

Committee On Finance The State House of Representatives

Friday, March 28, 2008

AGENDA #3

LATE

TESTIMONY IN STRONG SUPPORT OF SB 2004, SD2, HD2

Chair Oshiro, Vice Chair Lee, and members of the Committee:

My name is Carrie Ehrgott. I am a parent of an eight-year old

child with a high-functioning type of autism diagnosed as Pervasive Developmental Disorder – Not Otherwise Specified (PDD-NOS) which is part of the autism spectrum disorders category.

For the sake of time, I would like to share with you that when I started noticing difficulties with her behavior and how it got in the way of her learning, I approached the IDEA coordinator of my child's program and requested help where she was identified a special education student. However, the program placement was not appropriate and it was suggested that she no longer participate in their program. Instead, they placed her in a public school which did not have a certified special education teacher who was released from the school. Not only did both programs not be able to provide the services that she needed, but, they would only make recommendations for programs within the system and not the private schools that I was inquiring about. I have been trying to work with the school system and sent my daughter to the program that they directed me to. However, I didn't know that I had a say or a "voice" in her program. I have been put in a situation where only now, four-years down the road that I know what the school has offered for her educational program is below adequate. I am now put in a position to reclaim my right as the responsible decision-maker on behalf of my daughter to make sure that her education is appropriate. That is all that I have asked and I feel that I have been let down by the very people I looked to for help.

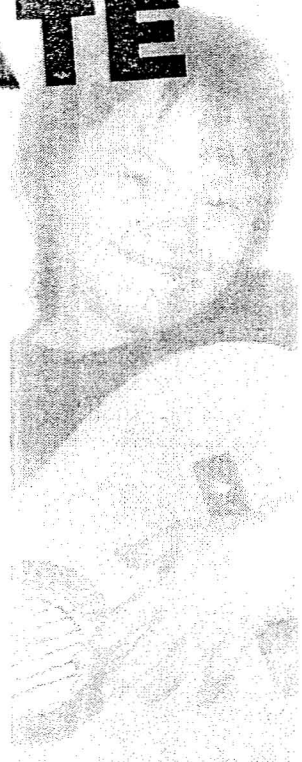
As I learn more about the Individuals with Disabilities Education Act (I.D.E.A.) federal law, I understand that whenever the state department makes a changes in the provisions of I.D.E.A., that they must convene public forums to gather input from the community. When this bill passed in 2005, there was

LATE

From: Wendell & Linda Elento
Members of The Hawaii Down Syndrome Congress

To: COMMITTEE ON FINANCE
Rep. Marcus Oshiro, Chair
Rep. Marilyn Lee, Vice Chair

Re: FIN March 28, 2008, 4:30 pm



Jason

SB2004 EDN, JUD, FIN seeks to reverse the Hawaii statute which passed in 2005 *without* full public participation as mandated by federal law: *Individuals with Disabilities Education Act*. Restores fairness and protection for children with disabilities. Equal to HRS Ch. 662 State Tort Liability Act's statute of limitations of two years.

Thank you for the opportunity to present testimony in support of **SB2004**. Our strong support for this bill stems from over two years experience with due process administrative hearings and federal court proceedings as parents of a seven year old boy named Jason. THE CURRENT STATUTE OF LIMITATIONS OF 90 DAYS EXTREMELY LIMITS THE RIGHTS OF OUR CHILDREN TO OBTAIN A FREE APPROPRIATE PUBLIC EDUCATION.

Before the federal special education law, *Individuals with Disabilities Education Act*, was reauthorized in 2004, there were no statute of limitations in the federal law. Currently IDEA rules two years unless otherwise by State laws.

In 2001 an IDEA case (from Oregon, filed after the student returned to public school) regarding a request for private school tuition reimbursement as a remedy by parents who believed the school did not provide a free appropriate public education for their child was argued before the US Court of Appeals for the Ninth Circuit (Hawaii's Court of Appeals). The hearing officer agreed.

This case addressed similar concerns of SB2004 as to length of Statute of Limitations. The report filed by the federal appeals court determined a two years Statute of Limitations rightfully applied. How was that determination made?

