



OFFICE OF DISPUTE RESOLUTION  
DEPARTMENT OF THE ATTORNEY GENERAL  
STATE OF HAWAI'I

In the Matter of STUDENT, by and through  
PARENT,<sup>1</sup>

Petitioner(s),

vs.

DEPARTMENT OF EDUCATION, STATE  
OF HAWAI'I,

Respondents.

DOE-SY2223-034

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION

Due Process Hearing: May 1-2, 2023

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

**I. INTRODUCTION**

On March 6, 2023, the Department of Education, State of Hawai'i (hereinafter "Respondents" or "Hawai'i DOE") received a Request for an IDEA Impartial Due Process Hearing (hereinafter "Complaint") under the Hawai'i Administrative Rules Title 8, Chapter 60, in accordance with the Individuals with Disabilities Education Act, from Student, by and through Parent (hereinafter "Petitioners"). On March 15, 2023, Respondents filed DOE's Response to



Petitioners' Request for IDEA Impartial Due Process Hearing.

A Prehearing Conference ("PHC") was conducted on April 4, 2023. Participating in the conference were: Chastity T. Imamura, Hearings Officer; Parent, on behalf of Petitioners; and District Educational Specialist (hereinafter "DES") on behalf of Respondents. At the prehearing conference, the Due Process Hearing (hereinafter "Hearing") was scheduled for May 1, 2, 4, and 5, 2023. A Prehearing Order was filed on April 5, 2023, which laid out the issues to be determined at the Hearing and the stipulation by the parties to hold the Hearing virtually over a videoconferencing platform.

An Order Regarding Video Conference Due Process Hearing was issued on April 5, 2023, which set forth the parameters for the video conference hearing. These parameters included: the instructions to participate via the Zoom video conference internet platform; a court reporter would participate in the video conference hearing, swear in the witnesses, and transcribe the proceedings; all witnesses were required to participate in the Hearing using both the video and audio functions of the Zoom platform; and that witnesses and parties would ensure confidentiality of the proceedings by participating in a private setting.

On April 28, 2023, a status conference was held with Parent and DES to discuss issues related to the DOE's exhibits that were submitted. Petitioners were considering whether to seek the assistance of counsel or proceed with the Hearing. Petitioners decided to continue with the Hearing as scheduled on May 1, 2, 4, and 5, 2023.

The Hearing commenced on May 1, 2023, using the Zoom video conferencing platform. Each attendee to the Hearing was sent a link through email to access the Hearing by the Office of Dispute Resolution. Present in the video conference Hearing were this Hearings Officer; Parent on behalf of Petitioners; and DES on behalf of Respondents, as well as the assigned court

reporter.

By agreement, Respondents coordinated the schedules for Petitioners to have DOE witnesses testify based on their availability. Since some witnesses were going to be called on behalf of Petitioners and Respondents, this Hearings Officer allowed both parties to ask all questions of the witness at one time, so the witnesses could complete their testimony on behalf of Petitioners and Respondents during one session.

At the Hearing on May 1, 2023, Petitioners called Parent, Student Services Coordinator (hereinafter “SSC”), and Principal to testify. SSC’s testimony was not completed on May 1, 2023, so SSC’s testimony was resumed on May 2, 2023. Petitioners also called Vice Principal (hereinafter “VP”) and General Education Teacher (hereinafter “GE Teacher”) to testify on May 2, 2023 and rested their case. Based on their presentation of these same witnesses during their testimony, Respondents did not have any additional witnesses to call and rested their case. The Hearing concluded on May 2, 2023.

Each party submitted their electronic disclosures by the deadline of April 24, 2023. Petitioners objected to many of Respondents’ exhibits, noting that multiple exhibits contained information of minor children other than Student. Respondents offered to redact all information regarding any children other than Student in the disclosures and this Hearings Officer allowed for the redactions. On April 26, 2023, Respondents provided Petitioners and this Hearings Officer with the redacted copy of their disclosures. Only documents from the redacted copy of exhibits were used at the Hearing and received into evidence.

At the Hearing, this Hearings Officer explained to the parties that only exhibits that are mentioned or discussed would be admitted into evidence. This Hearings Officer also informed the parties that they would have an opportunity to offer additional exhibits into evidence after the

hearing. On May 2, 2023, this Hearings Officer provided both parties with an updated list of exhibits from each party that indicated which exhibits had been received into evidence based on the witness' testimony. The list of additional exhibits requested by each party was due on May 10, 2023, and any objections to additional exhibits were due on May 12, 2023.

Respondents requested the following exhibits from their disclosures to be submitted into evidence: Exhibit 2, pages 044-045, 062-067; Exhibit 4, pages 086-093, 109-115. Petitioners objected to the receipt of these exhibits into evidence due to not having a live witness to explain the documents during the Hearing. Over Petitioners' objection, the documents were received by this Hearings Officer as they were part of the evaluation for eligibility that was completed with Student in this case.

Petitioners did not submit any additional exhibits to be received into evidence as all Petitioners' exhibits submitted in their disclosures were received into evidence at the Hearing, Petitioners' exhibits were later organized and paginated by the Office of Dispute Resolution. The final set of exhibits received into evidence from Petitioners with the page numbers was sent to both parties on May 15, 2023, along with the List of Exhibits Received at Due Process Hearing. An Amended List of Exhibits Received at Due Process Hearing was sent out on June 13, 2023, to add an exhibit on Petitioners' list that was inadvertently left off the original list.

The following exhibits were received as evidence in consideration of this Decision. Petitioners' Exhibit A, video recording dated April 14, 2023; Petitioners' Exhibit B,<sup>2</sup> video recording dated February 16, 2023; Petitioners Exhibit C, pages 01-02; Petitioners Exhibit D,

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<sup>2</sup> Petitioners' copy of the video recording was not playable by the Office of Dispute Resolution, so the parties agreed that the video submitted by Respondents would be admitted as the video recording for this meeting. Since Respondents' copy of the video is in evidence, any references to the video shall be made to Respondents' Exhibit 9 for clarity.

pages 03-07; Petitioners' Exhibit E, pages 08-30; Petitioners' Exhibit F, pages 31-35; Petitioners' Exhibit G, pages 36-43; and Petitioners' Exhibit H, pages 44-45.

