

SB759



## TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FIFTH LEGISLATURE, 2009

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 759, RELATING TO EDUCATION.

**BEFORE THE:**

SENATE COMMITTEE ON EDUCATION AND HOUSING

**DATE:** Monday, February 23, 2009 **TIME:** 1:35 PM

**LOCATION:** State Capitol, Room 225

**TESTIFIER(S):** Mark J. Bennett, Attorney General  
or Kris S. Murakami, Deputy Attorney General  
or Holly T. Shikada, Deputy Attorney General

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Chair Sakamoto and Members of the Committee:

The Department of the Attorney General **has concerns** regarding this bill.

The purpose of this bill is to provide parents of children with disabilities additional flexibility in choices relating to education.

Section 3 of this bill would amend section 302A-1143, Hawaii Revised Statutes, to allow children with disabilities to attend a school outside of the district in which they reside upon request by their parent or guardian. The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying any person within their jurisdiction the equal protection of the laws.

This bill may be subject to legal challenges for providing disabled children preferential treatment over nondisabled children by allowing disabled children to bypass chapter 13, Hawaii Administrative Rules, which is the established process used by students, disabled as well as nondisabled, to receive a geographic exception to attend a school outside the district in which they reside. Although neither disabled nor nondisabled children are a "protected class" for purposes of applying the "strict scrutiny" test under the Equal Protection Clause, the bill must withstand the rational basis test. Although the rational basis need not be stated explicitly in the bill, a rational

basis must exist. If the bill proceeds, it is recommended that the purpose section be expanded to more fully explain the need to provide more flexibility for disabled children.

Additionally, the term "disability," as used in this bill, is vague and ambiguous and potentially problematic under substantive due process grounds. This bill does not define disability or specify whether the bill is intended to apply only to a student with a disability who has been deemed eligible to receive special education and related services under the Individuals with Disabilities Education Act ("IDEA") or accommodations and modifications under section 504 of the Rehabilitation Act. If this bill proceeds, we recommend that "disability" be defined.

As written, this bill could require a school to accept a disabled student upon request by the parent or guardian, without the student being deemed eligible for services under the IDEA or section 504 of the Rehabilitation Act. This would require the school to incur additional costs and expend additional resources to provide the services, classes, and facilities necessary to accommodate the student, even if the student's disability does not impact his or her ability to benefit from the education provided by the school.

Date of Hearing: February 23, 2009

Committee: Senate Education and Housing

Department: Education

Person Testifying: Patricia Hamamoto, Superintendent

Title: S.B. 759, Relating to Education

Purpose: Provides parents of children with disabilities with additional flexibility in choices relating to education.

Department's Position: The Department of Education (Department) **does not support**

S.B. 759.

The Individuals with Disabilities Education Act does not require school districts to provide Free Appropriate Public Education (FAPE) to children who are home schooled by their parents. The insertion of, "including homes where the child is home schooled" in Section 302A-436 of the Hawaii Revised Statutes would require the Department to provide services not intended by federal law. This would impose additional cost and resources to the Department.

Amending §302A-1443 circumvents Hawaii Administrative Rule, Chapter 13, Geographic Exceptions. Chapter 13 is the process for parents to apply to any public school for their child, including exceptional students. An "exceptional student" means any student who is found eligible for special education and related services.

The insertion in §302A-1143 of "provided that a child with a disability shall be granted permission to attend a school outside of the district in

which they reside, upon request by the parent or guardian of the child with a disability” would impose additional cost and resources to the Department.

We concur with deleting from §302B-15, “that the department may offer for purchase by a charter school at an annual cost to be negotiated between an individual charter school and the department,” however, the corollary contract statement, “The department shall enter into a contract with a charter school to provide these services, which shall be renegotiated on an annual basis,” must also be deleted. The Department and the charter schools have collaboratively developed the “Hawaii Primers on Special Education and Public Charter Schools” which includes services to special education students.

The Department does not support S.B. 759.



**STATE OF HAWAII**  
STATE COUNCIL  
ON DEVELOPMENTAL DISABILITIES  
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February 23, 2009

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

Dear Senator Sakamoto and Members of the Committee:

**SUBJECT: SB 759 – RELATING TO EDUCATION**

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

The State Council on Developmental Disabilities (DD) **OFFERS COMMENTS ON SB 759**. The purpose of the bill is to provide parents of children with disabilities with additional flexibility in choices relating to education by requiring appropriate special education and related services be rendered by DOE in homes where the child is home schooled; providing for geographical exceptions for students with disabilities; and requiring DOE to enter into a contract with a charter school to provide central services to be renegotiated on an annual basis.

We support efforts to provide children with disabilities and their families with additional flexibility to choose home schooling, a geographical exception, or a charter school in the same manner provided to children without disabilities. However, there are areas in the bill that we feel need additional information or clarification. The following are our comments:

1. Home Schooling and Least Restrictive Environment (LRE) Requirement.  
We are concerned that broadening the locations at which services may be rendered to include the homes where the student is home schooled may make it more difficult to comply with the LRE requirement under the Individuals with Disabilities Education Improvement Act. Currently, services are rendered at the home public school site. The responsibility of determining the appropriate placement for the child is part of the IEP team based on evaluations and discussion amongst the team members.

On one hand, we feel a parent's choice to home school their child may conflict with the intent of LRE. Is the student's home the LRE for the student to gain social skills and establish relationships in addition to receiving education services? However, we are not aware of any tools to assess how restrictive a home setting is. Anecdotal data indicates there are various home school settings that include several situations: 1) one-to-one student/parent ratio, 2) one-to-four student/parent ratio, and 3) more than four-to-one student/parent ratio.

On the other hand, for students who reside in rural areas, there may not be appropriate and available education and ancillary services in their school district. Limited resources may offer limited alternatives with home schooling being one of them.

2. Geographic Exception, Section 3, page 2, lines 5-8.  
Current proposed new language states, "provided that a child with a disability shall be granted permission to attend a school outside of the district in which they reside, upon request by the parent or guardian of a child with a disability."

We ask for your consideration to amend the language to include the phrase, "in the same manner provided to children without disabilities." The language as currently written could be interpreted to mean that children with disabilities would be given preferential treatment due to their disability to obtain geographical exception "upon the request by the parent or guardian of the child with a disability." We believe that the intent of the bill is to ensure that children with disabilities are given equal opportunity to geographical exceptions in the same manner afforded to students without disabilities.

3. Provision of Services and Charter Schools.  
The Council defers to DOE on the necessity of amending Section 302B-15, Hawaii Revised Statutes, in Section 4, page 2, lines 11-20. We are aware that DOE and the charter schools have developed the Hawaii Primers on Special Education and Public Charter Schools. This document addresses special education services to students with disabilities.

Thank you for the opportunity to present testimony offering comments on and a proposed amendment to SB 759.

Sincerely,



Waynette K.Y. Cabral  
Executive Administrator



Rosie Rowe  
Chair



**S E A C**  
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February 23, 2009

**Special Education  
Advisory Council**

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

Ms. Brendelyn Ancheta  
Dr. Paul Ban, *Liaison  
to the Superintendent*  
Ms. Sue Brown  
Ms. Deborah Cheeseman  
Ms. Phyllis DeKok  
Ms. Mary Ellis  
Ms. Debra Farmer  
Ms. Gabriele Finn  
Ms. Martha Guinan  
Mr. Henry Hashimoto  
Mr. John Hinkle  
Ms. Tami Ho  
Ms. Barbara Ioli  
Ms. Shanelle Lum  
Ms. Rachel Matsunobu  
Ms. June Motokawa  
Ms. Kristy Nishimura  
Ms. Connie Perry  
Ms. Barbara Pretty  
Ms. Kau'i Rezentes  
Dr. Patricia Sheehey  
Mr. August Suehiro  
Ms. Judy Tonda  
Ms. Cari White  
Ms. Jasmine Williams  
Mr. Duane Yee  
Mr. Shawn Yoshimoto

Jan Tateishi, Staff  
Susan Rocco, Staff

Senator Norman Sakamoto, Chair  
Committee on Education and Housing  
State Capitol  
Honolulu, HI 96813

RE: SB 759 – Relating to Education

Dear Senator Sakamoto and Members of the Committee,

The Special Education Advisory Council, Hawaii's State Advisory Panel under the Individuals with Disabilities Education Act (IDEA), **neither supports or opposes SB 759** as we do not have enough information to ascertain the true intent or implications of implementing the bill as it is currently written.

However, SEAC would like to offer some comments regarding the purpose of this bill: providing additional flexibility in choices to parents regarding the education of their child with a disability. The Individuals with Disabilities Education Act (IDEA) incorporates parental choice and decision making into the identification, evaluation, program and placement of students with disabilities and the provision of a free appropriate public education. Under IDEA parents can choose whether to have their child evaluated and whether to consent to the provision of special education and related services. Once a student is receiving services, it is the IEP team (including the parent) that makes decisions regarding the program and placement needs of the student.

IDEA makes a distinction between educational decisions made by an IEP team (including the parent) and unilateral decisions made by parents which do not reflect the consensus of the IEP team. If parents unilaterally choose to forgo the offer of a free and appropriate public education and home school their child or place their child in private school, IDEA makes it clear that the child does not have an individual right to receive some or all of the special education and related services that would be provided if enrolled in a public school.



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The Board of Education is currently addressing the issue of related services for students with disabilities who are being home schooled in its revisions to Chapter 12. While there may be instances where home schooling is in the best interest of a student due to medical or behavioral issues, the home environment does not typically provide the opportunity to learn alongside same age peers without disabilities. It is also unclear how the Department would provide related services, if specified in an IEP, and monitor the educational progress of the student.

Thank you for the opportunity to provide comments.

Sincerely,

Ivalee Sinclair, Chair