



OFFICE OF ADMINISTRATIVE HEARINGS  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

In the Matter of  
  
STUDENT, by and through Parents,  
  
                                Petitioners,  
                                vs.  
  
DEPARTMENT OF EDUCATION,  
STATE OF HAWAII,  
  
                                Respondent.

DOE-SY1617-067A

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND DECISION

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CONCLUSIONS OF LAW AND DECISION**

**I. INTRODUCTION**

On March 31, 2017, the Department of Education, State of Hawai`i (“Respondent” or “DOE”) received a Request for a Due Process Hearing (“Request”) under Hawai`i Administrative Rules (“HAR”) Title 8, Chapter 60 from Student, by and through Student’s Parents, (collectively referred to as “Petitioners”) in DOE-SY1617-067. On May 5, 2017, Petitioners filed an Amended Request in DOE-SY1617-067A regarding alleged violations in Student’s March 16, 2017 Individualized Education Program (“IEP”).

On June 6, 2017, a pre-hearing conference in the above-captioned matter was conducted by the undersigned Hearings Officer. Parent 1 appeared pro se with Advocate Robert C. Thurston, Esq.; Respondents were represented by Kunio Kuwabe, Esq. and Department of Education District Educational Specialist (“DES”) 1. Parent 1, Mr. Thurston, and DES 1 participated via telephone conference. By agreement of both parties, the hearing was scheduled for October 16 through 20, 2017. Mr. Kuwabe requested an extension of the 45-day period in which a final decision is due be extended from July 20, 2017 to September 2, 2017, and from

September 3, 2017 to October 17, 2017, and from October 18, 2017 to December 1, 2017. Petitioners had no objection. The extension was granted on June 8, 2017.

On July 18, 2017, Petitioners informed Mr. Kuwabe that they were in the process of obtaining Samuel Shnider, Esq. as counsel. Mr. Shnider had a conflict with the hearing dates, and Petitioners requested a continuance. On August 4, 2017, Mr. Shnider contacted the Hearings Officer. A telephone conference was scheduled for August 9, 2017 to set the dates for the hearing and pre-hearing motions. On August 4, 2017, Mr. Shnider filed a Substitution of Counsel and a Request for Continuance of Hearing Date and Consent to Extension of Decision Deadline.

On August 9, 2017, a status conference was conducted by the undersigned Hearings Officer. Petitioners were represented by Mr. Shnider; Respondents were represented by Mr. Kuwabe and DES 2. Mr. Shnider and DES 2 participated via telephone conference. The hearing was rescheduled to October 30, 2017 through November 3, 2017. Pre-hearing motions, would be heard on October 9, 2017 at 9:00 a.m. at the Office of Administrative Hearings, and would be: a) filed with the Office of Administrative Hearings, no later than 4:30 p.m. on September 25, 2017; b) served upon the opposing party by personal service or by first class mail; and c) received by the opposing party no later than September 25, 2017. The response to any motion was to be filed and served by October 2, 2017.

On August 9, 2017, Petitioners filed their Motion to Establish Burden of Proof. On August 9, 2017, Respondents filed their Memorandum in Opposition to the Motion Establish Burden of Proof. On August 11, 2017, Petitioners filed an Amended Declaration of Parent 1. On August 15, 2017, Petitioners filed their Reply in Support of their Motion to Establish Burden of Proof.

On September 27, 2017, a hearing on the Motion to Establish Burden of Proof was held before the Hearings Officer. Petitioners were represented by Mr. Shnider; Respondent was represented by Mr. Kuwabe. Mr. Shnider participated via telephone. Both parties presented oral arguments. The Hearings Officer denied the Motion to Establish Burden of Proof and filed a written Order on October 11, 2017.

On September 27, 2017, Petitioners submitted a letter requesting a site visit in their Request for Due Process Hearing dated May 5, 2017. Petitioners requested the parties make a

site visit to Private Facility 1 and meet the staff there. On September 27, 2017, Respondent submitted a letter opposing the site visit. On September 29, 2017, the Hearings Officer filed an Order Denying Petitioners' Request for Site Visit.

On October 10, 2017, Petitioners filed a Complaint appealing the Hearings Officer's pre-hearing Order Denying Petitioners' Motion to Establish Burden of Proof, Order Denying Petitioners' Request for Site Visit, and Motion to Stay Administrative Proceedings Pending Resolution of Issues on Appeal at the Hawaii U.S. District Court.

On October 10, 2017, Petitioners filed a Verified First Amended Complaint and Emergency Motion for a Temporary Restraining Order and Injunction. On October 25, 2017, U.S. District Court Judge Derrick K. Watson denied the Complaint.

On October 10, 2017, Petitioners filed a Motion to Stay Administrative Proceedings Pending Resolution of Issues on Appeal at the Office of Administrative Hearings. On October 13, 2017, Respondents filed their Memorandum in Opposition to the Motion to Stay Administrative Proceedings Pending Resolution of Issues on Appeal. On October 16, 2017, the Hearings Officer denied the Motion to Stay Administrative Proceedings Pending Resolution of Issues on Appeal. On October 18, 2017, Petitioners filed their Reply in Support of their Motion to Stay Administrative Proceedings Pending Resolution of Issues on Appeal.

On October 19, 2017, Respondent's filed their Witness List, Exhibit List, and Exhibits.

On October 23, 2017, Petitioners filed their Witness List, Exhibit List, and Exhibits.

On October 26, 2017, Petitioners filed a Notice of Interlocutory Appeal to the Ninth Circuit Court of Appeals.

On October 26, 2017, Petitioner filed its Motion to Stay Proceedings Pending Appeal at the U.S. District Court. On October 26, 2017, U.S. District Court Judge Watson denied the Motion.

On October 26, 2017, Petitioners filed its Emergency Second Motion to Stay Administrative Proceedings Pending Resolution of Issues on Appeal pending their appeal to the Ninth Circuit Court of Appeals at the Office of Administrative Hearings. On October 26, 2017, Respondent filed its Memorandum in Opposition to Petitioners' Emergency Second Motion to

Stay Administrative Proceedings Pending Resolution of Issues on Appeal. The Hearings Officer denied the Motion on October 27, 2017.

On October 30, 2017, the hearing was commenced by the undersigned Hearings Officer. Petitioners were represented by Mr. Shnider; Parents and Student were present. Respondent was represented by Mr. Kuwabe; DES 2 was present on behalf of Respondent.

On October 31, 2017, Petitioners rested their case-in-chief. Mr. Shnider made an oral motion for directed verdict. Mr. Kuwabe objected. The Hearings Officer denied the oral motion.

The hearing was concluded on November 2, 2017. The transcripts would be available on November 17, 2017. Mr. Kuwabe orally requested an extension of the 45-day time limit in which a final decision is due from December 2, 2017 to January 15, 2018. Mr. Shnider had no objection. The extension was granted on November 7, 2017.

On December 1, 2017, Petitioners and Respondent filed their Closing Briefs.

## **II. ISSUES PRESENTED**

In their May 5, 2017 Amended Request, Petitioners allege procedural and substantive violations of the Individuals with Disabilities Education Act (“IDEA”). Specifically, Petitioners allege that the DOE denied Student a free appropriate public education (“FAPE”) in Student’s March 16, 2017 IEP. Petitioners raise the following issues:

- A. The DOE predetermined Student’s placement at the DOE Placement 2; and
- B. The DOE Placement 2 is not the least restrictive environment (“LRE”); and

Petitioners request the following relief:

- A. Find Private Facility 1 as the appropriate and stay put placement;
- B. Reimbursement for tuition for private services; and
- C. Compensatory education.

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

## **III. FINDINGS OF FACT**

1. Student was born on \_\_\_\_\_. Resp. Exh. 1 at 002.
2. Student has been diagnosed with \_\_\_\_\_ with early language impairment, \_\_\_\_\_, and \_\_\_\_\_. Pet. Exh. 4 at 121-122.

