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HAWAII DISABILITY RIGHTS CENTER

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HAWAII DISABILITY RIGHTS
CENTER, in a representative capacity
on behalf of its constituents,

Plaintiff,

vs.

CHRISTINA KISHIMOTO, in her
official capacity as Superintendent of
the State of Hawai'i, Department of
Education; and PANKAJ BHANOT, in
his official capacity as Director of the
State of Hawai'i, Department of
Human Services,

Defendants.

Case No. CV18-00465 LEK-RLP

**PLAINTIFF'S REPLY IN
SUPPORT OF *PLAINTIFF'S*
MOTION PRELIMINARY
INJUNCTION [DKT NO. 8];
SUPPLEMENTAL DECLARATION
OF MAILE OSIKA; EXHIBITS "1" -
"4"; SUPPLEMENTAL
DECLARATION OF AMANDA
KELLY, PHD, BCBA-D, LBA;
EXHIBIT "1"; SUPPLEMENTAL
DECLARATION OF ALISON
VILLIARIMO; EXHIBITS "1" - "2";
CERTIFICATE OF WORD COUNT;
CERTIFICATE OF SERVICE**

Hearing:

Date: January 8, 2019

Time: 9:45 a.m.

Judge: Honorable Leslie E. Kobayashi

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**PLAINTIFF’S REPLY IN SUPPORT OF *PLAINTIFF’S MOTION
PRELIMINARY INJUNCTION* [DKT NO. 8]**

Defendants’ Opposition (Dkt. No. 16, “Opp.”) falsely asserts that “DHS does not, and never has, delegated any of its responsibilities under the Medicaid program to DOE or any other State Department.” Opp. at 4 (citing Med-QUEST Administrator, Judy Mohr Peterson’s Declaration (“Peterson Decl.”), ¶4). However, DHS’s May 31, 2017 memorandum not only clearly delegates school-day ABA service decisions to DOE in the body of memo itself (as cited in the Motion at pp.4-5), it further details the delegation in section 6(f)(ii) of Attachment A to that memo as follows:

Attachment A

f. Coordination with Other State Programs

- i. Early Intervention Program (EIP) is responsible to determine and provide for services provided to its EIP beneficiaries aged 0 to three. In addition, EIP and QI health plans will transition a beneficiary from EIP to QI health plan to cover ABA services through collaboration with an EI Care Coordinator and QI health plan service coordinator.
- ii. Department of Education (DOE) will determine services to be provided to a beneficiary while the beneficiary is in school. Services provided by the DOE are for purposes of educational access and benefit only and will be determined in accordance with the IDEA. The QI health plan will collaborate with DOE, as applicable, to provide and reimburse for ABA services outside of school.
- iii. QI health plans will provide medically necessary ABA services for beneficiaries in the 1915(c) Developmental and Intellectual Disabilities (DD/ID) waiver.

Motion, Ex.3, [Dkt. No. 8-5, p. 8 of 29] (emphasis added). Although DHS directs QI health plans to “collaborate” with DOE, health plan collaboration is specifically limited “to provide for ABA services **outside of school.**” *Id.* (emphasis added.)

Further, DHS is well aware that DOE’s position is that the IEP team’s

determination of the “educationally relevant” needs of a student does not require deference to medical professionals. Motion, Ex.4, p.3. DHS also knows that DOE does not allow Medicaid providers onto campus to render ABA services. *Id.*

DHS is also aware of the dismal/non-existent status of DOE’s efforts to qualify for school-based claiming for providing qualified ABA services to Medicaid beneficiaries. *See* Peterson Decl., ¶¶23-25. DHS has reported that DOE sought zero (0) reimbursements for ABA services. Motion, Ex.9 at C2.

