No. _____

In The
Supreme Court of the United States

J.M., by and through his
Mother MARIA MANDEVILLE,

Petitioner,

v.

KATHRYN S. MATAYOSHI, Superintendent
of the Hawaii Public Schools and
STATE OF HAWAII DEPARTMENT OF EDUCATION,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Endrew F. v. Douglas County School Dist. RE-1*, 580 U.S. ___, 137 S.Ct. 988, 1000 (2017), this Court established that an Individualized Education Program (IEP) for a child with a disability must be "appropriately ambitious in light of his circumstances." J.M., an autistic child, was repeatedly bullied at the public school before his mother placed him in a private school for Autism to protect him against additional bullying. He made significant progress in that new environment. The State of Hawaii, Department of Education (HIDOE) prepared an IEP which would return J.M. back to the public school where he had been bullied even though the school did not have any formal policies against bullying.

Two questions are presented:

1. Did the Ninth Circuit Court of Appeals fail to follow this Court's standard for a free appropriate public education (FAPE) established in *Endrew F.* when it did not consider J.M.'s circumstances – a student with Autism who was subject to bullying – and allowed HIDOE to return J.M. to the school where the bullying had occurred without addressing the bullying?

2. In *Schaffer v. Weast*, 546 U.S. 49, 62 (2005), this Court held that, in a special education dispute, the party seeking relief bears the burden of proof. HIDOE sought to change J.M.'s educational placement from a judicially-sanctioned private placement in his IEP and was thus the party seeking relief. Did the trial and

QUESTIONS PRESENTED – Continued

appellate courts depart from this Court's precedent in *Schaffer* when they assigned the burden of proof on petitioner when he was not the one seeking relief?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner J.M., by and through his mother Maria Mandeville, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1) is unpublished. The opinion of the United States District Court for the District of Hawaii (Pet. App. 5) is published at 224 F.Supp.3d 1071. The decision of the State of Hawaii Office of Administrative Hearings (Pet. App. 53) is also unpublished but available on the Hawaii State Department of Education website.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 29, 2018. Pet. App. 1. Petitioner's request for rehearing en banc was denied on August 13, 2018. Pet. App. 101. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, requires that public

schools receiving federal funds for special education services provide each child with a disability a "free appropriate public education (FAPE)." 20 U.S.C. §§1401(9) and 1412(a)(1). These special education and related services must be "provided in conformity with the individualized education program (IEP) required under" the IDEA. 20 U.S.C. §§1401(9) and 1414(d).

IDEA must provide "[a]n opportunity for any party to present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. §1415(b)(6). Such opportunity must include "[p]rocedures that require either party, or the attorney representing a party, to provide due process complaint notice . . . that shall include . . . a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem." 20 U.S.C. §1415(b)(7). With compliance to those procedures "the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. §1415(f)(1)(A).

STATEMENT OF THE CASE

A year ago, this Court clarified the definition of a "free appropriate public education" within the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq*. The standard for a FAPE enunciated by this Court is that a child with a disability's Individualized Educational Program (IEP) must be "appropriately ambitious in light of his circumstances." *Endrew F. v. Douglas County School Dist. RE-1*, 137 S.Ct. 988, 1000, 580 U.S. ___ (2017).

Application of that standard by courts to IEP-eligible children who are also targets of bullying has been either sporadic or non-existent. Despite clear guidance from the United States Department of Education on how schools and courts should address bullying of students with disabilities in the context of special education programming, students, like J.M. herein, continue to be victims and courts, such as the Ninth Circuit below, refuse to give this issue special consideration. Elaboration that bullying is an important "circumstance" to be considered in developing an IEP would assist educators and parents alike in ensuring that children with disabilities have access to a FAPE and avoid disparate treatment of that same population.

Precedent from this Court holds that in a special education dispute the party seeking relief bears the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). This Court also acknowledged that the party seeking relief is not always the parents of a student with a disability. 546 U.S. at 58 (there are cases that

"will be in evidentiary equipoise" where the burden should be on school districts). Assigning the burden of proof to school districts seeking to change a child's educational placement from a judicially-sanctioned private placement harmonizes the intent of Congress with the balance of power between schools and parents in IDEA disputes.

A. Legal Background

1. Under IDEA, a state is eligible for federal funding of special education programs if a "free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive." 20 U.S.C. §1412(a)(1)(A). "Free appropriate public education" is defined in the statute as:

> 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 required under section 1414(d) of this title.