3. Student was found eligible for IDEA services under \_\_\_\_\_. Resp. Exh. 3 at 112.
4. Parent 1 testified that the DOE does not have the resources to educate children. When Student exhibited a negative behavior, Student would be rewarded. Parent 1 testified that it would turn children into “monsters.” Parent 1 testified Parent 1 removed Student from the DOE school after Parent 2 witnessed Student being carried “upside down...like an animal on a pole.” Parents removed Student from the DOE school in October 2009. Pet. Exh. 2 at 3; TR 16:18 – 18:6.
5. On April 25, 2010, the private doctor<sup>1</sup> wrote a letter stating Student “is an extremely unruly, difficult-to-control, who is essentially nonverbal.”<sup>2</sup> The private doctor gave Student a “prescription” for services 40 hours per week.<sup>3</sup> Pet. Exh. 14.
6. Student has attended Private Facility 1 for the last seven years. Parent 1 testified that Student has been learning and improving there. Private Facility 1 uses a multisensory mode of teaching overseen by staff. Student learns visually, auditorily, kinesthetically, and tactilely. TR 12:10-22; TR 15:7-21; TR 66:2-9.
7. Private Facility 1 has a customized program for Student’s specific and unique needs. Student has service providers that are overseen by providers, speech language therapy (“SLT”), community outings, reading, math, and a sensory program to help regulate Student. Currently, there is no licensed teacher at Private Facility 1, and there are no plans to hire one. TR 18:9 – 19:22; TR 81:11 – 86:1.
8. The Private Facility 1 is next to \_\_\_\_\_. Student’s program includes visits to these places. TR 44:8-23; 499:3-12.
9. Parent 1 testified that Private Facility 1 has \_\_\_ full-time students that have disabilities. Student feels more comfortable with other children that disabilities. Student does not hate neurotypical peers. TR 15:24 – 16:15; TR 45:23 – 46:2.
10. Student has issues with fluorescent lighting and sensory issues with smells and sounds. Private Facility 1 does not have fluorescent lights. TR 14:8 – 15:6.
11. Parent 1 testified that Student has behavioral issues that require support. Student has severe transition issues that can result in self-injurious behaviors (“SIBs”). Parent 1 testified that a change in Student’s program and placement would be “catastrophic.” TR 11:10 – 12:7.
12. Private Facility 1 Staff 2 testified as an expert in \_\_\_\_\_. TR 183:13-16.

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<sup>1</sup> According to the private doctor’s letterhead, private doctor specializes in Allergy and Environmental Medicine, and Childhood Disorders. Private doctor’s address was in \_\_\_\_\_.

<sup>2</sup> The letter did not state Student has disability.

13. Private Facility 1 Staff 2 is the regional manager for Private Facility 2. TR 179:17-19.

14. Private Facility 1 Staff 2 worked with Student from 2011 through June 2016, and periodically since then on an as-needed basis. Up until 2016, Private Facility 1 Staff 2 consulted with Student's team. Private Facility 1 Staff 2 conducted internet observations with Student, and Private Facility 1 Staff 2 would meet with Student every three months in person. TR 185:14-22; TR 194:22 – 195:1.

15. Private Facility 1 Staff 2 testified that Student had transition issues including transitions within and out of Private Facility 1 and with new staff members. Student would refuse to respond, speak at very low levels, try to elope from the learning area, and engage in nonmotivated learning. When Student transitioned out of Private Facility 1 and into the community, Student could exhibit SIBs, engage in obsessive behaviors and vocal protests. TR 186:2-25.

16. Private Facility 1 Staff 2 stated that when Student had new staff members introduced to Student's program, they would overlap in training with a current staff member. This overlap in training could last months. TR 187:6-18.

17. When Private Facility 1 Staff 1 started working with Student, Private Facility 1 Staff 1 went a "\_\_\_\_\_." Private Facility 1 Staff 1 observed Student, and spoke with Student's previous staff. Private Facility 1 Staff 1 testified if Student were to have a new staff member without the \_\_\_\_\_ process, Student would exhibit maladaptive behaviors, and Student's noncompliance would increase. TR 239:4 – 240:21.

18. Private Facility 1 Staff 2 witnessed Student working with Student's current Private Facility 1 Staff 1. Through the use of interventions, Student is not exhibiting as many transitional issues. Student has gone into the community to participate in activities with relatively little to no transitional issues. When Student has transitional issues, the staff follows the behavior intervention plan ("BIP"). Private Facility 1 Staff 2 testified that recently, Student has exhibited little to no SIBs through the use of the BIP. TR 188:6 – 189:2.

19. Private Facility 1 Staff 2 testified that Student has made progress at Private Facility 1 and is receiving an educational benefit there. Student's communication and motor abilities have improved, Student has acquired learning skills, and the skills are staying in Student's repertoire. Student has shown reductions in some of Student's aggressive and

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<sup>3</sup> The address on the "prescription" was in \_\_\_\_\_.

obsessive behaviors and SIBs, to the extent that Student is capable of learning. Student completed a table-time activity, and engaged in spontaneous speech. Private Facility 1 Staff 2 stated Private Facility 1 Staff 2 was not aware of any planned inclusion activities with the neurotypical peers at \_\_\_\_\_. TR 192:19 – 194:11; TR 195:2-13; TR 225:1-9.

20. Private Facility 1 Staff 2 testified that it is better for Student to be with higher functioning peers so that Student can model socially appropriate behaviors. Student had access to neurotypical peers at Private Facility 1 during special activities, or when other students' siblings were there. Private Facility 1 Staff 2 stated that a student with a disability might possess more skills than Student. TR 200:5-10; TR 217:17 – 218:2; TR 223:13-24.

21. Private Facility 1 Staff 1 testified that neurotypical and higher functioning children with \_\_\_\_\_ can help Student with Student's IEP goals, peer interaction, and communication skills. TR 241:9 – 242:12.

22. Private Facility 1 Staff 1 testified that there are no planned inclusion activities with neurotypical peers from other schools. Interaction with neurotypical peers in the community is not coordinated. Student will go to place, such as a park, in anticipation that other children will be there. TR 253:3 – 255:14.

23. The District Teacher 1 testified as an expert. TR 522:10-14.

24. The District Teacher 1 has been certified since 2013 and District Teacher 1 is licensed in the state of Hawaii. TR 519:12 – 520:1.

25. District Teacher 1 visited Private Facility 1 many times to observe children and their programs. TR 28:18-22.

26. On May 22, 2015, Parent 1 filed a complaint with the licensing agency alleging District Teacher 1 had committed ethical violations contrary to District Teacher 1's licensure. Parent 1 claimed District Teacher 1 provided: 1) false testimony which led to the termination of services from Private Facility 1; 2) testimony based on observations of children without receiving authorization; and 3) testimony without accurate information. Parent 1 also claimed HIPAA violations and stated that District Teacher 1 had testified at other hearings that children that attended Private Facility 1 were "being harmed" by the program. Pet. Exh. 3, 4; TR 26:13 – 27:4.

27. On September 2, 2015, the licensing agency issued a "Confidential Advisory Warning" finding that District Teacher 1 "did not breach the Professional and Ethical Standards." The warning clarified that if District Teacher 1 "provides testimony or service recommendation in the future that are not data-driven and pursuant to acceptable practices, then

such testimony or service recommendations should not be provided in conjunction with [District Teacher 1's] credential." Pet. Exh. 4; TR 27:4-24.

28. The Advisory Warning did not affect District Teacher 1's certification or licensing. TR 525:5 – 526:1.

29. After the Advisory Warning was issued, Parent 1 sent District Teacher 1 an email stating the Parent 1 "was ashamed of District Teacher 1." District Teacher 1 did not visit Private Facility 1 after the complaint was filed and Advisory Warning was issued. TR 28:23 – 29:20.

30. Parent 2 testified that Parent 2 knew District Teacher 1 was a DES in March 2017, because "it's kind of a small world." TR 305:22-25.

31. Private Provider 2 testified that Private Provider 2 has been working with Student for seven years and has seen progress. When Private Provider 2 started working with Student, Student required maximal cues and prompting; Student is now capable of saying six to eight-word sentences given picture cues and models. Student's language is more spontaneous in a structured setting. Private Provider 2 stated that Student has "benefitted tremendously" from Student's placement at the Private Facility 1. Student needs a level of safety and comfort and a feeling that someone knows Student and cares about Student in a well-established environment in order to make progress. TR 106:7 – 109:19.

32. Private Provider 2 testified that a change in placement to a different environment with people who do not know Student "would have a fairly devastating impact" on Student, Student's communication could regress, and Student could have SIBs. Student's difficulty with transitions is well-documented, even with people Student is familiar with. Student also has transition issues going from the classroom to the bathroom or outside. Private Provider 2 stated that "as long as Student was in Student's established routine with Student's established people, Student was doing reasonably well, but the minute that you took Student outside of any of that...Student would start to bang Student's head and start to yell and become completely dysregulated." The more severe the transition, the more detrimental it is. A transition to new staff could take months. TR 109:22 – 114:17.

33. Private Provider 2 testified that Student would best progress at Private Facility 1. TR 116:23 – 117:6.

34. Private Provider 1 testified as an expert. TR 137:7-10.

35. Private Provider 1 has worked with Student since 2013. Private Provider 1 focuses on Student's speech and language goals and works with Parents and the staff at Private Facility 1 to facilitate Student's goals. TR 137:16 – 138:6.



36. Private Provider 1 testified that Student has progressed in the time Private Provider 1 has worked with Student. Private Provider 1 has seen improvement in Student's voice volume and response to visual pictures. Private Provider 1 believed that Student was "being serviced appropriately." TR 138:9 – 139:3.

