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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

No. 16-17327

D.C. No. 1:15-cv-00405-
LEK-KJM

MEMORANDUM*

(Filed Jun. 29, 2018)

Appeal from the United States District Court
for the District of Hawaii

Leslie E. Kobayashi, District Judge, Presiding

Argued and Submitted June 15, 2018

Honolulu, Hawaii

Before: TASHIMA, W. FLETCHER, and HURWITZ,
Circuit Judges.

J.M., by and through his mother Maria Mandeville
(collectively “plaintiffs”), appeal an adverse district
court judgment in this action under the Individuals

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

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with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.* The district court upheld a decision by an administrative hearing officer (“AHO”) concluding that the individualized education program (“IEP”) proposed by the defendant state officials and agencies in 2014 provided J.M. with the “free appropriate public education” (“FAPE”) required by the IDEA. 20 U.S.C. § 1412(a)(1)(A). We have jurisdiction under 28 U.S.C. § 1291, and determine de novo “[w]hether a proposed IEP constitutes a FAPE,” giving deference to the AHO’s findings if “thorough and careful.” *Baquerizo v. Garden Grove Unified Sch. Dist.*, 826 F.3d 1179, 1184 (9th Cir. 2016) (citation omitted). We affirm the order of the district court.

1. Plaintiffs first argue that the AHO erred in placing the burden of proof on them to show the 2014 IEP denied J.M. a FAPE. But, because this argument was not presented to the AHO or the district court, it was abandoned. *See Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1293 (9th Cir. 2015); *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 952 (9th Cir. 2010). In any event, it is settled that “[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

2. The district court did not err in holding that the 2014 IEP provided J.M. with a FAPE. 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

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against that bullying. *See M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634, 650 (9th Cir. 2005) (recognizing that unremediated teasing by other students can deny a FAPE). But the 2014 IEP was expressly designed to overcome the deficiencies in the prior plan, mandating a full-time aide for J.M. and containing a crisis plan, which provides that “[i]nteractions with peers will be monitored by an adult” and sets forth a protocol to stop bullying if it occurs. The plan contains many, if not all, of the suggestions to combat bullying set forth in a “Dear Colleague” letter issued in 2014 by the U.S. Department of Education, Office for Civil Rights. *See Dear Colleague Letter: Responding to Bullying of Students with Disabilities* (October 21, 2014). Thus, the district court correctly concluded that plaintiffs have not shown that, under the terms of the 2014 IEP, J.M. would be unable “to make progress appropriate in light of [his] circumstances.” *See Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

3. We decline plaintiffs’ suggestion “to take the further step and give the USDOE policy guidance on bullying . . . the force of law” by adopting “it as a minimum standard when a public school agency develops an IEP” for disabled children who are bullied. The IDEA expressly provides that informal guidance letters are “not legally binding,” 20 U.S.C. § 1406(e), and that the Secretary “may not issue policy letters . . . that . . . establish a rule that is required for compliance

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with . . . this chapter without following the” rule-making requirements of the Administrative Procedure Act, *id.* at § 1406(d).¹

AFFIRMED.²

¹ Indeed, plaintiffs acknowledge that “policy letters issued by the Secretary of Education are ‘provided as informal guidance and [are] not legally binding.’” Plaintiffs also argue that a second guidance letter, issued by the Office of Special Education and Rehabilitative Services (“OSERS”), requires specific anti-bullying measures. Because this argument was not exhausted before the AHO, it was abandoned. *See J.L.*, 592 F.3d at 952. In any event, the second letter similarly does not mandate any particular anti-bullying remedy.

² Plaintiffs’ motion for judicial notice, Dkt. 13, is **GRANTED** as to the Department of Health and Human Services “tip sheet” and **DENIED** as moot as to the OSERS Dear Colleague Letter, which is already part of the record.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

J.M., by and through)	CIVIL 15–00405
his Mother, MARIA)	LEK–KJM
MANDEVILLE,)	(Filed Dec. 1, 2016)
Plaintiff,)	
vs.)	
DEPARTMENT OF)	
EDUCATION, STATE OF)	
HAWAI‘I, and KATHRYN)	
MATAYOSHI, superintendent)	
of the Hawaii Public Schools,)	
Defendants.)	

**ORDER AFFIRMING THE HEARINGS
OFFICER’S SEPTEMBER 9, 2015 FINDINGS
OF FACT, CONCLUSIONS OF LAW AND
DECISION; AND GRANTING PLAINTIFFS’
REQUEST FOR STAY-PUT RELIEF**

On October 6, 2015, Plaintiffs J.M. (“Student”), by and through his Mother, Maria M. (“Mother,” collectively “Plaintiffs” or “Petitioners”), filed an appeal of the Administrative Hearings Officer’s (“Hearings Officer”) September 9, 2015 Findings of Fact, Conclusions of Law and Decision (“2015 Decision”).¹ [Complaint (dkt. no. 1).] Plaintiffs filed their First Amended Complaint on December 22, 2015. [Dkt. no. 11.] Plaintiffs

¹ The 2015 Decision is part of the Administrative Record on Appeal, transmitted on October 27, 2015 (“AR”), at 299–326.

filed their Opening Brief on July 25, 2016. [Dkt. no. 35.] Defendants Department of Education, State of Hawai‘i and Kathryn Matayoshi, Superintendent of the Hawai‘i Public Schools (collectively, “Defendants,” “the DOE” or “Respondents”), filed their Answering Brief on August 26, 2016, and Plaintiffs filed their Reply Brief on September 12, 2016. [Dkt. nos. 39, 41.] The Court heard oral argument in this matter on October 11, 2016. After careful consideration of the briefs, record, arguments of counsel, and relevant legal authority, this Court HEREBY AFFIRMS the 2015 Decision, but GRANTS Plaintiffs’ request for stay-put relief pursuant to 20 U.S.C. § 1415(j).

BACKGROUND

Student was born in 2003, and he is eligible for special education services under the category of Autism Spectrum Disorder (“ASD”). [2015 Decision at 3.] The Hearings Officer found that “Student has sensory issues and social concerns representative of a child on the Autism Spectrum that require accommodations and specially designed instruction in social skills.” [*Id.*] Student attended his Home School from kindergarten. [*Id.* at 3.] The Hearings Officer found that, at the Home School, “Student was bullied by other students on several occasions even though he had counseling and a one-to-one (1:1) aide with him at all times.” [*Id.*] In March 2013, Mother unilaterally removed Student from the Home School, and he began attending an autism center (“Private School”). [*Id.*]

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An October 24, 2014 Findings of Fact, Conclusions of Law, and Decision (“2014 Decision”)² found that Student’s November 7, 2013 Individualized Education Program (“11/7/13 IEP”) denied him a free appropriate public education (“FAPE”) because “Student was the victim of bullying at the Home School and his learning opportunities were substantially restricted.” [2015 Decision at 3.] The Hearings Officer in the 2014 Decision found that Student’s placement at the Private School was appropriate and awarded Plaintiffs reimbursement. [*Id.*]

On November 24, 2014, the Home School held an IEP team meeting for Student and formulated an IEP (“11/24/14 IEP”). [*Id.* at 4; AR, Respondents’ Exhs. at 11–26 (11/24/14 IEP).] The IEP team reviewed: the 11/7/13 IEP; the Home School special education teacher’s (“SPED Teacher”) observations of Student at the Private School on November 5, 2014; information obtained on November 5, 2014 from Student’s Private School skills trainer; progress reports from the Private School dated November 5; samples of Student’s work on November 5; the behavioral health specialist’s (“BHS”) observations of Student on November 5; the occupational therapist’s (“OT”) observations of Student at the Private School on November 21, 2014; and input from the IEP team members. [2015 Decision at

² The 2014 Decision is part of the AR at pages 110–54, as Exhibit A to Plaintiffs’ Memorandum in Opposition to the Department’s Motion for Partial Dismissal or in the Alternative for Partial Summary Judgment. The same Hearings Officer issued both decisions. [2014 Decision at 45; 2015 Decision at 27.]

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5.] During the SPED Teacher's observation of Student, she saw Student try to converse with another student, who was younger. "The other student had difficulty communicating back and forth with Student; the other student wasn't able to answer questions and had to be prompted to engage in a conversation." [*Id.* at 4.]

As described by the Hearings Officer:

The [11/24/14] IEP provided Student with 270 minutes per quarter of counseling, 1770 minutes per week of special education, and 1770 minutes of individualized instructional support. He would receive daily: 1) role playing of situations that may cause anxiety; 2) seating near positive peer role models; 3) modified lunch and recess, as needed until Student felt comfortable with peers; 4) opportunities to interact with same-age peers; 5) opportunities to practice self-calming strategies; 6) social stories to help with his anxiety and peer interaction; 7) Behavior Support Plan ("BSP"); and 8) Crisis Plan. He would also have peer mediated instruction and intervention (buddy program) two times per week.

[*Id.* at 5.] The Hearings Officer found that, based on the Home School Principal's and the SPED Teacher's testimony, Student would have an adult – *i.e.* a 1:1 aide – with him at all times when he returned to the Home School. [*Id.*] The 11/24/14 IEP provided for transition services at the Home School during the winter break, and the SPED Teacher testified about other transition services that would be available after the break. [*Id.* at 5–6.]

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The DOE Psychologist testified that the Crisis Plan was developed to address, *inter alia*: any future bullying because of the prior bullying that Student experienced at the Home School; and Mother’s concerns about Student’s anxiety related to bullying.³ [*Id.* at 6.] As described by the Hearings Officer:

The Crisis Plan stated that the student “would be under close adult supervision at all times.” Interactions with peers would be monitored by an adult. The Crisis Plan listed steps to be taken “[s]hould a bullying incident occur (i.e., negative verbal and/or physical interaction, including, but not limited to: name calling, laughed at, pushed, kicked, punched, having things thrown at him, saying negative comments or statements, etc.) . . . [”]

[*Id.* at 7.]

At the meeting, the IEP team proposed a “draft” IEP, but added the following statement in the final version to address concerns that Mother raised in a November 21, 2014 letter (“11/21/14 Letter”): “‘Mother later voiced concern about a bullying incident at the Home School.’” [*Id.* at 8; 11/24/14 IEP at 2.]

In November 2014, Student began seeing a private counselor once a week for his anxieties. Student’s Grandfather, who is Student’s primary caretaker, testified that Student was a nervous child, who had phobias about other children, as well as the wind and rain.

³ The Crisis Plan is available in the AR, Respondents’ Exhibits at pages 36–37.

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However, Student's anxieties improved after he started seeing the counselor. [11/24/14 IEP at 3–4.] The Hearings Officer found that the IEP team was unaware that Student was seeing a private counselor, and, if they had known about it, they would have had the Home School Counselor conduct further assessments to determine if there were other services or supports that Student needed. [*Id.* at 8–9.]

Mother rejected the 11/24/14 IEP at the end of the meeting, and she sent a written notice of rejection to the Home School by facsimile on December 10, 2014. [*Id.* at 9.] The Home School issued a Prior Written Notice of Department Action on December 4, 2014 (“12/4/14 PWN”). It stated that Mother and the Private School representative wanted Student to remain at the Private School, but the Home School rejected that option because his IEP team could provide the services necessary for a FAPE at the Home School. [*Id.*; AR, Respondents' Exhs. at 27.] On December 28, 2014, Mother sent another letter to the Home School Principal rejecting the 11/24/14 IEP because of the previous bullying incidents at the Home School (“12/28/14 Letter”). The 12/28/14 Letter stated that Student would continue to attend the Private School and that Mother had instructed the Private School to continue to bill the DOE pursuant to the 2014 Decision. [2015 Decision at 9; AR, Petitioners' Exhs. at 45.] On February 3, 2015, the DOE sent the Private School a letter stating that it was only required to pay for Student's services received from the Private School up to the date of the

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12/4/14 PWN. [2015 Decision at 9; AR, Petitioners' Exhs. at 46.]

On February 11, 2015, the Home School sent Mother a letter through the Private School ("2/11/15 Letter") regarding the scheduling of a meeting to review the 11/24/14 IEP and to develop a plan for Student's transition services during spring break. The 2/11/15 Letter noted that the DOE had been having difficulty contacting Mother and requested that she update her contact information as soon as possible. [2015 Decision at 9; AR, Petitioners' Exhs. at 47.]

On February 13, 2015, Plaintiffs filed a request for a due process hearing ("Due Process Complaint"). [2015 Decision at 1; AR at 2–5 (Due Process Complaint).] The Hearings Officer conducted the due process hearing on May 29, 2015 and June 1, 2015. The parties also submitted post-hearing briefs. [2015 Decision at 2; AR at 197–213, 214–82, 283–97.]

Prior to the due process hearing, on February 25, 2015, the DOE conducted a resolution session, with Mother and Plaintiffs' attorney participating by phone. Mother agreed to work with the Home School and the intended intermediate school ("Future Home School") to develop a transition plan for the 2015–2016 school year. The DOE offered to perform a emotional behavioral assessment of Student, but Mother did not agree to the assessment. [2015 Decision at 10.]

The Home School made multiple attempts to hold the transition meeting with the Future Home School, but could not contact Mother. Their letters were

returned, and when DOE representatives went to her home, it appeared abandoned, but she never informed the Home School of an address change. Mother previously told the Home School to contact her through the Private School, but, in May 2015, when the Home School sent Mother a letter regarding a transition meeting on June 22, 2015, the Private School refused to accept it on her behalf. [*Id.*]

On March 30, 2015, Mother sent the Home School Principal a letter about one of the proposed transition meetings. She stated that: she was concerned about the prior bullying and whether there were sufficient protections in place to prevent future bullying incidents; Student was thriving at the Private School and she wanted him to remain there; and she wanted to wait for the ruling on the Due Process Complaint before making any arrangements for his return to the Home School or for his attendance at the Future Home School. [*Id.*; AR, Petitioners' Exhs. at 49.]

On May 8, 2015, the Home School Principal sent Mother a letter through the Private School regarding holding a transition meeting on May 21, 2015, after having previously offered six other dates. The Home School Principal acknowledged Mother's concerns about bullying and stated that they could review Student's plan and make changes. [2015 Decision at 10; AR, Petitioners' Exhs. at 112.] Also on May 8, Mother wrote the Home School a letter, stating that Student had visited the grounds of the Future Home School, and he told Mother that he was not brave enough to go there. According to Mother, "Student was 'experiencing

post-traumatic stress around large crowds of peers from his many years of continual bullying’ at the Home School.” [2015 Decision at 9–10; AR, Petitioners’ Exhs. at 50.] Mother stated that Student was not ready to transition to the Future Home School, and she thought it was best to leave him at the Private School. [2015 Decision at 10; AR, Petitioners’ Exhs. at 50.] Grandfather and the Private School representatives who testified before the Hearings Officer took similar positions. [2015 Decision at 12 (Clinical Director), 14 (Behavioral Intervention Specialist and Grandfather).]