20 U.S.C. §1401(9). This Court first interpreted that definition as requiring an IEP be "reasonably calculated to enable the child to receive educational benefits." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982).

In a unanimous 2017 decision, this Court reviewed and distinguished the previously-quantified standard of a FAPE in *Rowley*. "*Rowley* had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level." *Endrew F.*, 137 S.Ct. at 1000. For those children, this Court concluded:

> If [progressing smoothly through the regular curriculum] is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives . . . this standard is markedly more demanding than the 'merely more than de minimis' test.

Id.

IDEA does not define or address bullying of students eligible under the Act. Congress mandated that the United States Secretary of Education issue regulations to ensure compliance with the statute and permitted issuance of policy guidance. 20 U.S.C. §1406. Both the U.S. Department of Education's Office of Special Education and Rehabilitative Services (OSERS) and Office for Civil Rights (OCR) issued policy letters "to provide an overview of a school district's responsibilities under [IDEA] to address bullying of students with disabilities." *Dear Colleague Letter*, USDOE

OSERS, August 20, 2013, p. 1;[1] *see also Dear Colleague Letter*, USDOE OCR, October 21, 2014.[2]

Although policy letters issued by the Secretary of Education are "provided as informal guidance and [are] not legally binding," 20 U.S.C. §1406(e)(1), they represent "the interpretation by the Department of Education of the applicable statutory or regulatory requirements in the context of the specific facts presented." 20 U.S.C. §1406(e)(3). The 2013 OSERS letter and the 2014 OCR letter recommend specific procedures schools should adopt to prevent bullying of students with disabilities. *See* fns. 1 and 2.

2. If a dispute arises as to the special education of a child with a disability, IDEA authorizes any party to bring a complaint entitling that party to an impartial hearing. 20 U.S.C. §§1415(b)(6), (7), and (f)(1)(A). However, IDEA is silent on which party bears the burden of proof at the hearing.

This Court established the general rule for burden of proof in special education cases in *Schaffer v. Weast*, 546 U.S. 49 (2005). Justice O'Connor writing for the Court held that since IDEA does not statutorily assign the burden of proof, courts fall back to the default rule that "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." 546 U.S. at 62. Noting that "[t]he

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[1] https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf.

[2] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf.

ordinary default rule, of course, admits of exceptions," 546 U.S. at 57, this Court anticipated that there would be IDEA cases "in evidentiary equipoise" justifying assignment of the burden of proof to schools. 546 U.S. at 58; *see also* 546 U.S. at 62 (Justice Stevens, concurring.)

Initially, when a parent unilaterally removes a child with an IEP from the public school and seeks reimbursement for the private placement of such student, that parent is the party seeking relief and therefore carries the burden of proving "(1) that the public placement violated the IDEA, and (2) that the private school placement was proper under the [IDEA]." 20 U.S.C. §1412(a)(10)(C)(ii); *Florence County School District Four v. Carte*r, 510 U.S. 7, 15 (1993). What remains unresolved is which party bears the burden of proof when a school district seeks to change the educational placement of a student with a disability after a hearing officer or court has judicially-sanctioned a private placement.

B. Factual Background

Children with Autism are three times more likely to be bullied than their non-disabled peers.[3] This placed J.M., a student with Autism, sensory issues and

[3] "Bullying and Children and Youth with Disabilities and Special Health Needs," U.S. Department of Health and Human Services ("HHS") Tip Sheet / Bulletin, stopbullying.gov, p. 1 *citing* "Bullying and ostracism experiences in children with special health care needs," Twyman, K.A., Saylor, C.F., Saia, D., Macias, M.M., Taylor, L.A, & Spratt, E. (2010), *Journal of Developmental Behavioral Pediatrics*, 31, 1-8.

social concerns, in a vulnerable position at Kamali'i Elementary School (KES) in Hawaii. Pet. App. 58.

Despite having counseling and a one-to-one (1:1) aide with him at all times, J.M. was repeatedly bullied and physically assaulted while at KES. *Id.* 58-59. J.M.'s mother Maria removed him from KES in March 2013 and he began attending the Maui Autism Center (MAC). *Id.* 59.