DOE’s policy effectively reduces EPSDT benefits to whatever an IEP team determines is “educationally relevant.” DHS’s blind delegation to DOE, knowing that DOE is a Medicaid provider which is blocking the delivery of EPSDT services, is illegal. *See* 42 U.S.C. §1396b (prohibiting reduction of EPSDT services even when such services are included in an IEP process). Defendants’ bureaucratic blockade makes it virtually impossible for beneficiaries to receive medically necessary ABA services during the school day.

Defendants must coordinate to prevent the reduction of services under both IDEA and the Medicaid Act. *See* 20 U.S.C. §§1440(c) and 1412(e). Their failure to do so is not only a direct violation of those laws, but also constitutes discrimination against students with Autism in violation of ADA and Section 504.

I. HDRC IS LIKELY TO SUCCEED ON THE MERITS

A. DOE's Discriminatory Policies Violate ADA and Section 504

DOE does not dispute that it both bans private ABA providers from campus and does not provide full medically necessary ABA to its students who need it. This is a *prima facie* violation of ADA and Section 504 because students with Autism are being denied reasonable accommodations of medically necessary ABA services they need to “enjoy meaningful access to the benefits of [a public education.]”. *See A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1204 (9th Cir. 2016). Students with Autism who are recommended medically necessary ABA by qualified professionals cannot access the benefits of their education and receive the medical services they need.

It is not a reasonable accommodation to only provide “educationally necessary ABA services” because that determination is made by DOE’s IEP team (usually personnel not qualified to assess students with Autism for ABA) and has no bearing on the need for medically necessary services. *See Opp.* at 28; *See Albogniga v. Sch. Bd. Of Broward Cty.*, 87 F. Supp. 3d 1319, 1341 (S.D. Fla. 2015) (school cannot reject a requested accommodation in favor of one it prefers). DOE has not shown that accommodating full medically necessary ABA on campus would result in undue burden to DOE or fundamental alteration of its programming. *See K. M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097-98 (9th

Cir. 2013). Students with Autism are effectively excluded from school based on their disability and the services they need. *Tennessee v. Lane*, 541 U.S. 509, 531 (2004) (failure to accommodate has same effect as outright exclusion).¹

B. DHS’s Improper Delegation and Failure to Coordinate Services Violates EPSDT, ADA, and Section 504

DHS is required to provide all medically necessary ABA services to EPSDT recipients. *See* Opp. at 5-6. DHS insists that it does not delegate to DOE and that the health plans are sufficiently tasked with “coordinating and ensuring delivery of medically necessary ABA” for during the school day. Opp. at 7-8 (quoting DHS May 17, 2017 Memo (Motion, Ex.3)); Opp. at 28-29 (denying it

¹ DOE’s ongoing “efforts” to qualify for school-based claiming to offset the cost of providing ABA to students is of no consequence and does not relieve DOE of its federal obligations not to discriminate. DOE is and has been for years a Medicaid provider. 13 years ago, the Legislature directed DOE to maximize federal revenue for off-setting the cost of providing health and education services to children with special needs. *See* Supplemental Declaration of Maile Osika (“Supp. Osika Decl.”), Ex.4 (Act 141 (2005)). The issue of how to seek reimbursement for ABA services has been on DOE’s radar since at least 2015. *Id.*, Ex.2, pp. 4, 8; *See also* Motion, Ex.12 (HSTA Testimony) (reporting the same and concluding there is no reason for DOE to “continue denying or dragging their heels on accepting Medicaid funding for [ABA], including for privately rendered services offered during school hours.”). DOE already has a School-Based Medicaid Claiming Authorization process for medically necessary and educationally necessary, health related services. Supp. Osika Decl., Ex.3. And, even if a parent does not consent to participate in that program, DOE is “not relieved of its responsibility to ensure that all required services are provided to [a student], at no cost [to the parent].” *Id.*

delegates to DOE, but confirming delegation to DOE to its health plans). As explained above, this is patently false.

School day services are entirely left to the discretion of DOE.

Motion, Ex.3, Attach.A, p.9. DHS is aware that DOE “does not allow a parent’s provider on campus during the school day to serve students, as this would interfere with the school’s obligation to implement the student’s educational program.”

