



OFFICE OF DISPUTE RESOLUTION
DEPARTMENT OF THE ATTORNEY GENERAL
STATE OF HAWAI'I

In the Matter of STUDENT, by and through
the Parent¹,

Petitioners,

vs.

DEPARTMENT OF EDUCATION, STATE
OF HAWAI'I and CHRISTINA
KISHIMOTO, Superintendent of Hawai'i
Public Schools,

Respondents.

DOE-SY2021-007

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing:
November 24-25, 2020

Hearings Officer: Charlene S.P.T. Murata

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

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals with Disabilities Education Act ("IDEA"), as amended in 2004, codified at 20 U.S.C. §§1400, et seq.; the federal regulations implementing IDEA, 34 C.F.R. Part 300; and the Hawaii Administrative Rules §§8-60-1, et seq. Additionally, Petitioners reference Section 504 of the Rehabilitation Act of 1973

¹ [REDACTED]

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

II. INTRODUCTION

On July 15, 2020, the Department of Education, State of Hawaii and Christina Kishimoto, Superintendent of Hawaii Public Schools (“Respondents” or “DOE”) received a Complaint and Resolution Proposal from Student, by and through Student’s Parent-1 (collectively “Petitioners”), dated July 15, 2020.

On July 28, 2020, Respondents filed Department of Education’s Response to Petitioners’ Complaint and Resolution Proposal, dated July 24, 2020.

On August 10, 2020, a Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for August 19, 2020.

On August 10, 2020, another Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, correcting the date of the prehearing conference.

On August 27, 2020, with the consent of the undersigned Hearings Officer and with no objections by Respondents, Petitioners filed a First Amended Complaint and Resolution Proposal (“FAC”).

On September 8, 2020, Respondents filed a response, dated September 4, 2020, to Petitioners’ FAC.

On September 24, 2020, an Amended Notice of Prehearing Conference; Subjects to be Considered was issued, setting a prehearing conference for October 7, 2020.

On October 7, 2020, a prehearing conference was held with Keith H.S. Peck, Esq. (“Mr. Peck”) appearing on behalf of Petitioners, and Deputy Attorney General Gregg M. Ushiroda (“Mr. Ushiroda”) appearing on behalf of Respondents. During the prehearing conference, the

parties requested to have the due process hearing on November 24-25, 2020 and November 30, 2020. Mr. Peck stated that he would request an extension of the 45-day decision deadline, which was then November 10, 2020, so that the due process hearing could take place on those dates.

On October 8, 2020, Petitioners filed a Request for an Extension of the November 10, 2020 decision deadline. On that same date, an Order Granting Petitioners' Request for an Extension was issued, extending the 45-day decision deadline to December 25, 2020.

On October 9, 2020, a Notice of Further Prehearing Conference was issued, setting a further prehearing conference for October 12, 2020.

On October 12, 2020, a further prehearing conference was held. Following the further prehearing conference, a prehearing order was issued, setting forth the issues and procedures for the due process hearing, and deadlines for submission of substantive motions, witness and exhibit lists and exhibits, and witness email addresses. No substantive motions were filed, and the parties timely submitted their witness and exhibit lists, exhibits, and witness email addresses.

Due to the Coronavirus 2019 global pandemic, the parties agreed to conduct the due process hearing using a video conferencing platform to ensure compliance with government mandated social distancing. See Governor of the State of Hawaii's Third Supplementary Proclamation, effective March 23, 2020, and Twelfth Proclamation Related to the COVID-19 Emergency, effective August 20, 2020.

On November 4, 2020, an Order Regarding Due Process Hearing Via Video Conference was issued, setting forth the procedures that would be implemented during the due process hearing using the Zoom video conferencing platform.

The due process hearing took place on November 24-25, 2020 using the Zoom video conferencing platform. November 30, 2020 was taken off because the due process hearing was

completed within two days. On November 24, 2020, Parent-1 appeared in the due process hearing remotely via video and audio while testifying. Once Parent-1 was done testifying, Parent-1 participated in the remainder of the due process hearing that day via audio only. Respondents had no objection to Parent-1 participating by audio only. All other participants in the due process hearing appeared remotely via video and audio. On November 25, 2020, all participants appeared remotely via video and audio. Parent-1 was not present on November 25, 2020. The undersigned Hearings Officer presided over the matter. Petitioners were represented by Mr. Peck, and Respondents were represented by Mr. Ushiroda. The Department of Education District Educational Specialist (“DES”) was present on behalf of Respondents.

Petitioners called Parent-1 as their only witness during the due process hearing. Respondents called the following witnesses during the due process hearing: Special Education Teacher-Care Coordinator (“SPED-CC”), Behavioral Health Specialist-1 (“BHS-1”) and Principal.

The following exhibits were admitted into evidence without objection: Petitioners’ Exhibit 1 (pages 001-027), Exhibit 2 (pages 028-058), and Exhibit 3 (pages 078-092, 095-180 and video/audios dated 04/6/2020 and 05/26/2020)²; Respondents’ Exhibit 1 (pages 001-003), Exhibit 3 (pages 010-012), Exhibit 5 (pages 015-027), Exhibit 6 (pages 028-029), Exhibit 7 (page 030), Exhibit 10 (page 034), Exhibit 12 (page 036), Exhibit 13 (pages 037-048), and Exhibits 16 through 35 (pages 063-133 and DVD files dated 04/06/20 and 05/26/20).

² Pursuant to an October 12, 2020 Prehearing Order, Petitioners transcribed portions of the 4/6/2020 Video they deemed relevant to their case. Petitioners’ utilized a program called “Trint” to transcribe the Video, which resulted in a very rough draft with missing words, wrong words and statements attributed to the wrong person. Tr. Vol. I, 53:17-54:9.

On December 9, 2020, Petitioners submitted a request to the undersigned Hearings Officer to extend the 45-day period in which a decision is due under Haw. Admin. Rules §8-60-69, from December 25, 2020 to February 8, 2021, so that transcripts could be prepared and post-hearing briefs filed. Respondents stipulated to the request for an extension. An order granting Petitioners' request to extend the decision deadline was issued on December 9, 2020.

On December 29, 2020, the parties timely filed their closing briefs. On December 30, 2020, Respondents filed an Errata Re: Respondents' Closing Brief and Certificate of Service filed December 29, 2020; Exhibits "A"- "B". Respondents' Errata was for the purpose of correcting the case number on the caption of their closing brief.

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

III. ISSUES PRESENTED

In their August 27, 2020 FAC, Petitioners allege procedural and substantive violations of the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973. Specifically, Petitioners allege that the Respondents denied Student a free appropriate public education ("FAPE"). Petitioners raise the following issues:

Issue 1³ – Whether the 4/6/2020-IEP team had sufficient information/discussion on Student's needs regarding the following:

- (a) The appropriate least restrictive environment.
(Specifically, how Student's stress might be triggered by a setting with unfamiliar people and large number students would affect Student).
- (b) Needed supplementary aids.
(Specifically, what Student receives at Student's private program and how that enabled Student's success).

³ During the October 7, 2020 prehearing conference, Petitioners' counsel acknowledged that allegations 1(a), 1(h), 1(i), 1(j), 1(k) and 1(l) in the FAC were duplicative of other issues in the FAC and agreed to strike allegations 1(a) and 1(h) through 1(l).

- (c) Present Levels of Educational Performance.
(Specifically, Student's vocational skills, reading levels, stress triggers, ability to navigate the community and campus, self-advocacy skills, counseling needs, need for Adaptive Physical Education if Student were to attend large campus school with many peers and Student social skills).
- (d) The frequency and/or duration of Counseling services.
- (e) Whether Student needed adaptive physical education.
- (f) Student's focus and/or needs and/or goals for Student's Post High School Transition Plan.

Issue 2 – Whether the 4/6/2020-IEP contains sufficient supports and services to address Student's anticipated difficulties if transferring from Student's current and historic private program/setting to the public program/setting.

Issue 3 – Whether the DOE failed to revise the 4/6/2020-IEP when the IEP team agreed during the 4/6/2020 meeting to gather additional information to address Student's IEP.

Issue 4 – Whether the 4/6/2020-IEP team recognized Student's deficits in differentiating facts from opinions and social situations and holding conversations with peers, but the IEP does not address these needs⁴.

Issue 5 – Whether the discussion of Student's eligibility for ESY services was insufficient because regression and recoupment were the only bases discussed. Even after recognizing possible other bases for Student ESY eligibility, the school relied upon a regression/recoupment analysis to determine eligibility.

Issue 6 – Whether the DOE informed Parents that there will be alternations in the implementation of Student's 4/6/2020-IEP. Such alterations, as described, would result in a material failure to implement Student's IEP.

Petitioners request the following remedies:

Remedy 1 – Find that the allegations in the FAC have been proven and that the DOE denied Student a FAPE;

Remedy 2 – Order the DOE to assume the costs of Student's privately delivered educational and related services through reimbursement to family of

⁴ At the beginning of the due process hearing, Petitioners requested that Issue 4 be restated. Respondents did not have any objections to Petitioners' request. Petitioners' request was granted. Therefore, Issue 4 in this Decision is stated differently from how it is stated in the Prehearing Order.

expenses already assumed and as direct payment for expenses yet to be incurred; and

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

IV. FINDINGS OF FACT

Student Background

1. Student is currently ___ years old. Pet. Ex. 1 at 004.
2. Student is eligible for special education and related services pursuant to the IDEA and Hawaii Administrative Rules Chapter 60.
3. In February of 2016, Student was diagnosed with ___. Pet. Ex. 1 at 004; Pet. Ex. 3 at 134.
4. [REDACTED]
[REDACTED]
[REDACTED] Pet. Ex. 1 at 004.
5. [REDACTED]
[REDACTED]
[REDACTED] Parent-1, Tr. Vol. I, 26:1-25⁵, 27:20-28:2; Pet. Ex. 3 at 135.
6. Student’s deficits in the areas of emotional/behavior, writing, and mathematics impact Student’s ability to participate in the general education curriculum without supports. Pet. Ex. 1 at 004.
7. When Student was ___ years old, Student started to participate in a [REDACTED] group. [REDACTED]

⁵ “Parent-1, Tr. Vol. I, 26:1-25” means Parent-1 testimony, Transcript of due process hearing, Volume I, page 26, lines 1-25.

[REDACTED]

[REDACTED] allowed someone to be with Student “as a one-on-one type thing.” Student participated in group discussions and activities. [REDACTED]

[REDACTED] Parent-1, Tr. Vol. I, 83:8-87:9.

8. In the 2016-2017 school year, Student was placed in a fully self-contained classroom at Public School-1. Student felt the fully self-contained classroom was too noisy and was consequently transferred to regular special education classes with a one-to-one aide. Student did not like Public School-1 and cried practically every day. Student’s last day at Public School-1 was August 26, 2016. Pet. Ex. 3 at 134.

9. In the fall of 2016, Student was placed at Private School where Student completed Student’s ___ grade for the 2016-2017 school year. Parent-1, Tr. Vol. I, 27:23-28:2, 30:1-6, 73:8-12; Pet. Ex. 3 at 134.

10. In ___, Student participated in [REDACTED] classes at [REDACTED]. [REDACTED]. Parent-1, Tr. Vol. I, 77:25-78:25.

11. The teacher at the [REDACTED] Program did not tell Parent-1 that Student was having difficulties in class, and Parent-1 did not ask the teacher if Student was having difficulties or was socially awkward in class. Parent-1, Tr. Vol. I, 81:10-17.

12. Since Student started at Private School in the 2016-2017 school year, Student has always had an IEP. Parent-1, Tr. Vol. I, 73:11-22.

13. Student is currently in the ___ grade and continues to attend Private School. Parent-1, Tr. Vol. I, 30:7-11.

14. Student has made progress in recovering from the symptoms of ____.
- Pet. Ex. 3 at 4/6/2020 Video, 00:36:47; DOE Ex. 7 at 030; Pet. Ex. 3 at 134-135; Parent-1, Tr. Vol. I, 67:23-68:2.

Before April 6, 2020 IEP Meeting

15. Parent-1 attended Student's IEP meetings. Parent-1, Tr. Vol. I, 73:11-22.
16. Parent-1 has never informed Private School that Parent-1 would be attending IEP meetings for Student and has never invited Private School to any IEP meetings. Parent-1, Tr. Vol. I, 73:23-74:6.
17. No one from Private School has ever attended an IEP meeting for Student. Parent-1, Tr. Vol. I, 74:7-9.
18. Parent-1 testified that Parent-1 believed it would have been beneficial to have someone from Private School attend the IEP meetings because Private School sees Student on a daily basis. Parent-1, Tr. Vol. I, 74:15-23.
19. Private School develops its own school records for Student, such as report cards, progress reports, assessments, work samples, and counseling records. Parent-1, Tr. Vol. I, 75:1-21; DOE Ex. 1 at 001-003.
20. On April 8, 2019, an IEP meeting was held, resulting in an April 8, 2019 IEP ("4/8/2019-IEP"). No one from Private School attended the 4/8/2019-IEP meeting. Pet. Ex. 1 at 014-025.
21. On January 30, 2020, Parent-1, Parent-2, Executive Director ("Director") of Private School, and DOE entered into a settlement agreement ("1/30/2020-SA"). Pursuant to

- the 1/30/2020-SA, Private School agreed to provide DOE with Student's educational records on a quarterly basis for the 2019-2020 school year, including the first quarter of the 2019-2020 school year. Private School agreed to give DOE the following Private School educational records: quarterly progress reports; communications with teachers and direct service providers; attendance records; service plans; report cards; student work samples; counseling records; behavioral intervention plans; incident reports; and academic, behavioral, and social data. Private School also agreed to let DOE conduct observations of Student at Private School on a quarterly basis. DOE Ex. 1 at 001-003.
22. On February 25, 2020, Public School-1 sent a fax to Private School and requested that copies of Student's first semester progress reports, report cards and attendance records be sent to Public School-2 per the 1/30/2020-SA. Pet. Ex. 3 at 095, 148.
 23. Special Education Department Head ("SPED-DH") is a Special Education Department Head for DOE. DOE Ex. 10 at 034.
 24. Special Education Teacher-Care Coordinator ("SPED-CC") is a special education teacher and care coordinator at Public School-2. DOE Ex. 10 at 034; SPED-CC, Tr. Vol. I, 139:3-6.
 25. On March 3, 2020, SPED-CC called Parent-1 and scheduled an IEP meeting for March 26, 2020. DOE Ex. 21 at 071; SPED-CC, Tr. Vol. I, 149:11-150:14.
 26. On March 3, 2020, SPED-DH called Director of Private School requesting academic records, and to schedule an observation of Student and administer assessments. Director stated that records were forthcoming and Private School would follow-up with SPED-DH on when an observation and assessments could occur. Pet. Ex. 3 at 090, 095.

