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

In the Matter of STUDENT, by and through
the Parent¹,

Petitioners,

vs.

DEPARTMENT OF EDUCATION, STATE
OF HAWAII and KEITH T. HAYASHI,
Superintendent of the Hawaii Public Schools,

Respondents.

DOE-SY2223-035

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing:
May 22 & 25, 2023

Hearings Officer: Charlene S.P.T. Murata

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

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals with Disabilities Education Act ("IDEA"), as amended in 2004, codified at 20 U.S.C. §§ 1400, et seq.; the federal regulations implementing IDEA, 34 C.F.R. Part 300; and the Hawaii Administrative Rules §§ 8-60-1, et seq. Additionally, Petitioners reference Section 504 of the Rehabilitation Act of 1973

¹ Personal identifiable information is provided in the Legend.

("Section 504"), as amended in 1974, codified at 29 U.S.C. §§ 794, et seq.; and the Hawaii Administrative Rules §§ 8-61-1, et seq. in their claims and requests for relief.

II. INTRODUCTION

On March 22, 2023, the Department of Education, State of Hawaii and Keith T. Hayashi, Superintendent of the Hawaii Public Schools ("Respondents" or "DOE") received a Complaint and Resolution Proposal from Student, by and through Student's Parent (collectively "Petitioners").

On March 31, 2023, Respondents filed Respondents' Response to Petitioners' Complaint and Resolution Proposal.

On April 18, 2023, a Notice of Prehearing Conference; Subjects to be Considered was issued to the parties, setting a prehearing conference for May 1, 2023.

On May 1, 2023, a prehearing conference was held with Keith H.S. Peck, Esq. ("Mr. Peck") appearing on behalf of Petitioners, and Deputies Attorney General Ryan W. Roylo ("Mr. Roylo") and Bradford K. Chun ("Mr. Chun") appearing on behalf of Respondents. During the prehearing conference, the parties agreed to have the due process hearing on May 22 and 25, 2023.

Shortly after the prehearing conference, on May 1, 2023, a Prehearing Order was issued to the parties, setting forth the issues and procedures for the due process hearing, and deadlines for submission of witness and exhibit lists; exhibits; and witness email addresses². Both parties timely submitted their witness and exhibit lists; exhibits; and witness email addresses.

² During the prehearing conference, the parties were asked if anyone needed a translator or interpreter during the hearing, and both parties stated that none was needed.

The due process hearing took place on May 22 and 25, 2023 using the Zoom video conferencing platform. All participants in the due process hearing appeared remotely via video and audio. The undersigned Hearings Officer presided over the matter. Petitioners were represented by Mr. Peck, and Respondents were represented by Mr. Roylo. Parent was present to testify in Petitioners' case-in-chief; and Parent's presence was waived for the remainder of the due process hearing. The Department of Education District Educational Specialist ("DES") and Mr. Chun were present on behalf of Respondents.

Petitioners called Parent, Student Services Coordinator ("SSC") and Principal³ as their witnesses during the due process hearing. Respondents called the following witnesses during the due process hearing: SSC, Principal, and English Language Coordinator ("EL Coordinator" or "ELC")⁴. Petitioners did not call any rebuttal witnesses.

The following exhibits were admitted into evidence without objections: Petitioners' Exhibit 1 (pages 001-003 and 005-006); and Respondents' Exhibits 1-22 (pages 001-040). Petitioners' Exhibit 1 (page 004) was admitted into evidence over Respondents' objection. Tr. Vol. 2, 208:18-211:20⁵.

On May 3, 2023, Respondents submitted a request to the undersigned Hearings Officer to extend the 45-day period in which a decision is due under HAR § 8-60-69, from June 5, 2023

³ SSC and Principal were both named as witnesses by Petitioners and Respondents. The parties agreed that Mr. Roylo's questioning of SSC and Principal would not be limited to Mr. Peck's direct examination. Tr. Vol. 1, 89:6-90:10, 137:3-20.

⁴ Respondents' request to call School Counselor as a rebuttal witness was denied. School Counselor was not listed as a potential witness in Respondents' disclosures and Petitioners elected to prohibit the introduction of any evidence School Counselor may have given due to School Counselor not being disclosed as a witness five (5) business days before the due process hearing. Tr. Vol. 2, 241:10-245:23.

⁵ Transcript for due process hearing dated May 22, 2023 is designated "Tr. Vol. 1." Transcript for due process hearing dated May 25, 2023 is designated "Tr. Vol. 2."

to July 20, 2023, to accommodate a hearing shortly before the decision deadline. An Order Granting Respondents' Request to Extend the 45-Day Timeline; Declaration of Ryan W. Roylo, Dated May 3, 2023, was issued on May 5, 2023.

On June 23, 2023, the parties timely submitted their closing briefs.

Having reviewed and considered all 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.

III. ISSUE PRESENTED

In their March 22, 2023 Complaint, Petitioners allege the following violation of the IDEA and Section 504: Whether the DOE failed or insufficiently assessed Student for an IEP under the IDEA and/or for a modification plan under⁶ Section 504, where such was required by Student's known needs⁷.

Petitioners request the following remedies:

Remedy 1 – Order the DOE to conduct and complete necessary assessments to determine Student eligibility status for Section 504 and/or the IDEA;

Remedy 2 – Order compensatory educational services as determined appropriate; and

Remedy 3 – Order such other relief that is appropriate and justified in equity and/or in law, under the circumstances.

⁶ The issue in the Prehearing Order inartfully reads: "Whether the DOE failed or insufficiently assessed Student for an IEP under the IDEA and/or Section 504, where such was required by Student's known needs." This wording implies that IEPs are available under Section 504, which they are not.

⁷ Petitioners' Complaint also alleges "Whether the DOE materially failed to implement Student's IEP and/or Section 504 Modification Plan, in part or in whole." Mr. Peck withdrew this allegation based on DOE's representation that there is no IEP or Section 504 Modification Plan for Student. The withdrawal of this allegation rendered Petitioners' requested remedy that a finding be made that Student was denied a FAPE due to a material failure to implement Student's IEP and/or Section 504 Modification Plan moot.