Motion, Ex.4, p.2, ¶2. DHS now concedes that it “can not [sic] assume that educationally-focused ABA services DOE may be providing meet the medically necessary criteria for EPSDT.” Opp. at 7.²

DHS is not absolved of its EPSDT obligations just because it delegates. *Katie A., ex rel Ludin v. Los Angeles Cty.*, 481 F.3d 1150, 1159 (9th Cir. 2007); *John B. v. Menke*, 176 F.Supp.2d 786, 801 (M.D.Tenn.2001) (state cannot “disclaim responsibility for the ultimate provision of EPSDT-compliant services by a once-removed provider”); *Chisholm v. Hood*, 110 F.Supp.2d 499,

² This is a fair assumption based on DHS’s HUIPA response as of April 4, 2018, reporting, among other things, that there were no school-based claims for Autism services and no responsive documents on the number of Medicaid recipients who receive ABA (or even ABA-like) services in school. *See* Motion, Ex.9 (§§C1, C4, E4). The minimum qualifications necessary to provide ABA services in school are the same as those required by Medicaid. *Id.* at §C5. DHS is involved in the working group focused on how DOE can obtain Medicaid reimbursement, which is still reported to be a “work in progress.” Opp., Peterson Decl. *Id.* ¶¶23-25.

507 (E.D. La. 2000) (EPSDT violation where state Medicaid agency limited certain medically necessary services “exclusively to those allowed by school boards,” because “[it] cannot ... pawn off its obligation to the class as a whole by delegating it to a State agency not under the same federal mandate.”).

DHS must ensure that the EPSDT services are reasonably effective and sufficient to “achieve their purpose.” *Katie A.*, 481 F.3d at 1159. (quoting State Medicaid Manual § 5110). This includes ensuring that its constituents are not discriminated against simply because of their disability and type of treatment services they need. Because DOE blocks ABA providers from campus and does not itself provide the medically necessary services, students who need ABA need to leave school to get services. This policy fails to meet the requirement that ABA be implemented across settings. Motion, Ex.3, Attachment A at p.5; *Id.*, Ex.9, ¶E3 (“Beneficiaries may receive ABA services in settings that maximize treatment outcomes, to include but not limited to a clinic, in their home, or another community setting.”).

Defendants argue that the Egan Case (*J.E. v. Wong*) “has no application in this case.” Opp. at 30-31. While that case did not involve the DOE or its policy to exclude ABA providers from campus with the full knowledge and acquiescence of DHS, it confirms that ABA must be provided under EPSDT. Motion, Ex.1, *J.E. v. Wong*, No. 14-00399 HG-KJM, 2016 WL 4275590, at *10

(D. Haw. Aug. 12, 2016). The Court further held that the Medicaid Act requires sufficient notice to EPSDT recipients regarding services, which requires DHS to take a “proactive approach” and “seek out individuals and inform them of the benefits of prevention and the health services and assistance available.” *Id.* at *14 (citing 42 U.S.C. § 1396a(a)(43)(A)). Compliance “is measured in terms of the state’s efforts.” *Id.* Such communications should apprise eligible persons of the nature of the EPSDT program, services available under the program, and **where and how they may obtain EPSDT services.** *Id.* at *15 (citing 42 C.F.R. § 441.56(a)(2)(ii)). This means up-to-date information and DHS has an **affirmative duty to correct out-of-date or incorrect information.** *Id.*

Since the Egan Case, the only “notice” that DHS has supplied regarding ABA services under Medicaid provides **no information about how to access ABA during school** in light of DHS’s policy that DOE will handle ABA services during the school day. Motion, Ex.2. The notice implies that all medically necessary services will be provided and frustrates Judge Gillmor’s ruling because there is, again, “widespread confusion” regarding coverage of and access to ABA services under EPSDT. 2016 WL 4275590, at *15. The state may not “shirk its responsibilities to Medicaid recipients by burying information about available services in a complex bureaucratic scheme.” *Id.* at *17 (quoting

Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs., 293 F.3d 472, 481 (8th Cir. 2002)).