Excerpts from the case's publication from the US Court of Appeals for the Ninth Circuit :

"Statutes of Limitations under the IDEA

The IDEA specifies no limitations period governing either a plaintiff's request for an administrative hearing or the filing of a civil action. ...Therefore, we "must determine the most closely analogous state statute of limitations" and apply that statute" unless it would undermine the policies underlying the IDEA."...

...The two-year period contained in the Oregon Tort Claims Act ("OTCA"), ORS §§§§ 30.260 to 30.302. Under Oregon law, a claim alleging a public body's breach of duty imposed by statute is governed by the OTCA. See ORS §§§§ 30.260(8) (defining "tort") and 30.265 (discussing the scope of the OTCA). With two exceptions that do not apply to this case, the limitations period for any claim to which the OTCA applies is two years. ORS §§ 30.275(8). The Oregon Court of Appeals has held specifically that this two-year limitations period applies to a claim against a public body arising from a breach of duties imposed by a federal statute.

... S.V. [student] asserts that the School District is liable for his tuition because it breached its statutory duty to provide a free appropriate public education. The School District is unquestionably a "public body." ORS §§ 30.260(4)(b). Because the IDEA, and not a contract or a quasi-contract, is the source of the School District's alleged duty to S.V., his claim falls within the statutory definition of a tort:

...[T]he breach of a legal duty that is imposed by law, other than a duty arising from contract or quasi-contract, the breach of which results in injury to a specific person or persons for which the law provides a civil right of action for damages or for a protective remedy.

ORS §§ 30.260(8). Under that definition, S.V.'s claim is a "tort" within the meaning of the OTCA whether his requested remedy for breach of statutory duty is characterized as damages or as equitable relief.

... We adopt the limitations period in the OTCA for two reasons. First, the OTCA statute of limitations applies specifically to claims alleging breaches of statutory duty by school districts and other public bodies.

...Second, a two-year limitations period is consistent with both the policy underlying the IDEA and with the limitations periods adopted by most other circuits. A six-year period is not.

...The statutory framework of the IDEA and the statute's purpose show that a five-year statute of limitations would frustrate the federal policy of quick resolution of IDEA claims. The IDEA provides for substantial parental involvement in the IEP [individualized educational program] process, annual reviews, and annual notice to parents of procedural rights. See 20 U.S.C. §§ 1414(d)[(1)](B)(i) (parents must be part of IEP team); 20 U.S.C. §§ 1414(d)(4)(A)(i) (annual review); 20 U.S.C. §§ 1415(b)-(d) (notice of procedural rights). This statutory scheme mandating parental participation in an annual decision-making process demonstrates that Congress intended for parents to be actively implicated in the expeditious resolution of IDEA concerns. In addition, children protected by the IDEA benefit greatly from quick resolution of disputes because lost education is a substantial harm, and that harm is exactly what the IDEA was meant to prevent.

...Id. at 957. The court concluded that a two-year statute of limitations served those policies: It was short enough to allow expeditious resolution of claims, but long enough to allow parents "the opportunity to protect their disabled children's rights." Id. at 958.

...In sum, a two-year limitations period supports the IDEA's policies of expeditious resolution of disputes and ongoing parental involvement in the education of disabled children. A six-year statute of limitations would frustrate that policy by permitting parents to wait for up to half the total length of a child's primary and secondary educational experience before raising a claim that the school district had failed to provide the student with a free appropriate public education and was liable for private-school tuition. For all these reasons, ORS §§ 30.275(8) provides a limitations period of an appropriate length."

WE RESPECTFULLY ASK THE LEGISLATURE TO EXTEND THE STATUTE OF LIMITATIONS TO TWO YEARS, WHICH IS ALLOWABLE BY THE FEDERAL SPECIAL EDUCATION LAW, BY PASSING SB2004 WITH NO SUNSET DATE.

Reference:

Individuals with Disabilities Education Improvement Act of 2004

“(C) Timeline for requesting hearing.--A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.

“(D) Exceptions to the timeline.--The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to--

“(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

“(ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent.

HAWAII REVISED STATUTES, EDUCATION

§302A-443 Administrative hearing procedures and subpoena power relating to the education of children with a disability. (a) An impartial hearing may be requested by any parent or guardian of a child with a disability, or by the department, on any matter relating to the identification, evaluation, program, or placement of a child with a disability; provided that the hearing is requested:

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

(2) Notwithstanding paragraph (1), within ~~ninety days~~ **two years** of a unilateral special education placement, where the request is for reimbursement of the costs of the placement.