Respondents Exhibit 2, pages 015-016, 021, 034-045, 051, 057-069; Respondents' Exhibit 3, pages 074-077; Respondents' Exhibit 4, pages 086-093, 109-152, 161-165; Respondents' Exhibit 6, pages 489-553, 606-613; and Respondents Exhibit 9, pages 653, 656-660, video recording dated 2023-02-16, and audio recording dated 04/14/2023.

Both parties requested the opportunity to submit closing briefs with the use of the transcripts from the Hearing to summarize their arguments in support of their positions. Based on the original decision deadline of May 20, 2023, Petitioners requested an extension of the decision deadline from May 20, 2023 to June 14, 2023 to allow for the completion of the transcripts and the written briefs. The deadline for the written closing briefs was set for May 31, 2023 based on the anticipated transcripts being received by the parties on May 19, 2023. Respondents submitted their closing brief on May 31, 2023. Petitioners received their transcripts later than expected and submitted their closing brief on Sunday, June 4, 2023.

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

## **II. JURISDICTION**

This proceeding was invoked in accordance with the Individuals with Disabilities Education Act (hereinafter "IDEA"), as amended in 2004, codified at 20 U.S.C. § 1400, *et seq.*; the federal regulations implementing the IDEA, 34 C.F.R. § 300.1, *et seq.*; and the Hawai'i Administrative Rules (hereinafter "H.A.R.") § 8-60-1, *et seq.* This proceeding also addresses issues under Section 504 of the Rehabilitation Act of 1973 (hereinafter "Section 504"), codified

at 29 U.S.C. §794, *et seq.*; the federal regulations implementing Section 504, 34 C.F.R. §104.1, *et seq.*; and the H.A.R. §8-61-1, *et seq.*

### III. ISSUE PRESENTED

Petitioners assert the following issue and proposed remedies in the Complaint to be addressed at the Hearing:

**Issue 1** – Whether the DOE inappropriately determined that Student was not eligible for IDEA special education and related services.

**Issue 2** – Whether the DOE inappropriately implemented Student’s current Section 504 plan.

**Proposed Remedy 1** – Provide Student with appropriate supports for Student’s education, including special education and related services under the IDEA.

### IV. FINDINGS OF FACT

#### Witness background

1. Parent is a licensed teacher in the State of Hawai‘i and in another state. Parent currently teaches at a different DOE school than Home School. Parent has a bachelor’s degree in psychology and a master’s degree in elementary and special education. Parent’s license in Hawai‘i for elementary education is from grades kindergarten to sixth grade and special education for grades kindergarten through twelfth grade. Testimony of Parent, Transcript of Proceedings, Volume 1, page 51, line 10 through page 52, line 25 (hereinafter referenced as “Tr.V1, 51:10-52:25”).
2. Parent has not taught special education in the State of Hawai‘i but has attended individualized education plan (hereinafter “IEP”) meetings as a teacher. Testimony of Parent, Tr.V1, 51:3-7.
3. SSC is the student services coordinator for Home School. Prior to becoming the student services coordinator, SSC was a general and special education teacher for [REDACTED] years.

SSC has a bachelor's degree in elementary and special education. Testimony of SSC, Tr.V1, 116:3-118:12; R-Ex.9, p.653.

4. SSC was qualified as an expert witness in the area of special and general education for purposes of this Hearing. Testimony of SSC, Tr.V1, 118:15-119:19.
5. SSC has experience with [REDACTED] both in the [REDACTED] both through teaching children that have the [REDACTED] diagnosis in the classroom, and having been diagnosed with [REDACTED], as well as having two children with [REDACTED] diagnoses. Testimony of SSC, Tr.V1, 127:2-21; Tr.V2, 181:12-182:5.
6. Principal is the temporarily assigned principal of Home School. Prior to becoming the temporary principal, Principal was an assistant principal and vice principal at other DOE schools. Principal previously taught general education in the State of Hawai'i. Principal is on target to hold a professional school administrator's license in the State of Hawai'i. Testimony of Principal, Tr.V1, 144:25-146:5; R-Ex.9, p.656-657.
7. Principal was qualified as an expert witness in the area of administration with the State of Hawai'i DOE. Testimony of Principal, Tr.V1, 146:6-16.
8. VP is a vice principal at Home School and has held that position since 2021. VP previously taught at Home School and another DOE school and worked as an education consultant for a school improvement company. Testimony of VP, Tr.V2, 191:25-193:8; R-Ex.9, p.658-660.
9. GE Teacher is a grade-level general education teacher at Home School. GE Teacher has

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[REDACTED] Testimony of SSC, Tr.V1, 181:12-183:5.

taught in both general education setting classrooms and inclusion classrooms, where students with IEPs work in the same classroom as the general education students on a daily basis. Testimony of GE Teacher, Tr.V2, 213:25-214:35, 226:25-227:10.

#### Student's background

10. Student is [REDACTED] years old and currently<sup>4</sup> attends Home School in a [REDACTED] grade inclusion classroom taught by GE Teacher. Testimony of GE Teacher, Tr.V2, 201:9-20, 214:18-20; *see also* R-Ex.4, p.161.
11. Student began attending Home School during the 2019-2020 school year after Student, Parent, and Student's sibling moved to Hawai'i. *See* R-Ex.4, p.126.
12. At the end of Student's [REDACTED] grade school year, Student took standardized tests in the areas of English/Language Arts (hereinafter "ELA") and Math. These standardized tests are given to students in the [REDACTED] grade and statistics are taken to see how well the individual student scored on the test compared to a school-level, district-level, and state-level average. *See* R-Ex.4, p.092-093.
13. The standardized test scores are divided into levels of performance: Level 1- the student has not demonstrated meeting the achievement standards and needs substantial improvement to demonstrate the knowledge and skills in the area tested; Level 2 – the student has nearly met the achievement standards and may require further development to demonstrate the knowledge and skills in the area tested; Level 3 – the student has met the achievement standards and demonstrates progress toward mastery of the knowledge and skills in the area tested; and Level 4 - the student has exceeded the achievement standard

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<sup>4</sup> Although the Decision is being filed after the end of the 2022-2023 school year, at the time of the Hearing, Student was still in the [REDACTED] grade.



and demonstrates advanced progress toward mastery of the knowledge and skills in the area tested. R-Ex.4, p.092-093.

