



OFFICE OF DISPUTE RESOLUTION

DEPARTMENT OF THE ATTORNEY GENERAL

STATE OF HAWAI'I

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

Petitioner(s),

vs.

PARENTS of STUDENT,¹

Respondents.

DOE-SY2021-026

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

Due Process Hearing: November 2, 2020

Hearings Officer: Chastity T. Imamura

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On September 4, 2020, the Department of Education, State of Hawai'i and Christina Kishimoto, Superintendent of the Hawai'i Public Schools (hereinafter "Petitioners" or "DOE") submitted a Request for IDEA Impartial Due Process Hearing under the Hawai'i Administrative Rules Title 8, Chapter 60, in accordance with the Individuals with Disabilities Education Act, against Parents, as the parents/guardians of Student (hereinafter "Respondents" or "Parents").

¹ Personal identifiable information is contained in the Legend.

On September 4, 2020, a Letter to Parties, Hearing Guidelines, Notice of Prehearing Conference, Zoom Invitation and Zoom User Guide were sent via U.S. Postal Service Mail to DOE District Educational Specialist (hereinafter “DES”), on behalf of Petitioners, and Parents, on behalf of Respondents. In the Letter to Parties and the Notice of Prehearing Conference, notice was provided to both parties that the prehearing conference in this case was scheduled for Monday, September 14, 2020 at 2:30 p.m.

On September 9, 2020, Parent 1 called the Office of Dispute Resolution indicating that no one from their family would be able to attend the prehearing conference on September 14, 2020 at 2:30 p.m. On September 9, 2020, an email was also sent to the Office of Dispute Resolution that indicated that the Respondents were unavailable for the prehearing conference. On September 11, 2020, a telephone status conference was held with this Hearings Officer, DES, DOE District Teacher 1 and Parent 1. During the status conference, Parent 1 requested that the prehearing conference be rescheduled to September 30, 2020, which was granted. The prehearing conference was rescheduled to September 30, 2020 at 1:30 p.m.² Parent 1 also explained that Parent 1 was unavailable until late October and requested that the decision deadline of October 19, 2020 be extended to allow Parent 1 to participate in the prehearing conference and the subsequent Due Process Hearing (hereinafter “Hearing”). This Hearings Officer granted Respondents’ request and extended the deadline for the decision in this matter to December 3, 2020.³

On September 30, 2020, a prehearing conference was held by telephone with this Hearings Officer, Parent 1, DES, and DOE District Teacher 1. At the prehearing conference,

² See Order Rescheduling the Prehearing Conference, filed on September 14, 2020.

³ See Order Granting Respondents’ Request for Extension, filed on September 14, 2020.

Parent 1 requested that the Hearing be scheduled in November due to Parent 1's unavailability in October. The Hearing was scheduled by agreement of the parties for November 2 and 4, 2020 from 9:00 a.m. to 4:00 p.m. Due to the coronavirus 2019 global pandemic, this Hearings Officer informed the parties that the Hearing would need to be conducted via video conferencing to ensure compliance with government mandated social distancing.⁴ Parent 1 requested accommodations to participate in person. Parent 1's request was granted, and accommodations were arranged for Parent 1 to participate at the Office of Dispute Resolution using equipment and internet connections provided by the Office of Dispute Resolution. Parent 1 was also informed that any witnesses that needed accommodations would also be allowed to attend the Hearing in the same manner. All persons participating in the Hearing in person at the Office of Dispute Resolution would be subject to policies and procedures put in place based on recommendations from the Center for Disease Control and the State of Hawai'i Act with Care mandates.

On October 6, 2020, Parent 1 emailed the Office of Dispute Resolution to request a delay in the start time of the Hearing on November 2, 2020 from 9:00 a.m. to 11:00 a.m. due to scheduling issues. Parent 1's request was granted and an Order Delaying Start Time of the Due Process Hearing on November 2, 2020 was issued on October 6, 2020.

