been developed to address this type of situation." The section further noted that safety was a "major concern." When Student is "startled, excited, or scared, Student will bolt or run...Student does not have the awareness to watch for cars or discern what is in the environment that could hurt Student." Resp. Exh. 3 at 105-106.

25. Student received 1885 minutes per week of SPED services and other supports, 150 minutes per week of SLT, 200 minutes of occupational therapy ("OT") per quarter, and 205 minutes per quarter of teacher consult. The SLT could include direct service, consultation, and observation. The 150 minutes of SLT per week did not apply to weeks shorter than five days, and weeks that included the implementation of the transition plan, when Student was being introduced to new SLPs. Student had a transition plan when transitioning to a new environment, daily visual supports, behavior support plan ("BSP"), _____, and regulation plan. Student received Extended School Year ("ESY") services after a break of two calendar days. The IEP listed 38 dates in June and July 2015 that Student could receive 2015 summer ESY. Student would have 1830 minutes per week of support during the school day, and 10 hours per week afterschool, totaling 1885 minutes per week. Student's placement was on a public school campus fully self-contained in a functional program. Student would have a "transition plan to support Student's transition to a public school campus from the current private unilateral placement." *Id.* at 131-133.

26. SPED teacher 2 testified that "special education" is "specially designed instruction." When the IEP lists "special education" under the services section, it is not specifying who is providing it; rather it is "listing that Student needs services that are not the same as a general ed student would get. So, anything in Student's day that is different than what a general ed student would get. And Student's entire program was different than what a general ed student would get." TR 628:6-15.

27. Parents created "[Student's] transition plan relating to changes in staff members."³ The staff transition plan stated, "[t]he team⁴ should be notified at least a month in

³ The Parents' "staff transition plan" is not the same as Student's "transition plan" to new environments listed in the services section of the IEPs.

⁴ The "team" refers to the personnel at the private center, not the IEP team.

advance of changes to staffing whenever possible to give the team time to create a two to three week transition program for [Student.]” Specifically: 2a) if there will be a new staff working with Student, he or she will have three days to shadow the current staff; and 2b) after three days shadowing, he or she will have three days of working with Student’s current DOE provider and/or teacher. The provider and/or teacher will continue to provide additional support to the staff. The staff transition plan further stated, “[t]o the extent possible, staff members familiar to [Student’s] program will be requested to provide consistency when notifications of unexpected changes occur...Agencies should provide opportunities for staff members to shadow [Student] to increase the pool of substitutes who will be familiar with [Student’s] program. Parent 1 testified that the IEP team agreed to this staff transition plan. Pet. Exh. 6; TR 37:2 – 38:22.

28. The IEP stated “adults working with [Student] need to keep in mind Student’s affect and Student’s alert status in regard to any protocol implementation. Adults need to prioritize Student’s well being over schedule protocol.” The IEP further stated Student’s “transitioning to new staff members/environment may take four weeks. The Transition plan will be implemented whenever there is a new staff members [*sic.*] being introduced to [Student] and Student’s program. The team may set up future transition plan meetings to update transition plan to meet [Student’s] needs.” Resp. Exh. 3 at 131-132.

29. The Prior Written Notice (“PWN”) dated June 2, 2015 stated, “[Student] will receive Special Education for a full day generally in a self contained program (with access to general education students as Student can tolerate and appropriate for Student’s educational needs) for students needing functional support. [Student] will have 150 minutes per week of Speech and Language services, 200 minutes per month of OT, 205 minutes per month of teacher consultation. These will be fully implemented after completion of a transition to the public school campus...[Student] will be place [*sic.*] on a public school campus upon completion of a transition plan.” The Supplementary Aids and Services included 1885 minutes per week of support, 8 hours per month of Parent Education and Training, 120 minutes per month of team meetings, a transition plan when Student was transitioning to a new environment, and daily visual supports, BSP, _____, and regulation plan. Resp. Exh. 3 at 136.

30. The PWN also stated that Parents wanted Homebound Placement. The DOE determined that Student’s needs could be met on a public school campus; however, the IEP team recognized that a transition plan needed to be developed to address Student’s needs and for a smooth as possible transition. *Id.* at 136-137.

31. Parents believed that during the transition period, Student would be receiving all of the services listed in the IEP at the private center. Parents testified that Student did not receive SPED services, because there was no DOE SPED teacher at the private center working with Student full-time. SPED teacher 2 only came to the private center occasionally. TR 20:8-19; TR 24:3 – 25:7; TR 346:5-11.

32. Student did not attend 2015 Summer ESY at the Home School. TR 563:15-21.

33. Student worked with providers for a year and a half.⁵ A group of service providers were familiar with Student and were able to work with Student. If DOE Provider 4 was unable to work with Student, another “floater” would be able to assume the responsibilities. Parent 1 testified that it was important for Student to have consistent staff, because a change in Student’s routine could cause Student severe anxiety and stress. Student would _____, run back and forth, bolt, and _____. Student’s language would regress, and Student would stop eating and sleeping. Parent 1 testified that it would take two and a half to three months to train a new provider. TR 30:2 – 33:17.

34. Parent 1 testified that the staff transition plan was not followed. Every time DOE Provider 4 left for vacation, the agency waited until one or two days prior to the vacation before they sent the substitute to meet Student. The substitutes did not know Student and were not familiar with Student’s program at the private center. Student would regress behaviorally and academically. Student would stop sleeping and eating, and Student would get sick. When Student got sick, the ___ would start. It could take two to four weeks to stabilize Student. TR 39:1 – 41:18.

35. The private Psychiatrist testified as an expert in the field of Child Psychiatry. TR 299:15-18.

36. On July 16, 2015, the private Psychiatrist conducted a Comprehensive Psychiatric Diagnostic Evaluation of Student. The report was dated August 6, 2015. Student was referred for a psychiatric diagnostic evaluation in order to assess Student’s mental health behaviors regarding Student’s anxiety, behaviors, and self-injurious behaviors (“SIBs”). The information gathered would help to plan Student’s transition to the Home School. Pet. Exh. 4 at 115.

37. The private Psychiatrist interviewed and observed Student, Parents, and staff at the private facility. Private psychiatrist reviewed student’s background information, school records, assessments, transition plans, and the assessments conducted by private service

providers. Private psychiatrist had the Parents complete the assessments. The private SPED teacher completed the assessment. *Ibid.*

38. The private Psychiatrist diagnosed Student with Disability, requiring very substantial support, with early language impairment and loss of previously learned developmental skills related to Disability. *Id.* at 121.

39. The private Psychiatrist noted that Student was a “fairly nonverbal child.” Student had some language, but it did not serve Student well for communication purposes. TR 302:21 – 303:7.

40. The private Psychiatrist made several educational accommodation recommendations: 1) updated OT assessment; 2) updated speech therapy/communication assessment; 3) Student’s behavior equals Student’s communication; 4) Functional Behavioral Analysis (“FBA”) and BSP; 5) Transition Plan; 6) Crisis Plan; 7) consistent staff; 8) small group setting; 9) predictable and consistent environment with minimal distraction; and 10) visual and verbal schedule. The private Psychiatrist also provided several teaching strategies. Pet. Exh. 4 at 123-127.

41. The private Psychiatrist noted educational accommodation recommendations in private Psychiatrist’s report. Private Psychiatrist stated, “[s]ome excellent recommendations and accommodations are already in place at the [private facility] should continue to be followed because they are helping Student learn during the academic and adaptive skills instruction.” *Id.* at 123.

42. The private Psychiatrist testified that Student needed a transition plan, because children with Disability generally have difficulty with change. Anything that is introduced, should be done slowly to minimize distress. The transition plan would need to be flexible and gradual and not driven by dates. TR 306:7 – 307:8.

43. On August 17, 2015, the private Psychiatrist wrote a letter stating that Student had been recently “experiencing emotional dysregulation and a regression in Student’s behaviors, toileting, self-injurious behaviors (SIBS), and basic functioning due to an increase in Student’s anxiety level. Student’s increased anxiety level is mostly likely attributed to recent changes in Student’s environment, structure, staff, and expectations since Student has been transitioning from home-schooling in [the private facility] to a larger school setting at [the Home School].” Private Psychiatrist recommended that Student receive home-hospital tutoring until Student

⁵ It is unclear when DOE Provider 4 started working with Student. DOE Provider 4’s last day of employment was

could be stabilized emotionally and physically in order to decrease Student's anxiety level. If Student's anxiety level decreased, it would allow Student to handle new stressors. Pet. Exh. 4 at 114.

44. DOE Provider 1 testified as an expert in the fields of special education. TR 657:3-8.

45. DOE Provider 1 was assigned to work with Student in August 2015. DOE Provider 1 went to the private facility eight hours every week. During August and September 2015, DOE Provider 1 built a rapport between Student and the staff, and Student and ___self. TR 657:17-18; TR 662:11-25.

46. On August 17, 2015, the Home School conducted an IEP meeting to determine Student's placement. Parents, Parent Advocate, Principal, DOE SLP 2, DOE OT, DOE Provider 1, and SPED teacher 2 participated. The IEP team reviewed the private Psychiatrist's diagnostic evaluation and noted that the Parents' concerns were the primary source of data regarding Student's current anxiety. Resp. Exh. 3 at 143, 174, 170.

47. Parents presented the August 17, 2015 letter from the private Psychiatrist at the IEP meeting. SPED teacher 2 explained to Parents that this letter indicated that Student should be receiving home-hospital tutoring. If Student received home-hospital tutoring Student would not receive the other services, in the current IEP such as a staff or SLP. Further, Student was not eligible for home-hospital tutoring. The Parent Advocate advised Parents to withdraw the letter. TR 537:9 – 539:21.

48. The IEP noted that Student's "safety is the utmost concern and Student's environment should be locked and staff secure given Student's history of bolting or running off and Student should always be in line of sight with provider." Resp. Exh. 3 at 150.

49. Parent 1 had told the IEP team that Parent 1 was concerned that Student's classroom at the Home School had two open doors. One led to a field and the other to the parking lot. When Student is stressed or hears high-pitched or unexpected sounds like a police siren, Student will bolt. Parent 1 inquired if the school could install Dutch doors as in another school. Parent 1 was unaware if the Dutch doors were installed. TR 232:4 – 233:4.

50. The IEP stated that the private Psychiatrist recommended that Student "may benefit from an educational environment that is predictable and consistent with minimal distraction. Any changes to the environment should be gradual and Student should be given

plenty of advance notice of any changes.” Private Psychiatrist further stated that “changes in staff would cause Student great distress. [Student] may benefit from a consistent staff with Student at all times with at least two staff that are trained to work with Student and whom Student is familiar with in order to provide coverage. New staff introductions should occur gradually over time and the new staff should be thoroughly trained in how to use the BSP and Crisis Plans to manage Student’s behaviors.” Resp. Exh. 3 at 149, 151.

51. The IEP included the private Psychiatrist statement that, “[a] common misperception is that placing a child with Disability into a setting with socially typical peers will facilitate the child with Disability to develop normally. This is not the case because children with Disability need a different type of interaction facilitated by trained staff and is much more intensive and adaptive to their needs in order to encourage them. A trained staff can then facilitate and encourage interaction.” *Id.* at 151.

52. The IEP noted Parents’ concerns regarding Student’s “increased anxiety, toileting issues, and SIBs. They report regression. At home, Student has started to have bathroom accidents in the middle of the night. The teachers is [*sic.*] also indicating that there is regression on Student’s academic progress which is also a result of Student’s anxieties that are manifesting in the toileting issues and the SIBs.” *Id.* at 159.

53. Student’s services and placement remained the same as the May 27, 2015 IEP. Student received 1885 minutes per week of SPED services and support, 150 minutes per week of SLT, 200 minutes of OT per quarter, and 205 minutes per quarter of teacher consult. The SLT could include direct service, consultation, and observation. The 150 minutes of SLT per week did not apply to weeks shorter than five days, and weeks that included the implementation of the transition plan, when Student was being introduced to new SLPs. Student also had a transition plan when transitioning to a new environment, daily visual supports, BSP, and regulation plan. Student received ESY services after a break of two calendar days. Student would have 1830 minutes per week of support during the school day, and 10 hours per week afterschool, totaling 1885 minutes per week. Student’s placement was on a public school campus fully self-contained in a functional program. Student would have a “transition plan to support Student’s transition to a public school campus from the current private unilateral placement.” *Id.* at 171-173.

54. The PWN dated August 26, 2015 stated, “[Student] will receive Special Education for a full day generally in a self contained program (with access to general education students as Student can tolerate and appropriate for Student’s educational needs) for students needing functional support. [Student] will have 150 minutes per week of Speech and Language

services, 200 minutes per month of OT, 205 minutes per month of teacher consultation. These will be fully implemented after completion of a transition to the public school campus ...[Student] will be place [sic.] on a public school campus upon completion of a transition plan.” *Id.* at 175.

55. The August 26, 2015 PWN differed from the May 2, 2015 PWN. The August 26, 2015 PWN stated, “[Student] will have services of a person to lead and direct the staff for 8 hours per week...The team added a person to lead and direct the staff despite it is [sic.] adding another person into the transition as the staff needs more guidance in providing the services to [Student].” *Ibid.*

56. Parents indicated they were not ready for parent education, because they wanted someone to lead and direct the support staff first. *Id.* at 170.

57. On September 1, 2015, DOE Provider 1 created an assessment based on Student’s IEP. DOE Provider 1 had conducted numerous observations and interviews with Parents, DOE Provider 4, and private SPED teacher. The report stated that they would be implementing a new data collection system to obtain baseline information about the SIBs, toileting accidents, and transitions. DOE Provider 1 noted that there were no toileting goals in Student’s IEP, and DOE Provider 1 added them as temporary goals in the assessment. Parents were provided with daily communication sheets that included places to note SIBs, toileting accidents, and transitions. The staff would enter the raw data on the data collection sheets as part of their daily tracking system. Resp. Exh. 8 at 869-871; TR 658:2 – 661:4.

58. On September 23, 2015, DOE Provider 1 completed a draft BSP. The BSP was developed with input from Parents, private SPED teacher, DOE Provider 4, District Teacher 2, and another provider. DOE Provider 1 noted the problem behaviors to be SIBs and toileting accidents. The first “Proactive Strategy” listed in the BSP was, “[c]ontinuity and predictability of staff and routines are of high importance (Follow basic daily schedule, allowing for minor adjustments in timing and activities but adhering to basic routines).” The BSP also recommended that Student be supported to use more effective and functional replacement communication strategies to decrease and eventually extinguish Student’s SIBs. DOE Provider 1 stated that “[a]ll of [Student’s SIBs] are hypothesized to be 1) Escape/Avoidance of a demand or interaction; 2) An expression of frustration; 3) Sensory sensitivity; 4) An attempt to gain control of self, and possibly; 5) A learned behavior to emphatically request something (just like a speaking person might yell and then yell louder to get student’s wants/needs met or feel ‘heard.’” Resp. Exh. 4 at 443-444; TR 683:15 – 687:8.

59. DOE Provider 1 recommended that materials be placed up high to create a functional communication opportunity to meet Student's needs, rather than engaging in SIBs. DOE Provider 1 also recommended a visual schedule to aid Student with transitions, and "sanitizing the environment," by making it less visually stimulating and distracting to make Student request objects. Parents instructed DOE Provider 1 not to sanitize the environment, and they took away the visual schedule and materials provided by the DOE SPED teacher. Parents stated that they had to be notified if there were any changes in Student's program or if they planned on implementing something new to Student's program. DOE Provider 1 testified that DOE Provider 1 was frustrated with Parents' instructions, because DOE Provider 1 had to allow Student to continue to engage in SIBs. DOE Provider 1 testified that having an environment where there was so many objects at Student's disposal, did not encourage functional communication and self-advocating skills. TR 696:1 – 700:7; TR 704:18.

60. DOE Provider 1 testified that the DOE Provider 1 follows the lead and direction of a SPED teacher. Staff attempted to implement evidence-based strategies to create a setting to implement functional communication. Parents told the staff "not to interrupt certain behaviors that [Student] engages in because they weren't in alignment with the Parents' understanding of the way they would like to have [at the private facility]." TR 688:18 – 697:24.

61. DOE Provider 4 filmed a video of Student playing in the private facility, enjoying Student's world. DOE Provider 1 testified that none of Student's activities in the video showed Student engaging with another person, which is indicative of Student's behavior. Pet. Exh. 15 (____); TR 702:7 – 704:1.

62. On September 23, 2015, DOE Provider 1 completed the FBA. The FBA focused on three areas of concerns expressed by Parents: SIBs, toileting, and academic engagement.⁶ DOE Provider 1 hypothesized that when Student "feels that a caregiver does not understand Student's request, if there is a change in Student's routine or an unexpected transition, if Student is interrupted while engaging in behaviors, or a demand is placed, Student may respond by engaging in self-injurious behavior in order to escape the interaction or demand, to express frustration, or to gain control." Resp. Exh. 4 at 445-448.

