LATE TESTIMONY

Date: 03/16/2011

Committee: House Education

Department: Education

Person Testifying: Kathryn S. Matayoshi, Superintendent of Education

Title of Bill: SB 1284, SD 2 (SSCR 624) Relating to Education

Purpose of Bill: Authorizes DOE to monitor students with disabilities who are placed, at DOE's expense, at private schools or placements. Requires private schools or placements to post rates, fees, and tuition by April of each year. Requires DOE to pay only for private school or placement services that are specified in a student's individualized education program and to withhold payment to private schools or placements that restrict or deny monitoring by DOE. Effective 07/01/2050.

Department's Position: The Department of Education (Department) supports SB 1284, SD 2 (SSCR 624), providing Department the authority to monitor students with disabilities who are placed in private special education schools or placements. Hawaii Revised Statute Section 302A-443, as currently written, does not give this authority. The Department is mandated by both federal and state regulations to ensure that a student with a disability, who is placed in or referred by the Department, to a private special education school or placement, is provided special education and related services in conformance with the student's Individualized Education Program (IEP) and has access to and progresses in the general curriculum (common core state standards). To accomplish this mandate, the Department must have full cooperation and assistance from each private special education school or placement serving students with disabilities at the Department's expense. Currently, the Department educates over 181,000 students. Of

that total population, students with disabilities served in a private special education school or placement is approximately .03% (less than 2% of all students with disabilities). Tuition costs for the Department for these students is astronomically high. For school years 2008-2009 and 2009-2010, the Department paid approximately $8,477,394 and $9,044,525 respectively, while the Department recognizes that providing special education and related services can be costly, this Bill provides a means to regulate equitable and reasonable tuition fees. Finally, the Department is committed to education reform through the Race to the Top initiative and ensure that all students, including those placed in private special education schools and placements are college and/or career ready. This Bill provides the mechanism for the Department to monitor the performance and progress in the general education curriculum, on the common core state standards, as well as the students' IEPs.

LATE TESTIMONY

Teresa Chao Ocampo
215 N. King Street, Apt. 207
Honolulu, HI 96817

The House Committee on Education
Conference Room 309 at 2:00pm

Wednesday, March 16, 2011

To: Rep. Roy M. Takumi, Chair
Rep. Della Au Belatti, Vice Chair

From: Teresa Chao Ocampo

Re: SB 1284 SD2 RELATING TO EDUCATION
Testimony in OPPOSITION

Testimony: In OPPOSITION of SB1284 SD2, Related to Education

I do not have any qualms about the DOE's self-imposed mandate to provide oversight for special needs children placed in a private placement. That was the intent behind Act 179 which was passed in 2008. However, with the over-reaching language in SB 1284 SD2, I do not agree with allowing the DOE unlimited access and authority to a private school, a student and a student's educational records for the purposes of observation, interviews and review of a student's educational records without the inclusion of an independent, unbiased system of checks and balances that would ensure the rights of the private school and its students.

The only rights SB 1284 SD2 is concerned with are those of the DOE while blatantly violating the individual rights of the student, parents, private school and those of the students attending the private school.

Due process hearings have historically averaged approximately six to nine months for a decision. Given DCCA's recent enforcement of the 45 calendar days to complete a due process hearing after the expiration of the 30 calendar day period to conduct a resolution meeting in the due process timeline, parents most likely will be forced into a minimum of two due process hearings for EACH school year as a result of SB 1284 SD2. Based on my own experiences with due process, I believe that SB 1284 SD2 will INCREASE the number of due process hearings and additional litigation resulting in the DOUBLING of the expenses that the DOE is trying to avoid.

Although SB 1284 SD2 claims that the private placements do not "afford the same opportunity [for the disabled children] to receive rigorous, standards-based instruction and curriculum" as per the Common Core State Standards "which are provided to their peers in public schools," this is clearly false.

The ONLY reason the DOE recently adopted the Common Core State Standards was to compete for the RTTT awards. According to the DOE's educational reform website, implementation of this curriculum has not begun and will not begin until August 2011.

Further, the DOE is hardly in a position to boast a "rigorous, standards-based instruction" when FORTY-ONE percent of its schools FAILED to meet the NCLB requirements. According to the NCLB status and Adequate Yearly Progress for the 2010-2011 school year, 12 schools require "corrective action", 15 schools are scheduled for "planning and restructuring" and 91 schools are "restructuring." Out of the DOE's 286 schools, 118 or 41 percent of our public schools continue to struggle to teach basic reading and math to regular education students at the already low standards set by NCLB. This poor performance has continued since 2002.

According to a May 20, 2010 KITV4 investigation of Hawaii's law-makers, "over half of law-maker's children attend private school, and nearly two-thirds of state's law-makers NEVER had a child enrolled in the public school system they oversee." Apparently, Hawaii law-makers have very little confidence in the public school system. Yet, with SB 1284 SD2, the legislature has taken upon itself to decide on behalf of parents that the failing DOE performances are "good enough" for special needs children but not for their own children.

Perhaps the legislature should spend more time demanding greater accountability and academic progress from our publicly supported schools rather than further diminishing the civil rights and due processes of special needs children with bills such as SB 1284 SD2.

Related to health and safety, SB 1284 SD2 stated that the DOE should be permitted to monitor private schools and placements to "ensure compliance with all applicable federal, state, and county laws, rules, regulations and ordinances pertaining to health and safety." The DOE is an educational agency. It is not the government and it should not have any authority to enforce state and federal rules and regulations that are the responsibility of the state of Hawaii.

It is absurd to for SB 1284 SD2 to imply that the DOE is the ONLY agency that "cares" about a child's health and safety and that private schools do not. On the contrary, the following are examples of DOE teachers including Special Education teachers and their activities against helpless children. I believe the following headlines taken from our local newspaper speak volumes.

-A Kona teacher charged for child abuse of an 11-year old boy.

-A special education teacher on Hilo was arrested for drug distribution.

-A Leilehua high school Special education teacher arrested for selling methamphetamine while at school.

-A Makapu Elementary school teacher arrested for molesting two girls at a Kaneohe School.

The true issue in SB 1284 SD2 should be related ONLY to the DOE's ability to monitor the implementation of a child's IEP placed in a private placement.

I agree that the DOE has a responsibility and obligation to provide a Free Appropriate Public Education to all special needs children under IDEA, including those who are placed in a private school at the public's expense. However, SB 1284 SD2 fails to include or even suggest any system of checks and balances to ensure the rights of the private schools and their students all the while leaving these decisions up to the discretion of the DOE.

In most instances the DOE is fully capable of monitoring students without "invading" private school campuses. Many of the private school's documents are provided to the DOE without much ado and many educational documents are actually generated by DOE providers. Observations and assessments are permitted as well as properly scheduled visits if accompanied by parental consent. Many times the DOE's own providers provide services within the private placement and thus have the ability to provide updates on the student's educational progress and status on a daily basis. At times the providers in specialized schools are MORE qualified than those providers from the DOE and thus provide very insightful information related to the student to parents and DOE providers.

However, there are many instances in which the private school could refuse to allow the DOE on its campus. In several past cases the DOE failed to make payment to the school or facility despite an IEP team's decision, a due process decision or a federal court decision.

Denial of access can occur when the DOE fails to notify the private school or parent in advance of their visit without prior notification or parental consent. The unscheduled visit may be untimely or inopportune where the child was sick or unavailable. Written consent for observations or visits are required as per 34 CFR 300.9 of the DOE's Procedural Safeguards Notice. Just as consent is required when the DOE conducts an observation of a child on its OWN campus, it is equally required on a private school campus. Yet, SB 1284 SD2 mandates a direct violation of both state and federal laws where parental consent is required prior to any observation of a student with a disability.