IV. FINDINGS OF FACT

Witnesses

1. Parent has lived in Hawaii since [REDACTED] and speaks [REDACTED]. Parent has limited English speaking, reading, and writing abilities. Parent, Tr. Vol. 1, 19:10, 26:5-10, 28:7-10.
2. EL Coordinator is an English language coordinator at Home School. EL Coordinator has certifications in elementary education, Teaching English to Speakers of Other Languages (“TESOL”), and Sheltered Instruction. EL Coordinator has worked at Home School for twenty (20) years and has been an English language coordinator for the past nine (9) years. During EL Coordinator’s time as the English language coordinator at Home School, EL Coordinator was also an English language teacher. ELC, Tr. Vol. 1, 176:2-177:16.
3. As an English language coordinator, EL Coordinator’s duties include drafting compliance letters; conducting annual testing and screener testing; following up with parent notifications; and informing parents about how their children are progressing in their language development. ELC, Tr. Vol. 1, 177:17-178:4.
4. Principal has been the principal of Home School since 2019. Before becoming a principal of Home School, Principal was a vice principal in two other Hawaii DOE schools from 2015 to 2019. DOE Ex. 7 at 014; Principal, Tr. Vol. 1, 140:19-141:11. Principal has a bachelor’s degree in business administration; a postbaccalaureate in secondary teaching; and a master’s degree in administration. Principal, Tr Vol. 1, 145:7-10.
5. SSC has been a student services coordinator for eleven (11) years for three (3) different schools. As a student services coordinator, SSC’s duties include assisting with referrals

for suspected disability; and helping with IEPs, annuals reviews, and reevaluations.

SSC, Tr. Vol. 1, 93:4-95:8. SSC graduated from the University of Hawaii with a degree in elementary education, and a certification in special education. SSC started teaching for the DOE in 1998. SSC was also a special education teacher and third grade teacher for the DOE. SSC, Tr. Vol. 1, 128:20-129:24.

Facts of Case

6. Student is currently [REDACTED] years old. Pet. Ex. 1 at 001.
7. On March 3, 2022, Student was tested for suspected hearing loss at a medical center, and an audiology report was generated (“2022 Audiology Report”). The audiologist found that Student’s hearing was normal. The 2022 Audiology Report summarized Parent’s concerns shared with the audiologist. Parent told the audiologist that Student was “not really talking” and Student was not receiving speech therapy. The 2022 Audiology Report lists a collection of “diagnosis” beginning from when Student was a newborn. One of the diagnoses is “speech delay.” The audiologist recommended that Student get a speech evaluation. Pet. Ex. 1 at 001-003. Parent did not follow the audiologist’s recommendation to get a speech evaluation for Student. Parent, Tr. Vol. 1, 27:11-29:7, 68:17-69:19.
8. Parent did not share the 2022 Audiology Report with Home School. Parent, Tr. Vol. 1, 32:2-33:2.
9. On [REDACTED], Parent enrolled Student at Home School. DOE Ex. 1 at 001-004; Parent, Tr. Vol. 1, 54:20-55:1. In the process of enrolling Student at Home School, Parent filled out a “Student Enrollment Form” to provide personal data about Student to Home School (“2022 Enrollment Form”). Under the “Language Information” section of

the 2022 Enrollment Form, Parent indicated that English was spoken at home; was the first acquired language; and the language most used by Student. DOE Ex. 1 at 001; Parent, Tr. Vol. 1, 54:5-16.

10. Student was enrolled at Home School from [REDACTED] DOE Ex. 21 at 037; Principal, Tr. Vol. 1, 147:8-148:5.
11. From November 14-29, 2022, Student missed [REDACTED] days of school. DOE Ex. 22 at 039-040.
12. On [REDACTED], Parent submitted an “Exceptions to Compulsory Education” form to Home School, disenrolling Student from Home School to homeschool Student. DOE Ex. 20 at 036; Principal, Tr. Vol. 1, 148:14-24.
13. On [REDACTED], Parent submitted forms to reenroll Student at Home School. DOE Ex. 2 at 005-008; Parent, Tr. Vol. 1, 55:4-56:9. In the process of reenrolling Student at Home School, Parent filled out another “Student Enrollment Form” (“2023 Enrollment Form”). Under the “Language Information” section of the 2023 Enrollment Form, Parent indicated that [REDACTED] was the language spoken at home; the first acquired language; and the language most used by Student. DOE Ex. 2 at 005.
14. Student was enrolled at Home School from [REDACTED] DOE Ex. 21 at 037; Principal, Tr. Vol. 1, 148:9-13.
15. Student did not attend a large portion of the 2022-2023 school year because Student was either sick or refused to go to school. While Student was enrolled in Home School in the 2022-2023 school year, Student had [REDACTED] excused absences; [REDACTED] unexcused absences; and [REDACTED] tardies. Principal, Tr. Vol. 1, 149:21-24; Parent, Tr. Vol. 1, 29:11-30:23, 35:18-36:3, 44:6-11, 58:11-60:3; DOE Ex. 038-040.

16. On January 13, 2023, Parent spoke to Principal and School Counselor at Home School about Student. Principal, Tr. Vol. 1, 158:5-160:7; Parent, Tr. Vol. 1, 57:2-19.
17. EL Coordinator identifies students as English language learners when parents register their children at Home School and fill out the Student Enrollment Form, which contains questions about their children's language usage. If a parent answers that there is a language other than English used by a child, that child is "flagged," and EL Coordinator will administer a "WIDA Screener for Kindergarten" assessment ("WIDA Screener") to the child. Based on the child's score on the screener test, the child may "exit" the English Learner "EL" Program. ELC, Tr. Vol. 1, 178:5-179:11; ELC, Tr. Vol. 2, 226:24-227:15.
18. The WIDA Screener is an assessment used by the DOE to determine an English language learner's proficiency in the English language. SSC, Tr. Vol. 1, 131:19-132:2; ELC, Tr. Vol. 2, 230:4-6. The WIDA Screener assesses a child in four (4) language domains: listening, speaking, writing, and reading. The four (4) domains fall under one (1) of two (2) groups: oral language and literacy. Oral language is the average of the speaking and listening domains; and literacy is the average of the reading and writing domains. The scores on the WIDA Screener are one factor to consider in determining whether a child can benefit from English language support services. DOE Ex. 15 at 025; ELC, Tr. Vol. 1, 184:13-187:1; ELC, Tr. Vol. 2, 219:11-220:4. The scores on the WIDA Screener ranges from 1.0 to 6.0. A child who scores a 5.0 or above is considered functionally proficient in the English language and is "exited out" of the EL Program. A child exiting the EL program means that in the areas of listening, speaking, reading, and writing the child is proficient enough to be able to get the information from his/her

classrooms and the child does not need any additional language support. ELC, Tr. Vol. 1, 178:5-180:8, 187:5-188:8; DOE Ex. 7 at 014.

