NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J.G., by and through his Parents, Howard and Denise Greenberg; et al, Plaintiffs-Appellants, v. STATE OF HAWAII, Department of Education; et al., Defendants-Appellees.	No. 18-16538 D.C. No. 1:17-cv-00503-DKW-KSC MEMORANDUM* (Filed Jun. 27, 2019)

Appeal from the United States District Court
for the District of Hawaii
Derrick Kahala Watson, District Judge, Presiding

Argued and Submitted June 10, 2019
Honolulu, Hawaii

Before: THOMAS, Chief Judge, and CALLAHAN and CHRISTEN, Circuit Judges.

J.G., by and through his parents, brought suit against the Hawaii Department of Education (DOE), challenging his newest Individualized Education Program (IEP).

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.[1]

1. J.G.'s parents bear the burden of proof. In cases arising under the Individuals with Disabilities Education Act, "the burden of persuasion lies where it usually falls, upon the party seeking relief." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 58 (2005). Although the new IEP changes J.G.'s placement and thereby changes the status quo, J.G.'s parents are challenging the new IEP, meaning they are the "party seeking relief" and therefore bear the burden of proof. *See id.* at 62 ("The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this case, that party is [the student], as represented by his parents.").

2. The district court correctly ruled that the administrative hearing officer did not deny J.G.'s parents their statutory right to present evidence by declining to conduct a site visit to the Maui Autism Center. J.G.'s parents did not show that they were prejudiced by the absence of the site visit, as they were not otherwise precluded from introducing evidence about the facility. They were free to introduce pictures, diagrams, and testimony about the Maui Autism Center, and there is no indication that documentary and testimonial evidence was insufficient to convey the nature and quality of the facility.

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[1] Because the parties are familiar with the facts, we do not recount them in detail here.

3. The record does not show that J.G.'s placement in Po'okela was predetermined or that his parents were denied the opportunity to meaningfully participate in the formation of his IEP.

J.G.'s parents argue that one of the teachers at Po'okela told J.G.'s parents that Principal Francoise Wittenburg had previously told the teacher that J.G. would be attending Po'okela. Principal Wittenburg, however, denied that claim at the hearing. The hearing officer found that the principal's testimony was credible, and the parents have not identified any basis for second-guessing that determination.

J.G.'s parents' other arguments also failed to show that the DOE predetermined the outcome of his placement; the sequence of events they describe is consistent with working through and eliminating other possible options. Accordingly, it was not clearly erroneous for the district court to decide that DOE did not predetermine J.G.'s placement.

J.G.'s parents argue that they were denied the opportunity to meaningfully participate because they were unfamiliar with Po'okela and it was not proposed until the final IEP meeting. It is admittedly concerning that the parents of an autistic child with severe sensory issues were not afforded the opportunity to visit the new facility before the DOE decided to place the child there. But the DOE offered J.G.'s parents a tour of Po'okela and agreed that the first order of business will be the development of a transition plan to accommodate any issues that may exist. Moreover, the IEP

meeting participants spent at least half an hour at the last IEP meeting discussing Po‘okela and J.G.’s parents’ preference for the Maui Autism Center. And although J.G.’s parents had not visited Po‘okela, they raised specific concerns about the location, number of students, and the school’s autism resource teacher. We conclude that the district court did not err in finding that J.G.’s parents were not denied the opportunity to meaningfully participate.

4. Last, the record does not show that the new IEP substantively will deny J.G. a free appropriate public education (FAPE). Even accepting J.G.’s parents’ arguments about Po‘okela’s flaws and the progress J.G. has made at the Maui Autism Center, they have not shown that, once an appropriate transition plan is developed, J.G. cannot receive a meaningful educational benefit at Po‘okela or that his curriculum cannot be implemented there. *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 999 (2017) (“[T]he question is whether the IEP is *reasonable*, not whether the court regards it as ideal.”); *see also J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 439 (9th Cir. 2010) (“[A]ppropriate public education does not mean the absolutely best of potential-maximizing education for the individual child.”) (internal quotation marks omitted)). Moreover, they have not shown that Po‘okela is not the least restrictive environment. Accordingly, on this record, we affirm the district court’s decision.

AFFIRMED.

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

J. G., BY AND THROUGH HIS PARENTS, HOWARD AND DENISE GREENBERG, HOWARD GREENBERG, and DENISE GREENBERG, Plaintiffs, vs. STATE OF HAWAII, DEPARTMENT OF EDUCATION, DENISE GUERIN, PERSONALLY AND IN HER CAPACITY AS DISTRICT EDUCATION SPECIALIST, and FRANCOISE WHITTENBURG, PERSONALLY AND IN HER CAPACITY AS PRINCIPAL OF LOKELANI INTERMEDIATE SCHOOL, Defendants.	CIV. NO. 17-00503 DWK-KSC **ORDER AFFIRMING THE DECEMBER 20, 2017 DECISION OF THE ADMINISTRATIVE HEARINGS OFFICER** (Filed Aug. 7, 2018)

This appeal concerns the administrative hearings officer's ("AHO") determination of J.G. ("Student") and Howard and Denise G.'s ("Parents") request for due process following the issuance of Student's March 16, 2017 Individualized Education Program ("IEP") for the 2017-18 school year. Because Parents have not shown by a preponderance of the evidence that the AHO's

December 20, 2017 decision (Dkt. No. 97-29) should be reversed, the Court AFFIRMS that decision.

BACKGROUND

Student, who was fourteen years old at the time of the AHO's December 20, 2017 decision ("Decision"), is eligible for special education and related services pursuant to the Individuals with Disabilities Education Act of 2004 ("IDEA"), 20 U.S.C. §§ 1400, *et seq.,* for Autism Spectrum Disorder ("ASD"), Level 3 (requiring very substantial support) with early language impairment, Anxiety Disorder, and Obsessive-Compulsive Disorder. Decision at 5 (FOF 2), Dkt. No. 97-29 (citing Pet'rs' Admin. Ex. 4 [Confidential BACB Advisory Warning (Sept. 2, 2015)] at 121-22, Dkt. No. 103-5). Student has received these services via Autism Management Services a/k/a Maui Autism Center ("AMS"), a private school owned by Parents, since 2010. Second Am. Compl. ("SAC") ¶ 11, Dkt. No. 72; *see also* Decision at 5 (FOF 6), Dkt. No. 97-29 (citations omitted).

Student's IEP for the 2017-18 school year was developed during a series of IEP meetings on February 22, February 24, March 13, March 15, and March 16, 2017.[1] At least eight individuals—including Parents,

[1] IEPs are crafted annually by a group of individuals (the "IEP team") composed of "the parents of a child with a disability," at least one regular education teacher and one special education teacher, a qualified and knowledgeable representative of the local educational agency, "an individual who can interpret the instructional implications of evaluation results," if not one of the other IEP team members, "other individuals who have knowledge or

Defendant Françoise Wittenburg (Principal of Student's "Home" School, Lokelani Intermediate School),[2] three Department of Education ("DOE") teachers including Julia Whiteley (then-Special Education Teacher at the Home School and DOE Department Head), an Occupational Therapist, and a Speech-Language Pathologist—attended each IEP meeting. *See* Pet'rs' Admin. Ex. 8 [Mar. 16, 2017 IEP] at 29-34, Dkt. No. 103-9.[3]

The resulting March 16, 2017 IEP provides Student with special education services—including one-to-one individual instructional support and "specifically designed instruction in the areas of reading, writing, mathematics, behavior, functional performance, and communication"—occupational therapy, speech and language therapy, transportation, and a variety of other supplementary aids and services, program modifications, and supports. March 16, 2017 IEP at 2 (¶ 10), 26-27 (¶ 21). On the day of the final IEP meeting, Principal Wittenburg led the IEP team in a discussion of options along the LRE continuum, from least-to-most restrictive (*see, e.g.,* Decision at 11-15 (FOFs 58-64), Dkt. No. 97-29 (citations omitted)), until they determined that the IEP could be implemented at DOE's

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special expertise regarding the child," at the discretion of the parent or agency, and "whenever appropriate, the child with a disability." 20 U.S.C. § 1414(d)(1)(B).

[2] The Court adopts the Defendants' spelling of Principal Wittenburg's name, which is apparently misspelled in the case caption. *See* Defs.' Ans. to SAC at 2 n.1, Dkt. No. 94.

[3] An AMS-affiliated Board Certified Behavioral Analyst ("BCBA"), Keola Awana, also attended the final IEP meeting on March 16, 2017. *See* Mar. 16, 2017 IEP at 34, Dkt. No. 103-9.

new public separate facility (Pet'rs' Admin. Ex. 10 [Mar. 17, 2017 Prior Written Notice of Dep't Action ("PWN")] ¶ 3, Dkt. No. 103-11 at 4). Accordingly, Principal Wittenburg "[r]ejected placement at a private separate facility" such as AMS in favor of placement at the less restrictive public separate facility, Po'okela Maui specialized education center. Mar. 17, 2017 PWN ¶ 3, Dkt. No. 103-11 at 4.[4] At Po'okela Maui, Student would "participate with disabled peers during all school hours" and would "have opportunities to interact with non-disable[d] peers during community outings." Mar. 16, 2017 IEP at 28 (¶ 23), Dkt. No. 103-9.

Because Student "receive[d] educational services in a private setting, [AMS] located in Kihei, HI," when the March 16, 2017 IEP was developed, the IEP also provides for the following "transition plan" "[t]o occur prior to and during change of placement":

> Because student had been in private separate facility for some time, a transition plan will be implemented to mitigate any potential harmful impact of him 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

[4] The March 16, 2017 IEP meeting did not end immediately after the public separate facility recommendation was made. Because Parents strongly objected, the team engaged in further discussion about why Po'okela Maui would be a less restrictive environment than AMS, as discussed in further detail below.

> to the community, [and] new program routines.

March 16, 2017 IEP at 2 (¶ 10), 27 (¶ 21), Dkt. No. 103-9.

The instant matter arises out of Parents' May 5, 2017 amended request for due process, which challenges the DOE's "unilateral decision to change [Student]'s [educational] placement" from AMS to Po'okela Maui in the March 16, 2017 IEP. Admin. R., Ex. 1 [Pet'rs Addendum to Am. Request for Impartial Due Process Hr'g] at 2, 5, Dkt. No. 97-1 [hereinafter Due Process Compl.]. Parents contend that the March 16, 2017 IEP denied Student a free appropriate public education ("FAPE"), as required by the IDEA, 20 U.S.C. § 141(9)(d)(1)(A), because: the change in placement was "predetermined in the IEP without input from [Parents]"; Parents "knew nothing about the Po'okela Maui facility and the DOE provided no information regarding the facility" prior to changing Student's placement in the IEP; "independent research by . . . [P]arents indicated that the Po'okela Maui facility was inadequate to meet [Student's] needs and would not provide him a FAPE"; "the change in [Student's] educational placement from AMS, where he had been for at least 7 years, to Po'okela Maui violated the IDEA and . . . [P]arents['] procedural safeguards" under it; and "keeping [Student] in his current placement was not even considered by the IEP team." Due Process

Compl. at 3-4, Dkt. No. 97-2.[5] A hearing on this Due Process Complaint was scheduled for October 30, 2017 before AHO Rowena A. Somerville.

In anticipation of their due process hearing, Parents filed an August 9, 2017 Motion to Establish Burden of Proof, asking the Office of Administrative Hearings to "assign the burden of proof to [ ]DOE as to whether the change in [Student]'s placement from the judicially-approved placement at AMS back to the public school Po'okela Maui complies with IDEA and is a proper change of placement." Admin. R., Ex. 11 [Burden of Proof Mot.] at 16, Dkt. No. 97-12. AHO Somerville denied the Burden of Proof Mot. on October 11, 2017. *See* Admin. R., Ex. 19 [Order Denying Burden of Proof Mot.], Dkt. No. 97-20. In a letter dated September 27, 2017, Parents also requested that AHO Somerville conduct a site visit of AMS prior to ruling on the Due Process Complaint (Admin. R., Ex. 16 [Site Visit Request], Dkt. No. 97-17), but AHO Somerville declined

[5] Parents also suggest that the timing of the recommended change of Student's placement—which "followed closely on the heels of a Ninth Circuit determination" in Student's related cases, *G. et al. v. State of Hawaii, Department of Education, et al.,* Case No. 1:11-cv-00523-DKW-KSC (D. Haw. Aug. 25, 2011), and *Department of Education, State of Hawaii v. G.,* Case No. 1:13-cv-00029-DKW-KSC (D. Haw. Jan. 17, 2013) (consolidated), that was "highly favorable to [Parents] with respect to [Student]'s placement at AMS"—"represents unlawful retaliation by the DOE against [Parents] for their prior efforts to enforce [Student]'s right to a FAPE and for their advocacy on behalf of others in the Maui special education community." Due Process Compl. at 12, Dkt. No. 97-2.

to do so on September 29, 2017 (Admin. R., Ex. 18 [Order Denying Site Visit Request], Dkt. No. 97-19).