The Hearings Officer made findings about the appropriateness of the Private School and Student’s progress at the Private School, but those are not at issue here because Defendants have acknowledged that the 2014 Decision established that the Private School was Student’s educational placement, at least up to the 12/4/14 PWN. Further, Defendants do not dispute that Student has received academic benefits at the Private School.

The DOE District Resource Teacher (“DRT”) testified as an expert in special education and Applied Behavioral Analysis (“ABA”). The DRT observed Student at the Private School in the fall of 2013 and wanted to observe Student again prior to the due process hearing, but the Private School did not grant the DRT permission to do so. [*Id.* at 14.]

79. The DRT recommended that Student have a “desensitization program,” starting off with Student being in a situation of

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safety and comfort and slowly introducing new elements such as typically developing peers. The peers would be trained to understand how to react to Student, and they would participate in activities that Student particularly enjoyed. Once he developed a positive attitude and a feeling of safety in the new situations, the number of peers, activities, and locations would be expanded. . . .

[*Id.* at 14–15.] According to the DRT, the Future Home School could facilitate such a program, but the Private School could not because of its small size. The Private School’s size “does not provide Student with opportunities to help desensitize him to his anxiety in large groups.” [*Id.* at 15 (citing TR 208:6–209:21).]

The Hearings Officer concluded that the 11/24/14 IEP was tailored to fit Student’s unique needs and to provide him with educational benefits. In particular, the Hearings Officer noted that the 11/24/14 IEP provided Student with a 1:1 at all times to prevent bullying. The Hearings Officer found that: “[i]f the 1:1 needed a bathroom break, the supervising teacher or other paraprofessional would provide coverage. If the 1:1 was absent, the Home School would either obtain a substitute or rotate current staff to provide the support. Student would never be left alone.” [*Id.* at 18.] The Hearings Officer also emphasized the fact that the 11/24/14 IEP provided a transition plan during winter break, and the SPED Teacher testified she would implement additional transition support services when school started. Further, the IEP provided for 270

minutes per quarter of counseling to help Student with his anxieties. [*Id.* at 18–19.] The Hearings Officer also emphasized that the Home School tried to engage Mother to participate in the transition plan meeting to address her concerns about bullying, but Mother did not respond. [*Id.* at 19.]

As to the Crisis Plan, Plaintiffs' position was that the team should have followed the United States Department of Education, Office for Civil Rights ("OCR") October 21, 2014 Dear Colleague Letter: Responding to Bullying of Students with Disabilities ("10/21/14 Dear Colleague Letter"). [*Id.* at 20; AR, Petitioners' Exhs. at 72–84 (10/21/14 Dear Colleague Letter).]

Mother apparently argued that, to address the prior bullying incidents, the Home School should have implemented the components of the resolution agreements described in the 10/21/14 Dear Colleague Letter. The Hearings Officer described those components as follows:

- 1) ensure that FAPE is provided; 2) offer the Student counseling; 3) monitor whether bullying persists and take corrective action; 4) develop and implement a school-wide bullying prevention program; 5) devise a voluntary school climate survey for students and parents to assess the presence and effect of bullying; 6) revise the response to bullying and develop staff protocols to improve the response; 7) train staff and volunteers; and 8) provide continuing education to students on

the anti-bullying policies, including where to get help.

[2015 Decision at 20–21.] The Hearings Officer recognized that these were valid responses to bullying and that schools **could** implement them, but the Hearings Officer concluded that the 10/21/14 Dear Colleague Letter did not **require** schools to do so. [*Id.*]

Moreover, the Hearings Officer found that the Home School implemented most of the suggestions – in particular, by providing Student with counseling and a 1:1 aide. The Hearings Officer acknowledged that the Home School did not have a formal anti-bullying policy, but noted that the Home School “follows the disciplinary procedures set forth in [Haw. Admin. R.] Chapter 19, and the teachers and staff are trained in these procedures.” [*Id.* at 21.] The Home School had also held various anti-bullying events, and the Future Home School participates in anti-bullying programs and has “a classroom peer/buddy system for special education students.” [*Id.*] Thus, the Hearings Officer concluded that, even if the DOE was required to follow the 10/21/14 Dear Colleague Letter, “the Home School has substantially complied with its recommendations” and it “has taken several preventative measures to protect Student, as well as the entire student body, from bullying.” [*Id.* at 21–22.]

At the due process hearing, Plaintiffs argued, *inter alia*, that: 1) Defendants failed to acknowledge that Student previously suffered harm due to the Home School’s deliberate indifference to Student’s rights;

and 2) without such acknowledgment, there was no reason for Plaintiffs to believe that the Home School made sufficient changes to prevent harm to Student if he returned there. In response to these arguments, the Hearings Officer pointed out that: the IEP team developed the Crisis Plan to address Mother's concerns about bullying; the Private School's October 29, 2014 progress report indicated that Student's emotional outbursts were infrequent and his management of his anxiety had improved; the IEP team was unaware that Student was seeing a private counselor and, if it had been aware, the Home School Counselor would have conducted further assessments to determine whether additional services or supports were necessary; and Mother did not inform the team during the November 24, 2014 meeting either that Student was experiencing on-going harm from the prior bullying incidents or that he was seeing a private counselor. [*Id.* at 22–23.] After Mother informed the team about the on-going harm, the Home School offered to conduct an emotional behavioral assessment, but it could not do so because Mother would not consent to the evaluation. [*Id.* at 23 (citing 20 U.S.C. § 1414).] The Hearings Officer stated that the DOE did not become aware that Student was experiencing anxiety in large groups of non-disabled peers until it was provided with a May 8, 2015 progress report from the Private School. The Hearings Officer concluded that the DOE “cannot be expected to address behavioral needed [sic] that it does not know exists,” and that the 11/24/14 IEP and the Crisis Plan were drafted “with the input provided by the entire team and the information they had at the time.” [*Id.*] The

Hearings Officer observed that Mother, the Private School representative, and Plaintiffs' expert witness were in the best position to provide information about Student's anxieties, but they chose not to do so. [*Id.*]

The Hearings Officer concluded that, while the 11/24/14 IEP did not expressly state that Student had been bullied in the past, the IEP team clearly acknowledged this because the IEP provided "counseling, 1:1 aide, transition plan, buddy program, [and] Crisis Plan." [*Id.*] He also noted that the final version of the 11/24/14 IEP included a statement in the background section about Mother's concern about bullying at the Home School. The SPED Teacher testified that this statement was added in response to the concerns raised in Mother's 11/21/14 Letter. [*Id.*] Thus, the Hearings Officer found that "the DOE adequately acknowledged that Student had been a victim of previous bullying," and concluded that it "offered Student programs and services in the November 24, 2014 IEP and Crisis Plan to specifically address this issue." [*Id.* at 24.] The Hearings Officer concluded that the 11/24/14 IEP offered Student a FAPE at the Home School, and therefore the offered placement at the Home School was appropriate. [*Id.* at 25.]

The Hearings Officer found that: the 2014 Decision established Student's placement as the Private School; the 12/4/14 PWN changed his placement to the Home School; and Mother "unilaterally continued to place Student at the private school." [*Id.* at 24.] However, the Hearings Officer acknowledged that Plaintiffs exercised their rights to challenge the placement at the

Home School by filing the Due Process Complaint. [*Id.* at 25.] The Hearings Officer concluded that, because Mother made a unilateral decision to continue to place Student at the Private School, she ran the risk that retroactive reimbursement would be denied. Because Plaintiffs failed to prove that the 11/24/14 IEP either procedurally or substantively violated the IDEA and failed to offer Student a FAPE, Plaintiffs were not entitled to reimbursement for Student's attendance at the Private School. [*Id.* at 26.]

The instant appeal followed. Plaintiffs allege that the 11/24/14 IEP failed to offer Student a FAPE because: 1) the IEP team refused to discuss Mother's concerns about the prior bullying incidents at the Home School; 2) the 11/24/14 IEP failed to address the prior bullying incidents; 3) it called for placement at the Home School even though the school failed to comply with the 10/21/14 Dear Colleague Letter; 4) the IEP, including the Crisis Plan, failed to include sufficient protections to address the risk of future bullying; 5) it failed to address the on-going harm that Student was still suffering from the prior bullying incidents; and 6) it failed to include an adequate transition plan.

STANDARD

This Court has examined what constitutes a FAPE, and what is required in reviewing an administrative decision under the IDEA:

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The IDEA defines FAPE 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). To provide FAPE in compliance with the IDEA, a state educational agency receiving federal funds must evaluate a student, determine whether that student is eligible for special education, and formulate and implement an IEP. *See generally* 20 U.S.C. § 1414.

The standard for district court review of an administrative decision under the IDEA is set forth in 20 U.S.C. § 1415(i)(2)(c), which provides:

In any action brought under this paragraph, the court –

- (i) shall receive the records of the administrative proceedings;

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- (ii) shall hear additional evidence at the request of a party; and
- (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

This standard requires that “due weight” be given to the administrative proceedings. *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 908 (9th Cir. 2009) (some citations omitted) (quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)).⁴ The amount of deference accorded is subject to the court’s discretion. *J.W. [ex rel. J.E.W. v. Fresno Unified Sch. Dist.]*, 626 F.3d [431,] 438 [(9th Cir. 2010)] (citation omitted). In reaching that determination, the court should consider the thoroughness of the hearings officer’s findings, increasing the degree of deference where said findings are “thorough and careful.” *L.M.*, 556 F.3d at 908 (quoting *Capistrano Unified Sch. Dist. v. Wartenberg ex rel. Wartenberg*, 59 F.3d 884, 892 (9th Cir. 1995)). “Substantial weight” should be given to the hearings officer’s decision when it “evinces his careful, impartial consideration of all the evidence and demonstrates his sensitivity to the complexity of the issues presented.” *Cnty. of San Diego v. Cal. Special*

⁴ *Rowley* was superseded by statute on other grounds, as recognized in *N.B. v. Hellgate Elementary School District*, 541 F.3d 1202, 1213 n.3 (9th Cir. 2008).

Educ. Hearing Office, 93 F.3d 1458, 1466–67 (9th Cir. 1996) (citation and quotation marks omitted)). Such deference is appropriate because, “if the district court tried the case anew, the work of the hearings officer would not receive ‘due weight,’ and would be largely wasted.” *Wartenberg*, 59 F.3d at 891.

N.B. v. Hawai‘i, Civil No. 13–00439 LEK-BMK, 2014 WL 3663452, at *2–3 (D. Hawai‘i July 21, 2014) (some alterations in *N.B.*). The Ninth Circuit has stated:

When analyzing whether an agency provided a student a FAPE, we conduct a two-part inquiry. First, we consider whether “the State complied with the procedures set forth in the Act.” *Amanda J. [ex rel. Annette J. v. Clark Cty. Sch. Dist.]*, 267 F.3d [877,] 890 [(9th Cir. 2001)] (quoting [*Bd. of Educ. v. Rowley*, 458 U.S. [176,] 206–07, 102 S. Ct. 3034) (internal quotation marks omitted). Second, we must determine whether the IEP is “rationally calculated to enable the child to receive educational benefits.” *Id.* A state must meet both requirements to comply with the obligations of the IDEA. *Rowley*, 458 U.S. at 207, 102 S. Ct. 3034.

Harmless procedural errors do not constitute a denial of FAPE. *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 910 (9th Cir. 2008). “However, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents’ opportunity to participate in the IEP formulation process, clearly result in the denial of

FAPE.’” *Shapiro [ex rel. Shapiro v. Paradise Valley Unified Sch. Dist.]*, 317 F.3d [1072,] 1079 [(9th Cir. 2003)] (quoting *W.G. v. Bd. of Trs. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992)).⁵ Where a court identifies a procedural violation that denied a student a FAPE, the court need not address the second prong. *Id.*

Doug C. v. Haw. Dep’t of Educ., 720 F.3d 1038, 1043 (9th Cir. 2013) (footnote omitted).⁶ As to the second part of the inquiry, the Ninth Circuit has stated:

The School District must offer the Student a placement that is tailored to the Student’s unique needs. *See Gregory K. [v.*

⁵ *Shapiro* and *Target Range* were superseded by statute on other grounds, as recognized in *M.L. v. Federal Way School District*, 394 F.3d 634, 653 (9th Cir. 2005).

⁶ The Ninth Circuit noted:

Hawaii has fully implemented the purposes, guarantees, and protections of the IDEA into its own regulatory structure. *See* Haw. Code R. §§ 8–60–1 to 8–60–84; *see also* § 8–60–1(b) (“This chapter shall be construed as supplemental to, and in the context of, the Individuals with Disabilities Education Act . . . and other federal laws and regulations relating to the provision of a free appropriate public education to a student with a disability.”). Hawaii’s regulations mirror the language in the IDEA regarding the IDEA’s purposes, the guarantee of a FAPE, and the requirement of parent participation. *Compare* Haw. [Admin.] R. § 8–60–1 (purposes), *with* 34 C.F.R. § 300.1 (same); Haw. [Admin.] R. § 8–60–3 (guarantee of FAPE), *with* 34 C.F.R. § 300.101 (same); Haw. [Admin.] R. § 8–60–46 (parent participation), *with* 34 C.F.R. § 300.322 (same).

Doug C., 720 F.3d at 1043 n.4 (alterations in *Doug C.*).

Longview Sch. Dist.], 811 F.2d [1307,] 1314 [(9th Cir. 1987)]. Additionally, the placement must be in the least restrictive environment – in other words, the Student must be placed with non-disabled peers “to the maximum extent appropriate.” 34 C.F.R. § 300.114; 20 U.S.C. § 1412(a)(5)(A). . . .

A.R. ex rel. Reese v. Santa Monica Malibu Sch. Dist., 636 F. App’x 385, 386 (9th Cir. 2016).

The burden of proof in IDEA appeal proceedings is on the party challenging the administrative ruling. *Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099, 1103 (9th Cir. 2007) (citations omitted). The challenging party must show, by a preponderance of the evidence, that the hearing decision should be reversed. *J.W.*, 626 F.3d at 438 (citation omitted).

