
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)(2) creates a ninety-day statute of



1 limitations to request a hearing when the request seeks
2 reimbursement of costs for a unilateral private education
3 placement. This provision has been the source of some confusion
4 over when the statute of limitations begins to toll. This must
5 be clarified in the interest of fairness to all concerned.

6 Both the IDEA and HRS §302A-443 are silent about which
7 party bears the burden of proof in administrative proceedings
8 brought pursuant to their provisions. In recognition of the
9 special role the department of education plays in the educating
10 children with disabilities, it is only fair that the department
11 bears the burden of proof in administrative proceedings brought
12 under the IDEA. The IDEA and the No Child Left Behind Act both
13 impose affirmative legal duties on the school system to provide
14 highly-qualified teachers, and to implement peer-reviewed,
15 scientifically-based instruction and intervention strategies so
16 that children with a disability may close the achievement gap
17 with non-disabled peers and achieve their developmental and
18 educational goals. An underlying assumption of the IDEA is that
19 the department's erroneous denial of special education services
20 will cause serious harm to a child's long-term development. It
21 should be noted that the department controls much of the
22 information and resources pertaining to a particular child with



1 a disability, including experts and witnesses who work with the
2 child daily, scientifically-based instruction and intervention
3 strategies, and observation and child study team data. This
4 being the case, the department is in the best position to
5 demonstrate that a disabled child's IEP is appropriate to meet
6 the child's unique developmental and educational needs, as well
7 as the heightened requirements of the IDEA. Moreover, parents
8 and guardians often lack the financial resources and access to
9 comparative data involving other similarly situated children
10 with which to mount an effective challenge to the IEP proposed
11 by their child's school. Placing the burden of proof on the
12 department provides an added safeguard that the department's
13 initial IEP is based upon a sound, comprehensive review of the
14 child's unique developmental, educational, and functional needs,
15 and incorporates empirically-validated, peer-reviewed
16 intervention strategies to the greatest extent practicable,
17 which will reduce the number of potential disputes raised by
18 parents. If there are administrative hearings or appeals
19 brought by a parent or guardian subsequent to the initial IEP
20 challenge, the burden would shift to the parent or guardian to
21 prove the basis for the subsequent challenge.



1 The purpose of this Act is to clarify the procedures
2 through which the department of education shall provide fair
3 access to free and appropriate public education to children with
4 disabilities by:

5 (1) Establishing that the ninety-day limitation period to
6 recover costs of a unilateral private education
7 placement begins to run on the date that a parent or
8 guardian enrolls the special needs child in a private
9 school;

10 (2) Placing the burden of proof on the department of
11 education in the initial administrative hearing
12 brought pursuant to the IDEA; and

13 (3) Shifting the burden of proof, in the event that there
14 is an administrative hearing requested a parent or
15 guardian subsequent to an initial IEP challenge, to
16 the parent or guardian to prove the basis for the
17 subsequent challenge.

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

20 **"§302A-443 Administrative hearing procedures and subpoena
21 power relating to the education of children with a disability.**

22 (a) An impartial hearing may be requested by any parent or

1 guardian of a child with a disability, or by the department, on
2 any matter relating to the identification, evaluation, program,
3 or placement of a child with a disability; provided that the
4 hearing is requested:

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

9 (2) Notwithstanding paragraph (1), within ninety days of a
10 unilateral special education placement, where the
11 request is for reimbursement of the costs of the
12 placement. This period begins to run on the date that
13 a parent or guardian enrolls the child in a private
14 school.

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

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

21 (2) The department's withholding from the parent or
22 guardian information that was required by state or



1 federal laws and regulations to provide a free,
2 appropriate public education to a child with a
3 disability.

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

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

1 (e) In an administrative hearing held under this section,
2 the department shall bear the burden of proving, based solely on
3 the evidence and testimony presented at the hearing, that the
4 action or proposed placement is adequate to meet the appropriate
5 public education needs of the student in the least restrictive
6 environment. If a hearing officer finds against the department,
7 and a parent or guardian subsequently seeks reimbursement from
8 the department of the costs for a student's alternative private
9 placement, the burden of proof shall be on the parent or
10 guardian to demonstrate that the private placement is
11 appropriate.

12 (f) If a parent or guardian requests an administrative
13 hearing or brings an action against the department to challenge
14 the IEP subsequent to an adverse ruling on the parent or
15 guardian's initial challenge of the IEP under section (e), the
16 burden of proof shall be on the parent or guardian.

17 (g) In any hearing held under this section, the standard
18 of proof shall be by a preponderance of the evidence, except
19 when the issue is whether maintaining the current placement of
20 the child is likely to result in injury to the child or others,
21 in which case the standard is substantial evidence, which is
22 evidence that is more than a preponderance of the evidence."



1 SECTION 3. New statutory material is underscored.

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

Report Title:

Administrative Hearing Procedures; Children with Disabilities

Description:

Assigns burden of proof to the DOE in initial challenges to IEP in administrative hearings brought under the Individuals with Disabilities Education Act; shifts burden to parent or guardian in subsequent challenges following ruling adverse to parent or guardian. (SD1)

