



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

L A T E

ON THE FOLLOWING MEASURE:
S.B. NO. 2004, RELATING TO EDUCATION.

BEFORE THE:
SENATE COMMITTEE ON EDUCATION AND SENATE COMMITTEE ON HUMAN SERVICES
AND PUBLIC HOUSING

DATE: Monday, February 4, 2008 TIME: 3:00 PM

LOCATION: State Capitol, Room 225
Deliver to: Committee Clerk, Room 230, 1 copy

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

Chairs Sakamoto and Chun Oakland and Members of the Committees:

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.

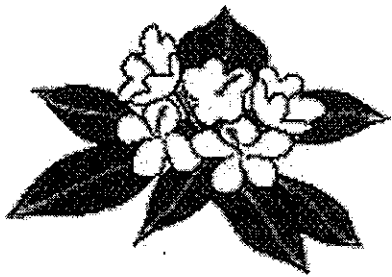
Enlarging the period of time in which a parent may file a request for an impartial hearing may be detrimental to the child. This is because the determination of the appropriateness of the student's education potentially may not be made until two years later. From a lay person's perspective, it is hard 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.



SEAC
Special Education Advisory Council

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L A T E

February 4, 2008

Special Education
Advisory Council

TESTIMONY TO THE SENATE COMMITTEES ON EDUCATION
AND HUMAN SERVICES AND HOUSING

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

RE: SB 2004 - Relating to Education

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).

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 vx. 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 the costs of these witnesses which are not reimburseable. 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,



LATE

STATE OF HAWAII
STATE COUNCIL
ON DEVELOPMENTAL DISABILITIES
919 ALA MOANA BOULEVARD, ROOM 113
HONOLULU, HAWAII 96814
TELEPHONE: (808) 586-8100 FAX: (808) 586-7543
February 4, 2008

The Honorable Norman Sakamoto, Chair
Senate Committee on Education
Twenty-Fourth Legislature
State Capitol
State of Hawaii
Honolulu, Hawaii 96813

Dear Senator Sakamoto and Members of the Committee:

SUBJECT: SB 2004 – RELATING TO EDUCATION

The position and views expressed in this testimony do not represent nor reflect the position and views of the Departments of Health and Education (DOE).

The State Council on Developmental Disabilities (DD) **SUPPORTS SB 2004**. The purpose of SB 2004 is to: 1) extend the deadline within which to file a request for a due process hearing relating to the education of a child with a disability from 90 days to two years when the request is for reimbursement of costs of a child's placement, 2) require DOE to adopt rules that provide for the reimbursement of expert witness and other relevant fees and expenses associated with a hearing, and 3) require the establishment of an appeals board and process wherein a State review officer shall review the decisions of the impartial hearings officers.

The Council fully endorses the repeal of the 90 days and replacing it with "two years" in which any parent or guardian of a child with a disability may request for reimbursement of the costs of the placement. This provision would be consistent with Item (1) allowing the parent, guardian or DOE to request for an impartial hearing regarding alleged action that formed the basis of the request for a hearing.

We are pleased that there is a provision for DOE to establish a process to reimburse expert witnesses for hearings. This provision would provide a level of parity for parents and other relevant persons as expert witnesses to be reimbursed for costs associated with hearings. Whereas, DOE personnel involved in hearings are financially covered as part of their position/job responsibility.

The Honorable Norman Sakamoto
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With respect to the provision on page 3, (e), lines 14-20, we are concerned that this section creates another level of bureaucracy by creating a process for a State review officer to review the decisions of the impartial hearings officer. We consider that hearings officer to be "impartial" as that is clearly the intent of the role of that position.

Thank you for the opportunity to provide testimony in support of SB 2004.