37. Private Provider 1 testified that Student's placement at Private Facility 1 is appropriate from Private Provider 1's perspective, because Student has a small group of peers and staff that Student interacts with. They are familiar with Student's communication style and have worked with the SLP to learn the strategies that work best. Student is comfortable and familiar with Student's peers, and private Provider 1 has used the peers in some of Student's speech sessions to practice interacting and communication strategies. Private Provider 1 testified that transitions are a challenge for Student. When Student is around new people Student might become frustrated and have negative behaviors; Student would need extra time to get focused and could miss a learning opportunity. TR 139:16 – 140:24.

38. Private Provider 1 testified that when a new staff member is introduced to Student, they would pair with a familiar person. Private Provider 1 would demonstrate the goals they were working on and model the strategies they were using. In Private Provider 1's expert opinion, Private Provider 1 stated that to implement Student's goals, Student would need familiar staff and Student's small group of peers. Student thrives with familiarity and routine, structure, and schedule. Private Provider 1 believed it was appropriate for Student to continue Student's placement at Private Facility 1. TR 141:2 – 149:17.

39. The special education ("SPED") teacher testified that SPED teacher had observed Student at Private Facility 1 in the 2015-2016 and 2016-2017 school years to determine if Student's IEP was being implemented. Resp. Exh. 3 at 357-359. TR 412:1-25.

40. On February 5, 2016, the SPED teacher observed Student at Private Facility 1 for one hour and 15 minutes. During that time, two dividers separated Student from the rest of the class. When the class exited the room for an outside activity, Student remained behind and continued with Student's table activity, isolated from Student's peers. Resp. Exh. 3 at 351.

41. The SPED teacher also observed Student at Private Facility 1 on May 6, 2016, May 18, 2016, August 22, 2016, and October 4, 2016. On December 13, 2016, the SPED teacher observed Student in the community stopping on the road and going to \_\_\_\_\_. \_\_\_\_\_ had fluorescent lighting. The SPED teacher never observed Student interacting with typically developing peers, higher-functioning children with \_\_\_\_\_, or with general education students at \_\_\_\_\_. Resp. Exh. 4 at 309-311, 321-323, 329-331, 344-346; TR 431:12 – 432:5; TR 499:24- 502:5.

42. District Teacher 1 developed the DOE Placement 2 from an idea to an actual location. District Teacher 1 continues to support the DOE Placement 2 by providing resources and making sure that it is running smoothly. TR 517:15-24.

43. The DOE Placement 2 serves students with \_\_\_\_ and those that need a more restrictive environment than the Home School. The DOE Placement 2 has a functional life skills curriculum, community-based instruction (“CBI”), the opportunity to work on skills to help them navigate the community, and have access to nondisabled peers. The curriculum at the DOE Placement 2 has an “off-site component,” and students will be able to regularly practice what they learn in a variety of community settings. Pet. Exh. 5; TR 327:9-23.

44. The Principal testified that Principal attended the open house at DOE Placement 2 prior to Student’s 2017 IEP meetings. The DOE Placement 2 served students that need a more restrictive environment than the Home School. TR 327:4-23.

45. On February 22, 2017, the Home School conducted an IEP meeting. Parents, Private Facility 1 Staff 3, Principal, District Teacher 3, DOE Related Service Provider 1, DOE Related Service Provider 2, and SPED and general education teachers were present. The IEP meeting was continued to February 24, 2017. Resp. Exh. 2 at 076.

46. On February 24, 2017, the Home School conducted an IEP meeting. Parents, Private Facility 1 Staff 3, Principal, District Teacher 3, DOE Related Service Provider 1, DOE Related Service Provider 2, and SPED and general education teachers were present. The IEP meeting was continued to March 13, 2017. Resp. Exh. 2 at 077.

47. On March 13, 2017, the Home School conducted an IEP meeting. Parents, Private Facility 1 Staff 3, Principal, District Teacher 3, DOE Related Service Provider 1, DOE Related Service Provider 2, and SPED and general education teachers were present. The IEP meeting was continued to March 15, 2017. Resp. Exh. 2 at 078.

48. On March 14, 2017, Parents sent the IEP team members an email sharing Student’s unique needs. Parents stated that the IEP did not address the need to lower Student’s SIBs, toileting issues, sensory issues, and other behaviors that impede Student’s learning. Parents also stated Student “is also adversely affected when being in a school environment around neuro-typical children. It lowers Student’s self-esteem, distracts Student’s ability to focus and is overstimulating to Student’s unique neuro-biology. In fact, the \_\_\_\_\_ agreed to \_\_\_\_ as \_\_\_\_ was causing self-injurious behaviors for Student.” Parents requested that the IEP specifically state the grocery stores, post office, neighborhood malls, restaurants, and possible

work site areas. Parents requested that the IEP team keep Student at Private Facility 1. Pet. Exh. 7.

49. On March 15, 2017, the SPED teacher responded to Parents' March 14, 2017 email. SPED teacher stated that the email would be discussed at the IEP meeting. Resp. Exh. 4 at 419.

50. On March 15, 2017, the Home School conducted an IEP meeting. Parents, Private Facility 1 Staff 3, Principal, District Teacher 3, DOE Related Service Provider 1, DOE Related Service Provider 2, and SPED and general education teachers were present. The concerns raised in Parents' March 14, 2017 email were discussed in full. Resp. Exh. 2 at 079; Resp. Exh. 7 at 1008.

51. At the March 15, 2017 IEP meeting, Parent 2 testified that the IEP team did not want to put specific streets or the names of stores in the IEP. TR 274:14 - 284:3.

52. The IEP team explained that they do not list specific stores or streets in the IEP, and Parent 2 accepted this answer. Resp. Exh. 7 at 1008, CD2 14:41-18:31.

53. The Principal testified that specific places are not listed in the IEP, because the IEP should be implemented any place. The goal should state Student is able to cross the street, not a "particular street." TR 330:5 - 331:12.

54. At the IEP meeting District Teacher 3 discussed busing as a transportation option. Parents said that Student would need an aid when riding the bus, and the IEP team said that this would be addressed through a transition plan. When Parent 2 questioned why transportation services were not in Student's previous IEP, District Teacher 3 stated that this was a SPED service offered to all eligible students, and District Teacher 3 preferred to include it in the IEP. Parent 1 was not opposed to this, and stated that Student needed to learn how to ride the bus. Resp. Exh. 7 at 1008, CD2 49:40-51:23.

55. Parent 2 testified that District Teacher 3 told Parents, "you will need transportation [services], you should take it." Parent 2 declined the services and stated that they did not need transportation, because Parents drove Student to Private Facility 1. Parent 2 testified that District Teacher 3 insisted that Parent 2 accept the transportation services. TR 274:14 - 284:3.

56. The first four IEP meetings lasted two hours each. Resp. Exh. 7 at 1005-1009; TR 271:19-20.

57. On March 16, 2017, the Home School conducted an IEP meeting that was continued from March 15, 2017. Parents, Private Facility 1 Staff 3, Principal, District Teacher 3,

DOE Related Service Provider 1, DOE Related Service Provider 2, and SPED and general education teachers were present. The IEP team considered Student's assessment reports, IEP progress reports, data from Private Facility 1, input from Parents and personnel from Private Facility 1, a skills checklist from Parents, and observation notes. Pet. Exh. 10; Resp. Exh. 2 at 080.

58. The IEP team discussed the LRE continuum and used a worksheet as a demonstrative aid. The worksheet was originally projected at the meeting, but after there was an issue with the computer, the IEP team worked off of the hard copy of the worksheet instead. The Principal facilitated the discussion and the SPED teacher wrote notes on the worksheet. Resp. Exh. 2 at 82, 83; Resp. Exh. 7 at 1009, CD 10:23-11:06, 17:10-17:23; TR 322:6 – 324:5.

59. The IEP team started the LRE discussion with placement in a general education setting and reviewed the three LRE factors.<sup>4</sup> District Teacher 3 said that generally speaking, students respond to being with their peers. Parent 1 stated that being with peers would have an adverse effect on Student. Student keeps a distance from neurotypical peers, because they are upsetting to Student. If Student was placed in a regular classroom, Student would not work, there would be no educational benefit, and Student would be disruptive to other students. District Teacher 3 asked if Student needed a smaller more controlled environment with similarly developing peers. Parent 1 stated that Student likes to be with children with disabilities, and they do not have to be on the same developmental scale. The Private Facility 1 has children who are higher functioning and lower functioning than Student. Student has not had much interaction with children with other disabilities, because they have impacted Student's self-esteem in the past. Parent 1 stated Student does not socialize with neurotypical peers and to be in a general education setting would cause overstimulation and Student would be disruptive. Parent 1 stated that Student benefits from being with children with disabilities. The Principal rejected placement in the general education setting based on their discussion. Resp. Exh. 2 at 82, 83; Resp. Exh. 7 at 1009, CD 11:07-19:50; TR 322:6 – 324:5.