N.B., 2014 WL 3663452, at *3.

DISCUSSION

At the outset, this Court acknowledges that some of the Hearings Officer’s findings and conclusions are open to interpretation and that there are a some minor errors, such as attributing one witness’s statement to another witness. However, read as a whole, this Court FINDS that the 2015 Decision is thorough, careful, and well-reasoned. The 2015 Decision is supported by appropriate evidence and demonstrates that the Hearings Officer considered all of the evidence and the complex issues presented. Accordingly, the Court gives

“substantial weight” to the 2015 Decision. *See Cty. of San Diego*, 93 F.3d at 1466–67. This Court now turns to the merits of Plaintiffs’ appeal.

I. Failure to Discuss Bullying at the Meeting

Plaintiffs allege that, at the November 24, 2014 IEP meeting, the team refused to discuss the 2014 Decision and the prior bullying incidents. They allege that this was a procedural denial of FAPE because the team’s refusal to discuss the issues that Mother raised violated her right to participate in the formulation of Student’s IEP.

The Due Process Complaint alleged the following denials of FAPE. First, the November 24, 2014 IEP and Crisis Plan did not address how the DOE changed or implemented policies in response to the bullying incidents that Student suffered. The IEP and Crisis Plan focus on how the DOE will respond if there is an incident of bullying, and they fail to specify how future bullying will be prevented. Second, the DOE has not acknowledged that Student was harmed. Third, Student should not be required to return to the environment where he was harmed. [Due Process Complaint at 3.] Fourth, the DOE refused to agree to placement at private school. [*Id.* at 4.]

This Court has stated:

As a general rule, arguments not raised at an administrative hearing cannot be raised for the first time on appeal to the district court. The Ninth Circuit applied this rule to

IDEA appeals in *Robb v. Bethel School District No. 403*, where it held that, “when a plaintiff has alleged injuries that could be redressed to any degree by the IDEA’s administrative procedures and remedies, exhaustion of those remedies is required.” 308 F.3d 1047, 1048 (9th Cir. 2002).⁷ Exhaustion may be avoided, however, if “it would be futile or offer inadequate relief, or if the agency has adopted a policy or pursued a practice of general applicability that is contrary to the law.” *N.D. v. Hawaii Dep’t of Educ.*, 600 F.3d 1104, 1110 (9th Cir. 2010) (citations and internal quotation marks omitted). . . .

The Ninth Circuit has also held that review in IDEA cases is specifically limited to the issues raised in the administrative complaint. *Cnty. of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1465 (9th Cir. 1996) (“The scope of the administrative hearing mandated by [former] section 1415(b)(2) is limited to the ‘complaint’ raised to obtain the hearing.”). 20 U.S.C. § 1415 codified this holding, providing that “[t]he party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under

⁷ *Robb* was overruled by *Payne v. Peninsula School District*, 653 F.3d 863 (9th Cir. 2011), which was overruled on other grounds by *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014). However, in *Payne* the Ninth Circuit merely “‘clarified that the IDEA’s exhaustion provision applies only in cases where the relief sought is available under the IDEA.’” *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842, 861 (9th Cir. 2014) (quoting *Payne*, 653 F.3d at 871).

subsection (b)(7), unless the other party agrees otherwise.” § 1415(f)(3)(B).

James M. ex rel. Sherry M. v. Hawai‘i, 803 F. Supp. 2d 1150, 1164–65 (D. Hawai‘i 2011) (alterations in *James M.*) (footnote omitted).

Concern for the safety and well-being of one’s child is far and away a parent’s greatest priority. Mother’s concerns about the prior bullying incidents and fears for her child if he returned to the Home School are understandable, and she has the Court’s sympathy. However, certain rules must be followed in challenges such as the instant appeal.

Because Plaintiffs failed to allege the procedural denial of FAPE in their Due Process Complaint, this Court CONCLUDES that they did not exhaust their administrative remedies as to this argument. Further, this Court CONCLUDES that none of the exceptions to the exhaustion requirement apply. This Court therefore DENIES Plaintiffs’ appeal as to their argument alleging a procedural denial of FAPE based on the IEP team’s alleged failure to discuss the prior bullying incidents.

II. Failure to Address Past Bullying in the IEP

Plaintiffs also argue that the 11/24/14 IEP failed to offer Student a FAPE because it failed to address the prior bullying incidents. This issue is related to the issue of whether the IEP included sufficient services and supports to address the risk of future bullying.

However, this issue raises the question whether – regardless of the services and supports offered – the failure of the 11/24/14 IEP to acknowledge the severity of, and the DOE’s responsibility for, the prior bullying incidents resulted in the failure to offer a FAPE.

The 2014 Decision – which the Hearings Officer issued on October 29, 2014 – concluded that Student’s 11/6/13 IEP denied Student a FAPE because: “1) Student was a victim of bullying; 2) the school authorities were aware of multiple bullying incidents; 3) the school failed to take the appropriate steps to notify the parents, investigate the incidents, or take remedial action; and 4) Student’s learning opportunities were ‘substantially restricted’ due to the bullying.” [2014 Decision at 35.] In spite of the findings and conclusions in the 2014 Decision, the Background Information of the 11/24/14 IEP merely states that Student attended the Home School “through the first semester of the 3rd grade” when Mother “unilaterally removed” him. [11/24/14 IEP at 2.] It also states that Mother “later voiced a concern regarding **possible bullying** which . . . occurred,” and she “subsequently enrolled him at” the Private School. [*Id.* (emphasis added).] The Parent Concerns section states that Mother requested that: the IEP team review the 2014 Decision; the team “discuss complaints raised in her earlier letters in regards to bullying”; and the IEP reflect the 2014 Decision’s ruling on Student’s placement. [*Id.* at 4.] There is no other discussion in the 11/24/14 IEP of the prior bullying incidents.

During the oral argument before this Court, Defendants' counsel acknowledged that the 11/24/14 IEP could have more directly addressed the prior bullying incidents. This Court is troubled by the fact that the 11/24/14 IEP appears to both minimize the seriousness of the prior bullying incidents and ignore the DOE's responsibility for the incidents. This Court also agrees with Plaintiffs that Student's IEP needs to alert school staff to the fact that bullying is a greater concern with Student than it is with others, and underscores this point here to emphasize its importance as well as to suggest firmly that including such information would be the better and wiser practice.

Although it failed to present a complete picture of the prior bullying that Student suffered, the minimal discussion of prior bullying in the 11/24/14 IEP and the fact that the IEP incorporated a Crisis Plan⁸ did alert school staff to the heightened concern about Student being bullied. There are no magic words that were required to be included in the 11/24/14 IEP to constitute a sufficient discussion of the prior bullying incidents. Instead, the critical inquiry for the issue of whether the 11/24/14 IEP offered Student a FAPE at the Home School is whether the services and supports offered were rationally calculated to enable Student to receive educational benefits. That issue is addressed *infra*.

Thus, to the extent that Plaintiffs contend that the 11/24/14 IEP's failure to adequately discuss the prior

⁸ Plaintiffs acknowledge that a Crisis Plan is not a standard component of every student's IEP.

bullying incidents – in and of itself – resulted in a failure to offer Student a FAPE, Plaintiffs’ appeal is DENIED.

III. 10/21/14 Dear Colleague Letter

Plaintiffs next argue that the 11/24/14 IEP failed to offer Student a FAPE because it called for placement at the Home School, even though the school failed to comply with the 10/21/14 Dear Colleague Letter after the 2014 Decision. Plaintiffs argue that, to address the prior bullying incidents, the Home School should have implemented the components of the resolution agreements described in the 10/21/14 Dear Colleague Letter, summarized in the 2015 Decision at pages 20–21. This discussion of resolution agreements appears in a section setting forth “hypothetical examples [that] illustrate how OCR would analyze a complaint involving allegations of the bullying of a student with a disability who only receives Section 504 FAPE services.” [10/21/14 Dear Colleague Letter at 9.] In an example of a situation involving disability-based harassment and a FAPE violation, the OCR stated: “If, upon concluding its investigation, OCR and the district were to enter into a resolution agreement, OCR **could require, for example. . .**” [*Id.* at 10 (emphasis added).] Thus, the eight actions listed, and which the Hearings Officer summarized in the 2015 Decision, are merely **examples** of how bullying which results in the denial of FAPE **can** be addressed. The eight actions are not **required** responses for all instances when bullying results in the denial of FAPE.

This Court also notes that the Courts of Appeal have described the OCR's Dear Colleague letters as providing "guidance." *Seth B. ex rel. Donald B. v. Orleans Par. Sch. Bd.*, 810 F.3d 961, 972 n.36 (5th Cir. 2016); *T.K. v. New York City Dep't of Educ.*, 810 F.3d 869, 876 (2d Cir. 2016). This Court 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. Because the 10/21/14 Dear Colleague Letter is merely aspirational and the responses to bullying described in the letter merely provide guidance for schools, not requirements, this Court does not reach the issue of whether the DOE substantially complied with the eight responses described in the letter.

To the extent that Plaintiffs contend that the 11/24/14 IEP failed to offer Student a FAPE because of the Home School's failure to implement the eight bullying responses listed in the 10/21/14 Dear Colleague Letter, Plaintiffs' appeal is DENIED.

IV. Whether the 11/24/14 IEP Adequately Addressed the Risk of Future Bullying Incidents

Plaintiffs contend that the DOE failed to offer Student a FAPE because the 11/24/14 IEP, including the Crisis Plan, failed to include sufficient protections to address the risk of future bullying.

The 11/24/14 IEP provided 1770 minutes per week of “Individual Instructional Support.” [11/24/14 IEP at 13.] The Crisis Plan – which is incorporated into the 11/24/14 IEP – explains: “The student will be under close adult supervision at all times. Interactions with peers will be monitored by an adult (teacher, EA, and/or paraprofessional).” [AR, Respondents’ Exhs. at 36.] The SPED Teacher testified that the IEP team included the 1770 minutes of individual instructional support to “make sure that [Student] would always have an adult with him at all times,” which she testified “would hopefully keep [bullying incidents] from happening.” [AR, Trans. vol. 3 at 113–14.] The Home School Principal testified that the Home School’s policy is that,

when there is a one-to-one paraprofessional, it does mean exactly that, that the child needs to be with a person at all times. Should it be like a brief break going to the restroom, the paraprofessional would indicate to the supervising teacher or other paraprofessionals about trying to . . . have coverage with the child. And that if the person were absent on that day, then if the person is from a different agency, we would try to get a substitute, or we would rotate our current staff to make sure that the students who have the highest needs being one-to-one have the paraprofessional support.

[*Id.* at 167.] Plaintiffs argue that neither the 11/24/14 IEP nor the Crisis Plan include the explanation of a 1:1 aide that the Home School Principal provided.

While Plaintiffs are correct that this specific information is not included in either document, the Home School Principal's testimony is consistent with the contents of the 11/24/14 IEP and the Crisis Plan. This Court therefore construes his testimony as a mere explanation of the services offered therein, not an after-the-fact attempt to expand upon the services that were offered in the 11/24/14 IEP.

Plaintiffs also argue that the offer in the 11/24/14 IEP of a 1:1 aide at all times was not sufficient because the prior bullying at the Home School occurred under the same circumstances. *See* 2015 Decision at 3 ("Student was bullied by other students on several occasions even though he had counseling and a one-to-one (1:1) aide with im at all times.").

The bullying that Student suffered at the Home School was horrifying and inexcusable. It is understandable that Mother did not trust the Home School to protect her son and that the services and supports offered in the 11/24/14 IEP were not acceptable to her. However, merely because the prior bullying incidents occurred when Student had a 1:1 aide does not necessarily mean that the offer of a 1:1 aide in the 11/24/14 IEP automatically failed to offer FAPE. First, the offer of a 1:1 aide must be viewed in the context of the IEP as a whole.

Based on the inclusion of the Crisis Plan in the 11/24/14 IEP, anyone working with Student at the Home School would be on alert to the heightened possibility of future bullying incidents. Plaintiffs argue

that the Crisis Plan is insufficient because it merely specifies reactions to bullying incidents if they occur and it does not require any preventative actions by the Home School. It is true the purpose of the Crisis Plan “is to take immediate action in **response** to future bullying incidents.” [AR, Respondents’ Exhs. at 36 (emphasis added).] However, the Crisis Plan also recognizes that: “Students with Autism may experience difficulty in interpreting social interactions. Response to bullying incidents will be the same, whether they are actual or perceived.” [*Id.*] Further, the Crisis Plan defines bullying incidents as “negative verbal and/or physical interaction, including, but not limited to: name calling, [being] laughed at, pushed, kicked, punched, having things thrown at him, saying negative comments or statements, etc.” [*Id.* at 36–37.] If any of those incidents – actual or perceived – occurred, the Crisis Plan called for the following response:

- First, assess student safety. Remove student from the situation and/or, remove all peers from the area. If any physical contact occurs, immediately bring the student to the Health Room. If he is unable to go to the Health Room for any reason, notify the Health Aide to come to the student’s location. The Health Aide will assess the student’s physical state, and the student’s parents will be contacted if any physical contact has occurred.
- Once the student’s physical state has been assessed for safety, the student will

be accompanied by the supervising adult (EA, Paraprofessional) to appropriate support staff (Behavioral Health Specialist, Counselor, and/or School Psychologist). Support staff will assess the student's social-emotional state, and debrief about the incident, as appropriate. Support staff will prompt the student to describe how the situation made him feel using "I" statements, as previously practiced in counseling sessions.

- Support staff will then prompt the student to use the coping strategies that he has previously learned in counseling sessions (i.e., deep breathing, count to ten, take short walks, drink water or positive self-talk, etc.).
- Support staff will determine if/when it is appropriate for the student to return to class.

Following an actual or perceived bullying incident, details will be documented in the student's counseling file. The parents will be notified of the incident. . . .

[*Id.* at 37.] The services and supports in the Crisis Plan would be triggered even where Student **perceived** he was being laughed at, called names, or had other negative comments directed at him. This Court FINDS that the Crisis Plan is rationally calculated to enable Student to receive educational benefits by addressing any possible or perceived bullying incidents and to prevent the incidents from continuing or escalating.