19. On January 23, 2023, Student was assessed by EL Coordinator using a WIDA Screener (“1/23/2023 WIDA Screener”). According to the 1/23/2023 WIDA Screener, Student’s home language was listed as [REDACTED] Student’s oral language score was 1.5, and literacy score was 1.0, with an overall score of 1.0. DOE Ex. 15 at 025; ELC, Tr. Vol. 1, 184:13-185:11. Student’s overall score of 1.0 indicated that Student was a beginning English learner and needed support in listening, speaking, reading, and writing through the EL Program. ELC, Tr. Vol. 1, 185:12-187:1; ELC, Tr. Vol. 2, 219:11-220:4.
20. At Home School, if a parent has concerns about his/her child possibly needing accommodations to access their education, the parent can either fill out a Request for Evaluation (Form 101) to see if their child qualifies for services, or request that Home School informally look at their child to see if there is something that needs to be addressed. If a parent fills out a Form 101, a student focus team (“SFT”)⁸ would be formed within fifteen (15) days to have a discussion about the concerns for that child. SSC, Tr. Vol. 1, 95:14-100:5.
21. During an SFT meeting, a general education teacher, a parent, an administrator, student services coordinator, and any relevant related service providers, such as an occupational therapist or physical therapist, who can address the concerned areas for a particular child, would discuss the available information the SFT team has on the student. The SFT team would decide if there is a suspicion of a disability. If there is a suspicion of a disability, the SFT team would discuss if there are any specific assessments that the

⁸ An SFT is sometimes referred to as student support team (“SST”).

team would need for a possible eligibility meeting to help determine if the child would qualify for services. If during the SFT meeting the team does not have a suspicion of a disability, the school would not move forward with an evaluation. SSC, Tr. Vol. 1, 99:4-105:5.

22. On January 23, 2023, SSC spoke to Parent on the phone where Parent expressed concerns about Student's speech. SSC explained to Parent that Parent could either formally request an evaluation or have a speech-language pathologist conduct an informal observation of Student during class and then they could talk about what the speech-language pathologist observed. Parent opted for a speech-language pathologist to informally observe Student in a classroom. SSC, Tr. Vol. 1, 105:12-106:8, 118:6-119:24.
23. Parent did not fill out a Form 101 to request a formal evaluation of Student. SSC, Tr. Vol. 1, 112:10-15, 124:4-6.
24. Parent did not give SSC any documents regarding Parent's concerns about Student's speech. SSC, Tr. Vol. 1, 123:25-124:3.
25. Following SSC's phone call with Parent on January 23, 2023, on the same day, SSC informed Speech-Language Pathologist ("SLP") that SSC had just gotten off the phone with Parent and that Parent had expressed "concerns with [Student] not speaking." SSC asked SLP to conduct a "low level intervention" by looking at Student in the classroom to help determine if Home School "should be looking toward a referral." SLP responded to SSC that SLP would contact Teacher and plan a time to stop by Student's classroom early that week. DOE Ex. 4 at 010; SSC, Tr. Vol. 1, 118:19-119:24.

26. On January 24, 2023, Student took a diagnostic test for math and scored below grade level. DOE Ex. 16 at 026-027; Principal, Tr. Vol. 1, 155:22-156:19.
27. On January 25, 2023, SLP met with Student in the classroom. DOE Ex. 5 at 011. On the same day, after meeting with Student, SLP sent SSC the following email message: “I definitely noticed some concerns with both articulation and expressive/receptive language that [Teacher] helped confirm. [Teacher] mentioned [Student] is ELL⁹ and that [Student] is soon to be tested in [Student’s] first language. I am thinking the results of that test will help us clarify if the communication concerns are due to ELL or to a speech/language disorder. Let me know how you would like to proceed.” DOE Ex. 6 at 012; SSC, Tr. Vol. 1, 106:9-17, 109:23-110:7, 111:19-112:1.
28. To determine if a communication or speech concern is a disability, information is needed on whether the communication or speech concern is due to limited English proficiency or a speech/language disorder. A child cannot be determined to be a child with a disability based on limited English proficiency. SSC, Tr. Vol. 1, 122:4-123:8.
29. Also on January 25, 2023, EL Coordinator spoke to Parent and informed Parent that paperwork for the EL Program would be sent home and explained the EL Program to Parent. EL Coordinator had the impression that Parent was agreeable to Student receiving EL Program services and Parent did not have any other questions or mention any other concerns. ELC, Tr. Vol. 1, 180:12-181:19, 183:6-184:4, 195:3-21; DOE Ex. 6 at 013.

⁹ “ELL” stands for “English Language Learner;” “EL” stands for “English Learner;” and they mean the same thing. SSC, Tr. Vol. 1, 122:12-21.

30. Also on January 25, 2023, Principal of Home School sent Parent a letter, informing Parent that Student was eligible to participate in the English Learner (EL) Program (“1/25/2023 Letter”). The 1/25/2023 Letter indicated that Student’s level of English Language Proficiency was “Entering” and summarized the results of the 1/23/2023 WIDA Screener. Attached to the 1/25/2023 Letter was an Acknowledgement form for Parent to fill out to indicate (1) Parent understood that Student would be receiving EL Program services unless Parent submitted a written letter refusing the EL Program support, and (2) Parent wanted to speak to someone about the program. The 1/25/2023 Letter also indicated that Student would receive “Dedicated ESL/ELD Course” and “Sheltered Instruction.” DOE Ex. 7 at 014-015; ELC, Tr. Vol. 1, 180:12-181:19, 187:5-188:8.
31. “Dedicated ESL/ELD Course” would be provided by EL Coordinator in his/her capacity as a language teacher certified in TESOL. EL Coordinator would focus on listening and speaking with Student four (4) times a week for twenty (20) minutes each time. ELC, Tr. Vol. 1, 188:9-189:9.
32. “Sheltered Instruction” are language supports that Student would receive in the classroom setting, such as visual supports, to enable Student to understand what the classroom teacher is presenting. ELC, Tr. Vol. 1, 190:9-24.
33. Later in the evening on January 25, 2023, EL Coordinator sent an email to SSC, SLP, Teacher, and others to inform them that Student scored at a beginning level in English in listening, speaking, reading, and writing. EL Coordinator also informed them that EL Coordinator would be submitting a request form to have a [REDACTED] Bilingual School

Home Assistant (“BSHA”) “‘talk story’ with [Student] in both [REDACTED] and English to determine how proficient [Student] is in [REDACTED]” DOE Ex. 6 at 013.