63. On September 24, 2015, DOE SLP 2 wrote a Speech and Language Assessment report. The results indicated that Student mainly communicated with gestures, body language, and vocalizations. Student used word approximations, words and phrases to comment, direct,

⁶ The FBA did not address the engagement in academic tasks at this time. *Id.* at 187.

request, and respond; however, Parents noted that Student had shown significant regression when compared to verbalizations at the beginning of 2014. DOE SLP 2 wrote that Student has many communication skills, but Student does not use them consistently. Student is very aware of what Student wants and will communicate this to others around Student. Student's strengths were Student's receptive language skills, understanding of cause and effect, repertoire of non-verbal communication, and the successful and appropriate use of some verbal communication. One of Student's challenges in the school environment was to engage Student and keep Student engaged. *Id.* at 449-454.

64. On September 25, 2015, the Home School conducted an IEP review meeting. Parents, Parent Advocate, private SPED teacher, Principal, DOE SLP 2, DOE Provider 1, SPED teacher 2, and a general education teacher participated. Student attended a portion of the meeting. The IEP team reviewed and considered the FBA by DOE Provider 1, Speech and Language Assessment by DOE SLP 2, and the OT assessment by the private OT. *Id.* at 177, 214, 216.

65. Student's services and placement remained the same as in the August 17, 2015 IEP. Student received 1885 minutes per week of SPED services and support, 150 minutes per week of SLT, 200 minutes of OT per quarter, and 205 minutes per quarter of teacher consult. The SLT could include direct service, consultation, and observation. The 150 minutes of SLT per week did not apply to weeks shorter than five days, and weeks that included the implementation of the transition plan, when Student was being introduced to new SLPs. Student also had a transition plan when transitioning to a new environment, daily visual supports, BSP, and regulation plan. Student received ESY services after a break of two calendar days. Student would have 1830 minutes per week of support during the school day, and 10 hours per week afterschool, totaling 1885 minutes per week. Student's placement was on a public school campus fully self-contained in a functional program. Student would have a "transition plan to support Student's transition to a public school campus from the current private unilateral placement." *Id.* at 211-212.

66. The PWN dated October 2, 2015 stated, "[Student] will receive Special Education for a full day generally in a self contained program (with access to general education students as Student can tolerate and appropriate for Student's educational needs) for students needing functional support. [Student] will have 150 minutes per week of Speech and Language services, 200 minutes per month of OT, 205 minutes per month of teacher consultation. These will be fully implemented after completion of a transition to the public school campus ...[Student] will

have services of a person to lead and direct the staff for 8 hours per week...[Student] will be placed [*sic.*] on a public school campus upon completion of a transition plan...The team added a person to lead and direct the staff despite it is [*sic.*] adding another person into the transition as the staff needs more guidance in providing the services to [Student].” The transition plan was discussed and revised. *Id.* at 215-216.

67. SPED teacher 2 testified that the idea of the transition period was to introduce Student to the DOE staff to make Student more comfortable. That way, when Student attended the Home School, Student would already know the SLP, OT, District Teacher 2, and other staff. TR 551:18-23.

68. On October 2, 2015, the DOE wrote an Evaluation Summary Report. The report stated the Student “continues to be on a transition plan to transition to [the Home School]. As such, Student now receives support through a DOE provider, speech and language services through a DOE Speech and Language Therapist. Student will begin receiving services starting the week of Oct. 26. The plan anticipates adding Occupations [*sic.*] Therapy and [Student] is tolerating new staff members.” Pet. Exh. 2 at 46-48.

69. SPED teacher 2 testified that the staff was to start two weeks after the 2015 Fall ESY. The team would then meet to discuss how the transition went. If it was proceeding well, they would introduce the OT. TR 568:4-16.

70. Student did not attend the Fall 2015 ESY. Parents informed the Home School that Student was having toileting issues and SIBs because of the provider change. TR 555:24 – 556:7.

71. The staff did not start on October 26, 2015, because staff had left the DOE. On November 17, 2015, SPED teacher 2 contacted Parent 2 about getting another staff, but Parents felt that the current team that was working with Student was enough staffing and they did not want to add any more people, especially if they were not going to be consistent. SPED teacher 2 scheduled a tentative meeting for December 17, 2015 to discuss the OT and services, parent education, and the transition to the Home School. Resp. Exh. 6 at 462-463; TR 571:9 – 573:21.

72. In October 2015, Student was recorded having 28 SIBs in 22 days of recording, and eight days of zero SIBS. The triggers included transitioning to a substitute staff during Fall ESY. Student had a spike of 10 SIBs in three days. Student also had one toileting accident during Student’s school day and 15 at home. Student maintained an engagement level of 2 or above for 14 out of 15 opportunities. Student’s average level of engagement for the month was 2.5, and Student spent 99% of recorded opportunities at level 2 or above. Parents did not believe

Student was ready to attend the Home School, because they were still in the early stages of the transition plan. Staff was still being introduced to Student. Resp. Exh. 8 at 880, 882; TR 665:23 – 666:22.

73. In November 2015, Student was recorded having 20 SIBs in 18 days of recording, and 10 days of zero SIBs. Student also had one toileting accident during Student's school day and 14 at home. Student maintained an engagement level of 2 or above for 18 out of 18 opportunities. Student's average level of engagement for the month was 2.5, and Student spent 100% of recorded opportunities at level 2 or above. Resp. Exh. 8 at 886.

74. On December 16, 2015, the Home School conducted an IEP review meeting. Parents, private SPED teacher, Principal, DOE SLP 2, DOE Provider 1, and SPED teacher 2 participated. Resp. Exh. 2 at 254.

75. The IEP noted the following SIB data at school:

September 2015: Average of 1 SIB per day, 10 days with zero SIBs

October 2015: Average of 1.27 SIBs per day, 8 days with zero SIBs

November 2015: Average of 1.11 SIBs per day, 10 days with zero SIBs

The IEP also noted the following toileting accidents at home and school:

September 2015: 18 at home, zero at school

October 2015: 15 at home, one at school

November 2015: 14 at home, one at school

Id. at 227.

76. The team discussed the OT and services, parent education, and the transition to the Home School, because the data showed that Student had stabilized. Student's SIBs and toileting incidents had decreased; however, the Parents still expressed their concerns. They did not want to have more staff at the private facility, because they thought it might trigger Student's behavioral issues again. TR 575:15 -576:17.

77. Student's services and placement remained the essentially the same as the September 25, 2015 IEP. Student received 1885 minutes per week of SPED services and support, 150 minutes per week of SLT, 30 minutes of OT per month, and 30 minutes per month of services. The SLT could include direct service, consultation, and observation. The 150 minutes of SLT per week did not apply to weeks shorter than five days, and weeks that included the implementation of the transition plan, when Student was being introduced to new SLPs. Student also had a transition plan when transitioning to a new environment, daily visual supports, BSP, and regulation plan. Student received ESY services after a break of two calendar days.

Student's ESY time was increased from five hours per day to six hours per day. Student would have 1830 minutes per week of support during the school day, and 10 hours per week afterschool, totaling 1885 minutes per week. Student's placement was on a public school campus fully self-contained in a functional program. Student would have a "transition plan to support Student's transition to a public school campus from the current private unilateral placement." *Id.* at 251-253.

78. The IEP team determined that Student was ready to start transitioning, because the SIBs were decreasing. Parents disagreed, because Student was still experiencing negative behaviors at home. The IEP team decided that Student would not attend the 2015 Winter ESY, and they planned of having Student start transitioning to the Home School during the 2016 Spring ESY. Then, by 2016 Summer ESY, Student could complete the transition process. TR 643:3-24.

79. The PWN dated December 18, 2015 provided for six hours per day of ESY services, instead of five hours. The PWN stated, "[Student] will have OT consult with the provider for 30 minutes per month and teacher consult with the staff for 30 minute [*sic.*] per month instead of direct services. The Special Education teacher from [the Home School] will also consult with the staff for 60 minutes per month. [Student] will continue with all other services remaining the same except for the extended time for ESY." The additional minutes would occur after Student's school day. Student's placement was a "a public school campus with a transition plan" in a self contained program. Resp. Exh. 2 at 255; TR 576:18 – 577:16.

80. The IEP team determined that Student had adjusted to the various staff members; however, they decided that additional people providing direct services would not be the best way to address Student's needs because it would be too disruptive. The IEP team felt consulting with the staff on a regular basis would be best. *Id.* at 255.

81. Parent 2 estimated that Student should have received approximately 100,000 minutes of SPED services in 2015, but Student only received 1010 minutes. The DOE SPED teacher and the District Teacher 1 would only visit the private facility once a month. TR 347:6 - 348:15.

82. On February 1, 2016, the District Teacher 2 observed Student at the private facility for 90 minutes. Resp. Exh. 9 at 1287.

83. The DOE OT first met Student in February or March 2016. Student had been assigned to DOE OT's caseload in August 2015, but DOE OT was informed that Parents wanted to limit DOE OT's time at the private facility and slowly introduce the personnel that would be

working with Student during Student's transition period. The DOE OT observed Student one time with DOE Provider 4 at the private facility for approximately 30 minutes to one hour. TR: 504:8 – 506:15.

84. In February through May 2016, the DOE OT, DOE Provider 1, DOE SLP 2, District Teacher 2, SPED Teacher 2 attended monthly meetings at the private facility with Parents. They discussed what was happening with Student's program and goals. They discussed how DOE Provider 4 could collect data, as DOE Provider 4 was the one working directly with Student. The meetings ranged from one to two hours. Resp. Exh. 9 at 1287; TR 506:18 – 507:24.

85. In March 2016, Student maintained an engagement level of 2 or above for 3 out of 21 recorded opportunities. Student's average level of engagement for the month was 1.8. Student had two substitute staff during this time. The first substitute had been planned and trained and worked with Student from March 16, 2016 to March 28, 2016. The second substitute was a last minute "cover" from March 29, 2016 to March 31, 2017. The second substitute shadowed the first substitute for one day and worked with the DOE Provider 1 for an additional day and a half. By March 31, 2017 Student's engagement level decreased to 1. Resp. Exh. 8 at 924.

86. The May 4, 2016 Progress Report showed that Student was making no progress in the areas of SIBs and toileting accidents. Pet. Exh. 7 at 330.

87. SPED teacher 1 testified as an expert in the field of special education. TR 787:1-3.

88. In April 2016, Parent 1 contacted SPED teacher 1 to meet Student at the private facility. Throughout the month of May 2016, SPED teacher 1 and a DOE SLP went to the private facility weekly to observe Student with DOE Provider 4. TR 787:9-25.

89. On May 10, 2016, a DOE SLP met Student at the Home School for a 90-minute session. Student was with DOE Provider 4, and SPED teacher 1 observed. They shared a social story with Student that had pictures of different locations on campus. They made sure Student was the only student on campus to reduce Student's anxiety and stress. They walked up to the tennis and basketball courts, and they went all over the campus to show Student the various locations in the social story. Student was quiet and did not show any discomfort. Student reciprocated and copied DOE Provider 4 behavior of splashing in a puddle. TR 789:6 – 794:20.

90. After the session, Parent 1 emailed SPED teacher 1 and told SPED teacher 1 Student was experiencing SIBs at home and was very anxious. Student was banging Student's

head into the wall, crying, screeching, being resistant, throwing and slamming things, and holding Student's urine. They agreed to cancel the next session. On May 11, 2016, Parent 1 emailed SPED teacher 1 and said Student had a toileting accident in bed, 12 strong SIBs, five slaps to objects, holding Student's urine, and a 30-minute meltdown. Student did not return to the Home School for the rest of the month of May 2016. Resp. Exh. 6 at 514; TR 791:8 – 792:5; 990:13 – 992:12.

91. On May 19, 2016 and May 25, 2016, the Home School conducted an IEP meeting. Parents, private SPED teacher, Principal 2,⁷ DOE OT, District Teacher 2, DOE SLP 2, DOE Provider 1, and SPED teacher 1 participated. Parents expressed that Student was experiencing a time of regression as evidenced by Student's behavior and academic data. There had been many changes to Student's routines at home, with providers at the private center, and IEP team members. Resp. Exh. 3 at 290, 292.

92. Student received 150 minutes of speech/language therapy, transportation, a transition plan when Student transitioned to a new environment, 480 minutes per week of Teacher Consultation, and 1800 minutes per week of support. Student would not participate with nondisabled peers. As Student transitioned to the Home School, Student's participation with non-disabled students would be in a controlled selected program as determined by IEP members. Student would receive ESY after a two-calendar day break. In the 2016 summer ESY, the IEP provided Student with SPED services for 90 minutes per week from May 25, 2016 to July 1, 2016; 180 minutes per week from July 1, 2016 to August 2, 2016; and 270 minutes per week from August 2, 2016 to May 25, 2017. The IEP team proposed 270 minutes of SPED services for August 2016 when the regular school year resumed. These minutes were "dependent on data and observations made during ESY's (June and July) transition period with subsequent months gradually increasing as determined with input by the team." During 2016 summer ESY, Student would receive 60 minutes per week of SLT. Student received 30 minutes per month of services and OT consult. *Id.* at 286-288.

93. The PWN dated June 8, 2016, stated that Parents did not believe that Student was ready for such a "quick transition." Parents expressed Student was experiencing a time of regression because there were many changes to routines at home, providers at the private facility, and the IEP team members. *Id.* at 291-292.

⁷ Principal 2 was a Vice Principal at the Home School at the time of the meeting. Resp. Exh. 3 at 289-290.

94. The PWN stated Student would receive SPED services for 360 minutes per month from May 25, 2016 to July 1, 2016, and 720 minutes per month from July 2, 2016 to May 25, 2017. The PWN stated, “[Student] was unilaterally placed in the [private facility], and is gradually transitioning to a Public School Campus.” *Ibid.*

95. DOE SLP 2 provided speech services to Student on May 3, 4, 19, 24, and 25, 2016. DOE SLP 4 provided the speech services from May 31, 2016 to June 30, 2016. Pet. Exh. 2 at 76-88.

96. The private SPED teacher was hired as Student’s SPED teacher for the 2016 summer ESY. The IEP team decided that because Student was familiar with private SPED teacher, it would make the transition from the private facility to the Home School easier. TR 46:3-5; TR 262:15 – 263:14.

97. The private SPED teacher reported that Student had regressed since private SPED teacher last taught Student. When private SPED teacher had worked with Student in 2013-2014, Student was able to sit and attend at the learning table for two hours. Student was able to pick from a field of three of choices when requested, sequence things, and use manipulatives. Student could create simple sentences using “I like,” and “I like pizza,” first using pictures and then moving on to word tiles. I could make verbal approximations. During the summer ESY, Student was very avoidant, bolted, and took a long time to settle, partly because on the new environment with other students. Student would only settle for 30 minutes at the most. Private SPED teacher had to take Student to the room during the academic period. Student needed to address these behaviors before Student could access Student’s learning. Student had lost the skills that Student previously had, and Private SPED teacher was worried that Student wouldn’t regain the skills. TR 37:25 – 40:08; TR 265:15 – 266:13.

98. In July 2016, DOE Provider 1 introduced DOE Provider 3 to Parents at a restaurant. Parents informed DOE Provider 3 about Student’s program and told DOE Provider 3 needed to communicate directly with them. DOE Provider 3 told Parents that the service would be changing on September 1, 2016. The new services were to teacher consultation, and the provider would no longer lead and direct the staff or collect data. The new provider role was to create a teacher support plan and train the teacher on teacher-identified targets. TR 709:12 – 713:12; TR 751:17 – 752:13.

99. DOE Provider 3 testified as an expert in special education. TR 736:2-6.

100. DOE Provider 3 started working with Student at the end of July 2016. From July 2016 to September 1, 2016 DOE Provider 3 led and directed providers, analyzed data, compiled graphs, generated reports, and consulted with SPED teacher 1. TR 736:12 – 738:24.

101. DOE Provider 3 created a SPP dated July 2016. Student's SIB Level 1 frequency averaged 2.5 per day; SIB Level 2 frequency averaged 2.67 per day; and, SIB Level 3 duration averaged 3 minutes. Student had only one toileting accident and transitioned without SIBs 93% of the time. Student's level of engagement was above 2 on average. Resp. Exh. 8 at 955-956.

102. On August 4, 2016, the Home School conducted an IEP meeting. Parents, Parent Advocate, private SPED teacher, Principal 2, Vice Principal 1, DOE SLP 6, DOE Provider 3, the SPED teacher 1, and SPED teacher 4 were present. The IEP team reviewed the 2016 Summer ESY progress report, input from the ESY private SPED teacher, Parents, and service providers. Resp. Exh. 3 at 330, 332.