60. The IEP team then discussed placement in general and special education setting. The IEP team stated Student could be on a diploma path there. Parent 2 stated Student could do that on-line. Parent 1 stated it would be "ridiculous" for Student to be in general education; Student would receive no benefit, and it would be detrimental for Student and the class. Parent 1 also stated that Student would not benefit from the SPED classroom because of the close

proximity to the neurotypical peers on campus. Parent 1 stated that they had to ask neighbors not to be so close to the outside of Private Facility 1's building, because in causes Student to have negative reactions inside the building. Parent 2 stated that they had to ask the neighbors to stop "encroaching" on the Private Facility1. When neighbors would conduct business, Student would scream when Student walked by. The Principal rejected placement in the general education setting based on their discussion. Parent 1 agreed. Resp. Exh. 2 at 82, 83; Resp. Exh. 7 at 1009, CD 11:07-19:50; TR 322:6 – 324:5.

61. The IEP team next discussed placement in the special education setting. The SPED teacher noted that they could implement aspects of Student's IEP this setting. Parent 2 stated that if Student is doing well in one place, with people that know Student and have a history with Student, Student should not be moved. Parent 2 said to move Student from one building to another for the "school's convenience" would not serve Student's unique needs. Parent 2 stated it was not "one-size-fits-all" and referenced the worksheet. The Principal responded that they needed to discuss the three factors for each placement option. Parent 2 felt that if the team was talking about a transition or change, it would be more restrictive for Student's unique needs because Student would need more than one skills trainer. The Principal responded that they had not made a decision yet, and they were still going through the LRE continuum and were focusing on Student's needs. The team discussed the large environment and safety concerns for Student at the Home School. It would be overstimulating. Parent 1 said when Student was in a DOE School previously, Student was isolated from Student's peers, did not have Student's needs met, and it was not beneficial. Parent 2 found it to be more restrictive. The SPED teacher noted that if Student attended the Home School, Student would be a member of the SPED classroom. The SPED program was a very small group of children. The Principal rejected placement in the general education setting based on their discussion. Parent 1 thanked the Principal. Resp. Exh. 2 at 82, 83; Resp. Exh. 7 at 1009, CD 26:58-33:25; TR 322:6 – 324:5.

62. The IEP team then discussed placement at a DOE Placement 2. Parent 1 asked, "is there such?" The Principal and District Teacher 3 stated there was. Parent 1 asked, "is it open?" The Principal District Teacher 3 said "yes." Parent 1 stated, "\_\_\_\_ said they didn't have staff." District Teacher 3 explained the DOE Placement 2 had staff, there were children attending, and they could set up a tour any time for them. Parents were told the teacher there was District Teacher 2 and Private Facility 1 Staff 1 was District Teacher 1. The SPED teacher said the IEP

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<sup>4</sup> 1) The educational benefits of placement in a regular class; 2) the non-academic benefits of such placement; and 3)

could be implemented there, specific functional programming could also be implemented, it had a small group of students, and individual learning opportunities. Parent 2 said the “down-side” was they had filed a “state complaint” against District Teacher 1, and “that would be a problem.” Parent 1 stated Parent 1 couldn’t speak about the facility. Student’s program at Private Facility 1 was seven years old, and Student had familiar people there that worked with Student and knew Student’s issues. Parent 1 said that Student has extreme needs, and placement at the DOE Placement 2 was not in Student’s best interest. Parent 1 stated that if Student was not doing well in a DOE SPED program, then Parent 1 would “probably send Student to DOE Placement 2” before a Private Facility. Parent 1 focused on the detrimental and harmful effects that would occur. District Teacher 3 explained that the DOE Placement 2 focused on functional skills, CBI, and cooperative skills. Parent 2 stated that Parent 2 was not sure if the community activities could be implemented and noted the DOE Placement 2’s location and if Student’s individual needs could be met there. The SPED teacher said that the IEP could be implemented at the DOE Placement 2 and it would require a transition plan. Resp. Exh. 2 at 82, 83; Resp. Exh. 7 at 1009, CD 33:32-1:00:42; TR 322:6 – 324:5.

63. Parents requested further discussion when the Principal indicated that the offer of FAPE could be made at the DOE Placement 2. The Principal complied, and Parent 2 handed out documents regarding LRE to the IEP team. They discussed Parent 2’s documents for approximately four minutes, and the DOE Related Service Provider 1 requested a short break. After the break, Parents raised their concerns about District Teacher 1, stated District Teacher 1 was unethical, and they had another current complaint about District Teacher 1.<sup>5</sup> Parent 1 stated there’s “no way in hell I’m going to have District Teacher 1 in charge of my kid’s program.” Parent 1 further stated that if Parent 1 had Parent 1’s way, District Teacher 1 would not have District Teacher 1’s license within a few months and the DOE Placement 2 would have to be run by someone else. Parent 1 said the DOE Placement 2 was a “joke” and was not an improvement over Private Facility 1. Parent 1 accused the Principal of having “marching orders” from the DOE district to cut costs. The Principal replied Principal did not have “marching orders” and accepted the DOE Placement 2 to be the LRE. Principal made an offer of FAPE at DOE Placement 2. Parents argued that all the placement options were not discussed and Principal

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the effect of the student on the teacher and children in the regular class.

<sup>5</sup> District Teacher 1 testified that District Teacher 1 has not visited the Private Facility 1 since May 22, 2015. TR 525:5-526:1.

replied that all the options did not have to be discussed. Parents rejected the offer of FAPE and said they did not have ample discussion. Exh. 7 at 1009, CD 1:00:43-1:05:05, 00:00-12:57.

64. The worksheet that the IEP team used was entitled “Least Restrictive Environment; Justification for Placement.” The SPED teacher’s notes of the LRE discussion in factors one through three are listed below and are categorized at positive (“+”) or negative (“-“). The blank worksheet stated:

In conjunction with HAR Chapter 60, the team must consider the following factors:

1. The educational benefits of placement in a regular class;
2. The non-academic benefits of such placement; and
3. The effect of the student on the teacher and children in the regular class.

PLACEMENT	DECISION	RATIONALE		
		Factor 1	Factor 2	Factor 3
<b>General Education Setting (80% or more of the school day)</b>	REJECT	+ Respond to being with peers - Needs smaller environment	Overstimulated and unable to	Behaviors impede others
<b>General Education and Special Education Setting</b>	REJECT	- Curriculum not meaningful + Path to diploma	Negative reaction to neurotypical peers	Behaviors and accommodation/ Modifications impede
<b>Special Education Setting</b>	REJECT	+ Implement aspects of IEP	- Safety Concerns - Large environment - Overstimulated - Isolated	+ Member of classroom
<b>Public Separate Facility</b>	ACCEPT	+ IEP implemented + Functional Programming with small group and individual	- Transition to new staff/program/location + Similar peers + Access to the community + Functional life skills + Cooperative skills + Community-based lessons	+ Member of Classroom + No foreseeable negative effects on teacher and children + Group of friends
<b>Private Separate Facility</b>			+ Longevity of current program	
<b>Public Residential Facility</b>				
<b>Private Residential Facility</b>				
<b>Homebound/Hospital</b>				

Resp. Exh. 2 at 82, 83. TR 322:6 – 324:5; TR 423:2 – 424:9.

65. The SPED teacher testified that all of Student's services, accommodations, and supports could be provided at the DOE Placement 2. SPED teacher had observed other students, grades \_\_\_ through \_\_\_ at the DOE Placement 2 several times. All the students at the DOE Placement 2 were primarily lower-functioning. The DOE Placement 2 had approximately \_\_\_ students who needed more intensive supports, behaviorally and academically. The DOE Placement 2 has multiple sensory rooms, kitchen facilities, and it highlights functional life skills. TR 416:5 – 418:14.

66. Parent 2 testified that when the IEP team discussed placement in the LRE, the DOE used a "backwards pyramid" as a demonstrative aid. TR 272:20 – 273:7.

67. The IEP stated Student would "participate with disabled peers during all school hours in a DOE Placement 2. Student will have opportunities to interact with non-disable peers during community outings." Resp. Exh. 2 at 75.

68. District Teacher 1 testified that Student would benefit from inclusion opportunities with Student's general education peers at the Home School. TR 532:16 – 534:1.

69. The IEP included a transition plan to a DOE Placement 2. The transition plan would occur prior to and during Student's change of placement. The IEP stated, "[b]ecause student had been in private facility 1 for some time, a transition plan will be implemented to mitigate any potential harmful impact Student moving to a less restrictive environment and transitioning to a new school. Factors to consider for transition will include new people, new location, self-injurious behaviors, potential regression, access to the community, new program routines." Resp. Exh. 2 at 74.

70. Parent 1 testified that there was no transition plan. The DOE attempted to schedule a transition plan meeting but Petitioners were out of the country. TR 38:14 – 41:3.

71. Parent 1 testified that Parents fully participated in the IEP in "everything except the placement decision; that was never discussed." Parent 1 told the IEP team that Student's placement should continue at Private Facility 1. TR 32:24 – 33:22.

72. Parent 1 testified that Parent 1 had never heard of the DOE Placement 2 until an hour and 20 minutes into the fifth IEP meeting. Parent 1 thought that Student's placement at the DOE Placement 2 should have been discussed throughout all five IEP meetings rather than at the end of the meetings. TR 34:17-22.

73. Parent 2 testified that they were not able to actively participate in the placement discussion, because they had no information about the DOE Placement 2. Parent 2 did not know where the DOE Placement 2 was or if it was open. TR 284:-15-18313:4-18.



74. Parent 1 disagreed that the IEP team reviewed the continuum of LRE placement options, because there was no discussion about Private Facility 1 or the DOE Placement 2. Parent 1 testified, for the Principal “to assert that the public facility would be a better program for my child’s – for my child after seven years in a private program based on a 20-minute observation is insincere.” TR 58:3-25.

75. There are currently \_\_\_\_ students at the DOE Placement 2, and they have a range of skill level. One of the students is \_\_\_\_, and the rest are from the Home School. \_\_\_\_ students are nonspeaking and use alternative methods of communication, and another \_\_\_\_ are able to do some reading, writing, and speaking. TR 528:7 – 529:8.

76. After the IEP meeting, Parents visited the DOE Placement 2 and met District Teacher 2. Parent 1 testified that District Teacher 2 told Parent 1 that the Principal had visited DOE Placement 2 earlier in the week and told District Teacher 2 that Student would be attending school there. TR 42:22 – 43:19; TR 79:21-23; TR 288:10 – 289:9.

77. District Teacher 2 is a licensed SPED teacher. District Teacher 2 has a very strong understanding of disabilities that District Teacher 2 uses to support teams and students. TR 433:9-11; TR 534:10 – 535:21.

78. The Principal testified that Principal never had a discussion about Student with District Teacher 2. TR 332:8-20.

79. Parent 1 testified that the DOE Placement 2 could not provide the services to meet Student’s needs. The DOE Placement 2 has fluorescent lighting. The staff at Private Facility 1 had worked with Student for seven years. Student’s IEP included \_\_\_\_, and Parent 1 did not want or trust District Teacher 1 to provide those services. TR 46:3 – 47:23; TR 2887:25 – 288:5.

80. Parents testified that the Principal only saw Student for 20 minutes when Principal made Principal’s placement decision. Pet. Exh. 9 at p.3; TR 22:13-15; TR 36:6-10; TR 284:21 – 285:8.

81. On March 16, 2017, Parents wrote the Principal a letter regarding their concerns with the IEP meeting and rejected the offer of FAPE. Parents stated the placement decision should have been done by an informed agreement or consensus. Parents did not know about the DOE Placement 2 and it was not discussed at any of the four prior IEP meetings, and the IEP team did not consider Student’s current placement at Private Facility 1. Parents did not find the DOE Placement 2 to be appropriate for Student or the LRE. Parents noted the harmful effect the change in placement would cause such as regression and an increase in SIBs. Parents stated the DOE Placement 2 had fluorescent lighting and objected to District Teacher 1’s involvement in

Student's program. Parents alleged that the Principal predetermined Student's placement at the DOE Placement 2, based on their discussions with District Teacher 2. Pet. Exh. 9; TR 53:1 – 55:18.

82. On March 17, 2017, Parents sent the IEP team an email requesting the IEP and PWN so that they could review the documents prior to the Spring 2017 break. The SPED teacher responded that they were still working on the documents and they would send them on a later date. Resp. Exh. 4 at 418.

83. The Prior Written Notice ("PWN") dated March 17, 2017 stated Student would receive 1792 minutes of SPED services per week, 200 minutes of occupational therapy per month, 120 minutes of SLT per week, and daily transportation. Student would receive extended school year ("ESY") services after a five-calendar day break. Student would receive 60 minutes of services six times per week, and a transition plan to a DOE Placement 2 to occur prior to and during the change of placement. The transition plan would address and mitigate potential SIBs, possible regression, and any negative effect that Student may temporarily experience as Student moves from one educational setting to another. The transition plan would include supports to help Student become familiar with and accept new staff members, age matched peers, and location. The IEP team determined that the adverse effects of a change in placement could be adequately addressed through careful transition planning. Pet. Exh. 10;

84. The PWN noted that the IEP team reviewed the continuum of LRE placement options and considered Student's educational and non-academic benefits, and the effect of Student on the teacher and children in the regular class. The IEP team determined Student needed to be placed in a DOE Placement 2 due to Student's academic and non-academic needs. The IEP could be implemented to the fullest extent, programming would be functional, and small group and individual instruction was available. Student would have access to similar peers, opportunities to integrate into the community, and would develop functional life and (cooperative) skills. Student would be educated among peers with disabilities, and Student would participate with disabled peers during all school hours in a DOE Placement 2. Student would have opportunities to interact with non-disabled peers during community outings. Pet. Exh. 10;

85. The PWN noted that Parents expressed concern that Student would regress in another educational setting, and Student's SIBs, aggression towards others and behaviors could potentially increase. It listed Parents' concerns when Student previously attended a DOE elementary school. Student has attended Private Facility 1 for seven years, and Student is

familiar with the people there. They stated that Student has a negative reaction to fluorescent lights, smells, and cleaning chemicals. Parents also had strong opposition towards District Teacher 1 and did not want District Teacher 1 working with Student. Parents noted they did not want Student to be around children with disabilities, because it impacts Student's self-esteem. Pet. Exh. 10;

86. On March 24, 2017, the Principal wrote a letter to Parents regarding the March 16, 2017 IEP meeting and their letter. The Principal sent the letter, the March 16, 2017 IEP, PWN, and a conference announcement for March 29, 2017 to develop Student's transition plan to Parents via email. Pet. Exh. 12.

87. The Principal stated the offer of FAPE was made after thorough discussions by the IEP team, including Parents. Placement was never predetermined, and the offer of FAPE at the DOE Placement 2 was based on the LRE discussion. Student's IEP could be fully implemented in a DOE Placement 2, and the staff that would be implementing the program fully met the credentials and licensure required by their professions. Principal stated that they wanted to work with Student and Student's current educational staff to develop a plan to mitigate any potential negative effects as Student transitions from one setting to another. Principal offered three meeting dates at the end of March 2017 to develop a transition plan. Resp. Exh. 4 at 378-416.

88. On March 24, 2017, Parents received the final IEP and PWN via email. Pet. Exh. 8, 10 -12; TR 163:17 – 166:3.

89. On March 28, 2017, the SPED teacher sent an email to Parents to confirm their attendance a transition planning meeting. The meeting was scheduled for March 29, 2017; however, SPED teacher also offered March 30 and 31, 2017. Resp. Exh. 4 at 376.

90. On March 29, 2017, the SPED teacher sent an email to Parents stating that SPED teacher was "sorry" that they did not attend the meeting that day to create an effective transition plan. SPED teacher again offered March 30 and 31, 2017. Resp. Exh. 4 at 374.

91. On March 31, 2017, the SPED teacher sent an email to Parents again stating that SPED teacher was "sorry" that they did not attend any of the three transition plan meetings. SPED teacher noted, "your participation is highly encouraged and vital to success." SPED teacher provided meeting dates on April 13 and 18, 2017. Resp. Exh. 4 at 372.

92. On March 31, 2017, Parents filed their original Request with the DOE. Ms. Comeau noted that the Petitioners were in \_\_\_\_ and were unable to participate in any meetings

until they returned. She asked that meetings not be scheduled until the week of April 24, 2017 so that Parents could participate. Resp. Exh. 1 at 21-26.

93. Private Facility 1 Staff 1 started working with Student in June 2017. TR 237:19-21.

94. Private Facility 1 Staff 1 testified that Student has transition issues. Transitions occurred when Student walked from one room to another room or community setting, or when Student switched to a non-preferred activity or staff member. Student would pace, \_\_\_\_\_, shout, and become noncompliant. Student would move objects around and become agitated if someone moves them back. TR 237:22 – 238:21.

95. Private Facility 1 Staff 1 testified that Student has made progress at Private Facility 1 and is receiving an educational benefit there. Student has made progress in Student’s public safety goals, matching colors, and fine motor academic goals working on the computer. TR 243:1-17.

96. Private Facility 1 Staff 1 testified that if Student were to be placed in a new program without a transition plan, there would be immediate academic and communication regression and an increase in challenging behavior and noncompliance. There would be a negative impact if Student were to be placed in a program without higher functioning children with \_\_\_\_\_, because there would be less social interactions and modeling. TR 244:11 - 245:25.