On October 20, 2020, at the request of Parent 1 based on Parent 1's allegations that one of the DOE's witnesses was harassing their family, the parties were offered to proceed in the Hearing using written testimony only, if both parties stipulated to waiving their rights to present and cross-examine any witnesses. A proposed written stipulation and sample written testimony forms were provided to both parties. On October 21, 2020, Petitioners rejected the proposed

⁴ See Governor of the State of Hawai'i's Thirteenth Proclamation Related to the COVID-19 Emergency, effective September 22, 2020.

procedures and did not agree to proceeding that way. Both parties were informed that proceeding via written testimony was no longer going to be allowed.⁵

On October 22, 2020, Parent 1 again alleged that one of the DOE's witnesses was harassing the family, and this Hearings Officer proposed another option of providing written testimony of specific witnesses, and a waiver of the right to cross-examine that witness. Sample forms were again provided to the parties. No response was heard from either party regarding this option.

An Order Providing Mandatory Procedures for Due Process Hearing (hereinafter "Order") was issued on October 22, 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 Order also included instructions and admonitions for civility during the hearing, such as instructions to speak during their turns, not raising their voices, refraining from the use of profane or offensive language, and having communications directed to the Hearings Officer and not to the opposing party.⁶

Prior to October 26, 2020, Parent 1 contacted the Office of Dispute Resolution and stated that the family has concerns about the DOE violating their privacy by using their children's information for a temporary restraining order in an unrelated matter. On October 26, 2020,

⁵ See Respondents' Exhibit 17, pages 053-054 (hereinafter referenced as "R-Ex.17, p.053-054").

⁶ See Order Providing Mandatory Procedures for Due Process Hearing, filed October 22, 2020.

Parent 1 called again and stated that since this Office was allowing the DOE to violate the privacy act, that the family does not want this Office to contact them.⁷ Parent 1 informed the legal clerk that if this Office calls or sends an invite with the Zoom Hearing invitation, they will call the police. Parent 1 repeated that this Office does not have any authority over them and cannot force them to participate. At that time, Parent 1 informed the legal clerk that neither Parent 1 nor Parent 2 will be participating in the Hearing in this case.

Parent 1 called the Office of Dispute Resolution again on October 27, 2020, October 29, 2020, and November 5, 2020, and reiterated that the family did not want to participate in the Hearing for this case and that they no longer wanted to receive any communications from this Office regarding this case.⁸

The Hearing commenced on November 2, 2020, 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. A letter containing the Zoom meeting identification number and password was also emailed to the parties on October 26, 2020. Emails encouraging both parties to participate in the Hearing were also sent on October 26, 2020, October 28, 2020 and November 2, 2020. Accommodations for Parent 1 as previously noted at the Office of Dispute Resolution were available for the Hearing. The Zoom meeting room was opened at 11:00 a.m. as scheduled. After waiting fifteen (15) minutes to see if Parents would appear either in person at the Office of Dispute Resolution, or on the Zoom conference, the Hearing began. Neither Parent 1 nor Parent 2 appeared at the Office of Dispute Resolution nor in the Zoom meeting, and no call or voicemail indicating their desire to participate was received from Parent 1 or Parent 2

⁷ See Telephone Call Log, filed on November 25, 2020.

⁸ See Telephone Call Log, filed on November 25, 2020.

at any time on November 2, 2020.

Present in the video conference Hearing were Hearings Officer Chastity T. Imamura; DES and DOE District Teacher 1 on behalf of Petitioners, as well as the assigned court reporter. At the Hearing, Petitioners called Student Services Coordinator (hereinafter “SSC”), DOE Psychologist 1 and Vice Principal 1 (hereinafter “VP1”) and rested. Petitioners submitted their exhibits for the Hearing by the disclosure deadline of October 26, 2020. Respondents requested that all the emails that were sent to the Office of Dispute Resolution be received as evidence, so the legal clerk of the Office of Dispute Resolution time-stamped, cataloged and paginated the emails sent from Student’s family. The time-stamped emails were also resent to the Petitioners and Respondents at or near the time they were received. The legal clerk also prepared a list of the emails as exhibits and the filed list was emailed to Petitioners and Respondents on October 27, 2020. All the exhibits received by Petitioners and Respondents were considered as part of the instant decision.

