Date: 03/30/2011

Committee: House Finance

Department: Education

Person Testifying: Kathryn S. Matayoshi, Superintendent of Education

Title of Bill: SB 1284,SD2,HD1 Relating to Education

Purpose of Bill: Amends section 302A-443, Hawaii Revised Statutes, to allow the Department of Education (1) access to monitor students with disabilities who are placed, at the Department's expense, at private special education schools or placements; and (2) the mechanism to set reasonable rates for the placement of students at private special education schools and placements.

Department's Position: The Department of Education (Department) supports SB 1284, SD 2, HD 1, providing Department the authority to monitor students with disabilities who are placed in private special education schools or placements. Hawaii Revised Statute Section 302A-443, as currently written, does not give this authority. The Department is mandated by both federal and state regulations to ensure that a student with a disability, who is placed in or referred by the Department, to a private special education school or placement, is provided special education and related services in conformance with the student's Individualized Education Program (IEP) and has access to and progresses in the general curriculum (common core state standards). To accomplish this mandate, the Department must have full cooperation and assistance from each private special education school or placement serving students with disabilities at the Department's expense. Currently, the Department educates over 181,000 students. Of that total population, students with disabilities served in a private special

education school or placement is approximately .03% (less than 2% of all students with disabilities). Tuition costs for the Department for these students is astronomically high. For school years 2008-2009 and 2009-2010, the Department paid approximately $8,477,394 and $9,044,525 respectively, while the Department recognizes that providing special education and related services can be costly, this Bill provides a means to regulate equitable and reasonable tuition fees. Finally, the Department is committed to education reform through the Race to the Top initiative and ensure that all students, including those placed in private special education schools and placements are college and/or career ready. This Bill provides the mechanism for the Department to monitor the performance and progress in the general education curriculum, on the common core state standards, as well as the students' IEPs.

Date of Hearing: March 30, 2011

Committee: House Finance Committee

Department: Education

Person Testifying: Lea E. Albert, Complex Area Superintendent, Castle-Kahuku Complex

Title: S.B. No. 1284, SD 2, HD 1, Relating to Education

Purpose: To allow the Department of Education (1) access to monitor students with disabilities who are placed, at the Department's expense, at private special education schools or placements; and (2) to allow the Department of Education to withhold payment if the Department is not allowed to monitor students at a private placement.

Department's Position: I support the amendment made by the House Education Committee, however I suggest that subsection (j) be amended to also include schools that are accredited by the Western Association of Schools and Colleges (WASC) and preschools accredited by the National Association for the Education of Young Children (NAEYC) or the National Early Childhood Program for Accreditation (NECPA).

Proposed amendment to Subsection (j) added by the House Education Committee:

(j) Subsections (f) through (i) shall not apply to those schools that are full and accredited members in good standing of the Hawaii Association of Independent Schools (HAIS), the Western Association of Schools and Colleges (WASC), the Hawaii Catholic Schools, and preschools accredited by the National Association for the Education of Young Children (NAEYC) or the National Early Childhood Program for Accreditation (NECPA).

HSTA
HAWAII STATE TEACHERS ASSOCIATION
Teaching Today for Hawaii's Tomorrow

1200 Ala Kapuna Street ⁂ Honolulu, Hawaii 96819
Tel: (808) 833-2711 ⁂ Fax: (808) 839-7106 ⁂ Web: www.hsta.org

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TESTIMONY BEFORE THE HOUSE COMMITTEE ON FINANCE

RE: SB 1284, SD2, HD1 – RELATING TO EDUCATION

March 30, 2011

WIL OKABE, PRESIDENT
HAWAII STATE TEACHERS ASSOCIATION

Chair Oshiro and Members of the Committee:

The Hawaii State Teachers Association opposes SB 1284, SD2, HD1, that amends section 302A-443, Hawaii Revised Statute (j) to exempt schools that are full and accredited members in good standing of the Hawaii Association of Independent Schools and the Hawaii Catholic Schools; provided that DOE may monitor any child at such schools eligible to receive special education and related services at DOE's expense.

Many of our special education teachers are made responsible for writing the Individualized Education Plan (IEP) for students with disabilities in private schools. This is often done without having the ability to monitor, assess, evaluate or interact with the child and their private education teacher. There is no accountability to see if the IEP is being properly implemented to meet the rigorous standard based instruction that align to the common core state standards.

