

Date of Hearing: February 6, 2008

Committee: House Education

Department: Education

Person Testifying: Patricia Hamamoto, Superintendent

Title: H.B. No. 2186, Relating to Education

Purpose: Extends the deadline within which to file a request for a due process hearing relating to the education of a child with a disability from ninety days to two years when the request is for reimbursement of costs of a child's placement. Requires the department to adopt rules that provide for the reimbursement of expert witness and other relevant fees and expenses associated with a hearing. Requires the establishment of an appeals board and process wherein a state review officer shall review the decisions of the impartial hearings officers.

Department's Position: The Department of Education (Department) does not support H.B 2186. Prior to the 2005 Legislative Session, all due process hearing requests filed under the Individuals with Disabilities Education Act (IDEA) was limited to a general state statute of limitations of two years. The 2005 Legislation Session enacted Hawaii Revised Statutes (HRS) §302A-443 which distinguished the statute of limitations for a specific kind of due process hearing relating to the reimbursement of private school tuition. During the 2005 Legislative Session, the Legislature accepted testimony that described the undue

burden of allowing a two-year delay before requesting private school reimbursement.

When a parent unilaterally places a student with disabilities in a private school against the proposal of the Department, the Department has no authority to monitor the progress of the student unilaterally placed in the private school. Thus, the Legislature recognized the inequity of the two-year statute of limitations for the filing of the due process hearing for a student's private school tuition reimbursement that began two years prior.

HRS 302A-443 appropriately distinguished a parent's request for reimbursement for private school tuition and limits the filing of a due process hearing request for the reimbursement of private school tuition to 90 days.

The bill proposes to extend the statute of limitations for the filing of a due process hearing request for the reimbursement of private school tuition, which does not distinguish the private school tuition issue from other due process hearing issues. If this bill is enacted, there will be confusion with the other statute of limitations which sets the limit. Section (c)(3) and (e) are contrary to United States Supreme Court precedence and the federal IDEA, respectively. The Department is unable to support H.B. 2186.



**TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FOURTH LEGISLATURE, 2008**

ON THE FOLLOWING MEASURE:

H.B. NO. 2186, RELATING TO EDUCATION.

BEFORE THE:

HOUSE COMMITTEE ON EDUCATION

DATE: Wednesday, February 6, 2008 **TIME:** 2:00 PM

LOCATION: State Capitol, Room 309

Deliver to: State Capitol, 415 Beretania Street, Honolulu, Hawai'i, 96813, Room 324, 5 copies

TESTIFIER(S): Mark J. Bennett, Attorney General
or Holly T. Shikada, Deputy Attorney General
or Elise A. Amemiya, Deputy Attorney General

Chair Takumi and Members of the Committee:

The Attorney General opposes this bill.

This bill provides for the extension of the deadline to file a request for an impartial due process hearing relating to the education of a child with a disability from ninety-days to two years when the request is for reimbursement of the costs of the child's placement. This bill also requires the Department of Education to adopt rules that allow the recovery of expert witness fees and other relevant fees and expenses associated with a hearing. Finally, this bill provides the establishment of a state appeals board and process to review the decisions of the impartial hearings officers.

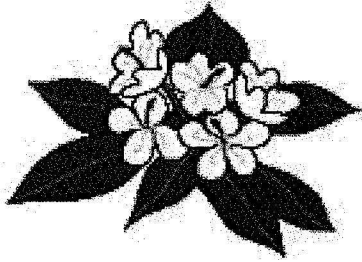
Enlarging the period of time in which a parent may file a request for an impartial hearing may be detrimental to the child. This is because the determination of the appropriateness of the student's education potentially may not be made until two years later. From a lay person's perspective, it is hard to imagine that waiting longer to resolve an issue relating to a child's education is better than addressing the concerns and problems immediately. Furthermore, during this time, a child may be in an inappropriate educational setting and the State is unable to monitor the progress of a disabled child when the child is unilaterally placed by parents

in a private school. This will also create a greater challenge for the State to present its case because administrators, teachers, and other service providers working with the student may change from year to year. Accordingly, enlarging the period of time in which a parent may challenge a school's offer of free appropriate public education would prove difficult to defend when school personnel change and memories fade.

The issue regarding whether parents of a disabled student, having prevailed in an Individuals with Disabilities Education Act ("IDEA") administrative hearing, may recover expert consultant fees was addressed by the United States Supreme Court in the case of Arlington Central School District Board of Education v. Murphy, 126 S. Ct. 2455 (2006). In the Murphy case, the Court held that non-attorney expert fees for services rendered to prevailing parents in IDEA cases are not "costs" recoverable from the state. Based upon the Murphy case, IDEA does not provide for the recovery of expert witness fees and therefore federal funds cannot be used. Accordingly, if this bill is passed, an additional provision appropriating state moneys to fund the reimbursement of expert witness fees to prevailing parents must be added.

Finally, with regard to the establishment of a state review officer and process, the current due process system does not provide a "two-tier" review system. The IDEA allows states to provide reviews at a local educational agency ("LEA") level and a state educational agency ("SEA") level. However, in Hawaii, impartial hearings officers sit as both the LEA and SEA. Establishing a state review officer would, in essence, create another state review and not necessarily a "two-tier" review system.

The Attorney General respectfully requests that this bill be held by the Committee.