Sometimes, DOE personnel while visiting one student at the private placement will inquire about another student placed in the same private placement, thus violating that child's rights and possibly jeopardizing his or her identity. According to the DOE's contracted SPED attorney from the mainland, any inquiry regarding other students in this situation is strictly prohibited.

The DOE has commonly used a "blanket" consent form which fails to clearly describe the purpose of the visit, the number of visitors, the time of visit, or a start or end time or date at the private school. Many times, the DOE will use the same consent form as a method of unauthorized and continual access onto these campuses, which technically can be considered trespassing. This type of open-ended consent openly violates 34 CFR 300.9 and could be technically invalid.

The consent requested as per 34 CFR 300.9 must "clearly identify all relevant information including records (if any) that will be released and to whom, related to the action for which the parent gives consent and that the parent must understand and agree in writing to that action." Based on my own personal experiences, even the state SPED administrator adamantly refused to satisfy these requirements of law despite numerous requests for clarification of the issues at hand.

In addition to these examples, HRS Section 302A-443 already permits the DOE to monitor students who have undergone unilateral private placement, so this legislation is redundant and unnecessary. It permits the DOE to greatly overstep its authority into the private sector yet, when the DOE fails to follow these same rules that they expect others to follow, no one of authority including the legislature, Governor's Office, the Board of Education, or even from within the DOE itself, will hold the DOE accountable for the numerous civil violations against the special needs children and their parents in this state. Was the Felix Consent Decree a meaningless and expensive exercise?

SB 1284 SD2's requirement to have a private school post an itemization of its fees and tuition rates for services provided to a child placed in their program is the

DOE's attempt to further restrict the educational choices for special needs children. It also creates a loophole allowing the DOE to get out of paying for a private placement for whatever reason, including those instances AFTER the placement has been deemed "appropriate" by an independent Hearings Officer. Regardless of whether or not the DOE believes that a placement is appropriate, it is the Hearings Officer's decision to make. The DOE's non-payment or intentional delay of payment will undoubtedly lead to additional litigation.

With this bill, the DOE's decision not to pay can be randomly decided and apparently by anyone in the DOE without due diligence to the child. SD 1284 SD2 does not offer any type of checks and balance system that addresses this issue. The DOE's refusal to pay for educational services rendered to a child most likely will force a child OUT of private school and back into the public school, which is most likely the underlying purpose of this bill among other things.

SB 1284 SD2's requirement for the private school to provide educational records to the DOE within "three business days of receipt of a request of such records" is intended to cause further burden on the private school. Not surprisingly, in Chapter 60, under 8-60-86, it states that the DOE is required to allow parents to have access to their child's educational records no more than 45 days after the request as been made. Yet SB 1284 SD2 requires the private school to provide DOE access to these same records within THREE business days of receipt of their request. Again, this demonstrates the extreme one-sidedness of this bill in favor of the DOE without regard to any other parties involved.

SB 1284 SD2's requirement to "withhold payment to any private school or placement that restricts or denies monitoring of students by the department of education" directly challenges a hearing officer's decision thus further violating a child's educational rights under IDEA. According to the DOE's Procedural Safeguards Notice under Hearing Decisions, 34 CFR 300.513, the hearing officer may decide in favor of the parents alleging procedural violations.

TWO of these procedural violations are the "deprivation of an educational benefit" and the interference with a child's right to a free and appropriate public education."

Once the DOE chooses to withhold payment to a private school for the purposes of manipulating a private school into allowing access to a student in this manner, the DOE will violate the child's right to FAPE once again by "depriving" the child from an educational benefit, even more so should the parents be unable to meet a sudden financial burden as a result of the DOE's actions. At the federal level, this type of activity would not bode well for the DOE as both the DOE and the state of Hawaii would be ill-prepared financially

should a class action lawsuit arise from this legislation due to the infringement of the rights of private businesses and the students protected under IDEA and FERPA as well as their civil rights.

Whatever challenges the DOE may face in acquiring observations, interviews or access to educational records for a child placed in a private placement, it was the DOE's INITIAL failure to provide FAPE as required by federal and state laws that resulted in the private placement in the first place.

The DOE is a one-tiered agency. It has no independent supervisory boards and thus has never been held accountable when it fails to follow the law. This boldness is what led Hawaii into the Felix Consent decree for over ten years and millions of dollars of waste, mismanagement, and undisclosed criminal activities.

For the reasons stated, I oppose SB 1284 SD2. I respectfully ask that this Committee do not pass the measure as written.

Sincerely,

(Signature on file)

Teresa Chao Ocampo

CARL M. VARADY

ATTORNEY AT LAW

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LATE TESTIMONY

March 16, 2011

Via Facsimile & e-mail
House Committee on Education
Rep. Roy Takumi, Chair
Rep. Della Belotti, Vice-Chair

Re: SB 1284, SD2
Hearing: 3/16/11 at 2:00 p.m.

Dear Representative Takumi, Vice-Chair Belatti and members of the Committee:

I am writing to oppose passage and ask the Committee to hold the above-referenced bill, which violates the Individuals with Disabilities Education Act ("IDEA") 20 U.S.C. §§ 1400-1487. IDEA guarantees public school children free appropriate public education, including special education and related services necessary to enable them to make academic, social and vocational progress, at public expense. Where the State fails to do so, parents make seek such special education and related services from alternative sources. If such sources are appropriate, the children receive services at public expense and at no expense to their parents. The United States Supreme Court has recently reaffirmed these principles.

After a private specialist diagnosed respondent with learning disabilities, his parents unilaterally removed him from a public school district, enrolled him in a private academy, and requested an administrative hearing on his eligibility for special-education services under IDEA. The school district found respondent ineligible for such services and declined to offer him an individualized education program (IEP). Concluding that the school district had failed to provide respondent a "free appropriate public education" as required by IDEA, 20 U.S.C. §1412(a)(1)(A), and that respondent's private-school placement was appropriate, an administrative hearing officer ordered the school district to reimburse his parents for his private-school tuition. The District Court set aside the award, holding that the IDEA Amendments of 1997 (Amendments) categorically bar reimbursement unless a child has "previously received special education or related services under the [school's] authority."

§1412(a)(10)(C)(ii). The Ninth Circuit reversed this ruling and concluded that the Amendments did not diminish the authority of courts to grant reimbursement as "appropriate" relief pursuant to §1415(i)(2)(C)(iii). *See School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U. S. 359 .

The Supreme Court agreed and ruled that IDEA authorizes reimbursement for private special-education services when a public school fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special-education services through the public school.

Therefore, when DOE fails to meet the mandates of IDEA, parents are not obligated to let their children fall behind while hoping DOE changes its collective mind. During the time such services are obtained privately because DOE has failed to meet the requirements of federal law, parents can obtain the services from private providers at public expense.

Seattle School District v. B.S. , 82 F.3d 1493 (9th Cir. 1996), explains the Ninth Circuit's position concerning the appropriateness of private placement under circumstances where FAPE has been denied.

> In that case, as here, the child had frequent behavior problems, was had tantrums, attention difficulties, and displayed physical and verbal aggression. 82 F.3d at 1492. She was expelled from school, at about the same time that she was hospitalized because of her problems. The school district and parent had several IEP meetings to determine a new program and placement, with the school district recommending a specialized self-contained behavioral classroom, and the parent and her experts recommending a residential treatment program.
>
> As in the case at hand, no agreement was reached between the parents and the school. The child was discharged from the hospital and remained out of school. After the Administrative Hearing, the child was enrolled in a full time residential treatment program. At the administrative hearing level and district court level, it was found that the child had not been able to receive academic or non-academic benefit from her education because of her severely disruptive behavior. The court noted that "the term 'unique educational needs' [shall] be broadly construed to include the handicapped child's academic, social, health, emotional, communicative, physical and vocational needs."