The department is responsible for paying tuition and fees that accompany attendance at various private schools. HSTA believes because the Department of Education is responsible for tuition payments to private institutions and because SPED teachers are responsible for writing the IEP the department should have access to monitoring and evaluating the educational progress of students with disabilities in all private schools, including accredited and Catholic.

Thank you for the opportunity to testify.

S E A C
Special Education Advisory Council
919 Ala Moana Blvd., Room 101
Honolulu, HI 96814
Phone: 586-8126 Fax: 586-8129
email: spin@doh.hawaii.gov

March 30, 2011

Representative Marcus R. Oshiro, Chair
House Committee on Finance
State Capitol
Honolulu, HI 96813

RE: SB1284 SD 2 HD1 – RELATING TO EDUCATION

Dear Chair Oshiro and Members of the Committee,

The Special Education Advisory Council (SEAC), Hawaii's State Advisory Panel under the Individuals with Disabilities Education Act (IDEA), supports SB1284, SD2, HD1 which proposes to amend Section 302A-443 of the Hawaii Revised Statues to authorize the Department of Education to monitor students with disabilities who are placed at private schools or placements at the Department's expense.

SEAC has been proactive in offering amendments to previous versions of SB1284 as part of the Task Force on Private School Placements, and many of these amendments have been incorporated into the current bill. We believe the language in SB1284 SD2 HD1 is appropriate and will set standards for consistency in the monitoring of private school students in publicly funded placements. SEAC further believes that the attached fact sheet, *SmartStart: Judicial Actions - Tuition Reimbursement*, clarifies many questions raised previously in testimony in opposition to the language in this bill.

Thank you for the opportunity to provide testimony on this important issue. Should you have any questions, I will be happy to answer them.

Respectfully,

Ivalee Sinclair, Chair, Special Education Advisory Council
Chair, Task Force on Private School Placements

SmartStart: Judicial Actions -- Tuition Reimbursement

Overview | Key Points | Links | Additional Resources

This SmartStart is updated with references to the IDEA 2004 statute, the 2006 IDEA Part B regulations, and the 2008 amendments to the Part B regulations.

Overview

Traditionally, tuition reimbursement was an equitable remedy that was commonly awarded by courts. *Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 556 IDELR 389 (U.S. 1985); and *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (1993). Congress later added the tuition reimbursement remedy to the IDEA. *See* 34 CFR 300.148. This SmartStart examines the issues involved in an award of tuition reimbursement under the IDEA.

Key Points

These key-point summaries cannot reflect every fact or point of law contained within a source document. For the full text, follow the link to the cited source.

PRIVATE SCHOOL TUITION REIMBURSEMENT

- Private school tuition reimbursement is available as a remedy under the IDEA where a court or hearing officer finds that the public agency did not make FAPE available to the student in a timely manner prior to the private enrollment and the private placement is determined to be appropriate. 34 CFR 300.148(c).
- Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child and the question of financial responsibility are subject to the due process procedures in 34 CFR 300.504 through 34 CFR 300.520. *Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Reg. 46,599 (2006).

REIMBURSEMENT FOR STUDENTS NEVER ENROLLED IN PUBLIC SCHOOL SYSTEM

- In *Forest Grove School District v. T.A.*, 52 IDELR 151 (U.S. 2009), the U.S. Supreme Court held that the receipt of special education and related services through the public school system is not a prerequisite for tuition reimbursement under the IDEA. Because 20 USC 1415(i)(2)(C)(iii) gives courts broad authority to grant such relief as they determine is appropriate, a court can order reimbursement if it finds that the district failed to make FAPE available to the student. However, the Court noted that parents still need to demonstrate the appropriateness of the private placement and show that there are no equitable bars to reimbursement.
- Tuition reimbursement may also be an appropriate remedy for a school district's failure to meet its obligations to comply with the child find requirement, which requires schools to locate, identify, and evaluate students with disabilities. *Doe v. Metropolitan Nashville Pub. Schs*, 27 IDELR 219 (6th Cir. 1998), *cert denied*, 111 LRP 10730, 525 U.S. 813 (1998). See SmartStart: Referral for Evaluation and Child Find Under IDEA and SmartStart: Child Find Under Section 504.