In November 2013, respondent State of Hawaii, Department of Education (HIDOE) proposed an Individualized Education Program (11/7/13 IEP) to transition J.M. back to KES, where the students who bullied J.M. still attended. *Id.* 59. J.M.'s mother contested the 11/7/13 IEP and sought relief through an administrative hearing. The hearings officer found that the 11/7/13 IEP denied J.M. a FAPE because it failed to properly address the bullying issue and that J.M.'s learning opportunities were substantially restricted. *Id.* 59. Private placement of J.M. at MAC was held to be appropriate and the hearings officer awarded reimbursement therefor. *Id.* 59.

J.M. began making significant progress at the private placement. *Id.* 59-61. One month after the preceding hearings officer's decision, HIDOE convened an IEP meeting seeking another change in J.M.'s placement back to KES with the bullies despite warnings from HIDOE's special education teacher that J.M. "might have some anxiety to large groups." *Id.* 61-62. The proposed IEP contained services to address J.M.'s anxiety, but only the identical 1:1 aide to prevent

bullying as was in his IEP when he was bullied previously at KES. *Id.* 62.

During the 2014 IEP meeting, HIDOE proposed a crisis plan to prevent future bullying. *Id.* 63-66. A MAC representative attending the IEP meeting stated that there was a "very minor discussion" about bullying, no actions prescribed to prevent bullying, and that the crisis plan was merely an emergency phone list. *Id.* 66. HIDOE admitted that it "does not have a formal anti-bullying policy" but simply "follows the disciplinary procedures set forth in [the] Hawaii Administrative Rules." *Id.* 66.

J.M.'s mother Maria sent a letter expressing her desire that the IEP team review the prior decision by the hearings officer and "discuss the complaints raised in my earlier letters with regards [sic] to bullying." *Id.* 68. The IEP was finalized with the change in J.M.'s placement back to the public school adding "Mother later voiced concern about a bullying at [KES]." *Id.* 68. Maria rejected the proposed IEP. *Id.* 68.

Ten days later, HIDOE issued a Prior Written Notice (PWN) acknowledging but rejecting Maria's request for J.M. to remain at MAC and confirming it was implementing the change in placement back to the public school. *Id.* 69. Maria sent another letter to HIDOE repeating her rejection of the IEP because of the bullying J.M. experienced at the public school and that J.M. would remain at MAC. *Id.* 69.

C. Proceedings Below

1. J.M., by his mother, filed a complaint and request for a due process hearing on February 13, 2015. Pet. App. 55. The complaint disputed the proposed change of placement away from the judicially-approved private school and sought recognition that MAC was the current placement and continued reimbursement therefor. *Id.* 57-58.

Attempts were made by the parties to resolve the dispute prior to hearing, but all failed as Maria continued to emphasize her concerns about the prior bullying that occurred at KES and that the proposed IEP did not state what steps HIDOE was taking to prevent future bullying of J.M. *Id.* 70-71. The proposed transition to the intermediate school was also rejected because, after J.M. visited the campus, he voiced "I am not brave enough" to attend that school due to "his many years of continual bullying." *Id.* 71-72.

The hearings officer ruled that petitioner bore the burden of proof in the administrative hearing because "[n]either *Schaffer* nor the text of the IDEA supports imposing a different burden in IEP implementation cases than in formulation cases." *Id.* 79. The hearings officer rejected petitioner's argument that neither HIDOE nor the proposed IEP complied with the USDOE policy guidance on bullying finding "that [sic] majority of the suggestions have been implemented." *Id.* 88-89. The September 9, 2015 decision concluded that petitioner did not meet his burden of proof to show that the proposed IEP violated IDEA or denied J.M. a FAPE

because it "addressed, [sic] perceived and actual bullying upon [J.M.]." *Id.* 99.

2. Maria appealed the hearings officer's decision by filing suit under IDEA in the U.S. District Court for the District of Hawaii, Pet. App. 5, premising jurisdiction on 20 U.S.C. §1415(i)(2)(A) and 28 U.S.C. §1331. That court, citing *Rowley*, described the FAPE standard as "rationally calculated to enable the child to receive educational benefits." *Id.* 22. Without addressing the burden of proof at the administrative level, the court stated that the burden "in IDEA appeal proceedings is on the party challenging the administrative ruling." *Id.* 24 [internal citations omitted].