27. On March 4, 2020, Parent-1 requested that the IEP meeting scheduled for March 26, 2020 be rescheduled to March 30, 2020. DOE Ex. 21 at 071; SPED-CC, Tr. Vol. I, 149:24-150:14, 151:3-5.
28. On March 5, 2020, SPED-CC sent a letter via email and fax to Director inviting Director or a Private School representative to Student's IEP meeting scheduled for March 30, 2020. The letter included contact information for SPED-CC and SPED-DH should Director need to contact them. The letter was mailed on March 6, 2020 via USPS. DOE Ex. 10 at 034; Pet. Ex. 3 at 095, 149; SPED-CC, Tr. Vol. I, 151:6-20.
29. SPED-CC did not get a response to SPED-CC's March 5, 2020 letter from Private School. SPED-CC, Tr. Vol. I, 151:21-23.
30. On March 6, 2020, SPED-DH called Director requesting academic records, and to schedule an observation and administer assessments. Director responded that Director was still waiting for a Private School teacher to provide available dates for an observation. Pet. Ex. 3 at 095.
31. On March 9, 2020, SPED-DH received a phone call from Director confirming an observation at Private School on March 11, 2020 at 9:00 a.m. and assessments administration at 10:30 a.m. Pet. Ex. 3 at 095-096.
32. On March 11, 2020, a 45-minute observation was conducted at Private School. The purpose of the observation was to gather social/behavioral/academic data on Student. SPED-CC, Tr. Vol. I, 141:19-23, 145:4-5. Present at the observation were SPED-CC, SPED-DH, Vice Principal, Student Services Coordinator ("SSC"), Behavioral Health Specialist ("BHS-1"), and Behavioral Health Specialist-2 ("BHS-2"). SPED-CC, Tr. Vol. I, 141:24-142:5. The observation was conducted while Student was in a fully self-

contained English class. The class had ___ students and ___ adults. Some of the observations made was that Student was listening to Student's teacher, following directions, focusing on class work, and asking questions. Student was also observed playing with Student's pencil (fidgeting) and looking around/at Student's hands. Pet. Ex. 3 at 096; DOE Ex. 7 at 030; SPED-CC, Tr. Vol. I, 142:14-145:5.

33. In addition to the observation that day, SPED-CC administered the Realistic, Investigatory, Artistic, Social, Enterprising, Conventional ("RIASEC") Vocational Interest Inventory assessment on Student at Private School. The purpose of the RIASEC Vocational Interest Inventory assessment was to assist with filling out the post high school transition services of the IEP (boxes 11-14) and to figure out which career "Academy" or "Pathway" in Public School-2 was right for Student. Student scored an "RIA" (Realistic, Investigative, Artistic) which meant that Student would do well working in a field that was hands-on and deals with research or art. The result was in line with Student wanting to be an engineer. SPED-CC, Tr. Vol. I, 145:6-147:13.
34. In addition to the RIASEC Vocational Interest Inventory assessment, SSC administered a Group Reading Assessment and Diagnostic Evaluation ("GRADE") on Student at Private School on March 11, 2020 ("3/11/2020-GRADE").
35. On March 11, 2020, a staff member at Public School-2 received an in-person verbal confirmation from Director that Private School academic records would be sent to Public School-2. Pet. Ex. 3 at 096.
36. On March 13, 2020, Private School closed due to the COVID-19 pandemic. Pet. Ex. 3 at 096.

37. On March 18, 2020, DOE schools closed due to the COVID-19 pandemic. Pet. Ex. 3 at 096.
38. On March 27, 2020, Parent-1 asked to reschedule the IEP meeting scheduled for March 30, 2020 to April 6, 2020. DOE Ex. 21 at 071; Parent-1, Tr. Vol. I, 69:1-14, 116:3-10; SPED-CC, Tr. Vol. I, 152:7-17.
39. Parent-1 did not inform Private School that the IEP meeting was rescheduled to April 6, 2020. Parent-1, Tr. Vol. I, 116:11-15.
40. On March 30, 2020, SPED-CC emailed Private School at [email address] to inform them that the IEP meeting was rescheduled to April 6, 2020. SPED-CC asked that Private School email SPED-CC should they have any questions. Pet. Ex. 3 at 150.
41. SPED-CC obtained Private School's email address from Private School's website and confirmed with SPED-DH, who used the same email address in the past to communicate with Director, that SPED-CC could reach Director at that email address. Pet. Ex. 3 at 096, 150; SPED-CC, Tr. Vol. I, 153:23-154:19.
42. On March 30, 2020, SPED-CC emailed Parent-1 apologizing that Parent-1 did not receive a draft IEP on Friday. SPED-CC re-sent the draft IEP. DOE Ex. 13 at 037-048.

April 6, 2020 IEP Meeting

43. On April 6, 2020, an IEP meeting was held using a video conferencing platform, resulting in an April 6, 2020 IEP ("4/6/2020-IEP"). No one from Private School attended the 4/6/2020-IEP meeting. Pet. Ex. 1 at 001-013; Pet. Ex. 3 at 096; DOE Ex. 5 at 015-027; DOE Ex. 34 at 131-132.
44. The 4/6/2020-IEP meeting was 2 hours, 24 minutes, and 13 seconds long. Pet. Ex. 3 at 4/6/2020 Video.

45. In drafting the 4/6/2020-IEP, the IEP team considered the following sources of information: 4/8/2019-IEP; Classroom observation on March 11, 2020; Private School Progress Reports for 2018-2019 school year; 3/11/2020-GRADE assessment; 3/11/2020 RIASEC Vocational Interest Inventory; Smarter Balanced Assessment (SBA) Statewide Assessment for ___ school year; Assessments from IDEA Re-evaluation; and Parent input. DOE Ex. 5 at 016; SPED-CC, Tr. Vol. I, 162:15-18.
46. Student's 2018-2019 Progress Reports from Private School show that Student did well during the first quarter of the school year after returning from summer break. Overall, Student did well during the 2018-2019 school year at Private School. Student's reading teacher commented that Student "offered good insight," and Student was able to "explain [Student's] reasoning very eloquently" (DOE Ex. 28 at 096). Student's P.E. teacher commented that Student was "an overall outstanding student," "confidently participated in all class activities," and "displayed positive leadership qualities." Student played basketball, soccer, dodgeball, sham-battle, football, kickball, relay races and swam (DOE Ex. 28 at 107). Student's occupational therapist commented that Student was willing to try challenging activities, Student is social with Student's peers, kind and considerate, and helpful to peers (DOE Ex. 29 at 108). DOE Ex. 28 at 093-107, Ex. 29 at 108-109.
47. The 3/11/2020-GRADE assessment was not provided to Parent-1 at the time of the 4/6/2020-IEP meeting. SSC did not score the 3/11/2020-GRADE assessment before public schools were closed due to COVID-19. After the school closure, SSC could not access SSC's office. As a result, during the 4/6/2020-IEP meeting, the IEP team used a GRADE assessment that Student took on April 2, 2019 ("4/2/2019-GRADE").

Student's 4/2/2019-GRADE assessment showed that Student had a score of "___."

When SPED-CC finalized the 4/6/2020-IEP, the 3/11/2020- GRADE assessment was scored and Student received a score of "___," which was added to the 4/6/2020-IEP.

Pet. Ex. 3 at 128; DOE Ex. 5 at 016; SPED-CC, Tr. Vol. I, 162:19-163:23; Pet. Ex. 1 at 001-002, 014-015; Pet. Ex. 3 at 4/6/2020 Video, 00:06:16-00:09:44.

48. During the 4/6/2020-IEP meeting, Parent-1 requested a copy of Student's 4/2/2019-GRADE assessment. The DOE members of the IEP team could not provide Parent-1 a copy of the actual assessment because the DOE uses the same GRADE assessment every year for all the students at different grade levels. Anyone who has a copy of the GRADE assessment would have an advantage when taking the assessment the next year. The DOE members of the IEP team offered to give a copy of the results to Parent-1. Pet. Ex. 3 at 128; Pet. Ex. 3 at 4/6/2020 Video, 00:06:16-00:09:44, 00:58:43-01:00:04.
49. The DOE members of the IEP team explained to Parent-1 that Student scored the grade equivalent of ___ in Student's 4/2/2019-GRADE assessment, which meant that Student was reading at a ___ grade level. Pet. Ex. 3 at 4/6/2020 Video, 00:06:16-00:06:43.
50. Student's 4/2/2019-GRADE assessment indicated that Student was reading at the ___ grade level when Student was in the ___ grade. Pet. Ex. 1 at 002.
51. Student's 3/11/2020-GRADE assessment indicated that Student was reading at the ___ grade level when Student was in the ___ grade. Pet. Ex. 1 at 002.
52. SPED-CC did not share SPED-CC's March 11, 2020 observation report ("3/11/2020-Observation Report") with Parent-1, nor did SPED-CC verbally tell Parent-1 what SPED-CC observed. SPED-CC agreed to share with Parent-1 SPED-CC's observations

- “later on” after the 4/6/2020-IEP meeting. SPED-CC, Tr. Vol. II, 167:7-168:4; Pet. Ex. 3 at 4/6/2020 Video, 00:58:43-01:00:17; DOE Ex. 7 at 030.
53. SSC shared with Parent-1 SSC’s observations of Student on March 11, 2020 during the 4/6/2020-IEP meeting. SSC told Parent-1, “From my short several hours of meeting with [Student], [Student] seems to be quite open and very willing to talk. We had nice conversations after the testing. And, you know, I’m confident that [Student] would do well in our academies.” Pet. Ex. 3 at 4/6/2020 Video, 01:55:04-01:56:38.
54. The DOE members of the IEP team used what they observed on March 11, 2020 in writing the Present Levels of Educational Performance (“PLEP”) section of the 4/6/2020-IEP. SPED-CC, Tr. Vol. II, 167:7-168:4.
55. The IEP team had a long discussion about Student’s placement and determined that Student’s least restrictive environment (“LRE”) was with Student’s non-disabled peers in all classes, passing periods, lunch, school-wide and extracurricular activities. Special education supports would be provided in Student’s core subjects, and the supports would also be available during the other periods of the day when the need arises. Pet. Ex. 1 at 012. The IEP team discussed the educational benefits, non-educational benefits, and the effects of Student’s presence on the teacher and other children. Pet. Ex. 3 at 4/6/2020 Video, 01:32:46-02:06:43.
56. Parent-1 testified that Parent-1 did not tell the 4/6/2020-IEP team that Student would have difficulty in a classroom with ___ kids. Parent-1, Tr. Vol. I, 61:15-22.
57. Parent-1 did not mention during the IEP meeting that Student was socially awkward in a large peer group in a school setting. SPED-CC, Tr. Vol. I, 165:17-21.

58. During the discussion regarding Speech/Language/Communication in the PLEP section, Parent-1 raised the concern that Student was “socially awkward” with people outside of the family and school. Parent-1 confirmed that Student did not have a problem talking to strangers while ordering food at a restaurant. SPED-CC addressed that concern by writing in the 4/6/2020-IEP under Speech/Language/Communication that Student needed help with “General social skills ie: holding a conversation.” Pet. Ex. 3 at 4/6/2020 Video, 00:26:45-00:28:50; Pet. Ex. 1 at 003; Parent-1, Tr. Vol. I, 77:3-8.
59. The IEP team discussed Student’s strengths and needs in Reading during the PLEP discussion. The IEP team wrote in the 4/6/2020-IEP that Student needed help to “differentiate fact and opinion” and “differentiate primary and secondary sources” when reading. SPED-CC included as a need “differentiate fact and opinion” because SPED-CC had read it in Private School’s progress reports. SPED-CC, Tr. Vol. I, 163:24-164:23. Parent-1 was asked if Parent-1 had anything to say about this section or if Parent-1 had any questions or concerns, and Parent-1 said “no.” Pet. Ex. 3 at 4/6/2020 Video, 00:28:52-00:29:34; Parent-1, Tr. Vol. I, 89:19-25. In discussing Student’s reading ability, the IEP team considered Student’s 4/8/2019-IEP, Private School Progress Reports for 2018-2019 school year, and 4/2/2019-GRADE assessment. Pet. Ex. 1 at 002-003.
60. The IEP team did not make a specific goal and objective to address the need to “differentiate fact and opinion” because Student tested high in reading. SPED-CC, Tr. Vol. I, 182:13-183:16.

61. Student's need to learn how to "differentiate fact and opinion" when reading can be addressed by chunking assignments and shortening assignments to focus on mastery. SPED-CC, Tr. Vol. II, 182:13-183:5.
62. During the discussion about Student's strengths and needs in Work Readiness/Vocational in the PLEP section, Parent-1 had no questions or concerns. Parent-1, Tr. Vol. I, 90:1-11.
63. In considering Student's Work Readiness/Vocational skills, the IEP team considered the 3/11/2020 RIASEC Vocational Interest Inventory, the 3/11/2020 classroom observation at Private School, and Private School Progress Reports for the 2018-2019 school year. Pet. Ex. 1 at 004-005. The IEP team went over Student's Work Readiness/Vocational strengths and needs and Parent-1 was asked if Parent-1 had any questions or concerns, to which Parent-1 said nothing. Pet. Ex. 3 at 4/6/2020 Video, 00:32:08-00:32:37.
64. Parent-1 expressed concern that the size of Private School was not nearly as big as Public School-2. Pet. Ex. 3 at 4/6/2020 Video, 01:23:20, 02:09:05-02:09:31. The IEP team addressed Parent-1's concern by proposing that Student have an adult support to transition from class to class, which could be an educational assistant or a special education teacher. Pet. Ex. 3 at 4/6/2020 Video, 01:23:39-01:24:31. The IEP team also explained that in an inclusion class setting, Student would have two teachers—Student's special education teacher and a general education teacher—working in collaboration to help Student. The general education teacher would give the special education teacher a lesson plan in advance, and the special education teacher would modify the lesson based on Student's needs. Pet. Ex. 3 at 4/6/2020 Video, 01:46:05-01:50:20, 02:09:14-02:11:15. The IEP team also discussed how Student's needs can be addressed with

counseling and a detailed transition plan to Public School-1. Pet. Ex. 3 at 4/6/2020 Video, 01:07:01-01:08:42, 01:56:38-01:57:27.