HAWAII REVISED STATUTES, STATE TORT LIABILITY ACT

§662-4 Statute of limitations. A tort claim against the State shall be forever barred unless action is begun within **two years** after the claim accrues, except in the case of a medical tort claim when the limitation of action provisions set forth in section 657-7.3 shall apply. [L 1957, c 312, pt of §1; Supp, §245A-4; HRS §662-4; am L 1976, c 219, §16]

Public Participation

The IDEA (1997 and 2004) requires public participation to make change to state laws, rules, regulations which doesn't seem to have been adequately followed.

IDEA: “SEC. 612. <<NOTE: 20 USC 1412.>> STATE ELIGIBILITY.

“(19) Public participation.--Prior to the adoption of any policies and procedures needed to comply with this section (including any amendments to such policies and procedures), the State ensures that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.

NOTE: A recent Supreme Court case determined parents may represent themselves (supporting their special needs children) in Court. Several months ago, the federal district court in Hawaii agreed that \$50,000 (approx.) was due to attorney of client prevailing with Administrative Hearings Officer's Decision for an IDEA Case. As originally included in SB2004, we continue to support reimbursement of expert fees to parents as the prevailing party (this would apply whether the expert was seeking payment for testifying or advocating).

Parents, including myself, cannot possibly have a due process hearing (similar to a court trial) without expert witnesses. The Department of Education is by default the expert in the eye of the administrative hearings officer until proven by the preponderance of the evidence by the parents.

IDEA 2004

``(h) Safeguards.--Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded--

``(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

``(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

``(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

``(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions....

Administrative Appeal

Although allowed by IDEA, Hawaii does not offer an administrative appeal. instead appeals (civil action) are made directly to state or federal district court. Hawaii Administrative Rules' time limit for appeal is 30 Days; Whereas The IDEA allows for 90 Days. We support the addition of the time limit for an appeal to court of 90 days.

IDEA: ``(i) Administrative Procedures.--

``(B) Limitation.--The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this part, in such time as the State law allows.

Hawaii Department of Education

<http://www.doe.k12.hi.us/reports/specialeducation/dueprocess/index.htm>

FINTestimony

From: Marry Me Maui Wedding Planners [info@marrymemauui.com]
Sent: Friday, March 28, 2008 1:40 PM
To: FINTestimony
Subject: SB2004

LATE

**Committee On Finance
The State House of Representatives**

**Friday, March 28, 2008
(I plan to testify at the 4:30p.m. committee hearing)**

AGENDA #3

**TESTIMONY IN STRONG SUPPORT OF
SB 2004, SD2, HD2**

Chair Oshiro, Vice Chair Lee, and members of the Committee, my name is Joe D'Alessandro. I am a parent of a child with special needs.

SB 2004, SD2, HD2 would expand the deadline within which to file a request for due process hearing from ninety (90) days to one (1) year when the request includes reimbursement of costs of a child's private placement. It also requires the Department of Education (DOE) to submit a report to the Legislature on the number of requests for due process relating to reimbursement for a child's placement and to exercise oversight of a child who has undergone unilateral special education placement.

My son Matthew has been diagnosed as developmentally disabled. He is 7 years old and does not speak. While he has many signs at his disposal he is functionally disadvantaged and needs intensive intervention to help him communicate with his peers.

The IEP process is generally stressful and burdensome. There is often an adversarial air in the room with the parents outnumbered by DOE employees.

A 90 day limitation to request a due process hearing is an extreme burden upon parents like us who work. It does not allow for sufficient time to evaluate the offer of FAPE nor does the 90 days allow for time to locate alternative school choice.

Another undue burden is expecting parents to pay for expert witnesses. We do not have the financial means to pay for that.

Finally, I respectfully ask that the measure become effective upon approval, and that the amendments contained in Section 1 of the bill remain in effect without the drop-dead date of July 1, 2010 as the drop-dead date would only cause confusion to the detriment of parents of special needs children.

I strongly support SB 2004, SD2, HD2 which would level the playing field for special needs children and urge this Committee to pass this measure with the amendments suggested.

Thank you for the opportunity to provide testimony on this matter.