In addition, this Court notes that it appears from the record that Mother was seeking a guarantee that Student would not be subjected to any bullying if he returned to the Home School. Although, ideally, no student would ever be subjected to bullying at school, that type of guarantee is not required to provide a FAPE. In the 2014 Decision, the Hearings Officer concluded that Student was denied a FAPE because his “learning opportunities were ‘substantially restricted’ due to the bullying.” [2014 Decision at 35.] In other words, the 11/3/13 IEP was not rationally calculated to enable Student to receive educational benefits because it failed to address the bullying that was substantially restricting his learning.

It is understandable that Mother wanted something in the 11/24/14 IEP promising that Student would not be subjected to any bullying. But the lack of such a promise did not constitute a failure to offer FAPE. It is well-settled that a FAPE need not provide the “absolutely best” or “potential-maximizing” education. *J.W.*, 626 F.3d at 439 (citation and internal quotation marks omitted). The FAPE need only be “appropriately designed and implemented so as to convey [the] [s]tudent with a meaningful benefit.” *Id.* at 433 (citations and quotation marks omitted). This Court CONCLUDES that the 11/24/14 IEP – including the Crisis Plan – was appropriately designed to enable Student to receive meaningful educational benefits at the Home School.

Plaintiff’s appeal is therefore DENIED as to their argument that the 11/24/14 IEP failed to offer Student

a FAPE because it did not adequately address the risk of possible bullying if he returned to the Home School.

V. Failure to Address On-going Harm

Plaintiffs also argue that the 11/24/14 IEP failed to offer Student a FAPE because it did not address the on-going harm that he was still suffering from the prior bullying incidents.

The 11/24/14 IEP offered Student 270 minutes of counseling per quarter. [11/24/14 IEP at 13.] In the discussion of Student's emotional strengths and needs, the IEP noted that:

His emotional outbursts are at a very low frequency. . . . When he is upset, he is able to express his feelings in a much more appropriate manner. [Student] has improved in his ability to manage his anxiety and knows how to calm himself down without excessive prompting. He is currently showing that he feels more confident about his abilities and skills.

[*Id.* at 3.] However, he still needed “to demonstrate consistency in managing his anxiety” and “to continue using appropriate coping skills and displaying positive self-expression.” [*Id.*] In the discussion of Student's behavioral strengths and needs, the IEP noted that he “likes to please his teachers and peers” and “likes to be a leader of his peers” at the Private School. [*Id.* at 4.] But, it noted that certain events, like having to wait to be picked up after school, made him anxious and would cause “pacing, face sweating, hyperventilating.” [*Id.*] In

the discussion of Student's social strengths and needs, the IEP noted that Student "likes to help his younger peers," but he "needs opportunities to interact with his same-age peers." [*Id.*] Thus, the 11/24/14 IEP recognized that Student had needs related to his anxieties, but the IEP did not indicate that these anxieties were related to his interactions with groups of same-age peers.

Grandfather testified that Student started seeing a private counselor in November 2014 because of his phobias about, *inter alia*, other children. [AR, Trans. vol. 3 at 97.] The SPED Teacher testified that she did not remember either Mother or the Private School representatives informing the team that Student was seeing a counselor because of the prior bullying. She also testified that, if the team had been so informed, it would have discussed further actions, including assessments by the Home School counselor and whether more counseling or other services should be included in the IEP. [*Id.* at 118–19.] The DOE Psychologist gave similar testimony. [*Id.* at 151–52.] The Hearings Officer found that:

The DOE only became aware of Student's anxiety in large groups of non-disabled peers when they were provided with the May 8, 2015 progress report form the private school. . . . Mother and the private school representatives participated in the November 24, 2014 IEP and this concern should have been raised to the IEP team. . . . Mother and the private school representatives were in the best position to provide this information to the

IEP team, but they chose not to disclose it. . . . The Home School drafted an IEP and Crisis Plan **with** the input provided by the entire team and the information they had at the time.

[2015 Decision at 23 (emphasis in original).]

Plaintiffs do not dispute that the Home School was not aware at the time of the November 24, 2014 meeting that Student was seeing private counselor to address on-going harm from the prior bullying incidents. However, they argue that Mother did not need to provide this information because it is common sense that Student would still be experiencing on-going harm, and therefore the DOE had the burden to address the on-going harm in the 11/24/14 IEP. Further, Plaintiffs point out that their autism and ABA expert witness testified that, at the November 24, 2014 IEP meeting, she “spoke about . . . his anxiety related to experiences that he had in [the Home School] as well as with his peers.” [AR, Trans. vol. 2 at 15, 25.] The Home School Principal also testified that, during the meeting, the Private School representatives stated that Student had anxieties about “large crowds.” [AR, Trans. vol. 3 at 163.]

The DOE representatives had limited opportunities to observe Student at the Private School prior to the November 24, 2014 IEP meeting. Even if the Hearings Officer erred in finding that the Home School representatives were unaware that Student had anxieties related to groups of same-age peers because of the prior bullying incidents, this Court CONCLUDES that

the Hearings Officer's error was harmless. The undisputed testimony is that, if the Home School representatives had known about those anxieties, they would have conducted further assessments to determine if more services and supports were necessary. The Home School Principal testified that, at the February 25, 2015 resolution session, the DOE offered to conduct a emotional/behavioral assessment of Student. Although Plaintiffs' counsel stated that they would think about it, as of the date of the due process hearing, they had never consented to the assessment. [*Id.* at 177–78.] The Hearings Officer concluded that the DOE could not proceed with the assessment without Mother's consent. [2015 Decision at 23 (citing 20 U.S.C. § 1414).] Thus, even if the Hearings Officer erred when he found that the Home School did not know about Students' anxieties about same-age peers at the time of the November 24, 2014 meeting, the school could not have performed further assessments without Mother's consent. Without the further assessments, no new information would have been available at the time of the meeting. This Court CONCLUDES that Plaintiffs have not shown that the error affected the Hearings Officer's ultimate conclusion that the 11/24/14 IEP, including the Crisis Plan, adequately addressed Student's unique needs based on the information available at the time of the meeting.

The Ninth Circuit has stated that: “When reviewing whether a proposed educational setting is ‘appropriate,’ we employ the ‘snapshot’ rule, which instructs us to judge an IEP not in hindsight, but instead based

on the information that was reasonably available to the parties at the time of the IEP.” *Baquerizo v. Garden Grove Unified Sch. Dist.*, 826 F.3d 1179, 1187 (9th Cir. 2016). The snapshot rule “is not retrospective.” *J.W.*, 626 F.3d at 439.

Instead of asking whether the [IEP] was adequate in light of the [Student’s] progress, the district court should have asked the more pertinent question of whether the [IEP] was appropriately designed and implemented so as to convey [Student] with a meaningful benefit. We do not judge an [IEP] in hindsight; rather, we look to the [IEP’s] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer [Student] with a meaningful benefit . . . In striving for “appropriateness,” an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is at the time the IEP was drafted.

Id. (alterations in *J.W.*) (citation omitted). In light of the information that was reasonably available to the Home School at the time the 11/24/14 IEP was drafted, this Court CONCLUDES that the services and supports offered to address Student’s anxieties were objectively reasonable and were reasonably calculated to confer Student with meaningful educational benefits.

This Court therefore DENIES Plaintiffs’ appeal as to their argument that the 11/24/14 IEP failed to offer Student a FAPE because it did not adequately address

the on-going harm that he was suffering as a result of the prior bullying incidents at the Home School.

VI. Transition Plan

Finally, Plaintiffs argue that the 11/24/14 IEP failed to offer Student a FAPE because it failed to include an adequate transition plan for his intended return to the Home School from the Private School. 20 U.S.C. § 1401(34) states:

The term “transition services” means a coordinated set of activities for a child with a disability that—

- (A) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
- (B) is based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests; and
- (C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living

skills and functional vocational evaluation.

Thus, this district court has recognized that,

while “the IDEA requires an IEP to have a statement of needed transition services in some circumstances, the statutory provision of the IDEA specifically addressing transition services does not mandate such services when a transition from private to public school takes place.” *L.M. v. Department of Education*, 2006 WL 2331031, *16 (D. Haw. 2006) (citing *Bock v. Santa Cruz City Schools*, No. 95–20168, 1996 WL 539715 at *5 (N.D. Cal. 1996)).

The IDEA does not mandate the creation of a specific transition plan when a student moves from a private placement to a public school, but in some cases, the knowledgeable education experts agree that a particular student would benefit from such a plan. *See*, [*L.M.*], 2006 WL 233103[1], *16. . . .

B.B. ex rel. J.B. v. Haw., Dep’t of Educ., 483 F. Supp. 2d 1042, 1056–57 (D. Hawai‘i 2006) (alterations in *B.B.*).

In the instant case, Plaintiffs do not argue that the 11/24/14 IEP failed to offer Student a FAPE because of a lack of a transition plan. Such a claim would fail as a matter of law. *See, e.g. Carrie I. ex rel. Greg I. v. Dep’t of Educ.*, 869 F. Supp. 2d 1125, 1241 n.16, 1243 n.17 (D. Hawai‘i 2012) (noting that a claim based on an IEP’s lack of a transition plan for a move from a private placement to a public school fails as a matter of law).

Plaintiffs' argument is that, although the IEP team determined that transition services were necessary, it failed to offer him a FAPE because the services and supports ultimately included in the 11/24/14 IEP were not sufficient to meet Student's unique needs.

The 11/24/14 IEP states:

[Student] does need a transition period prior to returning to school to prepare him for routines and expectations in the classroom. Therefore he will receive services prior to his return to school in January 2015, on the school campus during the last week of Winter Break for 2 hours per day. . . . [Student] will have access to sensory regulation activities and counseling consultation during this period. Counseling will consist of parent education provided for 8 hours over this period.

[11/24/14 IEP at 14.] The Hearings Officer found that:

23. The SPED teacher testified that she would have Student start the school year in a special education classroom with approximately five to seven students, with his 1:1 support. He would have a modified lunch in the special education classroom in a quiet, small group environment with only his 1:1 and teacher. They would bring in two to three peer mediators into the classroom and have them play with Student at recess. Once he was comfortable, Student would spend more time in the cafeteria. They would have him start with attending the last five or ten minutes and gradually start to increase the time. The

Home School would increase the amount of time Student would attend a class, until he became comfortable.

[2015 Decision at 6 (citation omitted).]

Plaintiffs argue that the Hearings Officer erred in considering the SPED Teacher's testimony because she admitted on cross-examination that she developed this plan – not the IEP team – and that it was not included in the 11/24/14 IEP. [AR, Trans. vol. 3, at 127–29.] It is true that these modifications are not discussed within the context of Student's "transition period prior to returning to school." [11/24/14 IEP at 14.] However, the "Supplementary Aids and Services, Program Modifications and Supports for School Personnel" offered included, *inter alia*: "Role playing of situations that may cause anxiety . . . [a]s needed for self-regulation"; daily "Adult modeling"; daily "Seat[ing] near positive peer role models"; "Peer Mediated Instruction and Intervention" twice a week; and "Modified lunch and recess . . . [a]s needed for self-regulation." [*Id.* at 13.] These program modifications and supports are similar to the transition plan that the SPED Teacher testified that she would implement upon Student's return to the Home School. Although not labeled as part of a transition plan in the 11/24/14 IEP, these modifications and supports were intended to help Student transition from the Private School back to the Home School. This Court FINDS that the Hearings Officer properly considered the SPED Teacher's testimony in evaluating the transition services offered in the 11/24/14 IEP.

The Hearings Officer concluded that the 11/24/14 IEP “contained a detailed transition plan to help Student return to the Home School” and that the transition plan was part of the overall offer of FAPE. [2015 Decision at 19.] This Court agrees and AFFIRMS the Hearings Officer’s conclusion that the transition plan, and the transition modifications and supports, in the 11/24/14 IEP were tailored to meet Student’s unique needs and were “rationally calculated to enable [Student] to receive educational benefits.” *See Amanda J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 890 (9th Cir. 2001).

Plaintiffs also challenge the Hearings Officer’s conclusion about the transition plan because they allege that the Hearings Officer improperly considered events that occurred after the formulation of the 11/24/14 IEP. Immediately after summarizing the SPED Teacher’s testimony about the transition modifications and supports, the Hearings Officer noted that the Home School had made several attempts to schedule a transition meeting with Mother. During these attempts, the Home School Principal acknowledged Mother’s concerns about Student’s safety, especially regarding bullying, and stated that they could review the IEP and make changes at the transition meeting. [2015 Decision at 19.] Plaintiffs argue that the Hearings Officer erred in considering the attempts to schedule a transition meeting because all of the proposed

meetings were after Plaintiffs filed the Due Process Complaint on February 13, 2015.⁹

This Court agrees with Plaintiffs that attempts to hold further transition meetings after the formulation of the 11/24/14 IEP are irrelevant to the issue of whether the IEP failed to offer Student a FAPE because the transition plan and services were inadequate. However, although the Hearings Officer mentioned the attempts to schedule a transition meeting in the context of the discussion of the adequacy of the IEP's transition plan and services, this Court does not interpret the 2015 Decision as **relying** upon Mother's failure to respond to the scheduling attempts to support the Hearings Officer's conclusion that the transition plan and services were sufficient. Plaintiffs' argument appears to imply that Mother had no obligation to participate in further transition meetings after the filing of the Due Process Complaint. Although that issue does not affect this Court's conclusion regarding the sufficiency of the transition plan and services in the 11/24/14 IEP, the issue is worth addressing.

Plaintiffs' Due Process Complaint sought an order recognizing the Private School "as Student's current

⁹ The Home School Principal did send Mother a letter prior to the filing of the Due Process Complaint attempting to schedule a meeting where Mother could "view the IEP, identify areas of concern, and provide input for [Student's] program" and where they could "discuss whether a transition program can be provided" during spring break. [AR, Petitioners' Exhs. at 47 (letter dated 2/11/15).] The letter offered four meeting dates – February 23 or 26, or March 5 or 9, 2015. [*Id.*]

educational placement for purposes of ‘stay put’.” [Due Process Complaint at 4.] “A parent can request a due process hearing and invoke the stay-put provision when the State proposes to change the child’s educational placement.” *N.D. v. Haw. Dep’t of Educ.*, 600 F.3d 1104, 1114 (9th Cir. 2010) (citing 34 C.F.R. § 300.507 (2006); 34 C.F.R. § 300.503(a) (2006)). The IDEA’s stay-put provision states that, “during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child.” 20 U.S.C. § 1415(j). However, the filing of a due process complaint that invokes the stay-put provision does not excuse a parent from cooperating with the DOE in its good faith attempts to address the concerns with the IEP that the parent has identified. This Court has stated:

The Court also notes that Loretta M. declined to participate in all subsequent IEP team meetings after the filing of the due process hearing request based on the 2004–2005 IEP, thus taking the position that the stay put provision gave her the right to refuse to work with the DOE. Other courts have rejected this same argument, and this Court does as well.