On October 10, 2017, Parents initiated the instant federal lawsuit challenging the Order Denying Burden of Proof Motion and the Order Denying Site Visit Request (collectively "AHO Somerville's Pre-Trial Orders"). Compl., Dkt. No. 1. The same day, Parents also filed a motion before the AHO (Dkt. No. 10-3 at 103-08) seeking to stay further administrative proceedings on the Due Process Complaint "pending resolution of issues on appeal." Parents next filed a "Motion to Enforce the 'Stay Put' Rule" in this Court on October 11, 2017, in which they requested an order requiring the DOE "to allow [Student] to remain in and continue to pay for his current educational placement at [AMS] until complete resolution of the issues presently before this Court, including any appeals taken therefrom." *See* Mot. to Enforce at 4, Dkt. No. 7. Parents filed their First Amended Complaint (Dkt. No. 9) and a Motion for TRO (Dkt. No. 10) on October 19, 2017. In the latter, Parents sought review of AHO Somerville's Pre-Trial Orders and asked the Court to enjoin administrative proceedings on the Due Process Complaint scheduled for October 30, 2017. *See* TRO Mot. ¶ 6, Dkt. No. 10. Finding both of AHO Somerville's Pre-Trial Orders to be "clearly interlocutory," this Court denied the Motion for TRO on October 25, 2017. Entering Order (Oct. 25, 2017), Dkt. No. 37 (citing *In re Merle's Inc.,* 481 F.2d 1016, 1018 (9th Cir. 1973)). Parents appealed the October 25, 2017 Entering Order to the Ninth Circuit Court of Appeals on October 26, 2017. *See* Notice of

Interlocutory Appeal, Case No. 17-17190 (9th Cir. Oct. 25, 2017), Dkt. No. 38.[6] This Court denied Parents' October 26, 2017 "Motion to Stay Proceedings Pending [Interlocutory] Appeal" (Dkt. No. 39). *See* Entering Order (Oct. 26, 2017), Dkt. No. 40. After the AHO filed the Decision on December 20, 2017, Parents filed the SAC on February 22, 2018, raising fifteen causes of action and seeking monetary, declaratory, and injunctive relief. SAC, Dkt. No. 72.

The administrative hearing on Parents' May 5, 2017 Due Process Complaint began on October 30, 2017 and lasted for four days. *See* Tr. of Proceedings (Oct. 30, 2017), Dkt. No. 99; Tr. of Proceedings (Oct. 31, 2017), Dkt. No. 100; Tr. of Proceedings (Nov. 1, 2017), Dkt. No. 101; Tr. of Proceedings (Nov. 2, 2017), Dkt. No. 102. In her December 20, 2017 decision, AHO Somerville upheld the placement decision of Po'okela Maui in Student's March 16, 2017 IEP, concluding that Parents had "not met their burden and ha[d] not shown procedural or substantive violations of the IDEA denying Student a FAPE." Decision at 32, Dkt. No. 97-29. In support of this holding, the Decision contains the following conclusions of law:

> 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

[6] Parents' interlocutory appeal was denied. *See* Mem., Case No. 17-17190 (9th Cir. June 27, 2018), Dkt. No. 132.

> offered Student a FAPE that was appropriately designed to convey student a meaningful educational benefit.
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> . . . .
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> The IEP was specifically tailored to meet Student's unique needs and provide him with a meaningful educational benefit and to make progress, and the IEP can be implemented at the [public separate facility] with a transition plan.
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> . . . .
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> The private facility [(AMS)] offers Student far less opportunity to socialize with non-disabled peers [than] the [public separate facility (Po'okela Maui)]. The Hearings Officer finds that the IEP team had an adequate discussion regarding LRE. The Hearings Officer further finds that the [public separate facility], with a transition plan, is the LRE for Student.

Decision at 25, 32, Dkt. No. 97-29. AHO Somerville also found that, because Parents did not show[ ] that the March 16, 2017 IEP denied Student a FAPE[,]" "the issue of appropriateness of the private facility does not need to be addressed." Decision at 32, Dkt. No. 97-29.

In their Second Amended Complaint (Dkt. No. 72), Parents ask the Court to vacate AHO Somerville's Pre-Trial Orders ("Counts I & II"; SAC ¶¶ 64-94) and Decision (SAC ¶¶ 95-190). In Counts II-IV of the SAC, Parents allege that the Decision contains errors of law

regarding "Burden of Proof," "FAPE Standard," "[LRE]/ Placement," "Transition Services," and "Stay Put" ("Count III"; SAC ¶¶ 95-138); mixed errors of law and fact regarding "Parental Participation/Predetermination," "[LRE]," and "Transition Services" ("Count IV"; SAC ¶¶ 139-76); and errors of fact that allegedly contributed to the Decision's legal errors ("Count V"; SAC ¶¶ 177-80). Parents assert that the March 16, 2017 IEP constitutes a "Denial of FAPE" to Student ("Count VI"; SAC ¶¶ 181-90), among other things. The instant dispute relates to Counts I-VI of the SAC.[7] *See, e.g.,* Mem. of Law—Pls.' Opening Br. on Cts. 1-6 of SAC, Dkt. No. 123 [hereinafter OB].

On April 5, 2018, the Court heard oral arguments on the Motion to Enforce the "Stay Put" Rule (Dkt. No. 7) and other motions in Parents' related cases.[8] *See* EP, Dkt. No. 106. Following this hearing, the parties

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[7] The SAC also brings claims for discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701, *et seq.* (SAC ¶¶ 191-201) and under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.* (SAC ¶¶ 202-13); "Civil Rights Violations" arising under 42 U.S.C. § 1983 (SAC ¶¶ 214-46); violations of the "Hawaii Law Against Discrimination in Public Accommodations," Hawai'i Revised Statutes §§ 489-1, *et seq.* (SAC ¶¶ 247-53); violations of the IDEA's "Stay Put" provision, 20 U.S.C. § 1415(j) (SAC ¶¶ 258-64); Intentional Infliction of Emotional Distress (SAC ¶¶ 286-89); and Negligent Infliction of Emotional Distress (SAC ¶¶ 290-91). The SAC also seeks entry of a declaratory judgment for a "Systemic Violation of IDEA" under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a) (SAC ¶¶ 254-57) and injunctive relief in the form of a TRO allowing Student to remain at AMS and ordering the DOE to reimburse Parents for the associated costs (SAC ¶¶ 265-85).

[8] *Supra* n.4.

entered a "Stipulation Regarding Obligation Under 20 U.S.C. § 1415(j) ('Stay Put') with Respect to J.G.'s Placement" on April 20, 2018 ("Stay Put Stipulation"), in which they stipulate and agree that— "J.G.'s stay put placement with respect to the underlying administrative proceeding, DOE-SY1617-067A, and the current judicial proceeding . . . is [AMS]"; J.G.'s stay put placement is "based upon" the February 29, 2016 IEP; this placement "shall remain during the pendency of this current judicial proceeding through and including final resolution of and all appeals of the IDEA claims"; and the DOE "shall abide by the stay put placement pursuant to the IDEA." Stay Put Stipulation at 2, Dkt. No. 118. The parties also filed a stipulation (Dkt. No. 114) dismissing with prejudice all claims against the Office of Administrative Hearings and against AHO Somerville in her capacity as AHO on April 16, 2018.

Parents appeal from the December 20, 2017 Decision that upheld the March 16, 2017 IEP, with the Court hearing oral argument on July 20, 2018. *See* EP, Dkt. No. 138. The instant disposition follows.

LEGAL STANDARDS

I. IDEA Overview

"The IDEA is a comprehensive educational scheme, conferring on disabled students a substantive right to public education and providing financial assistance to enable states to meet their educational needs." *Hoeft ex rel. Hoeft v. Tucson Unified Sch. Dist.,* 967 F.2d 1298, 1300 (9th Cir. 1992) (citing *Honig v. Doe,* 484 U.S. 305,

310 (1988)). It ensures that "all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living[.]" 20 U.S.C. § 1400(d)(1)(A). As a condition of federal financial assistance under the IDEA, states must provide such an education to disabled children residing in the state who are between the ages of 3 and 21, inclusive. 20 U.S.C. § 1412(a)(1)(A).

Under the IDEA, FAPE means special education and related services that: (a) "have been provided at public expense, under public supervision and direction, and without charge"; (b) "meet the standards of the State educational agency"; (c) "include an appropriate preschool, elementary school, or secondary school education in the State involved"; and (d) "are provided in conformity with the individualized education program. . . ." 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Haw. Admin. R. § 8-60-2. "A FAPE is accomplished through the development of an IEP for each child." *Laddie C. ex rel. Joshua C. v. Dep't of Educ.,* 2009 WL 855966, *2 (D. Haw. Mar. 27, 2009) (citing *Ojai Unified Sch. Dist. v. Jackson,* 4 F.3d 1467, 1469 (9th Cir. 1993), *cert. denied,* 513 U.S. 825 (1994)).

The IDEA guarantees "procedural safeguards with respect to the provision of a [FAPE]" to "children with disabilities and their parents." 20 U.S.C. §§ 1415(a), (b)-(h). For example, parents of a disabled child who claim violations of the IDEA "with respect to any

matter relating to . . . educational placement of the child[] or the provision of a free appropriate public education to such child" can file a complaint with a due process hearing officer under 20 U.S.C. § 1415(b)(6)(A). *Hopewell Valley Reg'l Bd. of Educ. v. J.R.,* 2016 WL 1761991, *3 (D.N.J. May 3, 2016) (citing *S.H. v. Lower Merion Sch. Dist.,* 729 F.3d 248, 257 (3d Cir. 2013)). Moreover, "wherever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing" to be "conducted by the State educational agency" at issue—here, the DOE. 20 U.S.C. § 1415(f)(1)(A).

II. District Court Review

"Any party aggrieved by the findings and decision" made pursuant to an administrative hearing under the IDEA "shall have the right to bring a civil action with respect to the complaint presented . . . in a district court of the United States. . . ." 20 U.S.C. § 1415(i)(2)(A). When a party files an action challenging an administrative decision under the IDEA, the district court "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court deems is appropriate." 20 U.S.C. § 1415(i)(2)(C); *see Ojai Unified,* 4 F.3d at 1471. The party challenging the administrative decision bears the burden of proof. *See Hood v. Encinitas Union Sch. Dist.,* 486 F.3d 1099, 1103 (9th Cir. 2007); *J.W. ex rel. J.E.W. v. Fresno Unified*

Sch. Dist., 626 F.3d 431, 438 (9th Cir. 2010) (stating that the challenging party must show, by a preponderance of the evidence, that the decision of the hearings officer should be reversed); *Seattle Sch. Dist., No. 1 v. B.S.,* 82 F.3d 1493, 1498 (9th Cir. 1996).

In reviewing administrative decisions, the district court must give "due weight" to the AHO's judgments of educational policy. *L.M. v. Capistrano Unified Sch. Dist.,* 556 F.3d 900, 908 (9th Cir. 2009); *Michael P. v. Dep't of Educ.,* 656 F.3d 1057, 1066 (9th Cir. 2011) (quoting *B.S.,* 82 F.3d at 1499). However, the district court has the discretion to determine the amount of deference it will accord the administrative ruling itself. *J.W.,* 626 F.3d at 438 (citing *Gregory K. v. Longview Sch. Dist.,* 811 F.2d 1307, 1311 (9th Cir. 1987)). In reaching this determination, the court should consider the thoroughness of the hearings officer's findings, increasing the degree of deference where said findings are "thorough and careful." *Michael P.,* 656 F.3d at 1066; *L.M.,* 556 F.3d at 908 (quoting *Capistrano Unified Sch. Dist. v. Wartenberg,* 59 F.3d 884, 892 (9th Cir. 1995)); *cf. Cty. of San Diego v. Cal. Special Educ. Hr'gs Office,* 93 F.3d 1458, 1466-67 (9th Cir. 1996) (explaining that the district court should give "substantial weight" to the decision of the hearings officer when the decision "evinces his [or her] careful, impartial consideration of all the evidence and demonstrates his [or her] sensitivity to the complexity of the issues presented" (citation and quotation marks omitted)). Further, the amount of deference to be given to an AHO's decision is, in part, influenced by whether the hearings officer's findings

are based on credibility determinations of the testifying witnesses. *See L.E. v. Ramsey Bd. of Educ.,* 435 F.3d 384, 389 n.4 (3d Cir. 2006); *see also B.S.,* 82 F.3d at 1499 (citations omitted). Such deference is appropriate because "if the district court tried the case anew, the work of the hearing officer would not receive 'due weight,' and would be largely wasted." *Wartenberg,* 59 F.3d at 891.

"[T]he ultimate determination of whether an IEP was appropriate," however, "is reviewed de novo." *A.M. ex rel. Marshall v. Monrovia Unified Sch. Dist.,* 627 F.3d 773, 778 (9th Cir. 2010) (citing *Wartenberg,* 59 F.3d at 891).

DISCUSSION

The Court AFFIRMS the Decision of the AHO, holding that the March 16, 2017 IEP did not deny Student a FAPE.

I. FAPE Standard

To provide a free appropriate public education in compliance with the IDEA, a state educational agency receiving federal funds must evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP. 20 U.S.C. § 1414(d)(1)(A) ("The term 'individualized education program' or 'IEP' means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this

title.")). The IEP is to be developed by an "IEP team" composed of, *inter alia,* school officials, parents, teachers and other persons knowledgeable about the child.

To determine whether a student has been offered a FAPE, the Supreme Court of the United States has established a two-part test, which examines: (1) whether the state has complied with the procedural requirements set forth in the IDEA; and (2) whether the IEP developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits. *Bd. of Educ. v. Rowley,* 458 U.S. 176, 206-07 (1982). "Procedural flaws in the IEP process do not always amount to the denial of a FAPE." *L.M.,* 556 F.3d at 909 (citations omitted). Rather, "[a] procedural violation denies a free appropriate public education if it results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits." *J.L. v. Mercer Island Sch. Dist.,* 592 F.3d 938, 952 (9th Cir. 2009) (citing *N.B. v. Hellgate Elementary Sch. Dist.,* 541 F.3d 1202, 1208 (9th Cir. 2008)). Additionally, the "educational benefit[]" that the child's IEP "is reasonably calculated to enable the child to receive" must be more than *de minimus. Endrew F. v. Douglas County School District,* 137 S. Ct. 988 (2017). The IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 1001; *Blake C. ex rel. Tina F. v. Haw. Dep't of Educ.,* 593 F. Supp. 2d 1199, 1206 (D. Haw. 2009) (holding 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").