14. The ELA score was further divided into two (2) subcategories of reading and writing.

Student scored a higher Level 3 score, which was higher than the state-level, district-level, and school-level scores. Both Student's reading and writing scores were considered at or near the standard of performance. R-Ex.4, p.092.

15. Student's math score was a higher Level 3 score, near the Level 4 threshold, and higher than the state-level, district-level, and school-level average scores. Student's performance on the math subcategory of concepts and procedures was considered above the standard. R-Ex.4, p.093.

2022-2023 school year – first semester

16. In August 2022, Student took diagnostic tests in the areas of reading and math, which looked at Student's abilities in reading, specifically phonological awareness, phonics, high-frequency words, vocabulary, comprehension – literature, and comprehension – informational tests; and math specifically number and operations, algebra and algebraic thinking, measurement and data, and geometry. These tests were based on the grade-level average measurement. R-Ex.4, p.088, 090.

17. Student's reading score in the August 2022 diagnostic test reflected that Student was having the most trouble in the comprehension of informational texts, but the reading diagnostic results showed that Student was generally suited for the [REDACTED] grade level skills. R-Ex.4, p.088.

18. Student's math score in the August 2022 diagnostic test reflected that Student has strong math skills and tested in the mid to early [REDACTED] grade level for all areas of the test. R-

Ex.4, p.090.

19. In September 2022, Student had applied for but was denied entry into the robotics club at Home School. Student was disappointed in being denied entry into the club, as Student had to write an essay with the application. Student expressed concern with having to interact with the teacher who appeared to be the decision-maker for the robotics club entry around school as a teacher. R-Ex.4, p.128-129.
20. Early in the 2022-2023 school year, GE Teacher raised concerns with Parent about Student's behaviors in class, specifically that Student would direct Student's focus intensely toward specific things and was frequently losing focus when working on assignments that were not interesting to Student. Testimony of GE Teacher, Tr.V2, 201:11-20.
21. In the first quarter of the 2022-2023 school year,<sup>5</sup> Student received a "well-below" or "WB" grade in writing. Student received a "WB" grade for writing in the first quarter since Student did not complete the final writing assignment for grading. Testimony of GE Teacher, Tr.V2, 231:2-6; R-Ex.4, p.161.
22. The "WB" grade characterizes a student's performance as "does not demonstrate acceptable achievement of the targeted benchmarks/standards." Other grades available to students for the DOE's elementary school report cards are "meets with excellence" or "ME," "meets with proficiency" or "MP," "developing proficiency" or "DP," "satisfactory," "unsatisfactory," and "not applicable at this time." R-Ex.3, p.161.
23. The standards-based grades mentioned above are mapped out for achievement of

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<sup>5</sup> The first quarter of the 2022-2023 school year at Home School started on August 3, 2022 and ended on September 30, 2022. P-Ex.H, p.44.

proficiency in the grade-level standards by the end of the school year. A “DP” grade in one of the quarter grades means that a student would be developing proficiency toward the end-of-the-school year standards. A student would still be considered as meeting proficiency if a “DP” grade is received during the school year. Testimony of SSC, Tr.V2, 172:3-20.

24. A “WB” would mean that the student is well below the standards or benchmarks and would not be considered as meeting proficiency for an end-of-the-school standard. Testimony of SSC, Tr.V2, 172:13-16.

25. In November 2022, a student focused team (hereinafter “SFT”) meeting was organized because Parent and Student’s teachers observed that Student was having moments of decreased attention and focus inside the classroom, so Home School determined that an evaluation for Section 504 accommodations would be appropriate for Student. No assessments were conducted for the Section 504 evaluation. R-Ex.2, p.015.

26. In December 2022, Student took another set of diagnostic tests to compare with the August 2022 diagnostic tests in reading and math. In the December 2022 reading test, Student’s scores reflected that Student was in the mid to late [REDACTED] grade level for vocabulary, comprehension – literature, and comprehension – informational text, and past the [REDACTED] grade level for phonological awareness, phonics, and high-frequency words. R-Ex.4, p.089.

27. Student’s math score on the December 2022 diagnostic test was significantly lower than the August 2022 scores in two areas: number and operations and algebra and algebraic thinking. Student’s scores in measurement and data improved to mid [REDACTED] grade level and Student’s geometry score stayed at mid [REDACTED] grade level. R-Ex.4, p.091.

28. At another SFT meeting was held in December 2022, the team determined that Student was eligible for a plan under Section 504. R-Ex.2, p.021.
29. A written plan with accommodations was drafted by the team and provided to Student's teachers and Parent (hereinafter referred to as "504-Plan"). R-Ex.3, p.074-077.
30. In December 2022, the SFT met again to determine whether an evaluation for services under the IDEA should be conducted with Student. The SFT agreed that an evaluation would be done to evaluate whether Student is eligible for special education and related services. R-Ex.2, p.051.
31. The evaluation for special education and related services included an observation by a school psychologist and a behavioral assessment by a behavior health specialist. R-Ex.2, p.051.

