TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2010

ON THE FOLLOWING MEASURE:
H.B. NO. 2077, RELATING TO EDUCATION.

BEFORE THE:
HOUSE COMMITTEE ON EDUCATION

DATE: Wednesday, January 27, 2010 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 309

TESTIFIER(S): Mark J. Bennett, Attorney General, or
Steve K. Miyasaka, Deputy Attorney General or Holly Shikada, Deputy Attorney General

---

Chairs **Takumi, Chang, and Rhoads** and Members of the Committees:

The Department of the Attorney General opposes this bill as currently written.

The stated purpose of the bill is to provide consistent age limits for both general education and special education students.

Section 1 of the bill contains inaccurate information about the requirements of the Individuals with Disabilities Education Act (IDEA). Section 1 states that the IDEA only allows States to deviate where there is clear state law setting age limits. This is not accurate. The IDEA allows a state to set its own age limits based upon state law, state practice, or court order.

Further, the bill does not accomplish the stated purpose for the following reasons:

1. Special education students are generally not on a grade level track. The Department of Education (Department) places many special education students in Grade 31. This bill would have no effect on special education students in Grade 31.

2. Section 302A-1134, Hawaii Revised Statutes, currently contains language that allows overage students to attend public schools with the permission of the Superintendent. This language is inconsistent with the stated purpose of the bill to provide consistent age limits as the Superintendent or designee has the discretion to permit any overage student to attend school.

Under the IDEA, 20 U.S.C. § 1400, *et seq.*, states are obligated to make a free appropriate public education (FAPE) available to children between the ages of three and twenty-one, inclusive. However, for children aged 3, 4, 5, 18, 19, 20, or 21, said obligation does not apply if it would be inconsistent with state law, state practice, or a court order.

Pursuant to its administrative rules, the Department has determined that it will be obligated to provide special education and related services to students who are under twenty years of age on the first instructional day of the school year as set by the Department. In the recent court case of B.T., by and through his Mother, Mary T. v. Department of Education, State of Hawaii, 2009 WL 4884447 (D. Hawaii), in the United States District Court for the District of Hawaii (USDC), the USDC found that there is no state law, state practice or court order that allows the Department to deviate from the IDEA age limit of twenty-one. The USDC found that "no further age restrictions are placed on general education students in HRS 302A-1134." Id. at 6. The USDC went on to state that "[t]here is no limitation on how old a general education student may be upon entering grade 12. Moreover, this statute [HRS 302A-1134] explicitly provides the superintendent the authority to make

exceptions to this rule. No such flexibility is provided for in the administrative rule regarding disabled students." Id. at 6.

To accomplish the stated purpose of the bill, we recommend this bill be amended by deleting section 302A-1134(c) in its entirety and replacing it with the following language:

"(c) No person who is over the age of eighteen years old on the first instructional day of the school year shall be eligible to attend a public school. If a person reaches the age of eighteen during the school year, the person shall be eligible to attend public school for the full school year.

The department shall not be responsible for providing educational services to any 'exceptional children,' as defined in section 302A-101, who are over the age of nineteen years old on the first instructional day of the school year. Any 'exceptional children' reaching the age of nineteen during the school year, shall be allowed to receive educational services for the full school year."

The age limits of eighteen for regular education students and nineteen for special education eligible students or "exceptional children" as defined by section 302A-101 are recommended by the Department of Education.

We respectfully ask the Committees to pass this bill with the recommended amendments.

HAWAII DISABILITY RIGHTS CENTER

900 Fort Street Mall, Suite 1040, Honolulu, Hawaii 96813
Phone/TTY: **(808) 949-2922** *Toll Free*: **1-800-882-1057** *Fax*: **(808) 949-2928**
E-mail: **info@hawaiidisabilityrights.org** *Website*: **www.hawaiidisabilityrights.org**

HOUSE OF REPRESENTATIVES
THE TWENTY-FIFTH LEGISLATURE
REGULAR SESSION OF 2010

Committee on Education

Testimony in Opposition to H.B. 2077,
Relating to Education

Wednesday, January 27, 2010, 2:00 p.m.
Conference Room 309

Chair Takumi and Members of the Committee:

I am John Dellera, Executive Director of the Hawaii Disability Rights Center, and testify in opposition to this bill.

H.B. 2077 would amend Section 302A-1134(c) of the Hawaii Revised Statutes by adding age limits for public school students entering grades eleven and twelve. It misleads the Legislature by pretending it would provide consistent age limits for both general education and special education students, but in practice, the measure would perpetuate what Federal District Judge David Ezra recently found to be "blatant discrimination in violation of IDEA and Section 504 of the Rehabilitation Act of 1973." *B.T. v. Department of Education*, 637 F.Supp.2d 856, 865 (D. Haw. 7/7/2009).

The bill is an attempt to reverse a judgment entered against the Department of Education ("DOE") in the *B.T.* case on January 13, 2010. That judgment requires the DOE to treat students with disabilities the same as those without disabilities and to end discrimination

against disabled students who wish to continue their education after they reach 20 years of age.

The *B.T.* case was filed on behalf of a young man with autism because the DOE refused to continue providing special education services solely because he had turned 20 years of age. Since the Individuals With Disabilities Education Act ("IDEA") and its predecessor were enacted by Congress in the early 1970's, Hawaii and Maine – together constituting less than 1% of the population of the United States – have been the ONLY States to end special education as early as 20. Most States continue services to 22, some to 21, and some even longer. In Michigan, disabled students receive special education until they are 26, and in Iowa until age 24.

Under the IDEA, States are required to provide special education and related services to students with disabilities between the ages of 18 and 22, UNLESS they have, by law or practice, reduced eligibility for public education for all students in that age range. In the *B.T.* case, evidence obtained from the DOE showed that nondisabled students over 20 years of age may continue their high school education in a number of ways:

1. They may show they were under 17 at the beginning of grade 9 or under 18 at the beginning of grade 10;

2. They may ask the school principal to allow them to continue attending classes by showing "seriousness of purpose and an ability to profit from further education" (School Code Section 4145.1);

3. They may pursue an alternate high school diploma (either a General Education Development diploma or a Competency-Based diploma) in the adult education program.

The DOE admitted during discovery that it had NEVER rejected the application of a non-disabled student who sought permission to continue in high school. Few wanted to do so, however, because the DOE steered them to adult education where they would attend classes

with their own age group. Since 1999, a total of 52 regular education students and 59 special education students have been allowed to continue in high school after becoming 20 years of age. The regular education students usually need a few more credits to graduate or they have immigrated from a foreign country and wish to study English and obtain a regular high school diploma. While every non-disabled student over 20 who wanted to continue in high school classes has been allowed to do so, HALF of the disabled students over 20 have had to sue the DOE in order to continue their education.

During the last five years, 3,444 students aged 20 and 21 (none in need of special education services) have enrolled in adult secondary education programs. NOT ONE SINGLE student needing special education has enrolled in the adult program, however, because no special education is provided there.

Judge Ezra granted summary judgment in a decision dated December 17, 2009 that allows B.T. to receive special education services until he is 22 years of age. In his decision, Judge Ezra found it to be "significant" that HRS Section 302A-1134(c) places age limits on entry to the 9th and 10th grades, but not to the 11th or 12th grades. The Court found, in fact, "[t]here is no limitation on how old a general education student may be upon entering grade 12." H.B. No. 2077 would require that students entering grade 12 be under 20, EXCEPT where the school principal decides that the facts warrant admission.

In the past, as the evidence in *B.T.* proved, school principals ALWAYS found the facts warranted admission in the case of non-disabled students, but in at least HALF of the cases involving students with disabilities, continued education was denied. Obviously, it doesn't cost the DOE much to allow the occasional non-disabled student aged 20 or 21 to attend regular

high school classes, which explains why principals have NEVER rejected a request to do so. On the other hand, special education is expensive, which explains why principals have denied more than HALF of the requests for special education services beyond age 20.

Cost is obviously a concern for the State, especially during the current fiscal crisis, but it cannot justify discrimination against Hawaii students with disabilities. As Judge Ezra wrote in granting summary judgment,

> The Court commends the State of Hawaii ... for recognizing there are instances where it is necessary to allow a student age 20 or above the opportunity to complete his or her public education. Under the IDEA, the State is obligated to do as much for special education students.

B.T. v. Department of Education, 2009 WL 4884447 at *9 (D. Haw., Ezra J., 12/17/2009).

There are approximately 17,000 special education students in Hawaii, but the decision announced in the *B.T.* case will probably benefit less than 1,000 students, 20 and 21 year-olds who are most severely affected by developmental disabilities such as autism. Two more years of education – funded under IDEA – can make a substantial difference to that group, giving them independent living chances and vocational skills that would improve the quality of their lives and reduce the need over their lifetimes for Medicaid waiver and vocational rehabilitation services.

We wish the Legislature to know that this bill is an attempt to reverse a federal court civil rights decision that protects disabled students from "blatant discrimination" practiced in the past. We respectfully request that this profoundly misguided bill be held.

John B. Dellera
Executive Director
January 25, 2010

012501.20