103. During 2016 Summer ESY, Student's classroom had ___ other students and staff. Each student had their own area in the classroom. Approximately ___ students were on the Home School campus. TR 806:10 – 807:11.

104. The private SPED teacher testified that when Private SPED teacher took Student to the Home School, they started off in a "dining area," but there was traffic going in and out, and Student was very distracted. They then moved to the other side of the room, but that location distracted another student. Student was able to engage and sit and attend at the Home School with the private SPED teacher once Student was moved to another area. Student had no SIBs and ate lunch with Student's peers. Student was able to trace on the iPad. Student did have trouble attending, because Student was distracted by the other students. The private SPED teacher stated Student enjoyed riding the bus and was excited. The private SPED teacher worked with Student for four weeks. Pet. Exh. 14 at 2:31 – 9:40; TR 263:22 – 264:6.

105. The private SPED teacher told the IEP meeting that Student had regressed, because of the staff changes and no formal academic teaching. When private SPED teacher worked with Student previously, Student could do more communication approximations, sustain sitting for two hours, and perform number sequencing. Private SPED teacher was worried that Student would not regain the skills, because Student was disengaged and avoided teaching. *Id.* at 37:22 – 42:10.

106. Parents reported that Student had regressed over the 2016 Summer ESY because of the changes to Student's routine. They were concerned with Student's increased anxiety, toileting issues, and SIBs. Student started to have bathroom accidents in the middle of the night.

The private SPED teacher also indicated that there was regression with Student's academic progress which is also a resulting from Student's anxieties. *Id.* at 351; TR 46:9-25.

107. Student received Student's SLT at the Home School. Parent 1 testified that the DOE SLPs kept changing. There were approximately six⁸ different SLPs, four in 2016 summer ESY. Parent 1 testified that due to the change in providers, Student did not do well with Student's SLTs and did not show progress. TR 55:10-19; TR 57:313.

108. SPED teacher 1 stated that during the summer months, SLPs are assigned to each school for one month. The SLPs rotate schools each month. The two 2016 Summer ESY SLPs that were assigned to the Home School were familiar with Student. Parents agreed that the SLP assigned in June 2016 would work; however, they did not feel that the July 2016 SLP would benefit Student. As a result, Student did not receive speech services in July 2016. TR 797:16 – 800:18.

109. The Parent Advocate stated that part of the transition plan was to shadow each other so they would be familiar with Student and Student's program. None of the SLPs had shadowed each other. Pet. Exh. 14 at 12:45 – 14:05.

110. Parent 2 asked the IEP team if the team agreed that Student would have a SPED teacher all year. The Parent Advocate stated that when Parent Advocate closed Student's case in September 2015, the agreement was that the DOE would have a SPED teacher go to the private facility to help guide DOE Provider 4 and teach Student. The same SPED teacher would help with Student's transition to the Home School. That did not occur. Pet. Exh. 14 at 29:30 – 33:50.

111. The Parent Advocate stated that the staff should not be the SPED teacher, and the IEP team had previously agreed to have a SPED teacher go to the private facility. An IEP team member proposed to have 1960 minutes per week of SPED services once Student fully transitioned to the Home School, to include transportation. Principal 2 stated the 1960 minutes could be provided at the Home School but not at the private facility. *Id.* at 44:00 – 59:13.

112. Principal 2 stated that at the last IEP meeting, Principal 1⁹ agreed to have a PTT at the private facility to satisfy the SPED minutes; however, no PTT was assigned.¹⁰ Principal 2

⁸ Parent 1 testified that there were seven SLPs, but the record indicates there were six.

⁹ The meeting participant lists showed that Principal 2 attended the meeting, not Principal 1. Resp. Exh. 3 at 289-290, 296-297.

¹⁰ There was no explicit mention of a PTT in the June 8, 2016, PWN. The PWN stated Student would receive "Teacher Consultation" for 480 minutes per week or 8 hours per week. The Clarification of Services and Supports section of the August 4, 2016 IEP stated that "teacher consultation service" is interpreted as services. Services will be coordinated by the SPED teacher and provided to parents electronically on a monthly calendar. Resp. Exh. 3 at 291-293, 328.

noted that it was “pretty obvious” that Student’s needs showed that Student needed a PTT for the 2016-2017 school year, because when Student worked with SPED teacher 1 and DOE SLP 2, “that formula worked.” Parent 2 suggested that Student should start working with DOE SLP 2 again. The IEP team then suggested that they have a PTT go to the private facility, and then transition with Student to the Home School. The PTT would then help Student become familiar with the SPED teacher 4, as be used as a “bridge” to the Home School. The goal was to have the PTT every day if Student was able to handle that. *Id.* at 1:10:35 – 1:16:35.

113. Principal 2 stated that a PTT was limited to a 17-hour work week, and Student’s 1860 SPED minutes per week would not be met. The Parent Advocate said that the PTT could work with Student every day or implement a schedule to include all 17 hours (1020 minutes). The PTT would start at the private facility and then transition Student to the Home School and eventually “fade out.” Parent 2 agreed that the PTT plan would be “a great way to start,” but Parent 2 wanted to make sure the PTT did not change. Principal 2 stated that it might be difficult to find a SPED licensed PTT, but that would be the DOE’s “problem.” The Parent Advocate stated that the PTT did not necessarily have to be a SPED teacher, because the SPED teacher 4 would be guiding the PTT. It was most important to find a PTT that was a good match for Student. *Id.* at 1:16:40 – 1:20:35; 1:27:12 – 1:31:50.

114. One of the IEP team members suggested that the PTT start with working with Student at the private facility for two hours every day for the first week when DOE Provider 4 was there. Principal 2 suggested the PTT spend three hours on Monday, Wednesday, and Friday at the private facility, and four hours on Tuesday and Thursday when Student went to the Home School from the private facility. That would total 17 hours for the PTT. At first, the PTT’s 17 hours would probably not be direct instruction, because the PTT would be shadowing DOE Provider 4; however, the 17 hours could also include observation and lesson preparation. Parents also requested that the private SPED teacher be introduced and speak with the PTT. Principal 2 said that they it would take 2 weeks, at the earliest, to hire a PTT. *Id.* at 1:33:41 – 1:37:13; 1:41:48 – 1:49:25.

115. The IEP team reviewed the data from 2016 Summer ESY. Parents objected that the data was incomplete. They had not received the DOE’s data, and their daily data sheets were not collected. The DOE stated that their data involved the time at the Home School. It was explained to Parent that in order to generate the monthly reports, the providers can only compile data from the providers and their time with Student. There was a question whether the monthly reports included the daily data sheets from Parents. *Id.* at 14:07 – 16:28; 20:30 – 25:23.

116. Parent Advocate stated that sometimes Student's behavior at school overflows into the home and manifests in SIBs. That is how Student shows Student's "displeasure." Parent 2 sent Parent Advocate photos of Student banging Student's head against the wall and leaving a big hole.¹¹ Parent Advocate said this was a sign of Student being dysregulated. The Parent Advocate stated the IEP team needs to consider the home data, because it shows Student's "full cycle." Pet. Exh. 15, HeadthroughWall.JPG; Pet. Exh. 14 at 17:25 – 18:30.

117. The Parent Advocate stated that Student needed to transition to the Home School. First, Student would remain at the private facility with the goal to work up to a six-hour day there. This could last for two to three weeks. Once Student was familiar with the PTT, Student could be brought to the Home School. When Student was at the Home School, the PTT could determine how many hours Student would be able to be there. The time at the Home School could be increased when Student was ready, and the service providers would be introduced gradually to Student's program. Pet. Exh. 14 at 1:05:15 – 1:10:10.

118. After reviewing the data, the IEP team decided to continue with Student's transitioning to the Home School two times a week on Tuesdays and Thursdays from 10:30 a.m. to 12:00 p.m. with transportation. The SPED service would "be provided at this time by 2 teachers at [the Home School]¹² and a Part Time Teacher on Mondays, Wednesdays, and Fridays for 3 hours per day and Tuesdays and Thursdays for 4 hours per day (which includes the transition time to [the Home School]). The PTT will provide services at this schedule for 2 weeks after which the duration at [the Home School] will raise to 2 hours, 10 – 12." Resp. Exh. 3 at 328.

119. SPED teacher 1 and SPED teacher 4 were unable to teach Student at the private facility, because they were teaching classes at the Home School. SPED teacher 1 consulted with DOE Provider 4 and gave DOE Provider 4 lesson ideas to work on at the private facility. TR 809:7 – 810:9.

120. The IEP team informed Parents that there was a possibility that the service would change on September 1, 2016 changing it to a teacher consult model. Parent 2 requested that they include the roles and responsibilities of the provider in the IEP. The Parent Advocate told the Parents that they had to abide by the services, and that the roles and responsibilities of the provider could not be in the IEP. The Parent Advocate said that all contact with the provider would be through SPED teacher 1, not the provider. Pet. Exh. 14 at 2:13:30 – 2:2:21:18.

¹¹ The date of this picture was June 19, 2016.

121. Parent 2 indicated that the private facility had a potential private SLP that Student would be comfortable with. Parent 2 did not believe DOE SLP 6 could facilitate Student's program because DOE SLP 6 was not familiar with assistive technology. Parent 1 had spoken to DOE SLP 6 previously and knew at that time that DOE SLP 6 would not work in Student's program. Parent 2 wanted to know how the private SLP could be hired. That Parent Advocate told Parent 2 that the DOE would not pay for a private SLP, because DOE uses DOE personnel. The IEP team told Parents that the private SLP would have to have private SLP apply with the DOE. Parents wanted to know if DOE SLP 4 was available to work with Student, because DOE SLP 4 was familiar with Student and understood Student's program. *Id.* at 2:21:25 – 2:28:50.

122. The PWN dated August 23, 2016, stated Student received 150 minutes of speech/language therapy, transportation, 1800 minutes per week of support, eight hours per month a Parent education and training, 480 minutes per week of teacher consultation services, and two hours per month of team meetings. Student's SPED services increased from 270 minutes per week to 1860 minutes per week. The PWN noted when Student is at the private facility, "a teacher needs to be there to guide Student's program, not only when Student is on a Public School campus. This will also assist the transition program to the Public School campus." Regarding placement, it stated, "[Student] was unilaterally placed in a Private Separate Facility, [the private center], and is gradually transitioning to a Public School Campus. [Student] receives Student's education at the [private center] as well as [the Home School]. No changes have been made to this placement but a transition plan has been discussed and proposed which will increase the duration by 30 minutes at [the Home School] after the PTT has been actively involved for 2 weeks." Student also received services and OT Consult for 30 minutes per month, and a transition plan when transitioning to a new environment. Student would receive ESY after a break of two calendar days. Resp. Exh. 3 at 331-332.

123. The DOE advertised for a PTT for Student, and several people applied. The DOE's original offer was to hire two PTTs for Student, but Parents said that would be too many staff changes. TR 810:12-14 – 812-:1.

124. Parents wanted a full-time SPED teacher, but the DOE only offered a PTT. Parent 2 said PTT 1 was interested, but PTT 1 needed to work 30 hours per week. Parents offered to pay for the other half of the time to equal a full-time teacher. Parent 2 spoke with Principal 2 about this possibility. Principal 2 said that the PTT could only work 17 hours per

¹² The two teachers at the Home School were SPED teachers 1 and 4.

week. Parent 2 testified that Parent 2 paid PTT 1 out of pocket and used a _____ to accommodate PTT 1's demands. Pet. Exh. 8 at 359; TR 369:1 – 370:19; TR 439:9 – 440:8; TR 810:20-25.

125. Parent 2 testified that Parent 2 believed Student would receive all of Student's SPED services and supports at the private facility or that the IEP team was working on a "hybrid" program to accommodate Student during the transition process. TR 367:3 – 368:14.

126. DOE Provider 3 created a program dated August 2016. Student's SIB Level 1 frequency averaged 1.5 per day; SIB Level 2 frequency averaged 2.2 per day; and, SIB Level 3 duration averaged 9.5 minutes. Student only had one toileting accident and transitioned without SIBs 91% of the time. Student's level of engagement was above 2 on average. Resp. Exh. 8 at 968.

127. On August 16, 2016, DOE SLP 6 observed Student at the Home School for 90 minutes. Pet. Exh. 2 at 90.

128. On September 12, 2016, the Home School conducted an IEP meeting. Parents, Parent Advocate, Principal, DOE SLP 6, DOE OT 2, DOE Provider 3, SPED teacher 1, and a general education teacher participated. The Home School wanted to discuss Student's behavioral data and Student's engagement levels. Pet. Exh. 14 at 366; TR 817:3-19.

129. Parents shared specific behaviors that had been occurring at home and advocated that there was not enough evidence to support the increase of minutes at the Home School. The IEP team agreed that the school would modify the data collection for "engagement" and that consistent ratings of "2" would be a good indicator to increase duration or frequency at the Home School.¹³ Video recordings would be taken at the Home School to be used as visual data and to be an indicator for possible increase of duration or frequency at Home School. Data would be collected from the providers, SPED teacher, and Parents, and it would be shared electronically. The data would be reviewed by the IEP team after two to three weeks of consistent "Level 2" engagement. *Id.* at 367-368.

130. Parent 1 testified that the determination to increase the frequency at the Home School would be based on the "Level 2" engagement and whether Student was experiencing regression. TR 80:4 – 81:11.

131. The Parent Advocate agreed with the IEP team's proposal. Parent Advocate stated that if the data showed that Student had met the engagement criteria, a meeting in January

2017 would not be necessary. Student's duration or frequency at the Home School could be increased without an IEP meeting. TR 820:6 – 821:17.

132. The FBA/BSP was almost completed. DOE Provider 3 and an IEP Care Coordinator needed to complete the last section on "bolting." This would be created with continuous input from Parents, the providers, PTT 1, and DOE District consultants. Resp. Exh. 3 at 368.

133. The IEP added a goal as a result of the FBA/BSP that was being developed. PTT 1 had been hired and would begin on September 13, 2016. Student would have 17 hours of PTT at the private center and during transitions to the Home School. Student would receive three hours per day, three times a week, and four hours per day, two times a week. The Home School would begin a trial, using a transition object to help Student transition from one location or activity to the next. *Id.* at 364.

134. Parent 1 testified that the DOE refused to provide a full-time SPED teacher at the private center. TR 53:11-13.

135. The IEP provided Student with 1800 minutes per week of support, 1860 minutes of SPED services per week, OT consult 30 minutes per month, a transition plan when transitioning to a new environment, eight hours per month a Parent education and training, 480 minutes per week of teacher consultation services, 120 minutes per month of team meetings, and transportation twice a week to and from the Home School from 10:30 a.m. to 12:00 p.m. Student would receive ESY after calendar break of two days. Student would not participate with nondisabled peers at any time throughout the school day. Student mainly participated with other students with disabilities at select times throughout the week. Student's participation with non-disabled peers would be in a controlled selected program as determined by the IEP members. Resp. Exh. 3 at 363 -365.

136. The IEP team decided to continue with Student's transitioning to the Home School two times a week on Tuesdays and Thursdays from 10:30 a.m. to 12:00 p.m. with transportation. The SPED service would "be provided at this time by 2 teachers at [the Home School]¹⁴ and a Part Time Teacher on Mondays, Wednesdays, and Fridays for 3 hours per day and Tuesdays and Thursdays for 4 hours per day (which includes the transition time to [the

¹³ Level zero engagement means Student is not engaging at all; Level five means full engagement. Level two includes referencing and eye contact. Engagement includes SIBs. TR 87:12 -88 – 89:1.

¹⁴ The two teachers at the Home School were SPED teachers 1 and 4.

Home School]. The PTT will provide services at this schedule for 2 weeks after which the duration at [the Home School] will raise to 2 hours, 10 – 12.” *Id.* at 364.

137. The PWN dated September 22, 2016 stated that the providers, SPED teacher, and Parent take daily data collection. This data collection would be used to determine Student’s levels of engagement. Data would be shared electronically and reviewed by team members after two to three weeks of consistent Level 2 engagement and video clips and the Home School. An IEP review meeting was scheduled for January 19, 2017. *Id.* at 367-368.

138. On September 12, 2016, Principal 2 emailed SPED teacher 1 to inform Parents that PTT 1 would start the next day. Resp. Exh. 6 at 618.

139. On September 13, 2016, SPED teacher 4 sent Parents an email regarding activities and materials that were sent to PTT 1 to work on with Student. SPED teacher 4 wanted Student to be familiar with the activities and materials, and then the Home School would follow-up with Student and ease Student into transitioning. Resp. Exh. 6 at 619.

140. In mid-September Parent 2 asked that SLP 6 be removed from Student’s program, because SLP 6 did not use assistive technology as part of SLP 6’s SLT. Student missed one week of services, but SLT resumed the following week with SLP 1. TR 802:1 – 803:8.