#### School Psychologist's observation report

32. The observations by School Psychologist were conducted on January 6 and 27, 2023. School Psychologist also conducted interviews of GE Teacher as part of the observation report, which was completed on January 30, 2023. R-Ex.4, p.109-115.
33. School Psychologist reported that Student appeared "very much like" Student's grade-level peers in the general education setting. Student demonstrated age-appropriate behaviors in the classroom and did not appear to actively struggle with demonstrating academic abilities within the classroom. R-Ex.4, p.113-114.
34. Student appeared to process visual and auditory information as well as Student's general education peers, made appropriate choices, responded to requests by the teacher, and demonstrated 'on-task' behavior at an appropriate level. R-Ex.4, p.113-114.
35. School Psychologist made recommendations for Student's 504-Plan, which included

providing Student with assignments that appeal to Student's interests, providing feedback to Student to develop confidence, highlighting areas of work that Student appears to be overlooking, providing reinforcement plan for improving retention of academics, and using homework to provide independent practice and reinforcement of the skills, but keeping the assignments short. R-Ex.4, p.115.

Behavior Health Specialist's behavioral assessment

36. Behavior Health Specialist (hereinafter "BHS") conducted a behavioral assessment with Student in January and February 2023. BHS submitted a report for Student's evaluation dated February 6, 2023 (hereinafter "BA-02/06/2023"). R-Ex.4, p.118-152.

37. BHS conducted several assessments with Student, Parent, and GE Teacher; and interviewed Student, Parent, Student's care coordinator/counselor, and two (2) of Student's teachers. BHS also conducted two (2) observations of Student in class, one (1) that was an unstructured observation and one (1) in which BHS collected behavior data using interval sampling. R-Ex.4, p.119, 138.

38. During BHS's interview with GE Teacher, GE Teacher provided examples of Student's distracted behavior, such as doing another activity than what is assigned like drawing, cutting, or folding paper. GE Teacher also provided an example of a time earlier in the school year where Student took eighty (80) minutes to complete a five (5) question multiple choice assessment in math, and that Student was drawing on paper instead of completing the assessment on the iPad. R-Ex.4, p.140-141.

39. GE Teacher told BHS that Student appears to be most distracted, careless, or gives minimal effort when working on subject matters that Student is least interested in, while Student performs better in areas of interest to Student. R-Ex.4, p.140-141.

40. GE Teacher noted to BHS that the use of some of the supports in Student's 504-Plan, such as the use of a timer, sitting near the front of the classroom, chunking assignments, verbal prompting for transitions, and seating Student near on-task students has helped Student from being more on tasks and less distracted. R-Ex.4, p.140-141.
41. GE Teacher also reported to BHS that Student sometimes would inform the teacher that Student had started or completed a task, when Student had not yet started working on the task. Student also requires redirection multiple times a day, however, Student is cooperative and compliant when being redirected. R-Ex.4, p.142.
42. Based on BHS's interview with Student, BHS was left with the impression that Student was avoiding tasks presented due to the tasks leaving Student feeling bored. Student expressed that Student questions why certain assignments are given but is confident that Student could have done the assignments if Student was interested in doing them. R-Ex.4, p.144.
43. BHS concluded that the assessments, interviews, and observations of Student suggested that Student needed supports in the classroom to 1) increase Student's motivation in the classroom, and 2) to interpret what appeared to be inattention and distractibility instead as Student's avoidance of tasks to keep Student safe from the feeling that Student cannot do well on the task, which in turn may lead Student to thinking that Student is not very smart. R-Ex.4, p.145.
44. Recommendations from BHS for a support plan for Student included a writing exercise (i.e., a letter) to express Student's feelings including unpleasant emotions, such as those Student felt when being denied entry into the robotics team; meditation; learning to cope with rejection; providing tasks that Student is interested in and providing positive

feedback for Student's achievements; linking emotions to learning, such as describing the academic tasks as having relevance in Student's present day life to show Student that the assignments are not given in vain; providing opportunities for enjoyable tasks, such as gardening, to show Student and adults Student's contribution to the community; providing more encouraging language feedback to Student, such as "that's a rough one, but you can work it out;" providing counter-statements to negative self-talk that Student may engage in; teaching and encouraging the use of complex feeling words, such as nervous, frustrated, embarrassed, disappointed, to provide opportunities to express emotions; having Student's work area be free of unnecessary clutter or things that could serve as a distraction; and the use of a behavior contract, if Student is willing, to provide a privileges if Student practices coping behaviors and completes academic tasks of acceptable quality. R-Ex.4, p.145-150.

#### Occupational Therapist's occupational therapy assessment

45. An occupational therapy assessment was also conducted as part of the evaluation by Occupational Therapist (hereinafter "OT"). R-Ex.4, p.116-117.
46. OT's occupational therapy assessment tested Student's visual perceptual abilities (how to process and interpret information that a person sees) and visual motor abilities (eye-hand coordination). R-Ex.4, p.116.
47. OT conducted a classroom observation the day before conducting the assessments on January 23, 2023. R-Ex.4, p.116.
48. OT determined that based on Student's occupational therapy assessment, Student's visual and fine motor skills are age-appropriate and functional for the school setting. Student's writing varied in neatness and length but is legible overall and can self-correct the

occasional reversal of the letters “b” and “d.” R-Ex.4, p.117.

49. OT noted that Student reported that Student prefers handwriting over typing, as Student reported that Student did not type very fast. R-Ex.4, p.117.

50. OT suggested that Student’s classroom supports include the ability to re-write Student’s work for a final draft to focus on neatness and have Student practice typing to increase Student’s skill and confidence at typing Student’s work. R-Ex.4, p.117.

#### Eligibility meetings on February 16, 2023

51. On February 16, 2023, the SFT had two (2) eligibility meetings<sup>6</sup> for Student to determine whether Student was eligible for IDEA special education and related services. R-Ex.9, video recording dated 2023-02-16, approximate time stamp [00:00-3:14:56] (hereinafter referenced as “R-Ex.9, video 2023-02-16 [00:00-3:14:56]”).

52. The SFT eligibility meetings were held over a videoconferencing platform. Present at the first meeting were Parent, SSC, VP, GE Teacher, SFT District Educational Specialist (hereinafter “SFT DES”), Special Education Teacher (hereinafter “SPED Teacher”), and BHS.<sup>7</sup> SFT DES was present on behalf of School Psychologist because School Psychologist was unable to attend the meeting.<sup>8</sup> R-Ex.9, video 2023-02-16 [00:43-01:49].

53. Present at the second eligibility meeting was Parent, SSC, VP, SPED Teacher, SFT DES, and OT.

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<sup>6</sup> While they team held two (2) separate meetings, the team met for one (1) three (3) hour session and just noted on the recording of the meetings that the first meeting ended, and the second meeting began. *See* R-Ex.9, video recording dated 2023-02-16.

<sup>7</sup> BHS left the meeting shortly after presenting BHS’s report and did not participate in the eligibility determination.

<sup>8</sup> OT was not present at the start of the first meeting but joined in the meeting before the SFT had made a decision.



54. The first SFT eligibility meeting was for the evaluation using School Psychologist's observation and BHS's behavioral assessment, and the second was for the evaluation using the occupational therapy assessment by OT. R-Ex.9, video 2023-02-16 [00:29-2:43:30], [2:43:30-3:13:50].
55. BHS presented the behavioral assessment report to the SFT while the document was being shared on the screen and visible to all participants. R-Ex.9, video 2023-02-16 [02:55-51:48].
56. SFT DES presented the report by School Psychologist, which was shared on the screen and visible to all participants during the meeting as SFT DES reviewed it. R-Ex.9, video 2023-02-16 [52:36-1:05:56].
57. During the review of School Psychologist's observation of Student in the classroom on January 27, 2023, Parent questioned the observation of Student being "on-task" since it conflicted with the information that Parent received from GE Teacher for the same date. SFT DES explained the basis of the information from School Psychologist regarding the "on-task" behavior and Parent noted that Parent would contact School Psychologist with any questions that Parent had.<sup>9</sup> R-Ex.9, video 2023-02-16 [55:18-1:00:29].
58. Parent continued to express concern that School Psychologist noted that Student was "on-task" approximately ninety-five percent (95%) of the time compared to Student's peers, however the reports from Student's teachers indicate that Student was often not "on-task"

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<sup>9</sup> It was explained to Parent during the meeting that School Psychologist's data in the report for "on-task" behaviors was taken during a twenty (20) minute period where School Psychologist would observe Student and then alternatively observe Student's classmates to see if they were on-task. GE Teacher noted that during the twenty (20) minutes when the data was taken, the class had just begun a new assignment and were being given instructions at the time of the data sampling.

during any given class time. *See e.g.*, R-Ex.9, video 2023-02-16 [1:02:57-1:04:55].

59. SSC provided a visual chart for the test that the SFT team should use to determine Student's eligibility for special education and related services. This test included an evaluation of whether: 1) the student has a disability, 2) does the disability adversely affect the student's involvement and progress in general education, and 3) does the student need special education and related services as a result of the student's disability and what are identified educational needs. SSC explained that all three (3) aspects of the test must be met for Student to be eligible for special education and related services. R-Ex.9, video 2023-02-16 [1:06:17-1:07:05].
60. The SFT reviewed Student's test scores for a cognitive abilities test given on August 9, 2022, a test for creative thinking given on September 1, 2023, the August 2022 and December 2022 diagnostic tests, and the standardized ELA and math test that was given at the end of the [REDACTED] grade school year. R-Ex.9, video 2023-02-16 [1:07:06-1:10:09].
61. The SFT also reviewed Student's report card for quarter 1 for the 2022-2023 school year and Student's report card from [REDACTED] grade (2021-2022 school year). R-Ex.9, video 2023-02-16 [1:10:10-1:12:18].
62. Student's report card from the previous (2021-2022) school year reflected that Student either received grades of "MP" or "ME" for all subject areas. R-Ex.9, video 2023-02-16 [1:11:40-1:12:10].
63. Parent informed the team that Student had psychological testing done but that it was not completed so Parent did not have a formal diagnosis for Student at the time of the meeting. R-Ex.9, video 2023-02-16 [1:12:59-1:13:43].

64. SSC reviewed the different possible categories of eligibility that are possible under the IDEA for special education and related services. SSC excluded most categories of disability based on Student's evaluation, testing, report cards, and observations and highlighted [REDACTED] and [REDACTED] [REDACTED] for the SFT to focus on for Student. R-Ex.9, video 2023-02-16 [1:13:45-1:16:37], [1:20:54-1:25:16].
65. When Parent proposed that Student might be eligible under a category, e.g., emotional disability due to Student missing school on occasion due to anxiety, SSC explained to Parent that Student's teachers are not seeing it in the classroom and it is not affecting Student's academic performance. R-Ex.9, video 2023-02-16 [1:16:02-1:16:37].
66. Parent also questioned how SSC was saying that Student's work was at grade-level when Parent had been getting reports of Student's work being below grade level. GE Teacher explained that what was written in the report by BHS (which is where Parent got the below grade-level rating) was incorrectly worded and that Student's work is at grade-level expectations. Parent informed the SFT that based on the grade-level standards from other schools, Parent did not believe that the work that Student was showing to Parent was at [REDACTED] grade level expectations. R-Ex.9, video 2023-02-16 [1:17:05-1:20:54].
67. Parent also noted that Parent did not have a sample work with the grade-level standards to review for the 2022-2023 school year. GE Teacher, SSC, and SFT DES discussed examples of Student's work and how it compared with the standards-based rubric for the grading of the assignments and was considered grade-level quality. Parent continued to disagree that Student was performing at grade-level. R-Ex.9, video 2023-02-16 [1:32:52-1:50:15].

68. The SFT then reviewed the [REDACTED] category for Student's eligibility. SSC used a worksheet to review the requirements for this category and the team focused on the concern regarding Student having a possible [REDACTED] diagnosis. SFT DES noted that a specific diagnosis for [REDACTED] is not necessary to consider Student for eligibility if Student demonstrated signs of having or symptoms related to [REDACTED]. R-Ex.9, video 2023-02-16 [1:25:25-1:31:40], [1:43:59-1:52:45].
69. The biggest concern from the Home School team members was that Student was performing at grade-level despite Student's lack of "on-task" behavior and distractibility. Parent disagreed with the Home School members that Student was performing at grade-level. SSC maintained that it was difficult for the team to find Student eligible for special education and related services when Student appeared to be performing at grade-level on the assignments that are reviewed for Student's grading. *See e.g.*, R-Ex.9, video 2023-02-16 [1:31:43-1:32:43], [1:50:16-1:50:53].
70. SSC reminded Parent that the information that the SFT had of Student's performance in class, including the information provided during the meeting by GE Teacher. Parent mentioned that Student has been tested by outside agencies that they said [REDACTED] was not performing at grade level, however, Parent did not provide the testing results to the SFT at the meeting.<sup>10</sup> R-Ex.9, video 2023-02-16 [1:50:18-1:52:45].
71. The SFT then discussed Student's eligibility under the category of [REDACTED]. GE Teacher provided information that Student's work is at grade-level and is at least meeting the "MP" rubric. Parent disagreed with the assessment by GE Teacher that Student is

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<sup>10</sup> Testing assessments mentioned by Parent during the eligibility meetings were also not presented at the Hearing in this case.

performing at grade-level. SFT DES explored different variables that affected Student's work, such as Student's interest in the topic and the importance of the assignment, as well as whether there were any patterns in Student's level of attentiveness versus Student's quality of work. R-Ex.9, video 2023-02-16 [1:54:01-

72. One of the assignments that was heavily discussed in the eligibility meeting was a writing assignment in which Student was able to read what Student had written to GE Teacher and make verbal edits to the writing as it was read aloud. GE Teacher typed what Student read to GE Teacher and the class hung all their finished products on the wall. GE Teacher had two (2) other students in the class who completed the assignments in a similar fashion because typing was not their strong suit. GE Teacher noted that the verbal product that Student read aloud was quality grade-level work. *See e.g.*, R-Ex.9, video 2023-02-16 [2:07:28-2:15:30].
73. The SFT determined that Student was not eligible for IDEA special education and related services based on [REDACTED] based on the evaluation using the observations by School Psychologist, the behavior assessment by BHS, and Student's school work and assessments. Parent disagreed with the decision on Student not being eligible. R-Ex.9, video 2023-02-16 [2:38:00-2:42:58].
74. The second eligibility meeting was a review of the occupational therapy assessment done by OT. OT presented the occupational therapy assessment report to the SFT and then the team again discussed Student's eligibility under [REDACTED]. R-Ex.9, video 2023-02-16 [2:43:30-3:13:50].
75. Based on OT's occupational therapy report the team determined that Student was not eligible for special education and related services under the [REDACTED] category. Parent agreed

with the decision made by the SFT based on OT's report and assessment. R-Ex.9, video 2023-02-16 [3:04:55-3:13:00].

#### Post-eligibility meeting

76. In the second and third quarter of the 2022-2023 school year, Student received two (2) "DP" grades in ELA and two (2) "DP" grades in math.<sup>11</sup> P-Ex.D, p.03; R-Ex.4, p.161.
77. Parent was extra concerned that Student received a "DP" in writing just two (2) weeks after the SFT team discussed that Student was working at proficiency at the time of the meeting. Testimony of Parent, Tr.V1, 17:22-20:25.
78. GE Teacher explained that for the first three (3) quarters of the school year, the writing assignments/grades focus on different styles of writing, such as narrative, informational writing, and opinion writing. For the [REDACTED] quarter writing grade, the previous styles of writing are reviewed and the students are given three assignments in each of the styles and a big focus on the fourth quarter writing is editing. The students also take the standardized assessments that are similar to the assessments given at the end of the [REDACTED]-grade year. Testimony of GE Teacher, Tr.V2, 231:2-17, 232:25-234:3.
79. Based on Student's participation in the general education class and the general education work submitted to GE Teacher, Student has demonstrated understanding of [REDACTED] grade-level materials and can access grade-level assignments to show proficiency or work towards proficiency and Student's 504-Plan providers Student with sufficient supports for Student to access Student's education. Testimony of GE Teacher, Tr.V2, 205:1-206:10, 209:11-25, 212:5-11, 218:10-19, 234:7-236:4, 240:20-25.

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<sup>11</sup> Student received "MP" and "ME" grades in the other areas of the report card, but the focus of Parent during the team discussions and at the Hearing was related primarily to ELA (writing) and math. See e.g., Testimony of Parent, Tr.V1, 12:5-19:11; P-Ex.E, p.08-30.

80. GE Teacher uses prompting, use of a timer, and positive reinforcement frequently with Student from Student's 504-Plan to get Student to focus and stay on-task in class. GE Teacher also noted that Student has preferred seating in the classroom, notification of due dates and extended time to turn in assignments both written on the board and verbally given by GE Teacher, and a timeline for writing assignments. Student has reduced computer assignments due and organizational checks by GE Teacher to ensure that Student's work area and folder are organized and neat. Testimony of GE Teacher, Tr.V2, 234:7-235:18; R-Ex.3, p.075-076.
81. Student also has a behavior log that assesses Student's daily on-task behaviors and whether Student met the classroom expectations in the areas of quality work, attentive listening, productivity, and mutual respect. During the last quarter of the 2022-2023 school year, Student was able to reflect on the daily behavior logs with GE Teacher at the end of every day. Testimony of GE Teacher, Tr.V2, 235:19-236:4; P-Ex.G, p.36; R-Ex.6, p.526-527.
82. The work samples submitted by Petitioners support GE Teacher's opinion that while Student may not be excelling in the writing assignments given, Student is demonstrating grade-level proficiency. Specifically, Student's final writing pieces show revision of work that was done by Student in a scaffolding method, where Student gathered ideas for the writing, used tools such as a writing map to produce substantive sentences, wrote a rough draft, and edited the rough draft to submit a final draft. The rubric for the grading of the writing pieces are presented with the final work and indicate in which areas Student excels or needs improvement. *See e.g.* P-Ex.E, p.9-30; Testimony of VP, Tr.V2, 193:9-196:19.

83. While some samples of Student's work submitted by Petitioners do not reflect 'quality work,' specifically the morning work assignments, GE Teacher explained that the process of the morning work is to introduce new concepts as a group and then work on building the skills independently and then gather to review the work as the students are able to use the skills independently. Testimony of GE Teacher, Tr.V2, 227:22-228:2, 228:20-230:11.
84. On March 31, 2023, Parent was informed that Student was given a writing assignment that was supposed to be worked on in class and was due on Monday, April 3, 2023. Parent noticed that the assignment was not noted anywhere in Student's planner and that Student had not completed any work on the assignment. Parent questioned how Student was able to bring work home that was incomplete when the 504-Plan included breaking assignments into smaller segments, providing notice about upcoming projects and reports, checking in with Student to ensure task is begun quickly, setting a timer, and having Student show the teacher Student's work progress. Testimony of Parent, Tr.V1, 29:17-32:6; P-Ex.F, p.31-35.
85. No evidence of the actual assignment or the grading of the assignment was presented at the Hearing. However, Parent noted in emails to Principal that Student's family had to change plans as a result of Student having to work on the incomplete assignment that was brought home on Friday and due on Monday. P-Ex.F, p.31-35.
86. In April 2023, Student's SFT met to review and revise Student's 504-Plan based on the information and recommendations from School Psychologist, BHS, and OT in the evaluations conducted. See P-Ex.A; R-Ex.9, audio recording dated 04/14/2023.

## **V. CONCLUSIONS OF LAW**



## IDEA framework

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (hereinafter “FAPE”) that emphasizes special education and related services designed to meet their unique needs. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91, 102 S.Ct. 3034, 3037-3043 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F.Supp.2d 89, 98 (D. D.C. 2008) (citing 20 U.S.C. §1400(d)(1)(A)). A FAPE includes both special education and related services. H.A.R. §8-60-2; 20 U.S.C. §1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

An educational agency, such as the Hawai‘i DOE, is responsible for conducting evaluations on children with suspected learning disabilities to determine whether they may be eligible for special education and related services. In order to receive special education and related services under the IDEA, child must meet the statutory criteria for “child with a disability. *Ashli C. ex rel. Sidney C. v. State of Hawaii*, 2007 WL 247761 \*7 (D.Hawaii 2007); 20 U.S.C. §1401(3). For a child to qualify, three (3) criteria must be satisfied: 1) the child suffers from one or more categories of impairments delineated in the IDEA; 2) the child’s impairment must adversely affect educational performance; and 3) the impairment must require special education and related services. *Ashli C.*, 2007 WL 247761 \*7 (citing *Capistrano Unified Sch. Dist. V. Wartenberg*, 59 F.3d 884, 892-893 (9<sup>th</sup> Cir. 1995)).

The burden of proof in a request for IDEA impartial due process proceeding falls upon the party making the request. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537 (2005); *see also Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J*, 502 F.3d 811, 820 (9<sup>th</sup> Cir. 2007). The standard of proof in such cases requires the requesting party to prove the allegations by a preponderance of the evidence. H.A.R. §8-60-66(a)(2)(B). The burden of proof in this case rests upon the Petitioners to demonstrate by a preponderance of the evidence

that Home School inappropriately determined that Student is not eligible for IDEA special education and related services.

### Section 504 of the Rehabilitation Act of 1973

The U.S. Department of Education has promulgated regulations that require recipients of federal funds to provide a FAPE to each qualified handicapped person. FAPE requirements in the IDEA and in the Section 504 regulations are different but overlap. “Unlike FAPE under the IDEA, FAPE under Section 504 is defined to require a comparison between the manner in which the needs of disabled and non-disabled children are met, and focuses on the ‘design’ of a child’s educational program.” *J.W. ex rel. J.E.W. v. Fresno Unified School Dist.*, 570 F.Supp.2d 1212, 1225 (E.D.C.A. 2008) (citing *Mark H. v. Lemahieu*, 513 F.3d 922, 924 (9<sup>th</sup> Cir. 2008)). The “appropriate education” under Section 504 is defined as

regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§104.34, 104.35, and 104.36.

*Lemahieu*, 513 F.3d at 929 (citing 34 C.F.R. §104.33(a), (b)). The IDEA focuses more on the provision of appropriate education to disabled children, while Section 504 more broadly addresses the provision of state services to disabled individuals. *Id.*

Section 504 regulations requires that recipients of federal funds place disabled individuals in a regular education environment unless it can be shown that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. *Id.* at 929-930, (citing 34 C.F.R. §104.34(a)). The regulations also include provisions that require evaluations of those students who need or are believed to need special education. *Id.*

The standard of proof in Section 504 cases rests the initial burden on the parents of a

student seeking relief to show that reasonable accommodations were not provided to the student to allow the student to enjoy meaningful access to the benefits of a public education and did so with deliberate indifference. *Mark H. v. Hamamoto*, 620 F.3d 1090, 1097 (9<sup>th</sup> Cir. 2010), *Bird v. Lewis & Clark College*, 303 F.3d 1015, 1020 (9<sup>th</sup> Cir. 2002), *Alexander v. Choate*, 469 U.S. 287, 300-302, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985).

A. Petitioners have not proven that the DOE inappropriately determined that Student is not eligible for IDEA special education and related services

Petitioners argue that Student's performance in school indicates that Student needs special education and related services to access Student's education. Student does not have an official diagnosis for [REDACTED], however Respondents in this case reviewed Student's eligibility determination with a suspected [REDACTED] diagnosis. [REDACTED] has been recognized under the IDEA as a specific learning disability based on guidance from the United States Department of Education. *See Capistrano*, 59 F.3d at 894. Petitioners assert that Student should have been found eligible for special education and related services to allow Student to succeed in Student's education.

"The appropriateness of a student's eligibility for IDEA special education and related services should be assessed in terms of its appropriateness at the time of the child's evaluation and not from the perspective of a later time with the benefits of hindsight." *L.J. by and through Hudson v. Pittsburg Unified School District*, 850 F.3d 996, 1004 (9<sup>th</sup> Cir. 2017). Even if a child has a qualifying disability, the child may not qualify for special education services if the supports provided through the regular school program is sufficient to allow the child to access his or her education. "Special classes, separate schooling, or other removal of children with disabilities from the regular education 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.” *Hudson*, 850 F.3d at 1003.