Colleen Pegg
Joe D'Alessandro

1.800.745.0344 o
808.385.2245 c

Colleen Pegg
Joe D'Alessandro
Marry Me Maui Wedding Planners
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FINTestimony

From: Serena Tzeng [lingwen22@gmail.com]
Sent: Friday, March 28, 2008 1:36 PM
To: FINTestimony
Cc: Stephanie Lu; naomigr@gmail.com
Subject: Strong Support of SB2004 SD2 HD2,

LATE

Rep. Marcus Oshiro, Chair
Rep. Marilyn Lee, Vice Chair
House Committee on Finance

From Serena Tzeng
Friday, March 28, 2008
Strong Support of SB2004 SD2 HD2, Relating to Special Education Due Process Timeline

Chair Oshiro, Vice Chair Lee, and members of the Committee, my name is Serena Tzeng. I am a single parent of a child with autism and minor cerebral palsy.

SB 2004, SD2, HD2 would expand the deadline within which to file a request for due process hearing from ninety (90) days to one (1) year when the request includes reimbursement of costs of a child's private placement. It also requires the Department of Education (DOE) to submit a report to the Legislature on the number of requests for due process relating to reimbursement for a child's placement and to exercise oversight of a child who has undergone unilateral special education placement.

I have been taking care Margaret by myself since she was 6 years old. Her sister, Stephanie joined to help me to support and help her sister 4 years ago when she moved back to Hawaii from Washington DC. I am struggling with daily financial needs and Margaret's special needs consistently. In addition to the hardship we are facing for our life, we have to use the very limited time to have IEP meeting with DOE, to understand the legal documents, prepare due process documents and deal with the stress that all add it up.

As a parent of a disabled child, I have been to a number of individualized education program (IEP) meetings for my child. This is a very stressful and difficult process, and it is not one which is straightforward or collegial. Parents are at a disadvantage at the IEP meetings because we do not always understand the process or the terms used. Placing yet another requirement upon the parents of having to request a due process hearing within 90 days is extremely burdensome. Additionally 90 days does not provide for sufficient time to evaluate the DOE's offer of a free and appropriate educational program (FAPE) or its proposed public school setting. Neither does the current 90-day time period provide parents with adequate time to locate an appropriate private school, evaluate it and enroll their child there.

It is unfair to require Hawaii 's families to be limited by the 90-day limitation when the majority of other states apply up to a two (2) year statute of limitations. Hawaii is one of only three states with a 90-day limitation period. The remaining forty-eight (48) states permit either a two or one year time period to file a request for due process where private placement is an issue. While the 1-year statute of limitations or deadline is an improvement from 90-days, I am respectfully asking for a 2-year limitation to be in line with the majority of the states.

It is equally important to have the DOE develop rules for reimbursement of expert witnesses and other related expenses to the parents. Very often expert witnesses are needed to testify at the due process hearings to explain a child's special needs and disabilities.

Many parents do not have the financial means to pay for expert witnesses. Many of us have to take off from work to attend IEP meetings as well as the due process hearings. The DOE on the other hand can rely on state funds to compensate the expert witnesses who testify on behalf of the Department. In its earlier version, SB 2004 contained a section

requiring the DOE to adopt rules providing for the reimbursement of expert witness and other relevant fees to the prevailing party. I ask that this Committee consider the inclusion of a similar provision in the current version of SB 2004, SD2, HD2 with the following language that tracks with HR 4188 which was introduced in the United States Congress on November 20, 2007 as part of the I.D.E.A. Fairness Restoration Act and which clarifies that expert witness fees are intended to be recoverable by the prevailing parents or guardians as opposed to the school district:

The department shall adopt rules that conform to the requirements of any applicable federal statutes or regulations pertaining to the impartial hearing based on the education of a child with a disability.

The rules:

Shall provide that the prevailing party is entitled to the reimbursement of attorneys' fees and expenses associated with a hearing. For the purposes of this subsection, the term 'attorneys' fees' shall include the fees of expert witnesses including the reasonable costs of any test or evaluation necessary for the parent's or guardian's case in the action or proceeding.

Finally, I respectfully ask that the measure become effective upon approval, and that the amendments contained in Section 1 of the bill remain in effect without the drop-dead date of July 1, 2010 as the drop-dead date would only cause confusion to the detriment of parents of special needs children.