II. AHO Somerville's Pre-Trial Orders

AHO Somerville's Pre-Trial Orders denying Parents' Motion to Establish Burden of Proof and Parents' informal Site Visit Request are AFFIRMED.

A. *Burden of Proof*

It is firmly established 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, 62 (2005). Parents insist that the most significant issue in the instant matter is that AHO Somerville incorrectly imposed this burden on Parents, rather than the DOE. OB at 12-21, 24, Dkt. No. 123. That is, Parents assert that because Student's "stay put" placement based on his February 29, 2016 IEP is AMS (*see* OB at 14, Dkt. No. 123 (citing Stay Put Stipulation, Dkt. No. 118)), the DOE is the "true party seeking relief in this case" because it "changed [Student]'s placement from AMS to Po'okela in order to terminate its obligation to pay the monthly stipend of $14,062.50 to AMS" (OB at 15, 20-21, Dkt. No. 123; Reply Br. at 2-3, Dkt. No. 133 (arguing that because Parents "had already proven that Defendants failed to provide [Student] a FAPE at its public facilities and that AMS was an appropriate placement for [Student]

. . . , [DOE was] attempting to remove its obligation to pay the private tuition at AMS under stay put")). These contentions are meritless.

In an administrative hearing challenging an IEP, the party "seeking relief" is the party who challenges the IEP. *Cf. Schaffer,* 546 U.S. at 62. This is the settled rule in the Ninth Circuit and elsewhere.[9] Nothing Parents cite provides authority for their contention that the DOE was actually the party seeking relief because Student's 2017 IEP recommended a new public placement even though Student was previously in a private placement pursuant to his IEP for the 2016-17 school year. *See, e.g.,* OB at 14 (arguing that Student's placement at AMS is "entitled to *res judicata*" but failing to demonstrate how Student's placement at Po'okela Maui in the March 16, 2017 IEP involves the same "issues of fact or law" that this Court resolved in the May 17, 2018 Order Granting Pl.'s Mot. for J. Granting

[9] Parents' Opening Brief states that "[t]his identical issue is currently pending before the U.S. Court of Appeals for the Ninth Circuit in *J.M., et al. v. Kathryn Matayoshi, et al.,* USCA Case No. 16-17327" (OB at 12 n.4, Dkt. No. 123), further noting that oral arguments in *J.M.* were scheduled to take place in June 2018. At oral argument on this Motion on July 20, 2018, counsel for both parties stated that the Ninth Circuit had issued its Memorandum Disposition in *J.M.* According to Plaintiffs, the Ninth Circuit denied the appeal because the burden of proof issue was not raised at the administrative hearing or in district court, but a petition for rehearing en banc had been filed. Defense Counsel, however, quoted from the Memorandum Disposition, in which the Ninth Circuit acknowledged that the burden of proof issue had been abandoned below, but also cited *Schaffer,* 546 U.S. 49, stating that the law is "settled" that the burden of proof in an administrative hearing is properly placed on the party seeking relief.

Reimbursement of Private Tuition, Case No. 1:11-cv-00523-DKW-KSC (D. Haw. May 17, 2018), Dkt. No. 116).

Accordingly, the Court AFFIRMS the Order Denying Parents' Motion to Establish Burden of Proof (Dkt. No. 97-20).

B. ***Right to Present Evidence***

Under the IDEA, "[a]ny party to a [due process] hearing . . . shall be accorded . . . the right to present evidence and confront, cross-examine, and compel the attendance of witnesses. . . ." 20 U.S.C. § 1415(h)(2). Parents contend that their right to present evidence was violated when AHO Somerville declined to conduct a site visit of AMS prior to the four-day administrative hearing on Parents' May 5, 2017 Due Process Complaint or prior to issuing the Decision. OB at 23, Dkt. No. 123 ("AHO Somerville's comment that testimony is sufficient to describe the placement is akin to saying witness statements and photos of the Grand Canyon are sufficient to appreciate the Arizona landmark. AHO Somerville should have permitted the site visit as a means of Plaintiffs presenting evidence.").

Parents, however, cite no authority for the proposition that an AHO must conduct a site visit to the existing placement site and/or the proposed placement site prior to creating or finalizing an IEP. Parents also fail to identify any prejudice or other tangible harm caused by AHO Somerville's refusal to visit AMS prior to developing the March 16, 2017 IEP. *See Hanson ex*

rel. Hanson v. Smith, 212 F. Supp. 2d 474, 485 (D. Md. 2002) ("[T]here needs to be harm to the child as the result of a procedural violation in order that an otherwise proper IEP decision may be invalidated by a court. To the extent that a procedural violation does not actually interfere with the provision of a free appropriate public education, such a violation is not sufficient to support a finding that an agency failed to provide a FAPE.") (citing *Gadsby by Gadsby v. Grasmick,* 109 F.3d 940, 956 (4th Cir. 1997)); *cf. W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23,* 960 F.2d 1479, 1484 (9th Cir. 1992) ("[P]rocedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE." (internal citations omitted)), *superseded in part by statute on other grounds,* as stated in *J.K. v. Missoula Cty. Pub. Schs.,* 713 Fed. Appx. 666, 668 (9th Cir. 2018).

Accordingly, the Order Denying Parents' Site Visit Request (Dkt. No. 97-19) is AFFIRMED.

III. AHO Somerville's December 20, 2017 Decision

A. *Least Restrictive Environment*

The IDEA's LRE requirement is laid out in 20 U.S.C. § 1412(a). Section 1412(a) provides that each state must establish procedures to assure that:

> [t]o the maximum extent appropriate, children with disabilities . . . are educated with

> children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). This LRE provision "sets forth Congress's preference for educating children with disabilities in regular classrooms with their peers." *Sacramento City Unified Sch. Dist. v. Rachel H.,* 14 F.3d 1398, 1403 (9th Cir. 1994) (citing, *inter alia, Dep't of Educ. v. Katherine D.,* 727 F.2d 809, 817 (9th Cir. 1983); *Oberti v. Bd. of Educ.,* 995 F.2d 1204, 1213 (3d Cir. 1993), as corrected (June 23, 1993)). The implementing regulations, in turn, require school districts to ensure that a "continuum of alternative placements is available to meet the needs of children with disabilities," including "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." 34 C.F.R. § 300.115(a), (b)(1). Placement options that facilitate mainstreaming are said to be less "restrictive" than are options that would cause the disabled child to be more isolated than "appropriate" under the child's unique circumstances. *See T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.,* 752 F.3d 145, 161 (2d Cir. 2014) ("After considering an appropriate continuum of alternative placements, the school district must place each disabled child in the least restrictive educational environment that is consonant with his or her needs."). "Because

every child is unique, 'determining whether a student has been placed in the "least restrictive environment" requires a flexible, fact-specific analysis.'" *Id.* (quoting *P. ex rel. Mr. & Mrs. P. v. Newington Bd. of Educ.,* 546 F.3d 111, 113 (2d Cir. 2008)).

To perform this analysis, courts in the Ninth Circuit employ a four-factor balancing test, which considers (1) "the educational benefits of placement full-time in a regular class"; (2) "the non-academic benefits of such placement"; (3) "the effect [that the disabled child] had on the teacher and children in the regular class"; and (4) "the costs of mainstreaming [the child]." *Rachel H.,* 14 F.3d at 1404; *accord B.E.L. v. Haw. Dep't of Educ.,* 711 Fed. Appx. 426, 427 (9th Cir. Feb. 14, 2018) (quoting *Rachel H., supra*); *Baquerizo v. Garden Grove Unified Sch. Dist.,* 826 F.3d 1179, 1187 (9th Cir. 2016) (same).[10] According to the Decision:

> 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

[10] Parents have offered no authority to support their argument that the AHO was also required to examine "the potential harm to [Student] or the quality of services at" each placement option along the LRE continuum "in her legal analysis of LRE." OB at 27, Dkt. No. 123. The Court therefore does not separately address the IEP team's discussion of these, except to note that potential harms were discussed with respect to each of the placement environments that the IEP team reviewed on March 16, 2017. *See, e.g.,* Decision at 13-14 (FOFs 61-62), Dkt. No. 97-29.

> education played no role in the Principal's decision making process.

Decision at 26, Dkt. No. 97-29.

Despite Parents' contention that the team's LRE discussion was inadequate (*see* OB at 27, Dkt. No. 123), the Court holds that the AHO adequately addressed the IEP team's consideration of the *Rachel H.* factors and conclusion that when "applying the facts of the case to the LRE standard, the [public separate facility] would provide Student with the LRE." Decision at 26, Dkt. No. 97-29. Accordingly, the Decision's holding is AFFIRMED.

1. *Student's Access to "Neuro-Typical" Peers*

In leading the IEP team's LRE discussion during the March 16, 2017 meeting, Principal Wittenburg used a worksheet entitled "Least Restrictive Environment; Justification for Placement." That worksheet lists placement options, from most-to-least restrictive and provides space for notes on each option in light of the first three *Rachel H.* factors. *See* Mar. 17, 2017 PWN ¶ 3, Dkt. No. 103-11 at 4. The IEP team discussed Student's access to both disabled and "neuro-typical" peers in each educational setting along the LRE continuum, while special education teacher Julia Whiteley took notes on the worksheet, categorizing discussion

points as either positive ("+") or negative ("-").[11] Decision at 11-15 (FOFs 58-64), Dkt. No. 97-29.

[11] The Decision includes the following representation of the completed worksheet with Whiteley's annotations:

PLACEMENT	**DECISION**	**RATIONALE**		
		Factor 1	**Factor 2**	**Factor 3**
General Education Setting (80% or more of the school day)	REJECT	+ Respond to being with peers - Needs smaller environment	Overstimulated and unable to	Behaviors impede others
General Education and Special Education Setting	REJECT	- Curriculum not meaningful + Path to diploma	Negative reaction to neurotypical peers	Behaviors and accommodation/ Modifications impede
Special Education Setting	REJECT	+ Implement aspects of IEP	- Safety Concerns - Large environment - Overstimulated - Isolated	+ Member of classroom
Public Separate Facility	REJECT	+ 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 children + Group of friends

The IEP team began its LRE discussion on March 16, 2017 with the possibility of placement in a "general education setting" at Student's "Home School," Lokelani Intermediate School. Regarding the benefits that such a full-time placement in the general education setting would present, Father stated that "Student keeps a distance from neurotypical peers, because they are upsetting to him," so "[i]f Student was placed in a regular classroom, he would not work," he would be "overstimulated," and there would therefore "be no educational benefit" to him. Decision at 12 (FOF 59), Dkt. No. 97-29 (citing, in relevant part, Resp. Admin. Ex. 7 at 1009 [CD of IEP Meeting (Mar. 16, 2017)] at

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			+ Functional life skills + Cooperative skills + Community-based lessons	
Private Separate Facility			+ Longevity of current program	
Public Residential Facility				
Private Residential Facility				
Homebound/ Hospital				

Decision at 15 (FOF 64), 29, Dkt. No. 97-29 (summarizing Resp. Admin Ex. 2 [Worksheet (annotated)] at 83, Dkt. No. 104-3 at 56).

11:07-19:50, Dkt. No. 105-5 at 17). Instead, "Student benefits from being with children with ASD." *Id.* Father further explained that even from a non-academic point of view, "being with [neuro-typical] peers would have an adverse effect on Student." *Id.* Father told the IEP team that Student "would be disruptive to other students" in such a setting. *Id. See Rachel H.,* 14 F.3d at 1404 (noting that the first two factors involve the non-educational and educational benefits of a placement option, and the third factor examines the effect that the Student would have on the teacher and children in the classroom at that placement). Principal Wittenburg "rejected placement in the general education setting based on their discussion." Tr. of Admin. Hr'g (Nov. 1, 2017) at 32[3]-24 (Wittenburg), Dkt. No. 101.

The IEP team then discussed placement in a "general and special education setting," which for Student would also be at Lokelani Intermediate School. In this placement setting, Student would benefit from being "on a diploma path," but Father reiterated that "it would be 'ridiculous' for Student to be in general education" because "he would receive no benefit, and it would be detrimental for him and the class." Decision at 13 (FOF 60), Dkt. No. 97-29 (citing CD of IEP Meeting (Mar. 16, 2017) at 11:07-19:50, Dkt. No. 105-5 at 17). Father also told the IEP team "that Student would not benefit from the [special education] classroom [at Lokelani Intermediate School] because of the close proximity to the neurotypical peers on campus." *Id.* (noting that Parents even "had to ask the Charter

School not to be so close to the outside of the private facility's building because [it] causes Student to have negative reactions inside the building," and Mother noted that "[w]hen the Charter School would hold 'morning circle,' Student would scream when he walked by"). Principal Wittenburg rejected placement in the general and special education setting based on this discussion. *Id.*

Next, the IEP team discussed placement in a special-education-only setting. For Student, such a setting would be offered via the special education classroom at Lokelani Intermediate School, which includes "a very small group of children, some of whom ha[ve] ASD." Decision at 13 (FOF 61), Dkt. No. 97-29 (citing CD of IEP Meeting (Mar. 16, 2017) at 26:58-33:25, Dkt. No. 105-5 at 17; Tr. of Admin. Proceedings (Nov. 1, 2017) at 322-24 (Wittenburg), Dkt. No. 101). During the discussion, Mother expressed her view that *any* change of placement would involve a difficult and potentially harmful transition for Student, but Principal Wittenburg explained that the IEP team still had to review each placement setting on the LRE continuum before making its offer of FAPE:

> Mother stated that if Student is doing well in one place, with people that know him and have a history with him, he should not be moved. She said to move him from one building to another for the "school's convenience" would not serve Student's unique needs. She 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. Mother felt that if the team was talking about a transition or change, it would be more restrictive for Student's unique needs because he 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.