C. DOE's Policies Regarding ABA Services Violate IDEA

1. Refusal to Fund or Provide ABA as a Related Service

DOE's refusal to accommodate medically necessary ABA during school hours forces students with Autism out of public schools. This violates not only ADA and Section 504, but IDEA as well. "As a general matter, services that enable a disabled child to remain in school during the day provide the student with the meaningful access to education that Congress envisioned." *Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 73, 119 S.Ct. 992, 997 (1999) (internal quotation omitted). "Congress intended to open the door of public education to all qualified children and required participating States to educate handicapped children with nonhandicapped children whenever possible." *Id.* at 78, 119 S.Ct. at 999 (internal quotations omitted).

DOE must fund or supply ABA as a "related service" to "help guarantee" that students with Autism are integrated into the public schools. *Cedar Rapids*, 526 U.S. at 79, 119 S.Ct. at 1000 (school was required to provide related and supportive services ventilator services in the school setting). DOE cannot dismiss ABA as an effective medical or educational method simply because it has

other preferred programs for students with Autism.³ When a student with Autism needs 30-40 hours of medically necessary ABA per week, as a practical matter, those services must be provided in school for that student to remain in school.

DOE contends that it has complete discretion within the IEP process to determine whether a student is “eligible for special education and related services.” Opp. at 12. DOE disregards professional and qualified recommendations for medically necessary ABA services (which meet the stringent Medicaid standards) based on assessments by its own IEP team (which does not purport to include any qualified LBAs), even though Defendants admit that “[t]he ABA field does not distinguish between medical and educational services.” (Opp. at 13). This is nonsensical. If ABA services are medically necessary for a student across settings, a professional has already determined that such services are needed in school. DOE must include those as a “related service” to ensure the student has “meaningful access to education.”⁴

³ Defendants do not mention or attempt to distinguish the *R.E.B.* (9th Cir.2017), *K.G.* (S.D. Fla. 2013), or *Deal* (6th Cir. 2004), which are cases cited by HDRC that affirm and discuss ABA as an effective educational and medical treatment for Autism. Motion at 23-24 (Note: HDRC inadvertently omitted the full citation to *K.G.* in the Motion, which is *K.G. v. Dudek*, 981 F.Supp.2d 1275 (S.D. Fla. 2013)).

⁴ Defendants rely heavily on *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 1102 S.Ct. 3034 (1982), which stands for the proposition that IDEA does not require “strict equality of

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2. Illegal Predetermination in the IEP Process

The IEP serves as the “primary vehicle” for providing students with a FAPE. Opp. at 9 (citing *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 734, 748 (2017)). Here, for both medically necessary and educationally relevant ABA services, that IEP process is fatally flawed.

Although required to review and consider parent recommendations for ABA, the IEP team enjoys complete autonomy to determine educational relevance for requested services. Opp. at 12.⁵ What Defendants do not mention is that ABA

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opportunity or services” to “maximize” education. Opp. 21-23. That case involved a deaf student who was already making excellent progress with the specialized services offered in her IEP. The standard expressed by the Supreme Court recently in *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S.Ct. 98 (2017) distinguishes *Rowley* and is more akin to this case because it involved a student with Autism. The Court held: “To meet its substantive obligation under the IDEA, a school must offer an IEP **reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.**” *Endrew F.*, 137 S.Ct. at 999. “[A] student offered an educational program providing “merely more than *de minimis*” progress from year to year can hardly be said to have been offered an education at all.” *Id.* at 1001.