C.H.’s parents also argued that the “stay put” provision gave them the right to refuse to work with the school district after they had filed their due process hearing request. [*C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 71 (3d Cir. 2010).] The

Third Circuit disagreed. “The stay-put provision,” the court said, “was never intended to suspend or otherwise frustrate the ongoing cooperation of parents and the school district to reach an amenable resolution of a disagreement over educational services.” *Id.* at 72.

A.R. [v. Hawai‘i], [Civil No. 10–00174 SOM/RLP,] 2011 WL 1230403, at *12 [(D. Hawai‘i March 31, 2011)] (some citations omitted). . . . [T]his Court cannot ignore Loretta M.’s refusal to participate in the IEP process. Although Loretta M. believed that the 2004–2005 IEP did not offer a FAPE, had she participated in the formation of the three subsequent IEPs, the IEP team could possibly have formulated an IEP that did offer a FAPE and that she was satisfied with.

Aliah K. ex rel. Loretta M. v. Hawaii, Dep’t of Educ., 788 F. Supp. 2d 1176, 1193–94 (D. Hawai‘i 2011) (some alterations in *Aliah K.*) (footnote and citations omitted).¹⁰ Similarly, in the instant case, the filing of the Due Process Complaint did not allow Mother to ignore the Home School’s good faith attempts to schedule further meetings to review the 11/24/14 IEP, including the transition plan and services.

This Court therefore DENIES Plaintiffs’ appeal as to their argument that the 11/24/14 IEP failed to offer

¹⁰ Although the *Aliah K.* decision is an order denying a motion for a temporary restraining order and preliminary injunction, the *A.R.* decision is an order affirming the hearings officer’s decision and denying “stay put” reimbursement.

Student a FAPE because it failed to offer an adequate transition plan for his return to the Home School from the Private School.

VI. Summary and Stay-Put Relief

This Court has rejected all of Plaintiffs' challenges to the 2015 Decision, and therefore AFFIRMS the 2015 Decision. In the event that this Court affirms the 2015 Decision, Plaintiffs' First Amended Complaint seeks stay-put relief. *See* First Amended Complaint at pgs. 5–6.

The 2014 Decision established the Private School as Student's educational placement. In the 11/24/14 IEP, the DOE proposed to change that placement to the Home School. Plaintiffs exercised their right to challenge the proposed change by filing the Due Process Complaint pursuant to 20 U.S.C. § 1415(f) and Haw. Admin. R. § 8–60–70(a). Pursuant to § 1415(j), Student is entitled to remain in his educational placement at the time the Due Process Complaint was filed during the pendency of all proceedings associated with the Due Process Complaint, including the current proceedings before this Court and any further appeals from the judgment in this case. *See, e.g., Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, 641 (9th Cir. 1990) (holding that the school district “was responsible for maintaining the [student's private] placement through the pendency of court review proceedings”). Further, Plaintiffs are entitled to stay-put relief during the pendency of the review

proceedings regardless of whether they prevail on the merits. *See, e.g., Sam K. ex rel. Diane C. v. Dep't of Educ.*, Civ. No. 12-00355 ACK-BMK, 2012 WL 3647139, at *8 (D. Hawai'i Aug. 22, 2012) (concluding that "Plaintiffs are entitled to Stay Put regardless of whether they ultimately prevail on the merits").

This Court therefore GRANTS Plaintiffs' request for stay-put relief during the pendency of all judicial review proceedings of the 2015 Decision.

CONCLUSION

On the basis of the foregoing, the Court HEREBY AFFIRMS the Hearings Office's September 9, 2015 Findings of Fact, Conclusions of Law and Decision. However, this Court GRANTS Plaintiffs' request for stay-put relief during the pendency of all judicial review proceedings of the 2015 Decision.

There being no remaining issues in this appeal, the Court DIRECTS the Clerk's Office to close this case on **December 22, 2016**, unless one of the parties files a motion for reconsideration of this Order by **December 19, 2016**.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, December 1, 2016.

[SEAL]

/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

***J.M., ET AL. VS. DEPARTMENT OF EDUCATION,
STATE OF HAWAII, ET AL; CIVIL 15-00405 LEK-
KJM; ORDER AFFIRMING THE HEARINGS OF-
FICER'S SEPTEMBER 9, 2015 FINDINGS OF
FACT, CONCLUSIONS OF LAW AND DECISION;
AND GRANTING PLAINTIFFS' REQUEST FOR
STAY-PUT RELIEF***

[SEAL]

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

In the Matter of REDACTED , by and through his Mother, MARIA MANDEVILLE, Petitioners, vs. DEPARTMENT OF EDUCATION, STATE OF HAWAII, Respondent.	DOE-SY1415-044 LEGEND; FINDINGS OF FACT, CONCLU- SIONS OF LAW AND DECISION (Filed Sep. 9, 2015)
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LEGEND

Maria Mandeville = “Mother”

Robert Allen Sutton = “Grandfather”

Catherine Heard = “Clinical Director for the Center
of Autism and Related Disorders (“CARD”)”

**Maui Autism Center aka Autism Management
Services** = “private school”

Denise Greenberg = “private school Director”

Howard Greenberg = “private school President”

Trenton Briney = “private school Behavioral Inter-
vention Specialist (“BISS”)”

Kamalii Elementary School = “Department of Education (“DOE”) Home School”

Iao Intermediate School = “future Home School”

Thomas Moon = “District Educational Specialist (“DES”)”

Kim Mukai-Otani = “Principal”

Janelle Vilitski (f.k.a. Janelle Custer) = “Special Education (“SPED”) teacher”

Wendy Wells = “general education teacher”

Ruth Ballinger = “District Resource Teacher (“DRT”)”

Marie “Kate” Madaya = “Student Services Coordinator (“SSC”)”

Aeryn Ralha = “DOE Psychologist”

Carrie Yealey = “Occupational Therapist (“OT”)”

Marra Hill = Behavioral Health Specialist (“BHS”)

I HEREBY CERTIFY THAT THE ATTACHED IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN THE DEPARTMENT OF COMMERCE & CONSUMER AFFAIRS.

/s/ Cheryl [Illegible]

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[SEAL]

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

In the Matter of	DOE-SY1415-044
STUDENT, by and through his Mother,	FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION
Petitioners,	
vs.	
DEPARTMENT OF EDUCATION, STATE OF HAWAII,	
Respondent.	

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION**

(Filed Sept. 9, 2015)

I. INTRODUCTION

On February 13, 2015, the Department of Education, State of Hawai'i ("Respondent" or "DOE") received a Request for a Due Process Hearing ("Request") under Hawai'i Administrative Rules ("HAR") Title 8, Chapter 60 from Student, by and through his Mother, (collectively referred to as "Petitioners").

A pre-hearing conference was held on March 19, 2015, before Hearings Officer Rowena A. Somerville, with Kirstin Hamman, Esq. representing Petitioners;

and Steve Miyasaka, Esq. representing Respondent. The due process hearing was scheduled for May 29, 2015 and June 1, 2015.

On April 24, 2015, Petitioners' counsel, Ms. Hamman submitted a Declaration to the undersigned Hearings Officer to extend the 45-day period in which a decision is due under HAR §8-60-69, from April 30, 2015 to June 14, 2015.

On May 4, 2015, the Respondent filed its Motion to Dismiss or in the Alternative for Partial Summary Judgment ("Motion"). Respondents sought to dismiss Petitioners' Request. On May 11, 2014, the undersigned Hearings Officer received Petitioners' Memorandum in Opposition. On May 18, 2014, a hearing on the motion was held before the undersigned Hearings Officer. Respondent was represented by Mr. Miyasaka; Petitioners were represented by Ms. Hamman via telephone. On May 20, 2015, the Motion was denied.

On May 29, 2015 the hearing was commenced at the Ralph Rosenberg Court Reporters' Offices at 2233 Vineyard Street, Wailuku, Maui, Hawai'i by the undersigned Hearings Officer. Petitioners were represented by Ms. Hamman; Mother's presence was waived. Respondent was represented by Mr. Miyasaka. The District Educational Specialist ("DES") was present on behalf of Respondent.

On June 8, 2015, Petitioners' counsel, Ms. Hamman submitted a Declaration to the undersigned Hearings Officer to extend the 45-day period in which a decision is due pursuant to HAR §8-60-69, so that the

transcript could be prepared and the post-hearing briefs filed. Respondent's counsel had no objection to the request for extension. The 45-day period was extended from June 15, 2015 to July 29, 2015, and from July 30, 2015 to September 10, 2015.

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

II. ISSUES PRESENTED

In their February 13, 2015 Request, Petitioners allege procedural and substantive violations of the Individuals with Disabilities Education Act ("IDEA"). Specifically, Petitioners allege that the DOE denied Student a free appropriate public education ("FAPE"). Petitioners raise the following issues:

- A. The November 24, 2014 Individualized Education Program ("IEP") IEP and Crisis Plan did not address how the DOE has changed or implemented policies to remedy the bullying incidents the Student suffered. The IEP and Crisis Plan focus on how the DOE will respond if there is an incident of bullying, and fails to specify how future bullying will be prevented;
- B. The DOE has not acknowledged that Student was harmed;
- C. Student should not be required to return to the environment where he was harmed; and

- D. The DOE refused to agree to placement at the private school.

Petitioners request the following relief:

- A. Reimburse Petitioners for the costs incurred for Student's education and related services at the private school;
- B. Recognize the private school as Student's current educational placement; and
- C. Compensatory educational and/or related services on an equitable basis.

III. FINDINGS OF FACT

1. Student was born on December 3, 2003.
2. Student is eligible for special education under the category of Autism Spectrum Disorder ("ASD"). Pet. Exh. 1 at 005.
3. Student has sensory issues and social concerns representative of a child on the Autism Spectrum that require accommodations and specially designed instruction in social skills. *Ibid.*
4. Grandfather is Student's primary caretaker. TR 93:16.
5. Student started attending the Home School in kindergarten. TR 94:4.
6. Grandfather testified that when Student attended the Home School Student was always very nervous. Student was bullied by other students on

several occasions even though he had counseling and a one-to-one (1:1) aide with him at all times. TR 94:7-10; TR 98:2-6; TR 157:6-13.

7. In March of 2013, Mother unilaterally removed Student from the Home School. Student started attending the private school on March 11, 2013. Resp. Exh. 4 at 012.

8. On October 24, 2014 the Findings of Fact, Conclusions of Law, and Decision in DOE-SY1314-071 were issued. In that case, the Hearings Officer found that the November 7, 2013 IEP denied Student a FAPE. Student was the victim of bullying at the Home School and his learning opportunities were substantially restricted. Student's placement in the private school was appropriate, and Petitioners were awarded reimbursement costs.

9. The private school prepared a progress report for Student dated October 29, 2014. The introduction to the progress report stated, "[h]is emotional outbursts are at a very low frequency. When he is upset he is able to express his feelings in a much more appropriate manner." Pet. Exh. 3 at 051.

10. The progress report stated that Student has "mastered the dot system for simple addition and subtraction math problems and now has the ability to do them using mental math . . . [Student's] reading level has advanced to a fourth grade level . . . [h]e can answer comprehension questions as well as present information to the skills trainer or class about what he just read . . . He has the ability to write a paragraph,

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proofread it making the corrections, and rewrite the paragraph with changes” Pet. Exh. 3 at 054-055.

11. In November 2014, Student started seeing a counselor once a week for his anxieties. Grandfather testified that Student was a very nervous child and had phobias about other children, the wind, and the rain. Student would shut all of the doors and windows and refuse to do anything when he was anxious. TR 96:18 – 97:20; TR 102:6.

12. The Grandfather testified that since Student has been seeing a counselor, he has fewer “spells of anxieties” and some “anxieties have disappeared.” TR 97:22-24.

13. The SPED teacher testified as an expert in the area of teaching special needs students. TR 109:15-18.

14. The SPED teacher observed Student at the private school two times. She observed Student on November 5, 2014 reading a story and working on multiplication with an adult. Student was also working on a second grade level spelling worksheet and third grade level grammar worksheet. Student presented factual information about three different amphibians using his own notes. The private school staff reported that Student had a good understanding of the parts of speech. He was able to read multiple pages of complex information and was able to independently research information on given topics and present the information to the class. Resp. Exh. 4 at 012; TR 11924 – 120:23.

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15. At one point during the observation, Student attempted to engage in conversation with a younger student. The other student had difficulty communicating back and forth with Student; the other student wasn't able to answer questions and had to be prompted to engage in a conversation. Resp. Exh. 4 at 012; TR 119:24 – 120:23.

16. On November 24, 2014 the Home School conducted an IEP meeting. Mother, Home School Principal, DES, Student Services Coordinator ("SSC"), DOE Psychologist, DOE Occupational Therapist ("OT"), special education ("SPED") and general education teachers were present. The private school's President, Director, Behavioral Intervention Specialist ("BISS"), and Clinical Director for the Center of Autism and Related Disorders ("CARD") were also present. Resp. Exh. 4 at 026.

17. The IEP team reviewed: 1) Student's November 7, 2013 IEP; 2) SPED teacher's observations at the private school on November 5, 2014; 3) interview and input from Student's skills trainer at the private school on November 5, 2014; 4) private school's progress reports dated October 29, 2014; 5) private school work samples on November 5, 2014; 6) Behavioral Health Specialist's ("BHS") observations at the private school on November 5, 2014; 7) input from IEP team members; and 8) OT observations at the private school on November 21, 2014. Pet. Exh. 1 at 0002.

18. The SPED teacher testified that the private school representatives told the IEP team that Student

“might have some anxiety to large groups.” TR 110:23-24.

19. The IEP provided Student with 270 minutes per quarter of counseling, 1770 minutes per week of special education, and 1770 minutes of individualized instructional support. He would receive daily: 1) role playing of situations that may cause anxiety; 2) seating near positive peer role models; 3) modified lunch and recess, as needed until Student felt comfortable with peers; 4) opportunities to interact with same-age peers; 5) opportunities to practice self-calming strategies; 6) social stories to help with his anxiety and peer interaction; 7) Behavior Support Plan (“BSP”); and 8) Crisis Plan. He would also have peer mediated instruction and intervention (buddy program) two times per week. Resp. Exh. 4 at 023-024; TR 114:8 – 115:24.

20. The SPED teacher testified that Student would have an adult with him at all times. The IEP team provided Student with this service to prevent bullying. TR 113:21 – 114:7.

21. The Principal testified that Student would have a 1:1 with him at all times. If the 1:1 needed a bathroom break, the supervising teacher or other paraprofessional would provide coverage. If the 1:1 was absent, the Home School would either obtain a substitute or rotate current staff to provide the support. TR 167:11-21.

22. The IEP also stated that Student needed “a transition period prior to returning to school to prepare him for routines and expectations in the classroom.”

Student was scheduled to receive services prior to his return to school in January 2015, on the school campus during the last week of Winter Break for two hours per day. The services would have continued from January 5, 2015 to January 8, 2015. Student would have had access to sensory regulation activities and counseling consultation, to include eight hours of parent education. Resp. Exh. 4 at 024.

23. The SPED teacher testified that she would have Student start the school year in a special education classroom with approximately five to seven students, with his 1:1 support. He would have a modified lunch in the special education classroom in a quiet, small group environment with only his 1:1 and teacher. They would bring in two to three peer mediators into the classroom and have them play with Student at recess. Once he was comfortable, Student would spend more time in the cafeteria. They would have him start with attending the last five or ten minutes and gradually start to increase the time. The Home School would increase the amount of time Student would attend a class, until he became comfortable. TR 122:21 – 124:22.

24. The Home School BHS, Counselor, and SPED teacher developed a Crisis Plan specifically for Student to address concerns about bullying. The DOE's primary concern was the health and safety of Student. The purpose of the plan was to take immediate action in response to "future bullying incidents, should they occur." The first step was to ensure his safety, followed by an assessment of his social-emotional state. The Crisis Plan noted that students with ASD have

difficulty interpreting social interactions; therefore, the response to any bullying incidents would be the same, whether they were “actual or perceived.” Resp. Exh. 8; TR 111:21 – 112:8; TR 150:7-22.

25. The DOE Psychologist testified as an expert in the field of school psychology. TR 148:4-8.

26. The DOE Psychologist testified that the Crisis Plan was developed because she had been informed Student had been previously bullied at the Home School, and they wanted to address any future bullying. TR 158:21-22.

27. The SPED teacher testified that the Crisis Plan took “proactive steps if he perceived he was being bullied.” Resp. Exh. 8; TR 116:13-14.

28. The DOE Psychologist testified that during the IEP meeting, the private school staff stated that Student had “some anxiety related to bullying and they referenced a letter that [Mother] had sent.” She testified that the Crisis Plan was developed to address Mother’s concerns. Pet. Exh. 1 at 40; Resp. Exh. 8; TR 149:15-23.

29. The DOE Psychologist testified that the Crisis Plan was also developed “to address any kind of physical safety needs to ensure that [Student] was safe should any future incident occur and then to assess his socioemotional state and to provide any counseling intervention that’s needed as a result of that incident and also provide for communication with the parent about the incident.” TR 150:16-22.

30. The Crisis Plan stated that the student “would be under close adult supervision at all times.” Interactions with peers would be monitored by an adult. The Crisis Plan listed steps to be taken “[s]hould a bullying incident occur (i.e., negative verbal and/or physical interaction, including, but not limited to: name calling, laughed at, pushed, kicked, punched, having things thrown at him, saying negative comments or statements, etc.), the following response will occur:

- First, assess Student’s safety. Remove Student from the situation and/or, remove all peers from the area. If any physical contact occurs, immediately bring Student to the Health Room. If he is unable to go to the Health Room for any reason, notify the Health Aide to come to the Student’s location. The Health Aide will assess Student’s physical state; Student’s Parents will be contacted if any physical contact has occurred.
- Once Student’s physical state has been assessed for safety, Student will be accompanied by the supervising adult (EA, Paraprofessional) to appropriate support staff (Behavioral Health Specialist, Counselor, and/or School Psychologist). Support staff will assess Student’s social-emotional state, and debrief about the incident, as appropriate. Support staff will prompt Student to describe how the situation made him feel using “I” statements, as previously practiced in counseling sessions.

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- Support staff will then prompt Student to use the coping strategies that he has previously learned in counseling sessions (i.e., deep breathing, count to ten, take short walks, drink water or positive self-talk, etc.).
- Support staff will determine if/when it is appropriate for Student to return to class.

Following an actual or perceived bullying incident, details will be documented in the Student's counseling file. Parents will be notified of the incident." Resp. Exh. 8.

31. The private school BISS testified there was a "very minor discussion" about bullying. The new Home School did not state what they were doing to prevent bullying. They gave Mother a Crisis Plan with list of telephone numbers to call if an incident were to occur. TR 69:17 – 71:8.

32. The SPED teacher started working at the Home School in August 2014. During that time, she has not witnessed any bullying incidents. TR 132:6-12.

33. The Principal testified that the Home School does not have a formal anti-bullying policy. The Home School follows the disciplinary procedures set forth in Hawaii Administrative Rules (HAR) Chapter 19. Teachers and staff are trained in Chapter 19 procedures. The Home School offers and implements a buddy system, counseling sessions, public speakers at assemblies, and activities during national anti-bullying week. This year the students wrote an anti-bullying statement on a piece of paper. The pieces of

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paper were combined to create a chain that was displayed in the cafeteria. They have also had an anti-bullying song contest, had students wear the same color to school, and a stomp out bullying t-shirt contest. TR 167:24 – 172:20.

34. The Spring 2014 School Quality Survey for the Home School stated the following on the teacher survey:

Student Safety

Our school handles discipline problems appropriately and in a timely manner

Strongly Agree	Agree	Disagree	Strongly Disagree	Don't Know
1 3.4%	10 34.5%	12 41.4%	4 13.8%	2 6.9%

Our school effectively prevents bullying

Strongly Agree	Agree	Disagree	Strongly Disagree	Don't Know
2 6.9%	18 62.1%	6 20.7%	3 10.3%	0 0.0%

Resp. Exh. 9 at 059.

35. The future Home School participates in the “Best Buddies” and “Rachel’s Challenge” anti-bullying programs. They also implement a classroom peer/buddy system for special education students. TR 187:1-3; TR 193:21 – 194:4; TR 205:6-24.

36. The IEP team initially proposed a “draft” IEP to the meeting participants. In the final IEP, the background information added, “Mother later voiced concern about a bullying incident at the Home School” to the draft. The SPED teacher testified that the sentence was added to the IEP to address Mother’s concerns as stated in her November 21, 2014 letter. Pet. Exh. 1 at 022 and 040; Resp. Exh. 4 at 012; TR 144:9-13.

37. The Emotional Strengths section in the IEP states, “According to the progress report from the [private school] 10/29/2014, [Student] has demonstrated progress throughout the first quarter of the school year. His emotional outbursts are at a very low frequency. Emotional outbursts has decreased to none. When he is upset, he is able to express his feelings in a much more appropriate manner. [Student] has improved in his ability to manage his anxiety and knows how to calm himself down without excessive prompting. He is currently showing that he feels more confident about his abilities and skills.” Pet. Exh. 1 at 003.

38. The IEP team was unaware that Student was receiving counseling services from a private counselor. SPED teacher and DOE Psychologist testified that had the IEP team known this, they would have had the school counselor conduct further assessments, such as an emotional behavioral assessment, to determine if Student needed additional services or supports. TR 118:15 – 119:2; TR 151:23 – 152:4.

39. At the end of the IEP meeting, Mother rejected Student’s proposed IEP. Pet. Exh. 2 at 047.

40. On December 10, 2014 Mother faxed a notice to the Home School rejecting the IEP. *Ibid.*

41. On December 4, 2014 the Home School drafted the Prior Written Notice (“PWN”). The PWN stated that the private school representatives and Mother wanted Student to remain at the private school. The Home School rejected that option because “[t]he team at [Home School] can provide services for [Student] on campus (FAPE).” Pet. Exh. 1 at 020.

42. On December 12, 2014 the Home School sent Mother a letter via the private school with Student’s November 24, 2014 IEP, the sign-in sheet, PWN, and Student information sheet attached. The Principal noted in the letter, “[w]e have not been successful in communicating with you at the home address nor phone number which [the Home School] has on file. We have requested updated contact information several times.” Pet. Exh. 2 at 043.

43. On December 28, 2014, Mother sent the Home School a letter rejecting the November 24, 2014 IEP because Student had been previously bullied there. Mother informed the Home School that Student would continue to attend the private school at public expense. Pet. Exh. 2 at 045

44. On February 3, 2015, the DES sent the private school a letter stating that the DOE would only pay for Student’s tuition up to December 4, 2014, the date of the PWN for the November 24, 2014 IEP. Pet. Exh. 2 at 046.

45. On February 11, 2015, the Home School sent Mother a letter to schedule a conference with Mother to review the IEP and develop a transition program for Student during the spring intersession. The letter stated, “[w]e have continued to contact you at your home address and by phone. We have mailed certified letters which have been returned and also asked our social worker to attempt delivery to your home but no one answers the door. We have requested updated contact information several times. We ask that you please return the attached information sheet as soon as possible.” Pet. Exh. 2 at 047.

46. On February 25, 2015 the DOE conducted a resolution session in this case. Mother and her attorney participated by telephone. The DOE offered to conduct an emotional behavioral assessment of Student. Mother agreed to work with the Home School and future Home School to develop a transition plan for Student’s 2015-2016 school year. At the time of the Hearing, Mother had not agreed to the assessment. Pet. Exh. 2 at 048; TR 177:19 – 178:10.

47. The Home School has made several attempts to hold a transition meeting with the future Home School. Their letters have been returned. They went to her residence, but there was a “no trespassing” sign and the home looked abandoned. The Home School sent Mother letters requesting her current phone numbers and address. Mother has not informed the school of any change of address. Mother previously told the Home School to contact her through the private school. In May 2015, the Home School sent Mother a letter

through the private school regarding holding a transition meeting on June 22, 2015. The private school refused to sign for or accept the letter. TR 179:20 – 181:13.

48. On March 30, 2015, Mother sent the Principal a letter regarding the transition meeting. Mother expressed her concerns about the previous bullying incidents. Mother said she was “unclear as to what protections are in place to prevent the bullying incidents from re-occurring.” Mother stated that Student was thriving at the private school. He can read chapter books, can perform addition and subtraction, and is learning multiplication. She wanted Student to remain at the private school, and was waiting for “the finding of the due process complaint before making any other arrangements.” Pet. Exh. 2 at 049.

49. On May 8, 2015, the Principal sent Mother a letter through the private school to schedule a transition meeting on May 21, 2015. The Home School had previously offered six other dates. The Principal stated, “[w]e understand that you are concerned about the schools’ provisions to ensure his safety, specifically in regards to bullying. We can review the plan that was developed with your input and make changes.” Pet. Exh. 6 at 112.

50. On May 8, 2015,¹ Mother wrote Home School a letter regarding the transition meeting. She stated that Student walked the grounds of the future Home

¹ The letter is dated “May 8, 2014.”

School and told her, “I am not brave enough” to attend the school. She further stated that Student was “experiencing post-traumatic stress around large crowds of peers from his many years of continual bullying” at the Home School. She said Student was not ready to make a transition to the future Home School, and thought it best to leave Student at the private school. Pet. Exh. 2 at 050.

51. The private school’s Director is responsible for Student’s academic curriculum. There are no licensed teachers at the private school. TR 31:3-14.

52. The private school’s Director has a master’s degree in education. TR 43:3-6.

53. The private school has four 1:1 skills trainers. The 1:1 who works directly with Student is not a registered behavioral therapist. TR 27:3-5; TR 29:15 – 30:2.

54. The private school operates from 8:30 a.m. to 3:00 p.m. during the regular school year. There are four students with ASD enrolled at the private school. Two of the Students are eight years old and the other is twelve. The private school provides social, life, academic, and communication skills. The private school does not have any licensed general education or special education teachers. TR 51:10 – 53:13; TR 79:18-19.

55. The private school is located in a classroom within the St. Theresa’s Church, adjacent to a fairly large grass lawn. It is located on the same campus of a DOE elementary charter school. There is a possibility

that the private school students will be able to have interaction time with the charter school students who are non-disabled; however this occurs very rarely or “once in a blue moon.” One of Student’s goals at the private school is to interact with these non-disabled peers. TR 23:9 – 24:15; TR 54:9-18; TR 80:16 – 20.

56. The CARD Clinical Director testified as an expert in the fields of ASD and applied behavioral analysis (“ABA”). TR 15:11-14.

57. CARD is a multifaceted organization that provides ABA services on a local level, parent training, and social skills. The Clinical Director provides behavioral services that include social, language, communication, and cognition. TR 15:23 – 16:10; TR 32-10-13.

58. CARD provides consultative services to the private school. The Clinical Director visits the private school every three months to provide direct services. She generates a workshop summary report on Student, based on these visits. She also provides “Facetime” supervision, where she provides feedback after watching the Student’s therapy session. TR 16:14-25; TR 37:10-21.

59. The Clinical Director started working with Student in March of 2013. She testified when student entered the private school he was very withdrawn and anxious. He had anxiety with transitions and other children. He showed apprehension and avoidance to his peers, because of prior incidents. He had difficulty completing or doing tasks. He wanted to be alone and stay at home. He had “self-down” type behaviors and

very limited skill sets in some areas; however, he had potential. TR 18:22 – 20:18.

60. The Clinical Director testified that as of May 21, 2015, Student continues to have some anxiety. He expressed interest in outside activities such as swimming and interacts with other peers at the private school. Student made considerable progress in the CARD program. He is in their “advanced programming” and is learning perspective based skills and conversation skills. He is learning to understand and observe body language, facial expressions, and preference of others. He has started reading chapter books, is able to write a paragraph, and is working on a project about Lewis and Clark. His money skills have improved, and he has very good fluency with time. TR 20:21 – 23:5; TR 43:19 – 44:4.

61. Student’s 1:1 works with Student on his CARD program, worksheets, and reading. TR 56:12 – 17.

62. The Clinical Director testified that in her opinion, the November 24, 2014 IEP would significantly impact Student in a negative way, due to his anxiety with transitions and other people. He was out sick at the private school for one week, and when he returned he regressed in several areas. His anxiety increased, and he had to receive “motivators” to return to his previous levels. TR 25:2-20.