Decision at 13 (FOF 61), Dkt. No. 97-29 (citing CD of IEP Meeting (Mar. 16, 2017) at 26:58-33:25, Dkt. No. 105-5 at 17; Tr. of Admin. Proceedings (Nov. 1, 2017) at 322-24 (Wittenburg), Dkt. No. 101). Although there was evidence suggesting that "aspects of Student's IEP" could be implemented in the special education setting, Parents testified that "[i]t would be overstimulating" for Student to be placed in "the large environment" of Lokelani Intermediate School, which could even present "safety concerns" for Student if placed there. *Id.* ("Father said when Student was in a DOE School previously, he was isolated from his peers, did not have his needs met, and it was not beneficial."). Principal Wittenburg rejected placement in the special education setting based on this discussion. *Id.*; *see also* Decision at 27-28, Dkt. No. 97-29.

The IEP team then moved to discuss placement at a DOE public separate facility. For Student, as of March 16, 2017, that meant Po'okela Maui, a brand new DOE school with a handful of enrolled students "between grades five and nine" who have "various disabilities, primarily autism." Tr. of Admin. Hr'g (Nov. 1,

2017) at 416-17 (Whiteley), Dkt. No. 101 (discussing her familiarity with Po‘okela Maui prior to the March 16, 2017 IEP meeting based on "several" past site visits). "Parents readily participated[,] and the [public separate facility] discussion lasted 27 minutes." Decision at 24, Dkt. No. 97-29. The special education teacher opined that "the IEP could be implemented [at Po‘okela Maui], specific functional programming could also be implemented," and that there would be "individual learning opportunities" there for Student. Decision at 14 (FOF 62), Dkt. No. 97-29 (noting that other team members with first-hand knowledge similarly explained that Po‘okela Maui "focused on functional skills, CBI [community-based instruction], and cooperative skills" (citing, in relevant part, CD of IEP Meeting (Mar. 16, 2017) at 33:32-1:00:42)). Although no neuro-typical peers would be "regularly" present at Po‘okela Maui, members of the IEP team noted that Po‘okela students would have opportunities for community interaction—both by visiting Lokelani Intermediate School and by taking community outings to restaurants and stores around Tech Park, where Po‘okela Maui is located. *See* Decision at 10 (FOFs 42-44), Dkt. No. 97-29 (citing, in relevant part, Tr. of Admin. Hr'g (Nov. 1, 2017) at 327 (Wittenburg), Dkt. No. 101); *see also* Tr. of Admin. Hr'g (Nov. 1, 2017) at 331-32, 365-66, 372-73 (Wittenburg), Dkt. No. 101 (explaining that Po‘okela Maui is approximately one-half mile from the Lokelani Intermediate School campus and describing Tech Park, acknowledging that grocery stores are located in "a different part of Kihei"). These outings would take place, together with "general education

peers" from Lokelani Intermediate School, as frequently as "appropriate" and necessary to implement each student's individual IEP. Tr. of Admin. Hr'g (Nov. 1, 2017) at 372-73 (Wittenburg), Dkt. No. 101; Tr. of Admin. Hr'g (Nov. 2, 2017) at 418, 421, 460-61 (Whiteley), Dkt. No. 102. Accordingly, Student's "non-academic benefits" at Po'okela Maui would also include "opportunities to integrate into the community." Mar. 17, 2017 PWN at 4, Dkt. No. 103-11.[12] Nonetheless, Parents, who had not yet visited Po'okela Maui, mostly focused on the negative aspects of a possible placement there:

> Mother said the "down-side" [of the public separate facility] was [that Parents] had filed a "state complaint" against [the autism resource teacher serving as BCBA at Po'okela Maui], and "that would be a problem." Father stated he couldn't speak about the facility, because it was brand new. Student's program at the private [AMS] facility was seven years old, and he had familiar people there that worked with him and knew his issues. Father said that Student has extreme needs, and placement at the [public separate facility] was not in his best interest. . . . Mother stated that she was not sure if the community activities could be implemented [at Po'okela Maui,] noted the [public separate facility's] location at "Lipoa[,]"

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[12] These accessible, yet irregular, opportunities appeared appropriate, or, particularly in Student's circumstance, even desirable, given Parents' comments about his level of discomfort with neuro-typical peers.

> and [questioned] if [Student's] individual needs could be met there.

Decision at 14 (FOF 62), Dkt. No. 97-29 (citing, in relevant part, CD of IEP Meeting (Mar. 16, 2017) at 33:32-1:00:42).

In light of all the information provided, Principal Wittenburg concluded that the first three *Rachel H.* factors suggested that Student would benefit academically and non-academically, and he would not negatively impact the teachers and children in the classroom, at the public separate facility, Po'okela Maui. Therefore, the least restrictive environment on the LRE continuum in which DOE could provide Student with a FAPE, in accordance with his needs identified in the March 16, 2017 IEP, was Po'okela Maui. *See* Mar. 16, 2017 IEP at ¶ 23, Dkt. No. 103-9 (explaining that Student would "participate with disabled peers during all school hours in a public separate facility" and would "have opportunities to interact with non-disable[d] peers during community outings"). Accordingly, Principal Wittenburg "[r]ejected placement at a private separate facility" such as AMS in favor of placement at the new public separate facility, Po'okela Maui. Mar. 17, 2017 PWN ¶ 3, Dkt. No. 103-11 at 4.

2. *The "Cost of Mainstreaming" Factor*

Parents' argument that the DOE violated the IDEA by failing to address the fourth *Rachel H.* factor regarding costs of mainstreaming Student is inapposite. OB at 25-27, Dkt. No. 123; Reply at 5, 11, Dkt. No.

133. First, the Record reveals that Father did, in fact, raise the issue of cost at the March 16, 2017 IEP meeting when he accused Principal Wittenburg of following "'marching orders' from the DOE district to cut costs" in making the public separate facility recommendation. Decision at 14-15 (FOF 63), Dkt. No. 97-29 (citing CD of IEP Meeting (Mar. 16, 2017) at 1:00:43-1:05:05, 00:00-12:57, Dkt. No. 105-5 at 17). Principal Wittenburg denied having any such "marching orders," however, and she explained that she "accepted the [public separate facility] to be the LRE," which is why she "made an offer of FAPE at the [public separate facility]." Decision at 24, Dkt. No. 97-29; Decision at 14-15 (FOF 63), Dkt. No. 97-29 (citing CD of IEP Meeting (Mar. 16, 2017) at 1:00:43-1:05:05, 00:00-12:57, Dkt. No. 105-5 at 17). Second, even though the IEP team "did not [explicitly] consider the cost of mainstreaming Student into the Home School" during its March 16, 2017 LRE discussion, AHO Somerville expressly found "that the cost of Student's education played no role in the Principal's decision-making process." Decision at 26, Dkt. No. 97-29. And third, even if any one of the *Rachel H.* factors is not specifically discussed during the development of an IEP, the challenging party "must still show prejudice from such a failure." *K.K. ex rel. K.S.K. v. Hawaii,* 2015 WL 4611947, *18, *20 (D. Haw. July 30, 2015) (noting that a failure to discuss the factors would be a procedural inadequacy that plaintiffs must demonstrate "resulted in the loss of educational opportunity or infringement on their ability to participate in the formulation of the IEP" (citing *L.M.*,

556 F.3d at 909)). Yet Parents have made no such showing in this case.

Accordingly, the IEP team did not reversibly err by, according to Parents, failing to include the "cost" factor in its LRE discussion prior to recommending placement at a public separate facility.

3. *Examining* Every *Option on the LRE Continuum*

Parents also argue that "AHO Somerville erred by failing to require a comparison of [Student]'s current placement at AMS to any proposed change in placement in the legal analysis of [the] decision on LRE, including whether Po'okela was a less or more restrictive environment than AMS." OB at 26-27, Dkt. No. 123; Reply at 11-23, Dkt. No. 133. This argument fails for two reasons.

First, Parents provide no authority for the contention that *all* possibilities on the LRE continuum *must* be discussed before a placement recommendation can be made. Here, in addition to the possible placement settings the IEP team did discuss—(1) General Education Setting (80% or more of the school day), (2) General Education and Special Education Setting, (3) Special Education Setting; (4) Public Separate Facility—the LRE continuum includes four more restrictive placement environments—(5) Private Separate Facility, (6) Public Residential Facility, (7) Private Residential Facility, and (8) Homebound/Hospital. *See* Worksheet (annotated), Dkt. No. 104-3 at 56. If Parents'

arguments were correct, the IEP team would have been required to conduct in-depth discussions of AMS in addition to the other three, *more* restrictive options than a public separate facility. *See T.M.,* 752 F.3d at 161; 34 C.F.R. § 300.115(a), (b)(1). But Principal Wittenburg properly rejected these options without formal discussion because under the IDEA, special education should be delivered in the *least* restrictive environment. Mar. 17, 2017 PWN at 4, Dkt. No. 103-11.

Second, the Administrative Record shows that Po'okela Maui was more appropriate than AMS as the least restrictive environment for Student under the provisions of his March 16, 2017 IEP. Indeed, AHO Somerville found that the public separate facility would provide Student with more access to neurotypical peers and the community as a whole than would AMS. *See, e.g., K.D. ex rel. C.L. v. Dep't of Educ.,* 665 F.3d 1110, 1128 (9th Cir. 2011) (noting that public placement was "more appropriate" than the private option as the LRE because the specific IEP at issue "included provisions providing that [student] would have the opportunity to interact with non-disabled peers"). The facts support this finding.

That is, Parents discussed Student's program at AMS during each of the IEP team's meetings to develop Student's IEP for the 2017-18 school year, and they provided additional information via correspondence. *See, e.g.,* Pet'rs' Admin. Ex. 7 [Parents' Mar. 14, 2017 Letter], Dkt. No. 103-8. As of March 16, 2017, the IEP team therefore knew that AMS is a private facility with "12 full-time students that have high functioning

ASD" (Decision at 6 (FOF 9), Dkt. No. 97-29 (citing, in relevant part, Admin Tr. (Oct. 30, 2017) at 45-46 (Father), Dkt. No. 99) and that it "shares a campus with a DOE Charter School" (Decision at 5-6 (FOF 8), Dkt. No. 97-29 (citing Admin Tr. (Oct. 30, 2017) at 44 (Father), Dkt. No. 99; Admin. Tr. (Nov. 2, 2016) at 499 (Whiteley), Dkt. No. 102). Although Parents later contended that Student's "program is on the same church grounds as the local public charter school," so he therefore "has access to normally developing peers daily" at AMS (Pet'rs' Admin. Ex. 9 [Parents' Mar. 16, 2017 Letter] at 2, Dkt. No. 103-10)), the IEP team possessed information indicating that such contact and access was, at least in Student's case, deleterious and not advantageous. For example, in their March 14, 2017 letter, Parents informed members of the IEP team that the charter school had "politely agreed to move their morning circle assembly as they had noted that it was causing self-injurious behaviors for my son due to their meeting proximity." Parents' Mar. 14, 2017 Letter, Dkt. No. 103-8. Moreover, the special education teacher (Whiteley), who had "observed Student at the private facility on May 6, 2016, May 18, 2016, August 22, 2016, and October 4, 2016," noted that she had "never observed Student interacting with typically developing peers, higher-functioning children with ASD, or with general education students at the Charter School" on any of her visits to AMS. Decision at 10 (FOF 41), Dkt. No. 97-29 (citing Resp. Admin. Ex. [3] [Whiteley AMS Observation Forms] at 309-11 (Dec. 13, 2016), 321-23 (Oct. 4, 2016), 329-31 (Aug. 22, 2016), 344-45 (May 6, 2016), 346[-47] (May 18, 2016), Dkt. No. 104-5; Tr. of

Admin. Hr'g (Nov. 1, 2016) at 431-32 (Whiteley), Dkt. No. 101; Tr. of Admin. Hr'g (Nov. 2, 2016) at 499-502 (Whiteley), Dkt. No. 102).[13]

Other testimony at the administrative hearing also revealed that at AMS, Student had "no planned inclusion activities with neurotypical peers from other schools" and "[i]nteraction with neurotypical peers in the community is not coordinated." Decision at 7 (FOF 22), Dkt. No. 97-29 ("Student will go to place, such as a park, in anticipation that other children will be there." (citing Admin Tr. (Oct. 31, 2017) at 253-55 (Glasgow), Dkt. No. 100)). Although AMS was arguably closer to the center of Kihei town, being located next to Kihei Charter School and near grocery stores and parks, students at Po'okela Maui could engage in community outings to stores or restaurants in the Tech Park area or to Lokelani Intermediate School, located one-half mile away, which "could occur daily" if appropriate to implement their individual IEPs. Tr. of Admin. Hr'g (Nov. 2, 2017) at 495-96, 511 (Whiteley), Dkt. No. 102.