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 § 8-60-1, *et seq.*

III. ISSUES PRESENTED

Petitioners assert one (1) issue in the Complaint to be addressed at the Hearing:

1. Petitioners are requesting that this Hearings Officer allow the Hawai‘i DOE to complete the academic assessment using the current assessor to complete the initial evaluation requested by Parents without parental consent under Hawai‘i Administrative Rules §8-60-31(a)(3)(A).

IV. FINDINGS OF FACT

1. Student attended Previous School.⁹
2. Student had been determined eligible for special education and related services under the IDEA prior to August 2019; however, on August 13, 2019, Parents revoked their consent for special education and related services.¹⁰
3. Sometime in December 2019, Student stopped attending school at any Hawai‘i public school.¹¹
4. On February 23, 2020, Parent 2 sent an email to several recipients,¹² one of whom was a district educational specialist with the DOE. Included in this email was a request for Student to be tested for special education services. The email also listed a number of complaints against Student’s previous school and a proposed settlement offer for the DOE to pay for Student to attend a private school.¹³
5. On February 27, 2020, SSC received the email and took steps to coordinate a meeting for the evaluation of Student.¹⁴
6. On March 5, 2020, a meeting was held with a team from Home School and Parents to discuss Student’s initial evaluation, and what assessments would be completed as part

⁹ Testimony of SSC, Transcript page 28, lines 5-20 (hereinafter referenced as “Tr.25:5-20”); Petitioners Exhibit 2, page 4 (hereinafter referenced as “P-Ex.2, p.4”).

¹⁰ P-Ex.6, p.13.

¹¹ Testimony of DOE Psychologist 1, Tr.52:12-14; Testimony of VP1, Tr.79:23-25.

¹² These recipients appear to include a family law firm, Student’s prior school, the United States Department of Justice, and the Hawai‘i Ombudsman office.

¹³ P-Ex.1, p.1-2.

¹⁴ Testimony of SSC, Tr.12:3-24; Testimony of VP1, Tr.78:24-79:3.

- of Student's evaluation.¹⁵
7. Present at the March 5, 2020 meeting were a special education teacher, a counselor, Parent 2, Parent 1, Student, VP1, SSC, a second vice principal, and a dean of students.¹⁶
 8. At the March 5, 2020 meeting the team determined that Student's initial evaluation for special education services would include assessments in various areas. Parents agreed and consented to the assessments to be completed with Student.¹⁷
 9. On March 18, 2020, Home School Principal sent a letter to Parents informing them that testing for Student may be delayed due to the COVID-19 directives being issued by the government.¹⁸
 10. In June 2020, when the DOE was allowed to reopen school campuses, SSC began to schedule assessments for Student.¹⁹
 11. The assessments were completed with Student.²⁰
 12. On July 6, 2020, DOE Psychologist 1 was scheduled to conduct the assessment for Student.²¹
 13. The scheduling of the assessment dates was all coordinated through SSC, and DOE Psychologist 1 had no contact with Parents or Student other than on the July 6, 2020 assessment date.²²

¹⁵ Testimony of SSC, Tr.12:17-13:10; P-Ex.2, p.4.

¹⁶ Testimony of SSC, Tr. 26:21-27:24; Testimony of VP1, Tr.79:4-5.

¹⁷ Testimony of SSC, Tr.12:25-13:4, 28:1-4; Testimony of VP1, Tr.79:11-80:4; P-Ex.3, p.6.

¹⁸ P-Ex.5, p.10.

¹⁹ Testimony of SSC, Tr.13:14-24, 15:21-25.

²⁰ Testimony of SSC, Tr.16:1-3.