STANDARD FOR EVALUATION OF A PROPOSED PUBLIC PLACEMENT

- The appropriateness of the proposed public placement is evaluated prospectively, without comparison to the current private placement, and consistently with the standard enumerated in *Board of Education of the Hendrick Hudson School District v. Rowley*, 553 IDELR 656 (U.S. 1982). *Kerkam v. Superintendent, D.C. Pub. Sch.*, 17 IDELR 808 (D.C. Cir. 1991). See SmartStart: FAPE -- Standards for Appropriate Education under IDEA.
- The test of the appropriateness of a proposed public placement for a student who had previously attended a private school as a result of a unilateral placement was not whether the private school's program benefited the student in the past and would likely continue to do so in the future, but whether the proposed public placement had the potential to provide the student with educational benefit. *Lewis v. School Bd.*, 19 IDELR 712 (E.D. Va. 1992).

STANDARDS FOR PRIVATE SCHOOL PLACEMENTS

- A parental placement can be appropriate, even if it does not meet state standards. *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S. 1993); and 34 CFR 300.148(c). *But see Gagliardo v. Arlington Cent. Sch. Dist.*, 48 IDELR 1 (2d Cir. 2007).
- Under the Supreme Court's *Carter* decision, a court may order reimbursement for a parent who unilaterally withdraws his child from a public school that provides an inappropriate education under the IDEA and enrolls the child in a private school that provides an education that is otherwise proper, but does not meet the state standards that apply to education provided by the SEA and LEAs. The Court noted that these standards apply only to public agencies' own programs for educating children with disabilities and to public agency placements of children with disabilities in private schools, for the purpose of providing a program of special education and related services. *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S. 1993).

AMOUNT OF TUITION REIMBURSEMENT AWARDED

- Courts have broad discretion in fashioning relief with regard to tuition reimbursement. However, total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable. *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S. 1993).
- In *Carter*, the Supreme Court provided no further guidance on how to determine when costs are "unreasonable." See SmartStart: Private Schools -- Expenditure of Funds on Parentally Placed Students.

LIMITS ON TUITION REIMBURSEMENT

- An award of tuition reimbursement may be reduced or denied if the court or hearing officer finds that:
  - The parents did not provide notice to the school district that they believe the proposed IEP does not provide FAPE. Parents should notify the school district of their concerns and their intent to enroll their child in a private school at public expense at the most recent IEP meeting that the parents attended prior to removal of the child from the public school or at least 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school. 34 CFR 300.148(d)(1)(ii).
  - Prior to the parents' removal of the child from the public school, the public agency informed the parents of its intent to evaluate the child (pursuant to 34 CFR 300.503(a)(1)) -- including a statement of the purpose of the evaluation and why it was appropriate and reasonable -- but the parents did not make the child available for the evaluation. 34 CFR 300.148(d)(2). See also SmartStart: Procedural Safeguards -- Notice to Parents and SmartStart: Procedural Safeguards -- Consent Under the IDEA.
  - The parents acted unreasonably. 34 CFR 300.148(d)(3).
- Notwithstanding the above listed parental notice limitation, the cost of reimbursement must not be reduced or denied if the school prevented the parents from providing notice, the parent did not receive notice of the removal pursuant to 34 CFR 300.148(d)(2), or where the compliance with section 34 CFR 300.148(d)(1) would result in physical harm to the child.

WAIVER OF THE PARENTAL NOTICE REQUIREMENT

- Parents may be excused from compliance with the requirement to notify schools about a unilateral private school placement under specific circumstances, which counteract the use of the discretion to limit or deny reimbursement awards. 34 CFR 300.148(e). These situations include:
  - The parent is illiterate and cannot write in English; (*but see, Ms. M. v. Portland Sch. Committee*, 40 IDELR 228 (1st Cir. 2004)).
  - Compliance with the notice requirement would likely result in physical or serious emotional harm to the child.
  - The school prevented the parent from providing the notice.
  - The parents did not receive notice of the notice requirement.

TUITION REIMBURSEMENT AS A REMEDY FOR DENIAL OF FAPE UNDER SECTION 504

- Tuition reimbursement can also be an appropriate remedy for denials of FAPE under Section 504. *Borough of Palmyra Bd. of Educ. v F.C.*, 28 IDELR 12 (D.N.J. 1998).