Id. at 1500.

The Ninth Circuit affirmed the decision of the district court ordering reimbursement

for the placement at the private school. It stated:

> The IDEA does not require A.S. to spend years in an educational environment likely to be inadequate and to impede her progress simply to permit the School District to try every option short of residential placement. . . . The School District did not satisfy its burden of proposing a specific alternative placement and establishing that it was appropriate for A.S. Thus it was appropriate for the district court to order that A.S. by placed at Intermountain. *See Board of Educ. v. Illinois State Bd. Of Educ* ., 41 F.3d 1162, 1168 (7th Cir. 1994)(where school district failed to propose a satisfactory alternative, court "was not required to locate another school that would satisfy the least restrictive alternative requirement based on the entire pool of schools available, but rather was required simply to determine whether that one available choice would provide an appropriate education.")

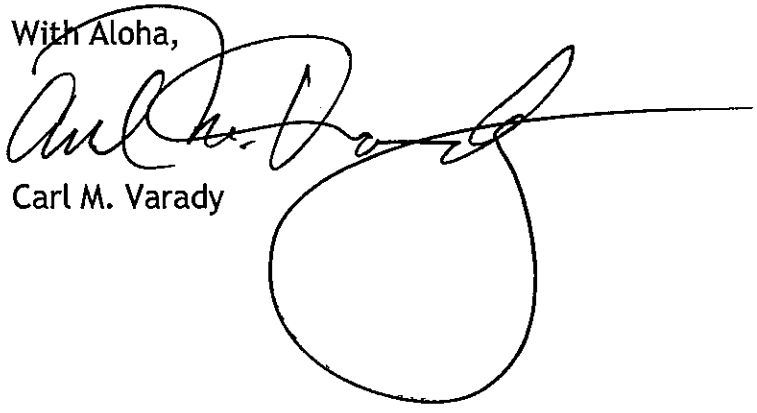
82 F.3d at 1501-1502.

The State cannot cap fees for services consistent with these principles that *free* appropriate public education means "at no cost to parents." Such a cap would either force children to go without services the need and are eligible for by law, or force parents to pay for services that are to be provided a no cost.

The United States District Court in Hawai'i already has ruled that the State cannot dictate what private providers charge. I have attached the Court's ruling and a transcript from the hearing in which the Court rejected the Attorney General's argument that the State could unilaterally limits fees for special education and related services.

I ask that the Committee review the cases I have provided and hold the bill to avoid further unnecessary and costly litigation of this issue.

With Aloha,



Carl M. Varady

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

LOVELAND ACADEMY, LLC, et al., Plaintiff, vs. PATRICIA HAMAMOTO, Superintendent of the Hawaii Department of Education, et al., Defendants.	CV 02-00693 HG-LEK Honolulu, Hawaii March 22, 2004 10:15 A.M. Plaintiff's Motion for Preliminary Injunction

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HELEN GILLMOR
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	CARL M. VARADY, ESQ. American Savings Bank Twr. 1001 Bishop St., Ste. 2870 Honolulu, HI 96813
For the Defendant:	AARON H. SCHULANER, ESQ. Dept. of the Attorney General 235 S. Beretania St., Rm. 304 Honolulu, HI 96813
Official Court Reporter:	Debra Kekuna Chun, RPR, CRR United States District Court 300 Ala Moana Blvd., Ste. C285 Honolulu, HI 96850 (808) 534-0667

Proceedings recorded by machine shorthand, transcript produced with computer-aided transcription (CAT).

MONDAY, MARCH 22, 2004 10:15 O'CLOCK A.M.

THE CLERK: Civil 02-00693 HG-LEK, Loveland Academy, et al., versus Patricia Hamamoto. This case is for a hearing on Plaintiff's Motion for Preliminary Injunction.

MR. VARADY: Good morning, Your Honor. Carl Varady on behalf of Loveland Academy, Dr. Dukes, and the parents of Loveland school. With me at the counsel table today is Dr. Dukes.

THE COURT: Good morning.

MR. SCHULANER: Good morning, Your Honor. Aaron Schulaner on behalf of the State of Hawai'i.

THE COURT: Good morning.

Okay. This matter -- you may be seated.

This matter comes before the court by way of a preliminary injunction. And I have read all of your filings, and I have a number of questions. But you may, Mr. Varady, have something that you want to present before I ask my questions.

MR. VARADY: Your Honor, I'm happy to address the court's questions, and, if there's anything left to address, I'll do that. Or, if you prefer, I did have one point.

THE COURT: Okay. Why don't you go to the lectern and make your point.

MR. VARADY: Thank you.

Just on the state court proceeding, Your Honor, because I think that that is -- although we dealt with it in the reply, that I wanted to assure the court that we're not seeking anything here that is at issue over in the state court because what we're seeking here is the payment of reimbursements due to children who are not covered by the Department of Health contract that is at issue across the street; so we're not asking the court to do anything that is at issue across the way and merely asking to order reimbursement for children who are receiving services by these settlement agreements or orders, not by the DOH contract.

I think that Loveland is obligated to bring this motion within the context of this case because it has received the assignment from the parents of those rights to reimbursement, and, based on principles of merger and bar, if it did not raise those issues now within the context of this suit, that later the state could argue an estoppel and that the claims, since they could have been brought in this litigation under rules of civil procedure, would later be barred.

That's all I had to say, Your Honor.

THE COURT: I have some questions just in terms of context. And I take it you don't intend to put on any

evidence.

MR. VARADY: I don't think so, Your Honor. That was not my intention. Unless the court -- I have Dr. Dukes here, and I also have her bookkeeper here, if there are any questions that the court might have, but we're prepared to stand on the declarations of Dr. Dukes and the supplemental declaration of Miss Gurtiza.

THE COURT: How big is Loveland Academy? How many students does it have?

MR. VARADY: In the Loveland side now I think there are about --

THE PLAINTIFF: Almost 30.

MR. VARADY: -- there are 30 students. And it's broken up into two -- sort of two segments. There's a day treatment program. How many people in the day treatment program?

THE PLAINTIFF: There are 26 in day treatment, 29 in --

MR. VARADY: And then there's an after-school program called the biocycle social program, which has 29 students.

THE COURT: These are all the children who have been diagnosed with autism.

MR. VARADY: That is correct. They may have other diagnoses as well, but, as to the children receiving

day treatment, they're on the autism spectrum. That would mean that they were diagnosed either with autism, Asberger Syndrome, or pervasive developmental disorder NOS, which is "not otherwise specified," all of which fall within the general category of autism.

THE COURT: And the children's parents who have assigned their rights to the PALS and to Loveland Academy, what -- have they had a meeting to change their assigned school, their placement?

MR. VARADY: The question would be has there been any discussion of change of placement. The answer to that would be --

THE COURT: Well, not a discussion. I mean, you know, it seems to me the basis of your action is IDEA, and you have these settlements or an order that says they are placed at Loveland Academy.

MR. VARADY: Yes.

THE COURT: And in order to take them out of Loveland Academy the DOE has to have an IFP meeting and there has to be either an agreement by the parents --

MR. VARADY: Right.

THE COURT: -- or there has to be a ruling, and then there can be an appeal and an administrative hearing. So where are you in that process?

MR. VARADY: There have been no -- let's just

look at those three. There are three actual avenues for changes of placement.

THE COURT: I mean I saw the letter that went out to the principals. What I want to know is what happened after that.