63. The Clinical Director testified that a transition plan for Student to attend his new Home School would not be appropriate until a psychologist or

counselor deemed him emotionally stable enough to attend. TR 39:9-23.

64. The private school BISS is a registered behavior technician. He is not Student's assigned 1:1, but does work directly with Student at times, and he sees him throughout the school day. He is not a licensed teacher. TR 47:11 – 48:18; TR 55:20; TR 74:16-18.

65. The private school BISS testified that Student is an "avid reader" and goes through a chapter book every three to four days. The chapter books are meant for a third to fourth grade level. He has solid reading comprehension. He can write with proper punctuation and capitalization, and is able to identify nouns, verbs, adjectives, pronouns, and the subject and predicate of the sentence. Student can write two to three pages on a subject. For his Lewis and Clark project he was working on: 1) researching the subject; 2) completing an art project based on his research; 3) writing questions, answers, and a typed final report; and 4) giving an oral presentation to the class. Student has progressed from one digit to triple-digit addition and subtraction. He is excelling a double-digit multiplication, and is starting to do divisions, fractions, and measurements. He can tell time down to the minute and identify all money. He is starting to make change with money. TR 56:18-25; TR 61:22 – 66:2.

66. The private school BISS testified that in the nine months he has been employed at the private school, Student has progressed and is a "leader" in the classroom. He helps the other Students, and often

leads “circle time.” He was named the “sempai” in aikido class, which is the teacher’s assistant. He leads the exercises, does the counting, and gathers the other Students for meditation. Student has gained confidence and holds himself in a stronger body posture, rather than rocking. TR 57:6 – 58:15; TR 61:8-21.

67. Grandfather testified that Student has made friends at the private school. TR: 98:8-12.

68. The private school BISS testified that Student has severe anxiety when on a field trip with many other students. On one occasion his anxiety made him appear physically ill. TR 58:18 – 59:25.

69. On May 8, 2015, the private school BISS and Director drafted Student’s “Academic Year End Progress Report.” The progress report stated that Student had become a leader in the classroom. The progress report noted that Student continued to struggle to overcome social anxieties with large groups of peer-aged children. Pet. Exh. 3 at 064 – 067.

70. The private school BISS testified that Student is seeing a counselor. The counselor taught Student coping strategies, such as deep breaths and removing himself from a stressful situation. TR 60:1-11.

71. Grandfather testified that Student has progressed academically at the private school; however, he continues to have some anxieties. TR 96:5-23.

72. Grandfather testified that he would be extremely nervous about Student attending the new

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Home School. He was concerned that Student would revert back to being introverted and be bullied again. TR 98:16-25.

73. The private school BISS testified that Student would have great difficulty transitioning to the new Home School. He thought the Student's anxiety would "shut him down" to the point he would not go into the classroom or a crowded hallway. TR 71:16 – 72:15.

74. The SPED teacher testified that she had concerns about Student's opportunities to interact with same age, typically developing peers at the private school. When she questioned the private school about Student's interactions, they said he "usually doesn't interact because he's reading a book." TR 121:20 – 122:14.

75. The District Resource Teacher ("DRT") was qualified to testify as an expert in the fields of special education and Applied Behavioral Analysis ("ABA"). TR 203:15-18.

76. The DRT testified that Student is a "very verbal, high functioning student with an interest in having friends." In the Fall of 2013, she observed Student at the private school he showed social interest in adults and one peer. The DRT testified that Student should have interaction with same age, typically developing peers. TR 206:5-13; TR 220:11-14.

77. The DRT testified that one of the core deficits of an ASD diagnosis is the challenge in having typical

social interactions, reciprocal social interactions with a wide variety of peers and adults. She stated that Student had some interaction with the adults at the private school, but there were no typically developing peers or peers his age. TR 206:23 – 207:7.

78. The DRT tried to observe Student a second time at the private school so that she could have an up-to-date assessment of his educational program in preparation for this Hearing. The private school did not give the DRT permission to observe Student at the private school. TR 216:24 – 217:6.

79. The DRT recommended that Student have a “desensitization program,” starting off with Student being in a situation of safety and comfort and slowly introducing new elements such as typically developing peers. The peers would be trained to understand how to react to Student, and they would participate in activities that Student particularly enjoyed. Once he developed a positive attitude and a feeling of safety in the new situations, the number of peers, activities, and locations would be expanded. She testified that the future Home School would be able to facilitate this type of program. She further testified that the private school is small, and does not provide Student with opportunities to help desensitize him to his anxiety in large groups. TR 208:6 – 209:21.

80. The DRT testified that the Home School, future Home School, and CARD program use ABA teaching methods; however it is not a curriculum or content. TR 213:9 – 214:21.

81. The private school does not have any certified special education teachers. The DRT testified that it is important to have a certified teacher, because they have the requisite, training, education, practicum experiences, supervision of master teachers, and have passed PRAXIS tests. TR 215:14 – 216:5.

IV. CONCLUSIONS OF LAW

A. Burden of Proof

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

B. IDEA Requirements

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

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

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

The mechanism for ensuring a FAPE is through the development of a detailed, individualized instruction plan known as an Individualized Education Program (“IEP”) for each child. 20 U.S.C. §§ 1401(9), 1401(14), and 1414(d). The IEP is a written statement, prepared at a meeting of qualified representatives of the local educational agency, the child’s teacher, parent(s), and where appropriate, the child. The IEP contains, in part, a statement of the present levels of the child’s educational performance (“PLEP”), a statement

of the child’s annual goals and short term objectives, and a statement of specific educational services to be provided for the child. 20 U.S.C. § 1401(19). The IEP is reviewed and, if appropriate, revised, at least once each year. 20 U.S.C. § 1414(d). The IEP is, in effect, a “comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” *Burlington v. Dep’t of Educ. Of the Commonwealth of Massachusetts*, 471 U.S. 359, 368, 105 S.Ct. 1996, 2002 (1985).

An IEP adequately provides a FAPE if it is reasonably calculated to provide a child with a meaningful educational benefit at the time it was developed. *J.W. by J.E.W. and J.A.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 449 (9th Cir. 2010). It must be tailored to the unique needs of the child and reasonably designed to produce benefits that are “significantly more than de minimus, and gauged in relation to the potential of the child at issue.” *Blake C. ex rel Tina F. v. Hawaii Dep’t of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Haw. 2009). An IEP must be evaluated prospectively as of the time it was created. Retrospective evidence that materially alters the IEP is not permissible. *R.E. v. New York City Dep’t of Educ.*, 694 F.3d 167 (2012).

C. Whether the November 24, 2014 Individualized Education Program Offered Student a Free Appropriate Public Education.

To analyze whether the DOE's offer of FAPE through the November 24, 2014 IEP was appropriate, the Student's individual needs at the time the IEP was created must be considered.

1. Whether the IEP and Crisis Plan addressed how the DOE has changed or implemented policies to remedy Student's past bullying.

Petitioners have alleged that the November 24, 2014 IEP and Crisis Plan failed to offer Student a FAPE because they do not address how the DOE has changed or implemented policies to remedy the bullying incidents the Student suffered and the school's failure to investigate when incidents are reported. They claim that the IEP and Crisis Plan only focus on how the DOE will respond if there is an incident of bullying, and fails to specify how future bullying will be prevented. Respondents assert that the Crisis Plan and November 24, 2014 IEP appropriately address Student's needs, including any concerns Petitioners have with potential incidents of bullying.

a. November 24, 2014 IEP

On November 24, 2014 the Home School conducted an IEP meeting. Mother, Home School Principal, DES,

SSC, DOE Psychologist, DOE OT, SPED and general education teachers were present. The private school's President, Director, BISS, and Clinical Director for the CARD were also present. The IEP team reviewed: 1) Student's November 7, 2013 IEP; 2) SPED teacher's observations at the private school on November 5, 2014; 3) interview and input from Student's skills trainer at the private school on November 5, 2014; 4) private school's progress reports dated October 29, 2014; 5) private school work samples on November 5, 2014; 6) BHS observations at the private school on November 5, 2014; 7) input from IEP team members; and 8) OT observations at the private school on November 21, 2014.

The private school prepared a progress report for Student dated October 29, 2014. The introduction to the progress report stated, "[h]is emotional outbursts are at a very low frequency. When he is upset he is able to express his feelings in a much more appropriate manner." The progress report also stated that Student has "mastered the dot system for simple addition and subtraction math problems and now has the ability to do them using mental math . . . [Student's] reading level has advanced to a fourth grade level . . . [h]e can answer comprehension questions as well as present information to the skills trainer or class about what he just read . . . He has the ability to write a paragraph, proofread it making the corrections, and rewrite the paragraph with changes"

In order to provide children with a FAPE, schools and parents work together to develop an individualized

education program (IEP). *Schaffer* 546 U.S. at 53. The IEP must be tailored to the unique needs of the child and reasonably designed to produce benefits that are “significantly more than de minimus, and gauged in relation to the potential of the child at issue.” *Blake C. ex rel Tina F. v. Hawaii Dept of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Haw. 2009).

In this case, the IEP team tailored Student’s IEP to fit his unique needs and to provide educational benefits. The IEP provided Student with 270 minutes per quarter of counseling, 1770 minutes per week of special education, and 1770 minutes of individualized instructional support. He would receive daily: 1) role playing of situations that may cause anxiety; 2) seating near positive peer role models; 3) modified lunch and recess, as needed until Student felt comfortable with peers; 4) opportunities to interact with same-age peers; 5) opportunities to practice self-calming strategies; 6) social stories to help with his anxiety and peer interaction; 7) BSP; and 8) Crisis Plan. He would also have peer mediated instruction and intervention (buddy program) two times per week.

Additionally, the IEP provided Student with an adult aide (1:1) all times. The IEP team provided Student with this service to prevent bullying. If the 1:1 needed a bathroom break, the supervising teacher or other paraprofessional would provide coverage. If the 1:1 was absent, the Home School would either obtain a substitute or rotate current staff to provide the support. Student would never be left alone.

The IEP also provided Student with “a transition period prior to returning to school to prepare him for routines and expectations in the classroom.” Student was scheduled to receive services prior to his return to school in January 2015, on the school campus during the last week of Winter Break for two hours per day; however, Student to not report to school. The services would have continued from January 5, 2015 to January 8, 2015. Student would have had access to sensory regulation activities and counseling consultation, to include eight hours of parent education.

The SPED teacher testified that she would have Student start the school year in a special education classroom with approximately five to seven students, with his 1:1 support. He would have a modified lunch in the special education classroom in a quiet, small group environment with only his 1:1 and teacher. They would bring in two to three peer mediators into the classroom and have them play with Student at recess. Once he was comfortable, Student would spend more time in the cafeteria. They would have him start with attending the last five or ten minutes and gradually start to increase the time. The Home School would increase the amount of time Student would attend a class, until he became comfortable.

On May 8, 2015, the Principal sent Mother a letter through the private school to schedule a transition meeting on May 21, 2015. The Home School had previously offered six other dates. The Principal stated, “[w]e understand that you are concerned about the schools’ provisions to ensure his safety, specifically in

regards to bullying. We can review the plan that was developed with your input and make changes.”

It is clear that the IEP was drafted to meet Student’s specific needs. The Home School continued to engage Mother to participate in a transition plan meeting to help Student with the bullying issue, but she failed to respond. Student was offered a 1:1 aide to be with him at all times to address the concerns about bullying. He was provided with 270 minutes per quarter of counseling to help with his anxiety. Additionally, the IEP contained a detailed transition plan to help Student return to the Home School. The Hearings Officer finds that the November 24, 2015 IEP offered Student a FAPE, as it was tailored to meet Student’s unique needs and reasonably designed to produce educational benefits.

b. Crisis Plan

The Home School BHS, Counselor, and SPED teacher developed a Crisis Plan specifically for Student to address concerns about bullying. The DOE’s primary concern was the health and safety of Student. The purpose of the plan was to take immediate action in response to “future bullying incidents, should they occur.” The first step was to ensure his safety, followed by an assessment of his social-emotional state. The Crisis Plan noted that students with ASD have difficulty interpreting social interactions; therefore, the response to any bullying incidents would be the same, whether they were “actual or perceived.”

The DOE Psychologist testified that the Crisis Plan was drafted because she had been informed Student had been previously bullied at the Home School, and they wanted to address any future bullying. The Crisis Plan was developed “to address any kind of physical safety needs to ensure that [Student] was safe should any future incident occur and then to assess his socioemotional state and to provide any counseling intervention that’s needed as a result of that incident and also provide for communication with the parent about the incident.” The SPED teacher testified that the Crisis Plan took “proactive steps for if he perceived he was being bullied.”

The Crisis Plan stated that the student “would be under close adult supervision at all times.” Interactions with peers would be monitored by an adult. The Crisis Plan listed steps to be taken “[s]hould a bullying incident occur (i.e., negative verbal and/or physical interaction, including, but not limited to: name calling, laughed at, pushed, kicked, punched, having things thrown at him, saying negative comments or statements, etc.), the following response will occur:

- First, assess Student’s safety. Remove Student from the situation and/or, remove all peers from the area. If any physical contact occurs, immediately bring Student to the Health Room. If he is unable to go to the Health Room for any reason, notify the Health Aide to come to the Student’s location. The Health Aide will assess Student’s physical state; Student’s Parents will be contacted if any physical contact has occurred.

- Once Student's physical state has been assessed for safety, Student will be accompanied by the supervising adult (EA, Paraprofessional) to appropriate support staff (Behavioral Health Specialist, Counselor, and/or School Psychologist). Support staff will assess Student's social-emotional state, and debrief about the incident, as appropriate. Support staff will prompt Student to describe how the situation made him feel using "I" statements, as previously practiced in counseling sessions.
- Support staff will then prompt Student to use the coping strategies that he has previously learned in counseling sessions (i.e., deep breathing, count to ten, take short walks, drink water or positive self-talk, etc.).
- Support staff will determine if/when it is appropriate for Student to return to class.

Following an actual or perceived bullying incident, details will be documented in the Student's counseling file. Parents will be notified of the incident.