Links

- SmartStart: Placement - Factors Limiting Private School Tuition Reimbursement
- SmartStart: Judicial Actions -- Scope of Remedies
- SmartStart: Judicial Actions -- Remedies Beyond the IDEA
- Form: Tuition Reimbursement Agreement
- Tuition Reimbursement: How does equity affect an award of tuition reimbursement?

Additional Resources

Additional resources on this topic are available for purchase from LRP Publications:

- What Do I Do When ...® The Answer Book on Special Education Law - Fifth Edition *by John Norlin, Esq.*

Please share your experience and expertise. Forward any suggested additions or changes to this or other Smart Starts to SmartStarteditor@lrp.com.

Last updated: February 15, 2011

Wednesday, March 30, 2011
2:00 p.m.
Conference Room 308

TESTIMONY TO THE HOUSE COMMITTEE ON FINANCE

RE: SB 1284, SD 2, HD 1 – Relating to Education

Dear Chair Oshiro, Vice Chair Lee, and Members of the Committee,

My name is Robert Witt and I am executive director of the Hawaii Association of Independent Schools (HAIS), which represents 99 private and independent schools in Hawaii and educates over 33,000 students statewide.

The Association supports SB 1284, SD 2, HD 1 – Relating to Education, which authorizes and obligates the Department of Education to oversee and monitor the instruction of special education students who are placed in private schools or facilities at public expense.

Mahalo for the opportunity to testify on this measure.

HAWAII DISABILITY RIGHTS CENTER

1132 Bishop Street, Suite 2102
Honolulu, Hawaii 96813
Phone/TTY: (808) 949-2922 *Fax*: (808) 949-2928 *Toll Free*: 1-800-882-1057

E-mail: info@hawaiidisabilityrights.org
Website: www.hawaiidisabilityrights .org

THE HOUSE OF REPRESENTATIVES
THE TWENTY-SIXTH LEGISLATURE
REGULAR SESSION OF 2011

Committee on Finance
Testimony in Opposition to S.B. 1284, SD2, HD1
Relating to Education

Wednesday, March 30, 2011, 2:00 P.M.
Conference Room 308

Chair Oshiro and Members of the Committee:

I am Louis Erteschik, Staff Attorney at the Hawaii Disability Rights Center, and am testifying in opposition to this bill.

The purpose of the bill is to give the DOE the ability to monitor students placed in private facilities under the IDEA and to set the rates the schools can receive for the education of the child .

The Legislature repealed the DOE's authority to monitor private schools in Act 188, SLH 1995. This bill would reinstate such authority, but only for monitoring private schools that educate children with disabilities. The limitation is discriminatory and particularly inappropriate, in view of the fact that children placed in private facilities under the IDEA have been placed there because the DOE has failed or refused to provide a free appropriate public education. There is no legitimate reason for the DOE to monitor a private school's delivery of services that the DOE has refused to provide itself.

School districts are required to provide a FAPE – a free and appropriate education to children who qualify for special education services under the IDEA. If they fail to do so, placement at a private facility is an option which the law allows. The DOE resists paying for these private placements because it incurs the expense of paying for teachers and staff who are properly trained to educate a very difficult population. By accepting IDEA funds, however, the DOE agreed to provide FAPE and thus brings upon itself the obligation to reimburse private school tuition by its unwillingness to do so in the public schools or in private schools the DOE selects.

Despite the desire to save money, we believe this bill violates federal law (IDEA) and the court opinions that have interpreted it. As announced by the U.S. Supreme Court in Florence County School District v. Carter, 510 U.S. 7, 114 S. Ct. 361 (1993) a school district's authority to control the cost of a private placement is limited to situations where the school district on its own decided to provide the child a FAPE by placing the child in the private setting. In the context of a unilateral placement, however, where the parent places the child in a school and then files a due process request for reimbursement, it is up to the Court to decide if the placement and the cost were reasonable. Inasmuch as many due process hearings involve unilateral placements, this bill would not only violate federal law under the IDEA, which says that the Courts are the arbiter of that issue, but also violate the separation of powers clause of the US Constitution because it is up to the Court, not the legislature or the Executive to decide if the cost of the private placement is reasonable. With all due respect, the state legislature does not have the constitutional authority to delegate that power to the Department of Education.