34. If a child scores 1 or 2 in the listening and speaking domains in the WIDA Screener, a native language proficiency (“NLP”) assessment is given to the child. The purpose of an NLP assessment is to ascertain how proficient a child is in their first language. SSC, Tr. Vol. 1, 123:5-15; ELC, Tr. Vol. 2, 216:9-11. Since Student scored a 1 and 2 in listening and speaking, respectively, a BSHA fluent in [REDACTED] was requested to meet with Student and ask Student questions in English and [REDACTED] to determine how proficient Student was in [REDACTED] DOE Ex. at 025; ELC, Tr. Vol. 1, 191:24-193:9, 195:22-197:1; ELC, Tr. Vol. 2, 221:22-223:3.
35. BSHAs are proficient and fluent in their own language and the English language. ELC, Tr. Vol. 1, 191:24-192:9.
36. There are five (5) BSHAs employed by the DOE that services the district in which Home School belongs. DOE-BSHA is physically located at another DOE school and would need to commute to Home School to conduct an assessment. ELC, Tr. Vol. 1, 192:1-9, 200:2-14.
37. On January 26, 2023, EL Coordinator filled out and emailed to DOE-BSHA a Bilingual School Home Assistant (BSHA) Service Request form for a [REDACTED] BSHA to assess Student’s native language proficiency. DOE Ex. 10 at 018; DOE Ex. 11 at 021; SSC, Tr. Vol. 1, 130:13-131:6. The BSHA request form would initiate the scheduling of an NLP assessment. ELC, Tr. Vol. 1, 198:2-18.
38. On January 26, 2023, Parent signed the Acknowledgement form, indicating “I understand that my child will receive English Learner (EL) Program services as needed

unless I have submitted a written letter refusing EL Program support.” Parent did not indicate that Parent had any questions or requested that someone call Parent. DOE Ex. 9 at 017; Parent, Tr. Vol. 1, 42:17-20.

39. Students are not precluded from being eligible for special education services if they are deemed English language learners or are in the EL Program. Principal, Tr. Vol. 1, 167:20-22; ELC, Tr. Vol. 1, 182:23-183:5.
40. On January 30, 2023, Student took a diagnostic test in reading and scored below grade level. DOE Ex. 17 at 028-030; Principal, Tr. Vol. 1, 153:10-154:6.
41. Also on January 30, 2023, Parent spoke to Principal and School Counselor about Student being [REDACTED] and Student saying [REDACTED] words to Parent. Principal, Tr. Vol. 1, 160:8-162:10; Parent, Tr. Vol. 1, 29:15-30:2, 36:17-37:7.
42. On January 31, 2023, having not received a response from DOE-BSHA, EL Coordinator resent the BSHA request form to DOE-BSHA. Later that day, DOE-BSHA informed EL Coordinator that DOE-BSHA was available on February 10, 2023 to conduct an NLP assessment for Student. DOE Ex. 11 at 020-021; ELC, Tr. Vol. 1, 198:19-199:16.
43. Student was absent from school on [REDACTED] [REDACTED]. DOE Ex. 22 at 039.
44. On February 9, 2023, EL Coordinator informed DOE-BSHA that Student had been absent from school and that Parent informed the school that Student would not be in school on [REDACTED]. EL Coordinator informed DOE-BSHA that the NLP assessment would need to be rescheduled. DOE Ex. 11 at 019-020.

45. On [REDACTED] Student was absent from school. ELC, Tr. Vol. 1, 200:15-18; ELC, Tr. Vol. 2, 214:19-215:1; DOE Ex. 22 at 039.
46. Student was absent from school on [REDACTED]; and [REDACTED]. DOE Ex. 22 at 039.
47. On February 22, 2023, EL Coordinator informed DOE-BSHA that Student was now in school, and asked DOE-BSHA when DOE-BSHA was available to conduct the NLP assessment. DOE Ex. 11 at 019.
48. On February 27, 2023, Student took another diagnostic test in reading. Although Student's reading score was still below grade level, Student's score improved after attending school for approximately one (1) month. DOE Ex. 18 at 031-033; Principal, Tr. Vol. 1, 154:20-155:21.
49. On February 28, 2023, DOE-BSHA informed EL Coordinator that DOE-BSHA would be able to go to Home School on March 3, 2023 to conduct an NLP assessment. DOE Ex. 11 at 019; DOE Ex. 12 at 022.
50. In early March, EL Coordinator had two (2) EL Program sessions with Student. ELC, Tr. Vol. 1, 193:15-24; ELC, Tr. Vol. 2, 217:2-16, 237:11-14. Between the first and second EL Program sessions, Student made progress in gaining fluency in the English language, which indicated that Student would benefit from continuing in the EL Program. ELC, Tr. Vol. 2, 217:11-219:10, 224:3-225:17.
51. On March 2, 2023, Student took another diagnostic test for math. Although Student's math score was still below grade level, Student improved after attending school for approximately one (1) month. DOE Ex. 19 at 034-035; Principal, Tr. Vol. 1, 156:20-158:1.

52. On [REDACTED], Student was absent from school. ELC, Tr. Vol. 1, 201:16-23; DOE Ex. 22 at 038.
53. The NLP assessment was rescheduled from March 3, 2023 to March 8, 2023. DOE Ex. 12 at 022.
54. Student was in school on March 6-7, 2023. DOE Ex. 22 at 038.
55. Parent testified that on [REDACTED], which was Student's last day at Home School, Student sustained [REDACTED] and Student told Parent that Teacher had given Student [REDACTED]. Parent, Tr. Vol. 1, 34:1-35:17, 84:14-85:20; DOE Ex. 22 at 038.
56. On March 8, 2023, EL Coordinator called Parent when Student did not show up for school. During the phone conversation, EL Coordinator informed Parent that Home School was trying to complete an NLP assessment for Student. Parent informed EL Coordinator that Parent had concerns about [REDACTED] and other behaviors" that Student was having and would be keeping Student home until Parent's concerns were resolved. During the conversation, Parent did not tell EL Coordinator that Student did not speak or understand [REDACTED] nor did Parent say that Parent did not want Student to be assessed in Student's native language. ELC, Tr. Vol. 2, 214:6-216:8; DOE Ex. 13 at 023; DOE Ex. 14 at 024; DOE Ex. 22 at 038.
57. On March 8, 2023, Principal received a complaint from the district office, initiated by Parent on March 7, 2023, that Teacher had hit Student [REDACTED] and that Student had [REDACTED]. The district office later conducted an investigation into Parent's complaint. The district office found no corroborating evidence into Parent's

allegations; informed Parent of its findings; and closed its investigation. Principal, Tr. Vol. 1, 162:8-165:3.

58. On March 9, 2023, Parent filed a police report for possible assault by Teacher for the [REDACTED] on Student's [REDACTED] Parent, Tr. Vol. 1, 33:3-35:17; Pet. Ex. 1 at 004.
59. March 13-17, 2023 was spring break for Hawaii public schools¹⁰.
60. During spring break 2023, Principal spoke to Parent when Parent went to Home School to get forms to request that Student be transferred to another DOE school. Principal asked Parent clarifying questions about Student's language because Principal was aware that Student was an EL student. Principal, Tr. Vol. 1, 165:4-15. Principal asked Parent what primary language the family speaks at home. Parent responded that the family speaks mostly in English, but Parent also speaks to Student in [REDACTED] Principal asked Parent how Student would respond to questions and Parent replied that Student did not speak much. Principal, Tr. Vol. 1, 163:12-164:2, 165:16-166:1.
61. On [REDACTED], Student was absent from school. DOE Ex. 22 at 038.
62. An NLP assessment was never completed for Student because Student was absent on the days the NLP assessment was scheduled. ELC, Tr. Vol. 1, 197:12-198:1.
63. On March 22, 2023, Petitioners filed the instant due process complaint.
64. On [REDACTED], Parent disenrolled Student from Home School to homeschool Student. DOE Ex. 3 at 009; Principal, Tr. Vol. 1, 149:6-20.

¹⁰ The undersigned Hearings Officer takes judicial notice of the dates of spring break for school year 2022-2023 in the State of Hawaii.
<https://www.hawaiipublicschools.org/DOE%20Forms/2022-23calendar.pdf>.

65. Parent did not request that Student be evaluated for special education eligibility and there is currently no evaluation request pending. Parent, Tr. Vol. 1, 72:23-73:6; SSC, Tr. Vol. 1, 112:10-15, 124:4-6; Principal, Tr. Vol. 1, 144:13-24.

V. CONCLUSIONS OF LAW

A. BURDEN OF PROOF

Pursuant to Hawaii Administrative Rules (“H.A.R.”) § 8-60-66(a)(2)(A), “the party initiating the due process complaint has the burden of proof.” The Hawaii Administrative Rules also state that “[t]he burden of proof is the responsibility of the party initiating and seeking relief in an administrative hearing under the IDEA or this chapter is to prove, by a preponderance of the evidence, the allegations of the complaint.” H.A.R. § 8-60-66(a)(2)(B).

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 “conclude[d] that the burden of persuasion lies where it usually falls, upon the party seeking relief.” Id. at 535. 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 purpose of the IDEA is to “ensure that all children with disabilities have available to them a free and appropriate public education 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 (2008) (citing 20 U.S.C. §1400(d)(1)(A)). A free and appropriate public education (“FAPE”) includes

both special education and related services. H.A.R. § 8-60-1; H.A.R. § 8-60-3; 20 U.S.C. § 1401(9); 34 C.F.R. § 300.34; 34 C.F.R. § 300.39; 34 C.F.R. § 300.101.

Special education means “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.34; 34 C.F.R. § 300.39; 20 USC §§ 1401(26) and (29). To provide FAPE in compliance with the IDEA, the 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.” Dept. of Educ. of Hawaii v. Leo W., 226 F.Supp.3d 1081, 1093 (D. Haw.2016).

In Bd. of Educ. v. Rowley, the Court set out a two-part test for determining whether the school 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. 176, 206-207, 102 S. Ct. at 3050-3051 (1982). “A state must meet both requirements to comply with the obligations of the IDEA.” Doug C. v. Hawaii Dept. of Educ., 720 F.3d 1038, 1043 (9th Cir.2013) (quoting Rowley). See also, Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 892 (9th Cir.2001).

The school is not required to “maximize the potential” of each student; rather, the school is 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. However, the United States Supreme Court in Andrew F. v. Douglas County Sch. Dist. held that the educational benefit must be more than *de minimus*. The Court held that the IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Andrew F. v. Douglas

County Sch. Dist., 137 S. Ct. 988, 1001 (2017). See also, Blake C. v. Hawaii Dept. of Educ., 593 F.Supp.2d 1199, 1206 (D. Haw.2009).

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(s), parent(s), and where appropriate, the child. The IEP contains, among other things, a statement of the child’s present levels of academic achievement and functional performance, 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. § 1414(d). The IEP is reviewed and, if appropriate, revised, at least once annually. 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. Dept. of Educ. of the Commonwealth of Massachusetts, 471 U.S. 359, 368, 105 S. Ct. 1996, 2002 (1985). 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 Dept. of Educ., 694 F.3d 167 (2nd Cir.2012).

Procedural violations do not necessarily constitute a denial of FAPE. Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 892 (9th Cir.2001). If procedural violations are found, a further inquiry must be made to determine whether the violations: (1) resulted in a loss of educational opportunity for Student; (2) significantly impeded Parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the Student; or (3) caused Student a deprivation of educational benefits. Amanda J., 267 F.3d 877, 892 (9th Cir.2001).

C. ISSUE FOR DETERMINATION

Whether the DOE failed or insufficiently assessed Student for an IEP under the IDEA and/or for a modification plan under Section 504, where such was required by Student's known needs

Petitioners are alleging that Respondents failed to assess or insufficiently assessed Student for special education eligibility under the IDEA and/or for modification to Student's educational program under Section 504. Pet. Closing Brief, p. 2. Petitioners' Closing Brief clarifies that "[t]his allegation relates to the DOE's Child Find obligations under 34 CFR 300.111 and Section 504 of the Rehabilitation Act." Pet. Closing Brief, p. 3, FN2. In the instant case, there was no referral, from Parent or DOE, for an evaluation of Student to determine eligibility as a student with a disability, or a request for an initial evaluation to determine if Student is a student with a disability. H.A.R. § 8-60-10(d); H.A.R. § 8-60-33(b)¹¹. Based on the foregoing, Petitioners fail to meet their burden.

(a) Special Education Eligibility

Federal regulations require that "[a]ll children with disabilities residing in the State...regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated..." 34 C.F.R. § 300.111(a)(1)(i). See also 20 U.S.C. § 1412(a)(3)(A); H.A.R. § 8-60-10(a). "Federal regulation clarifies [that] child find is triggered when children 'are *suspected* of being a child with a disability...even though they are advancing from grade to grade.' 34 C.F.R. § 300.111(c)(1) (emphasis added). Thus, the

¹¹ H.A.R. § 8-60-33(d) states that the "timeframe described in subsection (c)(1) does not apply to the department if the parent of a student repeatedly fails or refuses to produce the student for the evaluation." Although the assessment with DOE-BSHA is not an evaluation, Home School's inability to conduct the language assessment due to Student's frequent absences from school should not be held against Home School when Home School actively tried to schedule the assessment to determine Student's language proficiency.

child find duty is triggered when the school district has reasonable suspicion to believe that a student is a ‘child with a disability.’” D.T. by and through Yasiris T. v. Cherry Creek Sch. Dist. No. 5, 55 F.4th 1268, 1274 (10th Cir.2022) (affirming district court finding that school district’s child find duty was not triggered until after D.T.’s emotional dysfunction manifested in the school environment in the form of D.T.’s shooting threat in November of 2017, and that “[u]ntil November 2017, D.T.’s emotional dysfunction had not manifested in the school environment; the District actively engaged him with alternative interventions; and his struggles were readily explainable by acute, non-academic stressors.”). In the state of Hawaii, “the child-find duty ‘is triggered when the [state or LEA] has reasons to suspect a disability, and reason to suspect that special education services may be needed to address that disability.’” Dept. of Educ. State of Hawaii v. Cari Rae S., 158 F.Supp.2d 1190, 1194 (D.Haw. Aug 3, 2001) (quoting Corpus Christi Indep. Sch. Dist., 31 IDELR ¶ 41, at 158, No. 105-SE-1298 (Jan. 19, 1999) (brackets in original)).

Based on the information available to Home School, there was insufficient information to suspect that Student has a disability, and therefore, DOE’s child find duty was not triggered. The information Parent provided to Home School did not put Home School on notice that Student may be a child with a disability. Parent informed Home School through the 2023 Enrollment Form that [REDACTED] was the first language Student acquired; and [REDACTED] was spoken at home and most used by Student. (FOF 13). When Parent was informed that Student would be receiving EL Program services, Parent did not refuse EL Program services, nor did Parent have any questions or mention any other concerns. (FOF 29, 30, 38). Although Parent expressed concerns to SSC about Student not speaking, Parent did not provide SSC with any

documentation regarding Parent's concerns and did not request an evaluation of Student¹². (FOF 22, 23, 24, 25). Additionally, the 1/23/2023 WIDA Screener indicated that Student was a beginning English learner and needed support in listening, speaking, reading, and writing through the EL Program. (FOF 19). And after attending school for approximately one (1) month, Student's score in math and reading improved; and Student made progress in gaining fluency in the English language through the EL Program. (FOF 48, 50, 51).

Even Parent's own testimony about what Parent told Home School was insufficient to put Home School on notice that Student may be a child with a disability. For example, Parent gave the following testimony during the hearing:

- (1) "I keep talking to [School Counselor] and principal that [Student] got [REDACTED], [Student] got drama at home, [Student] call me names; what's going on here?"
Parent, Tr. Vol. 1, 29:15-30:2.
- (2) "It happens at – right after I put [Student] at that school. And I mention that to the principal and [School Counselor] when we had that meeting that [Student] came home and called me, 'You ugly, [Parent],' and all the bad words like F and S words, all the drama. And they say, Oh, we gotta look for that, we gotta look." Parent, Tr. Vol. 1, 36:17-37:7.
- (3) "I informed the counselor that [Student's] language is not – [Student] cannot say the whole full sentence in English. That's when I talk to counselor and other staff member. I think principal was there too." Parent, Tr. Vol. 1, 24:23-25:3.

¹² Parent testified that Parent could see how noting that [REDACTED] is Student's first language on the 2023 Enrollment Form and Student receiving very low test scores might lead someone to think that [REDACTED] is Student's first language and it made sense to test Student's proficiency in [REDACTED] Parent, Tr. Vol. 1, 81:25-82:20.

(4) Parent testified that on January 13, 2023, Parent informed Home School that Student had “speech delay,” and that Parent understood “speech delay” to mean “someone who is not speaking well in English. Or [Student] cannot talk in a full – fully sentence.” Parent, Tr. Vol. 1, 57:2-19. Besides telling Home School on January 13, 2023 that Parent was concerned about Student’s “speech delay,” Parent did not tell anyone else that Parent was concerned about Student’s “speech delay” (Parent, Tr. Vol. 1, 57:20-25), and Parent did not give Home School any documentation regarding Student’s “speech delay” on January 13, 2023¹³ (Parent, Tr. Vol. 1, 58:1-10).

The information that was available to Home School did not trigger Home School’s child find duty because Home School could not have had a reasonable suspicion to believe that Student may be a child with a disability. It is still unknown if Student has a disability as there is no evidence to show that Student is a student with a disability¹⁴. The information provided by Parent, without corroborating evidence--such as documents, information from health care

¹³ The undersigned Hearings Officer is not finding that Parent actually told Home School that Parent informed Home School that Student has a speech delay. There is conflicting testimony between Parent and Principal about what was discussed on January 13, 2023. According to Principal, Parent did not mention that Parent had any concerns about Student’s speech ability, and that they talked about Student being [REDACTED], the instruction Student received during the first half of the year; and the possibility of Student having to repeat kindergarten. Principal, Tr. Vol. 1, 158:5-160:7. The undersigned is more inclined to accept Principal’s testimony than Parent’s testimony because Parent gave inconsistent testimony during the hearing. For example, Parent first testified that Home School did not want to assess Student for language issues (Parent, Tr. Vol. 1, 22:8-14), then testified that Home School had an assessment of Student’s English proficiency but not [REDACTED] proficiency (Parent, Tr. Vol. 1, 47:19-48:13), and then testified that Home School wanted to test Student in English and [REDACTED] (Parent, Tr. Vol. 1, 78:18-25). Based on Parent’s inconsistent testimony, the undersigned questions Parent’s credibility.