²¹ Testimony of SSC, Tr.16:10-14; Testimony of DOE Psychologist 1, Tr.41:5-9.

²² Testimony of SSC, Tr.16:15-22; Testimony of DOE Psychologist 1, Tr.63:7-14.

14. DOE Psychologist 1 was assigned by the district to conduct Student's assessment because of DOE Psychologist 1's extensive experience in conducting these types of assessments.²³
15. DOE Psychologist 1 has been employed by the DOE for twenty (20) years. DOE Psychologist 1 has a bachelor's degree in psychology and master's degree in school psychology. DOE Psychologist 1 has extensive training in conducting assessments, and currently is a trainer of other psychologists for conducting assessments.²⁴
16. Prior to the assessment date, DOE Psychologist 1 prepared for the assessment for Student by reviewing Student's prior individualized educational program (hereinafter "IEP"), evaluation and eligibility documents, and determined what assessments would be administered to Student. DOE Psychologist 1 determined that the best evaluation of Student's abilities would be Assessments, along with additional informal testing activities to determine Student's level compared to Student's last IEP information.²⁵
17. At no point did DOE Psychologist 1 or anyone from Home School inform Parents the specific assessments that would be conducted with Student as part of the assessment.²⁶
18. The Assessment is a standardized test that is designed to determine the abilities for all ages, including children and adults. This test is regularly relied upon by other psychologists in conducting assessments. This test must be administered according to

²³ Testimony of SSC, Tr.26:10-20; Testimony of VP1, Tr.94:2-23.

²⁴ Testimony of DOE Psychologist 1, Tr.36:1-38:24.

²⁵ Testimony of DOE Psychologist 1, Tr.44:8-23.

²⁶ Testimony of DOE Psychologist 1, Tr.91:15-22.

- specific protocols to obtain valid, interpretable scores.²⁷
19. The Assessment is a standardized test. While this test would not provide comparable results for Student, the information from the test could be used to get more specific information about Student's present abilities.²⁸
20. DOE Psychologist 1 also wanted to have Student do activities that were noted in Student's prior IEP's present levels of educational performance to assess whether Student is currently able to do those same activities.²⁹
21. On July 6, 2020, DOE Psychologist 1 went early to the testing site to prepare the area in accordance with COVID-19 regulations in anticipation of Student's assessment, which was scheduled for 9:00 a.m.³⁰
22. At around 9:15 a.m., after Student and Parent 2 had not come to the testing site, SSC called to check on their status. Parent 2 indicated that they were on their way.³¹
23. Parent 2 and Student arrived at around 9:40 a.m. and DOE Psychologist 1 noted that the testing began at 9:46 a.m.³²
24. As part of the testing procedure, DOE Psychologist 1 had planned to use an incentive as a positive reinforcer and placemaker for Student to use to indicate the tests that Student had completed. The use of an incentive was based on Student's prior IEP, which indicated that an incentive were a preferred item for Student.³³
25. DOE Psychologist 1 was able to complete the Assessment with Student by

²⁷ Testimony of DOE Psychologist 1, Tr.46:16-20, 65:5-19, 70:23-72:5.

²⁸ Testimony of DOE Psychologist 1, Tr.66:2-17.

²⁹ Testimony of DOE Psychologist 1, Tr.66:18-67:8.

³⁰ Testimony of DOE Psychologist 1, Tr.41:10-42:7.

³¹ Testimony of DOE Psychologist 1, Tr.42:8-12.

³² Testimony of DOE Psychologist 1, Tr.42:13-19.

³³ Testimony of DOE Psychologist 1, Tr.43:12-44:7.

