
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 and
7 an insufficient implementation of scientifically-proven teaching
8 methods. Congress built into the IDEA procedural safeguards to
9 protect families' rights in the event parents or guardians are
10 not satisfied with their child's individualized education program
11 (IEP) provided by the public school administration. These
12 safeguards include, among other things, a right to request an
13 impartial administrative hearing to review the adequacy of an
14 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



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



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



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1 The purpose of this Act is to clarify the procedures through
2 which the department of education shall provide fair access to
3 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 brought
12 pursuant to the IDEA; and

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

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.**

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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 two years of the date the parent, guardian, or
7 department knew or should have known about the alleged
8 action that formed the basis of the request for a
9 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. This period begins to run on the date that
14 a parent or guardian enrolls the child in a private
15 school.

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

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

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1 (2) The department's withholding from the parent or
2 guardian information that was required by state or
3 federal laws and regulations to provide a free,
4 appropriate public education to a child with a
5 disability.

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

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



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1 in which the witness resides, upon application of the hearings
2 officer, shall compel attendance of the person.

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

14 (f) In any appeal of the administrative hearing, the
15 department shall have the burden of presentation, and the party
16 bringing the appeal shall have the burden of proof.

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."



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- 1 SECTION 3. New statutory material is underscored.
- 2 SECTION 4. This Act shall take effect on July 1, 2006.



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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. Gives the DOE the burden of presentation and the appellant the burden of proof in an appeal of the initial decision. (SD2)