MR. VARADY: The principals have attempted through the IEP processes in many of these cases to convince the parents to agree to a change of placement, and the parents have not agreed. That being the case, there are only two other avenues by which under IDEA a change of placement could lawfully occur. One would be through the mediation process in which the parties coming together in formal mediation and agree. That has not occurred. Or there could be a due process initiated by the Department of Education, which has occurred in some cases in the past -- not in any of these cases -- seeking a change to the child's placement and asking for an administrative hearing officer to rule under IDEA that the placement at Loveland no longer is appropriate. None of those three things have occurred as to any of the movant children; so for -- under the law, under IDEA and the way IDEA works, their placement is currently at Loveland.

THE COURT: Right.

MR. VARADY: So --

THE COURT: Okay. Let me just check.

Now, what I have seen are bills that say so much is owed for a particular child. Has the DOE paid the contract rate up to through February for these particular children?

MR. VARADY: The answer to that is -- has to be extremely qualified, Your Honor, because I didn't -- what I didn't want to do was have before you the billing history for each child.

THE COURT: No.

MR. VARADY: The answer to that is for some children the answer would be, "Yes, it is current at the old rate through the January bill." For lots of other children, though, the payments have been haphazard or intermittent.

THE COURT: But these nine children, the ones here.

MR. VARADY: The answer to that is I think only for one child are the payments --

THE COURT: It's delinquent or paid?

MR. VARADY: Is paid. At the old rate. And that would be the child P. G-M identified in the pleadings. That's why we filed a supplemental declaration on Friday to show you that payment had been made for the, I think, first two months of this year.

THE COURT: And so how much delinquency is there

with respect to just the old rates for the other eight children? Because what I understand you to have filed is what it would be at the new rates. I'm just trying to find out exactly where we are factually.

MR. VARADY: That's correct. These are at the new rates. I don't have the answer to that at my fingertips. And I'll ask Dr. Dukes, if I can have a short moment, if there's a way of calculating that on a percentage of these numbers. I don't believe there is. And the reason for that is because some children on the list receive both the day treatment and the after-school program. Some children receive the after-school program only. And I think there are probably a few kids who only get day treatment. So working that out would be a more complex exercise than I think I can do in the next couple minutes, but I'll check that with Dr. Dukes just to make sure.

THE COURT: Okay. Thank you. Now, is there something else you wanted to say?

MR. VARADY: Just that I wanted the court to be aware -- and I think it's fairly well set out in the pleadings -- that we did not rush in here willy-nilly asking for the relief. I know it's a hardship on you and your staff to have us come in here. I know we're asking for extraordinary relief. And we've tried over the past

year in several forums either through settlement conference, even including Judge Chang from the collateral state court action, with Mr. Fairbanks, with various attorneys general, and Judge Kobayashi to try and resolve this. It's just at a point now where Loveland cannot continue operating on a deficit, and that's why we're here today.

THE COURT: I understand you did get some money recently. Is it only for that one student? What amount of money did you receive from the DOE?

MR. VARADY: Well, it's reflected in the change in the P. G-M, which is the third child on the grid in the supplemental affidavit. My belief -- and I'll have to check the exact number -- is that it was $18,599 and change for that one child. But, if you compare Dr. Dukes' -- the grid -- the matrix in Dr. Dukes' declaration with the supplemental declaration, you'll see that the numbers are different, and the difference between those numbers would be the amount of payment. I'll do the math while Mr. Schulaner is speaking.

THE COURT: That's all right. You don't have to do the math. It's a small amount of money.

MR. VARADY: It's about eighteen thousand.

THE COURT: Very small amount.

Okay. Thank you.

MR. VARADY: Thank you.

THE COURT: Mr. Schulaner.

MR. SCHULANER: Okay. My understanding was you might have some questions since we'll stand on our briefs.

THE COURT: Well, if you want to go ahead and make any presentation, but I'm very interested to see how you're getting out from the placement and IDEA. It just seems like, you know, you're dead in the water as near as I can figure out.

MR. SCHULANER: Okay. With that as forerunner to my -- okay. First of all, our understanding is of all the students who have been placed at Loveland Academy through settlement agreements, IEPs, hearing officer decisions, the State of Hawai'i has, in fact, been paying at the old DOH rate. So, when I was hearing Mr. Varady speak -- I wasn't quite sure. It sounded like he was saying only one student was being paid for?

THE COURT: I believe what he said -- what he said -- and I believe my question was, "Anybody paid up in terms of even the old rate," and he said only one is paid up in terms of the old rate.

MR. SCHULANER: Okay. And I guess we would dispute that. We believe that the Department of Education's procurement office has acted in good faith to keep current on all students properly placed at Loveland

Academy with instructions from our office to pay at the old Department of Health contract rate. We believe that's a standard operating procedure when there's a contractual dispute to pay the undisputed amount. And to the extent there's any accounting disagreement about that, we have no problem being ordered to do what we already believe is appropriate, which is to pay --

THE COURT: Weren't you supposed to do that already? I mean you were in mediation. You've been in settlement. Why wouldn't it be up to date? Why wouldn't you know?

MR. SCHULANER: My belief actually, without questioning Mr. Varady or his accuracy, is that we are, in fact, up to date, and we have no problem being held to that statement. If Mr. Varady's able to show that we're off by $232.23, we'll pay the difference. But in good faith we believe we are current, paying at the old DOH rate. We would not willfully choose not to pay at least even that; so we believe we are current as to that. And our position has always been that we will pay at the current rates -- I mean at what we believe are the current rates, which are the DOH ones. So we really believe this dispute is really one of contractual as to what type of rate increase, if any, should Loveland Academy receive.

THE COURT: Well, that would be -- that is

something that is contractual issues with respect to the children who don't have a settlement agreement or an order. But in IDEA once you've got that placement you have procedures you have to go through, and I just don't hear that they've happened. Maybe you have a different take on that than Mr. Varady, but I see the letter to the principals, which in my mind didn't seem to understand what the IDEA requires because it says, "They're trying to be a private school. Quick. Hold a meeting." That's not how that works.

MR. SCHULANER: Okay. Now, since that time -- I mean Mr. Varady might clarify the matter, but our understanding is that the schools have cease and desisted from attempting to convene IEP meetings solely on the basis of Loveland Academy not being a contracted provider of the State of Hawai'i. The only bases for essentially having an IEP meeting would have to be some change in circumstances of the child. And I mean Mr. Varady could try to point to some recent events of meetings called solely because Loveland is no longer a contracted provider, but I don't believe so. And, in fact, now that we're in the year 2004 I don't believe there's been any significant amount of students that have been removed from Loveland Academy through the IEP process or that have gone to due process hearing about that. So there is no present attempt to move

students through the IEP process based solely upon Loveland no longer being a contracted provider.

We're quite clear, and we understand that, first of all, if a hearing officer decision or court order says, "Child is to be at Loveland," that's the child's placement, end of story, you know, for the term of the decision and order.

THE COURT: So where in this continuum do you get to -- if there's no contract and she wants to charge X amount, I mean how come you don't pay it? I mean --

MR. SCHULANER: Okay.

THE COURT: You know, where's your ground that you're standing on with respect to these nine children? I understand with respect to the other children how you can take a position, but where do you find the ability to say, "No, I'm not going to pay it"?

MR. SCHULANER: Okay. Because my -- okay. In accordance with Burlington, which, you know, is case law for the basis of reimbursement in IDEA cases, and its progeny, reimbursement is not just whatever the provider wants. It's an equitable analysis of the reasonableness of the cost. And so we're willing to pay whatever is reasonable and fair for the services.

THE COURT: Who has the burden of proof there?

MR. SCHULANER: I guess it would have to be the

petitioner, given under Burlington and under the IDEA regulations, when they talk about reimbursement, I believe the parent has to put on some case about the appropriateness of the alternative educational placement.

THE COURT: You're already beyond that, though. They've already been placed there.

