

JAN 25 2006

A BILL FOR AN ACT

RELATING TO EDUCATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The Individuals with Disabilities Education Act
2 of 1975, amended in 1997 and 2004 (20 U.S.C. 1400 *et seq.*)
3 (IDEA), ensures fair and equal access to free and appropriate
4 public education for children with a disability. Prior to the
5 IDEA's enactment, Congress had found that education for children
6 with a disability continued to be impeded by low expectations
7 and an insufficient implementation of scientifically-proven
8 teaching methods. Congress built into the IDEA procedural
9 safeguards to protect families' rights in the event parents or
10 guardians are not satisfied with their child's individualized
11 education program (IEP) provided by the public school
12 administration. These safeguards include, among other things, a
13 right to request an impartial administrative hearing to review
14 the adequacy of an IEP.

15 Section 302A-443, Hawaii Revised Statutes, was passed
16 pursuant to the IDEA and outlines administrative hearing
17 procedures concerning the education of children with a
18 disability. Paragraph (a)(1) sets forth a two-year statute of



1 limitation to request an administrative hearing which commences
2 at the time the petitioner knew or should have known about the
3 alleged action that formed the basis for the hearing. In
4 contrast, paragraph (a)(2) creates a separate, ninety-day
5 statute of limitations to bring an action, if the action seeks
6 cost reimbursement for a unilateral special education placement.
7 This ninety-day statute of limitation reduces the incentive for
8 department officials to seek a negotiated resolution to a
9 dispute when the damages that parents can claim is capped at a
10 mere three months of tuition paid for an alternative placement.
11 It also poses an added burden to parents and guardians to assert
12 a claim of this kind in an unreasonably and arbitrarily brief
13 period of time that can be unjust under the circumstances.
14 Further, the shorter statute of limitation is inconsistent with
15 the two-year statute of limitation provided by HRS §302A-
16 443(a)(1) and should be changed to a uniform two-year statute of
17 limitations.

18 In addition, both the IDEA and HRS §302A-443 are silent as
19 to which party bears the burden of proof in administrative
20 proceedings brought pursuant to their provisions. In
21 recognition of the special role the department of education
22 plays in the educating children with disabilities, it is only



1 fair that the department bears the burden of proof in
2 administrative proceedings brought under the IDEA. The IDEA and
3 the No Child Left Behind Act both impose affirmative legal
4 duties on the school system to provide highly-qualified
5 teachers, and to implement peer-reviewed, scientifically-based
6 instruction and intervention strategies so that children with a
7 disability may close the achievement gap with non-disabled peers
8 and achieve their developmental and educational goals. An
9 underlying assumption of the IDEA is that the department's
10 erroneous denial of special education services will cause
11 serious harm to a child's long-term development. It should be
12 noted that the department controls much of the information and
13 resources pertaining to a particular child with a disability,
14 including experts and witnesses who work with the child daily,
15 scientifically-based instruction and intervention strategies,
16 and observation and child study team data. This being the case,
17 the department is in the best position to demonstrate that a
18 disabled child's IEP is appropriate to meet the child's unique
19 developmental and educational needs, as well as the heightened
20 requirements of the IDEA. Moreover, parents and guardians often
21 lack the financial resources and access to comparative data
22 involving other similarly situated children with which to mount

1 an effective challenge to the IEP proposed by their child's
2 school. Placing the burden of proof on the department provides
3 an added safeguard that the department's initial IEP is based
4 upon a sound, comprehensive review of the child's unique
5 developmental, educational, and functional needs, and
6 incorporates empirically-validated, peer-reviewed intervention
7 strategies to the greatest extent practicable, which will reduce
8 the number of potential disputes raised by parents.

9 The purpose of this Act is to clarify the procedures
10 through which the department of education shall provide fair
11 access to free and appropriate public education to children with
12 disabilities by:

13 (1) Repealing the ninety-day statute of limitation allowed
14 for parents or guardians to recover education
15 placement costs; and

16 (2) Placing the burden of proof on the department of
17 education in administrative hearings brought pursuant
18 to the IDEA.

19 SECTION 2. Section 302A-443, Hawaii Revised Statutes, is
20 amended to read as follows:

21 **"§302A-443 Administrative hearing procedures and subpoena**
22 **power relating to the education of children with a disability.**



1 (a) An impartial hearing may be requested by any parent or
2 guardian of a child with a disability, or by the department, on
3 any matter relating to the identification, evaluation, program,
4 or placement of a child with a disability; provided that the
5 hearing is requested[+]

6 ~~(1) Within~~ within two years of the date the parent,
7 guardian, or department knew or should have known
8 about the alleged action that formed the basis of the
9 request for a hearing[; and

10 ~~(2) Notwithstanding paragraph (1), within ninety days of a~~
11 ~~unilateral special education placement, where the~~
12 ~~request is for reimbursement of the costs of the~~
13 ~~placement].~~

14 (b) Subsection (a) shall not apply to a parent or guardian
15 of a child with a disability if the parent or guardian was
16 prevented from requesting the hearing due to:

17 (1) Specific misrepresentations by the department that it
18 had resolved the problem that formed the basis of the
19 complaint; or

20 (2) The department's withholding from the parent or
21 guardian information that was required by state or
22 federal laws and regulations to provide a free,



1 appropriate public education to a child with a
2 disability.

3 (c) The department shall adopt rules that conform to the
4 requirements of any applicable federal statutes or regulations
5 pertaining to the impartial hearing based on the education of a
6 child with a disability. The rules shall require that any party
7 may be present at the proceeding, be accompanied and advised by
8 counsel or individuals with special knowledge or training with
9 respect to the problems of children with a disability, may
10 require witnesses to be under oath, cross-examine witnesses, and
11 obtain a written or electronic verbatim record of the
12 proceedings.

13 (d) Any party to these hearings or the hearings officer
14 shall have the right to compel the attendance of witnesses upon
15 subpoena issued by the hearings officer. The fees for
16 attendance shall be the same as for the fees of witnesses before
17 circuit court. In case of the failure of any person to comply
18 with a subpoena, a circuit court judge of the judicial circuit
19 in which the witness resides, upon application of the hearings
20 officer, shall compel attendance of the person.

21 (e) In an administrative hearing held under this section,
22 the department shall bear the burden of proof, based solely upon




1 the evidence and testimony presented at the hearing, that the
 2 action or proposed placement is adequate to meet the appropriate
 3 public education needs of the student in the least restrictive
 4 environment. If a hearing officer finds against the department
 5 and a parent or guardian subsequently seeks reimbursement from
 6 the department for a student's alternative private placement,
 7 the burden of proof shall be on the parent or guardian to
 8 demonstrate that the private placement is appropriate. In any
 9 hearing held under this section, the standard of proof shall be
 10 by a preponderance of the evidence, except when the issue is
 11 whether maintaining the current placement of the child is likely
 12 to result in injury to the child or others, in which case the
 13 standard is substantial evidence, which is evidence that is more
 14 than a preponderance of the evidence."

15 SECTION 3. Statutory material to be repealed is bracketed
 16 and stricken. New statutory material is underscored.

17 SECTION 4. This Act shall take effect on July 1, 2006.

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19

Report Title:

Administrative Hearing Procedures; Children with Disabilities

Description:

Repeals ninety-day statute of limitation for parents or guardians seeking reimbursement of a child's unilateral special education placement costs. Assigns burden of proof to the DOE in administrative hearings brought under the Individuals with Disabilities Education Act.