- approximately 10:30 a.m. At that time, DOE Psychologist 1 decided to have Student take a break to walk around and check in with Parent 2.³⁴
26. When they took a break, Parent 2 asked if they were done with the assessment and how much longer would they need to complete the assessment. DOE Psychologist 1 informed Parent 2 that it would take approximately half an hour to complete the assessment with Student.³⁵
27. Since Parent 2 appeared to be in a rush to leave, DOE Psychologist 1 cut the break short and began the second portion of the test with Student.³⁶
28. About five (5) minutes after DOE Psychologist 1 had begun the second part of Student's assessment, Parent 2 knocked on the door to the testing room and handed Parent 2's phone to DOE Psychologist 1. Parent 1 was on the phone and began yelling at DOE Psychologist 1. Parent 1 then told DOE Psychologist 1 that Parent 2 and Student would be leaving the test at 10:50 a.m.³⁷
29. DOE Psychologist 1, who was reasonably shaken after being yelled at by Parent 1, resumed the assessment with Student. Knowing the short amount of time DOE Psychologist 1 had with Student, DOE Psychologist 1 completed one part of the assessment and decided to stop for the day. DOE Psychologist 1 did not have enough time to complete the full assessment and explained to Parent 1 (on the telephone) and Parent 2 that they were stopping for the day, so they could leave.³⁸
30. DOE Psychologist 1 was only able to complete a portion of the Assessment and did

³⁴ Testimony of DOE Psychologist 1, Tr.45:19-24.

³⁵ Testimony of DOE Psychologist 1, Tr.45:25-47:18.

³⁶ Testimony of DOE Psychologist 1, Tr.47:19-48:11.

³⁷ Testimony of DOE Psychologist 1, Tr.48:16-50:8.

³⁸ Testimony of DOE Psychologist 1, Tr.50:13-51:11.

not have the time to do the informal activities with Student based on Student's previous IEP.³⁹

31. DOE Psychologist 1 conducted the assessment with Student on July 6, 2020 in accordance with the DOE's protocols regarding the health and safety of students and staff and in accordance with the standardized protocols for the Assessment. DOE Psychologist 1 did not waste time during the abbreviated testing session with Student.⁴⁰
32. Based on DOE Psychologist 1's completion of the Assessment, DOE Psychologist 1 could obtain a standardized score for Student, and in DOE Psychologist 1's estimation, Student's score would indicate a need for special education services.⁴¹
33. The primary reason why DOE Psychologist 1 was not able to complete Student's assessment on July 6, 2020 was the tardy arrival of Parent 2 and Student and Parent 1's demand that Parent 2 and Student leave the testing by 10:50 a.m.⁴²
34. On July 10, 2020, SSC sent Parents a letter attempting to schedule the second session of testing for Student's assessment. In the letter, SSC explained the reasons for the additional session.⁴³
35. On July 14, 2020, SSC sent Parent 1 another letter attempting to schedule the second session for Student's assessment. The times offered to Parents were in one (1) hour intervals at the demand of Parent 1 that the testing be no longer than one (1) hour.⁴⁴

³⁹ Testimony of DOE Psychologist 1, Tr.59:2-13.

⁴⁰ Testimony of DOE Psychologist 1, Tr.53:8-60:25, 64:5-17.

⁴¹ Testimony of DOE Psychologist 1, Tr.69:2-12; Testimony of VP1, Tr.88:16-13, 92:3-93:15.

⁴² Testimony of DOE Psychologist 1, Tr.61:13-11.

⁴³ Testimony of SSC, Tr.11-23:5; P-Ex.7, p.15.

⁴⁴ Testimony of SSC, Tr.23:18-24:20; P-Ex.8, p.18.

36. On July 16, 2020, Parent 1 left a voice message with Home School indicating that Student would be available to complete the second session of the assessment on July 23, 2020 at 9:30 a.m.⁴⁵
37. Parent 1 canceled the assessment on July 23, 2020, but agreed to another date of August 6, 2020 at 9:30 a.m.⁴⁶
38. At some point after the July 6, 2020 assessment, Parent 1 began making complaints to Home School about DOE Psychologist 1 and demanding a new assessor for Student's assessment. VP1 investigated the complaints and did not determine them to be valid complaints.⁴⁷
39. One of the complaints raised by Parent 1 was that DOE Psychologist 1 was harassing the family of Student.⁴⁸ VP1 found this complaint to be invalid due to DOE Psychologist 1 having no contact with Student's family. All scheduling of the assessments or any contacts were through Home School and not directly with DOE Psychologist 1.⁴⁹
40. On August 3, 2020, DES sent a letter to Parent 1 indicating that the DOE had determined that DOE Psychologist 1 would not be removed as Student's assessor after investigation by the DOE.⁵⁰
41. On August 6, 2020, Home School made extra preparations for Student's assessment to address Parents' concerns regarding health and safety. These preparations included