The district court rejected reference to the USDOE's guidance letters on bullying because the eight recommended actions are "merely aspirational" and "does not reach the issue of whether [HIDOE] substantially complied with the eight responses described in the letter." *Id.* 30-31. The district court affirmed the 9/9/15 administrative decision and denied all six challenges raised by petitioner, but granted that MAC was the 'stay put' placement for J.M. *Id.* 6, 50-51. The rationale provided for affirmance was that both the proposed IEP and the transition plan were "reasonably (rationally[4]) calculated to confer Student with meaningful educational benefits." *Id.* 41, 46.

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[4] The district court apparently used the terms "reasonably" and "rationally" interchangeably in the FAPE standard. *See supra*.

3. In a four paragraph Memorandum, the Ninth Circuit affirmed. Pet. App. 1-4. That court held that although a prior hearings officer "had accordingly found that an earlier IEP contained insufficient protections against that bullying [of J.M.]," *id.* 2-3, "the 2014 IEP was expressly designed to overcome the deficiencies in the prior plan, mandating a full-time aide for J.M. and a crisis plan." *Id.* 3. Acknowledging that the proposed IEP did not contain all "of the [USDOE's] suggestions to combat bullying," *id.* 3, the Ninth Circuit declined to require full implementation of the policy guidance. *Id.* 3-4.

As to burden of proof, the Ninth Circuit found that petitioner abandoned the issue, but nevertheless concurred that petitioner was properly assigned the burden as "the party seeking relief" citing *Schaffer*. *Id.* 2. The court concluded that petitioner had failed to show "that, under the terms of the 2014 IEP, J.M. would be unable 'to make progress in light of [his] circumstances'" citing *Endrew F*. *Id.* 3 [alteration in original].

4. Petitioner sought rehearing en banc. The Ninth Circuit denied this request. Pet. App. 101.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit severely departed from the FAPE standard requiring this Court's exercise of supervisory power. Consideration of bullying of students with disabilities as a circumstance when developing an

IEP is a vital question of federal law that has not yet been, but should be, settled by this Court. Likewise, which party bears the burden of proof when a school district seeks to change placement from a judicially-sanctioned private placement is unsettled law and should not presume that the parents of a child with a disability are the party seeking relief.

I. The Ninth Circuit Court of Appeals Misstated and Misapplied the FAPE Standard Under IDEA as Enunciated By This Court in *Endrew F.* (2017)

Prior to the Ninth Circuit hearing this case, this Court revisited the definition of a FAPE under IDEA for the first time since its 1982 ruling in *Rowley*. Chief Justice Roberts writing for the Court remarked:

> Thirty-five years ago, this Court held that the Individuals with Disabilities Education Act establishes a substantive right to a 'free appropriate public education' for certain children with disabilities. [*Board of Education of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).] We declined, however, to endorse any one standard for determining "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act." [citation omitted.] That "more difficult problem" is before us today.

Endrew F. v. Douglas County School Dist. RE-1, 137 S.Ct. 988, 993, 580 U.S. ___ (2017). This Court held that

"[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999. But the Court did not end its analysis there. "The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education" is a "fact-intensive exercise [ ] informed not only by the expertise of school officials, but also by the input of the child's parents or guardians." *Id.* "The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement." *Id.* The unanimous Court concluded that the standard of FAPE is as follows:

> If [progressing smoothly through the regular curriculum] is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. *But his educational program must be appropriately ambitious in light of his circumstances*, just as advancement from grade to grade is *appropriately ambitious* for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives . . . this standard is *markedly more demanding than the 'merely more than de minimis' test*.

Id. at 1000 (emphasis added.)

The reason for the clarification in the standard is due to the different fact scenarios in the two Supreme Court cases. *Rowley* involved a student with impaired hearing who was "achieving educationally,

academically, and socially" in her regular classroom with the use of a hearing aid. *Rowley*, 458 U.S. at 185. The Court then held that because the student "performs better than the average child in her class and is advancing easily from grade to grade," she did not require a sign-language interpreter to receive a FAPE. *Rowley*, 458 U.S. at 210.

By contrast, the student in *Endrew F.* is a child with Autism, "a neurodevelopmental disorder generally marked by impaired social and communicative skills." *Endrew F.*, 137 S.Ct. at 996. He exhibited severe behaviors as a result of his disability that caused interruption in his education. *Id.* When the school district proposed an IEP with essentially no changes to address his behaviors and lack of progress, Endrew's parents withdrew him from public school and placed him in a private school specializing in Autism where he exhibited significant progress. *Id.* at 996-97. The IEP should be designed to "meet the unique needs" of a child with a disability. *Id.* at 1000.