65. Parent-1 confirmed during the medical information discussion that Student no longer had [REDACTED] [REDACTED] Pet. Ex. 3 at 4/6/2020 Video, 00:32:37-00:35:44; Parent-1, Tr. Vol. I, 90:14-91:1; Pet. Ex 1 at 004.
66. Parent-1 testified that during the discussion about Student's post high school transition service needs, the IEP team discussed Student's interests and goals, and that what is reflected in box 12 ("Student's Interest") captures the discussion Parent-1 and the IEP team had about Student's interests. Parent-1, Tr. Vol. I, 93:5-21.
67. Parent-1 did not have any questions or concerns about box 13 and 14 of the post high school transition services. Parent-1, Tr. Vol. I, 94:5-95:13.
68. The IEP team discussed Student's goal of becoming an engineer, Student's interests, the public school course work Student would need to complete to get Student's diploma, and the transition services that Student will need to accomplish Student's post high school goals. Pet. Ex. 3 at 4/6/2020 Video, 00:40:11-00:53:09.
69. During the 4/6/2020-IEP meeting, the IEP team discussed that before Student attends Public School-2, they "would have a very detailed transition plan in place, which would have a very strong parent communication piece so that we can catch any issues that come, right away." Pet. Ex. 3 at 4/6/2020 Video, 01:56:49-01:57:27.
70. Parent-1 testified that the IEP team had an in-depth discussion about what the counseling services at Public School-2 would entail. The IEP team also discussed how

the counseling services would address Student's transition to a public school campus.

Parent-1, Tr. Vol. I, 95:14-97:1.

71. The IEP team spent approximately 19 minutes discussing Student's need for counseling during the services section. Pet. Ex. 3 at 4/6/2020 Video, 01:00:57-01:20:02, 02:17:52-02:18:22.
72. The 4/6/2020-IEP team discussed the frequency and/or duration of counseling services for Student. Parent-1 was specifically asked if Student received psychological services outside of Private School. Parent-1 stated that Student sees a doctor for Student's ____, but Parent-1 did not know if the doctor was a psychologist or psychiatrist. Parent-1 also stated that it was part of Student's curriculum at Private School to see a counselor every week, as needed. The IEP team explained to Parent-1 the difference between "as needed" counseling services and "regularly scheduled" counseling services, which would be mandatory. It was explained to Parent-1 that counseling for Student would address transitioning to public school, emotional/behavior problems, stress in school, peer issues, and anything that might hinder Student's education. Parent-1 was asked, "you could also give some of your concerns in these areas since knowing what kind of services Student had at [Private School]." Parent-1 stated: "I have nothing right now to say on that." The IEP team proposed a "starting figure" of 270 minutes per quarter of "floatable minutes" so that it can change from week to week, as needed, which would provide Student with flexibility during Student's transition to public school. This would come out to approximately 30 minutes a week. Should Student need more counseling, the minutes can be increased. Pet. Ex. 3 at 4/6/2020 Video, 01:00:57-01:20:02, 02:17:52-02:18:22; Parent-1, Tr. Vol. I, 42:17-43:16.

73. Principal asked Parent-1 regarding Student's self-advocacy ability to go and seek help from a counselor. Parent-1 stated that "[Student] has no problem with saying I have a concern about this, that or other with anybody." Pet. Ex. 3 at 4/6/2020 Video, 1:05:05. A strength of Student's was Student's ability to "self-advocate for a break" and "self-advocate for assistance" when Student needed clarification about something. Pet. Ex. 3 at 4/6/2020 Video, 00:25:09-00:26:44; Pet. Ex. 1 at 003.
74. The IEP team discussed Student's need for adaptive physical education. Parent-1 informed the rest of the 4/6/2020-IEP team that "I don't know if [Student] would need adaptive P.E." Pet. Ex. 3 at 4/6/2020 Video, 02:06:43-02:07:54.
75. The 4/6/2020-IEP team had a five-minute discussion regarding supplementary aids and services. Parent-1's input was sought throughout the five-minute discussion and ended when Parent-1 was asked if Parent-1 had "any questions, concerns, additions" and Parent-1 did not respond. Pet. Ex. 3 at 4/6/2020 Video, 01:21:29-01:26:50.
76. Parent-1 testified that Parent-1 did not share any information about the supports and accommodations that Student receives at Private School. Parent-1, Tr. Vol. I, 103:15-104:2.
77. The DOE members of the IEP team did not promise Parent-1 small group instruction.
78. The DOE members of the IEP team explained to Parent-1 Public School-2's "Academy" and "Pathway" program when discussing Transition Services of the IEP (Box 13). The purpose of Academies is to expose students to different careers. There are ____ Academies and within each Academy there are Pathways. All the students at Public School-2 select an Academy. Using Student as an example, the IEP team explained to Parent-1 that since Student was interested in becoming an engineer, Student could select

the STEM Academy. Within the STEM Academy are two pathways: (1) engineering, architect pathway and (2) health pathway (doctor, nurse, etc.). Pet. Ex. 3 at 4/6/2020 Video, 00:42:52-00:50:50.

79. The IEP team discussed what they needed to consider in making an extended school year (“ESY”) eligibility determination, the information that they had, and the need for more information. Parent-1 stated that Parent-1 personally noticed regression in Student when Student did not attend school, but Parent-1 had never asked Private School about Student’s regression. The DOE members of the IEP team listened to Parent-1 and responded to Parent-1 that Parent-1’s observation was good information but explained that more information was needed, such as rate of recoupment. Pet. Ex. 3 at 4/6/2020 Video, 01:26:51-01:32:45.

80. Since the IEP team did not have sufficient data to determine Student’s eligibility for ESY services, SPED-CC proposed that Student be deemed “not qualify” at that time and that the IEP team would reconvene once more information became available. Pet. Ex. 3 at 4/6/2020 Video, 01:26:54-01:27:49.

81. Parent-1 was asked for Parent-1’s opinion regarding Student’s eligibility for ESY services. Parent-1 stated:

I would like to talk to [Private School] again considering that they were the first day back to school since their vacation. They’re doing this online training thing, I think, starting today. So I would—I would like to talk to [Private School] before I say anything else on that.

Pet. Ex. 3 at 4/6/2020 Video, 01:27:59-01:28:29.

82. It was understood that Parent-1 would speak to Private School and SPED-CC would seek more information about ESY. It was also understood that the IEP team would

“meet again before the summer to further discuss the ESY.” Pet. Ex. 3 at 4/6/2020 Video, 01:27:49-01:31:48.

83. Parent-1 did not talk to Private School about ESY after the 4/6/2020-IEP meeting. Parent-1, Tr. Vol. I, 108:9-13.
84. SPED-CC did not try to get ESY data from Private School between April 6, 2020 and August 17, 2020, which was when the new school year began. SPED-CC, Tr. Vol. II, 187:23-188:8, 233:2-12.
85. As of the date of the due process hearing, Parent-1 had not provided the IEP team with any new information regarding ESY eligibility. Parent-1, Tr. Vol. I, 111:21-112:11.
86. The IEP team did not reconvene an IEP meeting prior to Summer 2020 to discuss ESY eligibility.
87. The 4/6/2020-IEP proposed the following Special Education and Related Services and Supplementary Aids and Services, Program Modifications and Supports for School Personnel: special education; counseling; transportation; chunking assignments; simplify and repeat instructions; extended time to complete assignments; shorten assignments; adult support transitioning from class to class; use of a calculator; and use of notes on test. Pet. Ex. 3 at 011.

After April 6, 2020 IEP Meeting

88. On April 8, 2020, a Prior Written Notice of Department Action was issued (“4/8/2020-PWN”). The 4/8/2020-PWN proposed that Student be given 2944 minutes per month of special education services in English, Math, Social Studies and Science classes in the general education setting; 270 minutes per quarter of counseling services; daily transportation service; modifications and accommodations listed in Student’s IEP would

be provided in all of Student's core and elective classes; all services would be provided in the general education setting on a public school campus. The 4/8/2020-PWN stated the following bases for the proposed action:

- 1.) [Student] requires specially designed instruction to address [Student's] academic needs....The General Education setting will provide [Student] with more opportunities to interact with both General Education and Special Education teachers in an academic environment where [Student] can benefit from class discussions, small group learning, and lesson presentations by both General Education and Special Education teachers while receiving the Special Education supports and services [Student] requires.
- 2.) Counseling services will address [Student's] behavioral, social/emotional, and interpersonal communication needs.

- 4.) The modifications and accommodations are provided to assist [Student] in accessing the General Education curriculum, to help [Student] make progress on [Student's] IEP goals and objectives, to help [Student] become more successful in [Student's] classes and to help [Student] stay on track as [Student] works toward achieving [Student's] school and post high school goals.

Pet. Ex. 1 at 026; DOE Ex. 6 at 028.

89. The 4/8/2020-PWN also described other options that were considered but rejected.

Some of the other options considered were: Special Education setting (resource classes) for core subjects (English Language Arts, Math, Social Studies and Science) and Adaptive Physical Education; and ESY services. Some of the reasons why these options were rejected were:

- 2) The review of the Least Restrictive Environment (LREs) using the Holland's Analysis, reports, data, and input from [Parent-1] stating that [Student] has been stigmatized in the Special Education setting informed the team's decision. The General Education setting with Special Education services is [Student's] Least Restrictive Environment (LRE). [Student's] current physical and/or medical condition does not

restrict [Student's] ability to participate in General Education Physical Education class.

- 3) Although there is data on the nature and severity of [Student's] disability, there is an absence of current data showing the rate of regression and recoupment. Therefore, the eligibility for Extended School Year (ESY) services could not be determined at this time. The team will reconvene prior to Summer 2020, to review any new data to determine Extended School Year (ESY) eligibility.

Pet. Ex. 1 at 027; DOE Ex. 6 at 029.

90. The 4/8/2020-PWN also contains a section called "Other relevant factors" which reads:

The Individual Education Program (IEP) meeting was conducted via a Department of Education (DOE) approved video conferencing program...[Student's] [Parent-1] will encourage the private school personnel to participate and provide additional data for the next Individual Education Program (IEP) meeting which will be scheduled prior to the end of the 2019-2020 school year. The team will discuss Extended School Year (ESY), current progress and other concerns that may come up. [Parent-1] will also be providing current medication and dosage information at next meeting.

Pet. Ex. 1 at 027.

91. On May 1, 2020, SPED-CC emailed Parent-1 to follow up on SPED-CC's phone call about scheduling a re-evaluation meeting and an ESY meeting. SPED-CC requested dates and times when Parent-1 was available. SPED-CC suggested May 12th as a possible date to hold both meetings. DOE Ex. 12 at 036.
92. On May 21, 2020 at 10:18 a.m., SPED-CC emailed Parent-1 to follow up on SPED-CC's phone calls and to ask Parent-1 if Parent-1 was okay with having a meeting with the current ___ Teachers on May 26, 2020. Pet. Ex. 3 at 092; DOE Ex. 17 at 064.
93. On May 21, 2020 at 10:56 a.m., SPED-CC emailed Parent-1, stating that SPED-CC had set up a ___ Teachers meeting for Tuesday (May 26, 2020). SPED-CC informed Parent-

1 to let SPED-CC know if there were any questions Parent-1 would like to give to the teachers before the meeting. DOE Ex. 16 at 063.

94. On May 26, 2020, a ___ Teachers meeting took place via WebEx. The meeting was a little under half an hour. Present at the ___ Teachers meeting were Parent-1, SPED-CC, BHS-1, general education teacher, math teacher, Pathways/health teacher, Vice Principal, special education teacher, history teacher, counselor, physical education teacher and district resource teacher. The group discussed the various classes Student would be taking and the Academy/Pathway Program, Transfer Plan/Transition Plan, and addressed any concerns Parent-1 had. BHS-1 offered to meet with Parent-1 at any time during the summer and offered a campus tour. DOE Ex. 34 at 133; Pet. Ex. 3 at 5/26/2020 Video.
95. On May 26, 2020 after the ___ Teachers meeting, SPED-CC emailed Parent-1 a draft transition plan or transfer plan to Public School-2 (“Transition Plan”). SPED-CC informed Parent-1 that SPED-CC welcomed Parent-1’s input and that they could look at the Transition Plan again with all the ___ teachers in August. SPED-CC also informed Parent-1 that SPED-CC would be sending Parent-1 a recording of the ___ Teachers meeting they just had, and that SPED-CC would put it in their “dropbox” as well. DOE Ex. 18 at 065.
96. Parent-1 did not provide any feedback to the IEP team on the draft Transition Plan, nor did Parent-1 provide the draft Transition Plan to Private School for their comment. Parent-1, Tr. Vol. I, 114:9-115:12.

97. The Transition Plan sets out goals, objectives, positive behavior support for Student, timeline, and the person responsible for the goals, objectives, and “PBIS” strategies. DOE Ex. 18 at 066-068; DOE Ex. 32 at 123-125.
98. The Transition Plan contains the following behavior supports for Student: access to teacher; access to Behavioral Health Specialist; taking breaks; chunking assignments; simplify/repeat instruction; extended time to complete assignments; shortened assignments; ___ Team meeting; and a modified schedule, if needed. DOE Ex. 32 at 123-125.
99. On May 27, 2020, SPED-CC emailed Parent-1 a copy of the ___ Teachers meeting that took place on May 26, 2020. DOE Ex. 19 at 069.
100. BHS-1 is a Behavioral Health Specialist for the ___ District, ___ Complex. DOE Ex. 20 at 070.
101. On June 5, 2020, BHS-1 emailed Parent-1 reiterating BHS-1’s offer to give Parent-1 and Student a tour of Public School-2 while school was still out for the summer. DOE Ex. 20 at 070, Ex. 22 at 073.
102. On June 12, 2020, DOE received a copy of Student’s Progress Reports for the 2019-2020 School Year from Private School. Pet. Ex. 3 at 096; DOE Ex. 27 at 080-090.
103. Student’s 2019-2020 Progress Reports show that Student did well during the first quarter of school after returning from summer break. Student did quite well in the first quarter of the 2019-2020 school year for science and adaptive P.E., having received the highest grade of “Achieved” in certain areas (DOE Ex. 27 at 087-088, 091). Student’s Social Studies teacher wrote: “[Student] did very well to start the school year in social studies.” (DOE Ex. 27 at 090). Overall, Student did well during the whole school year.