Petitioners assert that the DOE should have followed the *Dear Colleague Letter: Responding to Bullying Students with Disabilities* (Oct. 21, 2014) issued by the U.S. Department of Education. Pet. Exh. 5 at 81. That Letter states changes that the DOE *could require* in resolution agreements in response bullying incidents. The resolution agreement could include: 1) ensure that FAPE is provided; 2) offer the Student counseling; 3) monitor whether bullying persists and take corrective action; 4) develop and implement a

school-wide bullying prevention program; 5) devise a voluntary school climate survey for students and parents to assess the presence and effect of bullying; 6) revise the response to bullying and develop staff protocols to improve the response; 7) train staff and volunteers; and 8) provide continuing education to students on the anti-bullying policies, including where to get help. While these are valid responses to bullying, the Letter does not unequivocally require the DOE to follow the suggestions.

The Hearings Officer finds that majority of the suggestions have been implemented by the Home School. First, as previously stated the November 24, 2014 IEP provided Student a FAPE, and it included counseling. The Home School chose to monitor Student through 1:1 aides to prevent bullying. Additionally, the Principal testified even though the Home School does not have a “formal” anti-bullying policy, it follows the disciplinary procedures set forth in HAR Chapter 19, and the teachers and staff are trained in these procedures. The Spring 2014 School Quality Survey for the Home School stated the following on the voluntary teacher survey:

Student Safety

Our school handles discipline problems appropriately and in a timely manner

Strongly Agree	Agree	Disagree	Strongly Disagree	Don't Know
1 3.4%	10 34.5%	12 41.4%	4 13.8%	2 6.9%

Our school effectively prevents bullying

Strongly Agree	Agree	Disagree	Strongly Disagree	Don't Know
2 6.9%	18 62.1%	6 20.7%	3 10.3%	0 0.0%

The Home School also offers and implements a buddy system, counseling sessions, public speakers at assemblies, and activities during national anti-bullying week. During the 2014-2015 school year the students wrote an anti-bullying statement on a piece of paper. The pieces of paper were used to create a chain that was displayed in the cafeteria. In the past the Home School has offered an anti-bullying song contest, had students wear the same color to school, and instituted a stomp out bullying t-shirt contest. The future Home School participates in the “Best Buddies” and “Rachel’s Challenge” anti-bullying programs. They also implement a classroom peer/buddy system for special education students.

Petitioners argue that the DOE has not followed the *guidance* letter. Even assuming *arguenda* that the Home School was required to implement the letter’s suggestions, the Hearings Officer finds that the Home School has substantially complied with its recommendations. Eliminating bullying is a laudable goal; however, in reality bullying will always and unfortunately persist. The Home School has implemented strategies to protect Student from bullying by providing him with a 1:1, a buddy, and a Crisis Plan. Additionally, the Home School has programs and training for staff and

Students to educate them on anti-bullying measures. The Home School has taken several preventative measures to protect Student, as well as the entire student body, from bullying.

2. Whether the DOE acknowledged that Student was harmed.

Petitioners allege that the DOE has not acknowledged that Student was harmed. They assert that the DOE has not shown in good faith that what happened to Student due to their deliberate indifference violated Student's rights. Petitioners assert that without that acknowledgement, there is no reason for Petitioners to believe that anything has changed to protect Student from harm.

Grandfather testified that in November of 2014, Student started seeing a counselor once a week for his anxieties. Student was a very nervous child and had phobias about other children, the wind, and the rain. Student would shut all of the doors and windows and refuse to do anything when he was anxious. The Grandfather stated that since Student has been seeing a counselor, he has fewer "spells of anxieties" and some "anxieties have disappeared."

The DOE Psychologist testified that during the IEP meeting, the private school staff stated that Student had "some anxiety related to bullying and they referenced a letter that [Mother] had sent." She testified that the Crisis Plan was developed to address Mother's concerns. The Emotional Strengths section in

the IEP states, [a]ccording to the progress report from the [private school] 10/29/2014, [Student] has demonstrated progress throughout the first quarter of the school year. His emotional outbursts are at a very low frequency. Emotional outbursts has decreased to none. When he is upset, he is able to express his feelings in a much more appropriate manner. [Student] has improved in his ability to manage his anxiety and knows how to calm himself down without excessive prompting. He is currently showing that he feels more confident about his abilities and skills.” Pet. Exh. 1 at 003.

The IEP team was unaware that Student was receiving counseling services from a private counselor. SPED teacher and DOE Psychologist testified that had the IEP team known this, they would have had the school counselor conduct further assessments, such as an emotional behavioral assessment, to determine if Student needed additional services or supports.

Mother did not inform the IEP team during the November 24, 2014 IEP meeting that Student was still harmed or injured from the bullying incidents or that Student was receiving private counseling. Respondent claims that had Mother informed the IEP team of this, they could have further addressed it by scheduling an emotional behavioral assessment for Student. After the Home School became aware of this issue, they offered to conduct an emotional behavioral assessment, but Mother did not consent to it. The DOE cannot proceed with the assessment without Mother’s consent. 20 U.S.C § 1414.

The DOE only became aware of Student's anxiety in large groups of non-disabled peers when they were provided with the May 8, 2015 progress report from the private school. Respondent argues that it cannot be expected to address behavioral needed that it does not know exist. As previously stated, the IEP is a collaborative process. Mother and the private school representatives participated in the November 24, 2014 IEP and this concern should have been raised to the IEP team. Student had not attended the Home School since March of 2013; Mother and the private school representatives were in the best position to provide this information to the IEP team, but they chose not to disclose it. The purpose of the MP participants is to do just that, *participate*. The CARD Clinical Director testified as an expert in ASD and ABA was present at the IEP; yet, despite her expertise, this concern was not raised. The Home School drafted an IEP and Crisis Plan *with* the input provided by the entire team and the information they had at the time.

As stated in the previous sections, the Home School was taking measures to protect Student from future bullying incidents. While Respondent's witnesses and IEP team may not have affirmatively stated that Student had been a previous victim of bullying, the IEP and Crisis Plan clearly prove that they acknowledged that bullying was an issue. Had they not acknowledged this, there would have been no counseling, 1:1 aide, transition plan, buddy program, or Crisis Plan. Additionally, the IEP team initially proposed a "draft" IEP to the meeting participants that did not

contain Mother's concerns about bullying. In the final IEP, the IEP team added in the background information section, "Mother later voiced concern about a bullying incident at the Home School." The SPED teacher testified that the sentence was added to the final IEP to address Mother's concerns as stated in her November 21, 2014 letter regarding the DOE SY1314-071 decision placing Student at the private school.

The Hearings Officer finds that the DOE adequately acknowledged that Student had been a victim of previous bullying. The DOE offered Student programs and services in the November 24, 2014 IEP and Crisis Plan to specifically address this issue.

3. Whether Student should be required to return to environment where he was harmed.

Petitioners allege that Student is injured and he should not be required to return to the environment where he was harmed without an acknowledgement of the harm, a demonstrated change in policies and actions to remedy and prevent future instances of the harm caused by the Home School. Petitioners cite the October 24, 2014 decision in DOE SY1314-071 that found the program and placement at the private school appropriate.

Approximately one month after the decision in DOE SY1314-071, the Home School held an IEP meeting. At that meeting, Respondent offered Student placement at the Home School and discontinued

payment to the private school. The December 4, 2014 PWN stated that the “[t]he team at [Home School] can provide services for [Student] on campus (FAPE).” Mother rejected the IEP and offer of FAPE. On December 28, 2014, Mother sent the Home School a letter rejecting the November 24, 2014 IEP because Student had been previously bullied there. Mother informed the Home School that Student would continue to attend the private school at public expense. Mother unilaterally continued to place Student at the private school.

On March 30, 2015, Mother sent the Principal a letter regarding the transition meeting. Mother expressed her concerns about the previous bullying incidents. Mother said she was “unclear as to what protections are in place to prevent the bullying incidents from re-occurring.” Mother stated that Student was thriving at the private school. He can read chapter books, can perform addition and subtraction, and is learning multiplication. She wanted Student to remain at the private school, and was waiting for “the finding of the due process complaint before making any other arrangements.”

Where a parent unilaterally changes the placement of a child, but a subsequent administrative or judicial decision confirms that the parental placement is appropriate, the decision “constitute[s] an agreement by the State to the change of placement” and the placement becomes the “current educational placement” for the purposes of the stay put provision. *See Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*,

903 F.2d 635, 641 (9th Cir.1990). However, this placement is not absolute. The DOE provided Mother with the December 4, 2014 PWN changing Student's placement to the Home School, pursuant to 34 C.F.R. §300.503. Petitioner has the right to file a due process complaint relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child. 34 C.F.R. §300.507.

At issue here is Student's November 24, 2014 IEP and December 4, 2014 PWN placing him at the Home School, not DOE SY1314-071. As such, the Hearings Officer finds that Respondents provided Petitioners with a PWN changing Student's placement to the Home School consistent with 34 C.F.R. §300.503. As of December 4, 2014, Student's placement was at the Home School. Petitioners exercised their rights and challenged this placement decision by initiating these proceedings.

4. Whether the DOE refused to agree to placement at the private school.

Petitioners argue that the DOE placed Student at the Home School despite the decision in DOE SY1314-071, refuses to agree to placement at the private school, and has discontinued reimbursement. This argument is factually correct. The DOE responds that Petitioners cannot rely on the previous decision to determine placement because the facts and circumstances of the present case are different.

In *Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), the Supreme Court noted that once it is determined that a child suffers from a covered “learning disability,” the student is entitled to receive a FAPE. In order to comply with the requirement of providing a FAPE, the DOE must provide special education and related services pursuant to 20 U.S.C. § 1401(a)(18) 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, or secondary school education in the State involved, and
- (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(a)(5)].

The Hearings Officer finds that the November 24, 2014 IEP provided Student with a FAPE at the Home School; therefore, the issue of private school placement need not be addressed.

D. Whether Petitioners should be reimbursed for the costs incurred for Student's education and related services at the private school.

Once a Hearings Officer holds that public placement of learning a disabled child violated IDEA, they are authorized to grant appropriate relief. Equitable considerations are incorporated in fashioning relief, and Hearings Officer must consider all relevant factors, including appropriate and reasonable level of reimbursement that should be required. Total reimbursement for placement in private school is not appropriate if court determines that the cost of the private education was unreasonable. 20 U.S.C.A. § 1415(e)(2).

The Supreme Court has held that parents may be reimbursed for costs incurred in placing a child in “private special education . . . if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the *Act*.” *Burlington*, 471 U.S. at 359. Such reimbursement is contingent upon a showing that the parents diligently pursued the provision of appropriate services from the public school system, yet the school system failed to provide those services; and that the private placement is a suitable alternative. *Id.* at 370, 34 C.F.R. § 300.148(c). *See also Florence Cty. Sch. Dist. Four*, 510 U.S. at 12. Parents may send their student to a private program and seek retroactive tuition reimbursement from the state. *See Forest Grove Sch. Dist. v. TA.*, 557 U.S. 230, 233. 129 S. Ct. 2484, 2493, 2496 (2009). However, when the parents make a

unilateral choice, they must bear the associated risk: if the conditions for reimbursement are not met, the financial burdens are theirs. *Burlington*, 471 U.S. 359, 373-74 (1996).

The Hearings Officer has determined that Petitioners have not met their burden to show that the November 24, 2014 IEP procedurally or substantively violated the IDEA and denied Student a FAPE. The Hearings Officer further finds that placement at the Home School was appropriate. Petitioners' request for reimbursement is denied.

V. DECISION

Based upon the above-stated findings of fact and conclusions of law, the Hearings Officer concludes that Petitioners have not proven a denial of FAPE. Petitioners have not met their burden to show that, procedurally and substantively, the DOE did not change or implement policies to address any perceived or actual bullying upon Student. Rather, the November 24, 2014 IEP addressed, perceived and actual bullying upon Student by provided role playing to address anxieties, positive peer models and peer interaction, self-calming strategies, social stories, a BSP, and a Crisis Plan. Additionally, Student had a 1:1 adult aide, transition services, as well as access to sensory regulation and counseling services. Parent education was also offered.

Based upon this, the Hearings Officer denies Petitioners' request for reimbursement for the costs

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incurred for Student's education and related services at the private school.

Respondents shall be deemed the prevailing party in this matter.

RIGHT TO APPEAL

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

DATED: Honolulu, Hawai'i, SEP – 9 2015.

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. M., by and through his
Mother Maria Mandeville
and MARIA MANDEVILLE,
Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

No. 16-17327

D.C. No.

1:15 -cv-00405-

LEK-KJM

District of Hawaii,
Honolulu

ORDER

(Filed Aug. 13, 2018)

Before: TASHIMA, W. FLETCHER, and HURWITZ,
Circuit Judges.

Judges W. Fletcher and Hurwitz have voted to deny the petition for rehearing en banc, and Judge Tashima so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc, Dkt. 48, is **DENIED**.

STATUTES

20 U.S.C. §1400(d)(1)

The purposes of this chapter are—

- (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;
- (B) to ensure that the rights of children with disabilities and parents of such children are protected; and
- (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

20 U.S.C. §1406(e)

Any written response by the Secretary under subsection (d) regarding a policy, question, or interpretation under subchapter II shall include an explanation in the written response that—

- (1) such response is provided as informal guidance and is not legally binding;
- (2) when required, such response is issued in compliance with the requirements of section 553 of title 5; and
- (3) such response represents 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. §1412(a)

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education

(A) A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

...

(5) Least restrictive environment

(A) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

...

(10) Children in private schools

...

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

...

(ii) If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. §1415(b)

The procedures required by this section shall include the following:

...

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency—

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- (A) proposes to initiate or change; or
- (B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

...

- (6) An opportunity for any party to present a complaint—

- (A) 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(f)(1)(A)

Whenever a complaint has been received under subsection (b)(6) or (k), 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.

REGULATIONS

34 C.F.R. §300.8(c)(1)

Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three,

that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

34 C.F.R. §300.115

(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must –

- (1) Include the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and
- (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

34 C.F.R. §300.116

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that –

- (a) The placement decision –
 - (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
 - (2) Is made in conformity with the LRE provisions of this subpart, including §§300.114 through 300.118
- (b) The child's placement –
 - (1) Is determined at least annually;
 - (2) Is based on the child's IEP; and
 - (3) Is as close as possible to the child's home;
- ...
- (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; . . .

34 C.F.R. §300.324(b)(1)

(1)General. Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team –

- (i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and
- (ii) Revises the IEP, as appropriate, to address –
 - (A) Any lack of expected progress toward the annual goals described in §300.320(a)(2), and

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in the general education curriculum, if appropriate;

...

(C) Information about the child provided to, or by, the parents, as described under §300.305(a)(2);

(D) The child's anticipated needs; or

(E) Other matters.