This Court overturned the Tenth Circuit Court of Appeals for finding that the proposed IEP provided Endrew with a FAPE. *Id.* at 1002.

a. The Ninth Circuit misquotes the *Endrew F.* standard

The key distinction that this Court made in *Endrew F.* on the FAPE standard from that established in *Rowley* is the phrase "appropriately ambitious in light of his circumstances." That language does not appear

in *Rowley*. Clearly, this Court in 2017 wanted to clarify the approach to developing IEPs for children with disabilities, particularly students that are not able to easily advance grade levels.

In its June 29, 2018 Memorandum, the Ninth Circuit failed to apply the *Endrew F.* standard even though it referenced the case. Pet. App. 3. Instead of focusing on the "unique needs" of the child, the Ninth Circuit adopted the analysis of the district court that the proposed IEP would enable J.M. "to make progress appropriate in light of [his] circumstances." Pet. App. 3. There is no reference to the "appropriately ambitious" language of *Endrew F*. Accordingly, there is no analysis under the "appropriately ambitious" standard established by this Court.[5]

This is a grave error and one that has the potential to be repeated in other administrative special education cases and appeals therefrom, whether in federal or state court. This Court should emphasize that any forum in which a FAPE or the development of an IEP is at issue should apply the "appropriately ambitious" measure in its analysis.

[5] The "appropriately ambitious" standard was briefed and argued by petitioners before the Ninth Circuit.

b. The court below did not properly consider bullying a "circumstance" within the FAPE standard

A critical part of the *Endrew F.* standard is "in light of [the student's] circumstances." *Endrew F.*, 137 S.Ct. at 1000. Just as the nature and scope of a student's disability is part of his/her circumstances for purposes of a FAPE, *see* 20 U.S.C. §1414(d)(1)(A)(i)(I)(aa) (an IEP must include a statement of "how the child's disability affects the child's involvement and progress in the general education curriculum"), so must also the impact of a student with a disability that has been bullied be a "circumstance" to be considered in the provision of a FAPE.

It is now widely accepted that the bullying of a student with a disability who is receiving special education services can result in the denial of a FAPE that must be remedied by the school. *2013 OSERS Dear Colleague Letter*, p. 1; *2014 OCR Dear Colleague Letter*, p. 5; *see also T.K. v. New York City Department of Education*, 810 F.3d 869 (2nd Cir. 2016) (affirmed district court's ruling that student was denied a FAPE because of the severe bullying endured in the public school and SEA's refusal to address parents' concerns); *M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634, 650 (9th Cir. 2005)[6] (unremediated teasing by other students results in a denial of a FAPE).

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[6] The Ninth Circuit referenced this case in its Memorandum Opinion. Pet. App. 3.

In its policy guidance the USDOE has stated:

> When a student who receives IDEA FAPE services or Section 504 FAPE services has experienced bullying resulting in a disability-based harassment violation, however, there is a strong likelihood that the student was denied FAPE. This is because when bullying is sufficiently serious to create a hostile environment and the school fails to respond appropriately, there is a strong likelihood both that the effects of the bullying included an impact on the student's receipt of FAPE and that the school's failure to remedy the effects of the bullying included its failure to address these FAPE-related concerns.

2014 OCR Dear Colleague Letter, p. 7. The USDOE lists eight (8) steps the public school should take to address bullying:

> [To resolve a complaint about bullying in a school] . . . OCR could **require**, for example, that the district (1) ensure that FAPE is provided to the student by convening the Section 504 team to determine if the student needs different or additional services (including compensatory services) and, if so, providing them; (2) offer counseling to the student to remedy the harm that the school allowed to persist; (3) monitor whether bullying persists for the student and take corrective action to *ensure the bullying ceases*; (4) develop and implement a school-wide bullying *prevention* strategy based on positive behavior supports; (5) devise a voluntary school climate survey

> for students and parents to assess the presence and effect of bullying based on disability and to respond to issues that arise in the survey; (6) revise the *district's anti-bullying policies* to develop staff protocols in order to improve the district's response to bullying; (7) train staff and parent volunteers, such as those who monitor lunch and recess or chaperone field trips, on the *district's anti-bullying policies*, including how to recognize and report instances of bullying on any basis; **and**[7] (8) provide continuing education to students on the *district's anti-bullying policies*, including where to get help if a student either witnesses or experiences bullying conduct of any kind.