MR. SCHULANER: I guess it comes down -- and I would defer to you since this will be an important thing for my office to consider -- that the administrative hearing officers in the State of Hawai'i, my understanding, when it comes placements at private schools, do not determine what the appropriate rate is. I've personally recently have had litigation regarding the Lokahi Montessori school, which is affiliated with Loveland Academy. And the hearing officer would not get into the specific rate. He just ordered placement, ordered reimbursement, and he just would not touch the dollar amount because he didn't think it was within his realm. He thought of that as a contractual dispute was my understanding.

But, if the position of the court is that such matters should be litigated at the administrative hearing level and if the hearing officer -- sorry.

THE COURT: Well, I'm not saying that. I'm actually saying it seems to me that, if -- you know, you

have a need in terms of a particular population, and right now you have orders for -- with respect to that particular population. And, if you feel that it's too much money, then -- and you can duplicate that service somewhere else, then you would have the ability to show that the placement could be changed because it's too much money and you have the duplicate services somewhere else, and you would have to go through whatever steps are required.

But what I see here is you've mentioned Child and Family Service, but I really don't have any information about what's offered at Child and Family Service, and what I do have raises questions in my mind because to the extent that Loveland Academy is charging for particular one-on-one services and Child and Family Services doesn't, then it raises -- the next question is what services are they getting and are they comparable and, you know. So I mean there's a big hole in my ability to evaluate that. But I don't really even have to get to that because you haven't gone through the process to remove them from Loveland Academy.

So I don't -- I just don't see where your little island of law is that you can stand on and say, "No, we're not going to pay."

MR. SCHULANER: Okay. On a related note, given the court's --

THE COURT: I mean this is just an IDEA case. You got these orders, and they're supposed to be there; so, if you don't want to follow the order, whose burden is it to not follow the order?

MR. SCHULANER: I think we would -- it's not our intent to not follow orders. However, based upon the analysis that I see, I guess our backup position would be, if at the time of a hearing officer decision/court order there was, in fact, a certain rate in place -- let's say it was a DOH contract rate -- and the hearing officer or court ordered payment for Loveland or the child to attend Loveland to be reimbursed, that since the court didn't have before it the subsequent rate increases, that any order from this court possibly be that the rate that was in effect at the time of the hearing officer's decision/court order, you know, what have you, should remain at that versus it basically gives carte blanche to a private organization to increase it.

THE COURT: Well, no, there's a different way. I mean, as you say, the hearings officer doesn't want to get into that issue, and I don't blame them because it is a fact intensive and time-consuming thing to figure out what the proper rate is. That would seem to me to be something that DOE would be much better equipped to do. But you have to deal with the orders and the settlement agreements that

you have, and you have to say, "Okay. It seemed reasonable at X amount when they got placed there, but now it's X plus Y, and I think we can get those services someplace else because that's really the key: you have to get the same services. And so you have to produce the other place that will give it to you for less.

I suppose, you know, you could decide to litigate that they're charging too much, but I don't see why they have to come in -- I mean I don't believe, if you have an order that says I'm placing this child there so long as they are a contract provider, but I don't think that's what IDEA is about. It's all about the services.

MR. SCHULANER: I guess I'm beating a dead horse, but in our understanding of Burlington and its progeny, such as Florence v. Carter, when it speaks about tuition reimbursement, the analysis isn't just -- and you're not saying this, but the analysis is not limited to just whether or not the alternative placement is appropriate. There's also the question of whether or not the tuition is reasonable as part of the equitable analysis. And, given that at the administrative hearing the hearing officers don't do that analysis, it seems to be the appropriate place of the court to determine through the equitable test to see whether or not the rates charged by Loveland are appropriate because the state is more than willing to

comply with the decisions and orders, and we believe they say placement at Loveland and the understanding is reimbursement of reasonable rates because that's what Burlington and its progeny speak of. So we're willing to do that. We have no problem complying with the orders.

THE COURT: Well, it seems, you know, I don't think the courts want to get into the business of figuring out what your suppliers of services should be paid. I think that there may be some point in some case where it eventually ends up there, but the idea that it's just something that should be litigated each time, I think IDEA is complicated enough, don't you? I mean it's a very complex, cumbersome process. And once you get a result that says they're placed in a particular place, you have the means of changing it. And I don't know in terms of Child and Family Services. If Child and Family Service is actually offering the same thing for less, then Loveland Academy has a competitor, and, you know, you ought to be able to make that case within the procedures of IDEA that that's where the child should go. I don't have a problem with that, as long as you're following the IDEA procedures.

But I do have a problem with the idea that there are these nine children who were ordered to a particular place, and they're no longer on contract. And I must say

that the gag order was, I would say, an attempt to circumvent the meaning of IDEA, and I'm surprised that it happened that it got written into a contract because the idea that an educator wouldn't be able to speak their mind as to what a child needs is shocking. But going beyond that, you know, you know what you need to do. I mean why are we spending all this time in court?

MR. SCHULANER: Respectfully, I mean in our office's review of the law, when we saw reimbursement under Burlington and under, I guess, subsequently Florence v. Carter, it talked about the analysis of monies that the parent had already paid and, in fact, an analysis being done of one of the factors being the reasonableness of the rate of the services from the private school or --

THE COURT: I don't have a problem with you ultimately deciding that the rate is unreasonable. I mean I don't, you know, I mean there are reasonable rates and unreasonable rates. But I'm certainly not in a position with what I have before me to figure that out. You haven't made a case --

MR. SCHULANER: Okay.

THE COURT: -- to show that they're unreasonable. You haven't done anything with respect to that. And Mr. Varady has come in and said, "We've got these nine kids who are ordered there, and by not paying you're closing the

place down."

MR. SCHULANER: And our response to that, first of all, is, as to the rate, our argument is under abstention doctrine that the matter should be resolved by the state court where --

THE COURT: They filed here first.

MR. SCHULANER: Well, maybe by a couple days.

THE COURT: Well, one minute's enough, isn't it?

MR. SCHULANER: But they did file the state court action, and in their complaint they note that unjust enrichment, contract, certain rates, and there have been joint conferences in the past between the federal and state court, and so we believe through that mechanism would be the appropriate way to resolve the rate. Or even if --

THE COURT: Well, I don't have before me those kids that don't have the IDEA order. They're not my case. So it very well may be that all of those issues are going to get tried over there, but for these particular nine children all I have is an IDEA case and an assignment and the allegation that she's going to close if she doesn't get this money.

Now, I don't know if it's true or not. I mean this is a preliminary injunction. And the burden, you know, to show that there is a crisis, you know, has been met, and so, as near as I can figure out, it's -- somebody

has to do more than's happened in order for me to allow them to close. And, if you think this is not the case, that it's -- from a financial point of view they're crying wolf, then you need to show that.

MR. SCHULANER: I guess our position is that since they have the burden, a blanket statement -- I don't want to say a self-serving one -- but a blanket statement that we're going under without any support at all, no discussion about here's our operating expenses, this is how much we bring in, we don't believe that's sufficient to make it a prima facie case that, you know, there's necessity --

THE COURT: Well, they may not ultimately win; that's true. I mean there's certainly issues that at some point have to be addressed. But in terms of IDEA we're just talking about a preliminary injunction not a permanent injunction, and it's just that in this kind -- normally, if it's just money, we don't even deal with preliminary injunctions. But with IDEA how can I, you know, you have a burden, too, to show me that -- somebody out there, sitting out there, you know, at one of those tables or both of those tables, you know, at some point is going to have to put on that kind of a case. There's no doubt about it. I mean, you know, are these justified. But I don't know enough at this point in terms of what it actually costs --

I'm sure it's incredibly expensive to educate these children, given the nature of the kind of work that has to be done with each one. I don't doubt that it's expensive. But I have no ability to tell exactly what it ought to be.