As such, the record supports Whiteley's explanation that Po'okela Maui was "less restrictive" than AMS because its students "had more access to general

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[13] In fact, Whiteley never observed Student interacting with *any* other children or students at AMS. *See, e.g.,* Decision at 10 (FOF 40), Dkt. No. 97-29 ("On February 5, 2016, the [special education] teacher observed Student at [AMS] 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 his table activity, isolated from his peers." (citing Resp. Admin. Ex. 3 at 351 [Whiteley Event Log (Feb. 5, 2016)], Dkt. No. 104-5)).

education peers" at Lokelani Intermediate School, "as well as a more functional program" for community interactions. Tr. of Admin. Hr'g (Nov. 2, 2017) at 495-96, 511 (Whiteley), Dkt. No. 102. The Court therefore declines to disturb the conclusion of both the IEP team and the AHO that the public separate facility was the LRE for Student and an appropriate placement under the March 16, 2017 IEP.

B. ***Pre-Determination***

Under the IDEA, a school district may not determine a placement for the student before the IEP meeting; rather, "the general rule is that placement should be based on the IEP." *Spielberg v. Henrico Cty Pub. Schs.,* 853 F.2d 256, 259 (4th Cir. 1988) (basing its holding on the "spirit and intent of the EHA [the predecessor to the IDEA], which emphasizes parental involvement"); *accord Deal v. Hamilton Cty. Bd. of Educ.,* 392 F.3d 840, 857 (6th Cir. 2004) (quoting *Spielberg, supra*), *cert. denied,* 546 U.S. 936 (2005); *see also W.G.,* 960 F.2d at 1484 (finding that predetermination of placement prior to formation of an IEP is impermissible under the IDEA). As such, the logical progression of developing an annual IEP would first require the team to identify the student's needed programs and services, research placement options, and only after doing so, make its final placement decision in light of this information.

Parents argue that four lines of evidence demonstrate that the team did not follow this logical

progression but instead impermissibly pre-determined that Student's placement would be changed to Po'okela Maui. A review of the facts in the Administrative Record, however, evidences otherwise.

1. *Conversation with District Resource Teacher Chad Takakura at the Po'okela Maui Open House*

After the March 16, 2017 IEP meeting, Parents visited Po'okela Maui and met Chad Takakura, a licensed special education and autism teacher there. Tr. of Admin. Hr'g (Nov. 1, 2017) at 433 (Whiteley), Dkt. No. 101; Tr. of Admin. Hr'g (Nov. 2, 2017) at 534-35 (Ballinger), Dkt. No. 102. In the letter that Parents sent to Principal Wittenburg after this visit, Parents "alleged that the Principal predetermined Student's placement at the [public separate facility], based on their discussions with [Takakura]." Decision at 17 (FOF 81), Dkt. No. 97-29 (citing Parents' Mar. 16, 2017 Letter, Dkt. No. 103-10). According to Father, Takakura "told him that . . . Principal [Wittenburg] had visited the [facility] earlier in the week and told him that Student would be attending school there." Decision at 17 (FOF 76), Dkt. No. 97-29 (citing Tr. of Admin. Hr'g (Oct. 30, 2017) at 42-43, 79 (Father), Dkt. No. 99; Tr. of Admin. Hr'g (Oct. 31, 2017) at 288-89 (Mother), Dkt. No. 100).

However, Principal Wittenburg "testified that she never had a discussion about Student with [Takakura]." Decision at 17 (FOF 78), Dkt. No. 97-29 (citing Tr. of

Admin. Hr'g (Nov. 1, 2017) at 332 (Wittenburg), Dkt. No. 101). And Takakura did not testify during the Administrative Hearing, notwithstanding his appearance on the DOE's witness list. *See* DOE Admin. Witness List ¶ 4, Dkt. No. 104-1 at 3.

AHO Somerville found Principal Wittenburg's testimony on the topic "to be more credible" than Parents' testimony (Decision at 25, Dkt. No. 97-29), and the Court defers to this determination under the facts before it. *See B.S.,* 82 F.3d at 1499; *Wartenberg,* 59 F.3d at 891 (citation omitted); *L.E.,* 435 F.3d at 389 n.4 (explaining that a district court must accept the administrative hearings officer's credibility determinations "unless the nontestimonial, extrinsic evidence in the record would justify a contrary conclusion." (citation omitted)). Indeed, Parents have failed to offer any evidence calling Principal Wittenburg's testimony into question. Furthermore, Principal Wittenburg's site visit to Po'okela Maui prior to making the March 16, 2017 offer of FAPE there appears to represent due diligence. *Cf. K.D.,* 665 F.3d at 1123 ("[T]he fact that the DOE scouted out [the eventual placement setting] as a potential of placement for the . . . IEP [at issue] is not conclusive evidence that the DOE had decided to place [the child] there. . . ." (citation omitted)).

Parents have not shown that Principal Wittenburg pre-determined Student's 2017-18 placement based on any conversation she had with Takakura while visiting the Po'okela Maui campus prior to the final IEP meeting.

2. *Inclusion of Bus Transportation in the March 16, 2017 IEP*

Parents also argue that the fact that DOE representatives wanted to discuss the possibility of Student needing state-facilitated transportation under the March 16, 2017 IEP shows that the DOE had already decided to change Student's placement prior to finalizing that IEP. OB at 22, Dkt. No. 123 (citing Tr. of Admin. Hr'g (Oct. 31, 2017) at 281-83, Dkt. No. 100) ("Transportation, presumably to Po'okela, was inserted in the draft IEP during the March 13, 2017 IEP meeting."); Reply at 10-11, Dkt. No. 133 ("If placement was not yet decided, there would be no need to discuss transportation[, which] is a related service to be included in an IEP only 'if required to provide special transportation for a child with a disability.' ") (quoting 34 C.F.R. § 300.34(c)(16)(iii)). They argue that this is evidence of pre-determination, in-part because Parents—who work at Student's previous placement, AMS—have always refused transportation as part of Student's prior IEPs. In fact, Mother testified that she declined transportation services during the March 15, 2017 meeting, but one of the district resource teachers "insisted that she accept." Decision at 11-12 (FOF 55), Dkt. No. 97-29 (citing, in relevant part, Tr. of Admin. Hr'g (Oct. 31, 2017) at 281-84 (Mother), Dkt. No. 100).

Parents, in other words, seek to penalize the IEP team for its thoroughness. Indeed, AHO Somerville described the transportation issue as follows:

> At the March 15, 2017 IEP meeting, [one of the district resource teachers] discussed

> busing as a transportation option. Parents said that Student would need an aid [sic] when riding the bus, and the IEP team said that this would be addressed through a transition plan. When Mother questioned why transportation services were not in Student's previous IEP, [the teacher] stated that this was a [special education] service offered to all eligible students, and she preferred to include it in the IEP. Father 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.

Decision at 23, Dkt. No. 97-29 (explaining that "[t]he audio recording of the IEP meeting [was] quite different from Mother's recollection" that DOE officials insisted that she accept transportation services, "calling her credibility into question); *accord* Decision at 11 (FOF 54) (citing Resp. Admin. Ex. 7 at 1008 [CD2 of IEP Meeting (Mar. 15, 2017)] at 49:40-51:23, Dkt. No. 105-5 at 16). And despite Parents' contention (Reply at 10-11, Dkt. No. 133), there is no prohibition on including services that only *might* be necessary in a student's IEP. *See* 34 C.F.R. § 300.34(c)(16)(iii).

Additionally, Parents take issue with AHO Somerville's conclusion about the adequacy of a "transition plan" in the March 16, 2017 IEP—namely, they argue that the DOE merely made a plan to make a plan, which they allege is not adequate under the IDEA. *See* OB at 27-29, 35-36, Dkt. No. 123. But the fact that the

IEP team included elements such as bus transportation can be seen as an aspect of the very transition plan Parents claim was absent.[14] Moreover, and perhaps more importantly, "a transition plan may be created (and appropriately developed) after an IEP has been completed." *Anthony C. ex rel. Linda C. v. Dep't of Educ.,* 2014 WL 587848, *10 (D. Haw. Feb. 14, 2014) (citation omitted). Indeed, the logical progression of the annual IEP involves developing a plan, and *then* determining whether the State can implement that plan at a suggested placement along the continuum of placement options. *See Spielberg,* 853 F.2d at 259. It makes sense, then, that without knowing where the suggested placement would be, DOE was thoroughly planning by provisionally addressing potential transportation services.

Moreover, it appears a concerted effort was made to begin developing a transition plan in consultation with Parents, but no such planning meeting ever took place due to Parents' unavailability and the instant federal lawsuit. *See* Decision at 19 (FOFs 87-92), Dkt. No. 97-29 (citing, in relevant part, Resp. Admin. Ex. 4 at 378 [Mar. 24, 2017 Wittenburg Letter], 376 [Mar. 29, 2017 Whiteley Email], 374 [Mar. 29, 2017 Whiteley Email], 372 [Mar. 31, 2017 Whiteley Email], Dkt. No. 104-6; Resp. Admin. Ex. 1 at 21-26 [Parents' Mar. 31, 2017 Correspondence & Due Process Request], Dkt. No. 104-2 (noting that Parents were in Israel and would be

[14] Perhaps tellingly, Parents find fault with the very offer of transportation services and then do so again when insufficient details regarding those services is described.

unable to participate in any meetings until they returned—i.e., until the week of April 24, 2017)). As such, the following conclusion in AHO Somerville's Decision is supported by the Administrative Record:

> The IEP included a transition plan to a [public separate facility]. 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 [to] him 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 [Due Process Complaint] was filed.

Decision at 32, Dkt. No. 97-29.

Accordingly, addressing transportation services in the March 16, 2017 IEP is not evidence of pre-determination.

3. *Pre-Printed Form*

Parents have also argued that the DOE arrived at the March 16, 2017 meeting with "a pre-printed IEP indicating placement (under the Least Restrictive Environment or LRE) as Po'okela Maui," which they claim

is evidence of pre-determination. Due Process Compl. at 3, Dkt. No. 97-2; *see also* Tr. of Admin. Hr'g. (Oct. 30, 2017) at 37 (Father), Dkt. No. 99. However, Father acknowledged during the Administrative Hearing before AHO Somerville that he did not receive any draft IEP *with the placement recommendation filled out* prior to or at the start of the IEP meeting on March 16, 2017. Tr. of Admin. Hr'g (Oct. 30, 2017) at 77-78, Dkt. No. 99 ("If I insinuated that I received th[e] [March 16, 2017 IEP] at [the] March 16 meeting, that is not true."); *accord* Tr. of Admin. Hr'g (Nov. 2, 2017) at 467-68, 476-77 (Whiteley), Dkt. No. 102 (confirming that the draft IEP at the March 16, 2017 meeting did not have placement filled in). Moreover, even if the placement recommendation had been written into the draft prior to the March 16, 2017 meeting, it is not clear that such a fact would evidence pre-determination. *See Deal,* 392 F.3d at 858 (explaining that school officials are generally "permitted to form opinions and compile results prior to IEP meetings" so long as those officials "come to the meeting with suggestions and open minds, not a required course of action") (citing *N.L. ex rel. Mrs. C. v. Knox Cty. Schs.,* 315 F.3d 688, 693-94 n.3 (6th Cir. 2003)). And "[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process, draft IEPs are not impermissible under the IDEA." *M.M. ex rel. A.M. v. New York City Dep't of Educ.,* 583 F. Supp. 2d 498, 506 (S.D.N.Y. 2008) (citing *Deal,* 392 F.3d at 858; *Nack ex rel. Nack v. Orange City Sch. Dist.,* 454 F.3d 604, 611 (6th Cir. 2006)). Parents offer no further evidence.

Accordingly, the Court holds that the fact that members of the IEP team may have arrived at the March 16, 2017 meeting with print-outs of a draft IEP is not evidence of pre-determination.

4. *Parental Participation*

Parents argue that because Po'okela Maui and other potential, non-AMS placements were not discussed until the fifth and final IEP meeting on March 16, 2017, they were denied full participation in the IEP process. OB at 29-33, Dkt. No. 123; *see also, e.g.,* Tr. of Admin. Hr'g (Oct. 30, 2017) at 32-34 (Father), Dkt. No. 99; Tr. of Admin. Hr'g (Oct. 31, 2017) at 284, 313 (Mother), Dkt. No. 100. This argument fails for three reasons.

First, the record clearly shows that Parents *did* actively and substantially participate in the creation of Student's March 16, 2017 IEP.[15] Indeed, Parents attended all five IEP meetings (including the final meeting that focused on LRE and the placement decision) as members of the IEP team (*see, e.g.,* Tr. of Admin. Hr'g (Nov. 1, 2017) at 391, Dkt. No. 101), and by all accounts, they discussed AMS as their preferred placement for Student throughout the IEP development process. *See, e.g.,* Tr. of Admin. Hr'g (Nov. 1, 2017) at 324, 328, 350, 390-91 (Wittenburg), Dkt. No. 101 (stating

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[15] *See* Decision at 23, Dkt. No. 97-29 (distinguishing *Doug C. v. Haw. Dep't of Educ.,* 720 F.3d 1038 (9th Cir. 2013), "because the parent *was not present* at the IEP meeting, and the DOE held the meeting without him").

that Parents "did talk a lot about AMS and the program and how [Student] was doing there" throughout all of the IEP meetings, including the meeting on March 16, 2017). *See Hanson,* 212 F. Supp. 2d at 487 (rejecting plaintiffs' assertion of a procedural violation because the parents "were present at all the meetings and were thereby given a full opportunity to participate in the formulation of the IEP"). Moreover, "[w]hen the IEP team discussed the option of placement in a [public separate facility] at the March 16, 2017 IEP meeting, Parents readily participated and the discussion lasted 27 minutes." Decision at 24, Dkt. No. 97-29; Tr. of Admin. Hr'g (Nov. 2, 2017) at 414-16, 421, 446, 455-56, 491, 507-08 (Whiteley), Dkt. No. 102 (stating that, although there was no "formal discussion" about a private separate facility during the March 16, 2017 IEP meeting, "[i]t was mentioned throughout the discussion" about other options on the LRE continuum). Indeed, contrary to their assertion that the final IEP meeting was cut short after Principal Wittenburg indicated that the March 16, 2017 IEP could be implemented at Po'okela Maui (*see* Reply at 8, Dkt. No. 133 (suggesting that the DOE "refuse[d] to even discuss retaining [Student] at AMS and den[ied] Plaintiffs the opportunity to explain why AMS is the LRE for [Student]")), the record shows that Parents requested further discussion, and the IEP team complied. Decision at 24, Dkt. No. 97-29; *see also* Decision at 14-15 (FOF 63) (citing CD of IEP Meeting (Mar. 16, 2017) at 1:00:43-1:05:05, 00:00-12:57, Dkt. No. 105-5 at 17). Specifically, Mother "handed out documents regarding LRE to the IEP team," which the IEP team discussed

for "approximately four minutes" before taking a short break. Decision at 24, Dkt. No. 97-29. As the Decision explains:

> [a]fter the break, the discussion lasted another 13 minutes. Parents raised their concerns about the [autism resource teacher at Po'okela Maui], stated she was unethical, and they had another current complaint about her. Father stated there's "no way in hell I'm going to have her in charge of my kid's program." He further stated that if he had his way, the [autism resource teacher] would not have her BCBA license within a few months and the [public separate facility] would have to be run by someone else. Father said the [public separate facility] was a "joke" and was not an improvement over the private facility . . . Principal made an offer of FAPE at the [public separate facility]. 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.

Decision at 24, Dkt. No. 97-29; *see also* Tr. of Admin. Hr'g (Nov. 1, 2017) at 390-91 (Wittenburg), Dkt. No. 101 (noting that she responded to Mother's concerns about why placement should continue at AMS, and not at Po'okela Maui, at the end of the March 16, 2017 meeting).

Second, Parents' contention that they were unable to *meaningfully* participate in the IEP formulation

process because they were unaware of Po‘okela Maui prior to the March 16, 2017 IEP meeting is both contradicted by the record and legally unsound. Indeed, although Parents have repeatedly claimed that they had never heard of Po‘okela Maui until one hour and twenty minutes into the March 16, 2017 IEP meeting (*e.g.,* Tr. of Admin. Hr’g (Oct. 30, 2017) at 34 (Father), Dkt. No. 99; Tr. of Admin. Hr’g (Oct. 31, 2017) at 272 (Mother), Dkt. No. 100; Tr. of Admin. Hr’g (Nov. 2, 2017) at 581 (Father), Dkt. No. 102), AHO Somerville found that claim to be incredible based on testimony and other evidence in the Administrative Record:

> Father also testified that he had never heard of the [public separate facility Po‘okela Maui] until an hour and 20 minutes into the fifth IEP meeting. This is not true. At the IEP meeting, he did not ask specifics about the school. Instead he asked, “is it open?” The Principal [and one of the district resource teachers] said “yes.” Then Father stated, “Lesley said they didn’t have staff.” Clearly, he was aware of [Po‘okela Maui], again calling his credibility into question.
>
> Similarly, Mother testified that they were not able to actively participate in the placement discussion, because they had no information about [Po‘okela Maui]. She testified that [she] did not know where [Po‘okela Maui] was or if it was open. However, at the IEP meeting Mother stated that she was not sure if the community activities could be implemented and if [Student’s] individual needs could be met there, and noted the [public

> separate facility]'s location at "Lipoa." Obviously, Mother knew the general location of [Po'okela Maui], again calling her credibility into question.

Decision at 25, Dkt. No. 97-29; *see, e.g.,* Decision at 14 (FOF 62), Dkt. No. 97-29 (citing, in relevant part, CD of IEP Meeting (Mar. 16, 2017) at 33:32-1:00:42, Dkt. No. 105-5 at 17). The Court defers to AHO Somerville's careful credibility determinations here and is unpersuaded by Parents' contention (*see* OB at 37-38, Dkt. No. 123) that AHO Somerville's findings are erroneous and/or do not support the above conclusion. *See B.S.,* 82 F.3d at 1499 (citations omitted); *Wartenberg,* 59 F.3d at 891 (citation omitted); *L.E.,* 435 F.3d at 389 n.4 (citation omitted).

Moreover, even if Parents had been ignorant of the existence of a public separate facility on Maui prior to the March 16, 2017 IEP meeting, there is nothing in the IDEA requiring the DOE to allow parents to visit the school of the proposed placement prior to finalizing their child's annual IEP. *See Hanson,* 212 F. Supp. 2d at 487 (noting the absence of caselaw "holding that under the IDEA parents must be permitted to observe the proposed placement prior to an IEP decision in order to be able to fully participate in the process"). Rather, the statute requires merely that parents be active partners in the process. Here, Parents did actively participate, as noted above. *Id.* As such, it is sufficient that other members of the IEP team had first-hand information to assist in determining whether Student's March 16, 2017 IEP could be implemented at Po'okela

Maui. *See, e.g.,* Tr. of Admin. Hr'g (Nov. 1, 2017) at 400, 404-05, 407 (Wittenburg), Dkt. No. 101 (admitting that her own knowledge of the student population at Po'okela Maui on March 16, 2017 was limited, but explaining that various other members of the IEP team provided information about the facility and whether Student's March 16, 2017 IEP could be implemented there).

Third, although the IDEA requires the DOE to provide Parents with an opportunity for meaningful participation in the development of an IEP, "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." Decision at 24, Dkt. No. 97-29 (citing *Burlington Sch. Comm. v. Dep't of Educ.,* 471 U.S. 359, 368-69 (1996); 20 U.S.C. § 1401(19) (1982)); *see also Laddie C.,* 2009 WL 855966 at *4 ("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."). Indeed, "[i]f the Parents do not agree with the DOE's offer [of FAPE], they do not have to accept it," and they "have the right to file a due process complaint pursuant to Hawaii Administrative Rules § 8-60-61." Decision at 24, Dkt. No. 97-29 (citing *Doe by Gonzales v. Maher,* 793 F.2d 1470, 1490 (9th Cir. 1986) (explaining that if a consensus cannot be reached regarding the formulation of an IEP, "the agency has the 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"), *aff'd as modified sub nom. Honig v. Doe,* 484 U.S. 305 (1988)). The instant matter arises out of just such a challenge by Parents.

The Court therefore holds that Parents "have not shown that the March 16, 2017 IEP denied Student a FAPE" (Decision at 32, Dkt. No. 97-29) and AFFIRMS the AHO's Decision.

IV. Parents' Request for Reimbursement

A parent or guardian is "entitled to reimbursement only if a federal court concludes both (1) that the public placement violated the IDEA, and (2) that the private school placement was proper under the Act." *Cty. of San Diego,* 93 F.3d at 1466 (citing *Florence Cty. Sch. Dist. 4 v. Carter,* 510 U.S. 7 (1993)). Because the Court holds that the March 16, 2017 IEP does not deny Student a FAPE, Parents are not entitled to reimbursement for Student's private educational expenses via AMS during the 2017-18 school year. *Baquerizo,* 826 F.3d at 1189 (citing *Cty. of San Diego,* 93 F.3d at 1466).

CONCLUSION

The AHO's December 20, 2017 Decision (Dkt. No. 97-29) is AFFIRMED.

IT IS SO ORDERED.

DATED: August 7, 2018 at Honolulu, Hawai'i.

/s/ Derrick K. Watson
Derrick K. Watson
United States District Judge

[SEAL]

J. G. v. State Of Hawaii, Department Of Education, et al.
CIV. NO. 17-00503 DKW-KSC, **ORDER AFFIRMING THE DECEMBER 20, 2017 DECISION OF THE ADMINISTRATIVE HEARINGS OFFICER**

[SEAL]

OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAI'I

In the Matter of STUDENT, by and through his Parents, Petitioners, vs. DEPARTMENT OF EDUCATION, STATE OF HAWAI'I, Respondent.	DOE-SY1617-067A FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION (Filed Dec. 20, 2017)

**FINDINGS OF FACT,
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 his 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. Father appeared pro se with Advocate Robert C. Thurston, Esq.; Respondents were represented by Kunio Kuwabe, Esq. and Department of Education District Educational Specialist ("DES") G.C. Father, Mr. Thurston, and DES G.C. 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 DOE DES M.R. Mr. Shnider and DES M.R. 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 [sic] Establish Burden of Proof. On August 11, 2017, Petitioners filed an Amended Declaration of Howard Greenberg. 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 the private

facility 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 [sic] 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 [sic] 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 at the Ralph Rosenberg Court Reporters' Offices at 2233 Vineyard Street, Wailuku, Maui, Hawai'i by the undersigned Hearings Officer. Petitioners were represented by Mr. Shnider; Parents and Student were present. Respondent was represented by Mr. Kuwabe; DES M.R. 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 Public Separate Facility ("PSF"); and

B. The PSF is not the least restrictive environment ("LRE"); and Petitioners request the following relief:

A. Find the private center as the appropriate and stay put placement;

B. Reimbursement for tuition for private services; and

C. Compensatory education.

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

III. FINDINGS OF FACT

1. Student was born on April 10, 2003. Resp. Exh. 1 at 002.

2. Student has been diagnosed with Autism Spectrum Disorder ("ASD"), Level 3 (requiring very substantial support) with early language impairment, Anxiety Disorder, and Obsessive-Compulsive Disorder ("OCD"). Pet. Exh. 4 at 121-122.

3. Student was found eligible for IDEA services under the ASD criteria. Resp. Exh. 3 at 112.

4. Father testified that the DOE does not have the resources to educate children with ASD. When Student exhibited a negative behavior, he would be rewarded by going to the sensory room. Father testified that it would turn children into "monsters." Father testified he removed Student from the DOE elementary school when he was six years old after Mother witnessed Student being carried "upside down . . . like an animal on a pole." Parents removed Student from the

DOE elementary school in October 2009. Pet. Exh. 2 at 3; TR 16:18 – 18:6.

5. On April 25, 2010, the private doctor[1] wrote a letter stating Student "is an extremely unruly, difficult-to-control-boy, who is essentially nonverbal."[2] The private doctor gave Student a "prescription" for applied behavioral analysis ("ABA") 40 hours per week.[3] Pet. Exh. 14.

6. Student has attended the private facility for the last seven years. Parents are the sole owners of the private facility. Father testified that Student has been learning and improving there. The private facility uses a multisensory mode of teaching overseen by a board certified behavioral analyst ("BCBA"). Student learns visually, auditorily, kinesthetically, and tactilely. TR 12:10-22; TR 15:7-21; TR 66:2-9.

7. The private facility has a customized program for Student's specific and unique needs. Student has registered behavioral technicians ("RBTs") that are overseen by a BCBA, speech language therapy ("SLT"), community outings, reading, math, and a sensory program to help regulate him. Currently, there is no licensed teacher at the private facility, and there are no plans to hire one. TR 18:9 – 19:22; TR 81:11 – 86:1.

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[1] According to the private doctor's letterhead, he specializes in Allergy and Environmental Medicine, and Childhood Disorders. His address was in Oregon City, Oregon.

[2] The letter did not state Student has ASD.

[3] The address on the "prescription" was in Oregon City, Oregon.

8. The private facility is next to a grocery store, library, and shops. Student's program includes visits to these places. The private facility is across a large park with tennis and basketball courts used for outdoor activities. The private facility shares a campus with a DOE Charter School. TR 44:8-23; 499:3-12.

9. Father testified that the private facility has 12 full-time students that have high functioning ASD. Student feels more comfortable with other children that have high functioning ASD. He 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. The private facility does not have fluorescent lights. TR 14:8 – 15:6.

11. Father testified that Student has behavioral issues that require support. He has severe transition issues that can result in self-injurious behaviors ("SIBs"), such as biting his hands. Father testified that a change in Student's program and placement would be "catastrophic." TR 11:10 – 12:7.

12. BCBA C.H. testified as an expert in ABA. TR 183:13-16.

13. BCBA C.H. is the regional manager for the Center for Autism and Related Disorders ("CARD"). TR 179:17-19.

14. BCBA C.H. worked with Student from 2011 through June 2016, and periodically since then on an as-needed basis. Up until 2016, she consulted with

Student's team. BCBA C.H. conducted Facetime observations with Student, and she would meet with him every three months in person. TR 185:14-22; TR 194:22 – 195:1.

15. BCBA C.H. testified that Student had transition issues including transitions within and out of the private facility and with new staff members. He 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 the center and into the community, he could exhibit SIBs such as biting his hand, hitting himself in the head, falling to the floor, pushing through others, and engage in obsessive behaviors and vocal protests. TR 186:2-25.

16. BCBA C.H. stated that when Student had new staff members introduced to his program, they would overlap in training with a current staff member. This overlap in training could last months. TR 187:6-18.

17. When BCBA K.G. started working with Student, she went an "extensive desensitization process." She observed Student, and spoke with his previous BCBAs and RBTs. She testified if Student were to have a new staff member without the desensitization process, Student would exhibit maladaptive behaviors, and his noncompliance would increase. TR 239:4 – 240:21.

18. BCBA C.H. witnessed Student working with his current BCBA K.G. 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"). BCBA C.H. testified that recently, Student has exhibited little to no SIBs through the use of the BIP. TR 188:6 – 189:2.

19. BCBA C.H. testified that Student has made progress at the private facility and is receiving an educational benefit there. Student's communication and motor abilities have improved, he has acquired learning skills, and the skills are staying in his repertoire. He has shown reductions in some of his aggressive and obsessive behaviors and SIBs, to the extent that he is capable of learning. He completed a table-time activity, and engaged in spontaneous speech. BCBA C.H. stated she was not aware of any planned inclusion activities with the neurotypical peers at the Charter School that share the same campus as the private facility. TR 192:19 – 194:11; TR 195:2-13; TR 225:1-9.