Sincerely,

A handwritten signature in black ink, appearing to read "Waynette K.Y. Cabral". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Waynette K.Y. Cabral
Executive Administrator

L A T E

Kalma K. Wong
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(808) 235-4411

Cure Autism Now

**WALK
NOW**

February 4, 2008

Senator Norman Sakamoto
Chair, Senate Education Committee
Hawaii State Capitol, Room 230
415 South Beretania Street
Honolulu, HI 96813

Senator Jill Tokuda
Vice Chair, Senate Education Committee
Hawaii State Capitol, Room 218
415 South Beretania Street
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Hawaii Chapter
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Senator Suzanne Chun Oakland
Chair, Human Services and
Public Housing Committee
Hawaii State Capitol, Room 226
415 South Beretania Street
Honolulu, HI 96813

Senator Les Ihara
Vice Chair, Human Services and
Public Housing Committee
Hawaii State Capitol, Room 220
415 South Beretania Street
Honolulu, HI 96813

Re: In partial support of SB2004, Committees on Education/ Human Services and Public Housing, February 4, 2008, 3 p.m., Room 225

Dear Chair Sakamoto and Vice-Chair Tokuda, and Chair Chun Oakland and Vice-Chair Ihara:

I am writing to express my partial support of Senate Bill 2004, which extends the deadline to file a request for a due process hearing for reimbursement for the costs of placement of a child from 90 days to 2 years. This bill would realign HRS393 with the federal law. The current 90-day statute of limitations is advantageous to the Department of Education, and extremely unfair to parents of children with disabilities. Most parents do not know their rights or the law enough to be able to make the decision to file for reimbursement within a mere 90 days. Making the decision for private placement is one that takes much thought and consideration, and is certainly not taken lightly. It implies that the family has run out of options with the DOE, and therefore must find (on their own) an appropriate placement for their child in order for that child to receive an appropriate education based on his/her unique needs. Trying to find an alternative placement for a child is daunting enough for any family. And to compound that with having to decide to file for reimbursement, plus having to find an attorney, and then to actually proceed with the filing – all within a mere 3 months – is more than most families can bear. Extending the deadline to 2 years is reasonable and fair, and I support SB2004 on this point.

With regard to the issue of reimbursement of expert witnesses and other relevant fees and expenses associated with a hearing, I would support this as long as it is clear that

**cure
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now**
FOUNDATION

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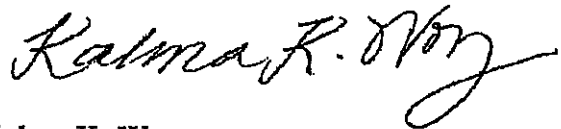
888.8AUTISM
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the party that may be entitled to this reimbursement is the **family or guardian(s)**, in the case that the family or guardian(s) prevail in a fair hearing. The Department of Education always has the advantage in a due process hearing, as they have easy access to important information and expert witnesses, not to mention legal counsel from the Attorney General's office.

Lastly, it is unclear as to the composition and structure of the "appeals board" that is proposed in this bill. Who will appoint the "state review officer," what qualifications will the review officer be expected to have, and how will you be able to guarantee that this person is impartial? Who will oversee the appeals board? Although I understand the intent of this section, the method of implementation is vague.

Until SB2004 is amended to be clearly understood in its entirety, I can only fully support the issue of extending the statute of limitations for reimbursement of costs of placement from 90 days to 2 years. Please clarify the 1) expert witness fees reimbursement and 2) appeals board sections of this bill.

Sincerely,



Kalma K. Wong
Hawaii Chapter President
Cure Autism Now / Autism Speaks



LATE TESTIMONY

Re: SB2004

Senator Sakamoto,

I am writing to support this bill, and ask that the education committee consider extending the 90 days, and consider the following:

We are up against tremendous odds in trying to help our children. Most of the time, we are making huge sacrifices to fund our children's intensive ABA and biomedical programs.

Some of us need our full reimbursements in order to continue to sustain these programs. The 90 day deadline makes it difficult to recover all of our out of pocket expenses which in turn shortens the time that we can fund our children's programs. In the end our children suffer.

All that we ask is to be fair.

Sincerely,
Deborah Tasato-Kodama