2014 OCR Dear Colleague Letter, p. 10, emphasis added. Similarly, in the 2013 policy guidance the USDOE suggested eight (8) "Evidence-based Practices for Preventing and Addressing Bullying" schools should take, namely:

- **Teach appropriate behaviors and how to respond**: *Preventing bullying* begins by actively and formally teaching all students and all school personnel: (1) what behaviors are expected at school and during school activities; (2) what bullying looks like; and (3) how to appropriately respond to any bullying that does occur.

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[7] Note that the USDOE OCR uses the term "require" and the conjunction "and", not "or", for the eight measures, indication that all 8 must be met, not selectively a subset.

- **Provide active adult supervision**: . . . intervene early so that minor rule violations are handled effectively *before problematic behaviors escalate*.

- **Train and provide ongoing support for staff and students**: . . . Training is essential in helping school personnel recognize the different forms of bullying that may be directed at students with disabilities, and the unique vulnerabilities these students may have to social isolation, manipulation, conditional friendships, and exploitive behaviors. Students, with and without disabilities, do not always recognize problem behaviors as bullying, or may be reluctant to stand up for themselves or others, seek help, or report bullying due to fear of retaliation, particularly if adults are involved. Due to the complexities of their disabilities, students with intellectual, communication, processing, or emotional disabilities may not understand manipulation or exploitive behavior as harmful, or have the knowledge and skills to explain the situation to an adult who can help.

- **Develop and implement clear policies to address bullying**: . . . Schools should *widely disseminate their antibullying policies* and procedures to staff, parents, and students, and post the policies in the school and on the school's website. . . . Schools should provide ongoing training to staff, parents, and students on

> their antibullying policies and procedures so that everyone in the school community is aware that *bullying behavior will not be tolerated*.
>
> - **Monitor and track bullying behaviors**: . . . guide planning of *prevention*
> - **Notify parents when bullying occurs**
> - **Address ongoing concerns**
> - **Sustain bullying prevention efforts over time**

2013 OSERS Dear Colleague Letter, Encl. pp. 3-6.

Although policy letters issued by the Secretary of Education are "provided as informal guidance and [are] not legally binding," 20 U.S.C. §1406(e)(1), they represent "the interpretation by the Department of Education of the applicable statutory or regulatory requirements in the context of the specific facts presented." 20 U.S.C. §1406(e)(3). Policy guidance letters are "entitled to respect," but only to the extent that those interpretations have the "power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) *citing Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *Skidmore*, this Court stated:

> We consider that the . . . interpretations . . . of the Administrator . . . , while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which *courts and litigants may properly resort for guidance*. The weight of such a judgment . . . will depend upon the

> thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140 (emphasis added.)

The district court stated that it "is not aware of any Ninth Circuit case addressing what, if any, weight courts should give to the OCR's Dear Colleague letters. This Court therefore CONCLUDES that the OCR's 10/21/14 Dear Colleague Letter is merely aspirational." Pet. App. 31 [emphasis in original]. The Ninth Circuit did not analyze whether the failure to incorporate all of the USDOE recommended actions into the IEP violated the FAPE standard. *See* Pet. App. 3.

Thus, the court below did not properly consider bullying a "circumstance" in its consideration of a FAPE. This is legal error contrary to this Court's decision in *Endrew F*.

II. The Questions Presented Are Vital Issues to Parties in IDEA Disputes

a. Bullying of students with disabilities is a pervasive societal problem

As the USDOE states unequivocally, "bullying persists in our schools today, and especially so for students with disabilities." *2014 OCR Letter to Colleague*, p. 1. "In recent years, [OCR] has received an ever-increasing number of complaints concerning the bullying of

students with disabilities and the effects of that bullying on their education, including on the special education and related services to which they are entitled." *2014 OCR Letter to Colleague*, p. 1. This fact "underscores the need for schools to fully understand their legal obligations to address and prevent disability discrimination in our schools." *2014 OCR Letter to Colleague*, p. 1.

"Students who are targets of bullying behavior are more likely to experience lower academic achievement and aspirations, higher truancy rates, feelings of alienation from school, poor relationships with peers, loneliness, or depression." *2013 OSERS Dear Colleague Letter*, p. 2, *citing* Gini G., & Pozzoli T. (2009), "Association between bullying and psychosomatic problems: A meta-analysis," *Pediatrics*, 123(3):1059-1065. "Bullying can foster fear and disrespect and negatively affect the school experience, norms, and relationships of all students, families, and school personnel." *2013 OSERS Dear Colleague Letter*, p. 2, *citing* O'Brennan, L.M., Bradshaw, C.P., & Sawyer, A.L. (2009). Examining developmental differences in the social-emotional problems among frequent bullies, victim, and bully/victims. Psychology in the Schools, 46(2), 100-115.

Both courts and the regulatory agencies recognize that bullying of students with disabilities is a "circumstance" that must be addressed in the development of IEPs. *See supra*. It is an obvious conclusion that the issue is of vital importance for this Court to address for all parties involved, *i.e.* parents, children with disabilities, schools, state and local education

agencies, administrative hearing officers, and courts. Because neither IDEA nor its regulations directly discuss bullying, this Court is in the proper position to establish a principle for application.

b. Resolving the burden of proof in subsequent private placement cases under IDEA would restore the balance of interests intended by Congress

The intent of IDEA is to level the playing field for families of a child with a disability away from historically unchallenged, unilateral decisions by schools. "Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. §1400(c)(1).

One of the key purposes of IDEA is "to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. §1400(d)(1)(B). To accomplish that purpose, IDEA establishes "Procedural Safeguards", which include the right of "any party to present a complaint . . . with respect to any matter relating to the . . . educational placement of the child." 20 U.S.C. §1415(b)(6)(A).

The most common scenario is a parent removes a child receiving special education services from the public school and enrolls the student in a private school without the consent of the public school agency and thereafter seeks reimbursement for the private

placement. A court or administrative hearing officer may require the public agency to reimburse the parent for the private school tuition if there is a finding that the public school did not provide a FAPE to the student with a disability and the private school placement is appropriate. 34 C.F.R. §300.148(c). The parent bears the burden of proof in this situation. *See Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2484, 2493-96, 557 U.S. 230, (2009).

The present case, however, presents the much rarer circumstance where the hearing officer has already made the private placement ruling in favor of the parent, but the public agency subsequently changes placement back to the public school. The unresolved question is which party bears the burden of proof in this subsequent situation, namely removal from a judicially-approved private placement.

The Ninth Circuit, following the rulings of both the hearings officer and the district court, assumed that the burden of proof should be borne by the parent as the "party seeking relief" under *Schaffer*. Pet. App. 2, 24, 79. However, *Schaffer* dealt with the first scenario outlined above. *See Schaffer*, 546 U.S. at 62.

Therein lies an assumption that the parents are always the "party seeking relief", despite this Court's acknowledgment that will not always be. *Id.* at 57-58. For example, if parents disagree with a school's evaluation of their child with a disability, they have the right to demand that the school district fund an Independent Educational Evaluation (IEE). 34

C.F.R. §300.502. The school has only two options: (a) fund the IEE; or (b) file an administrative due process complaint to avoid paying for an IEE. *Id.* If the school elects the latter option, it bears the burden of proof to "show that its evaluation is appropriate." 34 C.F.R. §300.502(b)(2)(i).

It is a matter of first impression as to the burden of proof when a school district proposes a change of placement from a judicially-sanctioned private school in an IEP and then relies upon the parents of the child with a disability to contest the IEP. Indeed, in this circumstance, the school district is the party seeking relief from reimbursement to the parents for the private placement.

The only means a parent has to contest a change in placement decision is via an administrative due process complaint. Requiring a parent to repeatedly bear the burden of proving that an IEP is not providing a FAPE and the private placement is appropriate violates both the purpose of IDEA and the rule of *res judicata*. *See M.R. v. Ridley School Dist.*, 744 F.3d 112 (3rd Cir. 2014) *cert. denied*, No. 13-1547, 2015 WL 2340858 (S.Ct. May 18, 2015) (doctrine of *res judicata* in the context of special education disputes); *Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979) (doctrine of issue preclusion prevents relitigation of all "issues of fact or law that were actually litigated and necessarily decided" in a prior proceeding).