S E A C
Special Education Advisory Council

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February 6, 2008

TESTIMONY TO THE HOUSE COMMITTEE ON EDUCATION

**Special Education
Advisory Council**

RE: HB 2186 - Relating to Education

Ms. Ivalee Sinclair, *Chair*
Mr. Steve Laracuenta, *Vice
Chair*

Ms. Janet Bamford
Dr. Paul Ban, *Liaison
to the Superintendent*
Ms. Sue Brown
Ms. Deborah Cheeseman
Ms. Phyllis DeKok
Mr. Lee Dean
Ms. Mary Ellis
Ms. Debra Farmer
Ms. Gabriele Finn
Ms. Martha Guinan
Mr. Henry Hashimoto
Ms. Tami Ho
Ms. Barbara Ioli
Ms. Valerie Johnson
Ms. Shanelle Lum
Ms. Rachel Matsunobu
Ms. June Motokawa
Ms. Barbara Pretty
Ms. Susan Rocco, *Ex-officio*
Dr. Patricia Sheehey
Mr. August Suehiro
Ms. Jan Tateishi, *Ex-officio*
Ms. Judy Tonda
Dr. John Viesselman
Ms. Cari White
Ms. Jasmine Williams
Mr. Duane Yee
Mr. Wilfred Young

The Special Education Advisory Council, Hawaii's State Advisory Panel under the Individuals with Disabilities Education Act (IDEA), supports the sections of the above bill that: 1) extend the timeline to file a due process complaint for reimbursement of the costs of a unilateral private school placement to two years, and 2) allow for the reimbursement of expert witness and other relevant fees and expenses when a parent prevails in a due process hearing. We do not support the establishment of an appeals board and process of review of hearing decisions by a state review officer.

The most recent amendments to the Individuals with Disabilities Education Act allow a parent up to two years to file a due process complaint on any matter related to a child's identification, evaluation educational placement or the provision of FAPE. These amendments also allow the Department a 10 day period to try to reconcile differences with parents over their child's placement by requiring the parent to give written notice to the Department at least 10 days prior to removing their child from public school, stating their concerns and intent to enroll their child in a private school at public expense. If the parent does not provide this notice or notify the IEP Team at the most recent IEP meeting that they reject the placement proposed by the Department, a hearing officer may reduce or deny the parent's request for reimbursement for the costs of private placement.

SEAC finds the language in IDEA regarding the filing of due process complaints sufficient to provide protections to both parents and schools. The imposition of a 90 day timeline specific to unilateral placements in state statute, however, is potentially unfair to parents who may be unaware of the timeline or have difficulty securing legal counsel to advise them within this short window of opportunity. SEAC has been notified of several parents who were denied access to due process, because they missed the 90 day timeline (in one instance, by one day).

Mandated by the Individuals with Disabilities Education Act



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SEAC also supports the second element of this bill--to allow reimbursement to parents for expert witness and other related fees, when a parent prevails in a due process hearing. Two recent Supreme Court decisions have impacted the parent's ability to provide an adequate argument in a due process hearing to show that a student's rights under IDEA have been violated. *Schaffer vs. Weast* established that the party initiating the due process complaint has the burden of proof based on the preponderance of evidence. Shortly thereafter, the Supreme Court, in *Arlington Central School District vs. Murphy*, ruled that IDEA did not allow for the reimbursement of expert witness fees to parents who prevail in a due process hearing.

The result of these two decisions is to put parents at a distinct disadvantage in a due process hearing. They are required to prove by a preponderance of the evidence that the Department failed to provide for FAPE for their child, and yet they may be restricted in providing expert witnesses to help prove their case, due to the costs of these witnesses which are not reimbursable. The Department on the other hand, has deep pockets and free reign to compel its own employees to testify as expert witnesses at these hearings. SEAC believes, therefore, that it is important to level the playing field by allowing parents to recoup these expenses, when they are the prevailing party in a due process hearing.

SEAC does not believe that there is a need for the third element of this legislation--the establishment of an appeals board and process of review of hearing decisions by a state review officer. The State Special Education Section has a Complaints Officer who routinely reviews decisions, and parties to a due process hearing currently have the right to appeal the decision of a hearing officer within thirty days to state or federal court.

Thank you for the opportunity to present testimony on this issue. Should you have any questions regarding our position, you are welcome to contact me by phone or email.

Sincerely,

Ivalee Sinclair, Chair



COMMUNITY CHILDREN'S COUNCIL OFFICE

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February 5, 2008

The Honorable Roy M. Takumi

RE: HB 2186: DOE; SPED; Due Process; Hearings and Appeals

Representative Roy Takumi and the committee,

The 17 Community Children's Councils in Hawaii support the bill with amendments of this bill. Our brochure is attached.

We fully support the repeal of the 90 calendar days in which parents must file an appeal in any unilateral placement of a child in a private placement. We strongly endorse the two year timeline for appeal based on the Supreme Court decision allowing a two year time for appeal in due process matters. We also support the subpoena power of the administrative hearing office as well as the reimbursement of expert witnesses. We recommend that this section requiring a state officer to review the findings be deleted.

Our reasons for supporting this bill are:

1. Many parents have not been; informed about the timeline;
2. The start of the timeline is actually before the student starts in the private placement creating difficulty for all parties;
3. Parents are not reimbursed for expert witness fees while department personnel are on the payroll. This practice is not equitable in our opinion.

We oppose the review of hearing decision by a state review officer because the state law only allows 30 calendar days for an appeal to be filed in either state or federal court. The review would greatly hinder the appeal process and is unnecessary. We respectfully request that this section of the bill be deleted.

We will be happy to answer any questions that you may have. Thank you for this opportunity to address HB 2186.

Sincerely,

Charlotte Kamauoha, Parent Co-Chair

Tom Smith, Professional Co-Chair

Signatures on file