141. PTT 1 started working with Student in September 2016. PTT 1 had one day of training with DOE Provider 4. Parent 1 testified that when DOE Provider 4 went on vacation, Student started regressing. Student stopped sleeping and eating and Student made high-pitched sounds. Student started hitting Student’s head into the wall or into the window of the car. Student slapped objects, started the self-stimulation again, and Student had toileting accidents. When DOE Provider 4 returned, Student slept through the night. TR 62:25 – 66:9.

142. At the end of September or early October 2016, Parent 1 testified that Parents were told by the provider that they could not talk to DOE Provider 3 unless SPED teacher 1 allowed it. SPED teacher did not give DOE Provider 3 permission to speak directly to Parents. TR 58:20 – 61:3.

143. DOE Provider 3 created a SPP dated September 2016. Student’s SIB Level 1 frequency averaged 2.38 per day; SIB Level 2 frequency averaged 3.0 per day; and, SIB Level 3 duration averaged .38 per day. Student only had two toileting accidents and transitioned without SIBs 86% of the time. Student’s level of engagement was above 2 on average. Resp. Exh. 8 at 974-981.

144. On October 4, 2016, DOE SLP 1 observed Student for 90 minutes at the Home School. Pet. Exh. 2 at 092.

145. On October 14, 2016, DOE SLP 5 observed Student for 60 minutes. *Id.* at 93.

146. On October 18, 2016, DOE SLP 1 observed Student for 90 minutes at the Home School. *Id.* at 94.

147. On October 18, 2016, DOE Provider 4 sent an email to Parent 2 noting that DOE Provider 4 would be on leave from October 27, 2016 to November 1, 2016, and from November 21, 2016 to November 28, 2016. DOE Provider 4 informed Parent 2 that DOE Provider 4's last day of work would be December 30, 2016. Pet. Exh. 8 at 364.

148. On October 20, 2016, Parents sent SPED teacher 1 an email regarding the changed communication log and inability to communicate with DOE Provider 3. Parents wanted clearance to directly communicate with DOE Provider 3. Parents also informed SPED teacher 1 that DOE Provider 4 would be on vacation from October 27 to November 1, 2016, and from November 21 to 28, 2016. DOE Provider 4's last day with Student was scheduled for December 30, 2016. Parents wanted to schedule meetings with potential replacement staff the next week. Resp. Exh. 6 at 629-630.

149. On October 14, 2016, DOE SLP 5 conducted a 60-minute speech session with Student. Pet. Exh. 2 at 91.

150. On October 21, 2016, Principal 2 informed SPED teacher 1 that the services had changed, and that Parents were no longer allowed to direct staff or communicate with the providers directly. Services were "teacher consultation." *Id.* at 629.

151. SPED teacher 1 testified that the Home School tried to find a provider that was familiar with Student during DOE Provider 4's vacation dates. The service provider was unable to find a replacement who was familiar with Student. The service provider sent DOE Provider 3 to the private facility two days before DOE Provider 4's vacation to shadow DOE Provider 4. TR 824:17 – 825:14.

152. On October 24, 2016, SPED teacher 1 sent an email to Parents informing them of the service change and how they would be unable to directly communicate with DOE Provider 3. SPED teacher 1 stated that SPED teacher 1 was "under the impression that the services are to consult with the teachers on [Student's] team... Together we determine how we might solve the issues. I'm not sure what you needed from DOE Provider 3, but DOE Provider 3 service is to DOE personnel who work with [Student]." *Id.* at 365.

153. On October 24, 2016, Parent 1 responded to SPED teacher 1's email. Parent 1 stated, "[t]he reason we asked to have direct communication with [DOE Provider 3] is because of situations like tomorrow, when a new person unfamiliar to [Student or the service provider] is

put on Student's case to sub/shadow right away with to time to train properly. In the recent past[,] subs that were landed like this caused much regression...Now again we are introducing someone new without following the minimum agreed steps." In the past, the provider would help to train the new or substitute provider. *Ibid.*

154. On October 25, 2016, DOE Provider 6 arrived at the private facility at 8:15 a.m., 15 minutes prior to DOE provider 6 shift. Parent 1 asked DOE Provider 6 about DOE Provider 6 background and qualifications, spent approximately 40 minutes giving DOE Provider 6 information on Student, and requested DOE Provider 6's phone number. DOE Provider 6 refused to give Parent 1 DOE Provider 6's phone number. DOE Provider 6 felt that Parent 1 would not let DOE Provider 6 work with Student unless Parent 1 had the phone number. Parent 1 stated Parent 1 would talk to DOE Provider 6's supervisor, the Administrator. Parent 1 told DOE Provider 6 that DOE Provider 6 was to report to Parent 1, not DOE Provider 6's employer, the administrator. Parent 1 asked DOE Provider 6 why DOE Provider 6 was ____ the previous week, and DOE Provider 6 told Parent 1 _____. Parent 1 stated, "I don't think you will be a good fit, _____." Resp. Exh. 6 at 637-638; TR 825:15 – 827:13.

155. After DOE Provider 6 met with Parent 1, Parent 2 requested to meet with DOE Provider 6 for 15 minutes. Parent 2 requested information on DOE Provider 6's experience and wanted DOE Provider 6's opinion of the facility. Parent 2 stated, "[a]t the end of the day, it does not matter what the DOE of [service provider] wants, it's what we feel will work for our child." *Id.* at 638.

156. At 9:24 a.m. Parent 2 called the service provider and stated that provider scheduled to shadow DOE Provider 4 did not show up. *Ibid.*

157. At 1:00 p.m., DOE Provider 6 contacted the service provider and said DOE Provider 6 was not comfortable working with Student. The service provider pulled DOE Provider 6 from the case. *Ibid.*

158. On October 26, 2016, the service provider sent DOE Provider 5 to shadow DOE Provider 4. DOE Provider 5 shadowed DOE Provider 4 for two days. DOE Provider 5 worked well with Student. TR 836:5 – 838:12.

159. DOE SLP 1 testified as an expert in the field of speech language pathology. TR 767:1-4.

160. DOE SLP 1 first met Student on October 4, 2016 at the Home School. DOE SLP 1 was instructed to observe Student for six to eight weeks prior to working with Student. DOE SLP 1 met with Student two times per week for a total of 150 minutes. TR 767:12-18.

161. On October 24, 2016, Parent 2 sent SPED teacher 1 an email clarifying DOE Provider 4's vacation dates and asked who the substitute provider would be. Parent 2 also questioned why DOE Provider 3 was not allowed to communicate with Parents. Parent 2 asked if they were allowed to contact DOE Provider 3 or if all communication would go directly to SPED teacher 1. *Id.* at 366.

162. DOE Provider 3 created a program dated October 2016. The program was revised to include the behaviors targeted in the FBA/BSP. Student averaged the following per day: 1) 3.6 self-injurious behaviors; 2) 2.6 SIB; 3) 5.5 SIB; and 4) 51.4 SIB. Student bolted one time in the month period. Student had four toileting accidents and transitioned without SIBs 80% of the time. Student's level of engagement was above 2 on average. Resp. Exh. 8 at 983-990.

163. DOE Provider 3 testified that DOE Provider 3 produced Student's behavioral and academic graphs for the 2016-2017 school year. The graph did not have a line drawn from September 2016 to December 2016 because there were "condition lines" in place. The condition lines were: when the PTT started, ESY start, ESY end, and DOE Provider 5 started. The "Function and Basic Math: 10-20 identification Summary" did not have data plotted for March and April 2017, because Parent 2 instructed PTT 1 and DOE Provider 5 to reduce academics because Student was stressed and had anxiety. Resp. Exh. 7 at 847-866; TR 916:20 – 921:3.

164. DOE Provider 3 testified that Student reached the level 2 engagement criteria within four weeks of the September 12, 2016 IEP; however, because of the transition with DOE Provider 4, DOE Provider 3 and SPED teacher 1 decided to extend the transition period for another three weeks. After seven weeks, Student continued to meet the level 2 engagement criteria. TR 758:1 – 759:9.

165. On October 31, 2016, SPED teacher 1 emailed the IEP team that Student had maintained an engagement level of 2.3, and Student's average was 2.0 during a seven-week period. Based on the discussion at the September 12, 2016 IEP meeting, SPED teacher 1 proposed that either Student's time at the Home School be increased by 30 minutes on both ends of Student's visit or Student attend on Tuesdays, Wednesdays, and Thursdays from 10:00 a.m. to 12:30 p.m. The new times could start on November 14, 2017. SPED teacher 1 thought that Student was ready to advance, because Student had been working with PTT 1 and Student's data from September and October showed Student had made progress. Resp. Exh. 6 at 640-646; TR 829:20 – 832:15.

166. On November 1, 2016, DOE Provider 3 responded to the October 31, 2016 email. DOE Provider 3 stated that based on the data and how Student had been doing at the Home

School, DOE Provider 3 would like to see Student come to the Home School from 10:00 a.m. to 12:30 p.m. on Tuesdays, Wednesdays, and Thursdays. *Id.* at 648

167. On November 1, 2016, Parent 2 responded SPED teacher 1's October 31, 2016 email. Parent 2 stated there was a "huge gap between the data from a month ago that you are basing your request on, and what's happening now for [Student]." Parent 2 claimed that the staffing changes were causing Student to regress and have SIBs and toileting accidents. Parent 2 wanted consistency with Student's program and did not want further changes until January 2017. Resp. Exh. 6 at 647.

168. Parent 1 responded to the October 31, 2016 on a later date. Parent 1 stated that there was a huge gap in the data between school and home, and that Student's behaviors were regressing since the fall break due to staff changes. Student had toileting accidents every night and an increase in SIBs. Parent 1 was concerned that increasing Student's demands in academics or adding more changes would lead to further regression. Parent 1 stated that the IEP team had agreed to gather data and revisit the issue in January 2017. *Ibid.*; TR 225:17 – 227:20.

169. On November 2, 2016, DOE Provider 4 returned from vacation. SPED teacher 1 informed the team that DOE Provider 5 should continue with Student full-time, since DOE Provider 4 would be leaving for vacation again and DOE Provider 4's last day of work would be December 30, 2016. The team wanted to make sure that they could secure DOE Provider 5, because if they waited until DOE Provider 4 eventually left, DOE Provider 5 might not be available. DOE Provider 5 remained with Student full-time until Student left school on April 30, 2017. TR 836:5 – 838:12.

170. Parent 1 testified DOE Provider 4 stopped working with Student on November 4, 2016. DOE Provider 4 had one day to train the new provider. Student again regressed. Parent 1 testified it took Student one month to stabilize.¹⁵ TR 62:6-22; TR 65:18-23.

171. On November 3, 2016, DOE SLP 1 met with Parent 2 and Parent 2 explained Student's program at the private facility. TR 769:9 – 770:15.

172. On November 7, 2016, Parent 2 emailed the DES, SPED teacher 1, and Principal 2 questions about communication with the provider. Parent 2 was concerned that the change in the service with the DOE resulted in their inability to communicate with DOE Provider 3. Parent 2 stated that this was unacceptable, and Parent 2 required direct communication with those

¹⁵ DOE Provider 5 had worked with Student from October 2016. TR 836:5 – 838:12.

working with Student and anyone with oversight of Student's program. Parent 2 requested a copy of the current and prior services. Pet. Exh. 8 at 350.

173. On November 8, 2016, SPED teacher 1 emailed Parent 2 and attached the Request for Proposals regarding the services. SPED teacher 1 stated that District Teacher 1 would be following up with further information. Pet. Exh. 8 at 349.

174. On November 9, 2016, District Teacher 1 replied to Parent 2's November 7, 2016 email. District Teacher 1 copied portions of the service and stated that DOE Provider 3 "would be in violation if DOE Provider 3 were communicating directly with you!" District Teacher 1 stated that the terms would stand "unless otherwise approved by the HIDEOE;" however "[t]his is a caveat for highly unusual circumstances." District Teacher 1 indicated that because Parents were able to directly communicate with SPED teacher 1, there was no need to communicate with DOE Provider 3. Pet. Exh. 8 at 348.

175. On November 10, 2016, SPED teacher 1 and DOE Provider 3 emailed Parents that in the past two weeks, Student's eating had decreased and there was an increase in behaviors when Student brushed Student's teeth. They suggested Student see a dentist. Parent 2 responded to the email stating that Student's behaviors were due to a lack of training, and Parent 2 attached Student's 2016 transition plan relating to changes in staff members. Resp. Exh. 6 at 651-655.

176. On November 10, 2016, PTT 1 was in charge of tooth brushing. DOE Provider 4 trained PTT 1 on the tooth brushing protocols during their eight weeks together. Tooth brushing is a daily activity. Resp. Exh. 6 at 659; TR 841:23 – 843:25.

177. On November 17, 2016, SPED teacher 1 sent an email to Parents and the IEP team. SPED teacher 1 clarified that the transition plan in the IEP refers to a "change in location," not "changes in staff." SPED teacher 1 stated that SPED teacher 1 thought that having DOE Provider 5 transition sooner, rather than later, would prevent further confusion. SPED teacher 1 further stated that there was no missing data in October 2016, and SPED teacher 1 informed Parents that SPED teacher 1 had not received copies of the daily home/school logs. Resp. Exh. 6 at 659.

178. DOE Provider 3 created a SPP dated November 2016. Student averaged the following per day: 1) 5 SIB; 2) 4 SIB; 3) 10 SIB; 4) 52 SIB; and 5) 1.5 bolts. Student had four toileting accidents and transitioned without SIBs 73% of the time. Student's level of engagement was above 2 on average. Level 2 engagement was defined as, "[p]articipates in activity with verbal prompting, has some referencing of others, some _____, minimum _____, **and** more than 5 behaviors." (emphasis in original). Resp. Exh. 8 at 992-999.

179. DOE Provider 3 testified that Student exceeded the level 2 engagement requirement by three weeks. Student had seven consecutive weeks at a level 2 engagement. TR 903:3-13.

180. Student had five different SLPs in 2016. Pet. Exh. 2 at 76-94.

181. On October 4, 2016, DOE SLP 1 conducted a speech session with Student. Pet. Exh. 3 at 98.

182. On April 14, 2017, PTT 1 informed the Principal that PTT 1 was resigning in two weeks. _____. PTT 1 was stressed. Parent 1 testified that because Student was exposed to this stress, Student was regressing. At the end of April 2017, Parents chose to stop sending Student to the Home School to prevent Student's regression, because the new PTT had only shadowed PTT 1 for one day. Pet. Exh. 8 at 352; TR 66:13 – 68:4; TR 378:1-8.

183. On April 20, 2017, Parents wrote the Home School a letter stating, “[i]n 10 business days from the date of the letter, we intend to remove [Student] from the Public School hybrid program that Student has been in, and place Student at the [private facility] at public expense.” Pet. Exh. 8 at 395.

184. On April 27, 2017, the day before PTT 1 was leaving, Principal 2 emailed Parents a letter documenting the staff assigned to provide Student with Student's instruction. The new staff included SPED teacher 1, SPED teacher 4, and another provider that Student had never met. Student had never worked one on one with SPED teacher 1. Pet. Exh. 8 at 356-358; TR 378:11

185. DOE Provider 3 created SPPs dated February 28, 2017 and April 30, 2017. The forms contain graphs tracking Student's level of engagement in academics, bathroom, bus, clean up, joining, visits to the Home School, lunch, morning routine, ____, SLT, tooth brushing, walking, and transitions. The forms also tracked Student's SIBs for bolting. Pet. Exh. 1 at 2-16.

186. DOE Provider 3 took a video of Student getting Student's lunch ready. Student hit the microwave with Student's head. DOE Provider 3 and DOE Provider 4 determined that this was not a SIB. The lightness of the hit indicated the action was sensory seeking. Pet. Exh. 15, video (SIB1_[Home School].mp4); TR 741:23 – 742:4.

187. DOE Provider 3 took a video of Student walking in the hallway of the Home School with DOE Provider 4. Several students and teachers were present. DOE Provider 3 testified that they were “doing laps” around campus. They had done this several times without others present, and they wanted to see if Student would enjoy being around other students. They wanted to determine if Student was capable of walking through a group of students without

having SIBs, and if Student would be able to transition to the Home School. Student was very excited. Student was skipping down the hallway, and Student nudged DOE Provider 4 with Student's head to indicate that Student was happy. DOE Provider 3 testified that even though Student's gait had accelerated, it would not be considered bolting, because it was a short distance, in a confined area. Student was safe, because there were railings, classrooms, and DOE Provider 4 was beside Student. DOE Provider 4 and DOE Provider 3 decided that when they went on walks in the future with Student, it would be in a less crowded area. Pet. Exh. 14 at 1:03:46 – 1:04:51; Pet. Exh. 15, video (SIB2_[Home School].mp4); TR 742:16 – 745:4.