⁵ Most of the factual allegations regarding DOE in the Opposition are supported by the Kalama Declaration. Opp., Ex.A (Kalama CV). Although Ms. Kalama purports to be an “employee” of DOE, her CV shows her most recent DOE position ended in March 2014 and that she is presently a grant project manager and adjunct faculty with Eastern New Mexico University. See Opp., Ex.A and Kalama Decl., ¶1. It is unclear how Ms. Kalama has personal knowledge regarding any of the current statistics for and practices of DOE or what qualifies her to testify on its behalf. Ms. Kalama also does not purport to have any specialized knowledge of or

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is disfavored in DOE. Over and over again, Parents and professionals who advocate for such services are summarily rejected.⁶

HDRC submitted seven witness declarations of parents of children with Autism and two declarations from other Autism advocates describing their predetermination experiences in requesting ABA services from DOE.⁷ Since this case was filed, HDRC's counsel has been contacted by additional parents and special education counsel who have shared similar experiences and want to submit

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experience with behavior analysis, yet makes generalized statements regarding what the ABA field consists of. *See* Kalama Decl., ¶¶6-7. Most critically, it is unclear what Ms. Kalama reviewed to reach her “understanding” of the services for individual constituent student witnesses in this case. *Id.*, ¶¶ 14-20. Defendants entirely rely on her conclusory remarks to argue that the constituents are “receiving all IEP services” and “all educationally relevant ABA services necessary for the students to enjoy meaningful access to the benefits of a public education.” *Opp.* at 15-17, 28. Such evidence is unreliable and should be given little, if any, weight.

⁶ *See* Supplemental Declaration of Amanda Kelly, Ex. 1 (Letter from Jason Gilkas, DOE District Educational Specialist). This letter confirms, among other things: DOE's position that there is no requirement for functional behavior assessments (FBAs) to be performed by LBAs and that DOE has its “own staff to conduct such assessments”; DOE teachers, related service providers, and SBBH counselors use ABA on DOE campuses every day; Parents have a fundamental misunderstanding of what ABA is and have been “brought to believe that it is some kind of new method of helping students with autism”; and the dispute over ABA services is fueled by private agencies hoping to get parents on board so they can make money.

⁷ *See* Kelly Decl. ¶¶ 52-56; Erteshick Decl. ¶¶ 23-25; Tachera Decl. 21-23, 28-30, 32-33, 39-43, 46, 64-67, 70, 76; White Decl. ¶¶12-16; Rogers Decl. ¶¶13-27, 30-39, 47-49; McComas Decl. 5-9, 10-12, 20-28; Villiarimo Decl. 11-22, 24-28; Cosio Decl. 11-20, 21-26; Cunningham Decl. 7-10.

additional testimony. Supp. Osika Decl. ¶5. HDRC also submitted declarations of Amanda Kelly, describing the IEP processes in which she participated as a parent consultant for Autism services. Defendants argue that all the exemplar constituents offered by HDRC through declarations of their parents already receive “comprehensive educational services.” Opp. at 2.⁸ Not only is Defendants’ position directly contradicted by the parent and advocate declarations, Defendants did not serve unredacted declarations on Plaintiff’s counsel until hours before this Reply was due and did not provide any supporting documentation to Plaintiff’s counsel, despite earlier requests to do so. Supp. Osika Decl. ¶6. The information about minors in the Kalama and Peterson declarations should be disregarded as untimely and untested.

DOE denies it has a policy only to offer SBBH services instead of ABA.⁹ Even assuming for argument purposes that DOE goes through the proper

⁸ Attached is a Supplemental Declaration of Alison Villiarimo, on behalf of constituent J.V., disputing Defendants’ characterization of her child’s experience, including exhibits as examples of her efforts to get DOE to recognize J.V.’s Autism and then to get one-to-one support services for J.V. Villiarimo Decl., Exs. 1-2.