Student’s SFT considered Student’s eligibility for special education services under both the categories of [REDACTED], as well as [REDACTED], based on Student’s prior progress reports, Student’s classwork and other educational assessments given to Student throughout the school year, the observations by BHS and School Psychologist, the information provided by GE Teacher, and an occupational therapy assessment conducted by OT. *FOF 59-73*. The team reviewed each of the pieces of information that was available to the team at the eligibility meetings and determined that Student was not eligible for special education and related services under either the [REDACTED] or other [REDACTED] categories.

Petitioners contend that the SFT did not consider Student’s recent work as part of the eligibility determination and that some of the information provided at the SFT meeting was inaccurate, based on Student’s subsequent report card. Petitioners also contend that Student’s work that is sent home and the grades that Student is receiving does not appear consistent with the Hawai’i DOE grade-level standards. *FOF 66-67, 71*. While these concerns are understandable for any parent who is reviewing their child’s work and is concerned with their child’s grades, the IDEA does not provide students with the best possible education in a public-school setting. The IDEA only requires that the school districts provide supplementary aids and supports or accommodations that allow disabled students to access the public-education system as adequately as their nondisabled peers.

Both the IDEA and Section 504 require that reviewing authorities should show a reasonable amount of deference to the professional judgment of educators when reviewing the substance of a genuinely academic decision. *Wong v. Regents of the University of California*,

192 F.3d 807, 817 (9<sup>th</sup> Cir. 1999); *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 106 S.Ct. 507, 513, 88 L.Ed.2d 523 (1985); *Zukle v. Regents of the Univ. of California*, 166 F.3d 1041, 1047 (9<sup>th</sup> Cir. 1999); *Rowley*, 458 U.S. at 206, 102 S.Ct. 3034, 73 L.Ed.2d 690; *J.L. v. Mercer Island School Dist.*, 592 F.3d 938, 950 (9<sup>th</sup> Cir. 2010). Here, this Hearings Officer finds that the testimony of GE Teacher to be credible and defers to the knowledge and professional judgment with which GE Teacher used to make evaluations of Student's work in determining Student's progress up until the time of the eligibility meeting.

In this case, Student's grade-level report cards reflect that Student was performing at a fairly standard or average level as Student's general education peers. *FOF 62*. Student's standardized testing scores show that Student perform nearly above average for Student's grade level. *FOF 12-15, 16-18, 26-27*. Specifically, Student's diagnostic tests taken at in August 2022 and December 2022 did show some regression in some areas of math, but overall still reflected that Student was performing at or near grade-level. GE Teacher determined that Student was performing adequately with the accommodations that were provided under Student's 504-Plan. *FOF 39-40, 71-72, 78-80*. At the time of the eligibility meeting, the information that the SFT had indicated that Student was performing satisfactorily in the general education class with the accommodations provided in Student's 504-Plan.

Petitioners have not met their burden of proving that Respondents did not follow the procedures set forth in the IDEA in determining Student's eligibility for special education and related services or that Respondents determination that Student was not eligible for IDEA special education and related services was improper. Further, the evidence presented demonstrates that Home School provides reasonable accommodations to Student under the 504-Plan that allows Student to reasonably access Student's grade-level general education. Petitioners have not

demonstrated that any failure on Respondents' part to follow any procedures under the IDEA resulted in a loss of educational opportunity, significant infringement on parental participation, or deprivation of educational benefits.

B. Petitioners have not proven that the DOE failed to appropriately implement Student's 504-Plan

Petitioners next contend that Home School has failed to implement Student's 504-Plan. Specifically, Petitioners argue that a writing assignment that was given to Student with deadlines, which was sent home with Student having no work done on the assignment on the Friday before it was due. *FOF 84-85*. Unlike the IDEA, Section 504 does not have codified specific implementation requirements. The Ninth Circuit Court of Appeals has noted that the focus of a Section 504 determination is whether "disabled persons were denied 'meaningful access' to state-provided services." *Lemahieu*, 513 F.3d at 937. As noted, *supra*, the standard in determining whether a section 504 violation has occurred is whether a public entity intentionally or with deliberate indifference failed to provide meaningful access or reasonable accommodations to disabled persons. *Id.* at 938.

The evidence presented in the record is that Student is being provided reasonable accommodations under the 504-Plan in place at Home School. GE Teacher testified that many of these accommodations are used daily with Student, and this is supported by both the behavior log examples that have been submitted by both parties, as well as Student's grade-level work and report cards. *FOF 80-83*. While it is unclear what happened with the March 2023 writing assignment, that incident alone is not enough to determine that Home School has intentionally or with deliberate indifference failed to provide Student with the accommodations in Student's 504-Plan or any other necessary reasonable accommodation.

As discouraging as it may be to Parent to see Student's report card grades in the average

range of “MP” or “DP,” this evidence alone is not sufficient to demonstrate that Student requires special education and related services or that Student has not been receiving reasonable accommodations for Student’s suspected disabilities. Home School has created a 504-Plan to provide Student with accommodations to help Student excel in school and has revised the 504-Plan based on the results of the evaluation conducted after the creation of the initial 504-Plan. *FOF 86*. This plan should be reviewed regularly and Parent may follow up with additional requests for evaluations for IDEA special education and related services if Student continues to show regression or setbacks in Student’s educational progress.

## **VI. DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Petitioners have not proven the allegations contained in the Complaint. Petitioners’ request to order Respondents to provide special education and related services to Student is respectfully denied.

## **RIGHT TO APPEAL**

The decision issued by this Hearings Officer is a final determination on the merits. Any party aggrieved by the findings and decision of the Hearings Officer shall have 30 days from the date of the decision of the hearings officer to file a civil action, with respect to the issues presented at the due process hearing, in a district court of the United States or a State court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2) and §8-60-70(b).

DATED: Honolulu, Hawai'i, June 14, 2023.

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