⁴⁵ Testimony of VP1, Tr.80:22-81:4; P-Ex.9, p.20.

⁴⁶ Testimony of VP1, Tr.81:5-15; P-Ex.11, p.27-28.

⁴⁷ Testimony of VP1, Tr.81:22-83:85:3.

⁴⁸ See e.g. R-Ex.1, p.1, R-Ex.6, p.13, R-Ex.20, p.59-62, R-Ex.22, p.74-84, R-Ex.23, p.85-86.

⁴⁹ Testimony of VP1, Tr.82:24-25, 84:22-85:3.

⁵⁰ P-Ex.12, p.32.

- reserving a larger space for testing and having a larger table at which the assessment would be conducted, in addition to the protocols used at the first assessment date, which included having DOE Psychologist 1 wear a face mask and shield, sanitizing all equipment and having hand sanitizer available.⁵¹
42. On August 6, 2020, Parents did not bring Student to Home School for the completion of Student's assessment. Home School was notified approximately forty-five (45) minutes after Student's assessment was scheduled that Student would not be coming to the assessment.⁵²
43. On August 19, 2020, Parents sent an email to Home School reiterating their desire to have DOE Psychologist 1 removed as Student's assessor and informing Home School that they wanted to continue onto a meeting to discuss the results of Student's assessments.⁵³
44. After receiving a response from DES that Student's assessment had not been completed and an eligibility meeting would not be scheduled until all the tests are completed, Parents sent another email now requesting that the entire testing process be redone. Parents' response email alleged that all testing prior to July 6, 2020 were not done professionally.⁵⁴
45. On September 4, 2020, Petitioners submitted the instant Request for IDEA Impartial Due Process Hearing (hereinafter "Complaint").
46. Since the filing of the Complaint, Parent 1 has called the Office of Dispute Resolution

⁵¹ Testimony of DOE Psychologist 1, Tr.57:19-58:22; Testimony of VP1, Tr.87:7-88:15.

⁵² Testimony of VP1, Tr.87:7-25.

⁵³ P-Ex.14, p.36-40; R-Ex.1, p.2-3.

⁵⁴ P-Ex.14, p.40.

at least forty-four (44) times regarding this case and another case, making various demands, yelling at the legal clerk answering the telephones, using profanity and making complaints toward the Office of Dispute Resolution and others involved with the proceeding.⁵⁵

47. Parents have also sent numerous emails to the Office of Dispute Resolution at atg.odr@hawaii.gov making various complaints about the people involved in this case, the personnel at the Office of Dispute Resolution and declaring that this office has no authority over their family.⁵⁶

48. In several of the emails submitted, Parents have indicated that even if this Hearings Officer finds in favor of Petitioners, Parents will refuse to abide by any orders given by this Hearings Officer.⁵⁷

49. Parents have repeatedly made complaints about and have objected to various perceived slights to them, which they escalate into a refusal to participate or cooperate with the DOE despite the consequences to Student's education.⁵⁸

V. CONCLUSIONS OF LAW

A. 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

⁵⁵ See Telephone Call Log, filed November 25, 2020.

⁵⁶ See generally Respondents' Exhibits 1-43.

⁵⁷ See e.g., R-Ex.4, p.10-11, R-Ex.10, p.23-25, R-Ex.13, p.30-33, R-Ex.16, p.51-52, R-Ex.21, p.63-73, R-Ex.34, p.111-112, R-Ex.43, p.135-138.