⁹ Defendants argue that HDRC “ignorantly relies” on DOE’s memo describing the SBBH program for its “students who do not require ABA services.” Opp. at 24. HDRC’s argument is that DOE has predetermined that its students do not require ABA unless other educational support services fail, which effectively means students receive SBBH services first. This results in irreparable harm to these

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motions of the IEP process, makes proper and qualified recommendations for a student with Autism, and then actually provides whatever is in the IEP, all in accordance with the specific requirements of IDEA, DOE still must accommodate medically necessary ABA services to students with Autism, as discussed above.¹⁰

II. THERE IS NO APPLICABLE EXHAUSTION REQUIREMENT

HDRC is entitled to bring these IDEA (and related ADA and Section 504 claims) against Defendants without exhausting administrative remedies. *See* Opp. at 19-21 (arguing that because this lawsuit asserts denials of FAPE, the administrative process must be exhausted). DOE's illegal policies and practices are of general applicability and have caused a systemic non-compliance with

(...continued)

students by delaying access to critical ABA services during students' developmental window under the guise that DOE is offering "Autism services."

¹⁰ Defendants discuss at length *Joshua A. ex rel. Jorge A. v. Roclin Unified Sch. Dist.*, 319 F. App'x 692, 694 (9th Cir.2009), an unpublished Ninth Circuit decision upholding an administrative ruling that a school district's IEP approach was sufficient for a FAPE, even though requested ABA services were denied. The *Joshua A.* case involved alleged individualized procedural violations, not a systemic violation as HDRC alleges here (see below at Fn.13). Further, it is unclear from the short, 2-page order whether the student's need for medically necessary ABA would have required him to withdraw from school, given the IEP team's rejection of ABA services.

IDEA.¹¹ Exhaustion is not required 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. *Doe By & Through Brockhuis*, 111 F.3d at 681.

HDRC brings this case on behalf of all its constituents with Autism who need ABA services in a medical or educational setting, or both. HDRC's IDEA claim alleges that Defendants systemically fail to comply with the statute's mandates. Administrative remedies cannot correct this systemic wrong and a FAPE can never be timely and adequately provided for an Autistic student who needs ABA unless and until DOE stops engaging in illegal predetermination.¹² See *New Jersey Prot. & Advocacy, Inc. v. New Jersey Dept. of Educ.*, 563 F.Supp.2d 474, 486 (D.N.J. 2008) (protection and advocacy group excused from exhaustion requirement where it alleged systematic legal deficiencies and, correspondingly

¹¹ See *Doe By & Through Brockhuis v. Arizona Dept. of Educ.*, 111 F.3d 678, 682 (9th Cir. 1997) (“a claim is “systemic” if it implicates the integrity or reliability of the IDEA dispute resolution procedures themselves, or requires restructuring the education system itself in order to comply with the dictates of the Act; but that it is not “systemic” if it involves only a substantive claim having to do with limited components of a program, and if the administrative process is capable of correcting the problem.”).

¹² Defendants cite only one case on this issue, *Wiles v. Dep't of Educ.*, 555 F. Supp. 2d 1143, 1163 (D. Haw. 2008), which is inapposite because it dealt with an individualized retaliation claim by the parents of a student. Opp. at 20-21.

requested system-wide relief that could not be provided (or even addressed) through the administrative process).¹³

Likewise, as to the claims against DHS, there is no requirement to exhaust state administrative state remedies before bringing a federal lawsuit alleging violation of the Medicaid Act. *See J.E. v. Wong*, 2016 WL 4275590, at *10 (citing *Okla. Chapter of Am. Acad. of Pediatrics (OKAAP) v. Fogarty*, 366 F.Supp.2d 1050, 1102 (N.D. Okla. 2005)).

III. THE *STATUS QUO* VIOLATES FEDERAL LAW AND MANDATORY INJUNCTIVE RELIEF IS NECESSARY TO PREVENT ONGOING IRREPARABLE HARM

Defendants' current policies are illegal. The requested injunctive relief would "impose an **entirely new policy and practice** regarding DOE's education of its students with ASD." Opp. at 2 (emphasis added).