III. The Ninth Circuit Erred By Disregarding Bullying As a "Circumstance" of a FAPE and Requiring Petitioners To Repeatedly Bear the Burden of Proof

This case is nearly identical to *Endrew F.* except that it adds the element of bullying of J.M., not present in the 2017 case before this Court. Despite evidence that "J.M. had undergone severe bullying at the public school in which he was placed and the AHO had accordingly found that an earlier IEP contained insufficient protections against that bullying," Pet. App. 2-3, the Ninth Circuit did not thoroughly analyze whether the proposed 2014 IEP was "appropriately ambitious" in light of J.M.'s circumstances.

The court below found that the 2014 IEP mandated "a full-time aide for J.M. and contain[ed] a crisis plan, which . . . sets forth a protocol to stop bullying if it occurs." *Id.* 3. However, like in the *Endrew F.* case, these services were not changes from J.M.'s prior IEP. When J.M. was at KES, the prior public school, his IEP also provided for a full-time 1:1 aide, *id.* 59, whose job would presumably include preventing J.M. from being a victim of bullying. Unfortunately, that 1:1 aide wasn't able to prevent bullying of J.M. at KES, *id.* 58-59, so it is not reasonable to assume that the same service would prevent future bullying. The duties of the 1:1 aide were not included in either the proposed IEP or the Crisis Plan. *Id.* 32-33. In essence, it was not "appropriately ambitious in light of [J.M.'s] circumstances" of previous bullying.

As to the abandonment of the burden of proof issue, the Ninth Circuit disregarded long-standing precedent that an appellate court may review an issue for fundamental error even when no contemporaneous objection or motion is filed in the trial court. *Bird v. Glacier Electric Cooperative*, 255 F.3d 1136 (9th Cir. 2000). Yet, without any analysis of the plain error rule[8] as first enunciated by this Court in *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) and adopted into the Federal Rules of Civil Procedure to correct "error [that] affects substantial rights," Fed.R.Civ.P. 51(d)(2), the Ninth Circuit simply ruled that the burden of proof argument was abandoned because it wasn't presented in the lower fora. Pet. App. 2.

The court below conducted no analysis of its own test established in *Settlegoode v. Portland Public Schools*, 371 F.3d 503 (9th Cir. 2004). Appellate courts have discretion to review issues not previously raised if "the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Pfingston v. Ronan Engineering Co.*, 284 F.3d 999, 1004 (9th Cir. 2002) *citing Bolker v. Comm'r*, 760 F.2d 1039, 1042 (9th Cir. 1985). Burden of proof is a pure question of law and does not depend on the factual record. *See Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 698 (9th Cir. 2007).

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[8] The "plain error rule" is also known as "fundamental error" and the terms are used interchangeably by the courts.

Compounding the error, the Ninth Circuit went on to actually make a ruling on burden of proof, Pet. App. 2, without considering that this case is in "evidentiary equipoise" from the facts of *Schaffer*. Petitioners had already proven that the 2013 IEP did not provide J.M. with a FAPE and that MAC was the appropriate placement for J.M. *Id.* 59. That decision is entitled to *res judicata* and need not be relitigated. *Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979). Yet, by simply changing J.M.'s placement in a new IEP one month later, HIDOE effectively did just that. Pet. App. 61-62.

This case presents a scenario where "the purpose of a statute is best effectuated by placing the burden of persuasion on" HIDOE. *Schaffer*, 546 U.S. at 62. HIDOE should have the burden to prove that MAC was not providing J.M. with a FAPE and that placement back in the public school was appropriately ambitious in light of J.M.'s circumstances.

For example, HIDOE has the burden of proving compliance with the IDEA, including its proposed placement of a child with a disability, at the administrative hearing and at the district court. *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1498 (9th Cir. 1996) *citing Clyde K. v. Puyallup School Dist. No. 3*, 35 F.3d 1396, 1398-99 (9th Cir. 1994). The principle underlying *Schaffer* is that just because HIDOE says it has made an "[o]ffer of FAPE – services on campus," Pet. App. 69, does not necessarily make it true.

The burden of proof issue is also "capable of repetition, yet evading review." *Sacramento City School Dist. v. Rachel H.*, 14 F.3d 1398, 1403 (9th Cir. 1994) *citing Honig v. Doe*, 484 U.S. 305, 318, 108 S.Ct. 592, 601, 98 L.Ed.2d 686 (1988). Courts loathe legal issues that are susceptible to recurrence when the issue remains unresolved. HIDOE should not be able to avoid the burden of proof simply by changing placement in an IEP back to a public school immediately after a decision favoring private placement in an IDEA case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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