⁵⁸ Testimony of VP1, 98:12-101:22; see e.g., R-Ex.3, p.8-9, R-Ex.4, p.10-11, R-Ex.6, p.14-15, R-Ex.9, p.21-22, R-Ex.13, p.30-33, R-Ex.15, p.44-50, R-Ex.19, p.57-58, R-Ex.23, p.85-86, R-Ex.34, p.111-112, R-Ex.39, p.121-122, and Telephone Call Log, filed November 25, 2020.

services designed to meet their unique needs.”⁵⁹ A FAPE includes both special education and related services.⁶⁰

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.⁶¹ 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.”⁶²

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 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.⁶³ 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(s) shall meet to determine if student is a student with a disability.⁶⁴

B. Validity of the Assessments Conducted by Petitioners

Petitioners argue that the assessment to be completed by DOE Psychologist 1 is in conformity with the IDEA and should be allowed to be completed for Student’s evaluation.

⁵⁹ *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)).

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

⁶¹ *Id.*

⁶² *Dep’t of Educ. of Hawai‘i v. Leo W. by & through Veronica W.*, 226 F.Supp.3d 1081, 1093 (D. Hawai‘i 2016).

⁶³ 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).

⁶⁴ H.A.R. §8-60-38(a)(1); 20 U.S.C. §1414(b)(4)(A); 34 C.F.R. §300.306(a)(1).

Hawai‘i Administrative Rules Section 8-60-36(c) provide the parameters by which assessments for students undergoing an evaluation for special education services under the IDEA must be conducted.⁶⁵ The record here demonstrates that the assessment proposed and partially completed by DOE Psychologist 1 complies with the recommended requirements under the IDEA.

Prior to the date of the assessment, DOE Psychologist 1 did a variety of background research to determine the most suitable assessments to be conducted with Student to get an accurate evaluation of Student’s abilities.⁶⁶ DOE Psychologist 1 has extensive experience in selecting and administering assessments and has been trained in the proper protocols necessary to obtain an accurate standardized score.⁶⁷ DOE Psychologist 1 selected assessments that were widely accepted by others in the field as being an accurate assessment of skills.⁶⁸

On the date of the assessment, DOE Psychologist 1 followed the proper health and safety protocols in preparing for Student’s arrival.⁶⁹ Parent brought Student nearly an hour late to the test, delaying the start of Student’s assessments.⁷⁰ DOE Psychologist 1 administered the assessment to the best of DOE Psychologist 1’s ability in the shortened time frame allotted, and with the proper protocols under the assessment and the State of Hawai‘i mandatory health and safety procedures for the COVID-19 pandemic.⁷¹ DOE Psychologist 1 was able to complete the Assessment, from which DOE Psychologist 1 would be able to get a standardized result for

⁶⁵ H.A.R. §8-60-37(b)-(c); 34 C.F.R. §300.304(b)-(c).

⁶⁶ FOF 16.

⁶⁷ FOF 15.

⁶⁸ FOF 18-19.

⁶⁹ FOF 21.

⁷⁰ FOF 23.

⁷¹ FOF 31.

Student. DOE Psychologist 1's opinion based on Student's performance on the Assessment is that Student would be eligible for special education services.⁷²

Nothing in the record supports a finding that DOE Psychologist 1 should be replaced as the assessor for the completion of Student's assessment. Even though DOE Psychologist 1 did indicate that another person could complete the assessment if necessary, this Hearings Officer concludes that there is no legal basis to order Petitioners to replace DOE Psychologist 1 for Student's assessment. This Hearings Officer concludes that Petitioners' have proven that the assessments conducted for Student's evaluation, specifically the assessment, were properly administered and that Parents are not entitled to an independent educational evaluation.

C. Petitioners' Requested Remedy

In the Prehearing Order, the issue was clarified for this matter for this Hearings Officer to further find that Petitioners may complete the assessment for Student with DOE Psychologist 1 without consent from Respondents. However, upon review of the record, it is clear that Respondents have not refused or revoked consent for Student to complete the assessment, so this Hearings Officer declines to address the clarified issue in the Prehearing Order and will instead address the requested remedy specified in Petitioners' Complaint.