104. On June 22, 2020, BHS-1 spoke to Parent-1 about taking a tour of Public School-2. Parent-1 informed BHS-1 that Student would not be interested in a tour; the decision to send Student to Public School-2 had not yet been made; Student did not want to go to Public School-2; and Parent-1 did not receive the finalized version of Student's IEP. DOE Ex. 23 at 074.
105. On July 7, 2020, BHS-1 called Parent-1 to offer again a tour of the campus before school started the next month. Parent-1 declined to take a tour. Parent-1 confirmed that Parent-1 received the IEP from last spring. Parent-1 said the plan as of now was to keep Student at Private School. DOE Ex. 24 at 075.
106. On July 8, 2020 at 11:07 a.m., Parent-1 sent an email to SPED-CC asking about the status of Student's IEP because Parent-1 had not received a finalized copy. Pet. Ex. 3 at 092; DOE Ex. 17 at 064.
107. On July 8, 2020 at 12:05 p.m., SPED-CC responded to Parent-1's email stating that SPED-CC had emailed a finalized IEP on April 8, and called on April 9 to confirm with Parent-1 that Parent-1 had received it. SPED-CC also confirmed that it was mailed on the 13th. SPED-CC indicated that SPED-CC would resend the document. DOE Ex. 17 at 064.
108. On July 29, 2020, Parent-1 sent an email to DOE requesting the sources of information used to develop Student's 4/6/2020-IEP and correspondence between the DOE and Private School. Pet. Ex. 3 at 095-096.
109. On August 5, 2020, Principal of Public School-2 ("Principal") sent a letter to Parent-1 ("8/5/2020-letter"), responding to Parent-1's July 29, 2020 email. The 8/5/2020-letter listed the sources of information used to develop Student's 4/6/2020-IEP, which is the

same as the sources of information listed in Student's 4/6/2020-IEP. The 8/5/2020-letter also provided a timeline of correspondences between the DOE and Private School in requesting information and inviting Private School to the IEP meeting. Pet. Ex. 1 at 002; Pet. Ex. 3 at 095-096.

110. On August 17, 2020, Public School-2 began the 2020-2021 school year with distance learning. All special education students attending Public School-2 would begin in-person instruction on September 14, 2020. DOE Ex. 33 at 128-129.
111. On August 24, 2020, a letter was sent to Private School requesting documents from Private School pursuant to a "January 31, 2020" settlement agreement. The letter requested that Private School provide the documents by September 11, 2020. DOE Ex. 26 at 077.
112. Private School did not produce the documents requested in DOE's August 24, 2020 letter by the September 11, 2020. DOE Ex. 26 at 077.
113. On September 8, 2020, Private School Math Teacher ("PS-Math Teacher") filled out a "Questionnaire" regarding Student ("9/8/2020-Questionnaire"). Pet. Ex. 3 at 080.
114. The 9/8/2020-Questionnaire was drafted by Petitioners' counsel. Parent-1, Tr. Vol. I, 38:23-39:5.
115. On September 14, 2020, SPED-CC faxed a letter to Private School requesting educational records from Private School. SPED-CC requested report cards and incident reports; Behavior Intervention/Support Plan and counseling records; service plans from related providers (e.g. occupational therapy, counseling); communication records between teachers and direct service providers; Summer session 2020 progress report and report card; Data (raw and annotated) for Quarters 1-4 and summer session: academic

(e.g. all formative and summative assessments), behavioral, communication and social; Student work samples (all subjects); and any other pertinent records to assist in the development of an IEP. SPED-CC requested that Private School provide the documents by September 25, 2020. DOE Ex. 25 at 076, Ex. 26 at 077.

116. On September 14, 2020, Director emailed SPED-CC a copy of Student's Progress Reports for the 2019-2020 school year and Private School's 2020-2021 school calendar. Director wrote: "I received your fax. I am attaching [Student's] progress report for the 2019-2020 school year. We did not do a summer program this year due to COVID and we don't have last year's work samples. If you would like us to keep work samples this year, we can definitely do so." Private School did not provide any other educational records to Public School-2. DOE Ex. 27 at 078-092.
117. On November 13, 2020, Parent-1 signed a Tuition Agreement for the 2020-2021 School Year with Private School. The 2020-2021 school year tuition is \$38,500.00. Pet. Ex. 3 at 078.
118. On November 16, 2020, Director responded via email to Petitioners' counsel's questions about Student's program at Private School ("11/16/2020-email"). Pet. Ex. 3 at 081, 090.
119. Private School's email address is _____. Pet. Ex. 3 at 091.

Private School

120. Private School is a nonprofit, non-graded, multidisciplinary school specifically designed for students with special needs. Pet. Ex. 3 at 084.
121. There are no non-disabled students in Student's classes at Private School and Student does not have any opportunities to interact and socialize with non-disabled peers at Private School. Parent-1, Tr. Vol. I, 72:25-73:7; SPED-CC, Tr. Vol. I, 141:1-5.

122. Private School staff consists of [REDACTED] Faculty, and Therapists. Pet. Ex. 3 at 082, 086.
123. [REDACTED] Pet. Ex. 3 at 089.
124. [REDACTED]
[REDACTED] Pet. Ex. 3 at 089.
125. [REDACTED]
[REDACTED] Pet. Ex. 3 at 080, 082.
126. [REDACTED]
[REDACTED] Pet. Ex. 3 at 082.
127. PS-Teacher is Student's teacher. Pet. Ex. 3 at 081.
128. PS-Math Teacher is Student's teacher. Parent-1, Tr. Vol. I, 61:23-62:1; Pet. Ex. 3 at 080.
129. Private School did not have summer school in 2020 due to COVID-19. DOE Ex. 27 at 078.
130. Private School's 2020-2021 school year runs from September 15, 2020 through June 30, 2021. Pet. Ex. 3 at 087-088.
131. Private School does not have academic instructional days during the following break periods: one-week spring break in March; two-week winter break in December; two-month summer break in July-September. DOE Ex. 27 at 078-079.
132. Summer school at Private School will start on July 6, 2021. Pet. Ex. 3 at 087; DOE Ex. 27 at 079.
133. Parent-1 testified that Student was successful because of the supports Student gets at Private School. Parent-1, Tr. Vol. I, 37:21-24.

134. Parent-1 testified that at the time of the due process hearing, Student was receiving counseling at Private School at least once a week, sometimes more often if Student was having a bad day. Parent-1, Tr. Vol. I, 42:25-43:12, 67:20-22.
135. As of November 2020, Student is not receiving adaptive P.E. at Private School. Pet. Ex. 3 at 081.
136. Private School cannot issue a regular high school diploma and Student would need to get a “GED” (General Educational Development) upon completion at Private School. Private School has a GED program that can assist Student with getting a GED. Parent-1, Tr. Vol. I, 66:18-67:19, 130:19-131:1.
137. Parent-1 testified that Private School provides chunking and assistive technology to Student. Parent-1, Tr. Vol. I, 39:6-14, 103:24.
138. Parent-1 does not know all of the supplementary supports that Student receives at Private School. Parent-1, Tr. Vol. I, 122:3-6.
139. Parent-1 testified that Private School has extended school year but Student has never participated in it because Parent-1 could not afford it and ESY was never approved in an IEP. Parent-1, Tr. Vol. I, 130:9-18.

V. CONCLUSIONS OF LAW

A. BURDEN OF PROOF

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

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

B. IDEA REQUIREMENTS

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

Special education means “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a child with a disability to benefit from special education. 34 C.F.R. §300.34; 34 C.F.R. §300.39; 20 USC §1401(26) and (29). To provide FAPE in compliance with the IDEA, the state educational agency receiving federal funds must “evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP.” Dep’t of Educ. of Hawaii v. Leo W. by and through Veronica W., 226 F.Supp.3d 1081, 1093 (D. Haw. 2016).

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

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

The mechanism for ensuring a FAPE is through the development of a detailed, individualized instruction plan known as an Individualized Education Program (“IEP”) for each child. 20 U.S.C. §§1401(9), 1401(14), and 1414(d). The IEP is a written statement, prepared at a meeting of qualified representatives of the local educational agency, the child’s teacher, parent(s), and where appropriate, the child. The IEP contains, among other things, a statement of the child’s present levels of academic achievement and functional performance, a statement of the child’s annual goals and short-term objectives, and a statement of specific educational

services to be provided for the child. 20 U.S.C. §1414(d). The IEP is reviewed and, if appropriate, revised, at least once each year. 20 U.S.C. §1414(d). The IEP is, in effect, a “comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” Burlington v. Dep’t of Educ. of the Commonwealth of Massachusetts, 471 U.S. 359, 368, 105 S. Ct. 1996, 2002 (1985). An IEP must be evaluated prospectively as of the time it was created. Retrospective evidence that materially alters the IEP is not permissible. R.E. v. New York City Dep’t of Educ., 694 F.3d 167 (2012).

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

C. ISSUES FOR DETERMINATION

1. **Whether the 4/6/2020-IEP team had sufficient information/discussion on Student’s needs regarding the following: LRE, Supplementary Aids, PLEP, Counseling, Adaptive P.E., Post High School Transition Plan**

In Issue No. 1, Petitioners are alleging that the 4/6/2020-IEP team did not have sufficient information on Student’s needs regarding appropriate LRE, needed supplementary aids, PLEP, the frequency and/or duration of counseling services, whether Student needed adaptive physical education, and Student’s focus and/or needs and/or goals for Student’s Post High School Transition Plan. Petitioners are also alleging that the discussion on the aforementioned needs during the 4/6/2020-IEP meeting was insufficient. Before addressing whether or not the

discussion regarding each of the aforementioned needs was sufficient, the issue of whether the IEP team had sufficient information about Student's needs will be addressed first. Based on the evidence, the undersigned Hearings Officer finds that the 4/6/2020-IEP team made reasonable efforts to obtain information on the aforementioned needs.

The evidence shows that Respondents attempted on numerous occasions to obtain information from Private School before the 4/6/2020-IEP meeting—the 1/30/2020-SA; verbal and written requests on February 25, 2020, March 3, 2020 and March 6, 2020 (FOF 21, 22, 26, 30). Even though Private School signed a settlement agreement on January 30, 2020 obligating Private School to provide Student's educational records to Respondents on a quarterly basis, Private School has effectively ignored the 1/30/2020-SA. A month after the execution of the 1/30/2020-SA, Respondents reminded Private School of the settlement agreement and requested copies of Student's educational records (FOF 22). None were provided. About a week later on March 3, 2020, Respondents followed up with Private School about Student's educational records. Director informed Respondents that Student's educational records were forthcoming (FOF 26). On March 6, 2020, Respondents followed up again on the status of Student's educational records (FOF 30). On March 11, 2020, Director stated that Student's educational records were forthcoming (FOF 35). On March 13, 2020, Private School closed due to the COVID-19 pandemic (FOF 36). Respondents did not receive any educational records for Student from Private School before the 4/6/2020-IEP meeting.

Petitioners' arguments that Respondents could have done more to get information about Student's educational records and needs are unpersuasive. Petitioners argue that SPED-CC should have drafted a set of questions for Private School teachers or administrators to answer (Pet. Closing Brief at 4); SPED-CC did not try to arrange a date that someone from Private School

was available (Pet. Closing Brief at 4); and Respondents could have asked Private School to withhold services from Student so that data regarding regression/recoupment can be obtained (Opening Statement, Tr. Vol. I, 14:3-16). The undersigned will address each of Petitioners' arguments in turn.

Petitioners' argument that SPED-CC should have drafted a set of questions for Private School to answer to get needed information on Student is unpersuasive. The evidence shows that Private School was uncooperative in producing Student's educational records, and in fact was willing to ignore the 1/30/2020-SA that it entered into with Respondents. For example, the 1/30/2020-SA specifically states that Private School "shall" provide Respondents with copies of Student's work samples on a quarterly basis, including work samples from first quarter of the 2019-2020 school year (FOF 21). At the time the 1/30/2020-SA was executed by Director, Private School was almost halfway through with the 2019-2020 school year⁶. On September 14, 2020, almost eight months after signing the 1/30/2020-SA and five (5) requests from Respondents for Student's educational records, which included work samples, Director made the following response to SPED-CC's September 14, 2020 request:

I received your fax. I am attaching [Student's] progress report for the 2019-2020 school year. We did not do a summer program this year due to COVID and we don't have last year's work samples. If you would like us to keep work samples this year, we can definitely do so.

(FOF 21, 22, 26, 30, 115, 116). Assuming that Private School discards all of Student's work product when they are created, Private School should still have had Student's work product from January 30, 2020 moving forward (FOF 19). However, knowing that Respondents wanted work samples and they were obligated to produce the work samples, Private School discarded all of

⁶ See FOF 130 for the dates of the 2020-2021 school year to get an approximation of the dates for the 2019-2020 school year.

Student's work product for the 2019-2020 school year, including those created after January 30, 2020. Private School's willingness to get rid of what it was contractually obligated to turn over to Respondents, Respondents drafting questions or questionnaires to Private School would have been a futile exercise. The fact that Private School was willing to answer questions or questionnaires from Petitioners' counsel says little about Private School's willingness to respect Respondents' requests (FOF 113-114, 118).

Petitioners' argument that SPED-CC did not try to arrange a date when someone from Private School would be available is also unpersuasive. An IEP team must consist of the following people:

IEP team. (a) General. The department shall ensure that the IEP team for each student with a disability includes:

- (1) The parents of the student;
- (2) Not less than one regular education teacher of the student (if the student is, or may be, participating in the regular education environment);
- (3) Not less than one special education teacher of the student, or where appropriate, not less than one special education provider of the student;
- (4) A representative of the department who:
 - (A) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of students with disabilities;
 - (B) Is knowledgeable about the general education curriculum; and
 - (C) Is knowledgeable about the availability of and has the authority to commit the resources of the department.
- (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (2) through (6);
- (6) At the discretion of the parent or the department, other individuals who have knowledge or special expertise regarding the student, including related services personnel as appropriate; and
- (7) Whenever appropriate, the student with a disability.

H.A.R. §8-60-45⁷; See also, 20 U.S.C. §1414(d)(1)(B). Private School's involvement falls under (a)(6). Private School clearly has a tremendous amount of information to contribute to the development of Student's IEP since Student has been attending Private School since 2016 (FOF 9). Parent-1 selected to have an IEP meeting on March 30, 2020 (FOF 25, 27). SPED-CC notified Private School of the March 30, 2020 IEP meeting on March 5, 2020 (FOF 28). In SPED-CC's March 5, 2020 letter to Private School, SPED-CC provided SPED-CC's and SPED-DH's contact information should Private School have any questions (FOF 28). Private School did not respond to SPED-CC's March 5, 2020 notification (FOF 29). On March 27, 2020, Parent-1 asked that the March 30, 2020 IEP meeting be rescheduled to April 6, 2020 (FOF 38). On March 30, 2020, SPED-CC emailed Private School informing them that the IEP meeting had been moved to April 6, 2020 (FOF 40). In SPED-CC's March 30, 2020 email to Private School, SPED-CC informed Private School to email SPED-CC should they have any questions (FOF 40). Parent-1 selected the March 30, 2020 and April 6, 2020 meeting dates. Parent-1 informed SPED-CC on Friday, March 27, 2020, that Parent-1 wanted to re-schedule the IEP meeting. SPED-CC informed Private School of the change in date on Monday, March 30, 2020. Under the circumstances, SPED-CC provided Private School with sufficient notice of the change in date for the 4/6/2020-IEP meeting. Therefore, the undersigned finds that SPED-CC made reasonable efforts to invite Private School to Student's 4/6/2020-IEP meeting.

Petitioners also argue that Respondents could have asked Private School to withhold services from Student so that data regarding regression/recoupment can be obtained (Opening

⁷ H.A.R. §8-60-45(e) allows a member of the IEP team described in subsection (a)(2) through (a)(5) to be excused from attending an IEP team meeting if the parent, in writing, and the department consent to the excusal, and the member submits, in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting. This excusal does not apply to Private School because Private School's attendance falls under (a)(6).

Statement, Tr. Vol. I, 14:3-16). The wisdom of withholding services from Student is questionable when during a school year Private School has opportunities to determine whether or not Student needs extended school year services⁸. Student has experienced extended periods of time without academic instruction while in Private School: one-week spring break in March; two-week winter break in December; two-month summer break in July-September (FOF 131). There is no evidence that Private School recommended that Student attend their extended school year during those breaks. Assuming that Student does regress during these breaks, Private School would be derelict in their duty to ignore the regression and not communicate it to Student's parents. The limited information about Student that is in the record does not suggest regression after a break. Student's 2018-2019 and 2019-2020 Progress Reports show that Student did well during the first quarter of the school year after returning from summer break (FOF 46, 103). In fact, Student did quite well in the first quarter of the 2019-2020 school year for science and adaptive P.E., having received the highest grade of "Achieved" in certain areas (FOF 103). Therefore, the undersigned does not agree that Respondents should have asked Private School to withhold services from Student so that data regarding regression/recoupment can be obtained. Private School has ESY services (FOF 132, 139). While there is no evidence

⁸ Petitioners assert that Private School does not keep regression/recoupment information, but there is no documentary or testimonial evidence that Private School does not keep regression/recoupment information. Regression/recoupment data can be ascertained from Student's educational records and assessments. Director telling SPED-CC that Private School does not have Student's work samples from the 2019-2020 school year does not mean that Private School does not have communications with teachers and direct service providers, attendance records, service plans, report cards, counseling records, behavioral intervention plans, incident reports, academic, behavioral and social data. Parent-1 testified that Private School develops its own school records for Student, such as report cards, progress reports, assessments, work samples, and counseling records (FOF 19). The fact that PS-Math Teacher has never taken data on Student's regression/recoupment does not mean that other teachers do not have such data.

in the record regarding whether or not Private School recommended that Student participate in Private School's ESY program, Student's 2018-2019 and 2019-2020 Progress Reports seem to suggest that Student may not have needed it.

Petitioners also argue that Parent-1 was not provided with a copy of SPED-CC's 3/11/2020- Observation Report, which would have helped Parent-1 contribute to the PLEP discussion during the 4/6/2020-IEP meeting. Although SPED-CC did not provide a copy of SPED-CC's 3/11/2020-Observation Report to Parent-1 or verbally told Parent-1 what SPED-CC observed, SSC, who was also at the March 11, 2020 observation, verbally shared what SSC observed with Parent-1 during the 4/6/2020-IEP meeting (FOF 52, 53). SSC told Parent-1 that SSC thought Student was "quite open and very willing to talk," and that SSC felt Student "would do well in our academics" (FOF 53). Although SPED-CC's observations were not shared with Parent-1, the DOE members of the IEP team used what they observed on March 11, 2020 in writing the PLEP section (FOF 54).

While SPED-CC should have at least verbally told Parent-1 what SPED-CC's observations were of Student at the 3/11/2020 observation, this minor procedural error is tempered by the information shared by SSC. Under the IDEA, harmless procedural errors do not constitute a denial of FAPE; however, procedural inadequacies that result in the loss of educational opportunity or significantly impede the parent's opportunity to participate in the IEP formulation process will result in the denial of a FAPE. W.G. v. Bd. of Trustees of Target Range School District, 960 F.2d 1479 (9th Cir.1992). "A procedural error results in the denial of an educational opportunity where, absent the error, there is a 'strong likelihood' that alternative educational possibilities for the student 'would have been bettered considered.'" Doug C. v. Hawaii Dept. of Educ., 720 F.3d 1038, 1046 (9th Cir.2013) (quoting M.L. v. Federal Way Sch.

Dist., 394 F.3d 634, 657 (9th Cir.2005). Petitioners fail to show how not having SPED-CC's 3/11/2020-Observation Report was a denial of an educational opportunity or significantly impeded Parent-1's opportunity to participate in the IEP formulation process when SSC shared SSC's observations of Student—the observations that SPED-CC and SSC made of Student were both positive observations.

Based on the above, the undersigned Hearings Officer finds that Respondents made reasonable efforts to obtain the necessary information to formulate Student's IEP and made reasonable efforts to obtain Private School's attendance at the 4/6/2020-IEP meeting. In addition to having made reasonable efforts, the "snapshot rule" applies in this situation. "[A]n IEP must be evaluated in light of the 'snapshot' rule, 'which instructs us to judge an IEP not in hindsight, but instead based on the information that was reasonably available to the parties at the time of the IEP.'" Dep't of Educ., State of Haw. v. Leo W., 226 F.Supp.3d 1081, 1099, 344 Ed. Law Rep. 246 (D.Haw. Dec. 29, 2016) (citing Baquerizo v. Garden Grove Unified Sch. Dist., 826 F.3d 1179, 1187 (9th Cir.2016)).

Now, turning to whether or not there was a sufficient discussion regarding Student's needs during the 4/6/2020-IEP meeting.

***(a) The appropriate least restrictive environment.
(Specifically, how Student's stress might be triggered by a setting with unfamiliar people and large number students would affect Student).***

Petitioners allege that the discussion regarding the appropriate least restrictive environment ("LRE"), specifically how Student's stress might be triggered by a setting with unfamiliar people and a large number of students would affect Student, was insufficient. The LRE requirement states that Respondents shall ensure that:

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

Haw. Admin. Rules §8-60-15. See also 20 U.S.C. §1412(a)(5). In considering whether Respondents proposed an appropriate placement for Student, the following facts must be examined: (1) the educational benefits available to Student in a regular classroom, supplemented with appropriate aids and services, as compared with the educational benefits of a special education classroom; (2) the non-academic benefits of interaction with children who were not disabled; (3) the effect of Student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming Student in a regular classroom. Sacramento City Unified School Dist., Bd. Of Educ. v. Rachel H., 14 F.3d 1398,1400-1401 (9th Cir.1994).

Based on the information that was available to the IEP team during the 4/6/2020-IEP meeting⁹ and after a long discussion about Student's placement, the IEP team determined that Student's LRE was with Student's non-disabled peers in all classes, passing periods, lunch, school-wide and extracurricular activities. Special education supports would be provided in Student's core subjects, and the supports would also be available during the other periods of the day when the need arises. Respondents basically proposed mainstreaming Student in the regular classroom with appropriate aids and services. The IEP team discussed the educational benefits,

⁹ The information that was available to the IEP team in Private School's Quarterly Progress Report for the 2018-2019 school year states that Student "display[ed] positive leadership qualities" in adaptive P.E. class (FOF 46) and Student was willing to try challenging activities, Student was social with Student's peers, kind and considerate, and helpful to peers (FOF 46).

non-educational benefits, and the effects of Student’s presence on the teacher and other children in making their decision (FOF 55).

With respect to Petitioners’ allegation about how Student’s stress may be triggered by a setting with unfamiliar people, Parent-1 brought up this concern when the IEP team was discussing Student’s Speech/Language/Communication needs in the PLEP section. Parent-1 stated that while Student does well around family and people at school, Student can be “socially awkward” with people outside of the family and school. SPED-CC addressed that concern by writing in the 4/6/2020-IEP under Speech/Language/Communication that Student needed help with “General social skills ie: holding a conversation” (FOF 58).

Although Petitioners allege that the IEP team did not sufficiently discuss how a large number of students could affect Student, Parent-1 testified that Parent-1 did not tell the IEP team that Student would have difficulty in a classroom of ___ children (FOF 56). However, Parent-1 did express a concern that Public School-2 was significantly bigger than Private School. The IEP team addressed Parent-1’s concern by proposing that Student have an adult support to help Student transition from class to class; explained that in an inclusion class setting, Student would have two teachers—Student’s special education teacher and a general education teacher—working in collaboration to help Student; and discussed how Student’s needs can be addressed with counseling and a detailed transition plan to Public School-2 (FOF 64).

The DOE members of the IEP team methodically went over each section of the 4/6/2020-IEP and provided Parent-1 an opportunity to speak at the end of each section of the IEP. While Parent-1 had information about how Student would react in situations where Student is with unfamiliar people or with a large number of peers (such as Student’s participation in the [REDACTED] program [REDACTED] and [REDACTED] group (FOF 7, 10-

11))¹⁰, Parent-1 did not share this information with the rest of the IEP team. Had Parent-1 shared this information with the rest of the IEP team, the IEP team would have had a more robust understanding of Student's needs; however, Parent-1 is not required to share such information.¹¹

Based on the foregoing, the undersigned finds that the discussion regarding Student's LRE was sufficient. The undersigned notes that Petitioners are not alleging that the IEP team's LRE decision was not appropriate. However, even if Petitioners are alleging that the LRE decision was not appropriate, Petitioners fail to show how the LRE decision was inappropriate. Based on the foregoing, the IEP team had a sufficient discussion regarding Student's LRE.

***(b) Needed supplementary aids.
(Specifically, what Student receives at Student's private program and how that enabled Student's success).***

Petitioners are alleging that the discussion regarding needed supplementary aids was insufficient because the IEP team did not discuss what Student receives at Student's private program and how that enabled Student's success. The IEP team had a five-minute discussion regarding supplementary aids and services. Parent-1's input was sought throughout the five-minute discussion and ended when Parent-1 was asked if Parent-1 had "any questions, concerns,

¹⁰ This information suggests that Student may be able to cope in a situation where Student is with unfamiliar people and in a situation that has a large number of students.

¹¹ Although not argued in Petitioners' closing brief, during the course of the due process hearing, Petitioners' questioning of witnesses appear to insinuate that the discussion during the 4/6/2020-IEP was insufficient because the DOE members of the IEP team did not ask Parent-1 specific questions and did not try to elicit information from Parent-1. The DOE members of the IEP team appropriately asked Parent-1 if Parent-1 had questions or concerns or additional information throughout the entire IEP meeting. The IDEA requires that parents are afforded the opportunity to participate in the IEP process. H.A.R. §8-60-46. Parent-1 was afforded such opportunity. The IEP team was respectful towards each other and there is no evidence that the DOE members of the IEP team prevented Parent-1 from talking. See *Dept. of Educ., Hawaii v. C.B.*, Civil No. 11-00576 SOM/RLP, 2012 WL 1537454, *11 (D.Haw. May 1, 2012) ("The court declines to place upon a school the burden of recognizing a parent's concern about the inadequacy of a school's response to the parent's inquiry when the parent has given no indication of concern.")

additions” and Parent-1 did not respond (FOF 75). Even though Parent-1 was given the opportunity to share Parent-1’s thoughts, Parent-1 did not share any information with the IEP team about the supports and accommodations that Student was receiving at Private School (FOF 76). Taking into account Private School’s refusal to produce documents and to attend the IEP meeting, the IEP team had a sufficient discussion regarding Student’s supplementary aids and services. Petitioners’ conclusionary statement that “this is a violation of FAPE due to infringement of parental participation and lost educational opportunity under Doug C.” without evidence or argument is not persuasive. Pet. Closing Brief at 6-7.

***(c) Present Levels of Educational Performance.
(Specifically, Student’s vocational skills, reading levels, stress triggers, ability to navigate the community and campus, self-advocacy skills, counseling needs, need for Adaptive Physical Education if Student were to attend large campus school with many peers and Student social skills).***

Petitioners allege that the 4/6/2020-IEP team did not have a sufficient discussion regarding Student’s Present Levels of Educational Performance (“PLEP”). During the PLEP discussion, the IEP team went over the various sources of information which are designated (A) through (H); Student’s GRADE assessment; RIASEC Vocational Interest Inventory; Behavior; Daily Living/Adaptive/Self-Help Skills; Speech/Language/Communication; Reading; Writing; Mathematics; Work Readiness/Vocational; Medical Information; Parent Concerns; and General Impact Statement. While Petitioners provide a long list of issues that the IEP team should have discussed while going over the PLEP section of the IEP, the only issue that Petitioners argue in their closing brief is the discussion about Student’s vocational skills and reading under the PLEP section. Pet. Closing Brief at 5, 7. To the extent that Petitioners are alleging that the IEP team should have discussed Student’s reading levels, stress triggers, ability to navigate the community and campus, self-advocacy skills, counseling needs, need for adaptive P.E., and social skills

while discussing Student's PLEP, Petitioners have put forth no arguments and cited to no legal authority that those specific issues must be discussed during the PLEP section as opposed to another section of an IEP. During the discussion on the PLEP section, Parent-1 was asked after each issue (Daily living/Adaptive/Self-Help Skills, Speech/Language/Communication, Reading, Writing, etc.) if Parent-1 had any questions or concerns. At the conclusion of the PLEP discussion, Parent-1 was asked if Parent-1 had any concerns with any of the PLEPs, and Parent-1 stated no. Pet. Ex. 3 at 4/6/2020 Video, 00:37:21-00:37:30. The undersigned Hearings Officer finds that the discussion regarding Student's PLEP was sufficient.

Vocational Skills: In considering Student's vocational skills, the undersigned disagrees with Petitioners' argument that "[t]he only source of evidence the IEP team had on Student vocational skills and needs came from an interest inventory." Pet. Closing Brief at 7. In addition to considering the 3/11/2020 RIASEC Vocational Interest Inventory, the IEP team also considered the 3/11/2020 classroom observation at Private School, and Private School Progress Reports for the 2018-2019 school year. The IEP team went over Student's Work Readiness/Vocational strengths and needs and Parent-1 was asked if Parent-1 had any questions or concerns, to which Parent-1 said nothing (FOF 62).

Reading levels: The IEP team discussed Student's strengths and needs in Reading during the PLEP discussion. The IEP team noted that Student needed help in differentiating fact and opinion, and differentiating primary and secondary sources when reading. Parent-1 was asked if Parent-1 had any questions or concerns, and Parent-1 stated Parent-1 did not (FOF 59).

Regarding Student's reading ability, the IEP team considered Student's 4/8/2019-IEP, Private School Progress Reports for 2018-2019 school year, 4/2/2019-GRADE assessment in discussing Student's reading levels (FOF 59). Petitioners argue that Respondents should have

had the “new reading assessment” during the 4/6/2020-IEP meeting to help Parent-1 contribute to the PLEP discussion. Pet. Closing Brief at 5. Student took a new GRADE assessment on March 11, 2020 (FOF 34). Shortly after Student took the 3/11/2020-GRADE assessment, DOE closed schools on March 18, 2020 due to the COVID-19 pandemic (FOF 37). SSC was not able to score the 3/11/2020-GRADE assessment because it was in SSC’s office at school (FOF 47). The IEP team did not consider the results of the 3/11/2020-GRADE assessment on April 6, 2020 because it did not exist, and not because the IEP team failed or refused to share the assessment result with Parent-1. Therefore, not having the 3/11/2020-GRADE assessment result at the time of the 4/6/2020-IEP meeting was not a procedural violation.

Assuming that it was a procedural violation to not have the 3/11/2020-GRADE assessment result in time for the 4/6/2020-IEP meeting, Petitioners fail to show how Parent-1’s participation was significantly impeded. Amanda J., 267 F.3d at 892. Petitioners argue that the 3/11/2020-GRADE assessment would have helped Parent-1 contribute to the PLEP discussion at the 4/6/2020-IEP meeting but does not explain how it significantly impeded Parent-1’s ability to contribute to the discussion when Parent-1 had available to Parent-1 the results of Student’s 4/2/2019-GRADE assessment (FOF 48-49). Student’s 4/2/2019-GRADE assessment indicated that Student was reading at the ___ grade level when Student was in the ___ grade (FOF 49-50).

Furthermore, Student’s 3/11/2020-GRADE assessment was scored shortly after the 4/6/2020-IEP meeting and Student’s score of “___” was reflected in the 4/6/2020-IEP¹² (FOF

¹² Petitioners are not alleging that Respondents committed a procedural violation by inputting the 3/11/2020 GRADE score in Student’s 4/6/2020 IEP without providing an opportunity for parental input. However, even if Petitioners were to allege this, the undersigned finds that changing the GRADE score from “___” to “___” in Student’s 4/6/2020 IEP’s PLEP section is not a procedural violation. “[P]arents are entitled to examine their child’s records and participate in meetings concerning their child’s education, 20 U.S.C. §1415(b)(1); receive written notice prior to any proposed change in the educational placement of their child, *id.* §1415(b)(3). . . .”

47). According to the 3/11/2020-GRADE assessment, Student made progress in reading. So even if it were a procedural violation to not have the results of the most recent GRADE assessment at the time of 4/6/2020-IEP meeting, there was no substantive violation because Petitioners have not proffered any evidence to show that there would have been a significant change to the PLEP or the supplementary aids and services provided to Student if Parent-1 had had the results of the 3/11/2020-GRADE assessment instead of the 4/2/2019-GRADE assessment.

Stress Triggers: Petitioners do not provide any arguments regarding this issue. The IEP team sufficiently discussed Student's stress triggers as discussed above in Issue No. 1(a) of this decision. Student's stress triggers were discussed during the PLEP section.

Ability to Navigate the Community and Campus: Petitioners do not provide any arguments regarding this issue. Parent-1 did not raise any issues regarding Student's ability to navigate the community, with the exception of Student being socially awkward with people outside of Student's family and school. As explained above in Issue No. 1(a) of this decision, the IEP team discussed Student's need for help with Student's social skills and proposed to help Student navigate the campus by providing Student with adult support with transitioning from class to class. Petitioners have not cited to any legal authority or made any legal arguments that the IEP team should have discussed Student's ability to navigate the community. See Issue No. 1(f) below for a discussion of Respondents' responsibility to address issues that do not relate to

Anchorage School Dist. v. M.P., 689 F.3d 1047, 1054 (9th Cir.2012). “[U]pdating an eligible student’s present level of academic achievement and functional performance and establish corresponding goals and objectives does not qualify as change to a student’s educational placement, so long as such revisions do not involve changes to the academic setting in which instruction is provided or constitute significant changes in the student’s education program.” M.P., 689 F.3d at 1057.

Student's academic needs.

Self-Advocacy Skills: Petitioners do not provide any arguments that Student's self-advocacy skills had to be discussed during the PLEP section. The IEP team had a sufficient discussion regarding Student's self-advocacy skills. Principal specifically asked Parent-1 regarding Student's self-advocacy ability to go and seek help from a counselor. Parent-1 told the IEP team that Student has no problem self-advocating (FOF 73). The IEP team noted that a strength of Student's was Student's ability to "self-advocate for a break" and "self-advocate for assistance" (FOF 73).

Counseling Needs: Petitioners do not provide any arguments that Student's counseling needs had to be discussed during the PLEP section, even though it was discussed during the IEP meeting. During the PLEP discussion, the IEP team discussed Student's medical information/history. Parent-1 confirmed during the medical information discussion that Student no longer had [REDACTED] [REDACTED] (FOF 65). The topic of counseling was not brought up by anyone at that moment. While Student's counseling needs were not discussed during the PLEP section, the IEP team had an in depth discussion regarding Student's need for counseling during the services section. See Issue No. 1(d) below.

Need for Adaptive P.E.: Petitioners do not provide any arguments that this issue should have been discussed during the PLEP section. Student's need for adaptive P.E. was discussed during the 4/6/2020-IEP meeting and will be addressed in Issue No. 1(e) below.

Social Skills: Petitioners do not provide any arguments about this issue. Student's social skills were discussed during the PLEP section when the IEP team talked about Student's Speech/Language/Communication needs and Student's social awkwardness with people outside

of the family and school. See Issue No. 1(a).

Based on the forgoing, the undersigned finds that the discussion regarding the Student's PLEP was sufficient. For those needs that were not specifically discussed during the PLEP section but were discussed during the IEP meeting, Petitioners fail to argue or cite to legal authority that those needs had to be discussed specifically during the PLEP section, irrespective of whether they were discussed at other moments during the IEP meeting.

(d) The frequency and/or duration of Counseling services.

The 4/6/2020-IEP team had a sufficient discussion regarding the frequency and/or duration of counseling services for Student. The IEP team spent approximately 19 minutes discussing Student's need for counseling during the services section (FOF 71). Parent-1 was specifically asked if Student received psychological services outside of Private School. Parent-1 stated that Student sees a doctor for Student's _____ and sees a counselor at Private School every week on an as needed basis. The IEP team explained the difference between "as needed" counseling and "regularly scheduled" counseling and the purpose of counseling. Parent-1 was asked to provide more information about counseling, but Parent-1 declined. The IEP team proposed a "starting figure" of 270 minutes per quarter of "floatable minutes" and explained why they were proposing it (FOF 72). The discussion regarding frequency and duration of counseling services was sufficient.

Petitioners argue that there was a lost of educational opportunity because the IEP team "just guessed at what Student needed for counseling services." As discussed above, the IEP team had an extensive discussion about the frequency and duration of the counseling services offered to Student and Petitioners' argument is not supported by the evidence. Furthermore, Petitioners are not arguing that they disagree with the counseling services proposed by the IEP

team. But, even if Petitioners did disagree with the counseling services proposed by the IEP team, “the mere existence of a difference in opinion between a parent and the rest of the IEP team is not sufficient to show that the parent was denied full participation in the process, nor that the DOE’s determination was incorrect.” Laddie C. ex rel. Joshua C. v. Dep’t of Educ., 2009 WL 855966 at *4 (D.Haw. Mar. 27, 2009). Petitioners failed to meet their burden of establishing that at the time Respondents created the 4/6/2020-IEP, a minimum of 270 minutes of counseling per quarter was not reasonably calculated to enable Student to make appropriate progress.

(e) Whether Student needed adaptive physical education.

Petitioners are alleging that the 4/6/2020-IEP team had an insufficient discussion on Student’s needs regarding adaptive physical education¹³. The IEP team discussed Student’s need for adaptive P.E. and Parent-1 stated that Parent-1 did not know if Student would need adaptive P.E. (FOF 74). But even assuming that the discussion regarding adaptive P.E. was insufficient in some manner, Petitioners have not shown, through documentary or testimonial evidence, that there was a loss of educational opportunity or Parent-1’s opportunity to participate was significantly impeded.¹⁴ Furthermore, Petitioners are not alleging that Student should have been

¹³ The record is unclear what exactly “adaptive physical education” means as it is used by Private School and no one from Private School testified during the due process hearing. Although Parent-1 testified that adaptive P.E. is different from the P.E. Parent-1’s other child receives at another DOE school, Parent-1 does not elaborate on what this difference is. Parent-1, Tr. Vol. I, 46:18-50:14.

¹⁴ Petitioners’ argue in their Closing Brief that “While Student had adaptive physical education in the past...the DOE did not seek to determine whether Student would continue to need this services [sic] until the IEP meeting.” Pet. Closing Brief at 8. It is unclear if Petitioners are arguing that DOE should have made a determination about whether Student needed adaptive P.E. before the IEP meeting or DOE should have put in more effort to get more information so they could make a determination. In both interpretation of Petitioners’ argument, Respondents did not commit a procedural violation. It was proper for DOE to wait until the IEP meeting to make a determination/decision about whether or not Student needed adaptive P.E.; and DOE made reasonable effort to get information to use in making the determination.

given adaptive P.E. Based on the 2018-2019 Progress Reports, Student was an overall outstanding Student in P.E. Adaptive P.E. at Private School consisted of playing basketball, swimming, soccer, dodgeball, sham-battle, football, kickball and running in relay races (FOF 46). Based on Student's schedule as of November 2020, Student is not receiving adaptive P.E. at Private School (FOF 135). Therefore, Petitioners fail to meet their burden of showing that the discussion regarding whether Student needed adaptive P.E. was insufficient.

(f) Student's focus and/or needs and/or goals for Student's Post High School Transition Plan.

Petitioners allege that the IEP team should have addressed "what does Student need to address Student's social/emotional needs in order to hold a job." Pet. Closing Brief at 8. The 4/6/2020-IEP team was not required to discuss Student's "social/emotional needs in order to hold a job" while discussing Student's post high school transition plan. Petitioners have not cited to any legal authority setting forth a requirement that Respondents are required to assess Student's social/emotional needs to hold a job. In San Rafael Elementary School Dist. v. California Special Education Hearing Officer, 482 F.Supp.2d 1152 (N.D.Cal. March 28, 2007), the California court addressed a school district's responsibility with respect to preparing a student for future employment:

Primarily, AK argues that the purpose of the act is to prepare disabled individuals for "employment" and "independent living" require the District to address AK's behavior problems at home. Id. Yet AK cites to no authority which equates the IDEA's laudable goals to substantive standards. By contrast, the IDEA's definition of "individual education program" revolves around an individuals' performance within the academic setting...The point that AK misses is that participation in the educational process, under the IDEA, is the vehicle for assisting individuals in achieving the goal of independence—it is not a guarantee that all children will achieve that level of independence.

San Rafael Elementary School Dist. v. California Special Education Hearing Officer, 482

F.Supp.2d 1152, 1160 (N.D.Cal. March 28, 2007). Preparing Student for employment is a laudable goal but it is not a substantive standard that Respondents must meet.

Although the IEP team did not talk about Student's social/emotional needs when discussing Student's post high school transition plan, the IEP team did discuss Student's possible stress triggers (interacting with unfamiliar people outside of Student's family and school and attending school at a campus that is larger than Private School) and the counseling services Student would receive to address Student's emotional and behavior needs. Petitioners have failed to meet their burden in showing that the IEP team was required to discuss Student's "social/emotional needs" while discussing Transition Services when Student's social/emotional needs were discussed during other portions of Student's IEP formulation process.

Furthermore, Petitioners do not allege that the discussion regarding Student's post high school transition services was insufficient in other ways, or that they disagreed with the transition services that were proposed in the 4/6/2020-IEP. The IEP team discussed Student's goal of becoming an engineer, Student's interests, the public school course work Student would need to complete to get Student's diploma, and the transition services that Student will need to accomplish Student's post high school goals (FOF 66-68).

2. Whether the 4/6/2020-IEP contains sufficient supports and services to address Student's anticipated difficulties if transferring from Student's current and historic private program/setting to the public program/setting.

In Issue No. 2, Petitioners allege that the 4/6/2020-IEP does not contain sufficient supports and services to address Student's anticipated difficulties if Student were to transfer from Private School's program/setting to Public School-2's program/setting. Petitioners also allege in their closing brief that "Parent was promised small group instruction, academies to limits [sic]

Student's stress by diminishing the numbers of students Student interacted with and a transition plan, not having these services in the IEP is a substantive denial of FAPE, since these supports were deemed necessary for Student." Pet. Closing Brief at 13.

Petitioners allege that Respondents "promised small group instruction, academies..." Pet. Closing Brief at 13. Petitioners do not cite to the record where Respondents "promised" small group instruction. After reviewing the video of the 4/6/2020-IEP meeting, the undersigned finds that the IEP team did not "promise" Parent-1 small group instruction. The DOE members of the IEP team explained to Parent-1 Public School-2's "Academy" and "Pathway" Program (FOF 78). Public School-2's use of an Academy/Pathway Program is not a promise of small group instruction. If Student's family were to move, as argued by Petitioners, and the new school does not have an Academy/Pathway Program, the new school would "provide [Student] with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local education agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law." 20 U.S.C. §1414(d)(2)(C)(i)(I). Based on the above, the undersigned finds that Respondents did not "promise" Parent-1 small group instruction, and therefore it was not a denial of FAPE to not have it in the 4/6/2020-IEP.

Petitioners also argue that it is a denial of FAPE to not have a transition plan in the 4/6/2020-IEP. The Hawaii Administrative Rules state that an IEP shall include the following:

- (1) A statement of the student's present levels of academic achievement and functional performance;
- (2) A statement of measurable annual goals, including academic and functional goals and a description of short-term objectives or benchmarks;
- (3) A description of how the student's progress toward meeting the annual goals will be measured; and when periodic reports on the progress the student is making toward meeting the annual goals will be provided;

- (4) A statement of the special education and related services and supplementary aids and services, to be provided to the student, or on behalf of the student, and a statement of the program modifications or supports for school personnel;
- (5) An explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class;
- (6) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the student on statewide assessments; and if the IEP team determines that the student shall take an alternate assessment instead of a particular regular State assessment of student achievement, a statement of why the student cannot participate in the regular assessment; and the particular alternate assessment selected is appropriate for the student; and
- (7) The projected date for the beginning of the services and modifications, and the anticipated frequency, location, and duration of those services and modifications.

H.A.R. §8-60-44(a). See also, 20 U.S.C. §1414(d)(1)(A). The Hawaii Administrative Rules do not require a transition plan from a private school to a public school to be included in an IEP. As stated by Hawaii District Court, “the DOE is not required to include a transition plan in an IEP whenever a child moves from a private institution to a public school.” Dep’t. of Educ., Hawaii v. C.B., Civil No. 11-00576 SOM/RLP, 2012 WL 1537454, at *5 (D.Haw. May 1, 2012) (citing to L.I. v. Hawaii, Dep’t. of Educ., Civil No. 10-00731 SOM/BMK, 2011 WL 6002623, at *6 (D.Haw. Nov. 30, 2011); M.N. v. Hawaii, Dep’t. of Educ., Civil No. 11-00121 SOM/BMK, 2011 WL 6020861, at *4 n.1 (D.Haw. Dec. 1, 2011)). Furthermore, Haw. Admin. Rules §8-60-44 goes on to state:

- (d) Construction. Nothing in this section shall be construed to require:
 - (1) That additional information be included in a student’s IEP beyond what is explicitly required in section 614 of the Act; or
 - (2) The IEP team to include information under one component of a student’s IEP that is already contained under another component of the student’s IEP.

Petitioners have not cited to any persuasive legal authority that would require Respondents to include a transition plan in Student’s IEP. Petitioners rely on Dep’t. of Educ., Hawaii v. L.S.,

Civil No. 18-CV-00223 JAO-RT, 2019 WL 1421752 (D.Haw. 03/29/2019), to support their argument that a transition plan should be included in an IEP or should “incorporat[e] the description of the transition plans process and supports” in an IEP. Pet. Closing Brief at 11. Petitioners attempt to analogize the L.S. Court’s analysis of requiring the incorporation of a behavioral support plan (“BSP”) into an IEP under certain circumstances to the instant case. The undersigned finds this analogy unpersuasive, especially when the L.S. Court addresses transition plans in its decision. The L.S. Court wrote:

DOE challenges the Decision’s conclusion that DOE violated the IDEA when it failed to provide a sufficient transition plan for Student to transition back to public school after several months at the Tyson Program [citation omitted]. The Court agrees that the AHO erred in this regard.

The Decision correctly noted that the IDEA does not specifically require a plan to ease the transition between placements [citation omitted]. The IDEA lists requirements to be included in an IEP and states that no additional information is required to be included in an IEP that is not “explicitly required in this section.” 20 USC §1414(d)(1)(A)(ii). The question of whether the IDEA otherwise requires transition plans to be included in an IEP is unsettled.

L.S., 2019 WL 1421752, *8. The rules do not require transition plans to be in an IEP, and Petitioners have not put forth a persuasive argument as to why this particular case should be an exception to the rule. Even if the undersigned were to apply the L.S. Court’s decision of requiring the incorporation of a BSP into an IEP under certain circumstances, the outcome would remain the same in this case because Student’s transition plan is incorporated in the 4/6/2020-IEP. The transition plan provides supports that are almost identical to the supplementary aids and services in the 4/6/2020-IEP (FOF 87, 97-98).

“[T]he fact that DOE elected to address the transition services at a separate meeting with Parent would at most constitute a procedural violation.” L.S., 2019 WL 142752, *9. During the

IEP meeting, the IEP team discussed that before Student transfers to Public School-2, they “would have a very detailed transition plan in place, which would have a very strong parent communication piece so that we can catch any issues that come, right away” (FOF 69). SPED-CC emailed Parent-1 a copy of the transition plan on May 26, 2020 and welcomed any additional input Parent-1 may have (FOF 95). Parent-1 did not respond to SPED-CC’s email with additional input nor did Parent-1 share the transition plan with Private School (FOF 96). Petitioners fail to show how discussing the transition plan at a separate meeting resulted in the loss of educational opportunity or significantly impeded Parent-1’s opportunity to participate when the services provided in the transition plan is contained in the 4/6/2020-IEP and Parent-1 was given the opportunity to provide input about the transition plan when a copy was sent to Parent-1.

Therefore, the undersigned finds that Petitioners fail to meet their burden in showing that the supports and services in the 4/6/2020-IEP do not address Student’s anticipated difficulties in transferring from Private School’s program/setting to Public School-2’s program/setting.

3. Whether the DOE failed to revise the 4/6/2020-IEP when the IEP team agreed during the 4/6/2020 meeting to gather additional information to address Student’s IEP.

In Issue No. 3, Petitioners argue that DOE failed to revise the 4/6/2020-IEP when the IEP team agreed during the 4/6/2020-IEP meeting to gather additional information to address Student’s IEP. Pet. Closing Brief at 13. During the 4/6/2020-IEP meeting, the IEP team discussed Student’s eligibility for ESY services. Since the IEP team did not have sufficient data to determine Student’s eligibility for ESY services, SPED-CC proposed that Student be deemed “not qualify” at that time and that the IEP team reconvene once more information became available (FOF 80). Parent-1 was asked for Parent-1’s opinion and Parent-1 stated:

I would like to talk to [Private School] again considering that they were the first day back to school since their vacation. They're doing this online training thing, I think, starting today. So I would—I would like to talk to [Private School] before I say anything else on that.

(FOF 81). It was understood that Parent-1 would speak to Private School and SPED-CC would seek more information about ESY. It was also understood that the IEP team would “meet again before the summer to further discuss the ESY.” (FOF 82). The 4/8/2020-PWN states in part:

Although there is data on the nature and severity of [Student's] disability, there is an absence of current data showing the rate of regression and recoupment. Therefore, the eligibility for Extended School Year (ESY) services could not be determined at this time. The team will reconvene prior to Summer 2020, to review any new data to determine Extended School Year (ESY) eligibility.

(FOF 89). Parent-1 did not talk to Private School about ESY after the 4/6/2020-IEP meeting

(FOF 83). SPED-CC did not try to get ESY data from Private School between April 6, 2020 and August 17, 2020, which is when the new school year began (FOF 84). By the time of the due process hearing, Parent-1 had not provided the IEP team with any new information regarding ESY eligibility (FOF 85).

On June 12, 2020, DOE received a copy of Student's Progress Reports for the 2019-2020 School Year from Private School¹⁵ (FOF 102). The IEP team did not reconvene prior to Summer 2020 to discuss ESY eligibility (FOF 86). The failure to reconvene an IEP meeting prior to Summer 2020 to discuss ESY eligibility with Parent-1 was a procedural violation. However, as discussed in Issue No. 5 below, Petitioners fail to meet their burden in showing that not having an IEP meeting to discuss ESY eligibility resulted in a loss of educational opportunity or significantly impeded Parent-1's opportunity to participate in the decision-making process.

¹⁵ There is no evidence in the record regarding what prompted Private School to produce Student's Progress Reports for 2019-2020 school year.

4. **Whether the 4/6/2020-IEP team recognized Student’s deficits in differentiating facts from opinions and social situations and holding conversations with peers, but the IEP does not address these needs.**

Petitioners are alleging that the 4/6/2020-IEP team did not recognize Student’s deficits in differentiating facts from opinions, and deficits in social situations and holding conversations with peers, and the 4/6/2020-IEP does not address these needs. The undersigned finds that the 4/6/2020-IEP team recognized Student’s deficits in differentiating facts from opinions, and deficits in social situations and holding conversations with peers, and the 4/6/2020-IEP addresses these needs.

During 4/6/2020-IEP meeting, the IEP team discussed Student’s strengths and needs in the area of Reading during the PLEP section. SPED-CC went over Student’s strengths and then stated that Student’s needs for reading were: “differentiate fact and opinion” and “differentiate primary and secondary sources.” (FOF 59). Parent-1 was then asked if Parent-1 had anything to say about the section or any questions or concerns, and Parent-1 said, “No” (FOF 59). The IEP team did not make a specific goal and objective to address the need to “differentiate fact and opinion” because Student tested high in reading (FOF 60). Student tested in the ___ grade level when Student was in the ___ grade (FOF 50); and Student tested in the ___ grade level when Student was in the ___ grade (FOF 51). Furthermore, the 4/6/2020-IEP contains supplementary aids and services—chunking assignments and shortening assignments to focus on mastery—that address the need to learn how to differential fact and opinion when reading (FOF 61). Student is reading at a level higher than Student’s age-appropriate grade, therefore the lack of goal and objective in the need of “differentiate fact and opinion” does not constitute a denial of FAPE.

Petitioners also allege that Student’s 4/6/2020-IEP is not substantively appropriate because there is no goal or objective to address Student’s need in holding conversations with

peers. However, there is no evidence that Student has a problem holding conversations with peers; Parent-1 did, however, tell the IEP team that Student was socially awkward with people outside of the family and school. The discussion regarding Student's communication needs is as follow:

SPED-CC: Ok, thank you. Moving on then to speech, language and communication. [Student's] strengths: [Student] responds to prompts and questions in the classroom setting. [Student] maintains eye contact when being spoken to. [Student] communicates needs and wants. [Student's] tone is in the typical range. Student's articulation and fluency are in the typical range. [Student's] age appropriate, receptive and expressive language. And [Student] participates in group discussions. And then, [Parent-1], are there any needs not listed here, or any needs that should be listed here relating to school classwork? For speech, language and communication.

Parent-1: No.

SPED-CC: Ok, any questions?

Parent-1: All this is a social aspect to it. I don't know if that's what you're talking about.

SPED-CC: It could. Yeah, I could note that needs: working on social skills help.

Another Team Member: What kind of social skills are you concerned about?

Parent-1: Just the way Student, I mean, Student does well with the people that Student's in school with. Student does well with Student's family, but Student's around us enough. For people outside of that, Student can be socially awkward.

SPED-CC: Like say you're like, I guess not now, but say you're going to McDonald's, is Student able to order? Like, can Student talk to people that Student doesn't know like that? Like, by Student's self.

Parent-1: Definitely, yes.

Pet. Ex. 3 at 4/6/2020 Video, 00:26:45-00:28:34. Parent-1's observation that Student is not socially awkward at school is supported by Student's 2018-2019 Progress Reports. Teachers at Private School characterize Student as being very eloquent during class discussion; Student displays positive leadership qualities; Student is social with Student's peers, kind and

considerate, and helpful to peers (FOF 46). Parent-1's concern that Student is socially awkward is strictly in a setting that is not the school or home. Based on the information that was available to the IEP team at the time, the IEP team did not have to make IEP goals and objectives targeting Student's social skills in the community setting. Respondents "as a matter of law...is not responsible for ensuring that...[Student] translates behavior skills learned in the classroom to the home or community settings." San Rafael Elementary School Dist. v. California Special Education, 482 F.Supp.2d 1152, 1160 (N.D.Cal. March 28, 2007). Respondents are "not required to ensure that a student takes behavioral skills learned at school into the home. The District is only required to ensure that a student's IEP is 'reasonably calculated to provide educational benefits.'" San Rafael Elementary School Dist., 482 F.Supp.2d at 1164. Petitioners have not cited to any legal authority requiring Respondents to address all of the emotional and behavioral problems that a student may have outside of the academic setting. Therefore, the undersigned finds that Petitioners have not met their burden in showing that Respondents denied Student a FAPE when the 4/6/2020-IEP does not address Student's needs in social situations and holding conversations outside of the school setting.

5. **Whether the discussion of Student's eligibility for ESY services was insufficient because regression and recoupment were the only bases discussed. Even after recognizing possible other bases for Student ESY eligibility, the school relied upon a regression/recoupment analysis to determine eligibility.**

Petitioners allege that the discussion about Student's eligibility for ESY services was insufficient because regression and recoupment were the only bases discussed. Petitioners also allege that even after recognizing possible other bases for ESY eligibility, the school relied upon a regression/recoupment analysis to determine eligibility. The undersigned Hearings Officer finds that the discussion about Student's eligibility for ESY services was sufficient and

Petitioners fail to show that Respondents were required to consider ESY eligibility using a different analysis besides regression/recoupment.

The discussion regarding Student's eligibility was sufficient. The IEP team discussed what they needed to consider in making an ESY eligibility determination, the information that they had, and the need for more information. The DOE members of the IEP team took into consideration what Parent-1 had to say regarding regression and explained that more information was still needed, such as rate of recoupment. The IEP team agreed to meet again before summer to discuss ESY eligibility after Parent-1 spoke to Private School and SPED-CC had an opportunity to get more information from Private School (FOF 79-86). Based on the foregoing, Petitioners fail to show that the discussion regarding ESY eligibility was not sufficient.

With respect to Petitioners' argument that the IEP team "recognized that Student might be eligible under a different basis. Yet, no discussion transpired," Petitioners do not state what this different basis is. Pet. Closing Brief at 15. Even if the IEP team recognized that Student might be eligible under a different basis and did not discuss it, there is no procedural violation when the law does not require them to consider "other bases" in making an ESY eligibility determination. The ESY eligibility standard consists of four-parts: nature and severity of Student's disability; self-sufficiency/independence; regression; and recoupment. Dep't of Educ., State of Haw. v. Leo W., 226 F.Supp.3d 1081, 1111, 1113, 344 Ed. Law Rep. 246 (D. Haw. Dec. 29, 2016). If there is another standard or bases for ESY eligibility, Petitioners have not cited to it.

Even assuming that Respondents committed a procedural violation by not discussing “other bases” for ESY eligibility¹⁶, Petitioners fail to meet their burden in showing that the procedural violation resulted in a loss of educational opportunity; significantly impeded Parent’s opportunity to participate; or caused deprivation of educational benefits. Amanda J., 267 F.3d at 892.

The C.F.R. §300.106—Extended school year services--states in pertinent part:

(a) General.

- (1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.
- (2) Extended school years services must be provided only if a child’s IEP Team determines, on an individual basis, in accordance with §§300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.
- (3) In implementing the requirements of this section, a public agency may not—
 - (i) Limit extended school year services to particular categories of disability; or
 - (ii) Unilaterally limit the type, amount, or duration of those services.

(b) Definition. As used in this section, the term extended school year services means special education and related services that—

- (1) Are provided to a child with a disability—
 - (i) Beyond the normal school year of the public agency;
 - (ii) In accordance with the child’s IEP; and
 - (iii) At no cost to the parents of the child; and
- (2) Meet the standards of the SEA.

Haw. Admin. Rule §8-60-7 is substantively identical to C.F.R. §300.106.

DOE must provide ESY services only if Student’s IEP team determines that ESY services are necessary for the provision of FAPE to Student. Leo W., 226 F.Supp.3d at 1112.

“The burden is on the parents to establish that ESY services are necessary.” Virginia S. ex rel.

¹⁶ As discussed in Issue No. 3 of this decision, Respondents committed a procedural violation when SPED-CC did not attempt to get more ESY information from Private School and the IEP team did not have a follow up IEP meeting before summer to discuss ESY eligibility.

Rachael M. v. Department of Educ., Hawaii, Civil No. 06-00128 JMS/LEK, 2007 WL 80814, at *13 (D.Haw. Jan. 8, 2007). “[A] claimant seeking an ESY must satisfy an even stricter test, because “providing an ESY is the exception and not the rule under the regulatory scheme.””

N.B. v. Hellgate Elementary School Dist., ex rel. Bd. of Directors, Missoula County, 541 F.3d 1202, 1211 (9th Cir.2008) (citations omitted). Therefore, the burden is on Petitioners to establish by a preponderance of the evidence that ESY services are necessary for Student. Petitioners have failed to meet this burden.

Petitioners do not allege, and therefore made no effort to show, that ESY services are necessary to provide FAPE to Student. Petitioners did not provide any testimonial evidence that ESY is necessary. There were no expert opinion testimony or opinions from professionals or any reliable documentation showing that ESY is necessary. N.B., 541 F.3d at 1212 (A claimant can rely on expert opinion testimony to make the showing that ESY is necessary to permit a child to benefit from [his/her] instructions, and are not required to present empirical proof of actual prior regression). See also, Virginia S. ex rel. Rachael M. v. Department of Educ., Hawaii, Civil No. 06-00128 JMS/LEK, 2007 WL 80814, at *12, (D.Haw. Jan. 8, 2007) (“the state should consider the likelihood of regression, slow recoupment, and predictive data based upon the opinion of professionals.” Todd v. Duneland Sch. Corp., 299 F.3d 899 (7th Cir.2002)).

Furthermore, the evidence that came out during the due process hearing, although not intended to prove ESY eligibility, shows that ESY may not be necessary. According to Parent-1, Private School has ESY but Student has never attended Private School ESY (FOF 132, 139). There is no evidence that Private School recommended that Student enroll in summer school. There is no mention in Student’s 2018-2019 Progress Reports or 2019-2020 Progress Reports from Private School that Student needed summer school or any form of ESY. In fact, during the

first quarter of the 2019-2020 school year, Student's Social Studies teacher wrote: "[Student] did very well to start the school year in social studies." (FOF 103).

"ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." N.B., 541 F.3d at 1211 (quoting MM ex rel. DM v. Sch. Dist. of Greenville County, 303 F.3d 523, 537-38 (4th Cir.2002)). Based on the lack of evidence that the benefits Student will gain during a regular school year will be significantly jeopardized if Student is not provided ESY services, Petitioners have failed to meet their burden. As such, Respondents did not deny Student a FAPE because the discussion regarding ESY eligibility was insufficient, which Petitioners failed to show, or because the IEP team failed to gather more information and meet again to discuss ESY eligibility.

6. **Whether the DOE informed Parents that there will be alterations in the implementation of Student's 4/6/2020-IEP. Such alterations, as described, would result in a material failure to implement Student's IEP.**

In Issue No. 6, Petitioners argue that DOE through the media informed Parent-1 that there would be alterations in the implementation of Student's 4/6/2020-IEP, and that such alternations would result in a material failure to implement Student's IEP. To be clear, Petitioners are not alleging that there was a material failure to implement Student's 4/6/2020-IEP since Student did not attend and is not attending a DOE school. Based on the lack of evidence during the due process hearing, the undersigned Hearings Officer finds that Petitioners did not meet their burden with respect to this issue.

Petitioners argue that "the DOE publicized its intention to provide distance learning to students for a period of time during the 2020-2021 school year" and that "Parent was informed of [this] through the public media." Pet. Closing Brief at 16. There is no evidence, documentary or

testimonial, that DOE informed Parent-1 that there will be alterations in the implementation of Student's 4/6/2020-IEP. There is no evidence about what Parent-1 may have learned through the media, and the undersigned Hearings Officer will not attribute to the DOE what Parent-1 may or may not have learned through the media.

The Ninth Circuit Court in Van Duyn v. Baker School Dist. 5J held that “when a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child’s IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP.” Van Duyn v. Baker School Dist. 5J, 502 F.3d 811, 815 (9th Cir.2007). “[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child’s educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.” Van Duyn, 502 F.3d at 822.

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

Not being able to interact in-person with non-disabled students would be a minor discrepancy in the implementation of the services provided to Student and those required by Student's 4/6/2020-IEP in light of the COVID-19 pandemic. Although not binding legal authority, the United States Department of Education (“USDOE”) provided some guidance to districts on how to address providing IDEA services during school closures. In the *Questions*

and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, the USDOE noted that “the IDEA, Section 504 and Title II of the American Disabilities Act do not specifically address a situation in which elementary and secondary schools are closed for an extended period of time. . .because of exceptional circumstances, such as an outbreak of a particular disease.” However, the USDOE went on to say

If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. SEAs, LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP developed under IDEA. . . .

76 IDELR 77 (EDU, March 2020). The USDOE’s guidance comports with the Ninth Circuit Court’s decision in N.D. v. Hawaii Dept. of Educ., 600 F.3d 1104 (9th Cir.2010), which addressed disabled students’ access to education during “Furlough Fridays” in Hawaii in the 2009-2010 school year. The Ninth Circuit Court held that “the overarching goal of the IDEA is to prevent the isolation and exclusion of disabled children, and provide them with a classroom setting as similar to non-disabled children as possible.” N.D., 600 F.3d at 1115. The Ninth Circuit Court affirmed the district court’s denial of a preliminary injunction because disabled and non-disabled students were equally affected. The Hawaii DOE did not implement policies and procedures that favored one group over the other, but rather made a financial decision to balance the budget that affected all students.

When Congress enacted the IDEA, Congress did not intend for the IDEA to apply to system wide administrative decisions. Hawaii’s furloughs affect all public schools and all students, disabled and non-disabled alike. An across the board reduction of school days such as the one here does not conflict with Congress’s intent of protecting disabled children from being singled out. In comparison to cases in which a child is singled out in relation to her peers, the furlough days do

not remove the plaintiffs from the regular classroom setting anymore than they do the other children. Disabled children are not singled out for furlough days. To the extent possible under the new school calendar, the disabled children are still “mainstreamed” with regular children at school. To allow the stay-put provisions to apply in this instance would be essentially to give the parents of disabled children veto power over a state’s decisions regarding the management of its schools. The IDEA did not intend to strip administrative powers away from local school boards and give them to parents of individual children, and we do not read it as doing so.

N.D., 600 F.3d at 1116-1117. While the Ninth Circuit Court did note that N.D.’s claim was more properly characterized as a “material failure to implement the IEP” under Van Duyn, 502 F.3d at 822, it still provides significant guidance on how at the administrative level we should be interpreting and applying the IDEA when faced with unprecedented challenges that require sacrifices from everyone

The United States Department of Education Office for Civil Rights (“OCR”) and Office of Special Education and Rehabilitative Services (“OSERS”) later clarified that during this unprecedented time,

School districts must provide a free and appropriate public education (FAPE) consistent with the need to protect the health and safety of students with disabilities and those individuals providing education, specialized instruction, and related services to these students. In this unique and ever-changing environment, OCR and OSERS recognize that these exceptional circumstances may affect how all educational and related services and supports are provided, and the Department will offer flexibility where possible. However, school districts must remember that the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online or telephonically.

Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, 120 LRP 10623 (OSERS/OCR March 21, 2020).

Petitioners argument that “[n]o determination made for Student at the IEP meeting placed [Student] at home without peers” fails because Student will have access to Student’s peers--

virtually. Student was scheduled to begin in-person instruction on September 14, 2020, which meant that Student would have had virtual learning for approximately one month (FOF 110). For the reasons stated above, the undersigned Hearings Officer finds that Petitioners have not met their burden in showing that DOE informed Parent-1 that there will be alternations in the implementation of Student's 4/6/2020-IEP. Virtual interaction with non-disabled peers is in conformity with Student's 4/6/2020-IEP¹⁷. Student's interaction with non-disabled students virtually is a minor discrepancy in the implementation of the 4/6/2020-IEP and was not a denial of a FAPE.

D. PETITIONERS FAIL TO MEET THEIR BURDEN IN SHOWING THAT PRIVATE SCHOOL IS AN APPROPRIATE PLACEMENT

Petitioners seek payment to Private School for the services provided in conformity with the Tuition Agreement for 2020-2021 school year entered into between Parent-1 and Private School, and reimbursement for parental expenses. The U.S. Supreme Court has recognized the rights of parents who disagree with a proposed IEP to unilaterally withdraw their child from public school and place the child in a private school and request reimbursement for tuition at said private school from the local educational agency. Florence County School Dist. Four v. Carter, 510 U.S. 7, 12, 114 S. Ct. 361, 364-365, 126 L.Ed.2d 284 (1993) (citing School Comm. of Burlington v. Department of Ed. of Mass., 471 U.S. 359, 369-370, 105 S. Ct. 1996, 2002-2003, 85 L.Ed.2d 385 (1985)), see also 20 U.S.C. §1415(b)(6), (f)(1)(A). A parent who unilaterally

¹⁷ The LRE requirements, in relevant part, reads: "To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled...." 34 C.F.R. §300.114(a)((2)(i). The undersigned notes that the LRE requirements do not specifically state that disabled children will be educated in-person with non-disabled children. In furtherance of safeguarding the health and welfare of students and teachers, it is reasonable to provide special education and related services virtually, where appropriate.

places a child in private school pending review proceedings under the IDEA is entitled to reimbursement if the parent can establish that (1) the public placement violated the IDEA, and (2) the private school placement was proper under the IDEA. Doug C., 720 F.3d 1038, 1041, 1047-1048 (9th Cir.2013) (citing Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 126 L.Ed.2d 284 (1993)). If both are met, “the district court must then exercise its ‘broad discretion’ and weigh ‘equitable considerations’ to determine whether, and how much, reimbursement is necessary.” C.B. ex rel. Baquerizo v. Garden Grove Unified School Dist., 635 F.3d 1155, 1159 (9th Cir.2011) (citing Carter, 510 U.S. at 15-16, 114 S. Ct. 361).

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

In this case, Petitioners have failed to prove that Respondents denied Student a FAPE. However, even assuming that Petitioners did meet their burden, Petitioners have failed to show that Private School is an appropriate placement for Student. The only witness to testify about Private School’s appropriateness was Parent-1. Parent-1 testified that Private School provides assistive technology and counseling to help Student (FOF 72, 134, 137). Parent-1 also testified

that Student is successful at Private School because of the supports that Student gets, but Parent-1 did not know all the supplementary supports that Student receives at Private School (FOF 133, 138). And while Parent-1 testified that a support Private School provides is chunking assignments (FOF 137), chunking is not listed as a support for Student in Director's 11/16/2020 email. See Pet. Ex. 3 at 081; FOF 118.

No one from Private School testified at the due process hearing. The limited information presented at the due process hearing about Private School were from the 2018-2019 and 2019-2020 Progress Reports; however, as Petitioners' counsel correctly stated during the due process hearing, "the progress reports don't talk about what supplementary aids Student uses in the classroom." Opening Statement, Tr. Vol. I, 13:20-14:2.

Director's 11/16/2020 email gives little insight into whether the educational instruction is specifically designed to meet the unique needs of Student or what services is being provided to Student (FOF 118). For example, "Istation" appears to have a significant part in Student's education, however, the 11/16/2020 email does not explain what "Istation" is or how it is designed to meet Student's unique needs. The 11/16/2020 email also does not indicate which IEP Private School is using or explain which "IEP Goals" Private School is implementing. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (FOF 122-128). [REDACTED] the record does not explain why Student is not taking science, P.E. and social studies [REDACTED]

[REDACTED] (FOF 124; Pet. Ex. 3 at 081).

A September 8, 2020 Questionnaire completed by PS-Math Teacher provides little information into Student's personalized program at Private School (FOF 113-114). PS-Math Teacher listed the classroom supports, modifications and accommodations that are "available" in PS-Math Teacher's math class, but that does not address what educational instruction specifically designed to meet the unique needs of Student is being provided. Private School's public webpage also does not provide information about Student's program and how it meets Student's unique needs. Pet. Ex. 3 at 082-091.

Petitioners fail to demonstrate that the private placement provides educational instruction specially designed to meet the unique needs of Student, supported by such services as are necessary to permit Student to benefit from instruction. Based on the foregoing reasons, Petitioners have not proven that Private School placement was proper under the IDEA.

E. PETITIONERS' SECTION 504 OF THE REHABILITATION ACT OF 1974 CLAIM

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

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have not met their burden of proving the issues raised in the August 27, 2020 First Amended Complaint by a preponderance of the evidence. As

Petitioners have failed to prove that Respondents denied Student a FAPE, Petitioners' request for direct payment to Private School and reimbursement for related expenses is denied.

RIGHT TO APPEAL

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

DATED: Honolulu, Hawai'i, February 5, 2021.

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