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

21. BCBA K.G. testified that neurotypical and higher functioning children with ASD can help

Student with his IEP goals, peer interaction, and communication skills. TR 241:9 – 242:12.

22. BCBA K.G. 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 ART testified as an expert in the field of ASD and special education. TR 522:10-14.

24. The ART has been certified as a BCBA doctorate level ("BCBA-D") since 2013 and she is licensed as a Behavior Analyst in the state of Hawaii. TR 519:12 – 520:1.

25. The ART visited the private facility many times to observe children and their programs. TR 28:18-22.

26. On May 22, 2015, Father filed a complaint with the Behavior Analyst Certification Board ("BACB") alleging the ART had committed ethical violations contrary to her BCBA licensure. He claimed the ACT [sic] provided: 1) false testimony which led to the termination of services from the private facility; 2) testimony based on observations of children without receiving authorization; and 3) testimony without accurate information. Father also claimed HIPAA violations and stated that the ART had testified at other hearings that children that attended the private

facility were "being harmed" by the program. Pet. Exh. 3, 4; TR 26:13 – 27:4.

27. On September 2, 2015, the BACB issued a "Confidential BACB Advisory Warning" finding that the ART "did not breach the BACB's Professional and Ethical Standards." The BACB clarified that if the ART "provides testimony or service recommendation in the future that are not data-driven and pursuant to acceptable applied behavior analytic (ABA) practices, then such testimony or service recommendations should not be provided in conjunction with [the ART's] BCBA-D credential." Pet. Exh. 4; TR 27:4-24.

28. The BACB Advisory Warning did not affect the ART's BCBA-D certification or licensing. TR 525:5 – 526:1.

29. After the Advisory Warning was issued, Father sent the ART an email stating the he "was ashamed of her." The ART did not visit the private facility after the complaint was filed and Advisory Warning was issued. TR 28:23 – 29:20.

30. Mother testified that she knew the ART was a DES in March 2017, because Mother is an administrator, and "it's kind of a small world." TR 305:22-25.

31. Private Speech Language Pathologist ("SLP") O.S. testified that she has been working with Student for seven years and has seen progress. When she started working with Student, he required maximal cues and prompting; Student is now capable of saying six to eight-word sentences given picture cues

and models. His language is more spontaneous in a structured setting. She stated that Student has "benefitted tremendously" from his placement at the private facility. Student needs a level of safety and comfort and a feeling that someone knows him and cares about him in a well-established environment in order to make progress. TR 106:7 – 109:19.

32. Private SLP O.S. testified that a change in placement to a different environment with people who do not know him "would have a fairly devastating impact" on Student, his communication could regress, and he could have SIBs. Student's difficulty with transitions is well-documented, even with people he is familiar with. He also has transition issues going from the classroom to the bathroom or outside. She stated that "as long as he was in his established routine with his established people, he was doing reasonably well, but the minute that you took him outside of any of that . . . he would start to bang his 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 SLP O.S. testified that Student would best progress at the private facility. TR 116:23 – 117:6.

34. Private SLP J.B. testified as an expert in the field of speech language pathology. TR 137:7-10.

35. Private SLP J.B. has worked with Student since 2013. She focuses on Student's speech and language goals and works with Parents and the staff at

the private facility to facilitate his goals. TR 137:16 – 138:6.

36. Private SLP J.B. testified that Student has progressed in the time she has worked with him. She has seen improvement in his voice volume and response to visual pictures. She believed that Student was "being serviced appropriately." TR 138:9 – 139:3.

37. Private SLP J.B. testified that his placement at the private facility is appropriate from her perspective of a SLP, because Student has a small group of peers and staff that he 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 his peers, and private SLP J.B. has used the peers in some of his speech sessions to practice interacting and communication strategies. She testified that transitions are a challenge for Student. When he is around new people he might become frustrated and have negative behaviors; he would need extra time to get focused and could miss a learning opportunity. TR 139:16 – 140:24.

38. Private SLP J.B. testified that when a new staff member is introduced to Student, they would pair with a familiar person. She would demonstrate the goals they were working on and model the strategies they were using. In her expert opinion, she stated that to implement Student's speech and language goals, he would need familiar staff and his small group of peers. Student thrives with familiarity and routine, structure, and schedule. She believed it was appropriate for

Student to continue his placement at the private facility. TR 141:2 – 149:17.

39. The special education ("SPED") teacher testified that she had observed Student at the private facility 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 the private facility 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 his table activity, isolated from his peers. Resp. Exh. 3 at 351.

41. The SPED teacher also observed Student at the private facility 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 Times Supermarket. Times Supermarket had fluorescent lighting. The SPED teacher never observed Student interacting with typically developing peers, higher-functioning children with ASD, or with general education students at the Charter School. Resp. Exh. 4 at 309-311, 321-323, 329-331, 344-346; TR 431:12 – 432:5; TR 499:24-502:5.

42. The ART developed the public separate facility ("PSF") from an idea to an actual location. She continues to support the PSF by providing resources and making sure that it is running smoothly. TR 517:15-24.

43. The PSF serves students with ASD and those that need a more restrictive environment than the Home School. The PSF 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 PSF 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 she attended the open house at the PSF prior to Student's 2017 IEP meetings. The PSF served students with ASD and those 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 BCBA K.A., Principal, District Resource Teacher ("DRT") S.R., DOE SLP, DOE Occupational Therapist ("OT"), 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 BCBA K.A., Principal, DRT S.R., DOE SLP, DOE OT, 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 BCBA K.A.,

Principal, DRT S.R., DOE SLP, DOE OT, 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, spitting or holding his saliva, toileting issues, sensory issues, and OCD behaviors that impede his learning. Parents also stated Student "is also adversely affected when being in a school environment around neuro-typical children. It lowers his self-esteem, distracts his ability to focus and is overstimulating to his unique neurobiology. In fact, the Charter School that shares the same church grounds as my son's program politely agreed to move their morning circle assembly as they had noted that it was causing self-injurious behaviors for my son due to their meeting proximity." 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 the private facility. Pet. Exh. 7.

49. On March 15, 2017, the SPED teacher responded to Parents' March 14, 2017 email. She 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 BCBA K.A., Principal, DRT S.R., DOE SLP, DOE OT, 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, Mother 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 team explained that they do not list specific stores or streets in the IEP, and Mother 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 DRT S.R. 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 Mother questioned why transportation services were not in Student's previous IEP, DRT S.R. stated that this was a SPED service offered to all eligible students, and she preferred to include it in the IEP. Father 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. Mother testified that the DRT S.R. told Parents, "you will need transportation [services], you should take it." Mother declined the services and

stated that they did not need transportation, because Parents drove Student to the private facility. Mother testified that DRT S.R. insisted that she 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 BCBA K.A., Principal, DRT S.R., DOE SLP, DOE OT, and SPED and general education teachers were present. The IEP team considered Student's assessment reports, IEP progress reports, data from the private facility, input from Parents and personnel from the private facility, 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.[4] DRT S. R. said that generally speaking, students respond to being with their peers. Father stated that being with peers would have an adverse effect on Student. Student keeps a distance from neurotypical peers, because they are upsetting to him. If Student was placed in a regular classroom, he would not work, there would be no educational benefit, and he would be disruptive to other students. DRT S.R. asked if Student needed a smaller more controlled environment with similarly developing peers. Father stated that Student likes to be with children with ASD, and they do not have to be on the same developmental scale. The private facility has children who are higher functioning and lower functioning than Student. Student has not had much interaction with children with Down syndrome or other disabilities, because they have impacted his self-esteem in the past. Father stated Student does not socialize with neurotypical peers and to be in a general education setting would cause overstimulation and Student would be disruptive. Father stated that Student benefits from being with children with ASD. 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

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[4] 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.

stated Student could be on a diploma path there. Mother stated Student could do that on-line. Father stated it would be "ridiculous" for Student to be in general education; he would receive no benefit, and it would be detrimental for him and the class. Father also stated that Student would not benefit from the SPED classroom because of the close proximity to the neurotypical peers on campus. He stated that they had to ask the Charter School not to be so close to the outside of the private facility's building, because in [sic] causes Student to have negative reactions inside the building. Mother stated that they had to ask the Charter School to stop "encroaching" on the private facility's space. When the Charter School would hold "morning circle," Student would scream when he walked by. The Principal rejected placement in the general education setting based on their discussion. Father agreed. Resp. Exh. 2 at 82, 83; Resp. Exh. 7 at 1009, CD 11:07-19:50; TR 322:6 – 324:5.

61. The team next discussed placement in the special education setting. The SPED teacher noted that they could implement aspects of Student's IEP this setting. Mother stated that if Student is doing well in one place, with people that know him and have a history with him, he should not be moved. She said to move him from one building to another for the "school's convenience" would not serve Student's unique needs. She 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. Mother felt that if the team was talking about

a transition or change, it would be more restrictive for Student's unique needs because he 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. Father said when Student was in a DOE School previously, he was isolated from his peers, did not have his needs met, and it was not beneficial. Mother found it to be more restrictive. The SPED teacher noted that if Student attended the Home School, he would be a member of the SPED classroom. The SPED program was a very small group of children, some of whom had ASD. The Principal rejected placement in the general education setting based on their discussion. Father 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 PSF. Father asked, "is there such?" The Principal and DRT S.R. stated there was. Father asked, "is it open?" The Principal DRT S.R. said "yes." Father stated, "Lesley said they didn't have staff." DRT S.R. explained the PSF had staff, there were children attending, and they could set up a tour any time for them. Parents were told the teacher there was DRT C.T. and the BCBA was the ART. 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. Mother

said the "down-side" was they had filed a "state complaint" against the ART, and "that would be a problem." Father stated he couldn't speak about the facility, because it was brand new. Student's program at the private facility was seven years old, and he had familiar people there that worked with him and knew his issues. Father said that Student has extreme needs, and placement at the PSF was not in his best interest. He stated that if Student was not doing well in a DOE SPED program, then he would "probably send him to a public separate facility" before a private facility. Father focused on the detrimental and harmful effects that would occur. DRT S.R. explained that the PSF focused on functional skills, CBI, and cooperative skills. Mother stated that she was not sure if the community activities could be implemented and noted the PSF's location at "Lipoa" and if his individual needs could be met there. The SPED teacher said that the IEP could be implemented at the PSF 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 PSF. The Principal complied, and Mother handed out documents regarding LRE to the IEP team. They discussed Mother's documents for approximately four minutes, and the DOE SLP requested a short break. After the break, Parents raised their concerns about the ART, stated she was unethical, and they had

another current complaint about her.[5] Father stated there's "no way in hell I'm going to have her in charge of my kid's program." He further stated that if he had his way, the ART would not have her BCBA license within a few months and the PSF would have to be run by someone else. Father said the PSF was a "joke" and was not an improvement over the private facility. He accused the Principal of having "marching orders" from the DOE district to cut costs. The Principal replied she did not have "marching orders" and accepted the PSF to be the LRE. Principal made an offer of FAPE at the PSF. Parents argued that all the placement options were not discussed and Principal 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;

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[5] The ART testified that she has not visited the private facility since May 22, 2015. TR 525:5-526:1.

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**
General Education Setting (80% or more of the school day)	REJECT	+ Respond to being with peers - Needs smaller environment	Overstimulated and unable to	Behaviors impede others
General Education and Special Education Setting	REJECT	- Curriculum not meaningful + Path to diploma	Negative reaction to neurotypical peers	Behaviors and accommodation/ Modifications impede
Special Education Setting	REJECT	+ Implement aspects of IEP	- Safety Concerns - Large environment - Overstimulated - Isolated	+ Member of classroom
Public Separate Facility	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
Private Separate Facility			+ Longevity of current program	
Public Residential Facility				
Private Residential Facility				
Homebound/Hospital				

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 PSF. She had observed other students, grades five through nine at the PSF several times. All the students at the PSF had ASD and were primarily lower-functioning. The PSF had approximately five students who needed more intensive supports, behaviorally and academically. The PSF has multiple sensory rooms, kitchen facilities, and it highlights functional life skills. TR 416:5 – 418:14.

66. Mother 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 public separate facility. He will have opportunities to interact with non-disable [sic] peers during community outings." Resp. Exh. 2 at 75.

68. The ART testified that Student would benefit from inclusion opportunities with his general education peers at the Home School. TR 532:16 – 534:1.

69. The IEP included a transition plan to a PSF. 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 him 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. Father 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. Father testified that Parents fully participated in the IEP in "everything except the placement decision; that was never discussed." He told the IEP team that Student's placement should continue at the private facility. TR 32:24 – 33:22.

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

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

74. Father disagreed that the IEP team reviewed the continuum of LRE placement options, because there was no discussion about the private facility or

the PSF. Father testified, for the Principal "to assert that the public facility would be a better program for my son's – for my son after seven years in a private program based on a 20-minute observation is insincere." TR 58:3-25.

75. There are currently five to six students at the PSF, and they have a range of skill level. One of the students is in high school, and the rest are from the Home School. Two students are nonspeaking and use alternative methods of communication, and another two are able to do some reading, writing, and speaking. TR 528:7 – 529:8.

76. After the IEP meeting, Parents visited the PSF and met DRT C.T. Father testified that DRT C.T. told him that the Principal had visited the PSF earlier in the week and told him that Student would be attending school there. TR 42:22 – 43:19; TR 79:21-23; TR 288:10 – 289:9.