Furthermore, as a result of the Felix case, it was recognized that there is a large component of these special education programs that need to focus on the behavioral needs of the child. For that reason, some of the placements that are utilized in Hawaii to satisfy the IDEA requirements are CARF accredited as mental health treatment facilities. In light of that, we submit that if any agency is to engage in monitoring to ensure that the child is receiving the services to which they are entitled, perhaps it ought to be the Department of Health, inasmuch as they have more background and competence in the oversight of facilities that provide mental health services and other related activities.

We would strongly recommend that the bill be held and that the DOE, if it truly seeks to save expenditures under the IDEA, develop the capacity and the will to comply with the IDEA, so that fewer private placements will be necessary.

Thank you for the opportunity to testify in opposition to this matter.

COMMUNITY CHILDREN'S COUNCIL OF HAWAII
1177 Alakea Street · B-100 · Honolulu · HI · 96813
TEL: (808) 586-5363 · TOLL FREE: 1-800-437-8641 · FAX: (808) 586-5366

March 30, 2011

Senator Marcus Oshiro
Chair Finance Committee

Chairs Oshiro, Members of the Committee

RE: SB1284 with Amendments

The 17 Community Children's Councils (CCCs) of Hawaii support the passage of SB1284 including the amendments purposed by the Special Education Advisory Council.

We have reviewed this purposed amendment and urge their conclusion so students are provided with a standard quality education that can be monitored by the Department of Education in private schools/facilities. Currently there is no consistency and no guidance in monitoring practices. This will provide a consistent standard to the field so the required monitoring in state and federal laws can be implemented. The provisions of these amendments ensure the appropriateness of services being provided to services with disabilities as well as providing the necessary steps for the Department of Education to provide their monitoring responsibilities.

CCCs are community based bodies comprised of parents, professionals in both public and private agencies and other interested persons. CCCs are in rural and urban communities organized around the Complexes in the Department of Education. Membership is voluntary and advisory in nature. CCCs are concerned with specialized services provided to Hawaii's students.

We respectfully request your consideration of SB1284 with the amendments purposed. Parents of children in our public schools have first hand information essential to the Board of Education. Community members provide a diverse viewpoint and can generate a broader base of support for our schools.

Should you have any questions or need additional information, please contact the Community Children's Council Office (CCCO) @ 586-5363 or email us at the address above.

Thank you for considering our testimony

Tom Smith, Co-Chair

Jessica Wong-Sumida, Co-Chair

(Original signatures are on file with the CCCO)

Teresa Chao Ocampo
215 N. King Street, Apt. 207
Honolulu, HI 96817

The House Committee on Finance
Conference Room 308 at 2:00pm

Wednesday, March 30, 2011

To: Rep. Marcus Oshiro, Chair
Rep. Marilyn Lee, Vice Chair

From: Teresa Chao Ocampo

Re: SB 1284 SD2 HD1 RELATING TO EDUCATION

Testimony: In OPPOSITION of SB1284 SD2 HD1, Related to Education

I do not have any qualms about the DOE's self-imposed mandate to provide oversight for special needs children placed in a private placement. That was the intent behind Act 179 which was passed in 2008. However, with the over-reaching language in SB 1284 SD2 HD1, I do not agree with allowing the DOE unlimited access and authority to a private school, private special education schools, a student and a student's educational records for the purposes monitoring a child in such a placement without the inclusion of an independent, unbiased system of checks and balances ensuring the rights of these private entities.

In this process, self-proclaimed "advocates" have worked with the legislature on this bill claiming to have the best interests of our children in mind but have met behind closed doors in secrecy without including the "community." These so-called advocates including one such advocate who is also a DOE employee work with agencies subsidized or contracted by the DOE.

I believe these "self-proclaimed advocates" with their conflicts of interest, as demonstrated by the amendments in this bill written to the disadvantage of our children have done more harm than good and will continue to diminish the educational rights of our children over time. Despite their beliefs that they represent the "community" they in fact, represent the interests of the DOE.

The only rights SB 1284 SD2 HD1 is concerned with are those of the DOE while blatantly violating the individual rights of the student, parents, private school and those of the students attending the private school.

