



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

In the Matter of STUDENT, by and through
PARENT 1,¹

Petitioner(s),

vs.

DEPARTMENT OF EDUCATION, STATE
OF HAWAI'I, and CHRISTINA
KISHIMOTO, Superintendent of the Hawai'i
Public Schools,

Respondents.

DOE-SY2021-012

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: October 5-6, 2020

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On July 28, 2020, the Department of Education, State of Hawai'i and Christina Kishimoto, Superintendent of the Hawai'i Public Schools (hereinafter "Respondents" or "DOE") received a request for a due process hearing (hereinafter "Complaint") under the Hawai'i Administrative Rules Title 8, Chapter 60, in accordance with the Individuals with Disabilities

¹ Personal identifiable information is contained in the Legend.

Education Act, from Student, by and through Parent 1 (hereinafter “Petitioners”). Respondents submitted a response to Petitioners’ Complaint on August 7, 2020.

A prehearing conference was held on August 31, 2020, before Hearings Officer Chastity T. Imamura, with Keith H.S. Peck, Esq. (hereinafter “Mr. Peck”), representing Petitioners, and Kevin M. Richardson, Esq. (hereinafter “Mr. Richardson”), representing Respondents. At the prehearing conference, the Due Process Hearing (hereinafter “Hearing”) was scheduled for October 5-6, 2020.

Due to the scheduling of the Hearing, Petitioners requested an extension of the original deadline by which a decision was to be made from October 12, 2020 to November 25, 2020. Respondents did not object to the request for extension, and Petitioners’ request for an extension was granted and the new deadline was set at November 25, 2020.

Due to the coronavirus 2019 global pandemic, the parties stipulated to the Hearing being conducted via video conferencing to ensure compliance with government mandated social distancing.² An Order Regarding Video Conference Due Process Hearing was issued on September 21, 2020, 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.

The Hearing commenced on October 5, 2020, using the Zoom video conferencing

² See Governor of the State of Hawaii’s Twelfth Proclamation Related to the COVID-19 Emergency, effective August 20, 2020, and Governor of the State of Hawaii’s Thirteenth Proclamation Related to the COVID-19 Emergency, effective September 22, 2020.

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 Hearings Officer Chastity T. Imamura; Parent 1 and Mr. Peck, on behalf of Petitioners; and District Educational Specialist and Mr. Richardson on behalf of Respondents, as well as the assigned court reporter. The Hearing continued to October 6, 2020, as scheduled, and the testimony was completed on that date.

At the Hearing, Petitioners called Parent 1 and Private School Director as their witnesses during their case-in-chief and rested. Respondents called Student Services Coordinator (hereinafter “SSC”), Principal, and Special Education Teacher (hereinafter “SPED Teacher”) during their case and rested. Petitioners did not present any rebuttal evidence.

Each party submitted their exhibits for the Hearing by the disclosure deadline of September 28, 2020. Following the Hearing on October 6, 2020, a list of exhibits that were discussed during the hearing was provided to counsel by this Hearings Officer. Both parties were allowed to propose additional exhibits that were not discussed at the Hearing to be received as evidence in this matter. The lists of proposed additional exhibits were due on October 14, 2020. Any objections to the proposed exhibits were due on October 16, 2020. Neither Petitioners nor Respondents submitted any corrections or additional proposed exhibits to be received as evidence for consideration in the Decision. On October 23, 2020, a List of Exhibits Received at Hearing was issued, outlining all the exhibits that would be considered as part of this Decision.

Petitioners’ exhibits that were received and considered as part of this Decision are as follows: Exhibit 2, pages 049, 055; and Exhibit 3, pages 062-064, 066-098, 105-116.

Respondents’ exhibits that were received and considered as part of this Decision are as follows:

Exhibit 1, pages 001-007, Exhibit 2 pages 014-015, 021-022, 027-029; and Exhibit 4, pages 034-119, 122-126, 132-151, 154-162.

Both parties wanted the opportunity to submit closing briefs regarding the legal issues and the relevant facts supporting those issues to this Hearings Officer for review. The deadline by which the briefs were to be submitted was Wednesday, November 4, 2020. Due to a delay in the transcripts being prepared, the parties requested an extension of the deadline for closing briefs. The deadline for closing briefs was extended to Monday, November 9, 2020. Both parties timely submitted their closing briefs on that date.

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 “HAR”) § 8-60-1, *et seq.*

III. ISSUES PRESENTED

Petitioners assert a single issue in the Complaint to be addressed at the Hearing:

1. Whether denying Student an Individualized Educational Program (hereinafter “IEP”) unless Parent 1 formally enrolled Student at Student’s public school was a denial of a free and appropriate public education (hereinafter “FAPE”).

IV. FINDINGS OF FACT

Student’s background

1. Student is a resident in Home School's district.³
2. Student was diagnosed in 2018.⁴
3. Prior to May 15, 2019, Parent 1 requested an evaluation for Student for special education and related services.⁵
4. Home School had begun the process of evaluating Student for eligibility under the IDEA, but on May 15, 2019, Parent 1 signed a letter revoking consent for the completion of Student's evaluation.⁶
5. Parent 1 again requested an IEP for Student on May 7, 2020. Due to the revocation of consent from Student's prior evaluation, Parent 1 was informed that Home School would need to go through the entire evaluation process from the beginning before an IEP could be developed for Student.⁷
6. As early as May 11, 2020, Parent 1 communicated with Home School that, despite the recency of the request for evaluation for Student, Parent 1 would seek private school for Student and would be asking for reimbursement for such private school expenses.⁸
7. On May 13, 2020, Parent 1 reiterated the request to start the process for Student, and on that same date, SSC proposed May 21, 2020 as a meeting date for the initial

³ Testimony of Parent 1, Transcript of Proceedings Volume 1, page 87, line 13 through line 14 (hereinafter referenced as "Tr.V1, 87:13-14), Testimony of SSC, Tr.V2, 180:12-19.

⁴ Testimony of Parent 1, Tr.V1, 37:23-24; Respondents' Exhibit 2, page 063 (hereinafter referenced as "R-Ex.2, p.063").

⁵ Testimony of Parent 1, Tr.V1, 13:21-14:22; Testimony of SSC, Tr.V2, 175:16-177:7.

⁶ Testimony of Parent 1, Tr.V1, 13:21-14:22; Testimony of SSC, Tr.V2, 175:16-177:7; R-Ex.4, p.051.

⁷ Testimony of Parent 1, Tr.V1, 36:1-11; Testimony of SSC, Tr.V2, 177:10-23; R-Ex.4, p.044-046.

⁸ Testimony of Parent 1, Tr.V1, 36:21-37:3; 38:12-39:12; Testimony of SSC, Tr.V2, 178:24-179:13; R-Ex.4, p.046.

- student services team (hereinafter “SST”) meeting.⁹
8. The SST meeting was held on May 21, 2020. At the SST meeting, the DOE proposed an initial evaluation for Student which included assessments to be used to determine Student’s eligibility under the IDEA.¹⁰
 9. On May 18, 2020, SSC sent Parent 1 forms for proof of residence and enrollment forms, which SSC requested Parent 1 complete and send back to SSC, along with a copy of Student’s birth certificate.¹¹
 10. After the SST meeting on May 21, 2020, SSC sent Parent 1 additional forms to be completed, including a Request for Evaluation form and a Consent for Assessment for Initial Evaluation form. In the same email, Parent 1 was sent the Meeting Notice for the May 21, 2020 meeting, the Prior Written Notice (hereinafter “PWN”) for the May 21, 2020 meeting, and a copy of the Procedural Safeguards Notice.¹²
 11. After the May 21, 2020 SST meeting, a PWN was issued (hereinafter “PWN-5/21/2020”) in which the DOE proposed an initial evaluation of Student for determination of eligibility.¹³
 12. On June 1, 2020, at approximately 10:02 a.m., after SSC did not receive the forms from Parent 1, SSC sent a follow up email requesting that Parent 1 complete the Request for Evaluation form, the Consent for Assessment for Initial Evaluation form and the student enrollment forms. SSC also requested that Parent 1 attach a proof of

⁹ Testimony of SSC, Tr.V2, 179:22-180:2; R-Ex.4, p.047.

¹⁰ Testimony of SSC, Tr.V2, 179:22-181:16; R-Ex.2, p.014.

¹¹ Testimony of SSC, Tr.V2, 180:20-24; R-Ex.4, p.048.

¹² R-Ex.4, p.048-111.

¹³ R-Ex.2, p.014-015.

- residency for Student and Student's birth certificate.¹⁴
13. In the afternoon of June 1, 2020, Parent 1 completed and emailed SSC the Request for Evaluation form and Consent for Initial Assessment form. Parent 1 inquired at that time if a mortgage statement would be accepted as proof of residency.¹⁵
14. On June 3, 2020, Parent 1 emailed a payment stub for Parent 1's mortgage, the signed Consent for Assessment as Part of an Initial Evaluation, the signed Request for Evaluation, and Student's birth certificate.¹⁶
15. Upon receipt of the forms, SSC informed Parent 1 that Home School needed the enrollment forms completed. Parent 1 responded to SSC by saying that Parent 1 did not want to enroll Student at public school until Parent 1 knows what Student's IEP will be.¹⁷
16. On June 4, 2020, SSC informed Parent 1 that Home School needed the forms to input into the DOE computer system and that it was not to enroll Student at that time. After asking for the forms to be resent, Parent 1 thereafter refused to complete the enrollment forms.¹⁸
17. By June 29, 2020, the DOE had completed all the assessments for Student's evaluation except for the Assessment 2. On June 29, 2020 the team met and decided that because Student had completed Assessment 2 at Student's private program, the

¹⁴ Testimony of SSC, Tr.V2, 181:17-23; R-Ex.4, p.049.

¹⁵ Testimony of SSC, Tr.V2, 182:5-12; R-Ex.4, 049-050.

¹⁶ Testimony of Parent 1, Tr.V1, 20:9-23, 21:22-24; Testimony of SSC, Tr.V2, 182:13-183:15; R-Ex.4, p.112-116.

¹⁷ Testimony of Parent 1, Tr.V1, 22:8-18; Testimony of SSC, Tr.V2, 184:3-5; R-Ex.4, p.116-117.

¹⁸ Testimony of Parent 1, Tr.V1, 41:16-18; Testimony of SSC, Tr.V2, 184:7-23, 187:9-11; R-Ex.4, p.117.

- DOE would request a Assessment 3 instead.¹⁹
18. On July 14, 2020, SSC requested that Parent 1 sign a consent for release of information for Home School to obtain treatment plans, assessment data, and current progress monitoring data from Student's private program to assist with the educational decisions, program and placement for Student. Parent 1 signed and returned the forms the same day.²⁰
19. On July 16, 2020, an eligibility meeting was held for Student, during which Student was determined to be eligible for special education services.²¹ Parent 1 was present at that eligibility meeting.²²
20. On July 19, 2020, Parent 1 signed a Consent for Initial Provision of Special Education and Related Services, which was received by Home School on July 21, 2020.²³
21. Home School repeatedly requested Parent 1 fill out the enrollment form for Student to obtain Student's information to put into the Hawai'i DOE computer system.²⁴ Parent 1 never completed an enrollment form for Student.²⁵
22. On July 23, 2020, SPED Teacher called and emailed Parent 1 to set up Student's IEP meeting for July 31, 2020 at 2:30 p.m.²⁶
23. SPED Teacher followed up with Parent 1 about the proposed July 31, 2020 meeting

¹⁹ Testimony of SSC, Tr.V2, 189:2-24; R-Ex.2, p.021-022.

²⁰ R-Ex.4, p.037, 122.

²¹ R-Ex.2, p.027-028.

²² Testimony of SSC, 190:2-17; *see also* Event Log of SSC, noting "At the eligibility meeting, principal explained to Parent 1 that enrollment forms need to be submitted in order to proceed with the development of the IEP." R-Ex.4, p.039.

²³ Testimony of SSC, Tr.V2, 192:2-193:6; R-Ex.2, p.029.

²⁴ Testimony of SSC, Tr.V2, 180:4-8, 183:21-23, 184:7-9, 184:24-187:8; R-Ex.4, p.038-039, 041, 043, 125,

²⁵ Testimony of Parent 1, Tr.V1, 41:16-18; Testimony of SSC, Tr.V2, 184:7-23, 187:9-11.

²⁶ Testimony of SPED Teacher, Tr.V2, 237:8-10, 237:17-239:1; R-Ex.4, p.132.

- to develop Student's IEP with an email sent on July 27, 2020.²⁷
24. Parent 1 received the emails from SPED Teacher but did not reply. Parent 1 forwarded the July 27, 2020 email to Parent 1's attorney, asking if Parent 1 needed to respond to the email.²⁸
25. Parent 1 did not respond to the emails from SPED Teacher and Parent 1 did not attend the IEP meeting for Student on July 31, 2020. At 3:19 p.m. on July 31, 2020, Parent 1 informed Home School that Parent 1 "need[ed] more notice to schedule an IEP meeting than 1 day." Parent 1 also informed Home School that Parent 1 wanted the family's attorney to be present at meetings.²⁹
26. Parent 1 informed Home School of three (3) dates in late August when the family's attorney would be available for an IEP meeting. Home School responded by proposing two (2) earlier dates in August, and one (1) of the dates that Parent 1 had proposed.³⁰
27. An IEP meeting was scheduled for August 27, 2020 for Student based on Parent 1's availability.³¹
28. Due to one of the DOE's team members not being available for the original start time of 9:00 a.m., the August 27, 2020 IEP meeting was moved back to 10:00 a.m., the team intended to start Student's IEP if time permitted.³²

²⁷ Testimony of SPED Teacher, Tr.V2, 242:5-20; R-Ex.4, p.133.

²⁸ Testimony of Parent 1, Tr.V1, 54:11-55:15; P-Ex.2, p.055.

²⁹ Testimony of Parent 1, Tr.V1, 57:19:6; Testimony of Principal, Tr.V2, 211:25-212:25; R-Ex.4, p.134

³⁰ Testimony of Parent 1, Tr.V1, 59:22-25, 62:14-19; Testimony of Principal, Tr.V2, 213:1-158; R-Ex.4, p.138.

³¹ Testimony of Principal, Tr.V2, 215:17-216:17; Testimony of SPED Teacher, Tr.V2, 245:18-246:14; R-Ex.4, p.144-151.

³² Testimony of Principal, Tr.V2, 217:5-22; R-Ex.4, p.155. This Hearings Officer notes that

29. The IEP team was not able to start Student's IEP on August 27, 2020.³³

30. Student's IEP meeting held scheduled on Friday, September 25, 2020 at 11:00 a.m.³⁴

31. Parent 1 enrolled Student at Private School on August 17, 2020.³⁵

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 and appropriate public education that emphasizes special education and related services designed to meet their unique needs.”³⁶ A FAPE includes both special education and related services.³⁷

Special education means “specially designed instruction to meet the unique needs of a child with a disability” and related services are the supportive services required to assist a student to benefit from their special education.³⁸ 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.”³⁹

The IEP is used as the “centerpiece of the statute’s education delivery system for disabled

while Parent 1 testified that Student was originally scheduled first, the documentary evidence supports the testimony of Principal that Student’s IEP meeting was scheduled to start after another IEP meeting was completed. *Compare* Testimony of Parent 1, Tr.V1, 63:7-65:4 and R-Ex.4, p.146, 150, 155.

³³ Testimony of Principal, Tr.V2, 218:20-219:4; Testimony of SPED Teacher, Tr.V2, 246:13-24.

³⁴ Testimony of Parent 1, Tr.V1, 31:8-18, 70:18-71:1; Testimony of Principal, Tr.V2, 223:12-17; Testimony of SPED Teacher, Tr.V2, 256:23-5; R-Ex.4, p.162.

³⁵ Testimony of Parent 1, Tr.V1, 32:14-33:15; P-Ex.3, p.063-064.

³⁶ *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)).

³⁷ H.A.R. §8-60-2; 20 U.S.C. §1401(9); 34 C.F.R §300.34; 34 C.F.R §300.39.

³⁸ *Id.*

³⁹ *Dep’t of Educ. of Hawai’i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai’i 2016).

children.”⁴⁰ It is “a written statement for each child with a disability that is developed, reviewed, and revised” according to specific detailed procedures contained in the statute.⁴¹ The IEP is a collaborative education plan created by parents and educators who carefully consider the child’s unique circumstances and needs.⁴²

In determining whether a student has been denied a FAPE, the initial inquiry is whether the educational agency complied with the procedures set forth in the IDEA.⁴³ Procedural violations do not automatically result in a denial of FAPE, however, as a secondary determination must be made as to whether the violation resulted in a loss of educational opportunity, significantly infringed on parental participation or resulted in a deprivation of educational benefits.⁴⁴

A. Respondents did not deny Student an IEP unless Parent 1 formally enrolled Student at Home School.

Petitioners argue that Respondents denied Student an IEP unless Parent 1 formally enrolled Student at Home School, which resulted in a denial of FAPE. However, the evidence presented at the Hearing shows that while Home School did repeatedly ask Parent 1 to complete enrollment forms for Student, Home School proceeded with the process to evaluate Student, determine Student’s eligibility and attempted to schedule an initial IEP meeting to develop Student’s IEP.

The State of Hawai‘i Department of Education’s IDEA procedures are codified in the Hawai‘i Administrative Rules §8-60-1 *et seq.* These rules set forth the timelines by which the

⁴⁰ *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).

⁴¹ H.A.R. §8-60-2; 20 U.S.C. §1401(14); 34 C.F.R §300.22.

⁴² H.A.R. §8-60-45; 20 U.S.C. §1414; 34 C.F.R §300.321-300.322.

⁴³ *Amanda J. ex rel. Annette J. v. Clark County School Dist.* 267 F.3d 877, 890 (9th Cir. 2001) (citing *Rowley*, 458 U.S. at 206-207, 102 S.Ct. at 3034).

⁴⁴ *Id.* at 892.

procedures for the initial request, evaluation, determination of eligibility and IEP meeting for students must follow. Hawai'i Administrative Rules §8-60-33(c)(1) provides that the initial evaluation for students shall be conducted within sixty (60) days of the receipt of parental consent for evaluation.⁴⁵ Hawai'i Administrative Rules §8-60-38(a)(1) provides that upon completion of the assessments and other evaluation measures, a group of qualified professionals and the parent shall meet to determine if student is a student with a disability.⁴⁶ Finally, Hawai'i Administrative Rules §8-60-47(c)(1) provides that within fifteen (15) days of receipt of parental consent for services, the DOE shall ensure that an IEP meeting is conducted to develop the student's IEP.⁴⁷

After Parent 1 made an initial request for evaluation of Student, Home School scheduled a student-focused team to determine what assessments would be necessary for Student's evaluation.⁴⁸ Student's evaluation for eligibility was conducted within sixty (60) days of Parent 1 signing the Consent for Evaluation forms on June 4, 2020.⁴⁹ Student was determined to be eligible for special education services on July 16, 2020.⁵⁰ On July 21, 2020, Home School received Parent 1's signed Consent for Initial Provision of Special Education and Related Services and attempted to schedule a meeting to develop Student's IEP within fifteen (15) days, on July 31, 2020.⁵¹ Nothing in the record supports Petitioners' position that Respondents denied Student an IEP for failure to enroll in Home School.

⁴⁵ H.A.R. §8-60-33(c)(1); 20 U.S.C. §1414(a)(1)(C)(1); 34 C.F.R. §300.301(c)(1).

⁴⁶ H.A.R. §8-60-38(a)(1); 20 U.S.C. §1414(b)(4)(A); 34 C.F.R. §300.306(a)(1).

⁴⁷ H.A.R. §8-60-47(c)(1); *see also* 34 C.F.R. §300.323(c)(1).

⁴⁸ FOF 7-8.

⁴⁹ FOF 14.

⁵⁰ FOF 19.

⁵¹ FOF 20, 22-23.

Petitioners argue that by telling Parent 1 that Home School needed Parent 1 to complete enrollment forms before they could proceed with Student's IEP, that was an effective refusal to complete Student's IEP. This argument fails because despite the repeated requests by Home School for the enrollment forms and Parent 1's repeated refusal to complete the forms, Home School continued with the process of evaluating Student, determining Student's eligibility and attempting to develop an IEP for Student. While it is worth noting that a parent may have been confused by the statements by Home School and may not have kept up with communications from Home School, believing that their student was being refused an IEP, that is clearly not the case here. In this case Parent 1 was aware of the steps that Home School was taking in evaluating Student.⁵² Parent 1 was present at the eligibility meeting.⁵³ Parent 1 also received the emails to schedule the IEP meeting for Student but chose not to respond to Home School until after Student's proposed meeting date had passed.⁵⁴ Petitioners' argument that Parent 1 was led to believe that Student was being refused an IEP for failure to enroll Student at Home School is not supported by the record in this case.

Petitioners further argue that Home School did not move forward with the IEP process for Student until after Parent 1 filed the instant due process complaint. The IDEA envisions situations where schools may commit some kind of procedural error in the development of a student's IEP, and one of the avenues for a parent to get the school to correct the error is by way of raising a complaint to the school district.⁵⁵ In these situations, the IDEA also allows for

⁵² FOF 7, 10, 11.

⁵³ FOF 19.

⁵⁴ FOF 24-25.

⁵⁵ See *Kutasi v. Las Virgenes Unified School Dist.*, 494 F.3d 1162, 1166 (9th Cir. 2007) (citing 20 U.S.C. §1415(b)(6)(A)).

school districts to correct the error and make efforts to remedy the situation.⁵⁶ Here, even if it appeared that Home School originally believed enrollment was necessary before proceeding with an IEP for Student, Home School's attempts after the fact to proceed forward with the IEP process in conducting the evaluation, eligibility meeting and scheduling the IEP meeting for Student rendered any procedural error that Home School may have committed a harmless error, which does not rise to the level of a denial of FAPE.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that Respondents have not denied Student an IEP for Parent 1's refusal to enroll Student at Home School. Petitioners' request for reimbursement and assumption of the costs of Student's educational and related expenses 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 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, November 13, 2020.

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⁵⁶ *Id.* (citing 20 U.S.C. §1415(f)(1)(B)(i)(IV)).