#### **IV. CONCLUSIONS OF LAW**

##### **A. Burden of Proof**

The Supreme Court held in *Schaffer* that “[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). “The Court concluded that the burden of persuasion lies where it usually falls, upon the party seeking relief.” *Id.* at 535; *see also Stringer v. St. James R-1 Sch. Dist.*, 446 F.3d 799, 803 (8th Cir.2006) (following *Schaffer* in context of claim that IEP was not being implemented). Neither *Schaffer* nor the text of the IDEA supports imposing a different burden in IEP implementation cases than in formulation cases.

##### **B. IDEA Requirements**

The Code of Federal Regulations (“CFR”) section 300-101 and the Hawai`i Administrative Rules (“HAR”), Title 8, Chapter 60, requires that Respondents make available to students with a disability an offer of FAPE that emphasizes special education and related services designed to meet their unique needs.

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Court set out a two-part test for determining whether Respondent offered a FAPE: 1) whether there has been compliance with the procedural requirements of the IDEA; and 2) whether the IEP is reasonably calculated to enable the student to receive educational benefits. *Rowley* 458 U.S. at 206-207. Respondent is not required to “maximize the potential” of each student; rather, Respondent is required to provide a “basic floor of opportunity” consisting of access to specialized instruction and related services which are individually designed to provide “some educational benefit.” *Rowley* 458 U.S. at 200.

However, the United States Supreme Court recently determined in *Endrew F. v. Douglas County School Dist.*, 137 S.Ct. 988 (2017) that the educational benefit must be more than *de minimus*. The Court held that the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in the light of the child’s circumstances.” *Endrew* 137 S.Ct. at 1001. Similarly, the Hawaii District Court held that the IEP must be tailored to the unique needs of the child and reasonably designed to produce benefits that are “significantly more than *de minimus*, and gauged in relation to the potential of the child at issue.” *Blake C. ex rel Tina F. v. Hawaii Dep’t of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Haw. 2009).

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

The mechanism for ensuring a FAPE under the IDEA is through the development of a detailed, individualized instruction plan known as an Individualized Education Program (“IEP”) for each child. 20 U.S.C. §§ 1401(9), 1401(14), and 1414(d). The IEP is a written statement, prepared at a meeting of qualified representatives of the local educational agency, the child’s teacher, parent(s), and where appropriate, the child. The IEP contains, in part, a statement of the present levels of the child’s educational performance (“PLEP”), a statement of the child’s annual goals and short-term objectives, and a statement of specific educational services to be provided for the child. 20 U.S.C. § 1401(19). The IEP is reviewed and, if appropriate, revised, at least once each year. 20 U.S.C. § 1414(d). The IEP is, in effect, a “comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” *Burlington v. Dep’t of Educ. Of the Commonwealth of Massachusetts*, 471 U.S. 359, 368, 105 S.Ct. 1996, 2002 (1985).

An IEP must be tailored to the unique needs of the child and reasonably designed to produce benefits that are "significantly more than de minimus, and gauged in relation to the potential of the child at issue." *Blake C. ex rel Tina F. v. Hawaii Dep't of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Haw. 2009). Lastly, an IEP must be evaluated prospectively as of the time it was created. Retrospective evidence that materially alters the IEP is not permissible. *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167 (2012).

**C. Whether the March 16, 2017 IEP Appropriately Offered Student a FAPE.**

To analyze whether the DOE's offer of FAPE through the March 16, 2017 IEP was appropriate, Student's individual needs at the time the IEP was created and Parent participation must be considered and evaluated. The undersigned Hearings Officer has reviewed the recordings of the February 22, 2017, February 24, 2017, March 13, 2017, March 15, 2017, and March 16, 2017 IEP meetings in their entirety. Resp. Exh. 7 at 1005-1009.

**1. Whether the DOE predetermined Student's placement at the DOE Placement 2.**

Petitioners allege that DOE failed to provide Student with a FAPE because is blocked Parents' participation in the March 16, 2017 IEP meeting and predetermined Student's placement. The recording of the March 16, 2017 IEP meeting does not support this contention.

"Among the most important procedural safeguards [in the IDEA] are those that protect the parents' right to be involved in the development of the child's educational plan." *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9th Cir.2001). The IDEA ensures that parents have the opportunity to participate in meetings and examine records regarding the child's educational placement. 20 U.S.C. § 1415(b). The Court in *Miller v. Monroe Sch. Dist.*, WL 5478149, at \*5 (W.D. Wash. Sept. 17, 2015) stated,

"A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir.2003). In other words, the District cannot enter an IEP meeting with a "take it or leave it" attitude. *Id.* However, a parent does not have veto power over individual provisions of the IEP. *Id.*

A school district violates the IDEA if it predetermines placement for a student *before* the IEP is developed or steers the IEP to the predetermined placement. *W.G. v. Bd. of Tr. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir.1992), superseded by statute on other grounds, as recognized in *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932 (9th Cir.2007); *see also*

*Spielberg v. Henrico Cnty. Pub. Schs.*, 853 F.2d 256, 258–59 (4th Cir.1988). Predetermination violates the IDEA because the Act requires that the placement be based on the IEP, and not vice versa. *Spielberg*, 853 F.2d at 259.

Petitioners argue that placement should have been discussed at the throughout the five IEP meetings. A discussion on placement cannot occur until the IEP is developed, because appropriate placement can only be based on the IEP. *Id.* The DOE properly waited until the IEP was developed before it determined Student’s appropriate placement. The IEP was specifically tailored to fit the Student’s unique needs, *prior* to the determination that Student could be offered a FAPE at the Home School.

At the hearing Parent 2 testified that Student’s placement was predetermined because the IEP team did not want to list specific streets or names of stores in the IEP. It is true that Parent 2 requested the IEP team to include specific names of streets and stores in the IEP at the March 15, 2017 IEP meeting. However, it was explained to Parent 2 at the IEP meeting why it could not be done and Parent 2 accepted their response. The Principal testified that specific places are not listed in the IEP, because the IEP should be implemented at any place. The goal should state Student is able to cross the street, not a “particular street.” There is no evidence to support Petitioners’ claim of predetermination from the IEP team’s failure to include specific names of streets and stores.

Parent 2 also testified that the IEP team’s offer to include transportation services in the IEP is further evidence of predetermination. Parent 2 testified that at the March 15, 2017 IEP meeting, District Teacher 3 told Parents, “you will need transportation [services], you should take it.” Parent 2 declined the services and stated that they did not need transportation, because Parents drove Student to Private Facility 1. Parent 2 testified that District Teacher 3 insisted that Parent 2 accept the transportation services.

The audio recording of the IEP meeting is quite different from Parent 2’s recollection, calling Parent 2’s credibility into question. At the March 15, 2017 IEP meeting, District Teacher 3 discussed busing as a transportation option. Parents said that Student would need an aid when riding the bus, and the IEP team said that this would be addressed through a transition plan. When Parent 2 questioned why transportation services were not in Student’s previous IEP, District Teacher 3 stated that this was a SPED service offered to all eligible students, and District Teacher 3 preferred to include it in the IEP. Parent 1 was not opposed to this, and stated that Student needed to learn how to ride the bus. There was no evidence to support Petitioners’ claim of predetermination from the IEP team’s offer of transportation

services.

Petitioners claim that the DOE blocked them from participating in the placement decision and rely heavily on *Doug C. v. Hawaii Dept. of Educ.*, 720 F.3d 1038 (9<sup>th</sup> Cir. 2013). The court in *Doug C.* stated, “[t]he parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to (i) the identification, evaluation, and educational placement of the child; and (ii) the provision of FAPE to the child.” *Id.* at 1044. However, the facts in *Doug C.* are readily distinguishable, because the parent *was not present* at the IEP meeting, and the DOE held the meeting without him.

The IDEA requires the DOE to provide Parents with an opportunity for meaningful participation during the development of an IEP; however, the Act does not explicitly vest parents with a veto power over any proposal or determination advanced by the educational agency regarding a change in placement. *See Burlington School Committee*, 105 S.Ct. at 2002; 20 U.S.C. §1401(19) (1982). Although a consensus is ideal, if a consensus cannot be reached, the school has a “duty to formulate the plan to the best of its ability in accordance with information developed at the prior IEP meetings, but must afford the parents a due process hearing in regard to that plan.” *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1490 (9th Cir. 1986) *aff’d as modified sub nom. Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). “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). If the Parents do not agree with the DOE’s offer, they do not have to accept it. The Parents have the right to file a due process complaint pursuant to HAR §8-60-61.

When the IEP team discussed the option of placement in a DOE Placement 2 at the March 16, 2017 IEP meeting, Parents readily participated and the discussion lasted 27 minutes. When the Principal indicated that the offer of FAPE could be made at the DOE Placement 2, Parents requested further discussion. The Principal complied, and Parent 2 handed out documents regarding LRE to the IEP team. They discussed Parent 2’s documents for approximately four minutes, and the DOE Related Service Provider 1 requested a short break. After the break, the discussion lasted another 13 minutes. Parents raised their concerns about District Teacher 1, stated District Teacher 1 was unethical, and they had another current complaint about District Teacher 1. Parent 1 stated there’s “no way in hell I’m going to have District Teacher 1 in charge of my kid’s program.” Parent 1 further stated that if Parent 1 had



Parent 1's way, District Teacher 1 would not have District Teacher 1's license within a few months and the DOE Placement 2 would have to be run by someone else. Parent 1 said the DOE Placement 2 was a "joke" and was not an improvement over Private Facility 1. Parent 1 accused the Principal of having "marching orders" from the DOE district to cut costs. The Principal replied Principal did not have "marching orders" and accepted the DOE Placement 2 to be the LRE. Principal made an offer of FAPE at the DOE Placement 2. Parents argued that all the placement options were not discussed and Principal replied that all the options, such as Home Hospital did not have to be discussed. Parents rejected the offer of FAPE and said they did not have ample discussion.

Parent 1 testified that Parents fully participated in the IEP in "everything except the placement decision; that was never discussed." This statement is simply not true and calls Parent 1's credibility into question. Parent 1 also argued that Parent 1's conversation with District Teacher 2 was evidence that Student's placement was predetermined. Parent 1 testified that District Teacher 2 told Parent 1 that the Principal had visited the DOE Placement 2 earlier in the week and told District Teacher 2 that Student would be attending school there. The Principal testified that Principal never had a discussion about Student with District Teacher 2 and that Principal had visited the DOE Placement 2 when they had an open house prior to all of Student's IEP meetings. The Hearings Officer finds the Principal's testimony to be more credible.

Parent 1 also testified that Parent 1 had never heard of the DOE Placement 2 until an hour and 20 minutes into the fifth IEP meeting. This is not true. At the IEP meeting, Parent 1 did not ask specifics about the school. Instead Parent 1 asked, "is it open?" The Principal and District Teacher 3 said "yes." Then Parent 1 stated, "\_\_\_ said they didn't have staff." Clearly, Parent 1 was aware of the DOE Placement 2, again calling Parent 1's credibility into question.

Similarly, Parent 2 testified that they were not able to actively participate in the placement discussion, because they had no information about the DOE Placement 2. Parent 2 testified that did not know where the DOE Placement 2 was or if it was open. However, at the IEP meeting Parent 2 stated that Parent 2 was not sure if the community activities could be implemented and if Student's individual needs could be met there, and noted the DOE Placement 2's location at "\_\_\_." Obviously, Parent 2 knew the general location of the DOE Placement 2, again calling Parent 2's credibility into question.

The Hearings Officer finds the DOE witnesses to be credible. The Hearings Officer further finds that the DOE did not block Parents' participation in the March 16, 2017 IEP

meeting or predetermine Student's placement. The Hearings Officer further finds that the DOE offered Student a FAPE that was appropriately designed to convey Student a meaningful educational benefit.

## **2. Whether the DOE Placement 2 is the Least Restrictive Environment.**

Petitioners allege that the DOE failed to provide Student with a FAPE because the change in Student's educational placement to the DOE Placement 2 is not the LRE. Respondents argue that the DOE Placement 2 is the LRE because the IEP could be implemented there and Student would have access to general education peers at the Home School.

The education of a disabled child should take place in the least restrictive environment. Haw. Admin. R. § 8-60-2 states that the LRE "means to the maximum extent appropriate, educating students with disabilities, including student in public or private institutions or other care facilities, with students who are non-disabled and removing students with disabilities from the regular educational environment 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." *See also* 20 U.S.C. § 1412(a)(5)(A) ("To the maximum extent appropriate, children with disabilities ... are [to be] educated with children who are not disabled ....") and 34 CFR § 300.114(a)(2).

"While every effort is to be made to place a student in the least restrictive environment, it must be the least restrictive environment which also meets the child's IEP goals." *County of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1468 (9th Cir. 1996). In determining the least restrictive environment, this Court considers the following four factors: "(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [Student] had on the teacher and children in the regular class; and (4) the costs of mainstreaming [Student]." *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994). In applying the facts of this case to the LRE standard, the DOE Placement 2 would provide Student with the LRE. The IEP team's LRE discussion at the March 16, 2017 IEP meeting followed the first three factors listed in *Rachel H.* The IEP team did not consider the cost of mainstreaming Student into the Home School; however, the Hearings Officer finds that the cost of Student's education played no role in the Principal's decision-making process.

At the March 16, 2017 IEP meeting, the IEP team discussed the LRE continuum and used a worksheet as a demonstrative aid. The worksheet was originally projected at the meeting, but after there was an issue with the computer, the IEP team worked off of the hard copy of the worksheet instead. The Principal facilitated the discussion and the SPED teacher wrote notes on the worksheet.

The IEP team started the LRE discussion with placement in a general education setting and reviewed the three LRE factors. District Teacher 3 said that generally speaking, students respond to being with their peers. Parent 1 stated that being with peers would have an adverse effect on Student. Student keeps a distance from neurotypical peers, because they are upsetting to Student. If Student was placed in a regular classroom, Student would not work, there would be no educational benefit, and Student would be disruptive to other students. District Teacher 3 asked if Student needed a smaller more controlled environment with similarly developing peers. Parent 1 stated that Student likes to be with children, and they do not have to be on the same developmental scale. The Private Facility 1 has children who are higher functioning and lower functioning than Student. Student has not had much interaction with children with other disabilities, because they have impacted Student's self-esteem in the past. Parent 1 stated Student does not socialize with neurotypical peers and to be in a general education setting would cause overstimulation and Student would be disruptive. Parent 1 stated that Student benefits from being with children. The Principal rejected placement in the general education setting based on their discussion.

The IEP team then discussed placement in general and special education setting. The IEP team stated Student could be on a diploma path there. Parent 2 stated Student could do that on-line. Parent 1 stated it would be "ridiculous" for Student to be in general education; Student would receive no benefit, and it would be detrimental for Student and the class. Parent 1 also stated that Student would not benefit from the SPED classroom because of the close proximity to the neurotypical peers on campus. Parent 1 stated that they had to ask neighbors not to be so close to the outside of Private Facility 1, because it causes Student to have negative reactions inside the building. Parent 2 stated that they had to ask neighbors to stop encroaching on Private Facility 1's space. When neighbors conducted business, Student would scream when Student walked by. The Principal rejected placement in the general education setting based on their discussion. Parent 1 agreed.

The IEP team next discussed placement in the special education setting. The SPED teacher noted that they could implement aspects of Student's IEP this setting. Parent 2 stated that if Student is doing well in one place, with people that know Student and have a history with Student, Student should not be moved. Parent 2 said to move Student from one building to another for the "school's convenience" would not serve Student's unique needs. Parent 2 stated it was not "one-size-fits-all" and referenced the worksheet. The Principal responded that they needed to discuss the three factors for each placement option. Parent 2 felt that if the team was talking about a transition or change, it would be more restrictive for Student's unique needs because Student would need more than one skills trainer. The Principal responded that they had not made a decision yet, and they were still going through the LRE continuum and were focusing on Student's needs. The team discussed the large environment and safety concerns for Student at the Home School. It would be overstimulating. Parent 1 said when Student was in a DOE School previously, Student was isolated from Student's peers, did not have Student's needs met, and it was not beneficial. Parent 2 found it to be more restrictive. The SPED teacher noted that if Student attended the Home School, Student would be a member of the SPED classroom. The SPED program was a very small group of children, some of whom had disabilities. The Principal rejected placement in the general education setting based on their discussion. Parent 1 thanked the Principal.

The IEP team then discussed placement at a DOE Placement 2. Parent 1 asked, "is there such?" The Principal and District Teacher 3 stated there was. Parent 1 asked, "is it open?" The Principal District Teacher 3 said "yes." Parent 1 stated, "\_\_\_ said they didn't have staff." District Teacher 3 explained the DOE Placement 2 had staff, there were children attending, and they could set up a tour any time for them. Parents were told the teacher there was District Teacher 2 and Private Facility 1 Staff 1 was District Teacher 1. The SPED teacher said the IEP could be implemented there, specific functional programming could also be implemented, it had a small group of students, and individual learning opportunities. Parent 2 said the "down-side" was they had filed a "state complaint" against District Teacher 1, and "that would be a problem." Parent 1 stated Parent 1 couldn't speak about the facility, because it was brand new. Student's program at the Private Facility was seven years old, and Student had familiar people there that worked with Student and knew Student's issues. Parent 1 said that Student has extreme needs, and placement at the DOE Placement 2 was not in Student's best interest. Parent 1 stated that if Student was not doing well in a DOE SPED program, then Parent 1 would "probably send

Student to DOE Placement 2” before Private Facility 1. Parent 1 focused on the detrimental and harmful effects that would occur. District Teacher 3 explained that the DOE Placement 2 focused on functional skills, CBI, and cooperative skills. Parent 2 stated that Parent 2 was not sure if the community activities could be implemented and noted the DOE Placement 2’s location at “\_\_\_\_\_” and if Student’s individual needs could be met there. The SPED teacher said that the IEP could be implemented at the DOE Placement 2 and it would require a transition plan. As stated *supra*, Parents requested further discussion when the Principal indicated that the offer of FAPE could be made at the DOE Placement 2. The IEP team complied.

Parent 2 testified that when the IEP team discussed placement in the LRE, the DOE used a “backwards pyramid” as a demonstrative aid. The audio recording of the March 17, 2017 does not match Parent 2’s description; rather, the SPED teacher’s testimony that the IEP team used a worksheet was more credible. The worksheet that the IEP team used was entitled “Least Restrictive Environment; Justification for Placement.” The SPED teacher’s notes of the LRE discussion in factors one through three are listed below and are categorized as positive (“+”) or negative (“-“). The blank worksheet stated:

In conjunction with HAR Chapter 60, the team must consider the following factors:

1. The educational benefits of placement in a regular class;
2. The non-academic benefits of such placement; and
3. The effect of the student on the teacher and children in the regular class.

PLACEMENT	DECISION	RATIONALE		
		Factor 1	Factor 2	Factor 3
<b>General Education Setting (80% or more of the school day)</b>	REJECT	+ Respond to being with peers - Needs smaller environment	Overstimulated and unable to	Behaviors impede others
<b>General Education and Special Education Setting</b>	REJECT	- Curriculum not meaningful + Path to diploma	Negative reaction to neurotypical peers	Behaviors and accommodation/ Modifications impede
<b>Special Education Setting</b>	REJECT	+ Implement aspects of IEP	- Safety Concerns - Large environment - Overstimulated - Isolated	+ Member of classroom
<b>Public Separate Facility</b>	ACCEPT	+ IEP implemented + Functional Programming with small group and individual	- Transition to new staff/program/location + Similar peers + Access to the community	+ Member of Classroom + No foreseeable negative effects on teacher and

			+ Functional life skills + Cooperative skills + Community-based lessons	children + Group of friends
<b>Private Separate Facility</b>			+ Longevity of current program	
<b>Public Residential Facility</b>				
<b>Private Residential Facility</b>				
<b>Homebound/Hospital</b>				

The audio recording of the IEP meeting was a direct reflection of the worksheet and the SPED teacher's notes.

Parent 1 disagreed that the IEP team reviewed the continuum of LRE placement options, because there was no discussion about Private Facility 1 or the DOE Placement 2. Parent 1 testified, for the Principal "to assert that the public facility would be a better program for my child's – for my child after seven years in a private program based on a 20-minute observation is insincere." However, the evidence showed that the Parents discussed Private Facility 1 throughout all the IEP meetings. Further, the DOE had observed Student several times at Private Facility 1, not just for 20 minutes. Parents were aware of these observations, because they had to authorize them.

The SPED teacher testified that SPED teacher had observed Student at Private Facility 1 in the 2015-2016 and 2016-2017 school years to determine if Student's IEP was being implemented. On February 5, 2016, the SPED teacher observed Student at Private Facility 1 for one hour and 15 minutes. During that time, two dividers separated Student from the rest of the class. When the class exited the room for an outside activity, Student remained behind and continued with Student's table activity, isolated from Student's peers. The SPED teacher also observed Student at Private Facility 1 on May 6, 2016, May 18, 2016, August 22, 2016, and October 4, 2016. On December 13, 2016, the SPED teacher observed Student in the community stopping on the road and going to \_\_\_\_ . \_\_\_\_ had fluorescent lighting. The SPED teacher never observed Student interacting with typically developing peers, higher-functioning children with \_\_\_\_, or with general education students at \_\_\_\_.

The IEP stated Student would "participate with disabled peers during all school hours in DOE Placement 2. Student will have opportunities to interact with non-disabled peers during community outings." A DOE Placement 2 serves students that need a more restrictive

environment than the Home School. There are currently \_\_\_\_ students at DOE Placement 2, and they have a range of skill level. One of the students is \_\_\_\_, and the rest are from the Home School. \_\_\_\_ students are nonspeaking and use alternative methods of communication, and another \_\_\_\_ are able to do some reading, writing, and speaking. The curriculum at DOE Placement 2 has an “off-site component,” and students will be able to regularly practice what they learn in a variety of community settings. DOE Placement 2 provides more opportunities for Student to be educated with non-disabled peers.

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

The facts of *K.D.* are similar to the facts of this case. Here, Parents are requesting that Student be placed at Private Facility 1. Private Facility 1 currently has \_\_\_\_ full-time students that have \_\_\_\_.<sup>6</sup> No general education students attend the private school. Their interaction with non-disabled peers is minimal and not provided on a regular basis. Private Facility 1 Staff 1 testified that there are no planned inclusion activities with neurotypical peers from other schools. Interaction with neurotypical peers in the community is not coordinated. Student will go to place, such as a park, in anticipation that other children will be there. Private Facility 1 Staff 1 stated Private Facility 1 Staff 1 was not aware of any planned inclusion activities with the neurotypical peers at Private Facility 1. Private Facility 1 does not have a sufficient level of socialization, because the interaction with non-disabled peers is not frequent enough and not planned.

Petitioners claim that Student does have access to neurotypical peers at Private Facility 1 because \_\_\_\_\_. However, the testimony and evidence contradict this claim. In an email dated

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<sup>6</sup> At the March 16, 2017 IEP meeting, Parent 1 stated that the Private Facility 1 has children who are higher functioning and lower functioning than Student.

March 14, 2017, Parent 1 stated that \_\_\_\_\_ that it was causing self-injurious behaviors for \_\_\_\_\_.” Similarly, at the March 16, 2017 IEP meeting, Parent 1 stated that they had to ask \_\_\_\_\_ not Private Facility 1, because in causes Student to have negative reactions inside the building. Parent 2 stated that they had to ask \_\_\_\_\_Private Facility 1 \_\_\_\_\_. When \_\_\_\_\_, Student would scream when Student walked by. The Principal rejected placement in the general education setting based on their discussion. Parent 1 agreed.

While it is certainly understandable the Parents want a Student to remain at Private Facility 1 because of Student’s progress there, compliance with the IDEA does not require school districts to provide the "absolutely best" or "potential maximizing" education. *J.W.*, 626 F.3d at 439 (citation and internal quotation marks omitted). School districts are required to provide only a "basic floor of opportunity." *Id.* (quoting *Rowley*, 458 U.S. at 201. The FAPE need only be "appropriately designed and implemented so as to convey [the] [s]tudent with a meaningful benefit." *Id.* at 433 (citations and quotation marks omitted). The Court has further held that the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in the light of the child’s circumstances.” and that the “educational benefit must be more that *de minimus*.” *Endrew* 137 S.Ct. at 1001. The IEP was specifically tailored to meet Student’s unique needs and provide Student with a meaningful educational benefit and to make progress, and the IEP can be implemented at DOE Placement 2 with a transition plan.

The IEP included a transition plan to DOE Placement 2. The transition plan would occur prior to and during Student’s change of placement. The IEP stated, “[b]ecause student had been in private separate facility for some time, a transition plan will be implemented to mitigate any potential harmful impact Student moving to a less restrictive environment and transitioning to a new school. Factors to consider for transition will include new people, new location, self-injurious behaviors, potential regression, access to the community, new program routines.” The DOE tried to schedule a transition plan meeting with Parents, but they were out of the country. Soon thereafter, the Request was filed.

The Private Facility 1 offers Student far less opportunity to socialize with non-disabled peers than DOE Placement 2. The Hearings Officer finds that the IEP team had an adequate discussion regarding LRE. The Hearings Officer further finds that DOE Placement 2, with a transition plan, is the LRE for Student.

## 2 **Whether Petitioners Are Entitled to Relief.**



The Hearings Officer has determined that Petitioners have not shown that the March 16, 2017 IEP denied Student a FAPE. Therefore, the issue of the appropriateness of Private Facility 1 does not need to be addressed. The Hearings officer finds that Petitioners are not entitled to reimbursement or compensatory education.

**V. DECISION**

Based upon the above-stated findings of fact and conclusions of law, the Hearings Officer concludes that Petitioners have not met their burden and have not shown procedural or substantive violations of the IDEA denying Student a FAPE.

Respondents shall be deemed the prevailing party in this matter.

**RIGHT TO APPEAL**

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

DATED: Honolulu, Hawai'i, \_\_\_\_\_.

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

*Redacted Unofficial Copy*