

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 18 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

A.K., the Student; and V.I., the Student's
Parent,

Plaintiffs-Appellants,

v.

DEPARTMENT OF EDUCATION, STATE
OF HAWAII,

Defendant-Appellee.

No. 21-17127

No. 1:21-cv-00127-DKW-RT

MEMORANDUM*

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

Submitted November 15, 2022 **
San Francisco, California

Before: McKEOWN and PAEZ, Circuit Judges, and MOLLOY, *** District Judge.

Appellant A.K., by and through her mother, V.I., appeals from the district

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

court’s judgment affirming the decision of an administrative hearings officer (“Hearings Officer”) that A.K.’s school district did not violate the Individuals with Disabilities Education Act (“IDEA”). A.K. claims that the Department denied her a free appropriate public education (“FAPE”) when it, pursuant to an individualized education program (“IEP”), reduced her weekly feeding therapy regimen and removed her communication aide. We have jurisdiction under 28 U.S.C. § 1291, and we review the district court’s factual findings for clear error and its legal conclusions de novo, including whether the school district complied with the IDEA, *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1118 (9th Cir. 2016). Because petitioners fail to meet their burden of proving error below, we affirm.

1. Because the Department adequately considered the recommendations and concerns of A.K.’s mother, its contrary decision to decrease her weekly feeding therapy regime based on the speech language pathologist’s recommendation does not constitute a denial of a FAPE. *See Capistrano Unified Sch. Dist. v. S.W.*, 21 F.4th 1125, 1134 (9th. Cir. 2021) (“Parents’ participation does not require school authorities automatically to defer to their concerns.”).

2. Nor did the Department deny A.K. a FAPE when it removed her communication aide. Based on the “snapshot” rule, review of an IEP determination is limited to evidence before the IEP team at the time it made the

determination, *Baquerizo v. Garden Grove Unified Sch. Dist.*, 826 F.3d 1179, 1187 (9th Cir. 2016) (limiting review “based on the information that was reasonably available to the [school district] at the time” the IEP was created), unless the additional evidence concerns events occurring after the determination that “provide significant insight into the child’s condition, and the reasonableness of the school district’s action, at the earlier date,” *E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist. Off. of Admin. Hearings*, 652 F.3d 999, 1004, 1006 (9th Cir. 2011). The Hearings Officer and the district court properly excluded testimony from one of A.K.’s registered behavioral technicians related to the communication aide removal because it was not “reasonably available” to the IEP team and did not provide any “significant insight” into A.K.’s condition at the time of IEP determination. Additionally, even if the additional evidence was considered, it would not have had an impact on the FAPE determination.

AFFIRMED.