A prohibitory injunction maintains the status quo whereas a mandatory injunction goes well beyond simply maintaining the status quo.¹⁴ *N.D.*

¹³ As was the fact in *New Jersey Prot.*, the individual students described by HDRC in the Motion are not plaintiffs in this action, but illustrative examples of the harm being caused by Defendants' policies. *New Jersey Prot.*, 563 F.Supp.2d at 486 (No exhaustion required where P&A sought relief that required restructuring, by judicial order, of the mechanism that the state had in place to meet the needs of students with special educational problems).

ex rel v. Hawaii Dept. of Educ., 600 F.3d 1104, 1112 (9th Cir. 2010) (quoting *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1320 (9th Cir.1994)). Such mandatory injunctive relief is appropriate where, as here, there is a strong likelihood of success because the “facts and law clearly favor” the plaintiff. *Katie A.*, 481 F.3d at 1156 (strong likelihood that plaintiffs would succeed on the merits meets the requirement for issuance of a mandatory preliminary injunction).

Injunctive relief is needed to stop this irreparable harm. *See K.G.*, 981 F.Supp.2d at 1288 (“there would be irreparable injury to Plaintiffs and all Medicaid-eligible minors in Florida who have been diagnosed with autism or ASD if these children do not receive ABA pursuant to this injunction... If these children do not receive ABA in the primary years of development up to age 6 and then to 12 years of age, the children may be left with irreversible language and behavioral impairments.”).

IV. ISSUES REGARDING PRIVATE INFORMATION OF THE WITNESS MINORS

Defendants moved for, and were granted, leave to submit unredacted declarations under seal because they contain private information about the witness

(...continued)

¹⁴ “The status quo means the last, uncontested status which preceded the pending controversy.” *N.D. ex rel. parents acting as guardians ad litem v. Hawaii Dept. of Educ.*, 600 F.3d 1104, 1112 (9th Cir. 2010) (quotation omitted).

declarants in support of the Motion. Dkt. Nos. 17 and 19. Despite the clear requirements of Local Rule 83.12 and a request of HDRC's counsel, HDRC was not served with unredacted copies of those declarations until within hours of the deadline for this Reply and have not been served with any documents supporting the hearsay statements of Declarants Peterson and Kalama regarding the minors' health benefits or IEPs. Supp. Osika Decl., ¶6.¹⁵ Thus HDRC was unable able to sufficiently review the content of the allegations contained therein in preparing this Reply. *Id.* Further, and despite seeing the obvious need to protect personal and confidential information regarding the minors, Defendants publicly filed personal details from the minors records unredacted in their Opposition and have not corrected the error even after Plaintiff brought it to their attention. Opp. at 15-17; Supp. Osika Decl., ¶7, Ex.1.¹⁶

¹⁵ As the designated Protection and Advocacy agency for Hawai'i, HDRC's access to DOE's information is not barred by the Federal Educational Rights and Privacy Act ("FERPA"). *See Disability Law Center of Alaska, Inc. v. Anchorage School Dist.*, 581 F.3d 939, 940 (2009).

¹⁶ In addition, prior to filing their Opposition Defendants disingenuously took the position that they were prejudiced by not having the full names of the minor individuals; Defendants concealed the fact that they had already accessed minors' health and medical records during the briefing on the discovery issues. Osika Decl., ¶¶3-4.

V. HDRC DOES NOT SEEK RETROSPECTIVE RELIEF

HDRC does not seek retrospective relief, and the requested prospective relief is permitted by the Eleventh Amendment. *See* Opp. at p.30. “To ensure the enforcement of federal law [], the Eleventh Amendment permits suits for **prospective injunctive relief** against state officials acting in violation of federal law.” *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 974 (9th Cir. 2015); *See also Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985) (“[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.”).

VI. CONCLUSION

For all the reasons set forth in the Motion and herein, HDRC respectfully submits that it should be granted the requested injunctive relief against Defendants.

DATED: Honolulu, Hawai`i, December 18, 2018.

/s/ Maile Osika

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