77. DRT C.T. is a licensed SPED teacher and autism consulting teacher. He has a very strong understanding of basic ABA principles that he uses to support teams and students. TR 433:9-11; TR 534:10 – 535:21.

78. The Principal testified that she never had a discussion about Student with DRT C.T. TR 332:8-20.

79. Father testified that the PSF could not provide the services to meet Student's needs. The PSF has fluorescent lighting. The staff at the private facility had worked with Student for seven years. Student's

IEP included BCBA consultation, and Father did not want or trust the ART to provide those services. TR 46:3 – 47:23; TR 2887 [sic]:25 – 288:5.

80. Parents testified that the Principal only saw Student for 20 minutes when she made her 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 PSF 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 the private facility. Parents did not find the PSF 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 PSF had fluorescent lighting and objected to the ART'S involvement in Student's program. Parents alleged that the Principal predetermined Student's placement at the PSF, based on their discussions with DRT C.T. 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 BCBA consultation six times per week, and a transition plan to a PSF 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 he 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 PSF due to his 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 he would participate with disabled peers during all school hours in a PSF. 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 his SIBs, aggression towards others and OCD behaviors could potentially increase. It listed Parents' concerns when Student previously attended a DOE elementary school. He has attended the private facility for seven years, and he 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 the ART and did not want her working with Student. Parents noted they did not want Student to be around children with disabilities such and Down syndrome, because it impacts his 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 PSF was based on the LRE discussion. Student's IEP could be fully implemented

in a PSF, and the staff that would be implementing the program fully met the credentials and licensure required by their professions. She stated that they wanted to work with Student and his current educational staff to develop a plan to mitigate any potential negative effects as he transitions from one setting to another. She 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 [sic] a transition planning meeting. The meeting was scheduled for March 29, 2017; however, she 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 she was "sorry" that they did not attend the meeting that day to create an effective transition plan. She 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 she was "sorry" that they did not attend any of the three transition plan meetings. She noted, "your participation is highly encouraged and vital to success." She 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 Israel 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. BCBA K.G. started working with Student in June 2017. TR 237:19-21.

94. BCBA K.G. testified that Student has transition issues. Transitions occurred when Student walked from one room to another room or community setting, or when he switched to a non-preferred activity or staff member. He would pace, flap his hand, shout, and become noncompliant. He would move objects around and become agitated if someone moves them back. He would arrange his shoes multiple time or be focused on closing doors. TR 237:22 – 238:21.

95. BCBA K.G. testified that Student has made progress at the private facility and is receiving an educational benefit there. He has made progress in his public safety goals, matching colors, and fine motor academic goals working on the computer. TR 243:1-17.

96. BCBA K.G. 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 ASD, 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 that *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 (9th Cir. 1992).

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

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

C. Whether the 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 PSF.

Petitioners allege that DOE failed to provide Student with a FAPE because is [sic] 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 [sic] 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 Mother 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 Mother 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 Mother at the IEP meeting why it could not be done and she 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.

Mother also testified that the IEP team's offer to include transportation services in the IEP is further evidence of predetermination. Mother testified that at the March 15, 2017 IEP meeting, DRT S.R. told Parents, "you will need transportation [services], you should take it." Mother declined the services and stated that they did not need transportation, because Parents drove Student to the private facility. Mother testified that DRT S.R. insisted that she accept the transportation services.

The audio recording of the IEP meeting is quite different from Mother's recollection, calling her credibility into question. At the March 15, 2017 IEP meeting, DRT S.R. 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 Mother questioned why transportation services were not in Student's previous IEP DRT S.R. stated that this was a SPED service offered to all eligible students, and she preferred to include it in the IEP. Father 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 (9th 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. Dept 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 §860-61.

When the IEP team discussed the option of placement in a PSF 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 PSF, Parents requested further discussion. The Principal complied, and Mother handed out documents regarding LRE to the IEP team. They discussed Mother's documents for approximately four minutes, and the DOE SLP requested a short break. After the break, the discussion lasted another 13 minutes. Parents raised their concerns about the ART, stated she was unethical, and they had another current complaint about her. Father stated there's "no way in hell I'm going to have her in charge of my kid's program." He further stated that if he had his way, the ART would not have her BCBA license within a few

months and the PSF would have to be run by someone else. Father said the PSF was a "joke" and was not an improvement over the private facility. He accused the Principal of having "marching orders" from the DOE district to cut costs. The Principal replied she did not have "marching orders" and accepted the PSF to be the LRE. Principal made an offer of FAPE at the PSF. 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.

Father 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 his credibility into question. Father also argued that his conversation with DRT C.T. was evidence that Student's placement was predetermined. He testified that DRT C.T. told him that the Principal had visited the PSF earlier in the week and told him that Student would be attending school there. The Principal testified that she never had a discussion about Student with DRT C.T. and that she had visited the PSF 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.

Father also testified that he had never heard of the PSF until an hour and 20 minutes into the fifth IEP meeting. This is not true. At the IEP meeting, he did not ask specifics about the school. Instead he asked, "is it open?" The Principal DRT S.R. said "yes." Then

Father stated, "Lesley said they didn't have staff." Clearly, he was aware of the PSF, again calling his credibility into question.

Similarly, Mother testified that they were not able to actively participate in the placement discussion, because they had no information about the PSF. She testified that [sic] did not know where the PSF was or if it was open. However, at the IEP meeting Mother stated that she was not sure if the community activities could be implemented and if his individual needs could be met there, and noted the PSF's location at "Lipoa." Obviously, Mother knew the general location of the PSF, again calling her 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 PSF 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 PSF is not the LRE. Respondents argue that the PSF 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 PSF 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. DRT S. R. said that generally speaking, students respond to being with their peers. Father stated that being with peers would have an adverse effect on Student. Student keeps a distance from neurotypical peers, because they are upsetting to him. If Student was placed in a regular classroom, he would not work, there would be no educational benefit, and he would be disruptive to other students. DRT S.R. asked if Student needed a smaller more controlled environment with similarly developing peers. Father stated that Student likes to be with children with ASD, and they do not have to be on the same developmental

scale. The private facility has children who are higher functioning and lower functioning than Student.

Student has not had much interaction with children with Down syndrome or other disabilities, because they have impacted his self-esteem in the past. Father stated Student does not socialize with neurotypical peers and to be in a general education setting would cause overstimulation and Student would be disruptive. Father stated that Student benefits from being with children with ASD. 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. Mother stated Student could do that online. Father stated it would be "ridiculous" for Student to be in general education; he would receive no benefit, and it would be detrimental for him and the class. Father also stated that Student would not benefit from the SPED classroom because of the close proximity to the neurotypical peers on campus. He stated that they had to ask the Charter School not to be so close to the outside of the private facility's building, because in [sic] causes Student to have negative reactions inside the building. Mother stated that they had to ask the Charter School to stop "encroaching" on the private facility's space. When the Charter School would hold "morning circle," Student would scream when he walked by. The Principal rejected placement in the general education setting based on their discussion. Father 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 [sic] this setting. Mother stated that if Student is doing well in one place, with people that know him and have a history with him, he should not be moved. She said to move him from one building to another for the "school's convenience" would not serve Student's unique needs. She 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. Mother felt that if the team was talking about a transition or change, it would be more restrictive for Student's unique needs because he 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. Father said when Student was in a DOE School previously, he was isolated from his peers, did not have his needs met, and it was not beneficial. Mother found it to be more restrictive. The SPED teacher noted that if Student attended the Home School, he would be a member of the SPED classroom. The SPED program was a very small group of children, some of whom had ASD. The Principal rejected placement in the general education setting based on their discussion. Father thanked the Principal.

The IEP team then discussed placement at a PSF. Father asked, "is there such?" The Principal and DRT S.R. stated there was. Father asked, "is it open?' " The Principal DRT S.R. said "yes." Father stated, "Lesley said they didn't have staff." DRT S.R. explained the PSF had staff, there were children attending, and they could set up a tour any time for them. Parents were told the teacher there was DRT C.T. and the BCBA was the ART. 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. Mother said the "downside" was they had filed a "state complaint" against the ART, and "that would be a problem." Father stated he couldn't speak about the facility, because it was brand new. Student's program at the private facility was seven years old, and he had familiar people there that worked with him and knew his issues. Father said that Student has extreme needs, and placement at the PSF was not in his best interest. He stated that if Student was not doing well in a DOE SPED program, then he would "probably send him to a public separate facility" before a private facility. Father focused on the detrimental and harmful effects that would occur. DRT S.R. explained that the PSF focused on functional skills, CBI, and cooperative skills. Mother stated that she was not sure if the community activities could be implemented and noted the PSF's location at "Lipoa" and if his individual needs could be met there. The SPED teacher said that the IEP could be implemented at the PSF 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 PSF. The IEP team complied.

Mother 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 [sic] does not match Mother'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 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**
General Education Setting (80% or more of the school day)	REJECT	+ Respond to being with peers - Needs smaller environment	Overstimulated and unable to	Behaviors impede others
General Education and Special Education Setting	REJECT	- Curriculum not meaningful + Path to diploma	Negative reaction to neurotypical peers	Behaviors and accommodation/ Modifications impede
Special Education Setting	REJECT	+ Implement aspects of IEP	- Safety Concerns - Large environment - Overstimulated - Isolated	+ Member of classroom
Public Separate Facility	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
Private Separate Facility			+ Longevity of current program	
Public Residential Facility				
Private Residential Facility				
Homebound/Hospital				

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

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

The SPED teacher testified that she had observed Student at the private facility 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 the private facility 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 his table activity, isolated from his peers. The SPED teacher also observed Student at the private facility 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 Times Supermarket. Times Supermarket

had fluorescent lighting. The SPED teacher never observed Student interacting with typically developing peers, higher-functioning children with ASD, or with general education students at the Charter School.

The IEP stated Student would "participate with disabled peers during all school hours in a public separate facility. He will have opportunities to interact with non-disabled peers during community outings." The PSF serves students with ASD and those that need a more restrictive environment than the Home School. There are currently five to six students at the PSF, and they have a range of skill level. One of the students is in high school, and the rest are from the Home School. Two students are nonspeaking and use alternative methods of communication, and another two are able to do some reading, writing, and speaking. The curriculum at the PSF has an "off-site component," and students will be able to regularly practice what they learn in a variety of community settings. The PSF provides more opportunities for Student to be educated with non-disabled peers.

In *K.D. v. DOE*, 665 F.3d 1110 (9th 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 him at Pearl Harbor Kai and included provisions that he would have the opportunity to interact with non-disabled peers. In contrast, Loveland Academy placed K.D. in a classroom with only students who had mental health or learning disabilities. K.D.'s Loveland placement did not square with

one of the main purposes behind the IDEA—to combat the "apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special education classes." *N.D. v. DOE*, 600 F.3d 1104 at 1115 (9th Cir. 2010). Thus, the evidence supported the district court's decision that K.D.'s 2007 and 2008 IEPs offered K.D. appropriate placement at Pearl Harbor Kai.

The facts of *K.D.* are similar to the facts of this case. Here, Parents are requesting that Student be placed at the private facility. The private facility currently has 12 full-time students that have high functioning ASD.[6] No general education students attend the private school. Their interaction with non-disabled peers is minimal and not provided on a regular basis. BCBA K.G. 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. BCBA C.H. stated she was not aware of any planned inclusion activities with the neuro-typical peers at the Charter School that share the same campus as the private facility. The private facility does not have a sufficient level of socialization, because the interaction with non-disabled peers is not frequent enough and not planned.

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[6] At the March 16, 2017 IEP meeting, he stated that the private facility has children who are higher functioning and lower functioning than Student.

Petitioners claim that Student does have access to neurotypical peers at the private facility because they share a campus with the Charter School. However, the testimony and evidence contradict this claim. In an email dated March 14, 2017, Father stated that the Charter school "politely agreed to move their morning circle assembly as they had noted that it was causing self-injurious behaviors for my son due to their meeting proximity." Similarly, at the March 16, 2017 IEP meeting, Father stated that they had to ask the Charter School not to be so close to the outside of the private facility's building, because in [sic] causes Student to have negative reactions inside the building. Mother stated that they had to ask the Charter School to stop "encroaching" on the private facility's space. When the Charter School would hold "morning circle," Student would scream when he walked by. The Principal rejected placement in the general education setting based on their discussion. Father agreed.

While it is certainly understandable the Parents want a Student to remain at the private facility because of his 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 ininimus*." *Endrew* 137 S.Ct. at 1001. The IEP was specifically tailored to meet Student's unique needs and provide him with a meaningful educational benefit and to make progress, and the IEP can be implemented at the PSF with a transition plan.

The IEP included a transition plan to a PSF. 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 him [sic] 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 offers Student far less opportunity to socialize with non-disabled peers then the PSF. The Hearings Officer finds that the IEP team had an adequate discussion regarding LRE. The Hearings Officer further finds that the PSF, 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 the private facility 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, DEC 20 2017

/s/ [Illegible]
ROWENA A. SOMERVILLE
Administrative Hearings
Officer Department of
Commerce and Consumer Affairs

STUDENT, by and through his Parents vs. DOE; DOE-SY1617-067A LEGEND; FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J.G., by and through his Parents, Howard and Denise Greenberg; et al., Plaintiffs-Appellants, v. STATE OF HAWAII, Department of Education; et al., Defendants-Appellees.	No. 18-16538 D.C. No. 1:17-cv-00503-DKW-KSC District of Hawaii, Honolulu ORDER (Filed Aug. 21, 2019)

Before: THOMAS, Chief Judge, and CALLAHAN and CHRISTEN, Circuit Judges.

The panel has unanimously voted to deny Plaintiffs-Appellants' petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of Plaintiffs-Appellants' petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.