



The Council of Parent Attorneys and Advocates, Inc.

February 14, 2006

Senator Norman Sakamoto,  
Chair, Senate Committee on Education  
Hawai'i State Capitol, Room 230  
415 South Beretania Street  
Honolulu, HI 96813

Senator Gary L. Hooser  
Vice Chair, Senate Committee on Education  
Hawai'i State Capitol, Room 207  
415 South Beretania Street  
Honolulu, HI 96813

Re: S.B. 2080 and S.B. 2733: Individuals with Disabilities Education Act  
Burden of Proof

Dear Senators:

The Council of Parent Attorneys and Advocates (COPAA) is a nonprofit organization of attorneys, advocates, and parents whose primary mission is to protect the civil rights of children with disabilities and secure appropriate educational services for them. Members of COPAA come from a variety of states, including a number from Hawai'i. Some of our members are in private practice; others work for nonprofit public interest groups and organizations, a number of which serve those with low incomes.

We understand that Hawai'i is considering two bills, S.B. 2080 and S.B. 2733, that would place the burden of proof in special-education cases on the state Department of Education. This is important to protect the rights of over 22,000 Hawai'ian students with disabilities to the free appropriate public education required by Hawai'ian and the federal Individuals with Disabilities Education Act.

The Individuals with Disabilities Education Act mandates an active and equal role for parents in advocating for their child's education. Hawai'ian parents often find it hard to navigate a special-education maze dominated by teachers and other professionals who are more familiar with special-education, the law and hearing procedures. For example, IEP meetings are inherently intimidating for parents. Parents are often outnumbered by school personnel, who control the process. School districts have free, unfettered access to all relevant information about a proposed placement. Parents do not, and are often denied, access to those programs in advance of hearings. When parents' experts are permitted to observe children in class, observations are limited. School

districts, like the Hawai'i's DOE, rely on psychologists, service providers, and other employees in IEP meetings to develop IEPs and then, on these same people (and other paid experts) to testify as witnesses at hearings. Parents, on the other hand, are often unable to access or afford expert witnesses. In fact, many parents of children with disabilities live in poverty or difficult financial circumstances and are less well-educated than parents of children in the general population.<sup>1</sup> Placing the burden of proof on Hawai'ian school districts helps correct these inequities.

For many children, good special-education services make the difference between success and failure. But when Hawai'ian parents believe that the DOE has failed to provide the free appropriate public education mandated by law, their only recourse is to seek due process if they cannot convince the school team otherwise. But, when parents do so, they continue to be at a disadvantage. The Hawai'ian DOE can use its professionals as experts. School districts are familiar with special-education law and hearing procedures; parents are not. Parents lack the large resources that the DOE has. Placing the burden of proof on the DOE simply require its to use the resources at its command to prove to an impartial hearing officer that the Individualized Education Program or placement proposed for a child meets the IDEA's minimal standards.

A concern expressed by some school district is costs. COPAA has examined whether there is a decrease or increase in litigation based upon the burden of proof. The Senate should be aware that there is no research showing that litigation increases if the burden of proof is placed on school districts.

The Supreme Court's recent *Schaffer v. Weast* decision puts the burden of proof on the party challenging the IEP, unless a state law or regulation states otherwise. This party is most often the parent. In placing the burden of proof on the DoE, Hawai'i would join many states that place the burden of proof on school districts, thereby strengthening protections for students with disabilities. Hawai'i would simply return to the rule that governed in the Ninth Circuit before *Schaffer v. Weast* shifted the burden of proof. This rule served Hawai'ian children and parents well for many years, and helped keep the playing field level.

Please let us know if COPAA may be of assistance or provide further information.

Sincerely,

Robert Berlow  
Chair, Government Relations

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<sup>1</sup> M. Wagner, C. Marder, J. Blackorby, & D. Cardoso, *The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* (Sept. 2002), 23 -24, 28-29 available at [http://www.seels.net/designdocs/SEELS\\_Children\\_We\\_Serve\\_Report.pdf](http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf) (as visited November 29, 2005).