¹⁴ Although the 2022 Audiology Report lists “speech delay” as a diagnosis, without clarification from witnesses or other documentation, it is unknown who made that determination or when it was made, or if that diagnosis was based on Parent’s reporting that Student was “not really talking.” In any event, Parent did not share the 2022 Audiology Report with Home School. (FOF 7, 8).

professionals, school personnel or related service providers--is insufficient to establish that Student may be a child with a suspected disability, especially when Parent informed Home School that English is not Student's first language. (FOF 13). Also, based on SLP's professional opinion, which no one contested, the results of an NLP assessment would help to clarify if the communication concerns were an English proficiency problem or a speech/language disorder. (FOF 27). DOE made reasonable efforts to determine if Student had a language proficiency problem by attempting on numerous occasions to schedule an NLP assessment. (FOF 33, 34-37, 42-47, 49, 52-53, 56, 62). And in the meantime, DOE provided Student with EL Program services, which improved Student's English proficiency. (FOF 30, 31, 32, 50). Based on the 2023 Enrollment Form, the 1/23/2023 WIDA Screener, and H.A.R. § 8-60-38(b)(1)(C), it was reasonable for Home School to want to determine if Student has limited English proficiency.

Now, turning to some of Petitioners' arguments. Petitioners rely on three (3) cases to articulate "what triggers the DOE obligation to initial the Child Find provisions and hold that initial inquiry": Dept. of Educ., Haw. v. Cari Rae S., McIntyre v. Eugene Sch. Dist., and G.M. v. Saddleback Valley Unified Sch. Dist. Pet. Closing Brief, p. 4, FN4, FN5. These three (3) cases support a finding that DOE did not violate its child find obligation in the instant case.

In Cari Rae S., DOE was found to have violated its child find duties because the record indicated that the student ranked near the bottom of her class and her grade point average continued to fall each year; her parent's inquired about private tutoring and the Sylvan Learning Center, and the student attended Sylvan Learning Center; a school counselor asked parent if the student had a learning disability; the student had numerous absences; teachers made many "behavioral referrals;" and the student exhibited signs of drug usage and behavioral problems

relating to her relationship with her mother. Cari Rae S., 158 F.Supp.2d at 1192, 1195. In the instant case, Home School was not confronted with nearly as much information as the school in Cari Rae S. The information available to Home School were: Parent informed Home School that “[Student] cannot say the whole full sentence in English” when English is not Student’s first language (Parent, Tr. Vol. 1, 24:23-25:3, FOF 13); Student swears at and insults Parent (Parent, Tr. Vol. 1, 36:17-37:7, FOF 41); Student has [REDACTED] absences¹⁵ (FOF 15); Student got [REDACTED] by another student (FOF 41); and Parent alleged that Teacher had hit Student in the [REDACTED] (FOF 55, 57). This type of information does not rise to the level of information that was available in Cari Rae S. and could not have placed Home School on notice that Student may have a suspected disability.

In GM v. Saddleback Valley Unified Sch. Dist., a 2014 Ninth Circuit Court case, the appellate court noted that it has “not yet articulated a test for when the child find obligation is triggered,” and noted that the test articulated by the Hawaii district court in Cari Rae S. “differ significantly” from the tests articulated by the Sixth and Third Circuits. GM v. Saddleback Valley Unified Sch. Dist., 583 Fed.Appx. 702, FN1, No. 12-56627 (9th Cir.2014). In GM v. Saddleback, the Ninth Circuit Court held that the United States District Court for the Central District of California did not err in concluding that the school district complied with its child find duty even though the “school counselor had been advised of [the] Student’s diagnosis of ‘major depressive disorder.’” GM v. Saddleback Valley Unified Sch. Dist., 583 Fed.Appx. 702, 703, No. 12-56627 (9th Cir.2014). In the instant case, there is no testimonial or documentary

¹⁵ The undersigned views Student’s unexcused absences differently from the absences by the student in Cari Rae S. The student in Cari Rae S. was in high school, while Student is six years old. A six-year-old missing school most likely means that an adult did not take the six-year-old to school.

evidence that Student has been diagnosed with any disorder or disability. See FN14 supra.

McIntyre v. Eugene reaffirms that “States [] have a ‘child-find’ obligation under the IDEA to identify, locate, and evaluate all children who may require special education and related services” but otherwise provide little guidance on what triggers DOE’s child find obligation. McIntyre v. Eugene Sch. Dist. 4J, 976 F.3d 902, 910 (9th Cir.2020)¹⁶.

Petitioners also argue that there were three (3) pivotal moments when DOE’s child find obligation was triggered and “DOE became obligated...under the law to *hold a meeting to determine* whether or not Student should be assessed for potential IDEA and/or Section 504 eligibility.” Pet. Closing Brief, p. 4. The first pivotal moment argued by Petitioners was when “Parent verbally spoke with an agent of the DOE who was in charge of Child Find and told [him/her] that [Parent] suspected Student had a problem communicating” and that “This expression of concern was an implicit demand for an assessment.” Pet. Closing Brief, p. 5. On Student’s first day of school on January 13, 2023, Parent spoke to Principal and School Counselor. (FOF 16). Principal and Parent have differing recollection as to what was discussed; however, without having to reconcile the witnesses’ recollection of what was talked about, based on Parent’s testimony of what Parent informed Principal and School Counselor, Home School could not have been placed on notice that Student may be a student with a disability. Parent testified that Parent told Principal and School Counselor that Student “cannot speak in full language, [Student] might need something” and “[Student] cannot say the whole full sentence in English.” Parent, Tr. Vol. 1, 23:23-25:3. Parent informing school personnel that Student is not able to speak in full sentences in English would not lead a reasonable person to think that

¹⁶ McIntyre v. Eugene Sch. Dist. 4J analyzes exhaustion of administrative remedies for students who have Section 504 plans and the case is discussed in more detail in Section (b) infra. Administrative exhaustion is not an issue in the instant case.

Student has a possible disability when English is not Student's first language. Also, although Parent expressed concerns to SSC about Student's speech, SSC appropriately sought an informal assessment of Student when Parent did not ask for an evaluation and did not provide SSC any documentation regarding Parent's concerns. (FOF 22-25). As for Petitioners' "implicit demand" argument, Petitioners have not cited any legal authority that DOE is legally required to conduct an evaluation based on an "implicit demand for an assessment." An implicit demand runs counter to the regulatory requirement of written parental consent for an initial evaluation. H.A.R. § 8-60-31(a). Petitioners' argument that "as long as the school holds a meeting to discuss whether a student should be assessed for relevant deficits...they have meet the requirements of this first step..." is also not persuasive. Pet. Closing Brief, pp. 5-6. There is no obligation for Home School to hold a meeting to discuss whether Student should be assessed when Home School's child find obligation was not triggered.

The second pivotal moment that arguably triggered DOE's child find obligation was when Parent informed the school of Parent's concerns regarding [REDACTED] Parent observed on Student in January and February¹⁷ of 2023. Pet. Closing Brief, p. 7. While any student receiving [REDACTED] from a [REDACTED], and especially a [REDACTED], is a concern, this does not trigger the child find obligation. A school's failure to investigate possible bullying or abuse may subject DOE to serious consequences, but it does not trigger a requirement to have an SFT meeting to determine if there is suspicion of a disability. Pet. Closing Brief, p. 8.

The third pivotal moment that Petitioners argue triggered DOE's child find obligation was when Petitioners filed their Complaint on March 22, 2023, and the withdrawal of Student

¹⁷ Parent testified Parent observed Student with bumps on Student's head in March. (FOF 55).

from public school on April 17, 2023 did not extinguish DOE's "ongoing obligation to assess Student under the 'Child Find' requirement." Pet. Closing Brief, pp. 8-9. First, a filing of a due process complaint did not trigger DOE's child find obligation in this case. Although there is no IEP or Section 504 Plan for Student, the "snapshot rule" used to evaluate an IEP is instructive on how a filed complaint affects DOE's child find obligation. According to the "snapshot rule," "an IEP must be evaluated in light of 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.'" Dept. of Educ., State of Haw. v. Leo W., 226 F.Supp.3d 1081, 1099, 344 Ed. Law Rep. 246 (D. Haw. Dec. 29, 2016) (citing Baquerizo v. Garden Grove Unified Sch. Dist., 826 F.3d 1179, 1187 (9th Cir.2016)). Similarly, a snapshot of the information that was available to Home School before March 22, 2023 was not sufficient to trigger DOE's child find obligation. The filing of the Complaint on March 22, 2023, which contains allegations of wrongdoing by DOE and not information about Student, does not convert the information that was available to Home School before March 22, 2023 into sufficient information to trigger DOE's child find obligation. Second, there is no evidence that additional information was given to Home School after the filing of the Complaint that would have triggered DOE's child find obligation. Additionally, viewing all three (3) pivotal moments together would also not trigger DOE's child find obligation.

Lastly, Petitioners' argument that "[t]here is no basis for [] an assessment [to rule out language proficiency] to delay the process outline by [the] regulation" is unpersuasive¹⁸. Pet.

¹⁸ During the due process hearing, Petitioners' counsel stated, "[Y]ou don't have to assess a student's language abilities before you have the obligation to assess the student's ability under Section 504 o[r] the IDEA. This is the indication that the case hinges on. The child has an absolute right for that discussion to occur, and it has yet to occur. That's our – that's our issue in this case." Tr. Vol. 1, 12:19-25.

Closing Brief, p. 10. Various procedural requirements imposed on DOE suggest that a child's native language must first be determined before any assessments are conducted. For example, 34 C.F.R. § 300.29(a)(2) states: "*Native language*, when used with respect to an individual who is limited English proficient, means the following:...(2) In all direct contact with a child (including evaluation of the child), the language normally used by the child in the home or learning environment." Also, 34 C.F.R. § 300.304(c)(1)(ii) states: "Each public agency must ensure that assessments and other evaluation materials used to assess a child under this part...are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer..." Also, 34 C.F.R. § 300.311(a)(6) states: "For a child suspected of having a specific learning disability, the documentation of the determination of eligibility...must contain a statement of...[t]he determination of the group concerning the effects of...limited English proficiency on the child's achievement level..." These sections suggest that DOE must first determine a child's native language before an evaluation can proceed. This is only logical. To conduct any assessment without knowing a child's native language could yield inaccurate information about the child or subject the child to repeated assessments because DOE did not conduct the assessments in a language the child understands. Finally, DOE is required to determine if Student has limited English proficiency in making its eligibility determination. H.A.R. § 8-60-38(b)(1)(C).

In this case, there is no evidence that Student's educational benefit was undermined because DOE wanted to determine Student's language proficiency. Based on the foregoing, Petitioners fail to meet their burden in showing that DOE failed to assess or insufficiently

assessed Student under the IDEA.

(b) Section 504 Accommodations

Section 504 of the Rehabilitation Act addresses the provision of state services to individuals with disabilities, and states in relevant part:

No otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

McIntyre v. Eugene Sch. Dist. 4J, 976 F.3d 902, 911 (9th Cir.2020). “Section 504’s regulations gauge the adequacy of services provided to individuals with disabilities by comparing them to the level of services provided to individuals who are not disabled.” McIntyre, 976 F.3d at 911. Petitioners do not cite to any legal authority regarding DOE’s child find obligation under Section 504, nor do Petitioners argue in their closing brief how DOE’s conduct violated child find under Section 504. For the same reasons why DOE did not violate its child find duty under IDEA, DOE also did not violate its child find duty under Section 504 because DOE’s child find duty was not triggered. Based on the evidence, the information that was available to Home School was not sufficient to put Home School on notice that Student may be a child with a disability. Therefore, Petitioners fail to meet their burden in showing that DOE failed to assess or insufficiently assessed Student under Section 504.

VI. DECISION


Based upon the above-stated Findings of Fact and Conclusions of Law, the undersigned Hearings Officer concludes that Petitioners have not met their burden by preponderance of the evidence that Respondents failed to comply with IDEA and Section 504’s child find obligations

and failed to prove that Student was denied a FAPE under the IDEA or Section 504. As Petitioners have failed to prove their claim, Petitioners' requested remedy is 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 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 H.A.R. § 8-60-70(b).

DATED: Honolulu, Hawaii, July 20, 2023.



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