188. At the end of April 2017, Parents chose to stop sending Student to the Home School to prevent Student's regression, because the new PTT had only shadowed PTT 1 for one day. Parents removed Student from DOE services on April 30, 2017. Pet. Exh. 8 at 352; TR 66:13 – 68:4; TR 378:1-8; TR 848:22-23.

189. Parent 1 is _____. Parent 1 is _____. TR 92:2-12.

190. Parent 1 testified that DOE Provider 3's graphs were not reliable, because some of the tasks are liked and others less liked. The graphs did not include data taken from the home environment, and did not take into account the time of the SIBs or toileting accidents. The data did not determine trends in Student's behavior to help Student's daily routine. TR 75:8 – 79:24.

191. Parent 1 created Parent 1's own level of engagement chart and graphs from May 1, 2017 to June 15, 2017. The new provider and Parents collected the data. Pet. Exh. 1 at 74-75; TR 82:17 – 4.

192. Parent 1 summed up and graphed Student's data from October 2016 through June 17, 2017 to determine Student's average level of engagement. Parent 1 also tracked Student's SIBs and toileting accidents. Parent 1 found Student's engagement level to fluctuate around 2.5. When Student was pulled out of the Home School, Student initially exhibited a high rate of SIBs; however, Student started to calm down and Student's engagement level increased. Pet. Exh. 1 at 2-16, 72-73; TR 85:6 – 91:21.

193. Parent 1 recorded Student's new words and context from May 1, 2017 to June 23, 2017. Student was able say several words, in English and _____, in the correct context. Pet. Exh. 1 at 055-56; TR 93:21 – 14.

194. In mid-2017, Student started working with the private SLP in _____. Student was very receptive to the SLT, because Student is responsive to assistive technology. To date, private SLP has seen Student progress by saying more words, making eye contact, and interacting. TR 95:15 – 97:7; TR 153:25 – 155:20.

195. On May 23, 2017, Student was assessed by _____. The assessment was based on observation of Student in the home, clinic, and community settings, interviews with caregivers, a review of historical records, and treatment tracking data. Student's repertoire was at 9% of the required functional skills for a child of Student's chronological age. The "caregivers" are required to carry out _____ to help reduce Student's SIBs. Pet. Exh. 5; Resp. Exh. 8 at 983; TR 491:3 – 494:3.

196. District Teacher 1 testified that _____ program and _____ program could not be used simultaneously because their philosophies and methodologies are different. The _____ program is individualized for each student and is based entirely on _____. _____ to reduce problem behaviors. TR 469:6 – 487:9.

197. On May 30, 2017, the private SPED teacher started working with Student at the private facility every Monday, Wednesday, and Friday for two hours. Student was unable to sit at the learning table, and private SPED teacher had to retrain Student. Private SPED teacher also focused on regaining Student's ability to attend, engage, participate, and motivate Student to try new things. Student can now sit at the learning table for 30 minutes. Student is focused and is able to access Student's academics. Private SPED teacher uses a variety of iPad applications and educational programs, because Student is responsive to computer technology. TR 267:22 – 268:3; TR 271:4 – 272:22; TR 282:12-15.

198. The private SPED teacher does not force Student to comply with an activity or demand, because it would make Student very anxious, causing _____, and dysregulation. TR 270:20 – 271:1.

199. The private SPED teacher's concerns from the August 2016 IEP meeting remained, and private SPED teacher testified that Student "really does need a special education teacher that is able to attend to Student and build Student's program." Private SPED teacher believed that Student needed a SPED teacher, because they have the education, training and ability to either adapt, modify, or monitor progress. It is not the role of the providers. TR 268:6-16.

IV. CONCLUSIONS OF LAW

A. Burden of Proof

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 concluded that the burden of

persuasion lies where it usually falls, upon the party seeking relief.” *Id.* at 535; *see also Stringer v. St. James R-1 Sch. Dist.*, 446 F.3d 799, 803 (8th Cir.2006) (following *Schaffer* in context of claim that IEP was not being implemented). 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 Code of Federal Regulations (“CFR”) section 300-101 and the Hawai‘i Administrative Rules (“HAR”), Title 8, Chapter 60, requires that Respondents make available to students with a disability an offer of FAPE that emphasizes special education and related services designed to meet their unique needs.

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Court set out a two-part test for determining whether Respondent offered a FAPE: 1) whether there has been compliance with the procedural requirements of the IDEA; and 2) whether the IEP is reasonably calculated to enable the student to receive educational benefits. *Rowley* 458 U.S. at 206-207. Respondent is not required to “maximize the potential” of each student; rather, Respondent 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 recently determined in *Andrew F. v. Douglas County School Dist.*, 137 S.Ct. 988 (2017) 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 the light of the child’s circumstances.” *Andrew* 137 S.Ct. at 1001. Similarly, the Hawaii District Court held that the IEP must be tailored to the unique needs of the child and reasonably designed to produce benefits that are “significantly more than *de minimus*, and gauged in relation to the potential of the child at issue.” *Blake C. ex rel Tina F. v. Hawaii Dep’t of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Haw. 2009).

Under the IDEA, procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity or seriously infringe on the parents’ opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE. *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479 (9th Cir. 1992).

The mechanism for ensuring a FAPE under the IDEA 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, in part, a statement of the present levels of the child's educational performance ("PLEP"), 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. § 1401(19). 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 tailored to the unique needs of the child and reasonably designed to produce benefits that are "significantly more than de minimus, and gauged in relation to the potential of the child at issue." *Blake C. ex rel Tina F. v. Hawaii Dep't of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Haw. 2009). Lastly, 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).

C. Whether the DOE Failed to Provide Services Listed in the 2015 IEPs.

Petitioners claim that the DOE failed to provide a provider and other services listed in Student's May 27, 2015 and September 25, 2015 IEPs.¹⁶ Petitioners further claim they had to employ a private provider from August 10, 2013 to August 28, 2015, because of the DOE's failure to provide one. Respondent asserts that there was no material failure to implement the 2015 IEPs.

The court in *Van Duyn v. Baker School Dist.* 502 F.3d 811, 822 (9th Cir. 2007) 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. The court clarified that "the 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." *Id.*

¹⁶ The IEP team also conducted IEP meetings on August 17, 2015 and December 16, 2015. These IEPs are not listed in Petitioners' Request and will not be addressed as a basis for the Decision. Resp. Exh. 1 at 1-5.

Parents unilaterally removed Student from DOE School 1 in July 2013. Student attended the private center since that time. Parent 1 testified that _____ after Student came home injured “day after day” in July 2013 and had not received Student’s speech language therapy SLT for six weeks. _____ at the private facility. _____ providers and the private SPED teacher _____ at the private facility.

The term “unilateral placement” is not defined by statute, and at least two Hawaii-based courts have concluded that the legislative history of H.R.S. §302A–443 is silent on the meaning of “unilateral” and “placement.” See *D.C. v. Dep't of Educ.*, 550 F.Supp.2d 1238, 1248 (D.Haw.2008); *Makiko D. v. Hawaii*, No. 06–CV–00189, 2007 WL 1153811, at *7 (D.Haw. April 17, 2007). Nevertheless, the *Makiko D.* court defined the term based on its plain meaning as follows: “a unilateral special education placement occurs when one party unilaterally (i.e., without consent or agreement of the other party) enrolls the student in a special education program.” *Id.* at *7. This is the case here. Parents, without the consent or agreement of the DOE, enrolled Student at the private facility. The Hearings Officer finds that Parents unilaterally placed Student at the private facility in July 2013.

In February or March of 2015, Parent 1 and the private SPED teacher went to the Home School to register Student. They met with SPED teacher 2, and SPED teacher 2 conducted a tour of the campus. SPED teacher 2 offered Parent 1 IEP meeting dates. SPED teacher 2 observed Student at the private facility two times prior to the May 27, 2015 IEP meeting. Parent 1 also brought Student’s previous SPED teacher 3 from the DOE School 1 and a DOE SLP to the private facility to meet with Parents and discuss Student’s current program. SPED teacher 2 wanted to have baseline data to make sure Student’s IEP would be appropriate. SPED teacher 2 discussed the full range of placement options with Parents.

1. May 27, 2015 IEP Meeting.

On May 27, 2015, the Home School conducted an IEP meeting. Parents, private SPED teacher, Principal 1, DES 2, DOE SLP 3, HSP, SPED teacher 2, and a general education teacher participated. Parents wanted Homebound Placement, but the IEP team determined that Student’s needs could be met on a public school campus. The IEP team recognized that a transition plan needed to be developed to address Student’s needs and for a smooth as possible transition from the private facility to the Home School.

Student received 1885 minutes per week of SPED services and Individual Instructional Support, 150 minutes per week of SLT, 200 minutes of OT per quarter, and 205 minutes per

quarter of ____ . The SLT could include direct service, consultation, and observation. The 150 minutes of SLT per week did not apply to weeks shorter than five days, and weeks that included the implementation of the transition plan, when Student was being introduced to new SLPs. Student also had a transition plan when transitioning to a new environment, daily visual supports, BSP, ____ , and a regulation plan. Student received ESY services after a break of two calendar days. The IEP listed 38 dates in June and July 2015 that Student could receive ESY.¹⁷ Student had 1830 minutes per week of support during the school day, and 10 hours per week afterschool, totaling 1885 minutes per week. Student's placement was on a public school campus fully self-contained in a functional program.

The June 2, 2015 PWN stated, “[Student] will receive Special Education for a full day generally in a self contained program (with access to general education students as Student can tolerate and appropriate for Student’s educational needs) for students needing functional support. [Student] will have 150 minutes per week of Speech and Language services, 200 minutes per month of OT, 205 minutes per month of services.¹⁸ **These will be fully implemented after completion of a transition to the public school campus...**[Student] will be place [*sic.*] on a public school campus upon completion of a transition plan.” (emphasis added). Parents believed that during the transition period, Student would be receiving all of the services listed in the IEP at the private center. Parents testified Student did not receive SPED services, because there was no DOE SPED teacher at the private center working with Student full-time.

Despite the fact Student would not receive all of Student’s services until Student was completely transitioned to the Home School, the DOE recognized that Student *did* have needs. Even though Student did not attend 2015 Summer ESY, sometime during the 2015 summer, DOE Provider 4 was hired by the DOE and started working with Student.

DOE Provider 1 was also assigned to work with Student in August 2015. DOE Provider 1 went to the private facility eight hours every week. During August and September 2015, DOE Provider 1 built a rapport between Student and the provider, and Student and __self. On September 1, 2015, DOE Provider 1 created an assessment based on Student’s IEP. DOE Provider 1 conducted numerous observations and interviews with Parents, the provider and private SPED teacher.

¹⁷ Student did not attend 2015 Summer ESY.

¹⁸ At the August 17, 2015 IEP meeting, Parents indicated they were not ready for parent education, because they wanted someone to lead and direct the paraprofessional first.

On September 23, 2015, DOE Provider 1 completed a draft BSP. The BSP was developed with input from Parents, private SPED teacher, DOE Provider 4, District Teacher 2, and another provider. DOE Provider 1 noted the problem behaviors to be SIBs and toileting accidents. The first “Proactive Strategy” listed in the BSP was, “[c]ontinuity and predictability of staff and routines are of high importance (Follow basic daily schedule, allowing for minor adjustments in timing and activities but adhering to basic routines).” The BSP also recommended that Student be supported to use more effective and functional replacement communication strategies to decrease and eventually extinguish Student’s SIBs. DOE Provider 1 stated that “[a]ll of [Student’s SIBs] are hypothesized to be 1) Escape/Avoidance of a demand or interaction; 2) An expression of frustration; 3) Sensory sensitivity; 4) An attempt to gain control of self, and possibly; 5) A learned behavior to emphatically request something (just like a speaking person might yell and then yell louder to get a student’s wants/needs met or feel ‘heard.’)”

DOE Provider 1 recommended that Student’s materials be placed up high to create a functional communication opportunity to meet Student’s needs, rather than engaging in SIBs. DOE Provider 1 also recommended a visual schedule to aid Student with transitions, and “sanitizing the environment,” by making it less visually stimulating and distracting to make Student request objects. Parents instructed DOE Provider 1 not to sanitize the environment, and they took away the visual schedule and materials provided by the DOE SPED teacher.¹⁹ Parents had to be notified if there were any changes in Student’s program or if they planned on implementing something new. DOE Provider 1 testified that DOE Provider 1 was frustrated with Parents’ instructions, because DOE Provider 1 had to allow Student to continue to engage in SIBs. Having an environment where there were so many objects at Student’s disposal did not encourage functional communication and self-advocating skills.

On September 23, 2015, DOE Provider 1 completed the FBA. The FBA focused on three areas of concerns expressed by Parents: SIBs, toileting, and academic engagement.²⁰ DOE Provider 1 hypothesized that when Student “feels that a caregiver does not understand Student’s request, if there is a change in Student’s routine or an unexpected transition, if Student is interrupted while engaging in a ____, or a demand is placed, Student may respond by engaging in self-injurious behavior in order to escape the interaction or demand, to express frustration, or to gain control.”

¹⁹ Parents testified that the visual calendar was only removed for a short period of time.

On September 24, 2015, DOE SLP 2 wrote an Assessment report. The results indicated that Student mainly communicated with gestures, body language, and vocalizations. Student used word approximations, words and phrases to comment, direct, request, and respond; however, Parents noted that Student had shown significant regression when compared to verbalizations at the beginning of 2014. DOE SLP 2 wrote that Student has many communication skills, but Student does not use them consistently. Student is very aware of what Student wants and will communicate this to others around Student. Student's strengths were Student's receptive language skills, understanding of cause and effect, repertoire of non-verbal communication, and the successful and appropriate use of some verbal communication. One of Student's challenges in the school environment was to engage Student and keep Student engaged.

20 U.S.C. § 1412(a)(10)(C)(i) provides: "Subject to subparagraph (A),²¹ this part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." This language clarifies the intended limitations that the IDEA places on entitlements for children voluntarily placed in private schools despite the offer of a FAPE in public institutions.

In *K.R. v. Anderson Community School Corp. (K.R. II)*, 125 F.3d 1017, 1019 (7th Cir. 1997) the school district refused to provide a full-time instructional assistant to attend classes with student at a private parochial school. In reaching their decision, the court in *K.R. II*, discussed the IDEA Amendments of 1997, PL 105-17, 111 Stat. 37. In Section 101 of the IDEA Amendments Act, which amended § 612(a)(10) of the IDEA, Congress explained that,

... this part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

111 Stat. 63. In light of this legislative clarification, the *K.R. II* court reversed the decision of the district court, which had required the defendant school board to pay for the cost of an instructional assistant for use by plaintiff K.R. while attending classes at a private parochial

²⁰ The FBA did not address the engagement in academic tasks at this time. *Id.* at 187.

²¹ 20 U.S.C. § 1412(a)(10)(A)(iii) states, "[s]uch services to parentally placed private school children with disabilities may be provided to the children on the premises of private, including religious, schools, to the extent consistent with law."

school.” See *Cefalu v. East Baton Rouge Parish School Board*, 117 F.3d 231, 232-233 (5th Cir.1997). (The amendments specifically state that an agency is required only to provide students voluntarily enrolled in private schools with a proportionate share of federal funds under the IDEA and is not required to pay for the cost of the special education services.); *Nieuwenhuis by Nieuwenhuis v. Delavan-Darien Sch. Dist. Bd. of Educ.*, 996 F. Supp. 855, 866–67 (E.D. Wis. 1998)(“Taken as a whole, the regulatory scheme reflects the fact that under the IDEA, when the parent of an eligible child opts out of a public school where a FAPE could be provided, that parent is opting for a lesser entitlement.”)²²

Further explained by 34 C.F.R. § 300.137, “[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.” Instead, parentally-placed private school students are governed by a different framework under the IDEA. Under this framework, a public school district must (1) locate, identify and evaluate children with disabilities who are enrolled by their parents in private schools within the district, and (2) allocate a proportional share of federal IDEA funds to provide special education and related services to parentally-placed private school children through their participation in the program assisted or carried out under Part B of the IDEA. 20 U.S.C. § 1412(a)(10)(A)(i)-(ii); 34 C.F.R. §§ 300.131–300.133. Part B funds must be spent by the school district on special education and related services for parentally-placed private school students in the district. The amount of the proportional share is determined by comparing the number of disabled students attending private schools in the district to the total number of children with disabilities being educated in the district. 20 U.S.C. § 1412(1)(10)(A)(i). As a result of this funding scheme, “[p]arentally-placed private school children may receive a different amount of services than children with disabilities in public schools.” 34 C.F.R. § 300.138.

In *Bd. of Educ. of Appoquinimink Sch. Dist. v. Johnson*, 543 F. Supp. 2d 351 (D. Del. 2008), the school district declined to provide a deaf student with a full-time sign language (“ASL”) interpreter at public expense while he attended a private school. The district presented evidence that the proportional share of federal Part B funds allocated to it for private school services amounted to \$3,639.00. The cost for the student's full-time interpreter exceeded \$37,000

²² Prior to the amendments of 1997, a school district needed only provide an eligible child who is voluntarily placed at a private school with a genuine opportunity for equitable participation in those services called for by the child's IEP. The amendments of 1997, specifically 20 U.S.C. § 1412(a)(10)(C), clarify a district's duty by specifying that such equitable participation need not be provided “at a private school or facility” if the district has offered a FAPE and the child's parents have nonetheless placed the child in a private setting.

per year, more than ten times the amount available for all parentally-placed private schools in the district falling within the provisions of the IDEA. “This fact alone demonstrates the inequity that would arise with respect to the other parentally-placed private school students if the District were required to fund a one-to-one ASL interpreter for the student. In light of this evidence and because the IDEA imposes no obligation on the District to provide related services on an individualized basis to a parentally-placed private school student.” *Id.* at 358-359.

It is clear from the language in the June 2, 2015 PWN, that the SPED instruction, SLT, OT and ___ would be “fully implemented” once Student was transitioned to the Home School. There was no offer in either the IEP or PWN stating that Student would receive **all** of the services and supports listed in the IEP at the private facility. Even though the DOE was not required to provide Student with all of the services listed in the IEP, Student received substantial services from DOE Provider 4, DOE SLP 2, and visual schedule and materials provided by the DOE SPED teacher. Had Student attended 2015 Summer ESY, Student could have received more services, but Parents chose not to have Student attend.

The Hearings Officer finds there was no failure to implement Student’s May 27, 2015 IEP.

2. September 25, 2015 IEP Meeting.

On September 25, 2015, the Home School conducted an IEP review meeting. Parents, Parent Advocate, private SPED teacher, Principal, DOE SLP 2, DOE Provider 1, SPED teacher 2, and a general education teacher participated. Student also attended a portion of the meeting. The IEP team reviewed and considered the FBA by DOE Provider 1, the Assessment by DOE SLP 2, and the OT assessment by the private OT.

The IEP stated that the private Psychiatrist recommended that Student “may benefit from an educational environment that is predictable and consistent with minimal distraction. Any changes to the environment should be gradual and Student should be given plenty of advance notice of any changes.” Private Psychiatrist further stated that “changes in teachers, providers, providers, educational assistants and other staff/caregivers would cause Student great distress. [Student] may benefit from a consistent provider with Student at all times with at least two providers that are trained to work with Student and whom Student is familiar with in order to provide coverage for the primary provider when he or she is not available. New staff introductions should occur gradually over time and the new staff should be thoroughly trained in how to use the BSP and Crisis Plans to manage Student’s behaviors.”

The private Psychiatrist testified that Student needed a transition plan, because children with ___ generally have difficulty with change. Anything that is introduced should be done slowly to minimize distress. The transition plan would need to be flexible and gradual and not driven by dates.

Parents created “[Student’s] transition plan relating to changes in staff members.” The staff transition plan stated, “[t]he team should be notified at least a month in advance of changes to staffing whenever possible to give the team time to create a two to three week transition program for [Student.]” Parent 1 testified that the IEP team agreed to this staff transition plan. The IEP further stated that Student’s transition to new staff members or an environment, may take four weeks. The staff transition plan would be implemented when new staff members were being introduced to Student and Student’s program.

Student’s services and placement remained the same as the May 27, 2015 IEP. Student’s placement was on a public school campus fully self-contained in a functional program. The Clarification of Services and Supports section stated Student’s “transitioning to new staff members/environment may take four weeks. The Transition plan will be implemented whenever there is [*sic.*] new staff members being introduced to [Student] and Student’s program.” The IEP also stated that Student would have a transition plan to support Student’s transition to a public school campus from the current private unilateral placement.” SPED teacher 2 testified that the idea of the transition period was to introduce Student to the DOE staff to make Student more comfortable. That way, when Student attended the Home School, Student would already know the SLP, OT, District Teacher 2, and the provider.

The PWN dated October 2, 2015 again stated, “[Student] will receive Special Education for a full day generally in a self contained program (with access to general education students as Student can tolerate and appropriate for Student’s educational needs) for students needing functional support. [Student] will have 150 minutes per week of Speech and Language services, 200 minutes per month of OT, 205 minutes per month of ____ . **These will be fully implemented after completion of a transition to the public school campus.**” (emphasis added). The PWN added, “[Student] will have services of a person to lead and direct the providers for 8 hours per week...[Student] will be place [*sic.*] on a public school campus upon completion of a transition plan.” The IEP team recognized that Student could become stressed when Student encountered service providers Student was not familiar with. However, they decided that Student needed adding a person “into the transition” to lead and direct the provider. The transition plan was discussed and revised.

On October 2, 2015, the DOE wrote an Evaluation Summary Report. The report stated the Student “continues to be on a transition plan to transition to [the Home School]. As such, Student now receives individual instructional support through a DOE provider, speech and language services through a DOE Speech and Language Therapist. Student will begin receiving services starting the week of Oct. 26, 2015. The plan anticipates adding Occupations [*sic.*] Therapy and [Student] is tolerating new staff members.”

SPED teacher 2 testified that the services were to start two weeks after the 2015 Fall ESY. The team would then meet to discuss how the transition went. If it was proceeding, they would introduce the OT. The services did not start on October 26, 2015, because provider had left the DOE. On November 17, 2015, SPED teacher 2 contacted Parent 2 about getting another provider, but Parents felt that the current team that was working with Student was enough staffing and they did not want to add any more people, especially if they were not going to be consistent. SPED teacher 2 scheduled a tentative meeting for December 17, 2015 to discuss the OT and services, parent education, and the transition to the Home School.

Student did not attend the Fall 2015 ESY. Parents informed the Home School that Student was having toileting issues and SIBs because of the provider change.

It is clear from the language in the September 25, 2015 IEP and October 2, 2015 PWN, that the SPED instruction, SLT, OT and services would be “fully implemented” once Student was transitioned to the Home School. There was no offer in either the IEP or PWN stating that Student would receive **all** of the services and supports listed in the IEP at the private facility. Even though the DOE was not required to provide Student with all of the services listed in the IEP, Student received substantial services from DOE Provider 4, SPED teachers 2 and 1 DOE provider 2, DOE SLPs 2 and 4, District Teacher 2, and DOE OT. Additionally, on November 17, 2015, Parents refused OT, services, and parent education services. Had Student attended 2015 Fall ESY, Student could have received more services, but Parents chose not to have Student attend.

Even though the DOE offered Student numerous services without Student’s complete transition to the Home School, Parents allege that the DOE failed to implement other services included in Student’s IEP. At the hearing, Parents complained that one of the services listed that the DOE failed to implement was the staff transition plan.

There are two “transition plans” at issue in the IEP. First, the “transition plan” listed in the IEP’s supplementary aids and services section relates to transitions from one environment to another. However, Parents created a “staff transition plan” relating to changes in staff members.

The September 25, 2016 IEP clarification of services and supports section includes **both** transition plans, as it states, “Student’s transition to **new staff members or an environment**, may take four weeks. The transition plan would be implemented when new staff members were being introduced to Student.” (emphasis added). At the outset, the Hearings Officer finds that the transition plan (transitioning to the Home School) was implemented. However, there is a question whether the DOE implemented the staff transition plan.

The staff transition plan created by Parents stated, “[t]he team should be notified at least a month in advance of changes to staffing whenever possible to give the team time to create a two to three week transition program for [Student.]” Specifically: 2a) if there will be a new provider working with Student, he or she will have three days to shadow the current provider; and 2b) after three days shadowing, he or she will have three days of working with Student’s current provider and/or teacher. The provider and/or teacher will continue to provide additional support to the provider. The staff transition plan further stated, “[t]o the extent possible, staff members familiar to [Student’s] program will be requested to provide consistency when notifications of unexpected changes occur...Agencies should provide opportunities for staff members to shadow [Student] to increase the pool of substitutes who will be familiar with [Student’s] program.

Parent 1 testified that the staff transition plan and the recommendations of the private Psychiatrist listed in the IEP were not followed. Parent 1 testified that it was important for Student to have consistent staff, because a change in routine would cause Student severe anxiety and stress. Student would make high-pitched sounds, run back and forth, bolt, and behavior. Student’s language would regress, and Student would stop eating and sleeping. Parent 1 testified that it would take two and a half to three months to train a new provider. Every time DOE Provider 1 left for vacation, the agency waited until one or two days prior to the vacation before they sent the substitute to meet Student. The substitutes did not know Student and were not familiar with Student’s program at the private center. Student would regress behaviorally and academically. Student would stop sleeping and eating, and Student would get sick. When Student got sick, the behaviors would start. It would take two to four weeks to stabilize Student.

During the 2016 Summer ESY, Student received Student’s SLT at the Home School. DOE SLP 4 provided the speech services from May 31, 2016 to June 30, 2016. Parent 1 testified that the DOE SLPs kept changing. There were approximately six different SLPs in six months, four in 2016 summer ESY. Parent 1 testified that due to the change in providers, Student did not do well with Student’s SLT and did not show progress.

SPED teacher 1 stated that during the summer months, SLPs are assigned to each school for one month. The SLPs rotate schools each month. The two 2016 Summer ESY SLPs that were assigned to the Home School were familiar with Student. Parents agreed that the SLP assigned in June 2016 would work; however, they did not feel that the July 2016 SLP would benefit Student, because of this disagreement Student did not receive speech services in July 2016. The Parent Advocate stated that part of the transition plan was to shadow each other so they would be familiar with Student and Student's program.²³ The SLPs that were unfamiliar with Student did not shadow SLPs that new Student's program.

The private SLP worked with Student from 2013 to 2015. Private SLP focused on increasing Student's expressive and receptive language, and Student's pragmatic and social skills. During the time, private SLP worked with Student private SLP "saw a major increase in Student's expressive language and really in Student's pragmatic abilities to interact with people and use Student's language to express ___self, even something as simple as following directions and being more independent." By August 2013, Student was up to 198 words; by February 2014, Student was speaking 700 words. The private SLP testified that having a consistent SLP and a routine is extremely important for children with Disability. If a child with Disability has multiple SLPs, it is hard to build trust, rapport, and to make a connection. It could impact their development, and how they use and understand their language. Parent 1 testified that when they removed Student from the DOE school, Student spoke no words.

Similarly, the private SPED teacher reported that Student had regressed since private SPED teacher last taught Student in 2013-2014.²⁴ At that time, Student was able to sit and attend at the learning table for two hours. Student was able to pick from a field of three of choices when requested, sequence things, and use manipulatives. Student could create simple sentences using "I like," and "I like pizza," first using pictures and then moving on to word tiles. Student could make verbal approximations. During the 2016 Summer ESY, Student was very avoidant, bolted, and took a long time to settle, partly because on the new environment with other students. Student would only settle for 30 minutes at the most. Private SPED teacher had to take Student to the _____ during the academic period. Student needed to address these behaviors before Student could access Student's learning. Student had lost the skills that Student previously had, and private SPED teacher was worried that Student wouldn't regain the skills.

²³ This testimony was taken from the August 4, 2016 IEP meeting, but it corresponds to Student's behavior and academic progress at the end of the 2015-2016 school year and 2016 Summer ESY.

²⁴ *Ibid.*

The court in *Van Duyn* stated the court stated that “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.” 502 F.3d 811, 822. It is clear from the testimony of Parents, the private SLP, and private SPED teacher, that Student had regressed during the 2015-2016 school year and the staff transition plan was not followed. The Hearings Officer notes that the staff transition plan is extremely specific and creates a very high standard for the DOE to comply with regarding staffing; however, because it is listed in the IEP, it must be followed and implemented when applicable.

The Hearings Officer finds that the staff transition plan identified in the September 25, 2015 IEP was not implemented and resulted in Student’s negative behaviors, thereby causing regression and inability to access Student’s education.

D. Whether the DOE Failed to Provide Services Listed in the 2016 IEPs.

Petitioners claim that the DOE failed to provide the services listed in Student’s August 4, 2016 and September 12, 2016 IEPs.²⁵ Petitioners allege Student was to receive 1860 minutes of SPED services per week, but Student only received 270 minutes per week when Student attended the Home School. Petitioners further claim that Student received no SPED services at the private facility and did not adequately receive the 30 minutes per month of OT consult, eight hours per month of Parent education and training, 480 minutes per week of teacher consultation services, and 120 minutes per month of team meetings. Additionally, Student did not receive speech services in August and September 2016 and the SLPs changed frequently. Lastly, the new staff was not properly trained and the transition plan was not followed. Respondent asserts that there was no material failure to implement the 2016 IEPs.

1. August 4, 2016 IEP Meeting.

On August 4, 2016, the Home School conducted an IEP meeting. Parents, Parent Advocate, private SPED teacher, Principal 2, Vice Principal 1, DOE SLP 6, DOE Provider 3, the SPED teacher 1, and SPED teacher 4 were present. The IEP team reviewed the 2016 Summer ESY progress report, input from the ESY private SPED teacher, Parents, and service providers.

As stated *supra*, the private SPED teacher reported that when private SPED teacher taught Student in 2016 Summer ESY Student had regressed, because of the staff changes and no

²⁵ The IEP team also conducted IEP meetings on May 19, 2016 and May 25, 2016. This IEP is not listed in Petitioners’ Request and will not be addressed. Resp. Exh. 1 at 1-5.

formal academic teaching. During the 2016 Summer ESY, Student's classroom had ____ to ____ other students and their providers. Each student had their own area in the classroom. The private SPED teacher testified that when private SPED teacher took Student to the Home School, they started off in a "dining area," but there was traffic going in and out, and Student was very distracted. They then moved to the other side of the room, but that location distracted another student. Student was able to engage and sit and attend at the Home School with the private SPED teacher once Student was moved to another area. Student had no SIBs and ate lunch with Student's peers. Student was able to trace on the iPad. Student did have trouble attending, because Student was distracted by the other students. The private SPED teacher stated Student enjoyed riding the bus and was excited. The private SPED teacher worked with Student ____ for four weeks.

Parent 2 asked the IEP team if the team agreed that Student would have a SPED teacher all year. SPED teacher 1 and SPED teacher 4 were unable to teach Student at the private facility, because they were teaching classes at the Home School. SPED teacher 1 consulted with DOE Provider 4 and gave DOE Provider 4 lesson ideas to work on at the private facility.

The Parent Advocate stated that when Parent Advocate closed Student's case in September 2015, the agreement was that the DOE would have a SPED teacher go to the private facility to help guide DOE Provider 4 and teach Student. The same SPED teacher would help with Student's transition to the Home School. That did not occur. The Parent Advocate stated that the provider should not be the SPED teacher, and the IEP team had previously agreed to have a SPED teacher go to the private facility. An IEP team member proposed to have 1960 minutes per week of SPED services once Student fully transitioned to the Home School, to include transportation. Principal 2 stated the 1960 minutes could be provided at the Home School but not at the private facility.

Principal 2 stated that at the last IEP meeting, Principal 1 agreed to have a PTT at the private facility to satisfy the SPED minutes; however, no PTT was assigned. It is unclear from the record if Principal 2's recollection was correct, because the meeting participant lists from the May 2016 IEP meetings do not indicate that Principal 1 attended the meeting, and there was no explicit mention of a PTT in the June 8, 2016 PWN. Nevertheless, Principal 2 noted that it was "pretty obvious" that Student's needs showed that Student needed a PTT for the 2016-2017 school year, because when Student worked with SPED teacher 1 and DOE SLP 2, "that formula worked." Parent 2 suggested that Student should start working with DOE SLP 2 again.

The IEP team suggested that a PTT go to the private facility and then transition with Student to the Home School. The PTT would help Student become familiar with SPED teacher 4, as would be used as a “bridge” to the Home School staff and environment. The goal was to have the PTT be with Student every day if Student could tolerate it.

Parents wanted a full-time SPED teacher, but the DOE only offered a PTT. Parent 2 said PTT 1 was interested, but PTT 1 needed to work 30 hours per week. Parents offered to pay for the other half of the time to equal a full-time teacher. Parent 2 spoke with Principal 2 about this possibility. Principal 2 said that the PTT could only work 17 hours per week. Parent 2 testified that he paid PTT 1 out of pocket and used a _____ to accommodate PTT 1’s demands.

Principal 2 stated that a PTT was limited to a 17-hour work week, and Student’s 1860 SPED minutes per week would not be met. The Parent Advocate said that the PTT could work with Student every day or implement a schedule to include all 17 hours (1020 minutes). The PTT would start at the private facility and then transition Student to the Home School and eventually “fade out.” Parent 2 agreed that the PTT plan would be “a great way to start,” but Parent 2 wanted to make sure the PTT did not change. Principal 2 stated that it might be difficult to find a SPED licensed PTT, but that would be the DOE’s “problem.” The Parent Advocate stated that the PTT did not necessarily have to be a SPED teacher, because the SPED teacher 4 would be guiding the PTT. It was most important to find a PTT that was a good match for Student.

One of the IEP team members suggested that the PTT start with working with Student at the private facility for two hours every day for the first week when DOE Provider 4 was there. Principal 2 suggested the PTT spend three hours on Monday, Wednesday, and Friday at the private facility, and four hours on Tuesday and Thursday when Student went to the Home School from the private facility. That would total 17 hours for the PTT. At first, the PTT’s 17 hours would probably not be direct instruction, because the PTT would be shadowing DOE Provider 4; however, the 17 hours could also include observation and lesson preparation. Principal 2 said that it would take 2 weeks, at the earliest, to hire a PTT.

The Parent Advocate stated that Student needed to transition to the Home School. First, Student would remain at the private facility with the goal to work up to a six-hour day there. This could last for two to three weeks. Once Student was familiar with the PTT, Student could be brought to the Home School. When Student was at the Home School, the PTT could determine how many hours Student would be able to be there. The time at the Home School

could be increased when Student was ready, and the service providers would be introduced gradually to Student's program.

The IEP team reviewed the data from 2016 Summer ESY. Parents objected and stated the data was incomplete. They had not received the DOE's data, and their daily data sheets were not collected. The DOE stated that their data involved the time at the Home School. It was explained to Parent that in order to generate the monthly reports, the providers could only compile data from the providers and their time with Student. There was a question whether the monthly reports included the daily data sheets from Parents.

The Parent Advocate stated that sometimes Student's behavior at school overflows into the home and manifests in SIBs. That is how Student shows Student's "displeasure." Parent 2 sent Parent Advocate photos of Student banging Student's head against the wall and leaving a big hole. Parent Advocate said this was a sign of Student being dysregulated. The Parent Advocate stated the IEP team needs to consider the home data, because it shows Student's "full cycle."

After reviewing the data, the IEP team decided to continue with Student's transitioning to the Home School two times a week on Tuesdays and Thursdays from 10:30 a.m. to 12:00 p.m. with transportation. The SPED service would "be provided at this time by 2 teachers at [the Home School] and a Part Time Teacher on Mondays, Wednesdays, and Fridays for 3 hours per day and Tuesdays and Thursdays for 4 hours per day (which includes the transition time to [the Home School]). The PTT will provide services at this schedule for 2 weeks after which the duration at [the Home School] will raise to 2 hours, 10 – 12."

The IEP team informed Parents that there was a possibility that services would change on September 1, 2016 changing it to a teacher consult model. Parent 2 requested that they include the roles and responsibilities of the provider in the IEP. The Parent Advocate told the Parents that they had to abide by the service, and that the roles and responsibilities of the provider could not be in the IEP. The Parent Advocate said that all contact with the provider would be through SPED teacher 1, not the provider.

Parent 2 indicated that the private facility had a potential private SLP that Parent 2 would be comfortable with. Parent 2 did not believe DOE SLP 6 could facilitate Student's program because DOE SLP 6 was not familiar with assistive technology. DOE SLP 6 had observed Student at the Home School for 90 minutes on August 16, 2016. In mid-September 2016, Parent 2 asked that DOE SLP 6 be removed from Student's program, because DOE SLP 6 did not use

assistive technology as part of DOE SLP 6's SLT. Student missed one week of services, but SLT resumed the following week with DOE SLP 1.

Parent 1 had ____ DOE SLP 6 previously and knew at that time that DOE SLP 6 would not work in Student's program. Parent 2 wanted to know how the private SLP could be hired. That Parent Advocate told Parent 2 that the DOE would not pay for a private SLP, because DOE uses DOE personnel. The IEP team told Parents that the private SLP would have to apply with the DOE. Parents wanted to know if DOE SLP 4 was available to work with Student, because DOE SLP 4 was familiar with Student and understood Student's program.

The PWN dated August 23, 2016, stated Student received 150 minutes of speech/language therapy, transportation, 1800 minutes per week of individual instructional support, eight hours per month a Parent education and training, 480 minutes per week of teacher consultation services, and two hours per month of team meetings. Student's SPED services increased from 270 minutes per week to 1860 minutes per week. The PWN noted when Student was at the private facility, "a teacher needs to be there to guide Student's program, not only when Student is on a Public School campus. This will also assist the transition program to the Public School campus." Regarding placement, it stated, "[Student] was unilaterally placed in a Private Separate Facility, [the private center], and is gradually transitioning to a Public School Campus. [Student] receives Student's education at the [private center] as well as [the Home School]. No changes have been made to this placement but a transition plan has been discussed and proposed which will increase the duration by 30 minutes at [the Home School] after the PTT has been actively involved for 2 weeks." Student also received ____ and OT Consult for 30 minutes per month, and a transition plan when transitioning to a new environment. Student would receive ESY after a break of two calendar days. Although the IEP reference the private Psychiatrists recommendations regarding consistent staff, neither the IEP or PWN listed the staff transition plan.

Petitioners claim that the DOE failed to provide the services listed in Student's August 4, 2016 IEP. Petitioners allege Student was to receive 1860 minutes of SPED services per week, but Student only received 270 minutes per week when Student attended the Home School. Student received no SPED services at the private facility. These statements are incorrect.

First, Principal 2 informed Parents that all of the SPED minutes could be provided at the school. It was explained to Parents and agreed upon that Student would receive the full 1860 minutes upon the completion of Student's transition to the Home School. In the meantime, the IEP team crafted a transition schedule to make sure that Student received 1020 minutes per week

of SPED services to gradually build to the 1860 minutes. The IEP team agreed for DOE to hire a PTT to work 17 hours a week with Student and DOE Provider 4 at the private facility and the Home School during the transition period. It was explained that the teacher might not be SPED certified, but would be providing SPED services to Student and directing DOE Provider 4. Moreover, the PTT would serve as a bridge between the private facility and the Home School and would help Student's transition. At the IEP meeting Parents agreed to the schedule and were informed that the DOE would hire the PTT as soon as possible.

The DOE advertised for a PTT for Student, and several people applied. Parents wanted a full-time SPED teacher, but the DOE only offered a PTT. Parent 2 had a PTT who was interested, but PTT 1 needed to work 30 hours per week. Parents offered to pay for the other half of the time to equal a full-time teacher. Parent 2 spoke with Principal 2 about this possibility. Principal 2 said that the PTT could only work 17 hours per week.

Parent 2 testified that Parent 2 believed Student would receive all of Student's SPED services and supports at the private facility or that the IEP team was working on a "hybrid" program to accommodate Student during the transition process. It is inconceivable how Parents could assume that all of the SPED minutes would be provided, when they were the ones responsible for limiting the DOE's access to Student. Even if the DOE agreed to hire Parents' choice for PTT to work 30 hours per week, that would only total 1800 minutes. The record is clear that according to Parents, Student was unable to tolerate all of the staff and the services at that time. That is precisely why the IEP team formulated a transition schedule for Student. Even the Parent Advocate noted that the "goal" was to work up to a six-hour day, and that could take two to three weeks. A six-hour day would only total 1800 minutes per week.

Petitioners also argue that Student did not adequately receive the 30 minutes per month of OT consult, eight hours per month of Parent education and training, 480 minutes per week of teacher consultation services, and 120 minutes per month of team meetings. Student did not receive speech services in August and September 2016. The evidence showed that Student's services were limited at the request of Parents. Petitioners did not present sufficient evidence to show that these services were not properly implemented.

Lastly, Petitioners allege the SLPs changed frequently, the new staff was not properly trained, and the staff transition plan was not followed. While this may be true, the August 4, 2016 IEP did not include the staff transition plan. The IEP and PWN discussed Student's transition plan from the private facility to the Home School, but eliminated any reference to the staff transition plan. Therefore, the DOE was not obligated to follow the staff transition plan.

The Hearings Officer finds that there was no failure to implement Student's August 4, 2016 IEP.

2. September 12, 2016 IEP Meeting.

On September 12, 2016, the Home School conducted an IEP meeting. Parents, Parent Advocate, Principal, DOE SLP 6, DOE OT 2, DOE Provider 3, SPED teacher 1, and a general education teacher participated. The Home School wanted to discuss Student's behavioral data and Student's engagement levels. Parents shared specific behaviors that had been occurring at home and advocated that there was not enough evidence to support the increase of minutes at the Home School. The IEP team agreed that the school would modify the data collection for "engagement" and that consistent ratings of "2" would be a good indicator to increase duration or frequency at the Home School. Video recordings would be taken at the Home School to be used as visual data and to be an indicator for possible increase of duration or frequency at Home School. Data would be collected from the provider, SPED teacher, and Parents, and it would be shared electronically. The data would be reviewed by the IEP team after two to three weeks of consistent "Level 2" engagement.

The Parent Advocate agreed with the IEP team's proposal. Parent Advocate stated that if the data showed that Student had met the engagement criteria, a meeting in January 2017 would not be necessary. Student's duration or frequency at the Home School could be increased without an IEP meeting. Parent 1 testified that the determination to increase the frequency at the Home School would be based on the "Level 2" engagement and whether Student was experiencing regression.

The FBA/BSP was almost completed. DOE Provider 1 and IEP Care Coordinator needed to complete the last section on "bolting." This would be created with continuous input from Parents, the provider, PTT 1, and DOE District consultants. The IEP added a goal as a result of the FBA/BSP that was being developed. PTT 1 had been hired and would begin on September 13, 2016. Student would have 17 hours of PTT at the private center and during transitions to the Home School. Student would receive three hours per day, three times a week, and four hours per day, two times a week. The Home School would begin a trial, using a green card as a transition object to help Student transition from one location or activity to the next.

The IEP provided Student with 1800 minutes per week of Individual Instructional Support, 1860 minutes of SPED services per week, ____ and OT consult 30 minutes per month, a transition plan when transitioning to a new environment, eight hours per month a Parent education and training, 480 minutes per week of teacher consultation services, 120 minutes per

month of team meetings, and transportation twice a week to and from the Home School from 10:30 a.m. to 12:00 p.m. Student would receive ESY after calendar break of two days. Student would not participate with nondisabled peers at any time throughout the school day. Student mainly participated with other students with ____ at select times throughout the week. Student's participation with non-disabled peers would be in a controlled selected program as determined by the IEP members.

The IEP team decided to continue with Student's transitioning to the Home School two times a week on Tuesdays and Thursdays from 10:30 a.m. to 12:00 p.m. with transportation. The SPED service would "be provided at this time by 2 teachers at [the Home School] and a Part Time Teacher on Mondays, Wednesdays, and Fridays for 3 hours per day and Tuesdays and Thursdays for 4 hours per day (which includes the transition time to [the Home School]. The PTT will provide services at this schedule for 2 weeks after which the duration at [the Home School] will raise to 2 hours, 10 – 12."

The PWN dated September 22, 2016 stated that the providers, SPED teacher, and Parent take daily data collection. This data collection would be used to determine Student's levels of engagement. Data would be shared electronically and reviewed by team members after two to three weeks of consistent Level 2 engagement and video clips and the Home School. An IEP review meeting was scheduled for January 19, 2017.

Petitioners claim that the DOE failed to provide the services listed in Student's September 12, 2016 IEP. Petitioners allege Student was to receive 1860 minutes of SPED services per week, but Student only received 270 minutes per week when Student attended the Home School. Student received no SPED services at the private facility. These statements are again incorrect.

On September 12, 2016, Principal 2 emailed SPED teacher 1 to inform Parents that PTT 1 would start the next day. On September 13, 2016, SPED teacher 4 sent Parents an email regarding activities and materials that were sent to PTT 1 to work on with Student. SPED teacher 4 wanted Student to be familiar with the activities and materials, and then the Home School would follow-up with Student and ease Student into transitioning. PTT 1 started working with Student on September 13, 2016. The evidence showed that PTT 1 worked with DOE Provider 4, DOE Provider 5, SPED teacher 1 and DOE Provider 3.

DOE Provider 3 created a SPP dated September 2016.²⁶ Student's SIB Level 1 frequency averaged 2.38 per day; SIB Level 2 frequency averaged 3.0 per day; and, SIB Level 3 duration averaged .38 per day. Student only had two toileting accidents and transitioned without SIBs 86% of the time. Student's level of engagement was above 2 on average.

DOE Provider 3 created a SPP dated October 2016. The SPP was revised to include the behaviors targeted in the FBA/BSP. Student averaged the following per day: 1) 3.6 SIB; 2) 2.6 SIB; 3) 5.5 SIB; and 4) 51.4 SIB. Student bolted one time in the month period. Student had four toileting accidents and transitioned without SIBs 80% of the time. Student's level of engagement was above 2 on average. DOE Provider 3 testified that Student reached the level 2 engagement criteria within four weeks of the September 12, 2016 IEP; however, because of the transition with DOE Provider 4 to DOE Provider 5, DOE Provider 3 and SPED teacher 1 decided to extend the transition period for another three weeks.

DOE Provider 3 created a SPP dated November 2016. Student averaged the following per day: 1) 5 SIB; 2) 4 SIB; 3) 10 SIB; 4) 52 SIB; and 5) 1.5 bolts. Student had four toileting accidents and transitioned without SIBs 73% of the time. Student's level of engagement was above 2 on average. Level 2 engagement was defined as, "[p]articipates in activity with verbal prompting, has some referencing of others, some _____, minimum _____, **and** more than 5 behaviors." (emphasis in original). Student had exceeded the level 2 engagement requirement by three weeks, having seven consecutive weeks at a level 2 engagement.

On October 31, 2016, SPED teacher 1 emailed the IEP team that Student had maintained an engagement level of 2.3, and Student's average was 2.0 during a seven-week period. Based on the discussion at the September 12, 2016 IEP meeting, SPED teacher 1 proposed that either Student's time at the Home School be increased by 30 minutes on both ends of Student's visit or Student could attend on Tuesdays, Wednesdays, and Thursdays from 10:00 a.m. to 12:30 p.m. The new times could potentially start on November 14, 2017. SPED teacher 1 thought that

²⁶ DOE Provider 3 started working with Student at the end of July 2016. From July 2016 to September 1, 2016 DOE Provider 3 led and directed paraprofessionals, analyzed data, compiled graphs, generated reports, and consulted with SPED teacher 1. DOE Provider 3 created a Monthly assessment dated July 2016. Student's SIB Level 1 frequency averaged 2.5 per day; SIB Level 2 frequency averaged 2.67 per day; and, SIB Level 3 duration averaged 3 minutes. Student only had one toileting accident and transitioned without SIBs 93% of the time. Student's level of engagement was above 2 on average.

DOE Provider 3 created a SPP dated August 2016. Student's SIB Level 1 frequency averaged 1.5 per day; SIB Level 2 frequency averaged 2.2 per day; and, SIB Level 3 duration averaged 9.5 minutes. Student only had one toileting accident and transitioned without SIBs 91% of the time. Student's level of engagement was above 2 on average.

Student was ready to advance, because Student had been working with PTT 1 and Student's data from September and October showed Student had made progress.

On November 1, 2016, Parent 2 responded to the October 31, 2016 email. Parent 2 stated there was a "huge gap between the data from a month ago that you are basing your request on, and what's happening now for [Student]." Parent 2 claimed that the staffing changings were causing Student to regress and have SIBs and toileting accidents. Parent 2 wanted consistency with Student's program and did not want further changes until January 2017. On November 1, 2016, DOE Provider 3 responded to the October 31, 2016 email. DOE Provider 3 stated that based on the data and how Student had been doing at the Home School, DOE Provider 3 would like to see Student come to the Home School from 10:00 a.m. to 12:30 p.m. on Tuesdays, Wednesdays, and Thursdays.

Parent 1 responded to the October 31, 2016 on a later date. Parent 1 stated that there was a huge gap in the data between school and home, and that Student's behaviors were regressing since the fall break due to staff changes. Student had toileting accidents every night and an increase in SIBs. Parent 1 was concerned that increasing Student's demands in academics or adding more changes would lead to further regression. Parent 1 stated that the IEP team had agreed to gather data and revisit the issue in January 2017.

DOE Provider 3 produced Student's behavioral and academic graphs for the 2016-2017 school year. The graphs do not have a line drawn from September 2016 to December 2016 because there were "condition lines." The condition lines were: when the PTT started, ESY start, ESY end, and when DOE Provider 5 started. The "Function and Basic Math: 10-20 identification Summary" did not have data plotted for March and April 2017, because Parent 2 had instructed PTT 1 and DOE Provider 5 to reduce academics because Student was stressed and had anxiety.