And the idea of raising rates is not an unusual thing. And I'm assuming that they are competent because you've contracted with them; so -- and you've got them placed there, and you agreed to the placement; so I mean --

MR. SCHULANER: Some of those placements were prior to them increasing their day treatment rate by approximately 38 percent and other providers coming into the field which can provide it at a lower rate. However, I understand the court's analysis.

THE COURT: You know, it's fine: competition and somebody else. But it's up to you to show that it's, you know, equitable and there should be a transfer and they get the same kind of services or the services that they need at that particular point in time. But what do you suggest happen here?

MR. SCHULANER: I suggest that the state continue to pay at the old DOH contract rates. If Mr. Varady actually in good faith believes that the state is not doing that, we can revisit the issue or have Magistrate Kobayashi or someone like that double-check on that. And then have the state court case move forward on an expedited basis to

resolve the contractual dispute as to what an appropriate rate should be. Or an expedited means through the federal court, even though we believe state court would be more appropriate, to determine an appropriate rate. But the interim situation in which they can pretty much choose any dollar amount they want we don't believe would be appropriate, and we'd rather have an expedition of the either federal court process or state court process to determine a reasonable rate because we're more than willing to pay a reasonable rate for these services. We have no problem with that.

THE COURT: Well, you know, your contract stopped two years ago in July -- year and a half -- and in the meantime what has the state done to remedy this problem?

MR. SCHULANER: We've -- without going into settlement negotiations, obviously, we've made offers back and forth as to that, as to a dollar amount.

THE COURT: So you've negotiated the amount, basically.

MR. SCHULANER: We've negotiated back and forth as to a rate for services, and, obviously, we have not come to an agreement as to that. And we probably do need the court's assistance or essentially order as to what a fair and reasonable rate is in this community for such services, be it state court or federal court. We believe state court

is actually the appropriate forum.

THE COURT: But you have these orders or settlements with these placements; so going forward, you know, you can do something. But at this point in time you have this order in place that says that's the place.

MR. SCHULANER: Yeah, and we believe we've been complying with that order by paying fair and reasonable rates for that. I guess what's to stop Loveland from after today increasing their rates again by 20 percent and just keep increasing and so on? There's nothing essentially to stop them under certain court orders and settlement agreements that are already in place. We think of it almost --

THE COURT: I guess the problem that I have is you want to put the burden on them instead of taking the burden yourself, and I believe you have the burden to deal with an order that you have that says they should be someplace. Then it's up to you, the state, to show why this placement isn't right anymore because that's -- they start with that in place, and if, you know, I think that, you know, it's just a matter of your not recognizing that you have this burden with this placement under IDEA. I mean that's why there are these different ways of changing a placement. And in terms of the monetary one your just not paying doesn't seem to me to be an appropriate

solution. You have to be more proactive.

MR. SCHULANER: I understand your comment about being more proactive. I guess our intent for the court orders and settlement agreements, hearing officer decisions, is not to unilaterally -- by not paying them what they want to change the placement. Far from it. Our position is we're complying with those. We're paying at the old DOH rate. We're not to my knowledge convening IEP meetings for those --

THE COURT: Gotten any raises in the last few years?

MR. SCHULANER: What?

THE COURT: Have you gotten any raises in the last few years? You don't actually have to answer, but my point is --

MR. SCHULANER: Not a 38 percent increase.

THE COURT: Okay. But my point is expenses change, things happen. The old rate probably isn't any good anyway just because it's an old rate. So the state needs to do more.

MR. SCHULANER: Okay.

THE COURT: And I'm not saying that they're going to end up getting everything that they've asked for, but the state can't sit on their hands and say, "We're going to pay you what you paid before and do what you like about

it." You've got a responsibility to deal with these orders and settlements.

And so what I would assume we need to do is to have something fairly fast track to get a resolution of what is a fair rate. And to the extent that you have, you know, competition for them that is equal to it, that's fine, and you can work through that. But I don't have anything that tells me that their rates are wrong. You folks haven't given me anything. You just say, "The old rate is good. We want the old rate." It's not enough.

MR. SCHULANER: We believe that -- well, again, if they're supposed to establish a fair rate, they should show some comparison to other companies in the state or even on the mainland. They show no comparisons, just "These are the rates we've unilaterally decided; so --

THE COURT: I'm saying you need to do it.

MR. SCHULANER: Okay. Fair enough.

THE COURT: You know, you're the one that's unhappy. And you've got an order placing them there. You can't just stand around and wait for them to do it.

MR. SCHULANER: (Nods head.)

THE COURT: Okay. Let's hear from Mr. Varady.

Now, Mr. Varady, I don't want this to go on for a very long time. I need a process by which -- and some kind of a figure that is reasonable, and you're going to have to

put up a bond because I have no idea whether or not, if things go bad, you're going to be able to repay the state if it's too much.

MR. VARADY: Right. Your Honor, one thing that I think would be extremely helpful for the state to get around the corner on this, of course, is hearing the words that you've said in this courtroom today because I think understanding where the court perceives us to be would be helpful for Mr. Schulaner to go back and advise his client as to what ought to happen in terms of resolving these claims.

I think the court is exactly right both in principle here in this hearing but also under IDEA. The burden is always on the state to show that placement and services requested are inappropriate. And you're right, if the state believes that that is the case or that for some reason it's able to provide compatible services for the child that will meet the child's individual and unique needs, there are methods of accomplishing that.

There are methods of accomplishing a continuing relationship with Loveland that would give the state some input into billing and services that, you know, for the gag clause and for other reasons haven't been pursued, but we've never closed -- Loveland has never closed the door on that. And, in fact, I wrote to Mr. Schulaner within the

past week and a half, saying, "Here's the balloon again. It's in the air. Would you be willing to talk to Loveland about a long-term relationship." I have not had a response on that point.

But, as to IDEA itself, they have got to come in and show that -- and meet the burden of proof under IDEA to show that the services are not appropriate, and, if they can do that, then he can get relief. If there's something else wrong with what Loveland is doing under IDEA, the state bears the burden of proof. And they haven't carried it here and they haven't carried it in the instance when there are orders and they've agreed through settlement agreement to placement at Loveland without putting any restriction on the payment.

As to the reasonableness, I do not want to go into a detailed description of why the rates are reasonable, but, as the court is well aware, things like insurance and ground leases and employee costs are expensive. The insurance at Loveland because of the priest cases that are out there, the clerical cases that are out there, their insurance has gone through the roof, and that's a major expense that has to have been accounted for since the DOH contract. It's not as if they're out there gouging or Dr. Dukes is trying to profiteer off of these agreements. I can assure the court she is not doing that.

And I'm confident that, when we get to a determination on the merits, you'll see that that is, in fact, true.

Mr. Schulaner said that the state is not trying to unilaterally ignore the orders or disobey their settlement -- break their settlement agreements or determine the placement of these children, but that's, in fact, exactly what is occurring through the state's refusal to pay.

Now, you had asked me who's current, I believe, when I first spoke. I went back through the billing summaries, and again this is sort of a moving target; so, as far as the billing summaries, which were prepared with the motion, the -- no one was current, except for Pili. Everyone's at least one month behind, even at the old rates. So to say that the state has been acting timely or in a good faith to try and meet its obligation is simply not true.

And I can assure you that Dr. Dukes has sent a letter to every parent, saying "We're going to close April 2d because of our current financial circumstances." And, if that occurs and if there is not payment, not only the children who are subject of this motion but the children who are placed there through IEP, through agreement with the Department of Health under the old contract, through informal agreement with the DOE, all will

have lost their placement by virtue of the state's refusal to pay. So until Mr. Schulaner can convince the court and meet his burden I think that the state's obligated to do what the settlement agreements and order say, which is pay for placement at Loveland because payment and placement are congruent in this case.