1. Although SB 1284 SD2 claims that the private placements do not "afford the same opportunity [for the disabled children] to receive rigorous, standards-based instruction and curriculum" as per the Common Core State Standards "which are provided to their peers in public schools," this is clearly false.

According to the DOE's educational reform website, implementation of a Common Core State Standards curriculum has not yet begun and will not begin until August 2011 or later. Making such a comparison regarding the type of curriculum that private school children receive over public school children is premature and more than likely exaggerated.

The ONLY reason the DOE recently adopted the Common Core State Standards was to compete for the RTTT awards. In general, these awards will be used to improve high school graduation rates as well as to prepare college grads to enter a career or college without additional remedial training.

Despite the testimony by the Superintendent, RTTT and education reform have nothing to do with special education children and the state's common core standards. The academic curricula of these children are guided by their IEP's as required by IDEA and not by education reform programs.

2. The DOE is hardly in a position to boast a "rigorous, standards-based instruction" when FORTY-ONE percent of its schools FAILED to meet the NCLB requirements. According to the NCLB status and Adequate Yearly Progress for the 2010-2011 school year, 12 schools require "corrective action", 15 schools are scheduled for "planning and restructuring" and 91 schools are "restructuring." Out of the DOE's 286 schools, 118 or 41 percent of our public schools continue to struggle to teach basic reading and math to regular education students at the already low standards set by NCLB. This poor performance has continued since 2002.

According to ED Facts, Summer 2010, State profile, Hawaii's students with disabilities had the following NAEP Achievement Scores (National Assessment for Educational Progress 2009):

Level	Hawaii %	Nation %
4th grade reading	3	12
8th grade reading	3	8
4th grade math	9	19
8th grade math	3	9

Given these assessment results for students with disabilities in Hawaii's public schools, it is obvious that the legislature should demand more intensive,

microscopic monitoring of student progress in the public schools. When Hawaii's students with disabilities score 25 to 50 percent lower than the national average while being educated in the public schools, it is extremely hypocritical and naive to believe that the DOE will be able to demand or monitor a student's progress in a private placement.

The DOE also reported that 91.2 percent and 68 percent of the core classes were taught by highly qualified teachers in the elementary and secondary schools, respectfully. Therefore the low achievement scores for students with disabilities could mean one of two things. Either many of the highly qualified teachers are NOT teaching special education students or the highly qualified teachers do not have any idea on how to teach special education students.

Perhaps the DOE should learn to how to teach the students they DO have and improve their poor performances in the public schools before trying to monitor and control the curricula of students in the private schools.

3. Section (f) (2) (a) of SB 1284 SD2 HD1 requires that the private placements provide "a rigorous curriculum and instruction, based on content standards, and aligned with the Common Core State Standards" in addition to the child's specialized educational program.

IDEA requires the provision of specialized instruction to a disabled child based on his or her own unique learning needs. In the development of a child's Individualized Educational Program (IEP), the child's educational team uses many evaluative tools, assessments, tests, and observations to identify a child's strengths as well as the academic, developmental and functional needs of the child. These findings serve as the starting point for teaching the child and are identified in a child's IEP.

If a private placement is required by state law to provide a "standard" education, then the child's program would no longer be specific to the child. This would be inconsistent with IDEA.

4. Related to health and safety, SB 1284 SD2 HD1 stated that the DOE should be permitted to monitor private schools and placements to "ensure compliance with all applicable federal, state, and county laws, rules, regulations and ordinances pertaining to health and safety." The DOE is an educational agency. It is not the government and it should not have any authority to enforce state and federal rules and regulations that are the responsibility of the state of Hawaii.

It is also absurd for SB 1284 SD2 HD1 to imply that the DOE is the ONLY agency that "cares" about a child's health and safety and that private schools do not.

On the contrary, the following are examples of DOE teachers including Special Education teachers and their activities against helpless children. I believe the following headlines taken from our local newspaper speak volumes.

-A Kona teacher charged for child abuse of an 11-year old boy.

-A special education teacher on Hilo was arrested for drug distribution.

-A Leilehua high school Special education teacher arrested for selling methamphetamine while at school.

-A Makapu Elementary school teacher arrested for molesting two girls at a Kaneohe School.

5. In relation to accreditation of a private placement, Section (j) of SB 1284 SD2 HD1 is misleading. It gives a false importance to an accredited school when in reality it has NO bearing on how a special education program and related services are implemented or on the quality or level of these services provided to the student at the private placement.

Accreditation of a private placement is neither mandatory nor relevant to Chapter 60 or IDEA 2004. The issue of accreditation should not even be part of SB 1284 SD2 HD1. What is required by IDEA involving a private school is the determination of the appropriateness of a child's educational placement.

In Chapter 60 under 8-60-2, the definition of placement is "an appropriate educational setting for the implementation of the program for a student with a disability based upon the individualized educational program. It does not mean the specific location or school but the type of placement on the continuum of placement options (e.g. regular classroom with support, special class, special school, etc.). Placement must be provided tin the least restrictive environment."

it should be obvious that an accredited private school may not be an appropriate placement if the school does not have the resources or trained personnel to implement an IEP. Conversely, a school not accredited as per this bill, could still be determined to be an appropriate placement due to a child's unique learning needs as identified under IDEA.

Basically, SB 1284 SD2 HD1 is an attempt to further limit the placement options available to a handful of special needs children by using "accreditation" as method to distinguish acceptable schools by DOE standards and non acceptable schools. However, this Committee should remember that the "appropriateness" of a placement whether it is a public school or a private

school, is determined by a hearings officer through a legal process as required by federal law. This section of the bill is inconsistent with IDEA.

6. As an aside, none of the DOE's public schools can be accredited under HAIS or HCS but may be accredited under the Western Association of Schools and Colleges (WASC). Yet, out of the DOE's 286 public schools (including charter schools and excluding post-secondary schools), only 100 are accredited by WASC for 2010-2011. It is ironic that this bill requires the private schools to be accredited for monitoring purposes and yet the majority of DOE schools is neither accredited nor monitored by any agency outside of itself.

In the same vein, IDEA 2004 requires that private placements meet the same standards that would apply to the DOE's own public schools. With an accreditation requirement as in SB 1284 SD2 HD1, it would seem that the public schools would have to be accredited to the same level as their private school peers. Otherwise, it would seem that the DOE would violate both IDEA 2004 and SB 1284 SD2 HD1 at the same time. The converse would also be true where NONE of the schools, public or private, would need to be accredited in order to meet both IDEA 2004 and SB 1284 SD2 HD1 at the same time. If only the private schools are required to be accredited then based on the differences in standards, this section of the bill contradicts IDEA.

7. The DOE continues to have an adversarial relationship with a handful of privately owned special education schools such as Loveland Academy, Variety School and the Pacific Autism Center. For the DOE, the issue has always been about the cost of tuition, fees and services that these schools charge. However, when a court determines that a special education school is an appropriate placement that addresses a child's specific learning needs, the DOE really does not have much say in this matter except to pay for these services.

SB 1284 SD2 HD1 would create a loophole allowing the DOE to withhold payment to these private special education schools for whatever reason they may deem suitable under the guise of monitoring. The DOE's decision not to pay could be randomly decided with the child's education hanging in the balance.

At the same time, SB 1284 SD2 HD1's requirement to "withhold payment to any private school or placement that restricts or denies monitoring of students by the department of education" directly challenges a hearing officer's decision thus further violating a child's educational rights under IDEA.

According to the DOE's Procedural Safeguards Notice under Hearing Decisions, 34 CFR 300.513, the hearing officer may decide in favor of the parents alleging procedural violations. TWO of these procedural violations are the "deprivation of

an educational benefit" and the interference with a child's right to a free and appropriate public education."

Once the DOE chooses to withhold payment to a private school for the purposes of manipulating a private school into allowing access to a student in this manner, the DOE will violate the child's right to FAPE once again by "depriving" the child from an educational benefit, even more so should the parents be unable to meet a sudden financial burden as a result of the DOE's actions. At the federal level, this type of activity would not bode well for the DOE as both the DOE and the state of Hawaii would be ill-prepared financially should a class action lawsuit arise from this legislation due to the infringement of the rights of private businesses and the students protected under IDEA and FERPA as well as their civil rights.

8. SB 1284 SD2 HD1's requirement for the private school to provide educational records to the DOE within "three business days of receipt of a request of such records" is intended to further burden the private school. In Chapter 60, under 8-60-86, it states that the DOE is required to allow parents to have access to their child's educational records no more than 45 days after the request as been made. Yet SB 1284 SD2 HD1 permits a double standard and requires the private school to provide DOE access to these same records within THREE business days of receipt of their request. Again, this demonstrates the extreme one-sidedness of this bill in favor of the DOE without regard to any other parties involved.

9. I agree that the DOE has a responsibility and obligation to provide a Free Appropriate Public Education to all special needs children under IDEA, including those who are placed in a private school at the public's expense. However, SB 1284 SD2 HD1 fails to include or even suggest any system of checks and balances to ensure the rights of the private schools and their students all the while leaving these decisions up to the discretion of the DOE.

In most instances the DOE is fully capable of monitoring students without "invading" private school campuses. Many of the private school's documents are provided to the DOE without much ado and many educational documents are actually generated by DOE providers. Observations and assessments are permitted as well as properly scheduled visits if accompanied by parental consent. Many times the DOE's own providers provide services within the private placement and thus have the ability to provide updates on the student's educational progress and status on a daily basis.

Private schools, being private entities, should also have the independent right to deny the DOE access for legitimate reasons including lack of parental consent, unannounced visits, unscheduled visits, inopportune times or dates or inaccessibility of the student at the time of the DOE's visit. These schools must

balance liability issues with their duty to protect their staff and students and the demands from the DOE. SB 1284 SD2 HD1 ignores these considerations altogether.

One major area of concern is related to a parent's written consent for observations or visits. Parental consent as per the DOE's Procedural Safeguards Notice under 34 CFR 300.9 states that a request for consent must "clearly identify all relevant information including records (if any) that will be released and to whom, related to the action for which the parent gives consent and that the parent must understand and agree in writing to that action."

However, this bill does not mention the need for parental consent when allowing the DOE 1) to conduct a direct observation of the student at the private school, 2) to review any educational records or documents collected by the private school, and 3) to hold discussions related to the student at the private school. A lack of parental consent would be inconsistent with IDEA.

HRS Section 302A-443 already permits the DOE to monitor students who have undergone unilateral private placement, so this legislation is redundant and unnecessary. It permits the DOE to greatly overstep its authority into the private sector yet, when the DOE fails to follow these same rules that they expect others to follow, no one of authority including the legislature, Governor's Office, the Board of Education, or even from within the DOE itself, will hold the DOE accountable for the numerous civil violations against the special needs children and their parents in this state.

This bill is a weak attempt to allow the DOE to control tuition costs and services at the expense of disabled children when they are forced to pay for the special education and services that they were initially unable to provide when the child was in their public school. This bill is also an attempt to further reduce placement options due to adversarial relationships that exist between the DOE and private special education schools. This bill, as is, will surely lead to additional due process cases and perhaps other civil cases, thus increasing DOE costs, the very thing the DOE is trying to control.

Whatever challenges the DOE may face in monitoring a child placed in a private placement, it was the DOE's INITIAL failure to provide FAPE as required by federal and state laws that resulted in the private placement in the first place.

It is the DOE's fault for the mess that it has created for itself and yet, the legislature continuously rewards this agency for failure without demanding one iota of accountability or fiscal responsibility. This intentional disregard is what led

Hawaii into the Felix Consent decree for over ten years and millions of dollars of waste, mismanagement, and undisclosed criminal activities

For the reasons stated, I oppose SB 1284 SD2 HD1. I urge this Committee not to pass the measure.

Sincerely.
Teresa Chao Ocampo

(Signature on file)

FINTestimony

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, March 30, 2011 7:30 AM
To: FINTestimony
Cc: jessica.wong@hawaiiantel.net
Subject: Testimony for SB1284 on 3/30/2011 2:00:00 PM

Testimony for FIN 3/30/2011 2:00:00 PM SB1284

Conference room: 308
Testifier position: support
Testifier will be present: No
Submitted by: Jessica Wong-Sumida
Organization: Community Children's Councils (CCC)
Address:
Phone:
E-mail: jessica.wong@hawaiiantel.net
Submitted on: 3/30/2011

Comments: