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OFFICE OF THE SUPERINTENDENT

May 15, 2012

TO: The Honorable Cheryl Kauhane Lupenui, Chairperson
Student Achievement Committee

FROM: Kathryn S. Matayoshi, Superintendent

SUBJECT: **DISCUSSION/RECOMMENDATION FOR BOARD ACTION ON APPROVAL FOR PUBLIC HEARINGS ON PROPOSED AMENDMENTS TO TITLE 8 SUBTITLE 2 CHAPTER 60, HAWAII ADMINISTRATIVE RULES, PROVISION OF A FREE APPROPRIATE PUBLIC EDUCATION FOR A STUDENT WITH A DISABILITY, ESTABLISHING THE PROCESS FOR THE DEPARTMENT OF EDUCATION'S MONITORING OF THE PRIVATE PLACEMENT OF SPECIAL EDUCATION STUDENTS**

1. RECOMMENDATION

The Department of Education (Department) recommends that the Board of Education (Board) approve the proposed amendments to the Rules Amending Title 8, Hawaii Administrative Rules (HAR), Chapter 60, Provision of a Free Appropriate Public Education for a Student with a Disability (Chapter 60) to proceed to the Office of the Attorney General for approval and to forward to the Governor's Office for approval to proceed to public hearing.

2. RECOMMENDED EFFECTIVE DATE

It is recommended that amended Chapter 60 become effective when the rule adoption process, pursuant to Chapter 91, the Hawaii Revised Statute (HRS), is completed.

3. RECOMMENDED COMPLIANCE DATE

It is recommended that Chapter 60 be effective upon adoption of the rules.

4. DISCUSSION

a. Conditions leading to the recommendation

The 2011 Legislature passed Act 129, Relating to Education, HRS §302-443(a) through (k).

b. Previous action of the Board on the same or similar matter

None.

c. Other policies affected

None.

d. Arguments in support of the recommendation

The revisions will place the Department in alignment with Act 129, HRS §302-443(a) through (k).

e. Arguments against the recommendation

Private schools and some parents/parent groups may voice concerns regarding the monitoring of students with disabilities placed at a private school, residential facility, or other non-public school or facility at the Department's expense.

f. Findings and conclusions of the Board Committee

None.

g. Other agencies or the departments of the State of Hawaii involved in the action

The Board and the Department will communicate the Board's decision to implement amended HAR Title 8, Chapter 60, Provision of a Free Appropriate Public Education for a Student with a Disability to all schools, including public charter schools (PCSs), and private school, residential facility, or other non-public schools that have students with disabilities.

h. Possible reaction of the public, professional organizations, unions, DOE staff and/or others to the recommendations

Although there may be some negative comments on the incorporated revisions by private schools, other non-public schools and parents of students with disabilities placed at these schools, it is anticipated that the proposed Chapter 60 revisions will be supported by the community and DOE staff.

i. Educational implications

The proposed revised Chapter 60 affords all students ages 3 to 20 with a Free Appropriate Public Education in the least restrictive environment that emphasizes special education and related services using specially designed instruction to meet the unique needs of students with disabilities.

j. Personnel implications

Personnel in all public schools, including PCSs, must adhere to the requirements under Chapter 60.

k. Facilities implications

None.

l. Financial implications

Noncompliance with the monitoring requirements under the Individuals with Disabilities Education Improvement Act and Chapter 60 may result in lawsuits, due process hearings, settlements, withholding of federal funds, etc. Failure to comply with the monitoring requirements of the HRS and Chapter 60 by the private school, private residential facility or non-public school or facility will result in the withholding of payment to the private school, private residential facility or non-public school or facility.

5. OTHER SUPPLEMENTARY RECOMMENDATIONS

None.

KSM:DF:ks

Enclosures: HAR Chapter 8-60 Standard format
HAR Chapter 8-60 Ramsayer format
Act 129, Relating to Education
HRS §302A-443(a) through (k)

c: Office of Curriculum, Instruction and Student Support

HAR Chapter 8-60

STANDARD FORMAT

Hawaii Administrative Rules

TITLE 8

DEPARTMENT OF EDUCATION

SUBTITLE 2

EDUCATION

CHAPTER 60

PROVISION OF A FREE APPROPRIATE PUBLIC EDUCATION FOR A STUDENT WITH A DISABILITY

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SUBCHAPTER 1

GENERAL PROVISIONS

§8-60-1 Purposes and scope. (a) The purposes of this chapter are:

(1) To ensure that all students with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(2) To ensure that the rights of students with disabilities and their parents are protected;

(3) To assist public schools in the provision of the education of all students with disabilities;

(4) To assess and ensure the effectiveness of efforts to educate students with disabilities;

(5) To strengthen the role of parents;

(6) To encourage whole-school approaches and pre-referral intervention to reduce the need to label students as disabled in order to address their learning needs;

(7) To encourage high expectations for students with a disability and to improve and increase educational achievement; and

(8) To encourage all students with a disability to develop skills needed to lead a self- determined life.

(b) This chapter shall be construed as supplemental to, and in the context of, the Individuals With Disabilities Education Act (20 U.S.C. section 1400 et seq.; 34 C.F.R. sections 300.1 et seq.) and other federal laws and regulations relating to the provision of a free appropriate public education to a student with a disability.
[Eff 11/26/09] (Auth: 20 U.S.C. 1412; HRS §302A-1112)
(Imp: HRS §§302A-1112, 302A-436; 34 C.F.R. §300.2)

§8-60-2 Definitions. As used in this chapter:

"Accredited private special education school or program" means a private day school, private day program, or any preschool that has earned accreditation according to the requirements and procedures specified by the Western Association of Schools and Colleges (WASC), any Hawaii affiliate of the WASC, the Hawaii Association of Independent Schools (HAIS), the National Association for the Education of Young Children (NAEYC), or the National Early Childhood Program for Accreditation (NECPA).

"Act" means the Individuals with Disabilities Education Act, as amended. (20 U.S.C. section 1400(a))

"Assessment" means the administration of specific tests, instruments, tools, strategies, and other materials.

"Assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is

used to increase, maintain, or improve the functional capabilities of a student with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device.

"Assistive technology service" means any service that directly assists a student with a disability in the selection, acquisition, or use of an assistive technology device. The term includes:

(1) The evaluation of the needs of a student with a disability, including an assistive technology functional evaluation of the student in the student's customary environment;

(2) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by students with disabilities;

(3) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(4) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(5) Training or technical assistance for a student with a disability or, if appropriate, that student's family; and

(6) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that student.

"Certified or licensed private residential facility" means a private residential facility" shall mean a private residential school or program that has earned licensure, certification, or accreditation according to the requirements and procedures specified by the appropriate state licensure board or department.

"Charter school" means a public school as defined in both federal and state laws.

"Consent" means that:

(1) The parent has been fully informed of all information relevant to the activity for which consent is sought, in the parent's native language, or through another mode of communication;

(2) The parent understands and agrees in writing to the carrying out of the activity for which the parent's consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(3) (A) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

(B) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

(C) If a parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the department is not

required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

"Day" means calendar day unless otherwise indicated as business day or school day.

(1) "Business day" means Monday through Friday, except for federal and state holidays (unless holidays are specifically included in the designation of business day, as in section 8-60-27(d)(1)(B)).

(2) (A) School day means any day, including a partial day that students are in attendance at school for instructional purposes.

(B) School day has the same meaning for all students in school, including students with and without disabilities.

"Department" means the state department of education, including charter schools.

"Due process complaint" means a request for an impartial hearing process to resolve an alleged violation relating to the identification, evaluation, or educational placement of a student with a disability or the provision of a FAPE to the student.

"Elementary school" means a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under state law.

"Eligible student" means a person aged three to twenty (3-20) who has not attained a high school diploma or its equivalent, who has been determined to have a disability pursuant to the IDEA and this Chapter and requires special education and related services.

"ESEA" means the Elementary and Secondary Education Act.

"Evaluation" means procedures used in accordance with sections 8-60-36 through 8-60-43 to determine whether a student has a disability and the nature and extent of the special education and related services that the student needs.

"Free appropriate public education" or "FAPE" means special education and related services that:

(1) Are provided at public expense, under public supervision and direction, and without charge;

(2) Meet the standards of the department, including the requirements of this chapter;

(3) Include an appropriate preschool, elementary school, or secondary school education in the state involved; and

(4) Are provided in conformity with an individualized education program that meets the requirements of sections 8-60-44 through 8-60-48.

"HAIS" means the Hawaii Association of Independent Schools.

"Homeless students" has the meaning given the term homeless students and youths in section 725 (42 U.S.C. 11434a) of the McKinney-Vento Homeless Assistance Act, as amended, 42 U.S.C. 11431 et seq.

"Include" means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

"Independent educational evaluation" or "IEE" means an evaluation conducted by a qualified examiner who is not employed by the department.

"Individualized education program" or "IEP" means a written statement for a student with a disability that is developed, reviewed, and revised in accordance with sections 8-60-44 through 8-60-48.

"Individualized education program team" means a group of individuals described in section 8-60-45 that is responsible for developing, reviewing, or revising an IEP for a student with a disability.

"Individualized family service or support plan" or "IFSP" has the meaning given the term in section 636 of the Act.

"Interim alternative educational setting" or "IAES" means a temporary placement for a student who has been suspended or otherwise removed from his current educational placement for disciplinary reasons in which the student continues to receive educational services to enable the student to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the student's IEP.

"Least restrictive environment" or "LRE" means to the maximum extent appropriate, educating students with disabilities, including students in public or private institutions or other care facilities, with students who are non-disabled and removing students with disabilities from the regular educational environment only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

"Limited English proficient" has the meaning given the term in section 9101(25) of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C.6301 et seq. ("ESEA").

"Manifestation determination" means a process triggered by a decision to change the placement of a student with a disability because of a violation of a code of student conduct to determine:

If the conduct in question was caused by, or had a direct and substantial relationship to the student's disability; or

If the conduct in question was the direct result of a failure to implement the IEP.

"Mediation" means a voluntary process in which a neutral third party (mediator) helps parents and education representatives try to resolve issues relating to a student's identification, evaluation, or educational placement or the provision of a FAPE.

"NAEYC" means the National Association for the Education of Young Children.

"NECPA" means the National Early Childhoold Program Accreditation.

"Native language". Native language, when used with respect to an individual who is limited English proficient, means the following:

(A) The language normally used by that individual, or, in the case of a student, the language normally used by the parents of the student, except as provided in paragraph (2).

(B) In all direct contact with a student (including evaluation of the student), the language normally used by the student in the home or learning environment.

For an individual with deafness or blindness, or for an individual with no written language, the mode of communication is that normally used by the individual (such as sign language, Braille, or oral communication).

"Nonpublic special education school or program" shall mean any privately owned or operated preschool, school, educational organization or corporation, treatment facility, day program, residential program, or any other placement that maintains, conducts, or provides classes or programming, including related services as defined by federal or state laws, rules, or regulations, for the purpose of offering instruction or treatment to students with disabilities for consideration, profit, tuition, or fees. This also includes any individual or individuals, sole proprietorship, partnership, or Limited Liability Corporation that provides only related services to a student with a disability as defined by federal or state laws, rules, or regulations.

"Parent" means:

(1) A biological or adoptive parent of a student;

(2) A foster parent, unless state law, rules, or contractual obligations with the State prohibit a foster parent from acting as a parent;

(3) A guardian generally authorized to act as the student's parent, or authorized to make educational decisions for the student (but not the State if the student is a ward of the State);

(4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the student lives, or an individual who is legally responsible for the student's welfare; or

(5) A surrogate parent who has been appointed in accordance with section 8-60-73 or section 639(a)(5) of the Act.

The biological or adoptive parent, when attempting to act as the parent and when more than one party is qualified to act as a parent, shall be presumed to be the parent for purposes of this chapter unless the biological or adoptive parent does not have legal authority to make educational decisions for the student; except that if a judicial decree or order identifies a specific person or persons under paragraphs (1) through (4) to act as the "parent" of a student or to make educational decisions on behalf of a student, then that person or persons shall be determined to be the "parent" for purposes of this chapter.

"Placement" means an appropriate educational setting for the implementation of the program for a student with a disability based upon the individualized education 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.).

"Present levels of academic achievement and functional performance" means an essential part of the IEP that summarizes the student's present levels of academic achievement and functional performance and states how the student's disability affects the student's involvement and progress in the general education curriculum.

"Prior written notice" or "PWN" means written notification given to parents of a student with a disability a reasonable time before the department:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of a FAPE to the student, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of a FAPE to the student.

"Programming" shall mean academic instruction, non-academic services, and related services as defined by federal and state laws, rules and regulations.

"Qualified" means that an individual has met the department-approved or department-recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individual is providing special education or related services.

"Related services". General definition. Related services includes transportation and such developmental, corrective, and other supportive services as are required to assist a student with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in students, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

Related services, with respect to students with surgically implanted devices, including cochlear implants.

(1) Do not include a medical device that is surgically implanted, the optimization of that device's functioning (e.g., mapping), maintenance of that device, or the replacement of that device.

(2) Nothing in paragraph (1):

(A) Limits the right of a student with a surgically implanted device (e.g., cochlear implant) to receive related services (as defined in the general definition) that are determined by the IEP team to be necessary for the student to receive a FAPE;

(B) Limits the responsibility of the department to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the student, including breathing, nutrition, or operation of other bodily functions, while the student is transported to and from school or is at school; or

(C) Prevents the routine checking of an external component of a surgically implanted device to make sure it is functioning properly, as required in section 8-60-11(b).

Related services terms are defined as follows:

(1) "Audiology" includes:

(A) Identification of students with hearing loss;

(B) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(C) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(D) Creation and administration of programs for prevention of hearing loss;

(E) Counseling and guidance of students, parents, and teachers regarding hearing loss; and

(F) Determination of students' needs for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification and assessment of disabilities in students" means the implementation of a formal plan for identifying a disability as early as possible in a student's life.

(4) "Interpreting services" includes:

(A) When used with respect to students who are deaf or hearing impaired: Oral transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time translation (CART), C-Print, and TypeWell; and

(B) Special interpreting services for students who are deaf-blind.

(5) "Medical services" means services provided by a licensed physician to determine a student's medically related disability that results in the student's need for special education and related services.

(6) "Occupational therapy" means services provided by a qualified occupational therapist, including:

(A) Improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation;

(B) Improving ability to perform tasks for independent functioning if functions are impaired or lost; and

(C) Preventing, through early intervention, initial or further impairment or loss of function.

(7) "Orientation and mobility services"

(A) Means services provided to blind or visually impaired students by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community; and

(B) Includes teaching students the following, as appropriate:

(i) Spatial and environmental concepts and use of information received by the senses (such as sound, temperature and vibrations) to establish, maintain, or

regain orientation and line of travel (e.g., using sound at a traffic light to cross the street);

(ii) To use the long cane or a service animal to supplement visual travel skills or as a tool for safely negotiating the environment for students with no available travel vision;

(iii) To understand and use remaining vision and distance low vision aids; and

(iv) Other concepts, techniques, and tools.

(8) (A) "Parent counseling and training" means assisting parents in understanding the special needs of their child;

(B) providing parents with information about child development; and

(C) helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP.

(9) "Physical therapy" means services provided by a qualified physical therapist.

(10) "Psychological services" includes:

(A) Administering psychological and educational tests, and other assessment procedures;

(B) Interpreting assessment results;

(C) Obtaining, integrating, and interpreting information about student behavior and conditions relating to learning;

(D) Consulting with other staff members in planning school programs to meet the special educational needs of students as indicated by psychological tests, interviews, direct observation, and behavioral evaluations;

(E) Planning and managing a program of psychological services, including psychological counseling for students and parents; and

(F) Assisting in developing positive behavioral intervention strategies.

(11) "Recreation" includes assessment of leisure function; therapeutic recreation services; recreation programs in schools and community agencies; and leisure education.

(12) "Rehabilitation counseling services" means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a student with a disability by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 et seq.

(13) "School health services" and "school nurse services" means health services that are designed to enable a student with a disability to receive a FAPE as described in the student's IEP. School nurse services are services provided by a qualified school nurse. School health services are

services that may be provided by either a qualified school nurse or other qualified person.

(14) "Social work services in schools" includes:
- (A) Preparing a social or developmental history on a student with a disability;
- (B) Group and individual counseling with the student and family;
- (C) Working in partnership with parents and others on those problems in a student's living situation (home, school, and community) that affect the student's adjustment in school;
- (D) Mobilizing school and community resources to enable the student to learn as effectively as possible in the student's educational program; and
- (E) Assisting in developing positive behavioral intervention strategies.

(15) "Speech-language pathology services" includes:
- (A) Identification of students with speech or language disabilities;
- (B) Diagnosis and appraisal of specific speech or language disabilities;
- (C) Referral for medical or other professional attention necessary for the habilitation of speech or language disabilities;
- (D) Provision of speech and language services for the habilitation or prevention of communicative impairments; and
- (E) Counseling and guidance of parents, students, and teachers regarding speech and language disabilities.

(16) "Transportation" includes:
- (A) Travel to and from school and between schools;
- (B) Travel in and around school buildings; and
- (C) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a student with a disability.

"Resolution session" means a meeting convened within fifteen days of a parent filing a due process complaint in which the parent, a representative from the department and the relevant member(s) of the IEP team discuss the complaint and attempt to resolve the dispute that is the basis of the complaint prior to a due process hearing.

"Scientifically based research" has the meaning given the term in section 9101(37) of the ESEA.

"Secondary school" means a nonprofit institutional day or residential school, including a public secondary charter school that provides secondary education, as determined under state law, except that it does not include any education beyond grade twelve.

"Services plan" means a written statement that describes the special education and related services the department will provide to a parentally-placed student with a disability enrolled in a private school who has been designated to receive services, including the location of the services and any transportation necessary, consistent with

section 8-60-22, and is developed and implemented in accordance with sections 8-60-23 through 8-60-25.

"Short-term objectives/benchmarks" means measurable intermediate performance steps that will enable parents, students, and educators to gauge, at intermediate times during the year, how well the student is progressing toward the annual goals by either:

(a) Breaking down the skills described in the goal into discrete components; or

(b) Describing the amount of progress the student is expected to make within specified segments of the year.

"Special education"

(1) Special education means specially designed instruction, at no cost to the parents, to meet the uniue needs of a student with a disability, including:

(A) Instruction conducted in the classroom, in the home, in hospitals and institutions, in the community, and in other settings; and

(B) Instruction in physical education.

(2) Special education includes each of the following, if the services otherwise meet the requirements of paragraph (1):

(A) Speech-language pathology services, when the speech or language disability is the disabling condition;

(B) Travel training; and

(C) Vocational education.

Individual special education terms defined. The terms in this definition are defined as follows:

(1) "At no cost" means that all specially-designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

(2) "Physical education" means:

(A) The development of:

(i) Physical and motor fitness;

(ii) Fundamental motor skills and patterns; and

(iii) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports); and

(B) Includes special physical education, adapted physical education, movement education, and motor development.

(3) "Specially designed instruction" means adapting, as appropriate to the needs of an eligible student, the content, methodology, or delivery of instruction:

(A) To address the unique needs of the student that result from the student's disability; and

(B) To ensure access of the student to the general curriculum, so that the student can meet the educational standards within the jurisdiction of the department that apply to all students.

(4) "Travel training" means providing instruction, as appropriate, to students with significant cognitive disabilities, and any other students with disabilities who require this instruction, to enable them to:

(A) Develop an awareness of the environment in which they live; and

(B) Learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).

(5) "Vocational education" means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree.

"Special education teacher" means a person assigned by the department who is highly qualified under state standards to provide the specially designed instruction that meets the definition of special education in this section. The term "highly qualified" has the meaning given the term in section 9101 of the ESEA and 34 CFR 200.56.

"State" means the State of Hawaii.

"State complaint" means a written complaint filed with the department of education by an organization or individual alleging a violation of a requirement of Part B of the Act.

"Student with a disability" means a student residing in the State, evaluated in accordance with sections 8-60-36 through 8-60-43 as deaf, hard of hearing, having an intellectual disability, a developmental delay, a speech or language disability, a visual disability (including blindness), an emotional disability, an orthopedic disability, autism spectrum disorder, traumatic brain injury, a specific learning disability, deaf-blindness, multiple disabilities, or other health disability, and who, by reason thereof, needs special education and related services.

(1) If it is determined, through an appropriate evaluation under sections 8-60-36 through 8-60-43, that a student has one of the identified disabilities, but only needs a related service and not special education, the student is not a student with a disability.

(2) If speech-language pathology services are required by the student, the student would be determined to be a student with a disability.

"Supplementary aids and services" means aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable students with disabilities to be educated with nondisabled students to the maximum extent appropriate in accordance with sections 8-60-15 through 8-60-17.

"Transition services" means a coordinated set of activities for a student with a disability that:

(1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the student with a disability to facilitate the student's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing

and adult education, adult services, independent living, or community participation;

(2) Is based on the individual student's needs, taking into account the student's strengths, preferences, and interests; and includes:

(A) Instruction;

(B) Related services;

(C) Community experiences;

(D) The development of employment and other post-school adult living objectives; and

(E) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

Transition services for students with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a student with a disability to benefit from special education.

"Ward of the State" means a student who, as determined by the State where the student resides, is:

(1) A foster student;

(2) A ward of the State; or

(3) In the custody of a public student welfare agency.

"WASC" means the Western Association of Schools and Colleges.

"Ward of the State" does not include a foster student who has a foster parent who meets the definition of a parent in this section. [Eff _____] (Auth: 20 U.S.C. 1221e-3, 1400(a), 1401(1)-(4), 1401(6), 1401(9), 1401(11), 1401(14)-(15), 1401(18), 1401(20), 1401(23), 1401(26)-(27),1401(29)-(36), 1411(e)(2)(C)(xi), 1412(a)(10)(A), 1413(a)(5) and 7221i(1), 1414(a)-(c), 1414(a)(1)(D), 1414(d)(1)(B); HRS §302A-1112) (Imp: 34 C.F.R. §§300.4-13, 300.15, 300.17, 300.19, 300.22 to 24, 300.27, 300.29 to 30, 300.34 to 35, 300.37, 300.39 to 42, 300.44 to 45, and 300.209)

SUBCHAPTER 2

FAPE REQUIREMENTS

§8-60-3 Free appropriate public education ("FAPE"). (a) General. A free appropriate public education shall be available to all students with disabilities residing in the State aged three to twenty, including students with disabilities who have been suspended or expelled from school, as provided for in section 8-60-75(d).

(b) FAPE for students beginning at age 3.

(1) The State shall ensure that:

(A) The obligation to make a FAPE available to each eligible student residing in the State begins no later than the student's third birthday; and

(B) An IEP is in effect for the student by that date, in accordance with section 8-60-47(b).

(2) If a student's third birthday occurs during the summer, the student's IEP team shall determine the date when services under the IEP will begin.

(c) Students advancing from grade to grade. (1) The State shall ensure that a FAPE is available to any individual student with a disability who needs special education and related services, even though the student has not failed or been retained in a course or grade, and is advancing from grade to grade.

(2) The determination that a student described in subsection (a) is eligible, shall be made on an individual basis by the group responsible for making eligibility determinations. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(1)(A); HRS §302A-1112) (Imp: 34 C.F.R. §300.101)

§8-60-4 Limitation: exception to FAPE for certain ages. General. The obligation to make a FAPE available to all students with disabilities does not apply with respect to the following:

(1) Students with disabilities who have graduated from high school with a regular high school diploma.

(A) The exception does not apply to students who have graduated from high school but have not been awarded a regular high school diploma.

(B) Graduation from high school with a regular high school diploma constitutes a change in placement, requiring written prior notice in accordance with section 8-60-58.

(C) As used in paragraph (1), the term "regular high school diploma" does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or a general educational development credential "GED";

(2) Students with disabilities who are eligible but who receive early intervention services under Part C of the Act.

(3) (A) Students with disabilities aged eighteen to twenty, who, in the last educational placement prior to their incarceration in an adult correctional facility:

(i) Were not actually identified as being a student with a disability under sections 8-60-2 and 8-60-39; and

(ii) Did not have an IEP under this chapter.

(B) The exception in paragraph (3)(A) does not apply to students with disabilities, aged eighteen to twenty, who:

(i) Had been identified as a student with a disability under sections 8-60-2 and 8-60-39 and had received services in accordance with an IEP, but who left school prior to their incarceration; or

(ii) Did not have an IEP in their last educational setting, but who had actually been identified as a student with a disability under sections 8-60-2 and 8-60-39. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(1)(B)-(C); HRS §302A-1112) (Imp: 34 C.F.R. §300.102; HRS 302A-101)

§8-60-5 Residential placement. If placement in a public or private residential program is necessary to provide special education and related services to a student with a disability, the program, including non-medical care and room and board, shall be at no cost to the parents of the student. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(1), 1412(a)(10)(B); HRS §302A-1112) (Imp: 34 C.F.R. §300.104)

§8-60-6 Assistive technology. (a) The department shall ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in section 8-60-2, are made available to a student with a disability if required as a part of the student's special education, related services, or supplementary aids and services, under section 8-60-2.

(b) On a case-by-case basis, the use of school-purchased assistive technology devices in a student's home or in other settings is required if the student's IEP team determines that the student needs access to those devices in order to receive FAPE. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(1), 1412(a)(12)(B)(i); HRS §302A-1112) (Imp: 34 C.F.R. §300.105)

§8-60-7 Extended school year services. (a) General.

(1) The department shall ensure that extended school year services are available as necessary to provide a FAPE, consistent with paragraph (2).

(2) Extended school year services shall be provided only if a student's IEP team determines, on an individual basis, in accordance with

sections 8-60-44 through 8-60-48, that the services are necessary for the provision of a FAPE to the student;

(3) In implementing the requirements of this subchapter, the department may not:

(A) Limit extended school year services to particular categories of disability; or

(B) Unilaterally limit the type, amount, or duration of those services.

(b) Definition. The term "extended school year services" means special education and related services that:

(1) Are provided to a student with a disability:

(A) Beyond the normal school year of the department;

(B) In accordance with the student's IEP; and

(C) At no cost to the parents of the student; and

(2) Meet the standards of the department.

[Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(1); HRS §302A-1112) (Imp: 34 C.F.R. §300.106)

§8-60-8 Nonacademic services. (a) The department shall take steps, including the provision of supplementary aids and services determined appropriate and necessary by the student's IEP team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford students with disabilities an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the department, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the department and assistance in making outside employment available. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(1), HRS §302A-1112) (Imp: 34 C.F.R. §300.107)

§8-60-9 Program options. The department shall take steps to ensure that its students with disabilities have available to them the variety of educational programs and services available to nondisabled students, including art, music, industrial arts, consumer and homemaking education, and vocational education. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(2), 1413(a)(1), HRS §302A-1112) (Imp: 34 C.F.R. §300.110)

§8-60-10 Child find and referral. (a) General. The department shall annually identify, locate, and evaluate, all students with disabilities residing in the State, including students with disabilities who are homeless students or are wards of the State, and students with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services.

(b) Other students in child find. Child find also shall include:

(1) Students who are suspected of being a student with a disability as defined in section 8-60-2 and in need of special education, even though they are advancing from grade to grade; and

(2) Highly mobile students, including migrant students.

(c) Construction. Nothing in the Act requires that students be classified by their disability so long as each student who has a disability that is listed in section 8-60-2 and who, by reason of that disability, needs special education and related services is regarded as a student with a disability under Part B of the Act.

(d) Referral.

(1) All referrals for the evaluation of a student to determine eligibility as a student with a disability under this chapter shall be documented and shall be in accordance with this section;

(2) Within fifteen days from the date of receipt of a request for an evaluation, the parent shall:

(A) Receive a written notice in accordance with section 8-60-58 of the department's proposal to assess the student under this chapter; request for consent to assess in accordance with section 8-60-31; and the procedural safeguards notice in accordance with section 8-60-59; or

(B) Receive a written notice in accordance with section 8-60-58 of the department's refusal to assess under this chapter and the procedural safeguards notice in accordance with section 8-60-59. [Eff 11/26/09] (Auth: 20 U.S.C. 1401(3)), 1412(a)(3); HRS §302A-1112) Imp: 34 C.F.R. §§300.111, 300.131)

§8-60-11 Routine checking of hearing aids and external components of surgically implanted medical devices. (a) Hearing aids. Each public school shall ensure that hearing aids worn in school by students who are hard of hearing, including deaf, are functioning properly.

(b) External components of surgically implanted medical devices.

(1) Subject to paragraph (2), the department shall ensure that the external components of surgically implanted medical devices are functioning properly.

(2) For a student with a surgically implanted medical device who is receiving special education and related services, the department is not responsible for the post-surgical maintenance, programming, or replacement of the medical device that has been surgically implanted (or of an external component of the surgically implanted medical device). [Eff 11/26/09] (Auth: 20 U.S.C. 1401(1), 1401(26)(B), HRS §302A-1112) (Imp: 34 C.F.R. §300.113)

§8-60-12 Transition of students from the Part C program to preschool programs. The State shall ensure that:

(1) Students participating in early intervention programs assisted under Part C of the Act, and who will participate in preschool programs assisted under Part B of the Act, experience a smooth and effective transition to those preschool programs in a manner consistent with section 637(a)(9) of the Act;

(2) By the third birthday of a student described in paragraph (1), an IEP, or if consistent with section 8-60-47(b), an IFSP has been developed and is being implemented for the student; and

(3) Each affected district will participate in transition planning conferences arranged by the designated lead agency under section 635(a)(10) of the Act. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(9), HRS §302A-1112) (Imp: 34 C.F.R. §300.124)

§8-60-13 Students with disabilities who are covered by public benefits or insurance. (a) Students with disabilities who are covered by public benefits or insurance.

(1) The department may use the medicaid or other public benefits or insurance programs in which a student participates to provide or pay for services required, as permitted under the public benefits or insurance program, except as provided in paragraph (2).

(2) With regard to services required to provide a FAPE to an eligible student, the department:

(A) May not require parents to sign up for or enroll in public benefits or insurance programs in order for their student to receive a FAPE under Part B of the Act;

(B) May not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to this chapter, but the department may pay the cost that the parents otherwise would be required to pay;

(C) May not use a student's benefits under a public benefits or insurance program if that use would:

(i) Decrease available lifetime coverage or any other insured benefit;

(ii) Result in the family paying for services that would otherwise be covered by the public benefits or insurance program and that are required for the student outside of the time the student is in school;

(iii) Increase premiums or lead to the discontinuation of benefits or insurance; or

(iv) Risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures; and

(D) (i) Shall obtain parental consent, consistent with section 8-60-2, each time that access to public benefits or insurance is sought; and

(ii) Notify parents that the parents' refusal to allow access to their public benefits or insurance does not relieve the department of its responsibility to ensure that all required services are provided at no cost to the parents.

(b) Students with disabilities who are covered by private insurance.

(1) With regard to services required to provide a FAPE to an eligible student, the department, may access the parents' private insurance proceeds only if the parents provide consent consistent with section 8-60-2.

(2) Each time the department proposes to access the parents' private insurance proceeds, the department shall:

(A) Obtain parental consent in accordance with paragraph (1); and

(B) Inform the parents that their refusal to permit the department to access their private insurance does not relieve the department of its responsibility to ensure that all required services are provided at no cost to the parents. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(12) and (e); HRS §302A-1112) (Imp: 34 C.F.R. §300.154)

§8-60-14 Prohibition on mandatory medication. (a) General. The department prohibits state personnel from requiring parents to obtain a prescription for substances identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)) for a student as a condition of attending school, receiving an evaluation under sections 8-60-31 through 8-60-43, or receiving services.

(b) Rule of construction. Nothing in subsection (a) shall be construed to create a federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under section 8-60-10. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(25); HRS §302A-1112) (Imp: 34 C.F.R. §300.174)

SUBCHAPTER 3

LEAST RESTRICTIVE ENVIRONMENT

§8-60-15 Least restrictive environment requirements. The department shall ensure that:

(1) To the maximum extent appropriate, students with disabilities, including students in public or private institutions or other care facilities, are educated with students who are nondisabled; and

(2) Special classes, separate schooling, or other removal of students with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(5); HRS §302A-1112) (Imp: 34 C.F.R. §300.114)

§8-60-16 Continuum of alternative placements. (a) The department shall ensure that a continuum of alternative placements is available to meet the needs of students with disabilities for special education and related services.

(b) The continuum required in subsection (a) shall:

(1) Include the alternative placements listed in the definition of special education under section 8-60-2 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(5); HRS §302A-1112) (Imp: 34 C.F.R. §300.115)

§8-60-17 Placements. In determining the educational placement of a student with a disability, including a preschool student with a disability, the department shall ensure that:

(1) The placement decision:

(A) Is made by a group of persons, including the parents, and other persons knowledgeable about the student, the meaning of the evaluation data, and the placement options; and

(B) Is made in conformity with the LRE provisions of this subchapter, including sections 8-60-15 through 8-60-18;

(2) The student's placement:

(A) Is determined at least annually;

(B) Is based on the student's IEP; and

(C) Is as close as possible to the student's home;

(3) Unless the IEP of a student with a disability requires some other arrangement, the student is educated in the school that the student would attend if nondisabled;

(4) In selecting the LRE, consideration is given to any potential harmful effect on the student or on the quality of services that the student needs; and

(5) A student with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(5); HRS §302A-1112) (Imp: 34 C.F.R. §300.116)

§8-60-18 Nonacademic settings. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in section 8-60-8, the department shall ensure that each student with a disability participates with nondisabled students in the extracurricular services and activities to the maximum extent appropriate to the needs of that student. The department shall ensure that each student with a disability has the supplementary aids and services determined by the student's IEP team to be appropriate and necessary for the student to participate in nonacademic settings. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(5), HRS §302A-1112) (Imp: 34 C.F.R. §300.117)

§8-60-19 (Reserved).

SUBCHAPTER 4

STUDENTS IN PRIVATE SCHOOLS

§8-60-20 Definition of parentally-placed private school students with disabilities. Parentally-placed private school students with disabilities means students with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the definition of elementary school or secondary school in section 8-60-2, other than students with disabilities covered under sections 8-60-28 through 8-60-30. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(A); HRS §302A-1112) (Imp: 34 C.F.R. §300.130)

§8-60-21 Child find for parentally-placed private school students with disabilities. (a) General. The department shall locate, identify, and evaluate all students with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the state, in accordance with section 8-60-10.

(b) Completion period. The child find process shall be completed in a time period comparable to that for students attending public schools in the state consistent with section 8-60-33. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(A)(ii); HRS §302A-1112) (Imp: 34 C.F.R. §300.131)

§8-60-22 Provision of services for parentally-placed private school students with disabilities: basic requirement. (a) General. To the extent consistent with the number and location of students with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the state, provision is made for the participation of those students in the program assisted or carried out under Part B of the Act by providing them with special education and related services, including direct services determined in accordance with section 8-60-23.

(b) Services plan for parentally-placed private school students with disabilities. In accordance with subsection (a) and sections 8-60-23 through 8-60-25, a services plan shall be developed and implemented for each private school student with a disability who has been designated by the department to receive special education and related services. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(A)(i); HRS §302A-1112) (Imp: 34 C.F.R. §300.132)

§8-60-23 Equitable services determined. (a) No individual right to special education and related services. No parentally-placed private school student with a disability has an individual right to receive some or all of the special education and related services that the student would receive if enrolled in a public school.

(b) Decisions.

(1) Decisions about the services that will be provided to parentally-placed private school students with disabilities under sections 8-60-20 through 8-60-26 shall be made in accordance with subsection (c).

(2) The department shall make the final decisions with respect to the services to be provided to eligible parentally-placed private school students with disabilities.

(c) Services plan for each student served under sections 8-60-20 through 8-60-26. If a student with a disability is enrolled in a religious or other private school by the student's parents and will receive special education or related services from the department, the department shall:

(1) Initiate and conduct meetings to develop, review, and revise a services plan for the student, in accordance with section 8-60-24(b); and

(2) Ensure that a representative of the religious or other private school attends each meeting. If the representative cannot attend, the department shall use other methods to ensure participation by the religious or other private school, including individual or conference telephone calls. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(A), HRS §302A-1112) (Imp: 34 C.F.R. §300.137)

§8-60-24 Equitable services provided. (a) General.

(1) The services provided to parentally-placed private school students with disabilities shall be provided by personnel meeting the same standards as personnel providing services in the public schools, except that private elementary school and secondary school teachers who are providing equitable services to parentally-placed private school students with disabilities do not have to meet the highly qualified special education teacher requirements of 34 C.F.R. 300.18.

(2) Parentally-placed private school students with disabilities may receive a different amount of services than students with disabilities in public schools.

(b) Services provided in accordance with a services plan.

(1) Each parentally-placed private school student with a disability who has been designated to receive services under section 8-60-22 shall have a services plan that describes the specific special education and related services that the department will provide to the student in light of the services that the department has determined, through the process described in section 8-60-23, it will make available to parentally-placed private school students with disabilities.

(2) The services plan shall, to the extent appropriate:

(A) Meet the requirements of section 8-60-44, or for a student ages three through five, meet the requirements of section 8-60-47(b) with respect to the services provided; and

(B) Be developed, reviewed, and revised consistent with sections 8-60-45 through 8-60-48.

(c) Provision of equitable services.

(1) The provision of services pursuant to this section and sections 8-60-25 through 8-60-26 shall be provided:

(A) By employees of the department; or

(B) Through contract by the department with an individual, association, agency, organization, or other entity.

(2) Special education and related services provided to parentally-placed private school students with disabilities, including materials and equipment, shall be secular, neutral, and nonideological.

[Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(A)(vi), HRS §302A-1112) (Imp: 34 C.F.R. §300.138)

§8-60-25 Location of services and transportation. (a) Services on private school premises. Services to parentally-placed private school students with disabilities may be provided on the premises of private, including religious, schools, to the extent consistent with law.

(b) Transportation: General.

(1) If necessary for the student to benefit from or participate in the services provided, a parentally-placed private school student with a disability shall be provided transportation:

(A) From the student's school or the student's home to a site other than the private school; and

(B) From the service site to the private school, or to the student's home, depending on the timing of the services.

(2) The department is not required to provide transportation from the student's home to the private school. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(A), HRS §302A-1112) (Imp: 34 C.F.R. §300.139)

§8-60-26 Due process complaints and state complaints. (a) Due process not applicable, except for child find. Except as provided in subsection (b), the procedures in sections 8-60-59 through 8-60-73 do not apply to complaints that the department has failed to meet the requirements of sections 8-60-22 through 8-60-25, including the provision of services indicated on the student's services plan.

(b) Child find complaints shall be filed with the department.

(1) The procedures in sections 8-60-59 through 8-60-73 apply to complaints that the department has failed to meet the child find requirements in section 8-60-21, including the requirements in sections 8-60-31 through 8-60-43.

(2) Any due process complaint regarding the child find requirements, as described in paragraph (1), shall be filed with the department.

(c) State complaints. Any complaint that the department has failed to meet the requirements in sections 8-60-22 through 8-60-26 shall be filed in accordance with the procedures described in sections 8-60-52 through 8-60-54. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(A), HRS §302A-1112) (Imp: 34 C.F.R. §300.140)

§8-60-27 Placement of students by parents when FAPE is at issue. (a) General. This chapter does not require the department to pay for the cost of education, including special education and related services, of a student with a disability at a private school or facility if the department made a FAPE available to the student and the parents elected to place the student in a private school or facility. However, the department shall include that student in the population whose needs are addressed consistent with sections 8-60-21 through 8-60-26.

(b) Disagreements about a FAPE. Disagreements between the parents and the department regarding the availability of a program appropriate for the student, and the question of financial reimbursement, are subject to the due process procedures in sections 8-60-59 through 8-60-74.

(c) Reimbursement for private school placement. If the parent of a student with a disability, who previously received special education and related services under the authority of the department, enrolls the student in a private preschool, elementary or secondary school without the consent of or referral by the department, a court or a

hearing officer may require the department to reimburse the parent for the cost of that enrollment if the court or hearing officer finds that the department had not made a free appropriate public education available to the student in a timely manner prior to that enrollment and that the private placement is appropriate.

(1) A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the state standards that apply to education provided by the department.

(2) The private school shall not be deemed appropriate for continued placement by the hearing officer, if the private school does not allow the department to exercise its responsibility to ensure the provision of a FAPE under section 8-60-29.

(3) The request for a due process hearing regarding reimbursement of all costs of the unilateral private placement including special education and related services shall be filed in accordance with state statute and section 8-60-61.

(d) Limitation on reimbursement. The cost of reimbursement described in subsection (c) may be reduced or denied:

(1) If:

(A) At the most recent IEP team meeting that the parents attended prior to removal of the student from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the department to provide a FAPE to their student, including stating their concerns and their intent to enroll their student in a private school at public expense; or

(B) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the student from the public school, the parents did not give written notice to the department of the information described in subparagraph (A);

(2) If, prior to the parents' removal of the student from the public school, the department informed the parents, through the notice requirements described in section 8-60-58(a)(1), of its intent to evaluate the student (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the student available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(e) Exception. Notwithstanding the notice requirement in subsection (d)(1), the cost of reimbursement:

(1) Shall not be reduced or denied for failure to provide the notice if:

(A) The school prevented the parents from providing the notice;

(B) The parents had not received notice, pursuant to section 8-60-59, of the notice requirement in subsection (d)(1); or

(C) Compliance with subsection (d)(1) would likely result in physical harm to the student; and

(2) May, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if:

(A) The parents are not literate or cannot write in English; or

(B) Compliance with subsection (d)(1) would likely result in serious emotional harm to the student. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(C), HRS §302A-1112, §302A-443) (Imp: 34 C.F.R. §300.148)

§8-60-28 Applicability of sections 8-60-29 through 8-60-30. Sections 8-60-29 through 8-60-30 apply only to students with disabilities who are or have been placed in or referred to a private school or facility by the department as a means of providing special education and related services. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(B), HRS §302A-1112) (Imp: 34 C.F.R. §300.145)

§8-60-29 Responsibility of the department. The department shall ensure that a student with a disability who is placed in or referred to a private school or facility by the department:

(1) Is provided special education and related services:

(A) In conformance with an IEP that meets the requirements of sections 8-60-44 through 8-60-49; and

(B) At no cost to the parents;

(2) Is provided an education that meets the standards that apply to education provided by the department including the department's responsibility to ensure the provision of a FAPE and the requirements of the Act; and

(3) Has all of the rights of a student with a disability who is served by the department. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(B); HRS §302A-1112) (Imp: 34 C.F.R. §300.146)

§8-60-30 Implementation by the department.

(a) In implementing section 8-60-29, the department shall monitor any student eligible to receive special education and related services, who is placed, whether as the result of a hearing officer's decision, court order, or programmatic placement, at the department's expense, whether by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian, in any private school or placement as defined by federal and state law relating to student with disabilities

(b) Any private school or placement, certified or licensed private residential facility, or nonpublic special education school or program that provides education, treatment, programming, or related services to students with disabilities who are eligible to receive special education and related services pursuant to federal or state laws, rules, or

regulations and receives public funding from the department, either directly or through parental reimbursement shall:

(1) Comply with all federal, state, and county laws, rules, regulations, and ordinances including but not limited to any laws, rules, regulations, and ordinances pertaining to health and safety;

(2) Allow the department access to exercise its authority pursuant to sections 302 A-443(f) through (k) of the Hawaii Revised Statutes to monitor any student placed at any private school or placement at the department's expense;

(3) Provide to the department proof of accreditation by the WASC, any Hawaii affiliate of WASC, HAIS, NAEYC, or NECPA, except that any nonpublic special education school or program shall provide proof of its application to WASC, a WASC affiliate, HAIS, NAEYC, or NECPA within 90 calendar days of accepting a student with a disability who was placed at the nonpublic special education school or program as the result of a hearing officer's decision pursuant to section 302A-443 of the Hawaii Revised Statutes and Chapter 60 of the Hawaii Administrative Rules, court order, settlement agreement, or placement by the department;

(4) Provide copies of a student's records to the department within three (3) business days of receipt of a request for such records;

(5) Post its rates with the department by April of each year. Such posting shall include itemized rates, fees, or tuition including but not limited to the itemized rates for related services as defined by federal and state law and regulation, for the following school year; and

(6) Charge the department the same itemized rates, fees, or tuition it charges parents, legal guardians, or legal custodians who unilaterally place a student at the private school or placement, certified or licensed private residential facility, or nonpublic special education school or program

(c) Any certified or licensed private residential facility that provides educational services to a student with a disability at the department's expense in a residential setting shall comply with subsection (b) and additionally shall:

(1) Provide the department proof of licensure, certification, or accreditation according to requirements and procedures specified by the appropriate state licensure board or department; and

(2) Provide the department proof of accreditation with WASC, a WASC affiliate, HAIS, NAEYC, or NECPA for the educational component of its program.

(3) In the event that the educational component of a certified or licensed private residential facility is not accredited by WASC, a WASC affiliate, HAIS, NAEYC, or NECPA, the certified or licensed private residential facility shall provide proof of application for accreditation with WASC, a WASC affiliate, HAIS, NAEYC, or NECPA within 90 calendar days of accepting a student with a disability placed at the school or program as a result of a hearing officer's decision pursuant to section 302A-443 of the Hawaii Revised Statutes and Chapter 60 of the Hawaii Administrative Rules, court order, settlement agreement, or placement by the department;

(d) The department shall pay only for services that are specified in a student's IEP that have been provided by a private school or placement, private residential facility, or nonpublic special education school or placement that meet the requirements in subsection (b) and (c) and only with the receipt of an itemized invoice. Such itemized invoice shall include:

(1) The type of service performed and provided directly to the student;

(A) If the service provided by the private school or placement or nonpublic school or placement is limited to academic instruction and no related service as defined by federal or state law, an invoice for tuition only will satisfy the invoice requirements.

(2) The individual who performed the service;

(3) The unit cost of the service and the duration of the services; and

(4) The setting in which the service was delivered.

(e) The department shall pay only for services that have been rendered to a student in accordance with the student's IEP.

(f) Monitoring Requirements. The department shall monitor students with disabilities placed at a private school or placement, certified or licensed private residential facility, or nonpublic school or placement at the department's expense. Monitoring shall include but not be limited to:

(1) Ensuring that each student with a disability in subsection (a) is receiving a FAPE;

(2) Ensuring the curriculum and instruction are rigorous, based on content standards, and aligned with the Common Core State Standards (CCSS);

(3) The direct observation of a student with a disability placed at any private school or placement, private residential facility, or nonpublic school or placement at the department's expense, whether by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian, with or without notice;

(4) The review and copies, if needed, of all records, notes, or documentation related to a student with a disability placed at any private school or placement, certified or licensed private residential facility, or nonpublic school or placement at the department's expense;

(5) The department's administrators, faculty, and staff to discuss the progress, strengths, and needs of a student with a disability with the student's teacher, related service provider, or other service related personnel of the private school or placement, certified or licensed private residential facility, or nonpublic school or placement where the student with a disability attends at the department's expense; and

(6) The administrators, faculty and staff of the department to conduct various assessments and/or evaluations of a student placed at any private school or program, private residential facility, or nonpublic school or program at the department's expense.

(g) There shall be no video or audio recordings made of any department personnel that are exercising the department's authority to monitor by conducting an observation or an assessment of a student with a disability who is placed at any private school or placement, certified or licensed private residential facility, or nonpublic school or placement at the department's expense, whether by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian. Notwithstanding consent by the department personnel, the parent of the student with a disability may request a video or audio recording of the observation or assessment. Any video or audio recordings shall not violate any protocols of the test or assessment being conducted by department personnel or .

(h) Except as provide in sections 8-60-31 through 8-60-37, parental consent is not needed by any department personnel who are exercising the department's authority to monitor any student with a disability who is placed at a private school or placement, private residential facility, or nonpublic school or placement at the department's expense, whether by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian.

(i) The department will monitor private schools or placements, private residential facility, or nonpublic school or placement that has students with disabilities in attendance at the the department's expense, at least once annually to ensure that the private school or placement, private residential facility, or nonpublic school or program:

(1) Possess a current and valid accreditation with WASC, a WASC affiliate, HAIS, NAEYC, or NECPA or has applied for accreditation with WASC, a WASC affiliate, HAIS, NAEYC, or NECPA;

(2) Is delivering curriculum and instruction that is rigorous, based on content standards and aligned with CCSS; and

(3) Has posted its itemized rates, fees, and tuition to be charged for the following school year by April of every year beginning in 2012.

(j) Each school and/or district that has students with a disability placed at any accredited private school or placement, certified or licensed private residential facility, or nonpublic school or placement, shall be responsible for monitoring individual students with disabilities at least twice annually but not more than once per quarter for the following:

(1) That the individual student with a disability is receiving an academic education, instruction, and programming as required by the student's IEP;

(2) That the individual student with a disability is receiving instruction that is rigorous, based on content standards, and aligned with the CCSS; and

(3) The review of all records, notes or documentation related to the student so that the school and/or district may create an appropriate offer of a FAPE for the student with a disability.

(k) Each private school or placement, certified or licensed private residential facility, or nonpublic school or placement shall provide to the department (a) a quarterly grade report; (b) a quarterly IEP progress report; and (c) any other information pertaining to the progress or lack thereof for a student with a disability placed at a private school or program, certified or licensed private residential facility, or nonpublic school or placement at the department's expense.

(l) Notice Requirements

(1) The department or its designee, shall give a private school or placement, certified or licensed private residential facility, or nonpublic school or placement at least five (5) business days notice of its intent to exercise its authority to monitor any individual student with a disability who is placed at a private school or placement, certified or licensed private residential facility, or nonpublic school or placement at the department's expense whether by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian.

(2) When Notice by the department is not needed. No notice shall be given of the department's intent to monitor any student with a disability placed at a private school or placement, certified or licensed private residential facility, or nonpublic school or placement at the department's expense in the event of an emergency, such as:

(A) When a crime against a student occurs including but not limited to physical assault, sexual assault, harassment or any other crime against a person as defined by state and federal law;

(B) When information is received by the department of physical destruction to the private school or program, certified or licensed private residential facility, or nonpublic school or placement; and

(C) When information is received by the department of unsafe, unsanitary, or hazardous conditions in a private school or placement, certified or licensed private residential facility, or nonpublic school or placement which may endanger the life or health of any student with a disability who is placed at the private school or placement, certified or licensed private residential facility, or nonpublic school or placement at the department's expense, whether by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian.

(m) When Monitoring Efforts by the department are Obstructed. In the event that the department gives notice to a private school or placement, certified or licensed private residential facility, or nonpublic school or placement as provided by paragraphs (a) through (k)_ of this section and the private school or placement, certified or licensed private residential facility, or nonpublic school or placement restricts or denies monitoring by the department, pursuant to sections 302 A-443(f) through (k) of the Hawaii Revised Statutes, the department shall withhold payment to the private school or placement, certified or licensed private residential facility, or nonpublic school or placement. Payment shall resume when the private school or placement, the certified or licensed private residential facility, or the nonpublic special education school or program allows the department access to exercise its authority to monitor students placed at the department's expense.

(n) Provisions for Nonpublic Schools or Placements.

(1) Any nonpublic special education school or program that:

(A) Is not accredited by WASC, a WASC affiliate, HAIS, NAEYC, or NECPA; and

(B) Receives funding from the Department, either directly or through parental reimbursement, shall apply for accreditation within ninety (90) calendar days from the date of accepting a student with disabilities who was placed there as a result of a hearing officer's decision pursuant to section 302A-443 of the Hawaii Revised Statutes, court order, settlement agreement, or placement by the department. Within the ninety (90) calendar application period, the nonpublic school or program shall provide proof of its application for accreditation to the department.

(2) If the application for accreditation is denied, the nonpublic school or placement shall continue in its status as a nonpublic school or placement until the nonpublic school or placement has fulfilled the requirements to be classified as an accredited private school or placement at which time the monitoring requirements still are applicable.

(3) A nonpublic school or placement must apply for accreditation for each student with a disability that is placed at the nonpublic school or placement as a result of a hearing officer's decision until the nonpublic school or placement receives accreditation.

(o) Accepting Credits from Nonpublic Schools or Placements. The department shall not accept high school credits for any coursework completed by a student with a disability at a nonpublic school or placement.

(p) Schools in Good Standing with HAIS. An accredited school or placement that is in good standing with HAIS is only required to assist the department when needed to monitor any child attending an accredited private school or placement at the department's expense. [Eff _____] (Auth: 20 U.S.C. 1412(a)(10)(B), 1416(a),HRS §302A-1112, §302A-443) (Imp: 34 C.F.R. §300.147, 34 C.F.R. §300.600)

SUBCHAPTER 5

EVALUATIONS AND ELIGIBILITY DETERMINATIONS

§8-60-31 Parental consent. (a) Parental consent for initial evaluation.

(1) (A) The department shall obtain consent, consistent with section 8-60-2, from the parent of the student before conducting an initial evaluation to determine if a student qualifies as a student with a disability under sections 8-60-2 and 8-60-39, after providing notice consistent with sections 8-60-58 and 8-60-59;

(B) Parental consent for initial evaluation shall not be construed as consent for initial provision of special education and related services;

(C) The department shall make reasonable efforts to obtain the consent from the parent for an initial evaluation to determine whether the student is a student with a disability;

(2) For initial evaluations only, if the student is a ward of the State and is not residing with the student's parent, the department is not required to obtain consent from the parent for an initial evaluation to determine whether the student is a student with a disability if:

(A) Despite reasonable efforts to do so, the department cannot discover the whereabouts of the parent of the student;

(B) The rights of the parents of the student have been terminated in accordance with state law; or

(C) The rights of the parent to make educational decisions have been subrogated by a judge in accordance with state law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the student;

(3) (A) If the parent of a student enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation under paragraph (1), or the parent fails to respond to a request to provide consent, the department may, but is not required to, pursue the initial evaluation of the student by utilizing the procedural safeguards in sections 8-60-56 through 8-60-82;

(B) The department does not violate its obligation under section 8-60-10 and sections 8-60-33 through 8-60-43 if it declines to pursue the evaluation.

(b) Parental consent for services.

(1) The department is responsible for making a FAPE available to a student with a disability and shall obtain consent from the parent of the student before the initial provision of special education and related services to the student;

(2) The department shall make reasonable efforts to obtain consent from the parent for the initial provision of special education and related services to the student;

(3) If the parent of a student fails to respond to a request for, or refuses to consent to,the initial provision of special education and related services, the department—

(A) May not use the procedures in subchapter 8 (including the mediation procedures under § 8-60-60 or the due process procedures under §§ 8-60-61 through 8-60-70) in order to obtain agreement or a ruling that the services may be provided to the student;

(B) Will not be considered to be in violation of the requirement to make FAPE available to the student because of the failure to provide the student with the special education and related services for which the parent refuses to or fails to provide consent; and

(C) Is not required to convene an IEP team meeting or develop an IEP under §§ 8-60-44 and 8-60-48 for the student.

(4) If, at any time subsequent to the initial provision of special education and related services, the parent of a student revokes consent in writing for the continued provision of special education and related services, the ~~department—~~

(A) May not continue to provide special education and related services to the student, but must provide prior written notice in accordance with § 8-60-58 before ceasing the provision of special education and related services;

(B) May not use the procedures in subchapter 8(including the mediation procedures under § 8-60-60 or the due process procedures under §§ 8-60-61 through 8-60-70) in order to obtain agreement or a ruling that the services may be provided to the student;

(C) Will not be considered to be in violation of the requirement to make FAPE available to the student because of the failure to provide the student with further special education and related services; and

(D) Is not required to convene an IEP team meeting or develop an IEP under §§ 8-60-44 and 8-60-48 for the student for further provision of special education and related services.

(c) Parental consent for reevaluations. (1) Subject to paragraph (2):

(A) The department shall obtain parental consent, in accordance with section 8-60-31(a)(1), prior to conducting any reevaluation of a student with a disability;

(B) If the parent refuses to consent to the reevaluation, the department may, but is not required to, pursue the reevaluation by using the consent override procedures described in subsection (a)(3);

(C) The department does not violate its obligation under section 8-60-10 and sections 8-60-33 through 8-60-43 if it declines to pursue the evaluation or reevaluation.

(2) The parental consent described in paragraph (1) need not be obtained if the department can demonstrate that:

(A) It made reasonable efforts to obtain such consent; and

(B) The student's parent has failed to respond.

(d) Other consent requirements.

(1) Parental consent is not required before:

(A) Reviewing existing data as part of an evaluation or a reevaluation; or

(B) Administering a test or other evaluation that is administered to all students unless, before administration of that test or evaluation, consent is required of parents of all students.

(2) The department may not use a parent's refusal to consent to one service or activity under subsection (a) to deny the parent or student any other service, benefit, or activity of the department, except as required by this chapter.

(3) (A) If a parent of a student who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or

the parent fails to respond to a request to provide consent, the department may not use the consent override procedures (described in subsections (a)(3) and (c)(1); and

(B) The department is not required to consider the student as eligible for services under sections 8-60-22 through 8-60-26;

(4) To meet the reasonable efforts requirement in subsections (a)(1)(C), (a)(2)(A), (b)(2), and (c)(2)(A), the department shall document its attempts to obtain parental consent using the procedures in section 8-60-46(d). [Eff 11/26/09] (Auth: 20 U.S.C. 1414(a)(1)(D) and 1414(c); HRS §302A-1112) (Imp: 34 C.F.R. §300.300)

§8-60-32 Evaluation. Students with disabilities shall be evaluated in accordance with sections 8-60-31 through 8-60-43 of this chapter. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(7), HRS §302A-1112) (Imp: 34 C.F.R. §300.122)

§8-60-33 Initial evaluations. (a) General. The department shall conduct a full and individual initial evaluation, in accordance with sections 8-60-36 and 8-60-38, before the initial provision of special education and related services to a student with a disability.

(b) Request for initial evaluation. Consistent with the consent requirements in section 8-60-31, either a parent of a student or the department may initiate a request for an initial evaluation to determine if the student is a student with a disability.

(c) Procedures for initial evaluation. The initial evaluation:

(1) Shall be conducted within 60 days of receiving parental consent for the evaluation; and

(2) Shall determine:

(A) If the student is a student with a disability under sections 8-60-2 and 8-60-39; and

(B) The educational needs of the student.

(d) Exception. The timeframe described in subsection (c)(1) does not apply to the department if the parent of a student repeatedly fails or refuses to produce the student for the evaluation. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(a), HRS §302A-1112) (Imp: 34 C.F.R. §300.301)

§8-60-34 Screening for instructional purposes is not evaluation. The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(a)(1)(E), HRS §302A-1112) (Imp: 34 C.F.R. §300.302)

§8-60-35 Reevaluations. (a) General. The department shall ensure that a reevaluation of each student with a disability is conducted in accordance with sections 8-60-36 through 8-60-43:

(1) If the department determines that the educational or related services needs, including improved academic achievement and functional performance, of the student warrant a reevaluation; or

(2) If the student's parent or teacher requests a reevaluation.

(b) Limitation. A reevaluation conducted under subsection (a):

(1) May occur not more than once a year, unless the parent and the department agree otherwise; and

(2) Shall occur at least once every 3 years, unless the parent and the department agree that a reevaluation is unnecessary. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(a)(2), HRS §302A-1112) (Imp: 34 C.F.R. §300.303)

§8-60-36 Evaluation procedures. (a) Notice. The department shall provide notice to the parents of a student with a disability, in accordance with section 8-60-58, that describes any evaluation procedures the department proposes to conduct.

(b) Conduct of evaluation. In conducting the evaluation, the department shall:

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining:

(A) Whether the student is a student with a disability under sections 8-60-2 and 8-60-39; and

(B) The content of the student's IEP, including information related to enabling the student to be involved in and progress in the general education curriculum (or for a preschool student, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a student is a student with a disability and for determining an appropriate educational program for the student; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(c) Other evaluation procedures. The department shall ensure that:

(1) Assessments and other evaluation materials used to assess a student:

(A) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(B) Are provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(C) Are used for the purposes for which the assessments or measures are valid and reliable;

(D) Are administered by trained and knowledgeable personnel; and

(E) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a student with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the student's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The student is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, visual and auditory processing, and motor abilities;

(5) Assessments of students with disabilities who transfer from one public school to another public school in the same school year are coordinated with those students' prior and subsequent schools, as necessary and as expeditiously as possible to ensure prompt completion of full evaluations.

(6) In evaluating each student with a disability under sections 8-60-36 through 8-60-38, the evaluation is sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified.

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the student are provided. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(b)(1)-(3), 1412(a)(6)(B), HRS §302A-1112) (Imp: 34 C.F.R. §300.304)

§8-60-37 Additional requirements for evaluations and reevaluations. (a) Review of existing evaluation data. As part of an initial evaluation (if appropriate) and as part of any reevaluation, the IEP team and other qualified professionals, as appropriate, shall:

(1) Review existing evaluation data on the student, including:

(A) Evaluations and information provided by the parents of the student;

(B) Current classroom-based or State assessments, and classroom-based observations; and

(C) Observations by teachers and related services providers; and

(2) On the basis of that review, and input from the student's parents, identify what additional data, if any, are needed to determine:

(A) (i) Whether the student is a student with a disability, as defined in sections 8-60-2 and 8-60-39 and the educational needs of the student; or

(ii) In case of a reevaluation of a student, whether the student continues to have such a disability, and the educational needs of the student;

(B) The present levels of academic achievement and related developmental needs of the student;

(C) (i) Whether the student needs special education and related services; or

(ii) In the case of a reevaluation of a student, whether the student continues to need special education and related services; and

(D) Whether any additions or modifications to the special education and related services are needed to enable the student to meet the measurable annual goals set out in the IEP of the student and to participate, as appropriate, in the general education curriculum.

(b) Conduct of review. The group described in subsection (a) may conduct its review without a meeting.

(c) Source of data. The department shall administer such assessments and other evaluation measures as may be needed to produce the data identified under subsection (a).

(d) Requirements if additional data are not needed.

(1) If the IEP team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the student continues to be a student with a disability, and to determine the student's educational needs, the department shall notify the student's parents of:

(A) That determination and the reasons for the determination; and

(B) The right of the parents to request an assessment to determine whether the student continues to be a student with a disability, and to determine the student's educational needs.

(2) The department is not required to conduct the assessment described in paragraph (1)(B) unless requested to do so by the student's parents.

(e) Evaluations before change in eligibility.

(1) Except as provided in paragraph (2), the department shall evaluate a student with a disability in accordance with sections 8-60-36 through 8-60-43 before determining that the student is no longer a student with a disability.

(2) The evaluation described in paragraph (1) is not required before the termination of a student's eligibility due to graduation from secondary

school with a regular diploma, or due to exceeding the age eligibility for a FAPE under State law.

(3) For a student whose eligibility terminates under circumstances described in paragraph (2), the department shall provide the student with a summary of the student's academic achievement and functional performance, which shall include recommendations on how to assist the student in meeting the student's postsecondary goals.

[Eff 11/26/09] (Auth: 20 U.S.C. 1414(c), HRS §302A-1112) (Imp: 34 C.F.R. §300.305)

§8-60-38 Determination of eligibility. (a) General. Upon completion of the administration of assessments and other evaluation measures:

(1) A group of qualified professionals and the parent of the student determines whether the student is a student with a disability as defined in sections 8-60-2 and 8-60-39, in accordance with subsection (c) and the educational needs of the student; and

(2) The department provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.

(b) Special rule for eligibility determination. A student shall not be determined to be a student with a disability:

(1) If the determinant factor for that determination is:

(A) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);

(B) Lack of appropriate instruction in math; or

(C) Limited English proficiency; and

(2) If the student does not otherwise meet the eligibility criteria under sections 8-60-2 and 8-60-39.

(c) Procedures for determining eligibility and educational need.

(1) In interpreting evaluation data for the purpose of determining if a student is a student with a disability under sections 8-60-2 and 8-60-39, and the educational needs of the student, the department shall:

(A) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior; and

(B) Ensure that information obtained from all of these sources is documented and carefully considered.

(2) If a determination is made that a student has a disability and needs special education and related services, an IEP shall be developed for the student in accordance with sections 8-60-44 through 8-60-48.

(d) The student resides in the State and comes within the following age range:

(1) Is three years of age; and

(2) Under twenty on the first instructional day of the official school year calendar set by the department. A student who is under twenty years of age on the first instructional day of the school year set by the department, but who reaches the age of twenty during the school year, shall be eligible for the full school year, including extended school year when the requirements of section 8-60-7 are met. [Eff 11/26/09] (Auth: HRS §302A-1112) (Imp: HRS §§302A-101; 34 C.F.R. §§300.7; 300.306)

§8-60-39 Eligibility criteria.

(a) (1) Autism spectrum disorder. A student shall be eligible under the category of autism spectrum disorder if the student has a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects the student's educational performance. The student may have one or more of the following other characteristics often associated with autism spectrum disorder:

(A) Engagement in repetitive activities and stereotyped movements;

(B) Resistance to environmental change or change in daily routines;

(C) Unusual responses to sensory experiences.

(2) A student who manifests the characteristics of autism spectrum disorder after age three may be diagnosed as having autism spectrum disorder if the criteria in paragraph (1) are satisfied.

(3) A team of qualified professionals and the parent may not identify a student as having autism spectrum disorder if the student's educational performance is adversely affected primarily because the student has an emotional disability pursuant to subsection (e).

(b) Deaf. A student shall be eligible under the disability category of deaf if the student has a hearing loss averaging greater than 70 decibels in the speech frequencies (500Hz to 4,000Hz) and:

(1) The hearing loss impairs the student's auditory processing of linguistic information through hearing, with or without amplification; or

(2) The hearing loss adversely affects the student's educational performance.

(c) Deaf-blindness. A student shall be eligible under the category of deaf-blindness:

(1) If the student meets the criteria under the category of deaf, or the category of hard of hearing, and the category of visual disability; and

(2) The concomitant hearing and visual disabilities cause severe communication and other developmental and educational needs.

(d) Developmental delay.

(1) A student, aged three through five, shall be eligible for any eligibility category in this subchapter if the applicable criteria are met, or for the

category of developmental delay if, as measured by appropriate diagnostic instruments and procedures, one or more of the following is met:

(A) Cognitive development and adaptive behavior are delayed equivalent to one and one-half standard deviations below the mean when compared with the standard score expected for the chronological age.

(B) One of the following areas is delayed one and one-half standard deviations below a standard score for:

(i) Motor development, including fine motor, gross motor, sensory motor, and perceptual-motor development;

(ii) Communication, including speech and language development;

(iii) Academic development;

(iv) Adaptive behavior;

(2) A student, aged six through eight, shall be eligible for any eligibility category in this subchapter if the applicable criteria are met, or for the category of developmental delay if as measured by appropriate diagnostic instruments and procedures, three of the five areas are delayed one and one-half standard deviations below a standard score for:

(A) Motor development, including fine motor, gross motor, sensory motor, and perceptual-motor development;

(B) Communication, including speech and language development;

(C) Academic development;

(D) Adaptive behavior;

(E) Cognition.

(3) If assessment materials would not conclusively demonstrate eligibility as required under paragraphs (1) or (2), the team of qualified professionals and the parent may find the student eligible under the category of developmental delay if the team determines the student's patterns of learning deviate from age expectations across settings. The documentation of eligibility required by section 8-60-38 shall include a statement of the patterns of learning that deviate from age expectations across settings and the basis and method used in determining eligibility

(e) Emotional disability.

(1) A student shall be eligible under the disability category of emotional disability if the student exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affect the student's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal; relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression;

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(2) A student shall not be determined to be a student with a disability under this category, if paragraph (1) is primarily the result of cultural, or language differences, or both.

(3) Emotional disability includes schizophrenia. Emotional disability does not apply to a student who is socially maladjusted, unless it is determined that the student has an emotional disability.

f) Hard of hearing. A student shall be eligible under the disability category of hard of hearing if the student has a hearing loss, whether permanent or fluctuating, averaging 26 to 70 decibels in the speech frequencies (500 Hz to 4,000 Hz), and:

(1) The hearing loss impairs the student's auditory processing of linguistic information, with or without amplification; or

(2) The hearing impairment adversely affects the student's educational performance.

(g) Intellectual disability. A student shall be eligible under the disability category of intellectual disability when all of the following are met:

(1) The student has subaverage general intellectual functioning, as demonstrated by evidence of intellectual functioning two or more standard deviations below the mean;

(2) The subaverage intellectual functioning exists concurrently with deficits in at least two adaptive skill areas; and

(3) The subaverage intellectual functioning and deficits in adaptive skill areas were manifested during the developmental period and adversely affect the student's educational performance.

(h) Multiple disabilities.

(1) A student shall be eligible under the category of multiple disabilities if the student has concomitant impairments, the combination of which causes severe educational needs and all of the following criteria are met:

(A) The student has subaverage general intellectual functioning, as demonstrated by evidence of intellectual functioning three or more standard deviations below the mean;

(B) The subaverage intellectual functioning exists concurrently with deficits in at least two adaptive skill areas;

(C) The subaverage intellectual functioning and deficits in adaptive skill areas were manifested during the developmental period and adversely affect the student's educational performance; and

(D) The student is not eligible under the category of deaf-blindness, as set forth in subsection (c), and the student is eligible under one or more of the following disability categories:

(i) Autism spectrum disorder, as set forth in subsection (a);

(ii) Deaf, as set forth in subsection (b);
(iii) Hard of hearing, as set forth in subsection (f);
(iv) Orthopedic disability, as set forth in subsection (i);
(v) Other health disability, as set forth in subsection (j); or
(vi) Visual disability including blindness, as set forth in subsection (n);

(2) If assessment materials would not conclusively demonstrate eligibility as required under paragraph(1), the team of qualified professionals and the parent may find the student eligible under the category of multiple disabilities if the criteria in paragraph (1)(A) to (C) are met and the team documents the existence of a concomitant disability in the determination of eligibility. The documentation of eligibility shall include a statement of the concomitant disability and the basis and method used in determining eligibility.

(i) Orthopedic disability. A student shall be eligible under the disability category of orthopedic disability if there is medical evidence that a severe orthopedic disability exists that adversely affects the student's educational performance. The term includes disabilities caused by congenital anomaly, disabilities caused by disease (e.g., poliomyelitis, bone tuberculosis), and disabilities from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

(j) Other health disability. A student shall be eligible under the category of other health disability if both of the following are met:

(1) The student has limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems or a medically fragile condition such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(2) The health disability adversely affects the student's educational performance.

(k) Specific learning disability.

(1) General. Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia;

(2) Disorders not included. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities; intellectual disability; emotional disability; or environmental, cultural, or economic disadvantage.

(l) Speech or language disability. A student shall be eligible under the category of speech or language disability when a significant problem in the comprehension or production, or both, of an oral communication system, which is not consistent with the student's other developmental or cognitive abilities, or both, adversely affects the student's educational performance and is evident in one or more of the following:

(1) Articulation or phonological condition, or both;

(2) Voice condition;

(3) Fluency condition;

(4) Language conditions, as documented by:

(A) Multiple sources of data; and

(B) A discrepancy of one and one-half standard deviations between the student's estimated cognitive level and performance on at least two standardized measures in the areas of semantics or grammar, or both.

(m) Traumatic brain injury.

(1) A student shall be eligible under the category of traumatic brain injury if both of the following are met:

(A) There is medical evidence that the student has an acquired injury to the brain, caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both that adversely affects the student's educational performance; and

(B) The traumatic brain injury is either an open or closed head injury, resulting in impairments in one or more areas such as:

(i) Cognition;

(ii) Language;

(iii) Memory;

(iv) Attention;

(v) Reasoning;

(vi) Abstract thinking;

(vii) Judgment;

(viii) Problem-solving;

(ix) Sensory, perceptual and motor abilities;

(x) Psychosocial behavior;

(xi) Physical functions;

(xii) Information processing;

(xiii) Speech.

(2) The team of qualified professionals and the parent may not identify a student as having a traumatic brain injury if the brain injury is congenital or degenerative, or induced by birth trauma.

(n) Visual disability including blindness. A student shall be eligible for the disability category of visual disability, including both partial sight and blindness, if the impairment in vision, even with the best correction, adversely affects the student's educational performance and one or more of the following are met:

(1) Partially-sighted. The student's visual acuity is 20/70 to 20/200 in the better eye and with the best correction;

(2) Blind. The student's visual acuity is 20/200 in the better eye and with the best correction, or less, or the student has a subtended visual field of less than 20 degrees, regardless of central visual acuity;

(3) The student has a progressive visual impairment, such as retinitis pigmentosa, that will lead to eventual visual disability as set forth in paragraphs (1) and (2). [Eff 11/26/09] (Auth: 20 U.S.C. 1414(b)(4) and (5), HRS §302A-1112) (Imp: HRS §§302A-101; 302A-439; 34 C.F.R. §§300.8, 300.306, and 300.534)

§8-60-40 Additional group members. The determination of whether a student suspected of having a specific learning disability is a student with a disability as defined in section 8-60-39(k), shall be made by the student's parents and a team of qualified professionals, which shall include:

(1) (A) The student's regular teacher;

(B) If the student does not have a regular teacher, a regular classroom teacher qualified to teach a student of his or her age; or

(C) For a student of less than school age, an individual qualified by the department to teach a student of his or her age; and

(2) At least one person qualified to conduct individual diagnostic examinations of students, such as a school psychologist, speech-language pathologist, or remedial reading teacher. [Eff 11/26/09] (Auth: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6); HRS §302A-1112) (Imp: 34 C.F.R. §300.308)

§8-60-41 Determining the existence of a specific learning disability. (a) The group described in section 8-60-38 may determine that a student has a specific learning disability, as defined in section 8-60-39(k), if:

(1) (A) The student does not achieve adequately for the student's age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the student's age or State-approved grade-level standards:

(i) Oral expression;

(ii) Listening comprehension;

(iii) Written expression;

(iv) Basic reading skill (including phonemic awareness, phonics, and/or vocabulary);

(v) Reading fluency skills;

(vi) Reading comprehension;

(vii) Mathematics calculation;

(viii) Mathematics problem solving; or

(B) The student demonstrates a severe discrepancy between actual achievement and intellectual ability by a difference of at least one and one-half standard deviations in one or more of the areas in subparagraph(A); and

(2) (A) The student does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified in paragraph(1)(A) when using a process based on the student's response to scientific, research-based intervention; or

(B) The student exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with sections 8-60-36 and 8-60-37; and

(3) The group determines that its findings under paragraphs (1)(A) and (2)(A) are not primarily the result of:

(A) A visual, hearing, or motor disability;

(B) Intellectual disability;

(C) Emotional disability;

(D) Cultural factors;

(E) Environmental or economic disadvantage; or

(F) Limited English proficiency.

(b) To ensure that underachievement in a student suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group shall consider, as part of the evaluation described in sections 8-60-36 through 8-60-38:

(1) Data that demonstrate that prior to, or as a part of, the referral process, the student was provided appropriate instruction in regular education settings, delivered by qualified personnel; and

(2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the student's parents.

(c) The department shall promptly request parental consent to evaluate the student to determine if the student needs special education and related services, and shall adhere to the timeframes described in sections 8-60-33 and 8-60-35, unless extended by mutual written agreement of the student's parents and a group of qualified professionals, as described in section 8-60-38(a)(1):

(1) If, prior to a referral, a student has not made adequate progress after an appropriate period of time when provided instruction, as described in subsections (b)(1) and (b)(2); and

(2) Whenever a student is referred for an evaluation. [Eff 11/26/09] (Auth: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6), HRS §302A-1112) (Imp: 34 C.F.R. §300.309)

§8-60-42 Observation. (a) The department shall ensure that the student is observed in the student's learning environment (including the regular classroom setting) to document the student's academic performance and behavior in the areas of difficulty.

(b) The group described in section 8-60-38(a)(1), in determining whether a student has a specific learning disability, shall decide to:

(1) Use information from an observation in routine classroom instruction and monitoring of the student's performance that was done before the student was referred for an evaluation; or

(2) Have at least one member of the group described in section 8-60-38(a)(1) conduct an observation of the student's academic performance in the regular classroom after the student has been referred for an evaluation and parental consent, consistent with section 8-60-31(a), is obtained.

(c) In the case of a student of less than school age or out of school, a group member shall observe the student in an environment appropriate for a student of that age. [Eff 11/26/09] (Auth: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6), HRS §302A-1112) (Imp: 34 C.F.R. §300.310)

§8-60-43 Specific documentation for the eligibility determination. (a) For a student suspected of having a specific learning disability, the documentation of the determination of eligibility, as required in section 8-60-38(a)(2), shall contain a statement of:

(1) Whether the student has a specific learning disability;

(2) The basis for making the determination, including an assurance that the determination has been made in accordance with section 8-60-38(c)(1);

(3) The relevant behavior, if any, noted during the observation of the student and the relationship of that behavior to the student's academic functioning;

(4) The educationally relevant medical findings, if any;

(5) Whether:

(A) The student does not achieve adequately for the student's age or to meet State-approved grade-level standards consistent with section 8-60-41(a)(1)(A) or the student demonstrates a severe discrepancy between actual achievement and intellectual ability consistent with section 8-60-41(a)(1)(B); and

(B) (i) The student does not make sufficient progress to meet age or State-approved grade-level standards consistent with section 8-60-41 (a)(2)(A); or

(ii) The student exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards or intellectual development consistent with section 8-60-41(a)(2)(B);

(6) The determination of the group concerning the effects of a visual, hearing, or motor disability; intellectual disability; emotional disability;

cultural factors; environmental or economic disadvantage; or limited English proficiency on the student's achievement level; and

(7) If the student has participated in a process that assesses the student's response to scientific, research-based intervention:

(A) The instructional strategies used and the student-centered data collected; and

(B) The documentation that the student's parents were notified about:

(i) The State's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided;

(ii) Strategies for increasing the student's rate of learning; and

(iii) The parents' right to request an evaluation.

(b) Each group member shall certify in writing whether the report reflects the member's conclusion. If it does not reflect the member's conclusion, the group member shall submit a separate statement presenting the member's conclusions. [Eff 11/26/09] (Auth: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6), HRS §302A-1112) (Imp: 34 C.F.R. §300.311)

SUBCHAPTER 6

INDIVIDUALIZED EDUCATION PROGRAMS AND EDUCATIONAL PLACEMENTS

§8-60-44 Definition of individualized education program. (a) General. As used in this chapter, the term individualized education program or IEP means a written statement for each student with a disability that is developed, reviewed, and revised in a meeting in accordance with sections 8-60-44 through 8-60-48, and that shall include:

(1) A statement of the student's present levels of academic achievement and functional performance, including:

(A) How the student's disability affects the student's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled students); or

(B) For preschool students, as appropriate, how the disability affects the student's participation in appropriate activities;

(2) A statement of measurable annual goals, including academic and functional goals and a description of short-term objectives or benchmarks designed to:

(A) Meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and

(B) Meet each of the student's other educational needs that result from the student's disability;

(3) A description of:

(A) How the student's progress toward meeting the annual goals described in paragraph (2) will be measured; and

(B) When periodic reports on the progress the student is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the student, or on behalf of the student, and a statement of the program modifications or supports for school personnel that will be provided to enable the student:

(A) To advance appropriately toward attaining the annual goals;

(B) To be involved in and make progress in the general education curriculum in accordance with paragraph (1), and to participate in extracurricular and other nonacademic activities; and

(C) To be educated and participate with other students with disabilities and nondisabled students in the activities described in this section;

(5) An explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class and in the activities described in paragraph (4);

(6) (A) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the student on statewide assessments consistent with section 612(a)(16) of the Act; and

(B) If the IEP team determines that the student shall take an alternate assessment instead of a particular regular State assessment of student achievement, a statement of why:

(i) The student cannot participate in the regular assessment; and

(ii) The particular alternate assessment selected is appropriate for the student; and

(7) The projected date for the beginning of the services and modifications described in paragraph (4), and the anticipated frequency, location, and duration of those services and modifications.

(b) Transition services. (1) For each student beginning at age 14 (or younger if determined appropriate by the IEP team), and updated annually, the IEP shall include a statement of the transition service needs of the student under the applicable components of the student's IEP that focuses on the student's courses of study (such as participation in advanced-placement courses or a vocational educational program).

(2) Beginning not later than the first IEP to be in effect when the student turns 16, or younger if determined appropriate by the IEP team, and updated annually, thereafter, the IEP shall include:

(A) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

(B) The transition services needed to assist the student in reaching those goals, including, if appropriate, a statement of the interagency responsibilities or any needed linkages.

(c) Transfer of rights at age of majority. Beginning not later than one year before the student reaches the age of majority under State law, the IEP shall include a statement that the student has been informed of the student's rights under Part B of the Act, if any, that will transfer to the student on reaching the age of majority under section 8-60-74.

(d) Construction. Nothing in this section shall be construed to require:

(1) That additional information be included in a student's IEP beyond what is explicitly required in section 614 of the Act; or

(2) The IEP team to include information under one component of a student's IEP that is already contained under another component of the student's IEP. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(d)(1)(A) and (d)(6), HRS §302A-1112) (Imp: 34 C.F.R. §300.320)

§8-60-45 IEP team. (a) General. The department shall ensure that the IEP team for each student with a disability includes:

(1) The parents of the student;

(2) Not less than one regular education teacher of the student (if the student is, or may be, participating in the regular education environment);

(3) Not less than one special education teacher of the student, or where appropriate, not less than one special education provider of the student;

(4) A representative of the department who:

(A) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of students with disabilities;

(B) Is knowledgeable about the general education curriculum; and

(C) Is knowledgeable about the availability of and has the authority to commit the resources of the department.

(5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (2) through (6);

(6) At the discretion of the parent or the department, other individuals who have knowledge or special expertise regarding the student, including related services personnel as appropriate; and

(7) Whenever appropriate, the student with a disability.

(b) Transition services participants. (1) In accordance with subsection(a)(7), the department shall invite a student with a disability to attend the student's IEP team meeting if a purpose of the meeting will be the consideration of the postsecondary goals

for the student and the transition services needed to assist the student in reaching those goals under section 8-60-44(b).

(2) If the student does not attend the IEP team meeting, the department shall take other steps to ensure that the student's preferences and interests are considered.

(3) To the extent appropriate, with the consent of the parents or a student who has reached the age of majority, in implementing the requirements of paragraph (1), the department shall invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services.

(c) Determination of knowledge and special expertise. The determination of the knowledge or special expertise of any individual described in subsection (a)(6) shall be made by the party (parents or department) who invited the individual to be a member of the IEP team.

(d) Designating the department representative. The department may designate another department member of the IEP team to also serve as the department representative, if the criteria in subsection (a)(4) are satisfied.

(e) IEP team attendance. (1) A member of the IEP team described in subsections (a)(2) through (a)(5) is not required to attend an IEP team meeting, in whole or in part, if the parent of a student with a disability and the department agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(2) A member of the IEP team described in paragraph (e)(1) may be excused from attending an IEP team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if:

(A) The parent, in writing, and the department consent to the excusal; and

(B) The member submits, in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting.

(f) Initial IEP team meeting for student under Part C. In the case of a student who was previously served under Part C of the Act, an invitation to the initial IEP team meeting shall, at the request of the parent, be sent to the Part C service coordinator or other representatives of the Part C system to assist with the smooth transition of services. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(d)(1)(B)-(d)(1)(D), HRS §302A-1112) (Imp: 34 C.F.R. §300.321)

§8-60-46 <u>Parent participation.</u> (a) Department responsibility: general. The department shall take steps to ensure that one or both of the parents of a student with a disability are present at each IEP team meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) Information provided to parents. (1) The notice required under subsection (a) (1) shall:

(A) Indicate the purpose, time, and location of the meeting and who will be in attendance; and

(B) Inform the parents of the provisions in sections 8-60-45(a)(6) and (c) (relating to the participation of other individuals on the IEP team who have knowledge or special expertise about the student), and section 8-60-45(f) (relating to the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP team meeting for a student previously served under Part C of the Act).

(2) For a student with a disability beginning at age 14, or younger if appropriate, the notice shall also;

(A) Indicate that a purpose of the meeting will be the development of a statement of the transition service needs of the student required in section 8-60-44(b)(1) and

(B) Indicate that the department will invite the student.

(3) For a student with a disability beginning not later than the first IEP to be in effect when the student turns 16, or younger if determined appropriate by the IEP team, the notice also shall:

(A) Indicate:

(i) That a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the student, in accordance with section 8-60-44(b); and

(ii) That the department will invite the student; and

(B) Identify any other agency that will be invited to send a representative.

(c) Other methods to ensure parent participation. If neither parent can attend an IEP team meeting, the department shall use other methods to ensure parent participation, including individual or conference telephone calls, consistent with section 8-60-51 (related to alternative means of meeting participation).

(d) Conducting an IEP team meeting without a parent in attendance. A meeting may be conducted without a parent in attendance if the department is unable to convince the parents that they should attend. In this case, the department shall keep a record of its attempts to arrange a mutually agreed on time and place, such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) Use of interpreters or other action, as appropriate. The department shall take whatever action is necessary to ensure that the parent understands the proceedings of the IEP team meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) Parent copy of student's IEP. The department shall give the parent a copy of the student's IEP at no cost to the parent. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(d)(1)(B)(i), HRS §302A-1112) (Imp: 34 C.F.R. §300.322)

§8-60-47 When IEPs shall be in effect. (a) General. At the beginning of each school year, the department shall have in effect, for each student with a disability within its jurisdiction, an IEP, as defined in section 8-60-44.

(b) IEP for students aged three through five. In the case of a student with a disability aged three through five, in the development of an IEP, the IEP team shall consider the IFSP content (including the natural environments statement) described in section 636 (d) of the Act and its implementing regulations (including an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills for students with IFSPs under this section who are at least three years of age).

(c) Initial IEPs; provision of services. The department shall ensure that:

(1) A meeting to develop an IEP for a student is conducted within 15 days after the receipt of parental consent for the initial provision of special education and related services by the department; and

(2) As soon as possible following development of the IEP, special education and related services are made available to the student in accordance with the student's IEP.

(d) Accessibility of student's IEP to teachers and others. The department shall ensure that:

(1) The student's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and

(2) Each teacher and provider described in paragraph (1) is informed of:

(A) His or her specific responsibilities related to implementing the student's IEP; and

(B) The specific accommodations, modifications, and supports that shall be provided for the student in accordance with the IEP.

(e) IEPs for students who transfer from another state. If a student with a disability (who had an IEP that was in effect in a previous public school in another state) transfers and enrolls in a Hawaii public school, within the same school year, the new public school (in consultation with the parents) shall provide the student with a FAPE (including services comparable to those described in the student's IEP from the previous public school), until the new public school:

(1) Conducts an evaluation pursuant to sections 8-60-36 through 8-60-38 (if determined to be necessary); and

(2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in sections 8-60-44 through 8-60-48.

(f) Transmittal of records. To facilitate the transition for a student described in subsection (e), the new public school in which the student enrolls shall take reasonable steps to promptly obtain the student's records, including the IEP and supporting

documents and any other records relating to the provision of special education or related services to the student, from the previous public school in which the student was enrolled, pursuant to 34 CFR §99.31(a)(2). [Eff 11/26/09] (Auth: 20 U.S.C. 1414(d)(2)(A)-(C), HRS §302A-1112) (Imp: 34 C.F.R. §300.323)

§8-60-48 Development, review, and revision of IEP. (a) Development of IEP: (1) General. In developing each student's IEP, the IEP team shall consider:

(A) The strengths of the student;

(B) The concerns of the parents for enhancing the education of their student;

(C) The results of the initial or most recent evaluation of the student; and

(D) The academic, developmental, and functional needs of the student.

(2) Consideration of special factors. The IEP team shall:

(A) In the case of a student whose behavior impedes the student's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

(B) In the case of a student with limited English proficiency, consider the language needs of the student as those needs relate to the student's IEP;

(C) In the case of a student who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP team determines, after an evaluation of the student's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the student's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the student;

(D) Consider the communication needs of the student including students who are deaf or hearing impaired. This consideration includes a review of the student's language and communication needs, opportunities for direct communications with peers and professional personnel in the student's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the student's language and communication mode; and

(E) Consider whether the student needs assistive technology devices and services.

(3) Requirement with respect to regular education teacher. A regular education teacher of a student with a disability, as a member of the IEP team, shall, to the extent appropriate, participate in the development of the IEP of the student, including the determination of:

(A) Appropriate positive behavioral interventions and supports and other strategies for the student; and

(B) Supplementary aids and services, program modifications, and support for school personnel consistent with section 8-60-44(a)(4).

(4) Agreement. (A) In making changes to a student's IEP after the annual IEP team meeting for a school year, the parent of a student with a disability and the department may agree not to convene an IEP team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the student's current IEP.

(B) If changes are made to the student's IEP in accordance with subparagraph (A), the department shall ensure that the student's IEP team is informed of those changes.

(5) Consolidation of IEP team meetings. To the extent possible, the department shall encourage the consolidation of reevaluation meetings for the student and other IEP team meetings for the student.

(6) Amendments. Changes to the IEP may be made either by the entire IEP team at an IEP team meeting, or as provided in paragraph (4), by amending the IEP rather than by redrafting the entire IEP. A parent shall be provided with a revised copy of the IEP with the amendments incorporated.

(b) Review and revision of IEPs: (1) General. The department shall ensure that, subject to paragraphs (2) and (3), the IEP team:

(A) Reviews the student's IEP periodically, but not less than annually, to determine whether the annual goals for the student are being achieved; and

(B) Revises the IEP, as appropriate, to address:

(i) Any lack of expected progress toward the annual goals described in section 8-60-44(a)(2), and in the general education curriculum, if appropriate;

(ii) The results of any reevaluation conducted under section 8-60-35;

(iii) Information about the student provided to, or by, the parents, as described under section 8-60-37(a)(2);

(iv) The student's anticipated needs; or

(v) Other matters.

(2) Consideration of special factors. In conducting a review of the student's IEP, the IEP team shall consider the special factors described in subsection (a)(2).

(3) Requirement with respect to regular education teacher. A regular education teacher of the student, as a member of the IEP team, shall, consistent with subsection (a)(3), participate in the review and revision of the IEP of the student.

(c) Failure to meet transition objectives:

(1) Participating agency failure. If a participating agency, other than the department, fails to provide the transition services described in the IEP in accordance with section 8-60-44(b), the department shall reconvene the IEP team to identify alternative strategies to meet the transition objectives for the student set out in the IEP.

(2) Construction. Nothing in this chapter relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet the eligibility criteria of that agency.

(d) Students with disabilities in adult prisons:

(1) Requirements that do not apply. The following requirements do not apply to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(A) The requirements contained in section 612(a)(16) of the Act and section 8-60-44(a)(6) (relating to participation of students with disabilities in general assessments)

(B) The requirements in section 8-60-44(b) (relating to transition planning and transition services) do not apply with respect to the students whose eligibility under this chapter will end, because of their age, before they will be eligible to be released from prison based on consideration of their sentence and eligibility for early release.

(2) Modifications of IEP or placement. (A) Subject to subsection (d)(2)(B), the IEP team of a student with a disability who is convicted as an adult under State law and incarcerated in an adult prison may modify the student's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(B) The requirements of sections 8-60-44 (relating to IEPs), and 8-60-15, do not apply with respect to the modifications described in subsection (d)(2)(A). [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(1), 1412(a)(12)(A)(i), 1414 (d) (3), (4)(B), and (7); and 1414(e), HRS §302A-1112) (Imp: 34 C.F.R. §300.324)

§8-60-49 Private school placements by the department. (a) Developing IEPs. (1) Before the department places a student with a disability in, or refers a student to, a private school or facility, the department shall initiate and conduct a meeting to develop an IEP for the student in accordance with sections 8-60-44 and 8-60-48.

(2) The department shall ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the department shall use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.

(b) Reviewing and revising IEPs. (1) After a student with a disability enters a private school or facility, any meetings to review and revise the student's IEP may be initiated and conducted by the private school or facility at the discretion of the department.

(2) If the private school or facility initiates and conducts these meetings, the department shall ensure that the parents and a department representative:

(A) Are involved in any decision about the student's IEP; and

(B) Agree to any proposed changes in the IEP before those changes are implemented.

(c) Responsibility. Even if a private school or facility implements a student's IEP, responsibility for compliance with Part B of the Act remains with the department. [Eff 11/26/09] (Auth: 20 U.S.C. 1412 (a) (10) (B), HRS §302A-1112) (Imp: 34 C.F.R. §300.325)

§8-60-50 Educational placements. Consistent with section 8-60-56(c), the department shall ensure that the parents of each student with a disability are members of any group that makes decisions on the educational placement of their student. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(e), HRS §302A-1112) (Imp: 34 C.F.R. §300.327)

§8-60-51 Alternative means of meeting participation. When conducting IEP team meetings and placement meetings pursuant to this chapter, and carrying out administrative matters under section 615 of the Act (such as scheduling, exchange of witness lists, and status conferences), the parent of a student with a disability and the department may agree to use alternative means of meeting participation, such as video conferences and conference calls. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(f), HRS §302A-1112) (Imp: 34 C.F.R. §300.328)

SUBCHAPTER 7

STATE COMPLAINT PROCEDURES

§8-60-52 State complaint procedures. (a) Applicability. This subchapter applies to the filing, investigation, and resolution of a complaint, including a complaint filed by an organization or individual from another state regarding an alleged violation by the department of one or more requirements of any of the following:

(1) Provisions of the Hawaii Revised Statutes relating to the education of students with a disability or this chapter; or

(2) Part B of the Act or the implementing regulations (34 C.F.R. Part 300).

(b) The department shall widely disseminate to parents and other interested individuals, including parent training and information centers, protection and advocacy

agencies, independent living centers, and other appropriate entities, the State procedures under sections 8-60-52 through 8-60-54.

(c) Remedies for denial of appropriate services. In resolving a complaint in which the department has found a failure to provide appropriate services, the department, pursuant to its general supervisory authority under Part B of the Act, shall address:

(1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the student (such as compensatory services or monetary reimbursement); and

(2) Appropriate future provision of services for all students with disabilities. [Eff 11/26/09] (Auth: 20 U.S.C. 1221e-3, HRS §302A-1112) (Imp: 34 C.F.R. §300.151)

§8-60-53 Minimum State complaint procedures. (a) Time limit; minimum procedures. Within 60 days after a complaint is filed under section 8-60-54. The department shall:

(1) Carry out an independent on-site investigation, if the department determines that an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Provide the public school with the opportunity to respond to the complaint, including, at a minimum:

(A) At the discretion of the public school, a proposal to resolve the complaint and

(B) An opportunity for a parent who has filed a complaint and the public school, to voluntarily engage in mediation consistent with section 8-60-60;

(4) Review all relevant information and make an independent determination as to whether the public school, is violating a requirement of Part B of the Act or of this chapter; and

(5) Issue a written decision to the complainant that addresses each allegation in the complaint and contains:

(A) Findings of fact and conclusions; and

(B) The reasons for the department's final decision.

(b) Time extension; final decision; implementation. The department's procedures described in subsection (a) also shall:

(1) Permit an extension of the time limit under subsection (a) only if:

(A) Exceptional circumstances exist with respect to a particular complaint; or

(B) The parent and the public school, agree to extend the time to engage in mediation pursuant to subsection (a)(3)(B), or to engage in other alternative means of dispute resolution; and

(2) Include procedures for effective implementation of the department's final decision, if needed, including:

(A) Technical assistance activities;

(B) Negotiations; and

(C) Corrective actions to achieve compliance.

(c) Complaints filed under this section and due process hearings under section 8-60-61 and sections 8-60-75 through 8-60-77.

(1) If a written complaint is received that is also the subject of a due process hearing under section 8-60-61 or sections 8-60-75 through 8-60-77, or contains multiple issues of which one or more are part of that hearing, the department shall set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action shall be resolved using the time limit and procedures described in subsections (a) and (b).

(2) If an issue raised in a complaint filed under this section has previously been decided in a due process hearing involving the same parties:

(A) The due process hearing decision is binding on that issue; and

(B) The department shall inform the complainant to that effect.

(3) A complaint alleging a school's failure to implement a due process hearing decision shall be resolved by the department.

[Eff 11/26/09] (Auth: 20 U.S.C. 1221e-3, HRS §302A-1112) (Imp: 34 C.F.R. §300.152)

§8-60-54 Filing a complaint. (a) An organization or individual may file a signed written complaint under the procedures described in sections 8-60-52 through 8-60-53.

(b) The complaint shall include:

(1) A statement that the department has violated a requirement of Part B of the Act or of this chapter;

(2) The facts on which the statement is based;

(3) The signature and contact information for the complainant; and

(4) If alleging violations with respect to a specific student:

(A) The name and address of the residence of the student;

(B) The name of the school the student is attending;

(C) In the case of a homeless student or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the student, and the name of the school the student is attending;

(D) A description of the nature of the problem of the student, including facts relating to the problem; and

(E) A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.

(c) The complaint shall allege a violation that occurred not more than one year prior to the date that the complaint is received in accordance with section 8-60-52.

(d) The party filing the complaint shall submit the complaint to the department. [Eff 11/26/09] (Auth: 20 U.S.C. 1221e-3, HRS §302A-1112) (Imp: 34C.F.R. §300.153)

SUBCHAPTER 8

PROCEDURAL SAFEGUARDS

§8-60-55 Procedural safeguards. General. Procedural safeguards identified. Students with disabilities and their parents shall be afforded the procedural safeguards, that meet the requirements of sections 8-60-56 through 8-60-81. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(6)(A), HRS §302A-1112) (Imp: 34 C.F.R. §300.121)

§8-60-56 Opportunity to examine records; parent participation in meetings. (a) Opportunity to examine records. The parents of a student with a disability shall be afforded an opportunity to inspect and review all education records with respect to:

(1) The identification, evaluation, and educational placement of the student; and

(2) The provision of a FAPE to the student.

(b) Parent participation in meetings. (1) The parents of a student with a disability shall be afforded an opportunity to participate in meetings with respect to:

(A) The identification, evaluation, and educational placement of the student; and

(B) The provision of a FAPE to the student.

(2) The department shall provide notice consistent with sections 8-60-46(a)(1) and (b)(1) to ensure that parents of students with disabilities have the opportunity to participate in meetings described in paragraph (1).

(3) A meeting does not include informal or unscheduled conversations involving department personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that department personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

(c) Parent involvement in placement decisions. (1) The department shall ensure that a parent of each student with a disability is a member of any group that makes decisions on the educational placement of the parent's student.

(2) In implementing the requirements of paragraph (1), the department shall use procedures consistent with the procedures described in section 8-60-46(a) through (b)(1).

(3) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their student, the department shall use other methods to ensure their participation,

including individual or conference telephone calls, or video conferencing.

(4) A placement decision may be made by a group without the involvement of a parent, if the department is unable to obtain the parent's participation in the decision. In this case, the department shall have a record of its attempt to ensure their involvement. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(e), 1415(b)(1), HRS §302A-1112) (Imp: 34 C.F.R. §300.501)

§8-60-57 Independent educational evaluation. (a) General. (1) The parents of a student with a disability have the right to obtain an independent educational evaluation of the student, subject to subsections (b) through (e).

(2) The department shall provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the department criteria applicable for independent educational evaluations as set forth in subsection (e).

(3) For the purposes of this chapter:

(A) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the department; and

(B) Public expense means that the department either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the department, subject to the conditions in paragraphs (2) through (4).

(2) If a parent requests an independent educational evaluation at public expense, the department shall, without unnecessary delay, either:

(A) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(B) Ensure that an independent educational evaluation is provided at public expense, unless the department demonstrates in a hearing pursuant to sections 8-60-61 through 8-60-67 that the evaluation obtained by the parent did not meet department criteria.

(3) If the department files a due process complaint notice to request a hearing and the final decision is that the department's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the department may ask for the parent's reason why he or she objects to the public evaluation. However, the department may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or

filing a due process complaint to request a due process hearing to defend the public evaluation.

(5) A parent is entitled to only one independent educational evaluation at public expense each time the department conducts an evaluation with which the parent disagrees.

(c) Parent-initiated evaluations. If the parent obtains an independent educational evaluation at public expense or shares with the department an evaluation obtained at private expense, the results of the evaluation:

(1) Shall be considered by the department, if it meets department criteria, in any decision made with respect to the provision of a FAPE to the student; and

(2) May be presented by any party as evidence at a hearing on a due process complaint under this chapter regarding that student.

(d) Requests for evaluations by hearing officers. If a hearing officer requests an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation shall be at public expense.

(e) Department criteria. (1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria that the department uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

(2) Except for the criteria described in paragraph (1), the department may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(b)(1) and (d)(2)(A), HRS section 302A-1112) (Imp: 34 C.F.R. section 300.502)

§8-60-58 Prior notice by the department; content of notice. (a) Notice. Written notice that meets the requirements of subsection (b) shall be given to the parents of a student with a disability a reasonable time before the department:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of a FAPE to the student; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of a FAPE to the student.

(b) Content of notice. The notice required under subsection (a) shall include:

(1) A description of the action proposed or refused by the department;

(2) An explanation of why the department proposes or refuses to take the action;

(3) A description of each evaluation procedure, assessment, record, or report the department used as a basis for the proposed or refused action;

(4) A statement that the parents of a student with a disability have protection under the procedural safeguards of this chapter and, if this notice is not

an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(5) Sources for parents to contact to obtain assistance in understanding the provisions of this chapter;

(6) A description of other options that the IEP team considered and the reasons why those options were rejected; and

(7) A description of other factors that are relevant to the department's proposal or refusal.

(c) Notice in understandable language. (1) The notice required under subsection (a) shall be:

(A) Written in language understandable to the general public; and

(B) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(2) If the native language or other mode of communication of the parent is not a written language, the department shall take steps to ensure:

(A) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(B) That the parent understands the content of the notice; and

(C) That there is written evidence that the requirements in subparagraphs (A) and (B) have been met. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(b)(3) and (4), 1415(c)(1), 1414(b)(1), HRS §302A-1112) (Imp: 34 C.F.R. §300.503)

§8-60-59 Procedural safeguards notice. (a) General. A copy of the procedural safeguards available to the parents of a student with a disability shall be given to the parents only one time a school year, except that a copy also shall be given to the parents:

(1) Upon initial referral or parent request for evaluation;

(2) Upon receipt of the first State complaint under sections 8-60-52 through 8-60-54 and upon receipt of the first due process complaint under section 8-60-61 in a school year;

(3) In accordance with the discipline procedures in section 8-60-75(h); and

(4) Upon request by a parent.

(b) Contents. The procedural safeguards notice shall include a full explanation of all of the procedural safeguards available under section 8-60-27, sections 8-60-52 through 8-60-54, section 8-60-31, sections 8-60-57 through 8-60-58, sections 8-60-60 through 8-60-72, sections 8-60-75 through 8-60-81, and section 8-60-84 relating to:

(1) Independent educational evaluations;

(2) Prior written notice;

(3) Parental consent;

(4) Access to education records;

(5) Opportunity to present and resolve complaints through the due process complaint and State complaint procedures, including:
  (A) The time period in which to file a complaint;
  (B) The opportunity for the department to resolve the complaint; and
  (C) The difference between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures;
(6) The availability of mediation;
(7) The student's placement during the pendency of any due process complaint;
(8) Procedures for students who are subject to placement in an interim alternative educational setting;
(9) Requirements for unilateral placement by parents of students in private schools at public expense;
(10) Hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations;
(11) Civil actions, including the time period in which to file those actions; and
(12) Attorneys' fees.
(c) Notice in understandable language. The notice required under subsection (a) shall meet the requirements of section 8-60-58(c). [Eff 11/26/09] (Auth: 20 U.S.C. 1415(d), HRS §302A-1112) (Imp: 34 C.F.R. §300.504)

§8-60-60 Mediation. (a) General. The department shall offer mediation to allow parties to disputes involving any matter, including matters arising prior to the filing of a due process complaint, to resolve disputes through a mediation process.
(b) Requirements. The department shall ensure the mediation process:
(1) Is voluntary on the part of the parties;
(2) Is not used to deny or delay a parent's right to a hearing on the parent's due process complaint, or to deny any other rights afforded under Part B of the Act; and
(3) Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques, and
(4) The State shall bear the cost of the mediation process, including the costs of meetings
(5) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.
(6) If the parties resolve a dispute through the mediation process, the parties shall execute a legally binding agreement that sets forth that resolution and that:
  (A) States that all discussions that occurred during the mediation process will remain confidential and may not be used as

evidence in any subsequent due process hearing or civil proceeding; and

(B) Is signed by both the parent and a representative of the department who has the authority to bind the department.

(7) A written, signed mediation agreement under this paragraph is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(8) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any Federal court or State court of a State receiving assistance.

(c) Impartiality of mediator. (1) An individual who serves as a mediator under this chapter:

(A) May not be an employee of the department that is involved in the education or care of the student; and

(B) Shall not have a personal or professional interest that conflicts with the person's objectivity.

(2) A person who otherwise qualifies as a mediator is not an employee of the department solely because he or she is paid by the department to serve as a mediator. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(e), HRS §302A-1112) (Imp: 34 C.F.R. §300.506)

§8-60-61 Filing a due process complaint. (a) General. (1) A parent or the department may file a due process complaint on any of the matters described in sections 8-60-58(a)(1) and (2) (relating to the identification, evaluation or educational placement of a student with a disability, or the provision of a FAPE to the student).

(2) The due process complaint shall allege a violation that occurred not more than two years before the date the parent or department knew or should have known about the alleged action that forms the basis of the due process complaint, or, within the timeframe specified in state statute for a unilateral special education placement, where the request is for reimbursement of the costs of the placement, including special education and related services. The unilateral special education placement timeframe begins on the student's first day of attendance.

(b) Information for parents. The department shall inform the parent of any free or low-cost legal and other relevant services available in the area if:

(1) The parent requests the information; or

(2) The parent or the department files a due process complaint under this section. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(b)(6), HRS §302A-1112) (Imp: 34 C.F.R. §300.507,HRS §302A-443)

§8-60-62 Due process complaint. (a) General. (1) The department shall have procedures that require either party, or the attorney representing a party, to provide to the other party a due process complaint (which shall remain confidential).

(2) The party filing a due process complaint shall submit a copy of the due process complaint to the department.

(b) Content of complaint. The due process complaint required in paragraph (1) shall include:

(1) The name of the student;

(2) The address of the residence of the student;

(3) The name of the school the student is attending;

(4) In the case of a homeless student or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the student, and the name of the school the student is attending;

(5) A description of the nature of the problem of the student relating to the proposed or refused initiation or change, including facts relating to the problem; and

(6) A proposed resolution of the problem to the extent known and available to the party at the time.

(c) Notice required before a hearing on a due process complaint. A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of subsection (b).

(d) Sufficiency of complaint. (1) The due process complaint required by this section shall be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not meet the requirements in subsection (b).

(2) Within five days of receipt of notification under paragraph (1), the hearing officer shall make a determination on the face of the due process complaint of whether the due process complaint meets the requirements of subsection (b), and shall immediately notify the parties in writing of that determination.

(3) A party may amend its due process complaint only if:

(A) The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to section 8-60-64; or

(B) The hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins.

(4) If a party files an amended due process complaint, the timelines for the resolution meeting in section 8-60-64(a) and the time period to resolve in section 8-60-64(b) begin again with the filing of the amended due process complaint.

(e) Department response to a due process complaint. (1) If the department has not sent a prior written notice under section 8-60-58 to the parent regarding the subject matter contained in the parent's due process complaint, the department shall, within 10 days of receiving the due process complaint, send to the parent a response that includes:

(A) An explanation of why the department proposed or refused to take the action raised in the due process complaint;

(B) A description of other options that the IEP team considered and the reasons why those options were rejected;

(C) A description of each evaluation procedure, assessment, record, or report the department used as the basis for the proposed or refused action; and

(D) A description of the other factors that are relevant to the department's proposed or refused action.

(2) A response by the department under paragraph (1) shall not be construed to preclude the department from asserting that the parent's due process complaint was insufficient, where appropriate.

(f) Other party response to a due process complaint. Except as provided in subsection (e), the party receiving a due process complaint shall, within 10 days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(b)(7), 1415(c)(2), HRS §302A-1112) (Imp: 34 C.F.R. §300.508)

§8-60-63 Model forms. (a) The department shall provide a model form to assist parents and public schools in filing a due process complaint in accordance with sections 8-60-61(a) and 8-60-62(a) through (c) and to assist parents and other parties in filing a State complaint under sections 8-60-52 through 8-60-54. However, the department may not require the use of the model forms.

(b) Parents, public schools, and other parties may use the appropriate model form described in subsection (a), or another form or other document, so long as the form or document that is used meets, as appropriate, the content requirements in section 8-60-62(b) for filing a due process complaint, or the requirements in section 8-60-54(b) for filing a State complaint. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(b)(8), HRS §302A-1112) (Imp: 34 C.F.R. §300.509)

§8-60-64 Resolution process. (a) Resolution meeting. (1) Within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing under section 8-60-65, the department shall convene a meeting with the parent and the relevant member or members of the IEP team who have specific knowledge of the facts identified in the due process complaint that:

(A) Includes a representative of the department who has decision-making authority on behalf of the department; and

(B) May not include an attorney of the department unless the parent is accompanied by an attorney.

(2) The purpose of the meeting is for the parent of the student to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the department has the opportunity to resolve the dispute that is the basis for the due process complaint.

(3) The meeting described in paragraph (1) and (2) need not be held if:

(A) The parent and the department agree in writing to waive the meeting; or

(B) The parent and the department agree to use the mediation process described in section 8-60-60.

(4) The parent and the department determine the relevant members of the IEP team to attend the meeting.

(b) Resolution period. (1) If the department has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.

(2) Except as provided in subsection (c), the timeline for issuing a final decision under section 8-60-69 begins at the expiration of this 30-day period.

(3) Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs (1) and (2), the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

(4) If the department is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented using the procedures in section 8-60-46(d)), the department may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint.

(5) If the department fails to hold the resolution meeting specified in subsection (a) within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.

(c) Adjustments to 30-day resolution period. The 45-day timeline for the due process hearing in section 8-60-69(a) starts the day after one of the following events:

(1) Both parties agree in writing to waive the resolution meeting;

(2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;

(3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or department withdraws from the mediation process.

(d) Written settlement agreement. If a resolution to the dispute is reached at the meeting described in subsections (a)(1) and (2), the parties shall execute a legally binding agreement that is:

(1) Signed by both the parent and a representative of the department who has the authority to bind the department; and

(2) Enforceable in any State court of competent jurisdiction or in a district court of the United States.

(e) Agreement review period. If the parties execute an agreement pursuant to subsection (d), a party may void the agreement within 3 business days of the agreement's execution. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(f)(1)(B), HRS §302A-1112) (Imp: 34 C.F.R. §300.510)

§8-60-65 Impartial due process hearing. (a) General. Whenever a due process complaint is received under section 8-60-61 or section 8-60-77, the parents or the department involved in the dispute shall have an opportunity for an impartial due process hearing, consistent with the procedures in sections 8-60-61, 8-60-62, and 8-60-64.

(b) The hearing described in subsection (a) shall be conducted by the department.

(c) Impartial hearing officer. (1) At a minimum, a hearing officer:

(A) Shall not be:

(i) An employee of the department that is involved in the education or care of the student; or

(ii) A person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(B) Shall possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts;

(C) Shall possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(D) Shall possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(2) A person who otherwise qualifies to conduct a hearing under paragraph (1) is not an employee of the department solely because he or she is paid by the department to serve as a hearing officer.

(3) The department shall keep a list of the persons who serve as hearing officers. The list shall include a statement of the qualifications of each of those persons

(d) Subject matter of due process hearings. The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under section 8-60-62(b), unless the other party agrees otherwise.

(e) The hearing officer shall conduct a pre-hearing conference. The hearing officer may conduct all or part of the pre-hearing conference by telephone if both parties or party representatives have an opportunity to participate in and hear the entire

proceeding while it is taking place. The pre-hearing conference shall include the identification of the precise issues to be heard under section 8-60-61(a).

(f) Timeline for requesting a hearing. A parent or the department shall request an impartial hearing on their due process complaint within two years of the date the parent or the department knew or should have known about the alleged action that forms the basis of the due process complaint. The request for a due process hearing regarding reimbursement of all costs of the private placement including special education and related services shall be filed within the timeframe specified by state statute.

(g) Exceptions to the timeline. The timeline described in subsection (f) does not apply to a parent if the parent was prevented from filing a due process complaint due to:

(1) Specific misrepresentations by the department that it had resolved the problem forming the basis of the due process complaint; or

(2) The department's withholding of information from the parent that was required to be provided to the parent. [Eff Nov.26, 2009] (Auth: 20 U.S.C. 1415(f)(1)(A), 1415(f)(3)(A)-(D), HRS §302A-1112) (Imp: 34 C.F.R. §300.511)

§8-60-66 Hearing rights. (a) General. Any party to a hearing conducted pursuant to sections 8-60-61 through 8-60-67 or sections 8-60-75 through 8-60-79, or an appeal conducted pursuant to section 8-60-68, has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of students with disabilities;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(A) The party initiating the due process complaint has the burden of proof.

(B) The burden of proof is the responsibility of the party initiating and seeking relief in an administrative hearing under the IDEA or this chapter is to prove, by a preponderance of the evidence, the allegations of the complaint.

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

(4) Obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing; and

(5) Obtain written, or, at the option of the parents, electronic findings of fact and decisions.

(b) Additional disclosure of information. (1) At least five business days prior to a hearing conducted pursuant to section 8-60-65(a), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(2) A hearing officer may bar any party that fails to comply with paragraph (1) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(c) Parental rights at hearings. Parents involved in hearings shall be given the right to:

(1) Have the student who is the subject of the hearing present;

(2) Open the hearing to the public; and

(3) Have the record of the hearing and the findings of fact and decisions described in subsections (a)(4) and (5) provided at no cost to parents. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(f)(2), 1415(h), HRS §302A-1112) (Imp: 34 C.F.R. §300.512)

§8-60-67 Hearing decisions. (a) Decision of hearing officer on the provision of a FAPE. (1) Subject to paragraph (2), a hearing officer's determination of whether a student received a FAPE shall be based on substantive grounds.

(2) In matters alleging a procedural violation, a hearing officer may find that a student did not receive a FAPE only if the procedural inadequacies:

(A) Impeded the student's right to a FAPE;

(B) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's student; or

(C) Caused a deprivation of educational benefit.

(3) Nothing in subsection (a) shall be construed to preclude a hearing officer from ordering the department to comply with procedural requirements under sections 8-60-56 through 8-60-81.

(4) Following the placement of a student in a private school, for continued placement, the private school cannot be deemed an appropriate placement by the hearing officer unless the private school allows the department to exercise its responsibility to ensure the provision of a FAPE under sections 8-60-29 and 30.

(b) Separate request for a due process hearing. Nothing in sections 8-60-56 through 8-60-81 shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

(c) Findings and decision to advisory panel and general public. The department, after deleting any personally identifiable information, shall:

(1) Transmit the findings and decisions referred to in section 8-60-66(a)(5) to the State advisory panel; and

(2) Make those findings and decisions available to the public. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(f)(3)(E) and (F), 1415(h)(4), 1415(o), HRS §302A-1112) (Imp: 34 C.F.R. §300.513)

§8-60-68 Finality of decision; appeal. A decision made in a hearing conducted pursuant to sections 8-60-61 through 8-60-67 or sections 8-60-75 through

8-60-79 is final, except that any party involved in the hearing may appeal the decision under the provisions of section 8-60-70. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(g) and (h)(4), 1415(i)(1)(A), 1415(i)(2), HRS §302A-1112) (Imp: 34 C.F.R. §300.514)

§8-60-69 Timelines and convenience of hearings and reviews. (a) The department shall ensure that not later than 45 days after the expiration of the 30 day period under section 8-60-64(b), or the adjusted time periods described in section 8-60-64(c):

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) A hearing officer may, for good cause, grant specific extensions of time beyond the period set out in subsection (a) at the request of either party. Each extension shall be no more than 45 days.

(1) The hearing officer shall consider the following factors before an extension is granted:

(A) The negative effects of extending the time in which a student's education is in abeyance;

(B) The requesting party's ability to have avoided the necessity for an extension;

(C) If the requesting party is the petitioner, whether the requesting party had an opportunity to adequately prepare before filing a hearing request;

(D) The negative effects denying the request for an extension;

(E) The intent of this chapter and federal laws to expedite an informal administrative proceeding; and

(F) Whether granting the extension will override the intent of the law in favor of the convenience of the parties.

(2) Absent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted. Agreement of the parties is not a sufficient basis for granting an extension.

(3) The impartial hearing officer shall respond in writing to each request for an extension. The response shall include findings of fact and conclusions as to why good cause exists. The response shall become part of the record. The impartial hearing officer shall set a new date for rendering his or her decision, and notify the parties in writing of such date.

(c) Each hearing and each review involving oral arguments shall be conducted at a time and place that is reasonably convenient to the parents and student involved. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(f)(1)(B)(ii), 1415(g), 1415(i)(1), HRS §302A-1112) (Imp: 34 C.F.R. §300.515)

§8-60-70 Civil action. (a) General. Any party aggrieved by the findings and decision made under sections 8-60-61 through 8-60-67 or sections 8-60-75 through 8-60-79 has the right to bring a civil action with respect to the due process complaint

notice requesting a due process hearing under section 8-60-61 or sections 8-60-75 through 8-60-77. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) Time limitation. The party bringing the action shall have 30 days from the date of the decision of the hearing officer to file a civil action, or, in the time allowed by State law.

(c) Additional requirements. In any action brought under subsection (a), the court:

(1) Receives the records of the administrative proceedings;

(2) Hears additional evidence at the request of a party; and

(3) Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

(d) Jurisdiction of district courts. The district courts of the United States have jurisdiction of actions brought under section 615 of the Act without regard to the amount in controversy.

(e) Rule of construction. Nothing in this chapter restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of students with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures under sections 8-60-61 and 8-60-68 shall be exhausted to the same extent as would be required had the action been brought under section 615 of the Act.
[Eff 11/26/09] (Auth: 20 U.S.C. 1415(i)(2) and (3)(A), 1415(l), HRS §302A-1112)
(Imp: 34 C.F.R. §300.516)

§8-60-71 Attorneys' fees. (a) In general. In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to:

(1) The prevailing party who is the parent of a student with a disability;

(2) To a prevailing party who is the department against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(3) To the department prevailing against the attorney of a parent, or against the parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(b) Prohibition on use of funds. (1) Funds under Part B of the Act may not be used to pay attorneys' fees or costs of a party related to any action or proceeding under section 615 of the Act and sections 8-60-56 through 8-60-81.

(2) Paragraph (1) does not preclude the department from using funds under Part B of the Act for conducting an action or proceeding under section 615 of the Act.

(c) Award of fees. A court awards reasonable attorneys' fees under section 615(i)(3) of the Act consistent with the following:

(1) Fees awarded under section 615(i)(3) of the Act shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this paragraph.

(2) (A) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 615 of the Act for services performed subsequent to the time of a written offer of settlement to a parent if:

(i) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(ii) The offer is not accepted within 10 days; and

(iii) The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(B) Attorneys' fees may not be awarded relating to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action, or at the discretion of the State, for a mediation described in section 8-60-60.

(C) A meeting conducted pursuant to section 8-60-64 shall not be considered:

(i) A meeting convened as a result of an administrative hearing or judicial action; or

(ii) An administrative hearing or judicial action for purposes of this subchapter.

(3) Notwithstanding paragraph (2), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(4) Except as provided in paragraph (5), the court reduces, accordingly, the amount of the attorneys' fees awarded under section 615 of the Act, if the court finds that:

(A) The parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(B) The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(C) The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(D) The attorney representing the parent did not provide to the department the appropriate information in the due process request notice in accordance with section 8-60-62.

(5) The provisions of paragraph (4) do not apply in any action or proceeding if the court finds that the department unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the Act. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(i)(3)(B)-(G), HRS §302A-1112) (Imp: 34 C.F.R. §300.517)

§8-60-72 Student's status during proceedings. (a) Except as provided in section 8-60-78, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under section 8-60-61, unless the department and the parents of the student agree otherwise, the student involved in the complaint shall remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the student, with the consent of the parents, shall be placed in the public school until the completion of all the proceedings.

(c) If the complaint involves an application for initial services from a student who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the student has turned three, the department is not required to provide the Part C services that the student had been receiving. If the student is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under section 8-60-31(b), then the department shall provide those special education and related services that are not in dispute between the parent and the department.

(d) If the hearing officer in a due process hearing conducted by the department agrees with the student's parents that a change of placement is appropriate, that placement shall be treated as an agreement between the State and the parents for purposes of subsection (a). [Eff 11/26/09] (Auth: 20 U.S.C. 1415(j), HRS §302A-1112) (Imp: 34 C.F.R. §300.518)

§8-60-73 Surrogate parents. (a) General. The department shall ensure that the rights of a student are protected when:

(1) No parent (as defined in section 8-60-2 can be identified;

(2) The department, after reasonable efforts, cannot locate a parent;

(3) The student is a ward of the State under the laws of that State; or

(4) The student is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)).

(b) Duties of the department. The duties of the department under subsection (a) include the assignment of an individual to act as a surrogate for the parents. This shall include a method:

(1) For determining whether a student needs a surrogate parent; and

(2) For assigning a surrogate parent to the student.

(c) Wards of the State. In the case of a student who is a ward of the State, the surrogate parent alternatively may be appointed by the judge overseeing the student's case, provided that the surrogate meets the requirements in subsections (d)(2)(A) and (e).

(d) Criteria for selection of surrogate parents. (1) The department may select a surrogate parent in any way permitted under State law.

(2) The department shall ensure that a person selected as a surrogate parent:

(A) Is not an employee of the department or any other agency that is involved in the education or care of the student;

(B) Has no personal or professional interest that conflicts with the interest of the student the surrogate parent represents; and

(C) Has knowledge and skills that ensure adequate representation of the student.

(e) Non-employee requirement; compensation. A person otherwise qualified to be a surrogate parent under subsection (d) is not an employee of the department solely because he or she is paid by the department to serve as a surrogate parent.

(f) Unaccompanied homeless youth. In the case of a student who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogate parents without regard to subsection (d)(2)(A), until a surrogate parent can be appointed that meets all of the requirements of subsection (d)..

(g) Surrogate parent responsibilities. The surrogate parent may represent the student in all matters relating to:

(1) The identification, evaluation, and educational placement of the student; and

(2) The provision of a FAPE to the student.

(h) Department responsibility. The department shall make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after the department determines that the student needs a surrogate parent. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(b)(2), HRS §302A-1112) (Imp: 34 C.F.R. §300.519)

§8-60-74 <u>Transfer of parental rights at age of majority.</u> General. A State may provide that, when a student with a disability reaches the age of majority under State law that applies to all students (except for a student with a disability who has been determined to be incompetent under State law):

(a) (1) The department shall provide any notice required by this chapter to both the student and the parents; and

(2) All rights accorded to parents under Part B of the Act transfer to the student;

(b) All rights accorded to parents under Part B of the Act transfer to students who are incarcerated in an adult or juvenile, State or local correctional institution; and

(c) Whenever the State provides for the transfer of rights pursuant to subsection (a), the department shall notify the student and the parents of the transfer of rights. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(m), HRS §302A-1112) (Imp: 34 C.F.R. §300.520)

SUBCHAPTER 9

DISCIPLINE PROCEDURES

§8-60-75 Authority of school personnel. (a) Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this subchapter, is appropriate for a student with a disability who violates chapter 8-19.

(b) General.

(1) School personnel under this subchapter may remove a student with a disability who violates school rules from the student's current placement to an appropriate interim alternative educational setting, another setting, or suspension for not more than 10 cumulative school days (to the extent those alternatives are applied to students without disabilities) in that same school year for one or separate incidents of misconduct;

(2) After a student with a disability has been removed from the student's current placement for ten school days in the same school year, during any subsequent days of removal the department shall provide services to the extent required under subsection (d);

(3) "Current educational placement" means the type of educational placement of the student as described in the student's annual IEP. 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; regular classroom with resource room support; special class; special school; home, etc.).

(c) Additional authority. For disciplinary changes in placement that would exceed ten consecutive or cumulative school days, if the behavior that gave rise to the violation of chapter 8-19 is determined not to be a manifestation of the student's disability pursuant to subsection (e), school personnel may apply the relevant disciplinary procedures to students with disabilities in the same manner and for the same duration as

the procedures would be applied to students without disabilities, except as provided in subsection (d).

(d) Services.

(1) A student with a disability who is removed from the student's current placement pursuant to subsection (c) or (g), shall:

(A) Continue to receive educational services, as provided in section 8-60-3(a), so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP; and

(B) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur;

(2) The services required by paragraphs (1), (3), and (4) may be provided in an interim alternative educational setting.

(3) When a student with a disability has been removed from his or her current placement for 10 school days or less in the same school year, that student may be provided with an alternate educational option (such as homework, projects, class assignments) in the same manner as a student without a disability who is similarly removed, in accordance with chapter 8-19.

(4) If the removal is a change of placement under section 8-60-81, the student's IEP team determines appropriate services under paragraph (1), except as stated in paragraph (5).

(5) For crisis removals that exceed the ten cumulative school days in a school year, school personnel, in consultation with at least one of the student's teachers, determine the extent to which services are needed so as to enable the student to continue to participate in the general education curriculum although in another setting, and to progress in meeting the goals set out in the student's IEP.

(e) Manifestation determination.

(1) Excluding subparagraph (g)(2)(A), within ten school days of any decision to change the placement of a student with a disability because of a violation of Chapter 19, the department, the parent, and relevant members of the student's IEP team (as determined by the parent and the department) shall review all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine:

(A) If the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or

(B) If the conduct in question was the direct result of the department's failure to implement the IEP;

(2) The conduct shall be determined to be a manifestation of the student's disability if the department, the parent, and relevant members of the

student's IEP team determine that a condition in either paragraph (1)(A) or (B) was met;

(3) If the department, the parent, and relevant members of the student's IEP team determine the condition described in paragraph (1)(B) was met, the department shall take immediate steps to remedy those deficiencies.

(f) Determination that behavior was a manifestation. If the department, the parent, and relevant members of the IEP team make the determination that the conduct was a manifestation of the student's disability, the IEP team shall:

(1) Either:

(A) Conduct a functional behavioral assessment, unless the department had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the student; or

(B) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in subsection (g), return the student to the placement from which the student was removed, unless the parent and the department agree to a change of placement as part of the modification of the behavioral intervention plan.

(g) Special circumstances.

(1) School personnel may remove a student to an interim alternative educational setting for not more than forty-five school days without regard to whether the behavior is determined to be a manifestation of the student's disability, if the student:

(A) Carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of the department;

(B) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of the department; or

(C) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the department.

(2) (A) If the basis for a crisis removal exists pursuant to chapter 8-19-7, school personnel may order the removal of a student with a disability from the student's current educational placement, for up to ten consecutive school days. If the crisis removal, together with any previous days of disciplinary suspensions or removals, exceeds ten school days, the crisis removal would constitute a change of placement only if the removals constitute a pattern:

(i) because the student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals.

(ii) because of such additional factors such as the length of each removal, the total amount of time the student is removed, and the proximity of the removals one to another.

(B) If school personnel determine the authority for a crisis removal exists pursuant to paragraph [(1)](2)(A):

(i) The crisis removal shall be in accordance with chapter 8-19-7, including the student's right to resume attendance at school as soon as the exclusion pursuant to chapter 8-19-7(a) is no longer necessary;

(ii) The student with a disability shall be provided a free appropriate public education in accordance with subsection (d) during the period of the crisis removal;

(iii) The IEP team shall conduct the functional behavioral assessment in accordance with subparagraph (d)(1)(b);

(iv) If the student's parent disagrees with the determination under paragraph (2), the parent may request a hearing pursuant to section 8-60-77. For purposes of section 8-60-72 on the student's status during the proceedings, the current placement is the free appropriate public education provided in accordance with subsection (d) until the end of the crisis removal, at which time the student shall resume attendance at school; and

(v) For purposes of subsequent disciplinary action, the school days of crisis removal shall be included as days of removal in this section. Nothing in this paragraph prohibits a student from being the subject of a subsequent crisis removal in a given school year if the requirements of chapter 8-19-7, and this subparagraph are met.

(h) Notification. On the date on which the decision is made to make a removal that constitutes a change of placement of a student with a disability because of a violation of a code of student conduct, the department shall notify the parents of that decision, and provide the parents the procedural safeguards notice described in section 8-60-59.

(i) Definitions. For purposes of this subchapter, the following definitions apply:

(1) "Controlled substance" means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c));

(2) "Illegal drug" means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law;

(3) "Serious bodily injury" has the meaning given the term "serious bodily injury" under section 1365(h)(3) of title 18, United States Code.

(4) "Weapon" has the meaning given the term "dangerous weapon" under 18 U.S.C. section 930(g)(2). [Eff 11/26/09] (Auth: 20 U.S.C. 1415(k)(1) and (7); HRS §302A-1112) (Imp: 34 C.F.R. §300.530)

§8-60-76 Determination of setting. The student's IEP team determines the interim alternative educational setting for services under section 8-60-75(c), (d)(4), and (g). [Eff 11/26/09] (Auth: 20 U.S.C. 1415(k)(2); HRS §302A-1112) (Imp: 34 C.F.R. §300.531)

§8-60-77 Appeal. (a) General. The parent of a student with a disability who disagrees with any decision regarding placement under sections 8-60-75 and 8-60-76, or the manifestation determination under section 8-60-75(e), or the department believes that maintaining the current placement of the student is substantially likely to result in injury to the student or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to sections 8-60-61 and 8-60-62(a) and (b).

(b) Authority of hearing officer.

(1) A hearing officer under section 8-60-65 hears, and makes a determination regarding an appeal under subsection (a).

(2) In making the determination under paragraph (1), the hearing officer may:

(A) Return the student with a disability to the placement from which the student was removed if the hearing officer determines that the removal was a violation of section 8-60-75 or that the student's behavior was a manifestation of the student's disability; or

(B) Order a change of placement of the student with a disability to an appropriate interim alternative educational setting for not more than forty-five school days if the hearing officer determines that maintaining the current placement of the student is substantially likely to result in injury to the student or to others.

(3) The procedures under subsection (a) and paragraphs (1) and (2) may be repeated, if the department believes that returning the student to the original placement is substantially likely to result in injury to the student or to others.

(c) Expedited due process hearing.

(1) Whenever a hearing is requested under subsection (a), the parents involved in the dispute or the department shall have an opportunity for an impartial due process hearing consistent with the requirements of sections 8-60-61 and 8-60-62(a) through (c) and sections 8-60-64 through 8-60-68, except as provided in paragraphs (2) through (4).

(2) The department is responsible for arranging the expedited due process hearing, which shall occur within twenty school days of the date the complaint requesting the hearing is filed. The hearing officer shall make a determination within ten school days after the hearing;

(3) Unless the parents and department agree in writing to waive the resolution meeting described in subparagraph (A), or agree to use the mediation process described in section 8-60-60:

(A) A resolution meeting shall occur within seven days of receiving notice of the due process complaint; and

(B) The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within fifteen days of the receipt of the due process complaint;

(4) The State shall ensure that the requirements in sections 8-60-64 through 8-60-68 are met;

(5) The decisions on expedited due process hearings are appealable consistent with section 8-60-68. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(k)(3) and (4)(B), 1415(f)(1)(A); HRS §302A-1112) (Imp: 34 C.F.R. §300.532)

§8-60-78 Placement during appeals. When an appeal under section 8-60-77 has been made by either the parent or the department, the student shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in section 8-60-75(c) or (g), whichever occurs first, unless the parent and the department agree otherwise. Eff 11/26/09] (Auth: 20 U.S.C. 1415(k)(4)(A), HRS §302A-1112) (Imp: 34 C.F.R. §300.533)

§8-60-79 Protections for students not determined eligible for special education and related services. (a) General. A student who has not been determined to be eligible for special education and related services and who has engaged in behavior that violated chapter 8-19, may assert any of the protections provided for in this chapter if the department had knowledge (as determined in accordance with subsection (b)) that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred.

(b) Basis of knowledge. The department shall be deemed to have knowledge that a student is a student with a disability if before the behavior that precipitated the disciplinary action occurred:

(1) The parent of the student expressed concern in writing to supervisory or administrative personnel of the department, or a teacher of the student, that the student is in need of special education and related services;

(2) The parent of the student requested an evaluation of the student pursuant to sections 8-60-31 through 8-60-43; or

(3) The teacher of the student, or other personnel of the department, expressed specific concerns about a pattern of behavior demonstrated by the student directly to the director of special education or to other supervisory personnel of the department.

(c) Exception. The department would not be deemed to have knowledge under subsection (b) if:

(1) The parent of the student:

(A) Has not allowed an evaluation of the student pursuant to sections 8-60-31 through 8-60-43; or

(B) Has refused services; or

(2) The student has been evaluated in accordance with sections 8-60-31 through 8-60-43 and determined to not be a student with a disability.

(d) Conditions that apply if no basis of knowledge.

(1) If the department does not have knowledge that a student is a student with a disability (in accordance with subsections (b) and (c)) prior to taking disciplinary measures against the student, the student may be subjected to the disciplinary measures applied to students without disabilities who engage in comparable behaviors consistent with paragraph (2).

(2) (A) If a request is made for an evaluation of a student during the time period in which the student is subjected to disciplinary measures under section 8-60-75, the evaluation shall be conducted in an expedited manner;

(B) Until the evaluation is completed, the student remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services;

(C) If the student is determined to be a student with a disability, taking into consideration information from the evaluation conducted by the department and information provided by the parents, the department shall provide special education and related services in accordance with this chapter, including the requirements of sections 8-60-75 through 8-60-81 and section 612(a)(1)(A) of the Act. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(k)(5), HRS §302A-1112) (Imp: 34 C.F.R. §300.534)

§8-60-80 Referral to and action by law enforcement and judicial authorities. (a) Rule of construction. Nothing in this chapter prohibits the department from reporting a crime committed by a student with a disability to appropriate authorities

or prevents state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to crimes committed by a student with a disability.

(b) Transmittal of records.

(1) When reporting a crime committed by a student with a disability, the department shall ensure that copies of the special education and disciplinary records of the student are transmitted for consideration by the appropriate authorities to whom the department reports the crime.

(2) The department may transmit copies of the student's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act(20 U.S.C. 1232g). [Eff 11/26/09] (Auth: 20 U.S.C. 1415(k)(6); HRS §302A-1112) (Imp: 34 C.F.R. §300.535)

§8-60-81 Change of placement because of disciplinary removals. For purposes of removals of a student with a disability from the student's current educational placement under sections 8-60-75 through 8-60-80, a change of placement occurs if the removal is for more than ten cumulative school days in the same school year, unless the basis for a crisis removal exists in accordance with sections 8-60-75(d)(5) and 8-60-75(g)(2). [Eff 11/26/09] (Auth: 20 U.S.C. 1415(k), HRS §302A-1112) (Imp: 34 C.F.R. §300.536)

§§8-60-82 to 8-60-83 (Reserved)

SUBCHAPTER 10

CONFIDENTIALITY OF INFORMATION

§8-60-84 Applicability. All of the provisions of the Hawaii administrative rule relating to the Protection of Educational Rights and Privacy of Students and Parents, the Individuals with Disabilities Education Act, and the Family Educational Rights and Privacy Act (20 U.S.C. section 1400 et seq.; 34 C.F.R. sections 300.610 – 627, 20 U.S.C. 1232g)) shall also apply. [Eff 11/26/09] (Auth: 20 U.S.C. 1212e-3,1412(a)(8), 1417(c); HRS §302A-1112) (Imp: 34 C.F.R. §§300.610 to 627)

HAR Chapter 8-60

RAMSEYER FIRMAT

DEPARTMENT OF EDUCATION

Adoption of Chapter 8-60
Hawaii Administrative Rules

Date

1. Chapter 60 of Title 8, Hawaii Administrative Rules, entitled "Provision of a Free Appropriate Public Education for a Student with a Disability" is adopted to read as follows:

Hawaii Administrative Rules

TITLE 8

DEPARTMENT OF EDUCATION

SUBTITLE 2

EDUCATION

CHAPTER 60

PROVISION OF A FREE APPROPRIATE PUBLIC EDUCATION FOR A STUDENT WITH A DISABILITY

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8-60-2 Definitions

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8-60-6 Assistive technology
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SUBCHAPTER 1

GENERAL PROVISIONS

§8-60-1 Purposes and scope. (a) The purposes of this chapter are:

(1) To ensure that all students with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(2) To ensure that the rights of students with disabilities and their parents are protected;

(3) To assist public schools in the provision of the education of all students with disabilities;

(4) To assess and ensure the effectiveness of efforts to educate students with disabilities;

(5) To strengthen the role of parents;

(6) To encourage whole-school approaches and pre-referral intervention to reduce the need to label students as disabled in order to address their learning needs;

(7) To encourage high expectations for students with a disability and to improve and increase educational achievement; and

(8) To encourage all students with a disability to develop skills needed to lead a self- determined life.

(b) This chapter shall be construed as supplemental to, and in the context of, the Individuals With Disabilities Education Act (20 U.S.C. section 1400 et seq.; 34 C.F.R. sections 300.1 et seq.) and other federal laws and regulations relating to the provision of a free appropriate public education to a student with a disability.
[Eff 11/26/09] (Auth: 20 U.S.C. 1412; HRS §302A-1112)
(Imp: HRS §§302A-1112, 302A-436; 34 C.F.R. §300.2)

§8-60-2 Definitions. As used in this chapter:

"Accredited private special education school or program" means a private day school, private day program, or any preschool that has earned accreditation according to the requirements and procedures specified by the Western Association of Schools and Colleges (WASC), any Hawaii affiliate of the WASC, the Hawaii Association of Independent Schools (HAIS), the National Association for the Education of Young Children (NAEYC), or the National Early Childhood Program for Accreditation (NECPA).

"Act" means the Individuals with Disabilities Education Act, as amended. (20 U.S.C. section 1400(a))

"Assessment" means the administration of specific tests, instruments, tools, strategies, and other materials.

"Assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is

used to increase, maintain, or improve the functional capabilities of a student with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device.

"Assistive technology service" means any service that directly assists a student with a disability in the selection, acquisition, or use of an assistive technology device. The term includes:

(1) The evaluation of the needs of a student with a disability, including an assistive technology functional evaluation of the student in the student's customary environment;

(2) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by students with disabilities;

(3) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(4) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(5) Training or technical assistance for a student with a disability or, if appropriate, that student's family; and

(6) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that student.

<u>"Certified or licensed private residential facility" means a private residential facility" shall mean a private residential school or program that has earned licensure, certification, or accreditation according to the requirements and procedures specified by the appropriate state licensure board or department.</u>

"Charter school" means a public school as defined in both federal and state laws.

"Consent" means that:

(1) The parent has been fully informed of all information relevant to the activity for which consent is sought, in the parent's native language, or through another mode of communication;

(2) The parent understands and agrees in writing to the carrying out of the activity for which the parent's consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(3) (A) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

(B) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

(C) If a parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the department is not

required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

"Day" means calendar day unless otherwise indicated as business day or school day.

(1) "Business day" means Monday through Friday, except for federal and state holidays (unless holidays are specifically included in the designation of business day, as in section 8-60-27(d)(1)(B)).

(2) (A) School day means any day, including a partial day that students are in attendance at school for instructional purposes.

(B) School day has the same meaning for all students in school, including students with and without disabilities.

"Department" means the state department of education, including charter schools.

"Due process complaint" means a request for an impartial hearing process to resolve an alleged violation relating to the identification, evaluation, or educational placement of a student with a disability or the provision of a FAPE to the student.

"Elementary school" means a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under state law.

<u>"Eligible student" means a person aged three to twenty (3-20) who has not attained a high school diploma or its equivalent, who has been determined to have a disability pursuant to the IDEA and this Chapter and requires special education and related services.</u>

"ESEA" means the Elementary and Secondary Education Act.

"Evaluation" means procedures used in accordance with sections 8-60-36 through 8-60-43 to determine whether a student has a disability and the nature and extent of the special education and related services that the student needs.

"Free appropriate public education" or "FAPE" means special education and related services that:

(1) Are provided at public expense, under public supervision and direction, and without charge;

(2) Meet the standards of the department, including the requirements of this chapter;

(3) Include an appropriate preschool, elementary school, or secondary school education in the state involved; and

(4) Are provided in conformity with an individualized education program that meets the requirements of sections 8-60-44 through 8-60-48.

<u>"HAIS" means the Hawaii Association of Independent Schools.</u>

"Homeless students" has the meaning given the term homeless students and youths in section 725 (42 U.S.C. 11434a) of the McKinney-Vento Homeless Assistance Act, as amended, 42 U.S.C. 11431 et seq.

"Include" means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

"Independent educational evaluation" or "IEE" means an evaluation conducted by a qualified examiner who is not employed by the department.

"Individualized education program" or "IEP" means a written statement for a student with a disability that is developed, reviewed, and revised in accordance with sections 8-60-44 through 8-60-48.

"Individualized education program team" means a group of individuals described in section 8-60-45 that is responsible for developing, reviewing, or revising an IEP for a student with a disability.

"Individualized family service or support plan" or "IFSP" has the meaning given the term in section 636 of the Act.

"Interim alternative educational setting" or "IAES" means a temporary placement for a student who has been suspended or otherwise removed from his current educational placement for disciplinary reasons in which the student continues to receive educational services to enable the student to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the student's IEP.

"Least restrictive environment" or "LRE" means to the maximum extent appropriate, educating students with disabilities, including students in public or private institutions or other care facilities, with students who are non-disabled and removing students with disabilities from the regular educational environment only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

"Limited English proficient" has the meaning given the term in section 9101(25) of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C.6301 et seq. ("ESEA").

"Manifestation determination" means a process triggered by a decision to change the placement of a student with a disability because of a violation of a code of student conduct to determine:

If the conduct in question was caused by, or had a direct and substantial relationship to the student's disability; or

If the conduct in question was the direct result of a failure to implement the IEP.

"Mediation" means a voluntary process in which a neutral third party (mediator) helps parents and education representatives try to resolve issues relating to a student's identification, evaluation, or educational placement or the provision of a FAPE.

"NAEYC" means the National Association for the Education of Young Children.

"NECPA" means the National Early Childhoold Program Accreditation.

"Native language". Native language, when used with respect to an individual who is limited English proficient, means the following:

(A) The language normally used by that individual, or, in the case of a student, the language normally used by the parents of the student, except as provided in paragraph (2).

(B) In all direct contact with a student (including evaluation of the student), the language normally used by the student in the home or learning environment.

For an individual with deafness or blindness, or for an individual with no written language, the mode of communication is that normally used by the individual (such as sign language, Braille, or oral communication).

"Nonpublic special education school or program" shall mean any privately owned or operated preschool, school, educational organization or corporation, treatment facility, day program, residential program, or any other placement that maintains, conducts, or provides classes or programming, including related services as defined by federal or state laws, rules, or regulations, for the purpose of offering instruction or treatment to students with disabilities for consideration, profit, tuition, or fees. This also includes any individual or individuals, sole proprietorship, partnership, or Limited Liability Corporation that provides only related services to a student with a disability as defined by federal or state laws, rules, or regulations.

"Parent" means:

(1) A biological or adoptive parent of a student;

(2) A foster parent, unless state law, rules, or contractual obligations with the State prohibit a foster parent from acting as a parent;

(3) A guardian generally authorized to act as the student's parent, or authorized to make educational decisions for the student (but not the State if the student is a ward of the State);

(4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the student lives, or an individual who is legally responsible for the student's welfare; or

(5) A surrogate parent who has been appointed in accordance with section 8-60-73 or section 639(a)(5) of the Act.

The biological or adoptive parent, when attempting to act as the parent and when more than one party is qualified to act as a parent, shall be presumed to be the parent for purposes of this chapter unless the biological or adoptive parent does not have legal authority to make educational decisions for the student; except that if a judicial decree or order identifies a specific person or persons under paragraphs (1) through (4) to act as the "parent" of a student or to make educational decisions on behalf of a student, then that person or persons shall be determined to be the "parent" for purposes of this chapter.

"Placement" means an appropriate educational setting for the implementation of the program for a student with a disability based upon the individualized education 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.).

"Present levels of academic achievement and functional performance" means an essential part of the IEP that summarizes the student's present levels of academic achievement and functional performance and states how the student's disability affects the student's involvement and progress in the general education curriculum.

"Prior written notice" or "PWN" means written notification given to parents of a student with a disability a reasonable time before the department:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of a FAPE to the student, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of a FAPE to the student.

"Programming" shall mean academic instruction, non-academic services, and related services as defined by federal and state laws, rules and regulations.

"Qualified" means that an individual has met the department-approved or department-recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individual is providing special education or related services.

"Related services". General definition. Related services includes transportation and such developmental, corrective, and other supportive services as are required to assist a student with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in students, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

Related services, with respect to students with surgically implanted devices, including cochlear implants.

(1) Do not include a medical device that is surgically implanted, the optimization of that device's functioning (e.g., mapping), maintenance of that device, or the replacement of that device.

(2) Nothing in paragraph (1):

(A) Limits the right of a student with a surgically implanted device (e.g., cochlear implant) to receive related services (as defined in the general definition) that are determined by the IEP team to be necessary for the student to receive a FAPE;

(B) Limits the responsibility of the department to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the student, including breathing, nutrition, or operation of other bodily functions, while the student is transported to and from school or is at school; or

(C) Prevents the routine checking of an external component of a surgically implanted device to make sure it is functioning properly, as required in section 8-60-11(b).

Related services terms are defined as follows:

(1) "Audiology" includes:

(A) Identification of students with hearing loss;

(B) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(C) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(D) Creation and administration of programs for prevention of hearing loss;

(E) Counseling and guidance of students, parents, and teachers regarding hearing loss; and

(F) Determination of students' needs for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification and assessment of disabilities in students" means the implementation of a formal plan for identifying a disability as early as possible in a student's life.

(4) "Interpreting services" includes:

(A) When used with respect to students who are deaf or hearing impaired: Oral transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time translation (CART), C-Print, and TypeWell; and

(B) Special interpreting services for students who are deaf-blind.

(5) "Medical services" means services provided by a licensed physician to determine a student's medically related disability that results in the student's need for special education and related services.

(6) "Occupational therapy" means services provided by a qualified occupational therapist, including:

(A) Improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation;

(B) Improving ability to perform tasks for independent functioning if functions are impaired or lost; and

(C) Preventing, through early intervention, initial or further impairment or loss of function.

(7) "Orientation and mobility services"

(A) Means services provided to blind or visually impaired students by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community; and

(B) Includes teaching students the following, as appropriate:

(i) Spatial and environmental concepts and use of information received by the senses (such as sound, temperature and vibrations) to establish, maintain, or

regain orientation and line of travel (e.g., using sound at a traffic light to cross the street);

(ii) To use the long cane or a service animal to supplement visual travel skills or as a tool for safely negotiating the environment for students with no available travel vision;

(iii) To understand and use remaining vision and distance low vision aids; and

(iv) Other concepts, techniques, and tools.

(8) (A) "Parent counseling and training" means assisting parents in understanding the special needs of their child;

(B) providing parents with information about child development; and

(C) helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP.

(9) "Physical therapy" means services provided by a qualified physical therapist.

(10) "Psychological services" includes:

(A) Administering psychological and educational tests, and other assessment procedures;

(B) Interpreting assessment results;

(C) Obtaining, integrating, and interpreting information about student behavior and conditions relating to learning;

(D) Consulting with other staff members in planning school programs to meet the special educational needs of students as indicated by psychological tests, interviews, direct observation, and behavioral evaluations;

(E) Planning and managing a program of psychological services, including psychological counseling for students and parents; and

(F) Assisting in developing positive behavioral intervention strategies.

(11) "Recreation" includes assessment of leisure function; therapeutic recreation services; recreation programs in schools and community agencies; and leisure education.

(12) "Rehabilitation counseling services" means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a student with a disability by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 et seq.

(13) "School health services" and "school nurse services" means health services that are designed to enable a student with a disability to receive a FAPE as described in the student's IEP. School nurse services are services provided by a qualified school nurse. School health services are

services that may be provided by either a qualified school nurse or other qualified person.

(14) "Social work services in schools" includes:
- (A) Preparing a social or developmental history on a student with a disability;
- (B) Group and individual counseling with the student and family;
- (C) Working in partnership with parents and others on those problems in a student's living situation (home, school, and community) that affect the student's adjustment in school;
- (D) Mobilizing school and community resources to enable the student to learn as effectively as possible in the student's educational program; and
- (E) Assisting in developing positive behavioral intervention strategies.

(15) "Speech-language pathology services" includes:
- (A) Identification of students with speech or language disabilities;
- (B) Diagnosis and appraisal of specific speech or language disabilities;
- (C) Referral for medical or other professional attention necessary for the habilitation of speech or language disabilities;
- (D) Provision of speech and language services for the habilitation or prevention of communicative impairments; and
- (E) Counseling and guidance of parents, students, and teachers regarding speech and language disabilities.

(16) "Transportation" includes:
- (A) Travel to and from school and between schools;
- (B) Travel in and around school buildings; and
- (C) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a student with a disability.

"Resolution session" means a meeting convened within fifteen days of a parent filing a due process complaint in which the parent, a representative from the department and the relevant member(s) of the IEP team discuss the complaint and attempt to resolve the dispute that is the basis of the complaint prior to a due process hearing.

"Scientifically based research" has the meaning given the term in section 9101(37) of the ESEA.

"Secondary school" means a nonprofit institutional day or residential school, including a public secondary charter school that provides secondary education, as determined under state law, except that it does not include any education beyond grade twelve.

"Services plan" means a written statement that describes the special education and related services the department will provide to a parentally-placed student with a disability enrolled in a private school who has been designated to receive services, including the location of the services and any transportation necessary, consistent with

section 8-60-22, and is developed and implemented in accordance with sections 8-60-23 through 8-60-25.

"Short-term objectives/benchmarks" means measurable intermediate performance steps that will enable parents, students, and educators to gauge, at intermediate times during the year, how well the student is progressing toward the annual goals by either:

(a) Breaking down the skills described in the goal into discrete components; or

(b) Describing the amount of progress the student is expected to make within specified segments of the year.

"Special education"

(1) Special education means specially designed instruction, at no cost to the parents, to meet the uniue needs of a student with a disability, including:

(A) Instruction conducted in the classroom, in the home, in hospitals and institutions, in the community, and in other settings; and

(B) Instruction in physical education.

(2) Special education includes each of the following, if the services otherwise meet the requirements of paragraph (1):

(A) Speech-language pathology services, when the speech or language disability is the disabling condition;

(B) Travel training; and

(C) Vocational education.

Individual special education terms defined. The terms in this definition are defined as follows:

(1) "At no cost" means that all specially-designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

(2) "Physical education" means:

(A) The development of:

(i) Physical and motor fitness;

(ii) Fundamental motor skills and patterns; and

(iii) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports); and

(B) Includes special physical education, adapted physical education, movement education, and motor development.

(3) "Specially designed instruction" means adapting, as appropriate to the needs of an eligible student, the content, methodology, or delivery of instruction:

(A) To address the unique needs of the student that result from the student's disability; and

(B) To ensure access of the student to the general curriculum, so that the student can meet the educational standards within the jurisdiction of the department that apply to all students.

(4) "Travel training" means providing instruction, as appropriate, to students with significant cognitive disabilities, and any other students with disabilities who require this instruction, to enable them to:

(A) Develop an awareness of the environment in which they live; and

(B) Learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).

(5) "Vocational education" means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree.

"Special education teacher" means a person assigned by the department who is highly qualified under state standards to provide the specially designed instruction that meets the definition of special education in this section. The term "highly qualified" has the meaning given the term in section 9101 of the ESEA and 34 CFR 200.56.

"State" means the State of Hawaii.

"State complaint" means a written complaint filed with the department of education by an organization or individual alleging a violation of a requirement of Part B of the Act.

"Student with a disability" means a student residing in the State, evaluated in accordance with sections 8-60-36 through 8-60-43 as deaf, hard of hearing, having an intellectual disability, a developmental delay, a speech or language disability, a visual disability (including blindness), an emotional disability, an orthopedic disability, autism spectrum disorder, traumatic brain injury, a specific learning disability, deaf-blindness, multiple disabilities, or other health disability, and who, by reason thereof, needs special education and related services.

(1) If it is determined, through an appropriate evaluation under sections 8-60-36 through 8-60-43, that a student has one of the identified disabilities, but only needs a related service and not special education, the student is not a student with a disability.

(2) If speech-language pathology services are required by the student, the student would be determined to be a student with a disability.

"Supplementary aids and services" means aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable students with disabilities to be educated with nondisabled students to the maximum extent appropriate in accordance with sections 8-60-15 through 8-60-17.

"Transition services" means a coordinated set of activities for a student with a disability that:

(1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the student with a disability to facilitate the student's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing

and adult education, adult services, independent living, or community participation;

(2) Is based on the individual student's needs, taking into account the student's strengths, preferences, and interests; and includes:

(A) Instruction;

(B) Related services;

(C) Community experiences;

(D) The development of employment and other post-school adult living objectives; and

(E) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

Transition services for students with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a student with a disability to benefit from special education.

"Ward of the State" means a student who, as determined by the State where the student resides, is:

(1) A foster student;

(2) A ward of the State; or

(3) In the custody of a public student welfare agency.

"WASC" means the Western Association of Schools and Colleges.

"Ward of the State" does not include a foster student who has a foster parent who meets the definition of a parent in this section. [Eff _____] (Auth: 20 U.S.C. 1221e-3, 1400(a), 1401(1)-(4), 1401(6), 1401(9), 1401(11), 1401(14)-(15), 1401(18), 1401(20), 1401(23), 1401(26)-(27),1401(29)-(36), 1411(e)(2)(C)(xi), 1412(a)(10)(A), 1413(a)(5) and 7221i(1), 1414(a)-(c), 1414(a)(1)(D), 1414(d)(1)(B); HRS §302A-1112) (Imp: 34 C.F.R. §§300.4-13, 300.15, 300.17, 300.19, 300.22 to 24, 300.27, 300.29 to 30, 300.34 to 35, 300.37, 300.39 to 42, 300.44 to 45, and 300.209)

SUBCHAPTER 2

FAPE REQUIREMENTS

§8-60-3 Free appropriate public education ("FAPE"). (a) General. A free appropriate public education shall be available to all students with disabilities residing in the State aged three to twenty, including students with disabilities who have been suspended or expelled from school, as provided for in section 8-60-75(d).

(b) FAPE for students beginning at age 3.

(1) The State shall ensure that:

(A) The obligation to make a FAPE available to each eligible student residing in the State begins no later than the student's third birthday; and

(B) An IEP is in effect for the student by that date, in accordance with section 8-60-47(b).

(2) If a student's third birthday occurs during the summer, the student's IEP team shall determine the date when services under the IEP will begin.

(c) Students advancing from grade to grade. (1) The State shall ensure that a FAPE is available to any individual student with a disability who needs special education and related services, even though the student has not failed or been retained in a course or grade, and is advancing from grade to grade.

(2) The determination that a student described in subsection (a) is eligible, shall be made on an individual basis by the group responsible for making eligibility determinations. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(1)(A); HRS §302A-1112) (Imp: 34 C.F.R. §300.101)

§8-60-4 Limitation: exception to FAPE for certain ages. General. The obligation to make a FAPE available to all students with disabilities does not apply with respect to the following:

(1) Students with disabilities who have graduated from high school with a regular high school diploma.

(A) The exception does not apply to students who have graduated from high school but have not been awarded a regular high school diploma.

(B) Graduation from high school with a regular high school diploma constitutes a change in placement, requiring written prior notice in accordance with section 8-60-58.

(C) As used in paragraph (1), the term "regular high school diploma" does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or a general educational development credential "GED";

(2) Students with disabilities who are eligible but who receive early intervention services under Part C of the Act.

(3) (A) Students with disabilities aged eighteen to twenty, who, in the last educational placement prior to their incarceration in an adult correctional facility:

(i) Were not actually identified as being a student with a disability under sections 8-60-2 and 8-60-39; and

(ii) Did not have an IEP under this chapter.

(B) The exception in paragraph (3)(A) does not apply to students with disabilities, aged eighteen to twenty, who:

(i) Had been identified as a student with a disability under sections 8-60-2 and 8-60-39 and had received services in accordance with an IEP, but who left school prior to their incarceration; or

(ii) Did not have an IEP in their last educational setting, but who had actually been identified as a student with a disability under sections 8-60-2 and 8-60-39. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(1)(B)-(C); HRS §302A-1112) (Imp: 34 C.F.R. §300.102; HRS 302A-101)

§8-60-5 Residential placement. If placement in a public or private residential program is necessary to provide special education and related services to a student with a disability, the program, including non-medical care and room and board, shall be at no cost to the parents of the student. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(1), 1412(a)(10)(B); HRS §302A-1112) (Imp: 34 C.F.R. §300.104)

§8-60-6 Assistive technology. (a) The department shall ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in section 8-60-2, are made available to a student with a disability if required as a part of the student's special education, related services, or supplementary aids and services, under section 8-60-2.

(b) On a case-by-case basis, the use of school-purchased assistive technology devices in a student's home or in other settings is required if the student's IEP team determines that the student needs access to those devices in order to receive FAPE. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(1), 1412(a)(12)(B)(i); HRS §302A-1112) (Imp: 34 C.F.R. §300.105)

§8-60-7 Extended school year services. (a) General.

(1) The department shall ensure that extended school year services are available as necessary to provide a FAPE, consistent with paragraph (2).

(2) Extended school year services shall be provided only if a student's IEP team determines, on an individual basis, in accordance with

sections 8-60-44 through 8-60-48, that the services are necessary for the provision of a FAPE to the student;

(3) In implementing the requirements of this subchapter, the department may not:

(A) Limit extended school year services to particular categories of disability; or

(B) Unilaterally limit the type, amount, or duration of those services.

(b) Definition. The term "extended school year services" means special education and related services that:

(1) Are provided to a student with a disability:

(A) Beyond the normal school year of the department;

(B) In accordance with the student's IEP; and

(C) At no cost to the parents of the student; and

(2) Meet the standards of the department.

[Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(1); HRS §302A-1112) (Imp: 34 C.F.R. §300.106)

§8-60-8 Nonacademic services. (a) The department shall take steps, including the provision of supplementary aids and services determined appropriate and necessary by the student's IEP team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford students with disabilities an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the department, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the department and assistance in making outside employment available. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(1), HRS §302A-1112) (Imp: 34 C.F.R. §300.107)

§8-60-9 Program options. The department shall take steps to ensure that its students with disabilities have available to them the variety of educational programs and services available to nondisabled students, including art, music, industrial arts, consumer and homemaking education, and vocational education. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(2), 1413(a)(1), HRS §302A-1112) (Imp: 34 C.F.R. §300.110)

§8-60-10 Child find and referral. (a) General. The department shall annually identify, locate, and evaluate, all students with disabilities residing in the State, including students with disabilities who are homeless students or are wards of the State, and students with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services.

(b) Other students in child find. Child find also shall include:

(1) Students who are suspected of being a student with a disability as defined in section 8-60-2 and in need of special education, even though they are advancing from grade to grade; and

(2) Highly mobile students, including migrant students.

(c) Construction. Nothing in the Act requires that students be classified by their disability so long as each student who has a disability that is listed in section 8-60-2 and who, by reason of that disability, needs special education and related services is regarded as a student with a disability under Part B of the Act.

(d) Referral.

(1) All referrals for the evaluation of a student to determine eligibility as a student with a disability under this chapter shall be documented and shall be in accordance with this section;

(2) Within fifteen days from the date of receipt of a request for an evaluation, the parent shall:

(A) Receive a written notice in accordance with section 8-60-58 of the department's proposal to assess the student under this chapter; request for consent to assess in accordance with section 8-60-31; and the procedural safeguards notice in accordance with section 8-60-59; or

(B) Receive a written notice in accordance with section 8-60-58 of the department's refusal to assess under this chapter and the procedural safeguards notice in accordance with section 8-60-59. [Eff 11/26/09] (Auth: 20 U.S.C. 1401(3)), 1412(a)(3); HRS §302A-1112) Imp: 34 C.F.R. §§300.111, 300.131)

§8-60-11 Routine checking of hearing aids and external components of surgically implanted medical devices. (a) Hearing aids. Each public school shall ensure that hearing aids worn in school by students who are hard of hearing, including deaf, are functioning properly.

(b) External components of surgically implanted medical devices.

(1) Subject to paragraph (2), the department shall ensure that the external components of surgically implanted medical devices are functioning properly.

(2) For a student with a surgically implanted medical device who is receiving special education and related services, the department is not responsible for the post-surgical maintenance, programming, or replacement of the medical device that has been surgically implanted (or of an external component of the surgically implanted medical device). [Eff 11/26/09] (Auth: 20 U.S.C. 1401(1), 1401(26)(B), HRS §302A-1112) (Imp: 34 C.F.R. §300.113)

§8-60-12 Transition of students from the Part C program to preschool programs. The State shall ensure that:

(1) Students participating in early intervention programs assisted under Part C of the Act, and who will participate in preschool programs assisted under Part B of the Act, experience a smooth and effective transition to those preschool programs in a manner consistent with section 637(a)(9) of the Act;

(2) By the third birthday of a student described in paragraph (1), an IEP, or if consistent with section 8-60-47(b), an IFSP has been developed and is being implemented for the student; and

(3) Each affected district will participate in transition planning conferences arranged by the designated lead agency under section 635(a)(10) of the Act. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(9), HRS §302A-1112) (Imp: 34 C.F.R. §300.124)

§8-60-13 Students with disabilities who are covered by public benefits or insurance. (a) Students with disabilities who are covered by public benefits or insurance.

(1) The department may use the medicaid or other public benefits or insurance programs in which a student participates to provide or pay for services required, as permitted under the public benefits or insurance program, except as provided in paragraph (2).

(2) With regard to services required to provide a FAPE to an eligible student, the department:

(A) May not require parents to sign up for or enroll in public benefits or insurance programs in order for their student to receive a FAPE under Part B of the Act;

(B) May not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to this chapter, but the department may pay the cost that the parents otherwise would be required to pay;

(C) May not use a student's benefits under a public benefits or insurance program if that use would:

(i) Decrease available lifetime coverage or any other insured benefit;

(ii) Result in the family paying for services that would otherwise be covered by the public benefits or insurance program and that are required for the student outside of the time the student is in school;

(iii) Increase premiums or lead to the discontinuation of benefits or insurance; or

(iv) Risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures; and

(D) (i) Shall obtain parental consent, consistent with section 8-60-2, each time that access to public benefits or insurance is sought; and

(ii) Notify parents that the parents' refusal to allow access to their public benefits or insurance does not relieve the department of its responsibility to ensure that all required services are provided at no cost to the parents.

(b) Students with disabilities who are covered by private insurance.

(1) With regard to services required to provide a FAPE to an eligible student, the department, may access the parents' private insurance proceeds only if the parents provide consent consistent with section 8-60-2.

(2) Each time the department proposes to access the parents' private insurance proceeds, the department shall:

(A) Obtain parental consent in accordance with paragraph (1); and

(B) Inform the parents that their refusal to permit the department to access their private insurance does not relieve the department of its responsibility to ensure that all required services are provided at no cost to the parents. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(12) and (e); HRS §302A-1112) (Imp: 34 C.F.R. §300.154)

§8-60-14 Prohibition on mandatory medication. (a) General. The department prohibits state personnel from requiring parents to obtain a prescription for substances identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)) for a student as a condition of attending school, receiving an evaluation under sections 8-60-31 through 8-60-43, or receiving services.

(b) Rule of construction. Nothing in subsection (a) shall be construed to create a federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under section 8-60-10. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(25); HRS §302A-1112) (Imp: 34 C.F.R. §300.174)

SUBCHAPTER 3

LEAST RESTRICTIVE ENVIRONMENT

§8-60-15 Least restrictive environment requirements. The department shall ensure that:

(1) To the maximum extent appropriate, students with disabilities, including students in public or private institutions or other care facilities, are educated with students who are nondisabled; and

(2) Special classes, separate schooling, or other removal of students with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(5); HRS §302A-1112) (Imp: 34 C.F.R. §300.114)

§8-60-16 Continuum of alternative placements. (a) The department shall ensure that a continuum of alternative placements is available to meet the needs of students with disabilities for special education and related services.

(b) The continuum required in subsection (a) shall:

(1) Include the alternative placements listed in the definition of special education under section 8-60-2 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(5); HRS §302A-1112) (Imp: 34 C.F.R. §300.115)

§8-60-17 Placements. In determining the educational placement of a student with a disability, including a preschool student with a disability, the department shall ensure that:

(1) The placement decision:

(A) Is made by a group of persons, including the parents, and other persons knowledgeable about the student, the meaning of the evaluation data, and the placement options; and

(B) Is made in conformity with the LRE provisions of this subchapter, including sections 8-60-15 through 8-60-18;

(2) The student's placement:

(A) Is determined at least annually;

(B) Is based on the student's IEP; and

(C) Is as close as possible to the student's home;

(3) Unless the IEP of a student with a disability requires some other arrangement, the student is educated in the school that the student would attend if nondisabled;

(4) In selecting the LRE, consideration is given to any potential harmful effect on the student or on the quality of services that the student needs; and

(5) A student with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(5); HRS §302A-1112) (Imp: 34 C.F.R. §300.116)

§8-60-18 Nonacademic settings. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in section 8-60-8, the department shall ensure that each student with a disability participates with nondisabled students in the extracurricular services and activities to the maximum extent appropriate to the needs of that student. The department shall ensure that each student with a disability has the supplementary aids and services determined by the student's IEP team to be appropriate and necessary for the student to participate in nonacademic settings. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(5), HRS §302A-1112) (Imp: 34 C.F.R. §300.117)

§8-60-19 (Reserved).

SUBCHAPTER 4

STUDENTS IN PRIVATE SCHOOLS

§8-60-20 Definition of parentally-placed private school students with disabilities. Parentally-placed private school students with disabilities means students with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the definition of elementary school or secondary school in section 8-60-2, other than students with disabilities covered under sections 8-60-28 through 8-60-30. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(A); HRS §302A-1112) (Imp: 34 C.F.R. §300.130)

§8-60-21 Child find for parentally-placed private school students with disabilities. (a) General. The department shall locate, identify, and evaluate all students with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the state, in accordance with section 8-60-10.

(b) Completion period. The child find process shall be completed in a time period comparable to that for students attending public schools in the state consistent with section 8-60-33. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(A)(ii); HRS §302A-1112) (Imp: 34 C.F.R. §300.131)

§8-60-22 Provision of services for parentally-placed private school students with disabilities: basic requirement. (a) General. To the extent consistent with the number and location of students with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the state, provision is made for the participation of those students in the program assisted or carried out under Part B of the Act by providing them with special education and related services, including direct services determined in accordance with section 8-60-23.

(b) Services plan for parentally-placed private school students with disabilities. In accordance with subsection (a) and sections 8-60-23 through 8-60-25, a services plan shall be developed and implemented for each private school student with a disability who has been designated by the department to receive special education and related services. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(A)(i); HRS §302A-1112) (Imp: 34 C.F.R. §300.132)

§8-60-23 Equitable services determined. (a) No individual right to special education and related services. No parentally-placed private school student with a disability has an individual right to receive some or all of the special education and related services that the student would receive if enrolled in a public school.

(b) Decisions.

(1) Decisions about the services that will be provided to parentally-placed private school students with disabilities under sections 8-60-20 through 8-60-26 shall be made in accordance with subsection (c).

(2) The department shall make the final decisions with respect to the services to be provided to eligible parentally-placed private school students with disabilities.

(c) Services plan for each student served under sections 8-60-20 through 8-60-26. If a student with a disability is enrolled in a religious or other private school by the student's parents and will receive special education or related services from the department, the department shall:

(1) Initiate and conduct meetings to develop, review, and revise a services plan for the student, in accordance with section 8-60-24(b); and

(2) Ensure that a representative of the religious or other private school attends each meeting. If the representative cannot attend, the department shall use other methods to ensure participation by the religious or other private school, including individual or conference telephone calls. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(A), HRS §302A-1112) (Imp: 34 C.F.R. §300.137)

§8-60-24 Equitable services provided. (a) General.

(1) The services provided to parentally-placed private school students with disabilities shall be provided by personnel meeting the same standards as personnel providing services in the public schools, except that private elementary school and secondary school teachers who are providing equitable services to parentally-placed private school students with disabilities do not have to meet the highly qualified special education teacher requirements of 34 C.F.R. 300.18.

(2) Parentally-placed private school students with disabilities may receive a different amount of services than students with disabilities in public schools.

(b) Services provided in accordance with a services plan.

(1) Each parentally-placed private school student with a disability who has been designated to receive services under section 8-60-22 shall have a services plan that describes the specific special education and related services that the department will provide to the student in light of the services that the department has determined, through the process described in section 8-60-23, it will make available to parentally-placed private school students with disabilities.

(2) The services plan shall, to the extent appropriate:

(A) Meet the requirements of section 8-60-44, or for a student ages three through five, meet the requirements of section 8-60-47(b) with respect to the services provided; and

(B) Be developed, reviewed, and revised consistent with sections 8-60-45 through 8-60-48.

(c) Provision of equitable services.

(1) The provision of services pursuant to this section and sections 8-60-25 through 8-60-26 shall be provided:

(A) By employees of the department; or

(B) Through contract by the department with an individual, association, agency, organization, or other entity.

(2) Special education and related services provided to parentally-placed private school students with disabilities, including materials and equipment, shall be secular, neutral, and nonideological.

[Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(A)(vi), HRS §302A-1112) (Imp: 34 C.F.R. §300.138)

§8-60-25 Location of services and transportation. (a) Services on private school premises. Services to parentally-placed private school students with disabilities may be provided on the premises of private, including religious, schools, to the extent consistent with law.

(b) Transportation: General.

(1) If necessary for the student to benefit from or participate in the services provided, a parentally-placed private school student with a disability shall be provided transportation:

(A) From the student's school or the student's home to a site other than the private school; and

(B) From the service site to the private school, or to the student's home, depending on the timing of the services.

(2) The department is not required to provide transportation from the student's home to the private school. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(A), HRS §302A-1112) (Imp: 34 C.F.R. §300.139)

§8-60-26 Due process complaints and state complaints. (a) Due process not applicable, except for child find. Except as provided in subsection (b), the procedures in sections 8-60-59 through 8-60-73 do not apply to complaints that the department has failed to meet the requirements of sections 8-60-22 through 8-60-25, including the provision of services indicated on the student's services plan.

(b) Child find complaints shall be filed with the department.

(1) The procedures in sections 8-60-59 through 8-60-73 apply to complaints that the department has failed to meet the child find requirements in section 8-60-21, including the requirements in sections 8-60-31 through 8-60-43.

(2) Any due process complaint regarding the child find requirements, as described in paragraph (1), shall be filed with the department.

(c) State complaints. Any complaint that the department has failed to meet the requirements in sections 8-60-22 through 8-60-26 shall be filed in accordance with the procedures described in sections 8-60-52 through 8-60-54. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(A), HRS §302A-1112) (Imp: 34 C.F.R. §300.140)

§8-60-27 Placement of students by parents when FAPE is at issue. (a) General. This chapter does not require the department to pay for the cost of education, including special education and related services, of a student with a disability at a private school or facility if the department made a FAPE available to the student and the parents elected to place the student in a private school or facility. However, the department shall include that student in the population whose needs are addressed consistent with sections 8-60-21 through 8-60-26.

(b) Disagreements about a FAPE. Disagreements between the parents and the department regarding the availability of a program appropriate for the student, and the question of financial reimbursement, are subject to the due process procedures in sections 8-60-59 through 8-60-74.

(c) Reimbursement for private school placement. If the parent of a student with a disability, who previously received special education and related services under the authority of the department, enrolls the student in a private preschool, elementary or secondary school without the consent of or referral by the department, a court or a

hearing officer may require the department to reimburse the parent for the cost of that enrollment if the court or hearing officer finds that the department had not made a free appropriate public education available to the student in a timely manner prior to that enrollment and that the private placement is appropriate.

(1) A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the state standards that apply to education provided by the department.

(2) The private school shall not be deemed appropriate for continued placement by the hearing officer, if the private school does not allow the department to exercise its responsibility to ensure the provision of a FAPE under section 8-60-29.

(3) The request for a due process hearing regarding reimbursement of all costs of the unilateral private placement including special education and related services shall be filed in accordance with state statute and section 8-60-61.