As stated *supra* Parents limited Student's access to the Home School and Student's academics. Parents and the Parent Advocate had agreed at the September 12, 2016 IEP meeting that if the data showed that Student had met the engagement criteria, a meeting in January 2017 would not be necessary. Student's duration or frequency at the Home School could be increased without an IEP meeting. Student reached the level after four weeks, but because DOE Provider 4 was going on vacation, it was decided not to have further changes to Student's program.

The DOE continued to track Student's behaviors beyond the four weeks. After seven weeks, the data showed Student had sustained an average engagement level over 2 every week. Unfortunately, Parents responded that Student was regressing again. They claimed that there

was a huge gap in the data and Student was having SIBs and toileting accidents at home. Parents argued that the DOE's data was incomplete and unreliable.²⁷ Parents would not even agree to extend Student's visits to the Home School for one hour a day. At every turn, Parents effectively stymied the transition process and limited Student's access to Student's academics. It is completely understandable that they were concerned about Student's regression and SIBs, but the testimony of the DOE witnesses and DOE Provider 3 indicated that Student would have benefitted from continuing with the proposed and mutually agreed upon Transition Plan.

Petitioners also argue that Student did not adequately receive the 30 minutes per month of OT consult, eight hours per month of Parent education and training, 480 minutes per week of teacher consultation services, and 120 minutes per month of team meetings. The evidence showed that Student's services were limited at the request of Parents. Petitioners did not present sufficient evidence to show that these services were not implemented.

Lastly, Petitioners allege the SLPs changed frequently, the new staff was not properly trained, and the transition plan was not followed. As stated *supra*, the September 12, 2016 IEP did not include the staff transition plan. The IEP and PWN discussed Student's transition from the private facility to the Home School, but eliminated any reference to the staff transition plan. Therefore, the DOE was not obligated to follow Parents' staff transition plan. In fact, on November 17, 2016, SPED teacher 1 sent an email to Parents and the IEP team. SPED teacher 1 clarified that the transition plan in the IEP referred to a "change in location," not "changes in staff." SPED teacher 1 further stated that there was no missing data in October 2016.

The Hearings Officer finds that there was no failure to implement Student's August 4, 2016 IEP.

E. Whether the DOE did not Permit Parents to Directly Communicate with the Provider.

Petitioners' allege that Student was denied a FAPE, because the DOE refused to allow the Parents to directly communicate with the provider. At the time, Student's IEPs dated August 4, 2016 or September 12, 2016 were in effect.

When developing Student's IEP, the IEP team shall consider: (i) the strengths of the child; (ii) the concerns of the parents for enhancing the education of their child; (iii) the results of

²⁷ Parent 1 is _____. _____. Parent 1 testified that DOE Provider 3's graphs were not reliable, because some of the tasks are liked and others less liked. The graphs did not include data taken from the home environment, and did not take into account the time of the SIBs or toileting accidents. The data did not determine trends in Student's behavior to help Student's daily routine.

the initial evaluation or most recent evaluation of the child; and (iv) the academic, developmental, and functional needs of the child. 20 U.S.C. § 1414(d), *see also* HAR §8-60-48(a). The IEP contains, in part, a statement of the PLEPs, 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. § 1401(19), *see also* HAR §8-60-44(a). The statement of measurable annual goals must include academic and functional goals, designed to “meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum” and “meet each of the child’s other educational needs that result from the child’s disability.” *Id.* The DOE shall have an IEP in effect at the beginning of each school year. HAR §8-60-47(a).

In accordance with the IDEA and the Court's decision in *Rowley*, the Ninth Circuit Court in *Van Duyn v. Baker School Dist.*, 502 F. 3d. 811, 822 (9th Cir. 2007) held that a *material* failure to implement an IEP violates the IDEA. A material failure occurs when 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. Respondents have an obligation to provide services “in conformity with” a Student’s IEPs. 20 U.S.C.A. §1401(9). IEPs are binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute—not to decide on its own no longer to implement part or all of the IEP. *See* 20 U.S.C.A. §§ 1414(d)(3)(F), 1415(b)(3).

In July 2016, DOE Provider 1 introduced DOE Provider 3 to Parents at a restaurant. Parents informed DOE Provider 3 about Student’s program and told DOE Provider 3 to communicate directly with them. DOE Provider 1 told Parents that the service would be changing on September 1, 2016. The new service changed to teacher consultation, and the providers would no longer lead and direct the providers or collect data. The new provider role was to create a teacher support plan and train the teacher on teacher-identified targets.

At the August 4, 2016 IEP meeting, the IEP team informed Parents that there was a possibility that services would change on September 1, 2016 changing it to a teacher consult model. Parent 2 requested that they include the roles and responsibilities of the provider in the IEP. The Parent Advocate told the Parents that they had to abide by the service, and that the roles and responsibilities of the provider could not be in the IEP. The Parent Advocate explained that all contact with the provider would be through SPED teacher 1, not the provider.

On October 20, 2016, Parents sent SPED teacher 1 an email regarding the changed communication log and inability to communicate with DOE Provider 3. Parents wanted

clearance to directly communicate with DOE Provider 3. On October 21, 2016, Principal 2 informed SPED teacher 1 that the services had changed, and that Parents were no longer allowed to direct providers or communicate with the provider. Provider services were “teacher consultation.” On October 24, 2016, SPED teacher 1 sent an email to Parents informing them of the service change and how they would be unable to directly communicate with DOE Provider 3. SPED teacher 1 stated that SPED teacher 1 was “under the impression that the services are to consult with the teachers on [Student’s] team... Together we determine how we might solve the issues. I’m not sure what you needed from DOE Provider 3, but DOE Provider 3’s service is to DOE personnel who work with [Student].”

At the end of September or early October 2016, Parent 1 testified that Parents were told by the service provider that they could not talk to DOE Provider 3 unless the SPED teacher 1 allowed it. SPED teacher did not give DOE Provider 3 permission to speak directly to Parents. On November 7, 2016, Parent 2 emailed the DES, SPED teacher 1, and Principal 2 questions about communication with the provider. Parent 2 was concerned that the change in the service with the DOE resulted in their inability to communicate with DOE Provider 3. Parent 2 stated that this was unacceptable, and Parent 2 required direct communication with those working with Student and anyone with oversight of Student’s program. Parent 2 requested a copy of the services and the prior services.

On November 8, 2016, SPED teacher 1 emailed Parent 2 and attached the services. SPED teacher 1 stated that District Teacher 1 would be following up with further information. On November 9, 2016, District Teacher 1 replied to Parent 2’s November 7, 2016 email. District Teacher 1 copied services and stated that DOE Provider 3 “would be in violation if DOE Provider 3 were communicating directly with you!” District Teacher 1 stated that the terms of the service would stand “unless otherwise approved by the HIDEOE;” however “[t]his is a caveat for highly unusual circumstances.” District Teacher 1 indicated that because Parents were able to directly communicate with SPED teacher 1, there was no need to communicate with DOE Provider 3.

Nothing in the August 4, 2016 or September 12, 2016 IEPs required the DOE to allow Parents to have direct communication with the provider. The Hearings Officer notes that it is certainly reasonable for the Parents to expect that they be able to speak to the provider; nevertheless, there was no specific statement in the IEP *requiring* the DOE to implement this.

The Hearings Officer finds that Petitioners have not met their burden to show that Student was denied a FAPE for failure to implement the August 4, 2016 or September 12, 2016

IEPs by refusing Parents to have direct communication with the provider. There was no procedural or substantive violation of the IDEA.

F. Whether Petitioners Are Entitled to Relief.

Once a Hearings Officer holds that public placement of learning disabled child violated IDEA, they are authorized to grant appropriate relief. Equitable considerations are incorporated in fashioning relief, and Hearings Officer must consider all relevant factors, including appropriate and reasonable level of reimbursement that should be required.

1. Find the private facility as the appropriate and stay-put placement.

Petitioners allege that the private facility is “a safe, secure, and consistent learning environment” where Student can receive educational benefit. Petitioners assert that Student is making progress at the private facility. Even though Petitioners’ Request stated that the “[private facility] is appropriate placement and is the stay put placement,” Petitioners’ Reply Brief stated, “Petitioners did not argue the issue of ‘stay put’ in their Closing Brief.” Pet. Reply Brief at p. 9.

Under the relevant portion of the Stay-Put statute, “during the pendency of any proceeding conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child...”. 20 U.S.C. §1415(j); *see also*, Hawaii Administrative Rules (“HAR”) §8-60-72(a). The phrase “current educational placement” includes “the placement described in the child's most recently implemented IEP [or Individualized Education Plan].” *L.M. ex rel. Sam M. v. Capistrano Unified Sch. Dist.*, 538 F.3d 1261, 1270 (9th Cir. 2008). The instant proceeding commenced upon the filing of the Request on January 24, 2017 and the IEP dated September 12, 2016 is Student’s most recently implemented IEP. Despite Petitioners’ statement that they did not request stay put placement, the Hearings Officer clarifies that the Home School is Student’s stay-put placement, upon Student’s transition there.

The next issue is whether the private facility is the appropriate placement. The education of a disabled child should take place in the least restrictive environment (“LRE”). 20 U.S.C. § 1412(a)(5)(A) (“To the maximum extent appropriate, children with disabilities ... are [to be] educated with children who are not disabled”). *See also* Haw. Admin. R. § 8–60–2, 34 CFR § 300.114(a)(2). “While every effort is to be made to place a student in the least restrictive environment, it must be the least restrictive environment which also meets the child's IEP goals.” *County of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1468 (9th Cir.

1996). In determining the least restrictive environment, this Court considers the following four factors: "(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [Student] had on the teacher and children in the regular class; and (4) the costs of mainstreaming [Student]." *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F. 3d 1398, 1404 (9th Cir. 1994). In applying the facts of this case to the LRE standard, the Home School would provide Student with the LRE.

In *K.D. v. DOE*, 665 F.3d 1110 (9th Cir. 2011), the facts showed that Pearl Harbor Kai was more appropriate than Loveland Academy as the LRE for K.D. K.D.'s 2007 and 2008 IEPs placed him at Pearl Harbor Kai and included provisions that he would have the opportunity to interact with non-disabled peers. In contrast, Loveland Academy placed K.D. in a classroom with only students who had mental health or learning disabilities. K.D.'s Loveland placement did not square with one of the main purposes behind the IDEA—to combat the “apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special education classes.” *N.D. v. DOE*, 600 F.3d 1104 at 1115 (9th Cir. 2010). Thus, the evidence supported the district court's decision that K.D.'s 2007 and 2008 IEPs offered K.D. appropriate placement at Pearl Harbor Kai.

The facts of *K.D.* are similar to the facts of this case. Here, Parents are requesting that Student be “placed” at the private facility where Student has no or very limited interaction with non-disabled peers. The Home School provides more opportunities for Student to be educated with non-disabled peers. Student is _____ of the private facility, save _____. Even though the private facility _____ to address Student’s needs, it falls short of the Parents’ vision to attend a public school campus. Parents’ actions are tremendous. However, Student’s isolation will not promote the goal of mainstreaming Student through the transition plan. The Hearings Officer finds that the Home School, with support of the transition plan, is the LRE for Student.

2. Reimbursement for tuition for private services.

Petitioners’ Request requested reimbursement for tuition and private services. However, Petitioners state in their Reply Brief, “Petitioners did not argue for private school reimbursement for their ‘unilateral’ placement of [Student] at the [private facility] in November of 2013.” Instead, “Petitioners are seeking reimbursement for out-of-pocket expenses for the services they paid for that the DOE should have been paying for and avoiding.” Pet. Reply Brief at pp. 8-9. In their Reply Brief, Petitioners attempt to characterize out-of-pocket expenses, separate and apart from tuition reimbursement. The Hearings Officer does not agree with this distinction.

Hawaii Revised Statutes §302A-443 sets forth the administrative hearing procedures relating to the education of children with a disability. Subsection (a) states, “[a]n impartial hearing may be requested by any parent or guardian of a child with a disability, or by the department, on any matter relating to the identification, evaluation, program, or placement of a child with a disability; provided that the hearing is requested: (1) Within two years of the date the parent, guardian, or department knew or should have known about the alleged action that formed the basis of the request for a hearing; and (2) Notwithstanding paragraph (1), within one hundred and eighty calendar days of a unilateral special education placement, where the request is for reimbursement of the costs of the placement.”

In this case, Parents’ expenses arise from the private facility. The private facility was for Student and is where Student received all of Student’s services that Parents unilaterally arranged for Student. There is no evidence that the DOE knew that Student was attending the private facility until February or March of 2015. At that point, an IEP meeting was scheduled on May 27, 2015 and Student was placed on a public school campus fully self-contained in a functional program. Student would have a “transition plan to support Student’s transition to a public school campus from the current private unilateral placement.”

It is clear from the record and the discussion and finding *supra* that Parents unilaterally placed Student at the private facility in July 2013. In order to receive reimbursement for tuition and private services, Petitioners would have had to file a Request by January 2014. This did not occur. Petitioners’ Request was filed on January 24, 2017; therefore, their request for reimbursement for tuition and private services is time-barred. The Hearings Officer denies Petitioners’ request for tuition reimbursement *a.k.a.* out of pocket expenses.

3. Compensatory Education.

Petitioners have requested compensatory education in the form of two years of education at the private facility. Petitioners allege that this time will enable Student to regain the skills Student has lost and prepare Student for transition to a public school campus. Respondent argues that there was no evidence presented to prove that Student’s educational deficit was caused by them.

Compensatory education is an equitable remedy that attempts to account for the educational deficit caused by a deprivation of educational services that a student should have received in the first place. *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125

(9th Cir. 2011). It seeks to "place disabled children in the same position they would have occupied but for the school district's violation of IDEA." *Id.* (quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)). Courts and Hearings Officers may award compensatory educational services at their discretion, often in the form of prospective injunctive relief. *Reid ex rel. Reid*, 401 F.3d at 523.

The inquiry as to an appropriate compensatory education remedy must be fact-specific and reasonably calculated to provide the educational benefits that would have accrued from special education services that should have been provided to the child in the first place. *Id.* at 524. An appropriate compensatory education award must be designed to ensure that a student is appropriately educated within the meaning of the IDEA. *Park ex rel. Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9th Cir. 2006.) There is no need to provide a day-for-day compensation for time missed. *Id.*

As stated *supra*, the Hearings Officer found that the staff transition plan identified in the September 25, 2015 IEP was not implemented and resulted in Student's negative behaviors, thereby causing regression and inability to access Student's education. However, the Hearings Officer does not agree with Petitioners' proposed compensatory education relief request as the private facility is not an appropriate placement.

At the August 4, 2016 IEP meeting, the IEP team suggested that a PTT go to the private facility, and then transition with Student to the Home School. The PTT would help Student become familiar with SPED teacher 4, as would be used as a "bridge" to the Home School staff and environment. The goal was to have the PTT be with Student every day if Student could tolerate it. At the September 12, 2016 IEP meeting, the Parent Advocate and the IEP team agreed that Student's transition to the Home School would occur after Student had two to three weeks of consistent "Level 2" engagement. The Parent Advocate stated that if the data showed that Student had met the engagement criteria, a meeting in January 2017 would not be necessary. Student's duration or frequency at the Home School could be increased without an IEP meeting.

The Hearings Officer determines that Student would benefit from having a PTT work with Student for 17 hours per week at the private facility to support Student's transition to the Home School. Once Student has four weeks of consistent "Level 2" engagement, Student will be transitioned to the Home School with the PTT. The engagement level will be determined through the data collection from the provider, EA, and other DOE service providers. Parents' data will be included, but the engagement level should focus on the school day. The Hearings

Officer appreciates Parents' concerns regarding Student's SIBs, lack of sleep, and toileting issues at home after Student attends school. However, it is patently obvious that every time Student was to transition to the Home School (e.g. ESY periods), Parents objected and claimed that Student was regressing. If Student's transition to the Home School was dependent on Parents' assertions, Student would never attend the Home School. Once Student is fully transitioned to the Home School, the IEP team can discuss whether to discontinue or reduce the PTT services.

The Hearings Officer determines that providing Student with a PTT to work with Student for 17 hours per week at the private facility to support Student's transition to the Home School to be appropriate compensatory education. The PTT does not need to be a certified SPED teacher, but must be someone whom is able to work with Student and build a rapport with Student.

V. DECISION

Based upon the above-stated findings of fact and conclusions of law, the Hearings Officer concludes that Petitioners have met their burden and have shown procedural and substantive violations of the IDEA, thereby denying Student a FAPE.

Petitioners shall be deemed the prevailing party in this matter.

RIGHT TO APPEAL

The parties have the right to appeal this decision to a court of competent jurisdiction within thirty (30) days after receipt of this decision.

DATED: Honolulu, Hawai'i, _____.

ROWENA A. SOMERVILLE
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

STUDENT, by and through Parents vs. DOE; DOE-SY1617-045
LEGEND; FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION