

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION

██████████ / ██████████ School District

IDPH FY-24-06-055

SCHOOL DISTRICT’S POST-HEARING MEMORANDUM

Defendant ██████████ School District (the “District”) files this post-hearing memorandum consistent with the Prehearing Conference Order issued by the Hearing Officer on August 5, 2024. Set forth below are proposed findings of fact, conclusions of law, and the District’s argument for why the Hearing Officer should rule fully in favor of the District on all issues in this case.

ISSUES FOR HEARING

1. Did the District fail to offer the Student a free appropriate public education during the 2022-2023 school year by failing to offer the Parent an IEP to sign? If so, what shall the remedy be?
2. Did the District fail to offer the Student a free appropriate public education during the 2022-2023 school year by failing to offer services pursuant to a stay-put IEP? If so, what shall the remedy be?
3. Did the District’s failure to issue a Summary of Performance upon the Student’s graduation deny the Student’s right to a free appropriate public education? If so, what shall the remedy be?

INTRODUCTION

The parent of ██████████ (the “Parent”) brought a due process hearing complaint regarding ██████████ (the “Student”) against the District on June 18, 2024. The District filed a Response and a Motion for Partial Dismissal on July 16, 2024, after mediation was unsuccessful. On July 31, 2024, the Hearing Officer granted the School District’s Motion

for Partial Dismissal, dismissing all claims arising prior to June 17, 2022. A two-day hearing was held on November 1, 2024 and November 7, 2024.

The District asserts that (i) it did not fail to offer the Student a FAPE during the 2022-2023 school year by failing to offer the Parent an IEP to sign; (ii) it did not fail to offer the Student a FAPE during the 2022-2023 school year by failing to offer services pursuant to a stay-put IEP; and (iii) its failure to issue a Summary of Performance upon the Student's graduation did not deny the Student's right to a FAPE. As the Hearing Officer noted during the first day of the hearing on November 1, 2024, these issues are highly fact dependent. Neither the facts nor the law supports the Parent's contentions. For the reasons set forth in this Memorandum, the District asks the Hearing Officer to rule fully in favor of the District.

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PROPOSED FINDINGS OF FACT

1. The Student was born on [REDACTED]. P/SD Core Exh. 43. [REDACTED] is a [REDACTED]-year-old high school graduate, having received [REDACTED] regular high school diploma on August 25, 2023. *Id.* at 660.
2. Because the Student and the Parent have resided at all times relevant to this matter within the geographical boundaries of the District, the Student is the educational responsibility of the District. P/SD Core Exh. 43.
3. The Student attended [REDACTED] (the “Charter School”) from the 2016-2017 academic year (seventh grade) to [REDACTED] graduation in 2023. P/SD Core Exh. 9-10. [REDACTED] is a public charter school located in [REDACTED], NH which serves students grades five through 12. Testimony of [REDACTED]
4. Aside from one summer session of extended-school-year (ESY) services in 2019, the Student has never attended [REDACTED] High School. [REDACTED] was present for approximately one day during seventh grade at [REDACTED] Middle School. Testimony of [REDACTED]
5. Until the Student received [REDACTED] regular high school diploma, the Student qualified for special education and related services based on the educational disabilities of Autism and Other Health Impairment due to a diagnosis of ADHD. P/SD Core Exh. 43-45.
6. The Student received a regular high school diploma on August 25, 2023. SD Doc 338. [REDACTED] earned a total of 27 credits in courses presented at a high school level. *Id.*
7. The last agreed-upon IEP, which is the stay-put IEP at issue in this case, is dated June 5, 2020 to June 4, 2021 (the “stay-put IEP”). P/SD Core Exh. 43. The Parent signed the stay-put IEP *with exceptions* on June 24, 2020. *Id.* at 62-63. [REDACTED] has not provided consent to an IEP since then.
8. The stay-put IEP addressed goals in the areas of written expression, executive functioning, transitional self-advocacy, and transitional social skills. P/SD Core Exh. 28-33. Accordingly, it called for the following special education and related services:
 - a. Specially designed instruction (SDI) in written expression, four sessions per week, 45 minutes per session in the special education setting;
 - b. SDI in executive functioning, one session per day, 15 minutes per session in the special education setting;
 - c. Transitional self-advocacy counseling, one session per week, 30 minutes per session in the regular education setting;
 - d. Executive functioning paraprofessional support, one session per day, 45 minutes per session in the regular education setting;
 - e. Social skills counseling, one session per day, 30 minutes per session in the regular education setting;

- f. Written expression (functional transition and self-advocacy) consultation between staff, four sessions per quarter, 60 minutes per session. *Id.* at 37.
9. The stay-put IEP additionally called for approximately four weeks of extended-school-year (ESY) services in the area of social skills, three days per week, 60 minutes per session in the special education setting. P/SD Core Exh. 37.
10. The Charter School worked in conjunction with the District to provide the Student's special education and related services. Testimony of [REDACTED]. Specifically, the District agreed to reimburse the Charter School for the cost of implementing the Student's IEP at the Charter School. The District was responsible for writing the Student's IEPs, scheduling IEP team meetings, and overseeing the provision of the Student's special education and related services. *Id.*
11. The Charter School was also responsible for issuing the Student's IEP progress reports and for the day-to-day implementation of classroom accommodations. Testimony of [REDACTED]. See also P/SD Core Exh. 46-47 (classroom accommodations section of stay-put IEP).
12. On March 5, 2021, the Parent submitted a handwritten letter to [REDACTED], Dean of School at the Charter School (the "Dean of Charter School"), stating that "No information regarding [REDACTED] ... is to be released without my express permission" including "testing materials, grade reports, transcripts, or schedules" P/SD Core Exh. 64-65. From that point on, the Parent only allowed "progress reports" to "be sent to [REDACTED] and [the Parent] at the same time." *Id.*
13. On March 31, 2021, the District sought the Parent's consent for the Charter School to disclose "all educational records, including report card, schedule, transcript" in order for the District to "provide oversight to IEP implementation and FAPE." P/SD Core Exh. 66. On April 13, 2021, the Parent rejected consent for the release of records to the District, writing, "maintain existing process that requires parental consent for each release." *Id.*
14. The District completed a Functional Behavior Assessment (FBA) of the Student on June 8, 2021. P/SD Core Exh. 68-72. The results of the FBA indicated that the Student "engages in the target behaviors of inappropriate computer use" but that "[t]he behaviors of concern to the teachers have been addressed in [Student]'s Individual Education Plan" through classroom accommodations. *Id.* at 70. The Student's target behaviors "typically occurred when the rest of the class was not using the computer and the expectation was that their computers were put away." *Id.* at 69.
15. The results of the FBA did *not* identify attendance issues as a target behavior. P/SD Core Exh. 68-72. This makes sense, given that the Student had only one excused absence during the 2020-2021 academic year. *Id.* at 4.

16. The Student was initially expected to graduate from the Charter School with a regular high school diploma in June 2022. Testimony of ██████. However, by the end of the 2021-2022 academic year, ██████ was short of one required Math credit and had not completed ██████ senior project (the latter being a requirement of the Charter School). *Id.*
17. The District emailed the Parent a “draft IEP” on May 2, 2022, with the expectation that the Parent would review the draft IEP with ██████ advocate. P/SD Core Exh. 244; Testimony of ██████. “[B]ased on our last couple of discussions[,]” the District understood that the Student “would attend [the Charter School] or [the District] for ██████ academic classes ██████ needs to graduate and then spend time in the community/job shadowing.” *Id.* See also P/SD Core Exh. 300-302 (5/2/2022 Meeting Notes).
18. On May 27, 2022, the District emailed the Parent proposing an IEP team meeting “to talk about some of the transition services we can offer” and reminding the Parent that ██████ was “going to share the IEP draft with [Parent’s advocate]” so that ██████ could inform the District of “any other changes [the Parent] wanted before I send a final proposal” P/SD Core Exh. 304.
19. Having not heard back from the Parent, the District sent a follow-up email on June 6, 2022. P/SD Core Exh. 313. The Parent responded, “I am reviewing it, however, I don’t understand the purpose of having a meeting” *Id.* at 316. The District then reiterated the previously stated purpose. *Id.*
20. On August 24, 2022, the District emailed the Parent again to request an IEP team meeting, explaining, “we still need to finalize the IEP and I sent you the draft to review with [Parent’s advocate].” P/SD Core Exh. 374. The District also sought clarification as to where the Student was attending school for the upcoming academic year, as the Student had the option of attending (and receiving services at) either the Charter School or the District’s high school. *Id.* at 374; *Id.* at 244; *Id.* at 300-302; Testimony of ██████. In response, the Parent claimed ██████ had not received the draft IEP. *Id.*
21. ██████’s academic year began on September 7, 2022. Testimony of ██████
22. On September 9, 2022, the District emailed the Parent asking where the Student was attending school. P/SD Core Exh. 376. Assuming the Student was at the Charter School, the District asked the Parent whether to “set up an IEP meeting with them [the Charter School] in attendance?” *Id.* The Parent did not respond. *Id.*
23. On September 12, 2022, ██████, Special Education Teacher at the Charter School (“Charter School’s Special Education Teacher”), emailed the Parent with a link to the Student’s special education services schedule for the 2022-2023 school year. SD Doc 95. See also SD Doc 56-57 (service schedule). The Parent testified that ██████ was unable to access the link; however, ██████ did not contact the Charter School or the District about this. Testimony of Parent. In fact, when the Dean of Charter School emailed the Parent to confirm that ██████ had “received communication from ██████ about [Student’s]

service” the Parent simply responded, “I just received a generic letter from [REDACTED] SD Doc 96.

24. On September 20, 2022, the District emailed the Parent after the Charter School informed the District that the Student was “not attending [the Charter School] for any classes and therefore not receiving any services.” P/SD Core Exh. 377. The District again asked where the Student was attending school and insisted on scheduling an IEP team meeting “as we do not have a signed IEP or placement.” *Id.* The Parent responded that if the Charter School was expelling the Student for non-attendance, the Charter School “should be contacting ME directly and not you.” *Id.* See also P/SD Core Exh. at 379 (“If you wish to schedule a meeting, we can, however, I am tired of having endless meetings which don’t end and no finalized iep.”).
25. After months of District requests to schedule an IEP team meeting, the Parent eventually agreed to a meeting on October 12, 2022. P/SD Core Exh. 384; *Id.* at 398 (Meeting Notice).
26. During the IEP team meeting on October 12, 2022, the District reiterated its offer to provide the Student’s special education and related services, including transition services, at the District’s high school. P/SD Core Exh. 401; Testimony of [REDACTED]. The Parent rejected this offer and informed the IEP team that the Student would finish [REDACTED] senior project with the Charter School while taking Probability and Statistics through the [REDACTED] Charter School ([REDACTED]). *Id.* at 402.
27. The Student had the option of taking Probability and Statistics, [REDACTED] remaining Math credit, in-person at the Charter School. Testimony of [REDACTED]. The Student also had the option of taking Probability and Statistics in-person at the District’s high school. Testimony of [REDACTED].
28. Following the IEP team meeting on October 12, 2022, the team seemed to be in agreement that the District “will finalize [the] IEP proposal and send” it to the Parent. P/SD Core Exh. 401. However, on October 26, 2022, the Parent sent the District the *draft IEP* dated May 3, 2022 with copious handwritten edits. *Id.* at 406-23. The Parent rejected that draft IEP. *Id.* at 423.
29. In response, the District sent the Parent on November 7, 2022, a list of proposed dates for an IEP team meeting “to review [REDACTED] concerns.” P/SD Core Exh. 425-26. In typical fashion, the Parent did not acknowledge the District’s request to schedule an IEP team meeting. *Id.* at 430-31.
30. On December 19, 2022, the District emailed the Parent another list of proposed dates for an IEP team meeting “to finalize [Student]’s IEP and respond to the feedback from [the Parent].” P/SD Core Exh. 430. The Parent did not acknowledge the District’s request. *Id.*

31. On December 20, 2022, the Charter School emailed the District (copying the Parent), stating that due to [REDACTED] absences, the Student “has not received any special education services this school year” despite services being in place. P/SD Core Exh. 438.
32. On January 4, 2023, the District emailed the Parent requesting to schedule an IEP team meeting. P/SD Core Exh. 446. The Parent did not respond. *Id.*
33. On January 27, 2023, the District emailed the Parent, “it is essential that we meet for an IEP meeting and I have not heard back from you about potential dates. Please see the attached meeting notice. Hard copy is being mailed to you and [Student].” P/SD Core Exh. 465.
34. The District scheduled an IEP team meeting for February 13, 2023. P/SD Core Exh. 465, 473. The Parent surprisingly did not attend the meeting. *Id.* at 480. As a result, a very brief meeting was held (lasting approximately 23 minutes), during which time the Charter School expressed that “services have been in place since the beginning of the school year” yet the Student had not accessed them. *Id.* at 481.
35. Several hours after the IEP team meeting on February 13, the Parent emailed the District, “I need new dates for the IEP meeting and I would like the zoom link sent immediately so I can access it and put it in my calendar.” P/SD Core Exh. 475.
36. On March 2, 2023, the District informed the Parent via email that it was “finalizing the IEP discussed at the meeting” and offered to “set up a meeting after you receive the paperwork” P/SD Core Exh. 498.
37. The District emailed the Parent a final IEP proposal on March 24, 2023. P/D Core Exh. 500; *Id.* at 501 (WPN); *Id.* at 515 (IEP).
38. On or around April 9, 2023, the Parent fully rejected the District’s final IEP proposal (the District did not receive the Parent’s formal rejection until around April 21, 2023). P/SD Core Exh. 543 (Parent Response); *Id.* at 544 (Emails re Response); *Id.* at 546 (Emails re Response).
39. On May 1, 2023, the District provided the Parent with a list of proposed IEP team meeting dates to discuss the Parent’s concerns. P/SD Core Exh. 546. The Parent did not respond. *Id.*
40. On May 8, 2023, the District sent an email to the Parent, asking whether [REDACTED] received the May 1, 2023 email with proposed IEP team meeting dates. P/SD Core Exh. 547. The Parent then responded from a new email address, writing, “No, I went through all my emails. I don’t kno[w] if you sent it to the old account, but if you did then I am not using it anymore.” *Id.* at 547.
41. An IEP team meeting was scheduled for May 15, 2023 to discuss the Parent’s concerns. P/SD Core Exh. 553. During the meeting, the Parent requested that services in written

expression be added back into the Student's IEP, as well as ESY services.¹ *Id.* at 554. In an effort to come to an agreement with the Parent, the District complied with both requests (despite the fact that the District believed █ did not need specialized direct instruction in written expression or ESY services). *Id.* at 556 (WPN); *Id.* at 567-572 (relevant pages from amended IEP).

42. Although “[e]veryone agreed that [Student] could graduate this June[,]” at the May 15, 2023 IEP team meeting, the District offered the Student three options for receiving █ high school diploma: (A) the Student could receive █ diploma in June and graduate from the Charter School; (B) the Student “could elect not to receive █ diploma in June and work on █ transition skills including writing in ESY[;]” or (C) the Student could elect not to receive █ diploma in June, attend ESY, and attend the District’s high school program for the 2023-2024 school year to work primarily on transition skills. P/SD Core Exh. 554-56; Testimony of █
43. On May 18, 2023, the District emailed the Parent an amended IEP proposal. P/SD Core Exh. 599. The amended IEP included a new writing goal; SDI in writing skills, four sessions per week, 45 minutes per session in the special education setting; and ESY services. *Id.* at 556 (WPN); *Id.* at 567-572 (relevant pages from amended IEP).
44. On June 3, 2023, the Parent emailed the District, “I found a number of errors in the IEP, and so I am declining it.” P/SD Core Exh. 628. However, as of June 14, 2023, the District was “still waiting” for the Parent to return █ response in writing. *Id.* at 630. On that same date, the District asked the Parent to “confirm the plan for receiving [the Student’s] diploma as that was left up in the air when you both left the [May 15] IEP meeting.” *Id.*
45. On June 16, 2023, the day before the Charter School’s graduation, the Dean of Charter School informed the Parent that “[a]s of 2:30 this afternoon, our records show that [Student] still has a few assignments left to finish on █.” P/SD Core Exh. 631. The Student was thus ineligible to graduate until █ completed 14 remaining assignments. *Id.* at 631; *Id.* at 650 (“As of 6/22 it is my understanding that █ still had all 14 to complete. This is the only piece left for [Student] to earn the diploma.”).
46. Over the course of 2022-2023 school year, the Student was absent from the Charter School for a total of 124 out of approximately 160 school days. P/SD Core Exh. 1; Testimony of █ The Parent testified that █ did not bring the Student to the Charter School, causing █ to accrue 124 absences, because █ was unaware of the availability of services there. Testimony of Parent. As the record demonstrates, however, the Parent was repeatedly informed that services were in place at the Charter

¹ This was a surprise to the District, given that the Parent rejected the District’s offers to conduct the Test of Written Language, Fourth Edition (TOWL-4) and to “include a writing goal” at the October 12, 2022 IEP team meeting. P/SD Core Exh. 402-403 (meeting minutes); P/SD Core Exh. 449 (parent response to evaluation proposal); Testimony of █ Likewise, the Parent had not brought the Student to ESY services in several years. Testimony of █

School beginning as early as September 12, 2022. *E.g.*, SD Doc 95; P/SD Core Exh. 377; P/SD Core Exh. 438; P/SD Core Exh. 481.

47. The Student attended the Charter School for “less than a month” towards the end of the school year, often refusing to participate in [redacted] written expression services “because [redacted] had to work on [redacted].” SD Doc 266; Testimony of [redacted] Testimony of Student. In turn, the Student would feign work completion in [redacted] while playing video games. Testimony of Student. When the Charter School’s Special Education Teacher asked to see [redacted] work in [redacted] the Student would close [redacted] laptop or hide it with [redacted] body. Testimony of [redacted]
48. On June 19, 2023, still having yet to provide the District with a formal IEP response, the Parent emailed the District, “I wrote you an answer, however, I also asked [Student] to drop off a paper copy. I will have to see what [Student] did with it.” P/SD Core Exh. 632. The Student does not drive, so it is unclear how the Student would have “drop[ped] off a paper copy.” Testimony of [redacted] *See also id.* at 318-19 (Driving Evaluation recommending “that the goal of driving be delayed for [Student]” and “reevaluated at 21-23 years of age, or when [redacted] demonstrates increased independence and improvements in these areas.”).
49. It is unclear when the District received the Parent’s written response to the District’s amended IEP proposal. However, the Parent signed the parent response form on or around June 2, 2023, fully rejecting the proposed IEP and placement. P/SD Core Exh. 624. Per usual, the Parent did not explain why [redacted] rejected the District’s proposal. *Id.*
50. On July 5, 2023, the Parent emailed the District, “I am ... curious as to why you haven’t contacted me regarding ESY?!?” P/SD Core Exh. 656. The District responded:
- I included ESY in the IEP proposal as a compromise per our conversation during the [May 15, 2023] IEP meeting. [Student] has not accessed [redacted] services all year and there is no evidence that [redacted] needs ESY for FAPE ([redacted] also did not attend the last couple of years). I did propose 3x a week for 4 weeks for SDI in writing per the [May 15] conversation. This was also based on [Student’s] desire to receive [redacted] diploma at the end of the summer. *You did not agree to the IEP, but if you and [Student] want to access those services, I can work on getting that set up with signed agreement*
- Id.* at 655 (emphasis added). The District also sought clarification as to the Student’s progress in [redacted] as well as [redacted] intent to graduate, as “[t] [redacted] impacts proposed services for the 23-24 school year.” *Id.* The Parent did not acknowledge the District’s question, instead turning [redacted] attention to a recent FERPA request. *Id.* at 649.
51. The Student was slated to attend [redacted] for the 2023-2024 school year. *E.g.*, Testimony of Parent; Testimony of Student, P/SD Core Exh. 554-55 (“[Student] has a plan to attend college to major [in] entomology and minor in computer science.”).

52. Virginia Tech’s first day of classes was April 21, 2023. Testimony of Parent. On that same date, Virginia Tech emailed the Student and the Parent, “After multiple reminders, we have not received your final high school transcript. Please submit your transcript by 4PM Eastern on Wednesday, August 23” or “your application will be withdrawn.” SD Supp. A 72. In a previous email, Virginia Tech warned, “If we do not receive your final high school transcript by Friday, August 25 at the latest, University Scholarships and Financial Aid will cancel your 2023-24 financial aid.” SD Supp. A 30.
53. The Student submitted [REDACTED] final [REDACTED] assignments on August 24, 2023. SD Doc 69; Testimony of [REDACTED] [REDACTED] received [REDACTED] regular high school diploma from the Charter School on August 25, 2023. SD Doc 336 (Charter School transcript); P/SD Core Exh. 660 (WPN).
54. Unsurprisingly, the Student started “late” at Virginia Tech. Testimony of Parent. Records received from Virginia Tech reveal the Student made little-to-no effort to catch up after [REDACTED] late arrival, despite the efforts of faculty members and the Services for Students with Disabilities (SSD) office to assist [REDACTED]. *E.g.*, SD Doc 440-60 (emails from SSD office); SD Supp. A 104, 193, 196, 286 (emails from faculty members).
55. On or around August 28, 2023, the District proposed to discharge the Student from special education due to [REDACTED] having received a regular high school diploma. P/SD Core Exh. 660 (WPN); *Id.* at 662 (parent response form). On September 4, 2023, the Parent rejected the District’s proposal, writing “Still owe me a summary of performance among other things.” *Id.* at 662.
56. On September 5, 2023, the District emailed the Charter School, “[w]ith [Student] exiting the program I need to provide a summary of performance to [Parent]. I am struggling given that [REDACTED] did not participate in any programming or [REDACTED]’s academic last year.” P/SD Core Exh. 664. In response, the Charter School provided the District with a copy of the Student’s senior project and transcript. *Id.*
57. The District ultimately did not issue a Summary of Performance. Testimony of [REDACTED] [REDACTED]. The District’s ability to draft a Summary of Performance was substantially hampered by the Parent’s refusal to allow the District to exchange information with the Charter School, as well as the Parent’s choice not to bring the Student to the Charter School for the majority of the 2022-2023 academic year. *Id.*
58. On December 16, 2023, the Student was placed on “1st Academic Probation” at Virginia Tech due to a GPA of “less than 2.0 at the end of the 2023 Fall semester” SD Supp. A 353. On May 11, 2024, the Student was placed on First Academic Suspension at Virginia Tech “through the end of the fall 2024 semester.” *Id.* at 471.
59. As a result, the Student’s Virginia Tech scholarship (amount unclear) was “cancelled,” as were [REDACTED] Veterans Affairs scholarships and [REDACTED] tuition assistance through Vocational Rehabilitation. SD Doc 519 (Student Aid Detail); SD Doc 516-18 (Student Account

Detail); SD Supp. A 378 (Voc. Rehab. emails); SD Supp. A 484-85 (VA Education Benefits emails).

60. The Parent initially alleged in [REDACTED] hearing request that because the District failed to issue a Summary of Performance upon the Student's graduation, "there was no documentation to justify accommodations that might have been available in college" and "the Parent was unable to obtain services and support for Student within the college setting." Attached Statement to Due Process Hearing Request, p. 2, 6. However, after the District became aware through discovery that the Student was in fact offered accommodations at Virginia Tech, the Parent attempted to back-pedal [REDACTED] original, false allegation, and testified that the Student's accommodation plan would have been more *robust* but for the District's failure to issue a Summary of Performance. Testimony of Parent.²
61. Virginia Tech never requested a Summary of Performance as a prerequisite to the Student's eligibility for accommodations. *E.g.*, SD Doc 511. Rather, the SSD office requested "documentation of previous accommodation" such as "a previous school letter, an IEP, or 504 plan." *Id.* On or around June 30, 2023 (well before the Student received [REDACTED] high school diploma), the Student submitted the stay-put IEP and a Boston Children's Hospital evaluation report to Virginia Tech. SD Doc 342, 362.
62. On August 30, 2023, Virginia Tech emailed the Student to "confirm[] [REDACTED] registration with services for Students with Disabilities at Virginia Tech." The email set forth the following "Approved Accommodations" for the student: (a) Accessible Media (accessible text: electronic format with searchable text); (b) Exam Accommodations (computer and word processor for exams, distraction reduced testing space: small group setting, extended time 2.00x); (c) Notes and Lecture Access (advanced class materials, notetaking technology). SD Doc 506-07. The Student's accommodation plan at Virginia Tech was robust. Testimony of [REDACTED]
63. In addition to the accommodation plan referenced in the above paragraph, the Student was eligible to receive academic coaching through Virginia Tech's SSD office. SD Doc 456. As the Student's academic coach explained in an email, the SSD Academic Coaching Program offers a weekly meeting to "address executive functioning skills such as planning and time management" and to "go over grades, discuss resources, review upcoming assignments, address study strategies, etc." *Id.* at 455. The Student testified that [REDACTED] was unable to access academic coaching because it took place during [REDACTED] lunch hour. Testimony of Student. However, the Student's academic coach offered two alternative time slots, and added that "If neither of the times work, we ca[n] discuss alternative[] times." *Id.* at 454.

² Such a reversal should give pause to anyone seeking to determine the Parent's credibility, as it appears to point to a tendency to warp or distort the truth when expedient to do so.

PROPOSED RULINGS OF LAW

1. The stay-put IEP was reasonably calculated to provide the Student with meaningful educational benefits in the least restrictive appropriate environment. *See, e.g., Andrew F. v. Douglas County School District*, RE-1, 137 S.Ct. 988, 1001 (2017); *C.D. v. Natick Public School District*, 924 F.3d 621, 629 (1st Cir. May 2019); *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990).
2. The IEP proposed by the District on March 24, 2023, and the IEP proposed by the District on May 18, 2023, were reasonably calculated to provide the Student with meaningful educational benefits in the least restrictive environment. *See, e.g., Andrew F. v. Douglas County School District*, RE-1, 137 S.Ct. 988, 1001 (2017); *C.D. v. Natick Public School District*, 924 F.3d 621, 629 (1st Cir. May 2019); *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990).
3. The District met its obligation to offer to provide a FAPE to the Student in the least restrictive environment during the 2022-2023 school year. 20 U.S.C. §§ 1401(9), 1412(a)(5); 34 C.F.R. §§ 300.114, 300.115.
4. The District met its obligation to implement the stay-put IEP during the 2022-2023 school year. *See J. v. Portland Pub. Sch.*, No. 2:15-CV-00084-DBH, 2016 WL 5940890, *4 (D. Me. Oct. 12, 2016), *report and recommendation adopted*, No. 2:15-CV-84-DBH, 2016 WL 7076995 (D. Me. Dec. 5, 2016).
5. The Parent obstructed the District's ability to hold IEP team meetings and revise IEPs by ignoring the District's requests to schedule IEP team meetings, failing to attend an IEP team meeting once scheduled, belatedly providing parent input on a draft IEP, and refusing to allow the District to exchange information with the Charter School. *C.G. v. Five Town Commun. Sch. Dist.*, 513 F.3d 279, 288 (1st Cir. 2008) (failure to participate in IEP team process is unreasonable and can bar relief sought by parent).
6. The Student's absences during the 2022-2023 school year were not attributable to [REDACTED] disability. *See S.J. v. Issaquah Sch. Dist. No. 411*, 2007 WL 2703056 (W.D. Wa. Sept. 12, 2007) (finding that student's attendance difficulties were not the product of [REDACTED] disability, but instead caused by the parent).
7. Compensatory education is an equitable remedy. The equities do not support a compensatory education order because the Parent's actions were unreasonable. *See, e.g., Five Town*, 513 F.3d at 288.
8. Charter schools bear the responsibility to implement classroom accommodations under Section 504. 20 U.S.C. § 7221i(2); 71 Fed. Reg. 46,548 (2006).

9. Procedural violations of the IDEA do not require a remedy unless the violation: i) impeded the child's right to a free appropriate public education; ii) Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a [FAPE]; or iii) Caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii). The District's alleged procedural violations did not impede the Student's right to a free and appropriate public education, nor did they significantly impede the Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE or result in a deprivation of educational benefits.
10. The District met all its special education procedural obligations, and to the extent a procedural obligation was not met, any such violation did not have the requisite impact on the Student or the Parent so as to warrant a remedy under state and federal special education laws. *See* 20 U.S.C. § 1415(f)(3)(E)(ii).
11. The Parents have the burden of establishing the appropriateness of the remedies that they ask the hearing officer to order. *D.B. v. Esposito*, 675 F.3d 26, 35 (2012); *see also Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005).

BURDEN OF PROOF

Under federal law, “the burden of persuasion” at a due process hearing “lies with the party challenging the IEP.” *D.B. v. Esposito*, 675 F.3d 26, 35 (1st Cir. 2012); *see also Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005). New Hampshire's special education law, RSA 186-C:16-b, III-a (as amended in 2022) attempts to override the IDEA by shifting the burden of persuasion onto school districts regarding “the appropriateness of the child's program or placement, or of the program or placement proposed by the public agency.” Those amendments do not alter that parents have the burden of production and the burden of persuasion on all other issues, such as whether the compensatory education they seek is appropriate and whether the equities support their claims. *D.B. v. Esposito*, 675 F.3d 26, 35 (1st Cir. 2012); *see also Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005).

The District submits that, insofar as RSA 186-C:16-b, III-a shifts the burden of persuasion onto the District, the statute violates Part 1, Article 28-a of the New Hampshire Constitution as interpreted by *New Hampshire Munic. Trust Workers' Comp. Fund v. Flynn*, 133

N.H. 17 (1990) because it will cause districts to lose cases they would otherwise win, resulting in obligations to make additional special education expenditures that would not otherwise have to be made. If shifting the burden of persuasion onto school districts is unconstitutional, the provision shifting the burden of production onto school districts is intertwined with the unconstitutional provision and must likewise fail.

ARGUMENT

I. The District did not fail to offer the Student a FAPE during the 2022-2023 school year by failing to offer the Parent an IEP to sign.

After an initial review of the governing legal standards, the District asserts below that although the District did not produce a finalized IEP for the Parent to sign from June 17, 2022 to March 24, 2023, this failure was entirely the result of the Parent's obstructionism. In addition, even if the Hearing Officer somehow concludes that parental obstructionism was not the cause of this violation, this procedural violation did not deny the Student a FAPE or deny the Parent the opportunity for meaningful engagement in the IEP team process.

A. Relevant Legal Standards.

Where a party to an IDEA due process hearing alleges a procedural violation, the Hearing Officer may find that the student was denied a free appropriate public education "only if" the procedural violation:

(I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits.

20 U.S.C. § 1415(f)(3)(E)(ii). “There must be some rational basis to believe that the procedural violations had those effects, and that they were not ‘mere technical violations.’” *Doe ex rel. Doe v. Attleboro Pub. Sch.*, 960 F. Supp. 2d 286, 295 (D. Mass. 2013); *see also, e.g., Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990); *Lt. T.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 82 (1st Cir.2004) (finding that “any procedural violations were not sufficiently material to justify rejection of the IEP or tuition reimbursement and that the proposed IEP did not substantively deny [Plaintiff] FAPE”). In short, the party alleging a procedural violation must do more than simply prove the existence of a procedural inadequacy; there must also be a resulting harm. *See Roland M.*, 910 F.2d at 995.

“The development of an IEP is meant to be a collaborative project.” *Five Town*, 513 F.3d at 285. Accordingly, where a parent’s “actions disrupt[] the IEP process, stalling its consummation and preventing the development of a final IEP[,]” their unreasonable conduct may preclude relief. *Id.* at 288. It is well settled that a school district may be relieved of a procedural obligation where the violation resulted from a parent’s obstructionism. *See, e.g., Five Town*, 513 F.3d at 288; *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 26 (1st Cir. 2008) (“[A] parent's obstruction of the IEP process, caused by ■■■ or ■■■ unreasonable delay in acting upon a completed IEP, can relieve a school system from its obligation to have an assented-to IEP in place at the start of the school year”); *Roland M.*, 910 F.2d at 995 (“The law ought not to abet parties who block assembly of the required team and then, dissatisfied with the ensuing IEP, attempt to jettison it because of problems created by their own obstructionism”). “Otherwise, school systems would be at the mercy of obdurate parents—a result plainly at odds with the collaborative relationship fostered by the IDEA framework.” *Lessard*, 518 F.3d at 26.

Finally, although a substantive FAPE violation claim may give rise to a claim for compensatory education, “compensatory education is not an appropriate remedy for a purely procedural violation of the IDEA.” *Maine Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 19 (1st Cir. 2003). In other words, where a parent alleging a procedural violation is unable to prove a resulting, substantive harm, the parent will be precluded from relief. *See, e.g., Attleboro Pub. Sch.*, 960 F. Supp. 2d at 296.

B. The District’s Failure to Produce a Finalized IEP was the Result of the Parent’s Obstructionism.

The Parent prevented the District from providing an IEP for the Parent to sign until March 24, 2023 by ignoring the District’s requests to schedule IEP team meetings, failing to attend an IEP team meeting once scheduled, belatedly providing parent input on a draft IEP, and refusing to allow the District to exchange information with the Charter School. Testimony of [REDACTED] [REDACTED] After providing the Parent with a “draft IEP” on May 2, 2022, the District spent *four months* attempting to schedule an IEP team meeting to review it. *Id.* To be more specific, the District emailed the Parent on May 27, 2022, June 6, 2022, August 24, 2022, September 9, 2022, and September 20, 2022 requesting to schedule an IEP team meeting to finalize the IEP, while the Parent continuously ignored the District’s pleas. P/SD Core Exh. 304, 313-16, 374-77. After an IEP team meeting was held on October 12, 2022, and the District was prepared to issue a finalized IEP, the Parent emailed the District a copy of the earlier May 2, 2022 draft IEP with copious handwritten edits. *Id.* at 401, 406-23. This time, the District spent *two months* attempting to schedule an IEP team meeting to review the Parent’s edits, culminating in an IEP team meeting that the Parent either forgot about or opted not to attend. P/SD Core Exh. 425-26, 430-31, 446, 465 (emails requesting IEP team meeting); P/SD Core Exh. 475 (parent email re non-attendance).

The Parent's refusal to allow the District to exchange information with the Charter School unquestionably impacted the District's ability to draft a finalized IEP. Testimony of [REDACTED] [REDACTED] The Parent explicitly forbade the Charter School from communicating with the District without [REDACTED] knowledge or disclosing to the District any educational records aside from outdated progress reports. P/SD Core Exh. 64-66; Testimony of Parent, [REDACTED] and [REDACTED] [REDACTED] As a result, the District was left to glean crucial information related to the Student's educational needs from IEP team meetings which the Parent prevented from occurring. Testimony of [REDACTED]

As evidenced by the number of IEP team meetings held between the expiration of the stay-put IEP and May 15, 2023 (nine meetings total), the District was highly motivated to draft an IEP proposal that the Parent would consent to. Testimony of [REDACTED] P/SD Core Exh. 578. The Parent, on the other hand, appeared to be motivated more by a desire to obstruct the District's efforts to finalize the IEP than to actually address [REDACTED] belatedly raised concerns. Even after the District issued an amended IEP proposal on May 18, 2023 which fully complied with the Parent's requests, [REDACTED] *still rejected it in full*. P/SD Core Exh. 556 (WPN); P/SD Core Exh. 567-572 (relevant pages from amended IEP); P/SD Core Exh. 624 (parent response form). It is thus no wonder why the District initially provided the Parent with a draft IEP rather than a finalized one back in May 2022 – the District, by virtue of the Parent's perpetual dissatisfaction with its IEP proposals, "was in a perilously poor position to remedy" this procedural error. *Roland M.*, 910 F.2d at 995.

C. The Parent Has Not Demonstrated that the District's Alleged Procedural Violation Resulted in a Denial of FAPE.

The Student did not suffer any harm as a result of the alleged procedural violation because the Student's stay-put IEP remained in effect during the 2022-2023 school year and the

Parent was afforded the opportunity to participate meaningfully in the IEP decision-making process. Testimony of [REDACTED] Testimony of [REDACTED] Testimony of [REDACTED] The Parent has not challenged the appropriateness of the stay-put IEP or the special education services therein. *See* Testimony of Parent. As will be discussed in more detail below, both the District and the Charter School were ready and willing to implement the Student’s special education services pursuant to the stay-put IEP throughout the 2022-2023 school year. Testimony of [REDACTED] Testimony of [REDACTED] Testimony of [REDACTED] Likewise, the Student’s special education and related services were in place and available at the Charter School throughout the 2022-2023 school year, and the Parent was made aware of the availability of those services through emails from the District and the Charter School, as well as IEP team meetings. *E.g.*, SD Doc 95; P/SD Core Exh. 377; P/SD Core Exh. 401-404; P/SD Core Exh. 438; P/SD Core Exh. 481; P/SD Core Exh. 656. The Parent did not testify, nor does the record show, that the Parent’s choice not to bring the Student to school for the majority of the 2022-2023 school year was causally linked to the District’s failure to issue a finalized IEP proposal until March 24, 2023. *See* Testimony of Parent.

Moreover, the District’s delayed IEP proposal was the result of its legally required efforts to include the Parent in the IEP decision-making process rather than “significantly impede[]” [REDACTED] opportunity to participate. 20 U.S.C. § 1415(f)(3)(E)(ii); Testimony of [REDACTED] By way of example, the District repeatedly emailed the Parent requesting to schedule IEP team meetings to finalize the Student’s IEP. *E.g.*, P/SD Core Exh. 304, 313-16, 374-77. After an IEP team meeting was held on October 12, 2022, and the District was prepared to “finalize [the] IEP proposal and send” it to the Parent, the District resisted finalizing the IEP so that another meeting could be held to review the Parent’s belatedly raised concerns. P/SD Core Exh. 401, 406-23.

Although the Parent elected not to attend an IEP team meeting scheduled for February 13, 2023, there is no evidence to suggest that the Parent's non-attendance was in any way related to the District's procedural violation. *See* P/SD Core Exh. 498; Testimony of Parent. Likewise, the District offered "to set up a meeting after you receive" the finalized IEP to address any of the Parent's concerns. P/SD Core Exh. 498.

In a nutshell, the District's alleged procedural violation did not impede the Student's right to a free appropriate public education or result in a deprivation of educational benefits because the Student's special education and related services were in place and available at the Charter School throughout the 2022-2023 school year. *E.g., Attleboro Pub. Sch.*, 960 F. Supp. 2d at 297-98. Likewise, the alleged violation did not prevent the Parent from meaningfully participating in the decision-making process because the District regularly communicated with the Parent regarding scheduling IEP team meetings and there is no evidence to suggest that the District was not open to considering [REDACTED] input. *E.g., id.* at 296-97. In fact, the District was so motivated to afford the Parent the opportunity to raise [REDACTED] concerns that the District resisted finalizing the IEP to its own detriment, resulting in the alleged procedural violation for which the Parent now seeks a remedy. *See id.* The District's delayed issuance of a finalized IEP was the product of the Parent's obstructionism and, regardless, did not result in any harm to the Parent or the Student.

II. The District did not fail to offer the Student a FAPE during the 2022-2023 school year by failing to offer services pursuant to a stay-put IEP.

After addressing the substantive legal standards related to the provision of a free appropriate public education, the District asserts below that the stay-put IEP and the proposed IEPs were reasonably calculated to provide the Student with a FAPE, the District offered the Student a FAPE during the 2022-2023 school year by contracting with the Charter School to

implement the Student’s IEP, and the Charter School had special education services in place during the 2022-2023 school year. In addition, the Parent’s inequitable conduct throughout that school year precludes the relief [REDACTED] seeks.

A. Relevant Legal Standards.

The IDEA and New Hampshire state law, RSA 186-C, require local educational agencies to provide every eligible child a free appropriate public education (FAPE) in the least restrictive appropriate environment by means of an individualized educational program (IEP) that is “tailored to the unique needs” of the particular child. 20 U.S.C. §§ 1401(9)(D), 1412(a)(1); RSA 186-C:1, I; *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 181 (1982). In meeting its substantive obligations under the FAPE requirement, “a school must offer an individual education plan (IEP) reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” *Andrew F. v. Douglas County School District*, RE-1, 137 S. Ct. 988, 1001 (2017). The First Circuit has described this standard as a duty to provide an IEP that is “reasonably calculated to confer a meaningful educational benefit.” *Elizabeth B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012). *See also, e.g., C.D. v. Natick Public School District*, 924 F.3d 621, 629 (1st Cir. 2019); *Johnson v. Boston Pub. Sch.*, 906 F.3d 182, 194 (1st Cir. 2018).

Notably, however, “[a]n IEP need not ... offer the student ‘an optimal or an ideal level of educational benefit[.]’” *Johnson*, 906 F.3d 182 (1st Cir. 2018) (quoting *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 23-24 (1st Cir. 2008)). This sentiment harkens back to the First Circuit’s well-established principle that “[t] [REDACTED] IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents.” *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993). Rather, “[t] [REDACTED]

Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP.” *Id.* In the same vein, the First Circuit has also stated that an IEP can be appropriate even if it is not “the *only* appropriate choice, or the choice of certain select experts, or the child’s parents’ *first* choice, or even the *best* choice.” *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 948 (1st Cir. 1991).

“In addition to developing an IEP that is reasonably calculated to provide meaningful educational benefits, a school district is required to *implement* the IEP in accordance with its requirements[.]” *J. v. Portland Pub. Sch.*, No. 2:15-CV-00084-DBH, 2016 WL 5940890, *4 (D. Me. Oct. 12, 2016), *report and recommendation adopted*, No. 2:15-CV-84-DBH, 2016 WL 7076995 (D. Me. Dec. 5, 2016) (internal citations omitted) (emphasis added). “[P]erfect implementation is not required[;]” rather, courts have held that only a “material or significant” implementation failure will amount to a denial of FAPE. *Id.* (citing *Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478, 484 (4th Cir. 2011); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). A material failure occurs “when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” *Van Duyn*, 502 F.3d at 822.

Beyond this, courts have declined to further elaborate on what “appropriate progress” will look like, reasoning that “the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” *Andrew F.*, 137 S.Ct. at 1000-01. *See also Johnson*, 906 F.3d at 196 (“the relationship between speed of advancement and the educational benefit must be viewed in light of the child’s individual circumstances”). However, “the absence of a bright line rule ... should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’” *Id.* (citing

Rowley, 458 U.S. at 206). Indeed, the *Endrew F.* Court found that deference should be accorded “the expertise and the exercise of judgment by school authorities”; specifically, “cogent and responsive explanation [by school authorities] for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of [REDACTED] circumstances.” *Id.* at 1002.

B. The District Offered the Student a FAPE During the 2022-2023 School Year Pursuant to the Stay-Put IEP.

The District met its obligation to offer to provide a FAPE to the Student during the 2022-2023 school year because special education and related services were available both at the Charter School and at the District’s high school. Testimony of [REDACTED] Testimony of [REDACTED] [REDACTED] The Student’s stay-put IEP called for the following special education and related services:

- a. Specially designed instruction (SDI) in written expression, four sessions per week, 45 minutes per session in the special education setting;
- b. SDI in executive functioning, one session per day, 15 minutes per session in the special education setting;
- c. Transitional self-advocacy counseling, one session per week, 30 minutes per session in the regular education setting;
- d. Executive functioning paraprofessional support, one session per day, 45 minutes per session in the regular education setting;
- e. Social skills counseling, one session per day, 30 minutes per session in the regular education setting;
- f. Written expression (functional transition and self-advocacy) consultation between staff, four sessions per quarter, 60 minutes per session.

P/SD Core Exh. 37. While the District continuously offered to provide the above services at the District’s high school, the District contracted with the Charter School to provide services at the

Charter School per the Parent's request. Testimony of [REDACTED] See also RSA 194-B:11, III(b)(3), (5).

The Charter School made available each of the Student's special education services through designated service providers and billed the District for the cost of reserving those service providers. Testimony of [REDACTED] see also, e.g., P/SD Core Exh. 395, 424, 429, 443 (invoices). For instance, the Charter School's Special Education Teacher was available to provide the Student's SDI in executive functioning and written expression every day of the school week and consulted with the Student's paraprofessional on a regular basis.³ SD Doc 56; Testimony of [REDACTED] [REDACTED] The District reimbursed the Charter School for those services. E.g., P/SD Core Exh. 395, 424, 429, 443. Likewise, a paraprofessional at the Charter School was available to provide 45 minutes of support in executive functioning each day of the school week. Testimony of [REDACTED] [REDACTED] see also SD Doc 266. The District reimbursed the Charter School for those services. E.g., P/SD Core Exh. 395, 424, 429, 443. While it is unclear why the invoices received by the District list "0 hours" of counseling, the Charter School had a counselor on staff and available to implement the Student's counseling services for the entirety of the 2022-2023 school year, and the Student seemingly accessed these services during the few weeks [REDACTED] attended the Charter School. SD Doc 266; Testimony of [REDACTED]

³ While the Charter School's Special Education Teacher was on maternity leave from approximately October 5, 2022 to November 30, 2022 (eight weeks), the Student did not suffer any educational harm as a result of the Teacher's absence. See *Five Town*, 513 F.3d at 290 ("Compensatory education is a surrogate for the warranted education that a disabled child may have missed during periods when [REDACTED] IEP was so inappropriate that he was effectively denied a FAPE"); *Maine Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 18 (1st Cir. 2003) ("a child's claim for compensatory education begins to accrue when [REDACTED] or [REDACTED] IEP is so inappropriate that the child is receiving no real educational benefit"); *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (compensatory education services to replace the "educational services the child should have received in the first place"). In other words, the Student was not denied a FAPE by reason of the Teacher's absence, but rather the Parent's refusal to bring [REDACTED] to school. Had the Student attended the Charter School to receive services during the Teacher's maternity leave, the Charter School would have provided compensatory education services. Testimony of [REDACTED]

While the Charter School was ready and willing to implement the Student's special education services, the Charter School's providers were "frustrated in this endeavor by the frequent absences of the [Student] and by the lack of coordination due to the restrictions placed by the [Parent] on communicating with the [District]." *Doe By and Through Doe v. Def. I*, 898 F.2d 1186, 1191 (6th Cir. 1990). The Student was absent from the Charter School for a total of 124 out of approximately 160 school days. P/SD Core Exh. 1; Testimony of [REDACTED]. The Parent testified that [REDACTED] did not bring the Student to school because [REDACTED] was unaware of the availability of services.⁴ Testimony of Parent. However, the record is replete with evidence showing that the Parent was repeatedly informed that services were in place at the Charter School beginning as early as September 12, 2022.⁵ *E.g.*, SD Doc 95; P/SD Core Exh. 377; P/SD Core Exh. 438; P/SD Core Exh. 481. Moreover, the Parent explicitly forbade the Charter School from communicating with the District or exchanging educational records (aside from outdated progress reports), which significantly impeded the District's ability to oversee the Charter School's service implementation. P/SD Core Exh. 64-66; Testimony of [REDACTED]. As a result, the stay-put IEP "was never given a chance to succeed." *Doe v. Defendant I*, 898 F.2d at 1191.

The Student attended the Charter School for "less than a month" towards the end of the school year, following a May 15, 2023 IEP team meeting where the Charter School offered [REDACTED] a "quiet space to work on" [REDACTED] [REDACTED] course. P/SD Core Exh. 554; Testimony of [REDACTED]. Even then, the Student's attendance was spotty; during the month of June 2023, [REDACTED] was absent

⁴ While the Parent has not alleged the Student's absences were attributable to [REDACTED] disability, it's worth noting that the Student's absences were the result of the Parent's choice not to bring [REDACTED] to school. *See S.J.*, 2007 WL. Neither the District nor the Charter School had any reason to suspect that the Student's absences were attributable to [REDACTED] disability. Testimony of [REDACTED].

⁵ Likewise, the Parent has not identified any reason [REDACTED] had to suspect that services would not be available at the Charter School. The Student attended the Charter School and received services there for many years. Testimony of [REDACTED].

twice and was tardy on five occasions. P/SD Core Exh. 3. Nonetheless, when the Student was actually present to receive [REDACTED] services at the Charter School, those services were delivered by the Charter School's providers to the greatest extent possible. Testimony of [REDACTED] The Parent's only contention to the contrary relates to services provided by the Charter School's Special Education Teacher. Testimony of Parent; Testimony of Student. Despite reminders of [REDACTED] IEP goal in written expression, and despite having lessons in place to implement that goal, the Student often refused SDI in that area "because [REDACTED] had to work on [REDACTED] [REDACTED]." SD Doc 266; Testimony of [REDACTED] Testimony of Student. In turn, the Student would feign work completion in [REDACTED] while playing video games. Testimony of Student. When the Charter School's Special Education Teacher asked to see [REDACTED] work in [REDACTED], the Student would close [REDACTED] laptop or hide it with [REDACTED] body. Testimony of [REDACTED]

The Student and the Parent worked in tandem to thwart the Charter School's efforts to provide the Student's special education services. The Parent refused to bring the Student to school and prevented the District and the Charter School from adequately coordinating with each other, while the Student refused services in written expression and manipulated the Charter School's service provider. While the Parent will certainly argue that the Student's work refusal was attributable to [REDACTED] disability, it seems far more likely that the Student's refusal to work with the Charter School's Special Education Teacher emerged due to [REDACTED] numerous absences and resulting unfamiliarity with that service provider. Testimony of [REDACTED] Regardless, the District had no way of knowing that the Student was refusing work at the Charter School outside of IEP team meetings, none of which occurred after May 15, 2023. Testimony of [REDACTED]

C. The Stay-Put IEP, the IEP Proposed by the District on March 24, 2023, and the IEP Proposed by the District on May 18, 2023, were Reasonably Calculated to Provide the Student with a FAPE.

None of the issues for hearing pertain to the appropriateness of the stay-put IEP or the District’s proposed IEPs. Likewise, the Parent has not contended in any way that the stay-put IEP addressed in this Section was inappropriate. Rather, the Parent’s only relevant claim is that the District – or, perhaps more appropriately, the Charter School – failed to implement the stay-put IEP. Testimony of Parent; Testimony of Student. Nonetheless, the District asserts that the stay-put IEP at issue in this case, as well as the IEPs it proposed on May 24, 2023 and May 18, 2023, were reasonably calculated to provide the Student with meaningful educational benefits in the least restrictive appropriate environment. *See, e.g., Andrew F. v. Douglas County School District*, RE-1, 137 S.Ct. 988, 1001 (2017); *C.D. v. Natick Public School District*, 924 F.3d 621, 629 (1st Cir. May 2019); *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990).

The First Circuit has cautioned against “balkaniz[ing] the concept of educational benefit[.]” by parsing an IEP into highly particularized components rather than judging it as a “unitary whole.” *Lenn*, 998 F.2d at 1090. However, the District will address the Parent’s testimony related to the proposed IEP [REDACTED] rejected on or around April 7, 2023 in acknowledgement of the state’s burden of proof standard for special education due process hearings. *See* RSA 186-C:16-b, III-a; P/SD Core Exh. 543 (Parent Response). According to the Parent, [REDACTED] objected to the District’s proposed IEP dated May 1, 2023 through April 30, 2024 because it did not include services in written expression. P/SD Core Exh. 554; Testimony of Parent. The Parent did not raise this objection until an IEP team meeting on May 15, 2023. P/SD Core Exh. 533, 543 (Parent response); P/SD Core Exh. 554 (IEP team meeting record). Regardless, based on the Student’s writing assessment results, work product, IEP progress reports, and input from Charter School staff, the District determined that the Student no longer

required goals or services in written expression to make meaningful educational progress. P/SD Core Exh. 482; Testimony of [REDACTED] *See also Mr. R.*, 321 F.3d at 20 (“IEPs are by their very nature idiosyncratic, and the appropriate content of a particular child’s IEP ... can only be determined by those assigned to evaluate the child and develop the IEP (with the help of the parents)”); *Lessard*, 592 F.3d at 270 (“an ideal or perfect plan is not required.”). “Given the truism that courts should recognize the expertise of educators with respect to the efficacy of educational programs,” *Five Town*, 513 F.3d at 289, the District respectfully requests that the Hearing Officer afford due weight to the Parent’s reason for rejecting the proposed IEP – especially given that the Parent *still* rejected the IEP after the District amended it to address the area of written expression as a compromise. The Parent has presented no evidence that the amended IEP was inappropriate, aside from a June 3, 2023 email where the Parent wrote “I found a number of errors in the IEP, and so I am declining it.” P/SD Core Exh. 628. The Parent never elaborated on what those supposed “errors” were. *Id.* at 655-59.

D. The Equities Do Not Support an Award of Compensatory Education.

“Compensatory education is a surrogate for the warranted education that a disabled child may have missed during periods when [REDACTED] IEP was so inappropriate that he was effectively denied a FAPE.” *Five Town*, 513 F.3d at 290. Put another way, “a child’s claim for compensatory education begins to accrue when [REDACTED] or [REDACTED] IEP is so inappropriate that the child is receiving no real educational benefit.” *Maine Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 18 (1st Cir. 2003). Compensatory education is an equitable remedy, meaning that it “is not an automatic entitlement but, rather, a discretionary remedy for nonfeasance or misfeasance in connection with a school system's obligations under the IDEA.” *Five Town*, 513 F.3d at 290. Accordingly, “the extent of a compensatory education award is very dependent on the particular

facts and circumstances of the case.” *Millay v. Surry Sch. Dept.*, 2011 WL 1122132, at *9 (D. Me. Mar. 24, 2011), *aff’d sub nom.*, *Millay ex rel. Y.M. v. Surry Sch. Dept.*, 2011 WL 1989923 (D. Me. May 23, 2011).

The particular facts and circumstances of this case do not support an award of compensatory education because the Parent has not contended that the stay-put IEP was inappropriate and any IEP implementation failures were the result of the Parent’s refusal to bring the Student to school. As stated above, the District continuously offered to provide services at the District’s high school program throughout the 2022-2023 school year. Testimony of [REDACTED] [REDACTED] Likewise, the Charter School had services in place throughout the 2022-2023 school year. Testimony of [REDACTED] For the vast majority of the academic year, however, the Parent rejected both options, creating a situation where the Student was deprived of special education services not due to an inappropriate IEP or a material implementation failure, but because the Parent blocked the Student from receiving those services. The Parent cannot now attempt to jettison the Student’s educational program because of problems created by [REDACTED] own obstructionism.

III. The District’s failure to issue a Summary of Performance upon the Student’s graduation did not deny the Student’s right to a FAPE.

The District below echoes the arguments it posed in its Motion for Partial Summary Judgment dated October 28, 2023. Namely, even if the District failed to issue an explicit Summary of Performance upon the Student’s graduation, this procedural violation was caused by the Parent’s obstructionism. Regardless, it did not deny the Student a FAPE or otherwise result in any harm to the Student or Parent.

A. Relevant Legal Standards.

As noted earlier, when a party to an IDEA due process hearing alleges a procedural violation, the Hearing Officer may find that the student was denied a free appropriate public education “only if” the procedural violation:

(I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits.

20 U.S.C. § 1415(f)(3)(E)(ii). “There must be some rational basis to believe that the procedural violations had those effects, and that they were not ‘mere technical violations.’” *Doe ex rel. Doe v. Attleboro Pub. Sch.*, 960 F. Supp. 2d 286, 295 (D. Mass. 2013); *see also, e.g., Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990); *Lt. T.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 82 (1st Cir.2004) (finding that “any procedural violations were not sufficiently material to justify rejection of the IEP or tuition reimbursement and that the proposed IEP did not substantively deny [Plaintiff] FAPE”). In short, the party alleging a procedural violation must do more than simply prove the existence of a procedural inadequacy; there must also be a resulting harm. *See Roland M.*, 910 F.2d at 995.

Moreover, the First Circuit has repeatedly held that school districts may be relieved of procedural obligations where the procedural violation resulted from a parent’s obstructionism. *See, e.g., Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 26 (1st Cir. 2008) (“[A] parent's obstruction of the IEP process, caused by ■■■ or ■■■ unreasonable delay in acting upon a completed IEP, can relieve a school system from its obligation to have an assented-to IEP in place at the start of the school year”); *C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 288 (1st Cir. 2008) (“the parents' actions disrupted the IEP process, stalling its

consummation and preventing the development of a final IEP” thereby precluding relief); *Roland M.*, 910 F.2d at 995 (“The law ought not to abet parties who block assembly of the required team and then, dissatisfied with the ensuing IEP, attempt to jettison it because of problems created by their own obstructionism”).

B. The District’s Procedural Violation did not Impede the Student’s Right to a FAPE or Otherwise Result in any Harm.

The District does not dispute that it failed to provide the Student with an *explicit* “summary of the child’s academic achievement and functional performance,” including “recommendations on how to assist the child in meeting the child’s postsecondary goals.” 34 C.F.R. § 300.305(e)(3); Testimony of [REDACTED]. However, this mere technical violation neither compromised the Student’s right to a FAPE nor denied the Parent the opportunity to participate in the decision-making process. In short, there is no causal link between the omission of a Summary of Performance and the alleged injury.

The Parent’s sole evidence of any harm resulting from the District’s failure to issue a Summary of Performance is [REDACTED] contention that, in the absence of a Summary of Performance, “there was no documentation to justify accommodations that might have been available in college” and “the Parent was unable to obtain services and support for Student within the college setting.” Attached Statement to Due Process Hearing Request, p. 2, 6. However, the Student was slated to receive academic accommodations at Virginia Tech well before a Summary of Performance would have been issued by the District, and the Student was in fact provided with those accommodations notwithstanding the District’s procedural error. SD Doc 506-07; Testimony of [REDACTED].

To be more specific, Virginia Tech contacted the Student on June 21, 2023, to schedule a welcome meeting with its Services for Students with Disabilities (SSD) office to discuss

potential accommodations. SD Doc 510-11. The Student did not graduate, earning [REDACTED] regular high school diploma, until August 25, 2023. P/SD Core Exh. 660. The Student met with Virginia Tech’s SSD office on or around August 29, 2023, shortly after receiving [REDACTED] high school diploma. SD Doc 508. The very next day, the SSD office emailed the Student to “confirm[] [REDACTED] registration with services for Students with Disabilities at Virginia Tech.” *Id.* at 506. The email set forth a robust set of approved academic accommodations for the student to access at Virginia Tech. SD Doc 507; Testimony of [REDACTED]

C. The Parent Should Not Be Allowed to Invoke a Procedural Violation Claim Arising From [REDACTED] Own Obstructionism.

This case is just like the decisions cited above. *E.g., Lessard*, 518 F.3d at 26; *Five Town*, 513 F.3d at 288; *Roland M.*, 910 F.2d at 995. The Parent vehemently objected to any communication between the District and the Charter School (where the student attended high school) yet expected the District to produce a summary of the Student’s current academic achievement and functional performance, including “recommendations on how to assist the child in meeting the child’s postsecondary goals.” 34 C.F.R. § 300.305(e)(3); Testimony of [REDACTED] [REDACTED] *see also* Testimony of Parent. On March 5, 2021, the Parent wrote a letter to the Charter School’s Dean of School, stating “No information regarding my [REDACTED] [REDACTED] is to be released without my express permission” aside from “progress reports.” P/SD Core Exh. 64-65. The letter explicitly precluded “testing materials, grade reports, transcripts or schedules” from disclosure without the Parent’s “express permission.” *Id.* When the District sought the Parent’s permission to exchange information with the Charter School, the Parent refused, writing “maintain existing process that requires parental consent for each release.” *Id.* at 66. Moreover, by the time the Student graduated from the Charter School, any progress reports received by the District were based on an outdated, stay-put IEP from 2020.

The Parent's refusal to allow the Charter School to exchange information with the District unequivocally prevented the District from accessing the information it needed to provide a Summary of Performance. Testimony of [REDACTED] The Parent should not be allowed to invoke a procedural violation claim because of problems created by [REDACTED] own obstructionism. *E.g., Lessard*, 518 F.3d at 26; *Five Town*, 513 F.3d at 288. Put another way, the District should not be penalized for failing to do the impossible, especially when the Parent created that impossibility.

CONCLUSION

The District did not fail to offer the Student a FAPE during the 2022-2023 school year by failing to offer an IEP for the Parent to sign, failing to offer services pursuant to the stay-put IEP, or failing to issue a Summary of Performance. For the reasons set forth above, the District requests that the Hearing Officer fully in favor of the District on all issues in this case.

November 18, 2024

By: /s/ Elizabeth Trautz
Elizabeth C. Trautz, NH Bar No. 277020
Counsel for the [REDACTED] School District
Drummond Woodsum
670 N. Commercial St., Suite 207
Manchester, NH 03101

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2024, I sent a copy of this Post-Hearing Memorandum to Kristen Mansharamani, Advocate for [REDACTED] by email only.

By: /s/ Elizabeth Trautz
Elizabeth C. Trautz