THE COURT: We need to have some sort of a timetable. And I'm also interested in, you know, the idea that what's the minimum amount that your client needs to keep going until the timetable of having a hearing can take place because there's going to have to be a bond because, if it turns out that there is an inappropriate amount being paid, then there may be money going back to the state from your client. So I don't know if you want to, you know, take a moment to say, "Okay. What's -- or maybe you know what the minimum amount is. And I'm talking about having a hearing in a month or two to resolve this because it shouldn't go on for very long.

MR. VARADY: If I could just have a colloquy with my client for a second.

THE COURT: Sure.

(Counsel and plaintiff conferring.)

THE COURT: Yes, Mr. Varady.

MR. VARADY: I'm sorry, Your Honor, not to have had that number at my fingertips, but it wasn't something

that we really talked much about.

What I tried to do in the colloquy with my client and her bookkeeper was figure out what was the minimum amount to do things like clear important liabilities that must be cleared immediately and then to keep the place going for another month, month and a half, or so. And Dr. Dukes and her bookkeeper believe that, if the state were to pay $250,000 immediately, we could clear those liabilities and keep the place open at least till the hearing.

There's no guaranty, though, and I have to be really candid with the court that, depending on outcomes, it will result in Loveland staying open unless there is some sort of long-term relief clearing, you know, the remainder of the balances and setting up some form of -- some method of future payment.

The other thing I have to tell the court is that the premise that $250,000 would be sufficient is based on an assumption that the state will pay at -- every kid timely at the old rate in addition to that amount so that, you know, whatever is billed will be promptly paid, the outstanding invoices for February will be paid. Only one child has been paid for February so far.

So those are the premises under which we could say that Loveland will stay open that length of time.

THE COURT: So $250,000. Now, I'm looking at,

say, a trial in May.

MR. VARADY: Okay. When would that be? Mid-May or --

THE COURT: Well, maybe the first week in May.

MR. VARADY: That would be difficult for me. I have two oral arguments before the Ninth Circuit the week of May 5th and then actually a personal commitment to leave -- to be out of town from the 5th to the 11th; so if it could be sometime maybe either before or after that would be better.

THE COURT: Okay.

MR. VARADY: I know that the court is really busy with its own docket, and I'm sorry to ask for that.

THE COURT: Well, no, it's just that that following week I have a trial that's been planned for years.

I don't think it should take more than a day or two at most.

MR. VARADY: I think -- I would be surprised if it were more than that.

THE COURT: How about Tuesday, May 25th?

Mr. Hisashima, is that going to work?

(Court and courtroom manager conferring.)

THE COURT: I just don't want to let it go too long.

MR. VARADY: No, because then we'll be back in the same hearing. I'm sorry about the Ninth Circuit, but it's a visiting panel coming here. Otherwise, I would ask -- if it were just going to be rescheduled, you know, if it was a mainland hearing, I could just call and ask to reschedule that, but they've set us. In fact, Mr. Schulaner is representing appellees in one of those cases.

THE COURT: How is Tuesday the 18th?

MR. VARADY: That would be fine with me. That would be May 18, Your Honor, is that correct?

THE COURT: May 18th.

How about you, Mr. Schulaner?

MR. SCHULANER: I don't have my calendar with me, but I'm sure I could clear off anything on that date.

THE COURT: Okay. Let's make it that date.

Now, and your client will get a bond for the $250,000.

MR. VARADY: Yes. I've not had to do that before, but we'll figure it out and we'll post the bond.

THE COURT: Okay. And so included in that is prompt payment of the going rate from the contract for everyone else.

MR. SCHULANER: (Nods head.)

THE COURT: Okay. Now, what's the usual method of paying: At the beginning of the month or the end of the

month?

MR. VARADY: The bills go out at the very first of the month and -- with a request for payment within 30 days.

THE COURT: So you've sent out February 1st bills that haven't been paid yet.

MR. VARADY: That is correct. That is correct.

THE COURT: Okay. Let's hear from Mr. Schulaner in terms of his thoughts.

MR. VARADY: And, Your Honor, if -- just one more thing before I sit down, please.

Since we have an interim period between now and the May 18th hearing I would really ask the court to entertain the possibility of assigning either Judge Kurren or Judge Chang as a special master in this matter to bring us in to talk to each other seriously now that we've heard the court's analysis prior to that time and the possibility of avoiding the need for trial. And the reason I suggest either Magistrate Kurren or Magistrate Chang is that Judge Kobayashi has acted as a settlement judge in this case already, and I don't know if it would be appropriate to have her as a special master or not. I just don't know what the rules are on that. So I'm indicating that, you know, any of the magistrates would be fine, but, if there's some complication, we'd be happy to come in with Judge

Kurren or Judge Chang to try and resolve this before taking up additional court time.

THE COURT: Okay. Thank you.

Mr. Schulaner.

MR. SCHULANER: As to the February invoices, I'm not sure as to the exact date of the receipt of the Department of Education of those invoices; however, state practice is to pay within 30 days. So I can check with my office as to that or the Department of Education.

As to the $250,000, I assume a written order will issue, and I can -- we can put that through the appropriate channels to get payment in an expedited manner, unless you just want me to tell them she said --

THE COURT: Well, we'll issue a minute order today; so you can have a copy of the minute order.

MR. SCHULANER: That will be sufficient documentation for the normal administrative stuff.

THE COURT: Okay. But I am also including in it not just the 250 but that the state become current of paying within 30 days of any bill at the old rates because there's no point -- I mean why shouldn't the state pay its bills I mean in a timely fashion?

MR. SCHULANER: I believe we actually have; so I mean I guess it will just be a question of the accounting to double-check on that that that's -- but we have no

problem with that, clearly.

THE COURT: Uh-huh. Well, and is there anything else that you --

MR. SCHULANER: I guess on one related matter: I guess the May 18th trial date, I think previously Magistrate Kobayashi had vacated the scheduling order; so I assume we'll be getting new dates for certain deadlines prior to the May 18th trial date.

THE COURT: Well, is it your intention to file any -- this is for the, you know, this is a preliminary injunction. That's for the permanent injunction. So it's of the nature of a permanent injunction, as opposed to a regular trial. I don't know if you have some dispositive motions that you want to file.

MR. SCHULANER: Well, we've already given the court some inclination of our dispositive motion in this one; so maybe not. But we also were thinking of discovery actually to find out community rates and so on to get to the ultimate issue as to what a reasonable rate is, and so we'll assume discovery is ongoing.

THE COURT: Yes. And we would have a pretrial in this matter before me when we have the -- we said May 18th; so the pretrial would be on Friday, the 7th of May, at 8:30 in the morning. And the normal rules with respect to witness lists, et cetera.

Now, and there should be a date -- Mr. Hisashima, what's the date for the magistrates -- do we need a magistrate pretrial on this for preliminary injunction? I'm not sure if we do have it. Do --

THE CLERK: I don't think so.

THE COURT: No, I don't think we have it usually.

Now, I guess I want to be clear that I need some information. I need hard information. I can't figure out from what I have about what Child and Family Service is doing. I don't know how many kids they have there. I don't know what kind of services they're giving. And in terms of anything that's comparable. Those are the issues that are going to come up. I mean, if one place has a psychologist on staff and is meeting with a child regularly or they have a number of one on one or the level of training of the people that they're using and what kinds of programs they're doing compared to another place. It can't just be they'll charge us $300 and they charge $400. It's got to have some real hard information.