In the Complaint, Petitioners request that this Hearings Officer order Parents to make Student available for the continued assessment with DOE Psychologist 1. Parents have repeatedly insisted that even if this Hearings Officer makes such an order, they will continue to refuse to work with DOE Psychologist 1.⁷³ The IDEA grants administrative hearings officers with vast equitable powers to provide remedies for parents when their children are denied a

⁷² FOF 32.

⁷³ FOF 48.

FAPE by a school district.⁷⁴ However, nothing in the IDEA provides for administrative hearings officers or courts to place demands on parents who are responding to a request for due process hearing filed by the school district.⁷⁵ Further, even if this Hearings Officer provided such an order, Parents have already indicated that they will disregard such an order. Therefore, this Hearings Officer will not grant Petitioners' request to order Parents to make Student available to complete the assessment with DOE Psychologist 1.

D. Equitable Resolution

The equitable powers conferred upon administrative hearings officers and courts under the IDEA encourages reviewing bodies to find "appropriate relief designed to ensure that the student is appropriately educated within the meaning of the IDEA."⁷⁶ In doing so, "the conduct of both parties must be reviewed to determine whether relief is appropriate."⁷⁷ Here, it is clear from the record that Parents' behavior in bringing Student late to the assessment, setting a shortened time limit for the completion of the assessment, and refusing to bring Student to complete the assessment, is entirely the basis for Student's assessment having not been completed.⁷⁸ While Parents' behavior toward the school and other officials at the DOE should not be encouraged,⁷⁹ this Hearings Officer is concerned that Student has not been in any school system with special education services and supports since December 2019.⁸⁰ While VP1 believed it would be irresponsible for the IEP team to determine Student's eligibility and prepare

⁷⁴ See, e.g. *R.P. ex rel. C.P. v. Prescott Unified School Dist.*, 631 F.3d 1117, 1125-1126 (9th Cir. 2011).

⁷⁵ See, e.g. H.A.R. §8-60-67.

⁷⁶ *Parents of Student W. v. Puyallup School Dist., No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994).

⁷⁷ *Id.* at 1496.

⁷⁸ FOF 23, 28-29.

⁷⁹ FOF 46-47, 49.

⁸⁰ FOF 3.

an IEP for Student, due to assessments not being completed, it is also clear that there is sufficient data from which the IEP team may hold a meeting regarding eligibility of Student for IDEA services. The assessments have been completed and at least one standardized, measurable assessment had been completed with Student.⁸¹ DOE Psychologist 1 noted that while Student's scores for the Assessment had not yet been calculated, there was enough data to calculate the scores and that based on Student's performance on the test, Student would be in need of services.⁸²

This Hearings Officer further notes that some of the additional tasks that DOE Psychologist 1 wanted to do with Student, such as having Student work on some of the tasks Student was able to perform in Student's previous IEP, could be done while Student is in the classroom. While the situation may not be ideal for the IEP team to determine all of the services Student may need to make progress, an eligibility meeting at this point would at least get a preliminary version of an IEP developed for Student and ideally get Student into school.

VI. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Hearings Officer finds that the assessments conducted by Petitioners to be appropriate and that Parents are not entitled to an independent educational evaluation. This Hearings Officer further finds that nothing in the record supports ordering Petitioners to replace DOE Psychologist 1 as the assessor for Student's assessment; however, Parents are NOT being ordered at this time to make Student available for the assessment completion with DOE Psychologist 1. Finally, while this Hearings Officer declines to order it at this time, it is strongly suggested that Petitioners

⁸¹ FOF 11, 25.

⁸² FOF 32.

consider holding Student's eligibility meeting based on the results of the three completed assessments and on the portion of the assessment completed by DOE Psychologist 1 with Student.

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 27, 2020.

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