I strongly support SB 2004, SD2, HD2 which would level the playing field for special needs children and urge this Committee to pass this measure with the amendments suggested.

Thank you for the opportunity to provide testimony on this matter.

Serena Tzeng
1212 Nuuanu Ave 1901
Honolulu, Hawaii 96817

**Committee On Finance
The State House of Representatives**

**Friday, March 28, 2008
(I plan to testify at the 4:30p.m. committee hearing)**

AGENDA #3

**TESTIMONY IN STRONG SUPPORT OF
SB 2004, SD2, HD2**

LATE

Chair Oshiro, Vice Chair Lee, and members of the Committee, my name is Vera Marie Asato. I am a parent of a child with Autism (Asperger's).

SB 2004, SD2, HD2 would expand the deadline within which to file a request for due process hearing from ninety (90) days to one (1) year when the request includes reimbursement of costs of a child's private placement. It also requires the Department of Education (DOE) to submit a report to the Legislature on the number of requests for due process relating to reimbursement for a child's placement and to exercise oversight of a child who has undergone unilateral special education placement.

Our son was diagnosed with Asperger's six years ago and we placed him in a private school. Ninety days is way too short of a time for parents to file for due process. As parents we do not have the access to professional services that the DOE have. DOE already have a speech therapy, occupational therapy, psychologist, recourse teachers, autism consultant and lawyer already onboard for them to used to help them to determine if my son needs special education or not. We as parents need to go out and find this professional to test our son to help us determine if he needs services or not. A lot of time they are so busy that you have to wait a long time or they can't take anymore clients. We had to change our medical provider just so that we could get more services for our son. Having to change our medical provider and looking for professional to help us is a very frustrating experience. Having been diagnosed with Asperger's they are not very many school that would be able to accommodate his need and take our son in. One private school turned our son down just because I told them that he is diagnosed with Asperger's. We went for a school visit and talked and a couple days later they called and said because of our sons Asperger they are not able to accommodate him on campus because they had other children before and found that they couldn't accommodate them. This school didn't even look at our sons records. Our son is well behaved and is very high in academics. We keep him active in activities like Boys Scouts and Ji- Jitsu. He is progressing well as a teenager but he has a lifetime ahead of him. Asperger's Syndrome is not like a cold where you get better. You get help from different sources and hopefully you can live with it and lead a full life.

As a parent of a disabled child, I have been to a number of individualized education program (IEP) meetings for my child. This is a very stressful and difficult process, and it is not one which is straightforward or collegial. Parents are at a disadvantage at the IEP meetings because we do not always understand the process or the terms used. Placing yet another requirement upon the parents of having to request a due process hearing within 90 days is

extremely burdensome. Additionally 90 days does not provide for sufficient time to evaluate the DOE's offer of a free and appropriate educational program (FAPE) or its proposed public school setting. Neither does the current 90-day time period provide parents with adequate time to locate an appropriate private school, evaluate it and enroll their child there.

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It is equally important to have the DOE develop rules for reimbursement of expert witnesses and other related expenses to the parents. Very often expert witnesses are needed to testify at the due process hearings to explain a child's special needs and disabilities. Many parents do not have the financial means to pay for expert witnesses. Many of us have to take off from work to attend IEP meetings as well as the due process hearings. The DOE on the other hand can rely on state funds to compensate the expert witnesses who testify on behalf of the Department. In its earlier version, SB 2004 contained a section requiring the DOE to adopt rules providing for the reimbursement of expert witness and other relevant fees to the prevailing party. I ask that this Committee consider the inclusion of a similar provision in the current version of SB 2004, SD2, HD2 with the following language that tracks with HR 4188 which was introduced in the United States Congress on November 20, 2007 as part of the I.D.E.A. Fairness Restoration Act and which clarifies that expert witness fees are intended to be recoverable by the prevailing parents or guardians as opposed to the school district:

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Finally, I respectfully ask that the measure become effective upon approval, and that the amendments contained in Section 1 of the bill remain in effect without the drop-dead date of July 1, 2010 as the drop-dead date would only cause confusion to the detriment of parents of special needs children.

I strongly support SB 2004, SD2, HD2 which would level the playing field for special needs children and urge this Committee to pass this measure with the amendments suggested.

Thank you for the opportunity to provide testimony on this matter.

Vera Marie and Vernon Asato
<<Name & Signature>>