And, you know, it would seem to me once you get some of this information you folks ought to be able to work this out, and I would hope that you would look to trying to work this out once the state comes to terms with the fact that the only way out in terms of the placement under IDEA is one of those roads. And I can't force Loveland Academy

to have particular rates. If they're within a normal range, you're going to have to pay them anyway. I mean so -- I don't know enough about it at this point to know how this is ultimately going to come out, but it seems to me that the public interest in terms of having these children educated as has been agreed to or ordered and the lack of information showing that there is anything wrong with the rates, the state's got to come up with something.

MR. SCHULANER: To clarify -- and I apologize -- so the May 18th is actually as to the permanent injunction on the nine students with hearing officer orders and court orders that Mr. Varady referenced, not as to the overall issue of the rate for services for all students at Loveland Academy.

THE COURT: Well, right now there are orders and settlement agreements that they be there. You have been withholding payment. That's what's happening. You're withholding what is being billed to you. And, as it stands, you need to show that you're in the right.

MR. SCHULANER: Okay. I just wanted to clarify the scope being those students versus all --

THE COURT: This is IDEA. It's only the kids with the orders. The other remains, you know, in state court.

Now, you're both spending a lot of time and

effort on it. To the extent you can wrap it up in a settlement, that would certainly be to your advantage. However, on the other hand, if it comes in and you have evidence that it's too much money and you can get the services somewhere else, then Loveland Academy can't charge those rates. That's, you know, but I need some hard information in terms of people testifying and, you know, authenticated documents in terms of, you know, what it costs to do a particular kind of program. And there's got to be some connection between what these children have been placed there for in terms of what they need and what's being provided. And, if you're proposing an alternate -- because I mean the whole thing only can be interpreted when you have an alternative. I mean to the extent that we're just talking in a vacuum, then you can say, "Well, that psychologist costs too much money," then you have to show what other psychologists cost.

I would like to have a special master. I'm not sure if it should be a magistrate or somebody who is more attuned to dealing with the finances.

MR. SCHULANER: I think the finances would be very helpful. That's been an ongoing issue I think Mr. Varady and I could agree upon.

THE COURT: If you two, you know, we have had different accountants in the past who have acted as

masters. If you two have somebody you think would be helpful, I think that might, you know, and I would be comfortable with somebody being able to look and see is the state doing what they say they're doing. I mean the state is isn't always as easy to deal with as we would like in terms of finance, and somebody who is fiscally more astute may be able to figure it out a lot faster.

Do you have a possible name?

MR. VARADY: Yes, Your Honor. I was going to suggest Bob Hatanaka, Robert Hatanaka. He's from the Detor & Williams firm.

THE COURT: I'm sorry. What firm is that?

MR. VARADY: Detor, D-e-t-o-r, and Williams. They're at 700 Bishop Street, Suite 140.

THE COURT: I'm sorry. Would you move your microphone down.

MR. VARADY: I'm so sorry. I'm short.

THE COURT: What's the address again?

MR. VARADY: It is 700 Bishop Street, Suite 140, and it's 96813. His number -- his phone number is 521-0002.

Now, I'll disclose to the court that Detor & Williams does the periodic audits for Loveland and is directly familiar with Loveland's billing system and the like. The reason that I think would be useful to use him

is he's a CPA who would certify to the court under his own oath that he's checked the math, and he will have the advantage of being able to get into the bookkeeping system a lot easier than someone coming to the project cold.

THE COURT: You have a suggestion, Mr. Schulaner.

MR. SCHULANER: Actually, just given that apparent conflict because, when he started to mention the name, it did sound familiar. If time is of the esense, we would probably instead just prefer to defer to the court as to its previous experience with appropriate accountants to choose someone other than someone who already has a financial relationship with Loveland, such as Detor & Williams.

THE COURT: Well, let's do this: why don't you two take today and tomorrow and talk to each other and look into it because, rather than me pulling the name out of a hat, it also means me approaching them, figuring out whether or not they are willing to do it, and you know what you need, both of you, in terms of an accountant. So I'm going to see if you folks can agree on somebody because I think you really ought to be able to.

And I do think that it's possible that this person might even be a witness for the petitioner, and so I don't think he would be the correct one. But you need somebody who has some ability to deal with numbers. I just

think it would make an awful lot more sense and go a lot faster.

MR. SCHULANER: That makes sense.

THE COURT: If you two would talk and see if you can't come up with somebody who is comfortable with doing this. And in terms of payment, it's something that's, you know, this person is going to have to be paid. And that's going to have to get worked out in terms of prevailing party, et cetera; so you both have an interest in keeping it down.

MR. SCHULANER: Okay.

THE COURT: So let me know -- today is Monday -- by the end of Tuesday or if you've got somebody. Is that enough time, or you want Wednesday? Want to tell me on Wednesday?

MR. SCHULANER: Wednesday might be better.

THE COURT: See if you can't come up with somebody that you both agree with.

And I'm going to issue a minute order that's consistent with what I said. And it's up to the petitioner to get a bond in the amount of $250,000. At that point, when they've got the bond in place, the state can release the check to them. And that you just deal with the Clerk's Office, and they can give you some leads on that, Mr. Varady.

MR. VARADY: I'll go down and talk to them before I leave.

THE COURT: Is there anything else we need to do? Yes.

MR. VARADY: I just had one question, Your Honor. As to the work of the special master, what would help the court at this point because it seems to me the reason we would be asking for one is -- from our side at least -- would be to review Loveland's bills and to report to the court what's been paid and what the disparity, you know, the difference between those two sums would be. Is there something else that the court would be asking for from the special --

THE COURT: Well, I think, if you think about it from the point of view of assisting you in coming to some kind of a resolution, the first thing the special master would be able to verify is whether or not the state is timely paid in the way that we've talked about: the old rate and the $250,000 and ongoing up until the time of trial because, you know, it won't do any good if they default next month.

MR. VARADY: Right.

THE COURT: So it would be ongoing until then.

The next thing that they would be able to do, if you folks were comfortable with it in recognizing that the

person has to be paid at some point, is coming to terms with how are you going to compare these things, you know, meeting with the special master possibly and talking about what are the ways that you can compare this in terms of what the state thinks is an appropriate rate and what is being offered and what would be an appropriate rate.

The issue of insurance has come up. I don't know if there is a way for the state to become the insurer to relieve some of that burden, you know. The state, when it does its own offering of services, is self-insured, and that might be something there could be some sort of an agreement. I don't know.

But I think you need a financial person to sit down with the parties and to look at this as -- it's just a financial problem. That's all it is. I mean, you know, to the extent that there are other issues, I haven't really seen that there is a comparable place where these children can go; so you have a disagreement about a financial matter. So sitting down and talking and becoming educated about what it is that Loveland has in terms of business that they're doing that causes these rates compared to what's the norm and then what the state comes up with is the comparables, I just think it would be very helpful to have this person who can look at it solely from a financial point of view. And it may be that you can come to some

kind of an accommodation.

MR. VARADY: Yeah, I think that whatever expert testimony we would be presenting on that subject -- and I assume that Mr. Schulaner would be contemplating the same thing -- that the special master would be someone who could take a look at that and give us a read, I think, fairly --

THE COURT: And the special master may be able to report to the court that, you know, what is going on. I mean they will be an impartial person, and they may have an opinion with respect to where things are going and what's going on.

And we can have a status conference between now and then and work out any kinds of problems. And I'm willing to do that rather than sending it down to the magistrate, if it's just a status conference and I'm not settling discovery disputes, et cetera. And I'll look at whether or not we will keep it with Judge Kobayashi or whether we'll choose one of the other magistrates, and I'll let you know about that.

MR. VARADY: Okay.

THE COURT: Thank you. We stand in recess.

(Court recessed at 11:20 A.M.)

COURT REPORTER'S CERTIFICATE

I, Debra Kekuna Chun, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATED at Honolulu, Hawaii, March 26, 2004.

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DEBRA KEKUNA CHUN

RPR, CRR