(d) Limitation on reimbursement. The cost of reimbursement described in subsection (c) may be reduced or denied:

(1) If:

(A) At the most recent IEP team meeting that the parents attended prior to removal of the student from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the department to provide a FAPE to their student, including stating their concerns and their intent to enroll their student in a private school at public expense; or

(B) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the student from the public school, the parents did not give written notice to the department of the information described in subparagraph (A);

(2) If, prior to the parents' removal of the student from the public school, the department informed the parents, through the notice requirements described in section 8-60-58(a)(1), of its intent to evaluate the student (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the student available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(e) Exception. Notwithstanding the notice requirement in subsection (d)(1), the cost of reimbursement:

(1) Shall not be reduced or denied for failure to provide the notice if:

(A) The school prevented the parents from providing the notice;

(B) The parents had not received notice, pursuant to section 8-60-59, of the notice requirement in subsection (d)(1); or

(C) Compliance with subsection (d)(1) would likely result in physical harm to the student; and

(2) May, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if:

(A) The parents are not literate or cannot write in English; or

(B) Compliance with subsection (d)(1) would likely result in serious emotional harm to the student. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(C), HRS §302A-1112, §302A-443) (Imp: 34 C.F.R. §300.148)

§8-60-28 Applicability of sections 8-60-29 through 8-60-30. Sections 8-60-29 through 8-60-30 apply only to students with disabilities who are or have been placed in or referred to a private school or facility by the department as a means of providing special education and related services. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(B), HRS §302A-1112) (Imp: 34 C.F.R. §300.145)

§8-60-29 Responsibility of the department. The department shall ensure that a student with a disability who is placed in or referred to a private school or facility by the department:

(1) Is provided special education and related services:

(A) In conformance with an IEP that meets the requirements of sections 8-60-44 through 8-60-49; and

(B) At no cost to the parents;

(2) Is provided an education that meets the standards that apply to education provided by the department including the department's responsibility to ensure the provision of a FAPE and the requirements of the Act; and

(3) Has all of the rights of a student with a disability who is served by the department. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(10)(B); HRS §302A-1112) (Imp: 34 C.F.R. §300.146)

§8-60-30 Implementation by the department.

(a) In implementing section 8-60-29, the department shall monitor any student eligible to receive special education and related services, who is placed, whether as the result of a hearing officer's decision, court order, or programmatic placement, at the department's expense, whether by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian, in any private school or placement as defined by federal and state law relating to student with disabilities

(b) Any private school or placement, certified or licensed private residential facility, or nonpublic special education school or program that provides education, treatment, programming, or related services to students with disabilities who are eligible to receive special education and related services pursuant to federal or state laws, rules, or

regulations and receives public funding from the department, either directly or through parental reimbursement shall:

(1) Comply with all federal, state, and county laws, rules, regulations, and ordinances including but not limited to any laws, rules, regulations, and ordinances pertaining to health and safety;

(2) Allow the department access to exercise its authority pursuant to sections 302 A-443(f) through (k) of the Hawaii Revised Statutes to monitor any student placed at any private school or placement at the department's expense;

(3) Provide to the department proof of accreditation by the WASC, any Hawaii affiliate of WASC, HAIS, NAEYC, or NECPA, except that any nonpublic special education school or program shall provide proof of its application to WASC, a WASC affiliate, HAIS, NAEYC, or NECPA within 90 calendar days of accepting a student with a disability who was placed at the nonpublic special education school or program as the result of a hearing officer's decision pursuant to section 302A-443 of the Hawaii Revised Statutes and Chapter 60 of the Hawaii Administrative Rules, court order, settlement agreement, or placement by the department;

(4) Provide copies of a student's records to the department within three (3) business days of receipt of a request for such records;

(5) Post its rates with the department by April of each year. Such posting shall include itemized rates, fees, or tuition including but not limited to the itemized rates for related services as defined by federal and state law and regulation, for the following school year; and

(6) Charge the department the same itemized rates, fees, or tuition it charges parents, legal guardians, or legal custodians who unilaterally place a student at the private school or placement, certified or licensed private residential facility, or nonpublic special education school or program

(c) Any certified or licensed private residential facility that provides educational services to a student with a disability at the department's expense in a residential setting shall comply with subsection (b) and additionally shall:

(1) Provide the department proof of licensure, certification, or accreditation according to requirements and procedures specified by the appropriate state licensure board or department; and

(2) Provide the department proof of accreditation with WASC, a WASC affiliate, HAIS, NAEYC, or NECPA for the educational component of its program.

(3) In the event that the educational component of a certified or licensed private residential facility is not accredited by WASC, a WASC affiliate, HAIS, NAEYC, or NECPA, the certified or licensed private residential facility shall provide proof of application for accreditation with WASC, a WASC affiliate, HAIS, NAEYC, or NECPA within 90 calendar days of accepting a student with a disability placed at the school or program as a result of a hearing officer's decision pursuant to section 302A-443 of the Hawaii Revised Statutes and Chapter 60 of the Hawaii Administrative Rules, court order, settlement agreement, or placement by the department;

(d) The department shall pay only for services that are specified in a student's IEP that have been provided by a private school or placement, private residential facility, or nonpublic special education school or placement that meet the requirements in subsection (b) and (c) and only with the receipt of an itemized invoice. Such itemized invoice shall include:

(1) The type of service performed and provided directly to the student;

(A) If the service provided by the private school or placement or nonpublic school or placement is limited to academic instruction and no related service as defined by federal or state law, an invoice for tuition only will satisfy the invoice requirements.

(2) The individual who performed the service;

(3) The unit cost of the service and the duration of the services; and

(4) The setting in which the service was delivered.

(e) The department shall pay only for services that have been rendered to a student in accordance with the student's IEP.

(f) Monitoring Requirements. The department shall monitor students with disabilities placed at a private school or placement, certified or licensed private residential facility, or nonpublic school or placement at the department's expense. Monitoring shall include but not be limited to:

(1) Ensuring that each student with a disability in subsection (a) is receiving a FAPE;

(2) Ensuring the curriculum and instruction are rigorous, based on content standards, and aligned with the Common Core State Standards (CCSS);

(3) The direct observation of a student with a disability placed at any private school or placement, private residential facility, or nonpublic school or placement at the department's expense, whether by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian, with or without notice;

(4) The review and copies, if needed, of all records, notes, or documentation related to a student with a disability placed at any private school or placement, certified or licensed private residential facility, or nonpublic school or placement at the department's expense;

(5) The department's administrators, faculty, and staff to discuss the progress, strengths, and needs of a student with a disability with the student's teacher, related service provider, or other service related personnel of the private school or placement, certified or licensed private residential facility, or nonpublic school or placement where the student with a disability attends at the department's expense; and

(6) The administrators, faculty and staff of the department to conduct various assessments and/or evaluations of a student placed at any private school or program, private residential facility, or nonpublic school or program at the department's expense.

(g) There shall be no video or audio recordings made of any department personnel that are exercising the department's authority to monitor by conducting an observation or an assessment of a student with a disability who is placed at any private school or placement, certified or licensed private residential facility, or nonpublic school or placement at the department's expense, whether by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian. Notwithstanding consent by the department personnel, the parent of the student with a disability may request a video or audio recording of the observation or assessment. Any video or audio recordings shall not violate any protocols of the test or assessment being conducted by department personnel or .

(h) Except as provide in sections 8-60-31 through 8-60-37, parental consent is not needed by any department personnel who are exercising the department's authority to monitor any student with a disability who is placed at a private school or placement, private residential facility, or nonpublic school or placement at the department's expense, whether by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian.

(i) The department will monitor private schools or placements, private residential facility, or nonpublic school or placement that has students with disabilities in attendance at the the department's expense, at least once annually to ensure that the private school or placement, private residential facility, or nonpublic school or program:

(1) Possess a current and valid accreditation with WASC, a WASC affiliate, HAIS, NAEYC, or NECPA or has applied for accreditation with WASC, a WASC affiliate, HAIS, NAEYC, or NECPA;

(2) Is delivering curriculum and instruction that is rigorous, based on content standards and aligned with CCSS; and

(3) Has posted its itemized rates, fees, and tuition to be charged for the following school year by April of every year beginning in 2012.

(j) Each school and/or district that has students with a disability placed at any accredited private school or placement, certified or licensed private residential facility, or nonpublic school or placement, shall be responsible for monitoring individual students with disabilities at least twice annually but not more than once per quarter for the following:

(1) That the individual student with a disability is receiving an academic education, instruction, and programming as required by the student's IEP;

(2) That the individual student with a disability is receiving instruction that is rigorous, based on content standards, and aligned with the CCSS; and

(3) The review of all records, notes or documentation related to the student so that the school and/or district may create an appropriate offer of a FAPE for the student with a disability.

(k) Each private school or placement, certified or licensed private residential facility, or nonpublic school or placement shall provide to the department (a) a quarterly grade report; (b) a quarterly IEP progress report; and (c) any other information pertaining to the progress or lack thereof for a student with a disability placed at a private school or program, certified or licensed private residential facility, or nonpublic school or placement at the department's expense.

(l) Notice Requirements

(1) The department or its designee, shall give a private school or placement, certified or licensed private residential facility, or nonpublic school or placement at least five (5) business days notice of its intent to exercise its authority to monitor any individual student with a disability who is placed at a private school or placement, certified or licensed private residential facility, or nonpublic school or placement at the department's expense whether by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian.

(2) When Notice by the department is not needed. No notice shall be given of the department's intent to monitor any student with a disability placed at a private school or placement, certified or licensed private residential facility, or nonpublic school or placement at the department's expense in the event of an emergency, such as:

(A) When a crime against a student occurs including but not limited to physical assault, sexual assault, harassment or any other crime against a person as defined by state and federal law;

(B) When information is received by the department of physical destruction to the private school or program, certified or licensed private residential facility, or nonpublic school or placement; and

(C) When information is received by the department of unsafe, unsanitary, or hazardous conditions in a private school or placement, certified or licensed private residential facility, or nonpublic school or placement which may endanger the life or health of any student with a disability who is placed at the private school or placement, certified or licensed private residential facility, or nonpublic school or placement at the department's expense, whether by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian.

(m) When Monitoring Efforts by the department are Obstructed. In the event that the department gives notice to a private school or placement, certified or licensed private residential facility, or nonpublic school or placement as provided by paragraphs (a) through (k)_ of this section and the private school or placement, certified or licensed private residential facility, or nonpublic school or placement restricts or denies monitoring by the department, pursuant to sections 302 A-443(f) through (k) of the Hawaii Revised Statutes, the department shall withhold payment to the private school or placement, certified or licensed private residential facility, or nonpublic school or placement. Payment shall resume when the private school or placement, the certified or licensed private residential facility, or the nonpublic special education school or program allows the department access to exercise its authority to monitor students placed at the department's expense.

(n) Provisions for Nonpublic Schools or Placements.

(1) Any nonpublic special education school or program that:

(A) Is not accredited by WASC, a WASC affiliate, HAIS, NAEYC, or NECPA; and

(B) Receives funding from the Department, either directly or through parental reimbursement, shall apply for accreditation within ninety (90) calendar days from the date of accepting a student with disabilities who was placed there as a result of a hearing officer's decision pursuant to section 302A-443 of the Hawaii Revised Statutes, court order, settlement agreement, or placement by the department. Within the ninety (90) calendar application period, the nonpublic school or program shall provide proof of its application for accreditation to the department.

(2) If the application for accreditation is denied, the nonpublic school or placement shall continue in its status as a nonpublic school or placement until the nonpublic school or placement has fulfilled the requirements to be classified as an accredited private school or placement at which time the monitoring requirements still are applicable.

(3) A nonpublic school or placement must apply for accreditation for each student with a disability that is placed at the nonpublic school or placement as a result of a hearing officer's decision until the nonpublic school or placement receives accreditation.

(o) Accepting Credits from Nonpublic Schools or Placements. The department shall not accept high school credits for any coursework completed by a student with a disability at a nonpublic school or placement.

(p) Schools in Good Standing with HAIS. An accredited school or placement that is in good standing with HAIS is only required to assist the department when needed to monitor any child attending an accredited private school or placement at the department's expense. [Eff _____] (Auth: 20 U.S.C. 1412(a)(10)(B), 1416(a),HRS §302A-1112, §302A-443) (Imp: 34 C.F.R. §300.147, 34 C.F.R. §300.600)

SUBCHAPTER 5

EVALUATIONS AND ELIGIBILITY DETERMINATIONS

§8-60-31 Parental consent. (a) Parental consent for initial evaluation.

(1) (A) The department shall obtain consent, consistent with section 8-60-2, from the parent of the student before conducting an initial evaluation to determine if a student qualifies as a student with a disability under sections 8-60-2 and 8-60-39, after providing notice consistent with sections 8-60-58 and 8-60-59;

(B) Parental consent for initial evaluation shall not be construed as consent for initial provision of special education and related services;

(C) The department shall make reasonable efforts to obtain the consent from the parent for an initial evaluation to determine whether the student is a student with a disability;

(2) For initial evaluations only, if the student is a ward of the State and is not residing with the student's parent, the department is not required to obtain consent from the parent for an initial evaluation to determine whether the student is a student with a disability if:

(A) Despite reasonable efforts to do so, the department cannot discover the whereabouts of the parent of the student;

(B) The rights of the parents of the student have been terminated in accordance with state law; or

(C) The rights of the parent to make educational decisions have been subrogated by a judge in accordance with state law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the student;

(3) (A) If the parent of a student enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation under paragraph (1), or the parent fails to respond to a request to provide consent, the department may, but is not required to, pursue the initial evaluation of the student by utilizing the procedural safeguards in sections 8-60-56 through 8-60-82;

(B) The department does not violate its obligation under section 8-60-10 and sections 8-60-33 through 8-60-43 if it declines to pursue the evaluation.

(b) Parental consent for services.

(1) The department is responsible for making a FAPE available to a student with a disability and shall obtain consent from the parent of the student before the initial provision of special education and related services to the student;

(2) The department shall make reasonable efforts to obtain consent from the parent for the initial provision of special education and related services to the student;

(3) If the parent of a student fails to respond to a request for, or refuses to consent to,the initial provision of special education and related services, the department—

(A) May not use the procedures in subchapter 8 (including the mediation procedures under § 8-60-60 or the due process procedures under §§ 8-60-61 through 8-60-70) in order to obtain agreement or a ruling that the services may be provided to the student;

(B) Will not be considered to be in violation of the requirement to make FAPE available to the student because of the failure to provide the student with the special education and related services for which the parent refuses to or fails to provide consent; and

(C) Is not required to convene an IEP team meeting or develop an IEP under §§ 8-60-44 and 8-60-48 for the student.

(4) If, at any time subsequent to the initial provision of special education and related services, the parent of a student revokes consent in writing for the continued provision of special education and related services, the department—

(A) May not continue to provide special education and related services to the student, but must provide prior written notice in accordance with § 8-60-58 before ceasing the provision of special education and related services;

(B) May not use the procedures in subchapter 8(including the mediation procedures under § 8-60-60 or the due process procedures under §§ 8-60-61 through 8-60-70) in order to obtain agreement or a ruling that the services may be provided to the student;

(C) Will not be considered to be in violation of the requirement to make FAPE available to the student because of the failure to provide the student with further special education and related services; and

(D) Is not required to convene an IEP team meeting or develop an IEP under §§ 8-60-44 and 8-60-48 for the student for further provision of special education and related services.

(c) Parental consent for reevaluations. (1) Subject to paragraph (2):

(A) The department shall obtain parental consent, in accordance with section 8-60-31(a)(1), prior to conducting any reevaluation of a student with a disability;

(B) If the parent refuses to consent to the reevaluation, the department may, but is not required to, pursue the reevaluation by using the consent override procedures described in subsection (a)(3);

(C) The department does not violate its obligation under section 8-60-10 and sections 8-60-33 through 8-60-43 if it declines to pursue the evaluation or reevaluation.

(2) The parental consent described in paragraph (1) need not be obtained if the department can demonstrate that:

(A) It made reasonable efforts to obtain such consent; and

(B) The student's parent has failed to respond.

(d) Other consent requirements.

(1) Parental consent is not required before:

(A) Reviewing existing data as part of an evaluation or a reevaluation; or

(B) Administering a test or other evaluation that is administered to all students unless, before administration of that test or evaluation, consent is required of parents of all students.

(2) The department may not use a parent's refusal to consent to one service or activity under subsection (a) to deny the parent or student any other service, benefit, or activity of the department, except as required by this chapter.

(3) (A) If a parent of a student who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or

the parent fails to respond to a request to provide consent, the department may not use the consent override procedures (described in subsections (a)(3) and (c)(1); and

(B) The department is not required to consider the student as eligible for services under sections 8-60-22 through 8-60-26;

(4) To meet the reasonable efforts requirement in subsections (a)(1)(C), (a)(2)(A), (b)(2), and (c)(2)(A), the department shall document its attempts to obtain parental consent using the procedures in section 8-60-46(d). [Eff 11/26/09] (Auth: 20 U.S.C. 1414(a)(1)(D) and 1414(c); HRS §302A-1112) (Imp: 34 C.F.R. §300.300)

§8-60-32 Evaluation. Students with disabilities shall be evaluated in accordance with sections 8-60-31 through 8-60-43 of this chapter. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(7), HRS §302A-1112) (Imp: 34 C.F.R. §300.122)

§8-60-33 Initial evaluations. (a) General. The department shall conduct a full and individual initial evaluation, in accordance with sections 8-60-36 and 8-60-38, before the initial provision of special education and related services to a student with a disability.

(b) Request for initial evaluation. Consistent with the consent requirements in section 8-60-31, either a parent of a student or the department may initiate a request for an initial evaluation to determine if the student is a student with a disability.

(c) Procedures for initial evaluation. The initial evaluation:

(1) Shall be conducted within 60 days of receiving parental consent for the evaluation; and

(2) Shall determine:

(A) If the student is a student with a disability under sections 8-60-2 and 8-60-39; and

(B) The educational needs of the student.

(d) Exception. The timeframe described in subsection (c)(1) does not apply to the department if the parent of a student repeatedly fails or refuses to produce the student for the evaluation. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(a), HRS §302A-1112) (Imp: 34 C.F.R. §300.301)

§8-60-34 Screening for instructional purposes is not evaluation. The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(a)(1)(E), HRS §302A-1112) (Imp: 34 C.F.R. §300.302)

§8-60-35 Reevaluations. (a) General. The department shall ensure that a reevaluation of each student with a disability is conducted in accordance with sections 8-60-36 through 8-60-43:

(1) If the department determines that the educational or related services needs, including improved academic achievement and functional performance, of the student warrant a reevaluation; or

(2) If the student's parent or teacher requests a reevaluation.

(b) Limitation. A reevaluation conducted under subsection (a):

(1) May occur not more than once a year, unless the parent and the department agree otherwise; and

(2) Shall occur at least once every 3 years, unless the parent and the department agree that a reevaluation is unnecessary. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(a)(2), HRS §302A-1112) (Imp: 34 C.F.R. §300.303)

§8-60-36 Evaluation procedures. (a) Notice. The department shall provide notice to the parents of a student with a disability, in accordance with section 8-60-58, that describes any evaluation procedures the department proposes to conduct.

(b) Conduct of evaluation. In conducting the evaluation, the department shall:

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining:

(A) Whether the student is a student with a disability under sections 8-60-2 and 8-60-39; and

(B) The content of the student's IEP, including information related to enabling the student to be involved in and progress in the general education curriculum (or for a preschool student, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a student is a student with a disability and for determining an appropriate educational program for the student; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(c) Other evaluation procedures. The department shall ensure that:

(1) Assessments and other evaluation materials used to assess a student:

(A) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(B) Are provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(C) Are used for the purposes for which the assessments or measures are valid and reliable;

(D) Are administered by trained and knowledgeable personnel; and

(E) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a student with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the student's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The student is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, visual and auditory processing, and motor abilities;

(5) Assessments of students with disabilities who transfer from one public school to another public school in the same school year are coordinated with those students' prior and subsequent schools, as necessary and as expeditiously as possible to ensure prompt completion of full evaluations.

(6) In evaluating each student with a disability under sections 8-60-36 through 8-60-38, the evaluation is sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified.

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the student are provided. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(b)(1)-(3), 1412(a)(6)(B), HRS §302A-1112) (Imp: 34 C.F.R. §300.304)

§8-60-37 Additional requirements for evaluations and reevaluations. (a) Review of existing evaluation data. As part of an initial evaluation (if appropriate) and as part of any reevaluation, the IEP team and other qualified professionals, as appropriate, shall:

(1) Review existing evaluation data on the student, including:

(A) Evaluations and information provided by the parents of the student;

(B) Current classroom-based or State assessments, and classroom-based observations; and

(C) Observations by teachers and related services providers; and

(2) On the basis of that review, and input from the student's parents, identify what additional data, if any, are needed to determine:

(A) (i) Whether the student is a student with a disability, as defined in sections 8-60-2 and 8-60-39 and the educational needs of the student; or

(ii) In case of a reevaluation of a student, whether the student continues to have such a disability, and the educational needs of the student;

(B) The present levels of academic achievement and related developmental needs of the student;

(C) (i) Whether the student needs special education and related services; or

(ii) In the case of a reevaluation of a student, whether the student continues to need special education and related services; and

(D) Whether any additions or modifications to the special education and related services are needed to enable the student to meet the measurable annual goals set out in the IEP of the student and to participate, as appropriate, in the general education curriculum.

(b) Conduct of review. The group described in subsection (a) may conduct its review without a meeting.

(c) Source of data. The department shall administer such assessments and other evaluation measures as may be needed to produce the data identified under subsection (a).

(d) Requirements if additional data are not needed.

(1) If the IEP team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the student continues to be a student with a disability, and to determine the student's educational needs, the department shall notify the student's parents of:

(A) That determination and the reasons for the determination; and

(B) The right of the parents to request an assessment to determine whether the student continues to be a student with a disability, and to determine the student's educational needs.

(2) The department is not required to conduct the assessment described in paragraph (1)(B) unless requested to do so by the student's parents.

(e) Evaluations before change in eligibility.

(1) Except as provided in paragraph (2), the department shall evaluate a student with a disability in accordance with sections 8-60-36 through 8-60-43 before determining that the student is no longer a student with a disability.

(2) The evaluation described in paragraph (1) is not required before the termination of a student's eligibility due to graduation from secondary

school with a regular diploma, or due to exceeding the age eligibility for a FAPE under State law.

(3) For a student whose eligibility terminates under circumstances described in paragraph (2), the department shall provide the student with a summary of the student's academic achievement and functional performance, which shall include recommendations on how to assist the student in meeting the student's postsecondary goals.

[Eff 11/26/09] (Auth: 20 U.S.C. 1414(c), HRS §302A-1112) (Imp: 34 C.F.R. §300.305)

§8-60-38 Determination of eligibility. (a) General. Upon completion of the administration of assessments and other evaluation measures:

(1) A group of qualified professionals and the parent of the student determines whether the student is a student with a disability as defined in sections 8-60-2 and 8-60-39, in accordance with subsection (c) and the educational needs of the student; and

(2) The department provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.

(b) Special rule for eligibility determination. A student shall not be determined to be a student with a disability:

(1) If the determinant factor for that determination is:

(A) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);

(B) Lack of appropriate instruction in math; or

(C) Limited English proficiency; and

(2) If the student does not otherwise meet the eligibility criteria under sections 8-60-2 and 8-60-39.

(c) Procedures for determining eligibility and educational need.

(1) In interpreting evaluation data for the purpose of determining if a student is a student with a disability under sections 8-60-2 and 8-60-39, and the educational needs of the student, the department shall:

(A) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior; and

(B) Ensure that information obtained from all of these sources is documented and carefully considered.

(2) If a determination is made that a student has a disability and needs special education and related services, an IEP shall be developed for the student in accordance with sections 8-60-44 through 8-60-48.

(d) The student resides in the State and comes within the following age range:

(1) Is three years of age; and

(2) Under twenty on the first instructional day of the official school year calendar set by the department. A student who is under twenty years of age on the first instructional day of the school year set by the department, but who reaches the age of twenty during the school year, shall be eligible for the full school year, including extended school year when the requirements of section 8-60-7 are met. [Eff 11/26/09] (Auth: HRS §302A-1112) (Imp: HRS §§302A-101; 34 C.F.R. §§300.7; 300.306)

§8-60-39 Eligibility criteria.

(a) (1) Autism spectrum disorder. A student shall be eligible under the category of autism spectrum disorder if the student has a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects the student's educational performance. The student may have one or more of the following other characteristics often associated with autism spectrum disorder:

(A) Engagement in repetitive activities and stereotyped movements;

(B) Resistance to environmental change or change in daily routines;

(C) Unusual responses to sensory experiences.

(2) A student who manifests the characteristics of autism spectrum disorder after age three may be diagnosed as having autism spectrum disorder if the criteria in paragraph (1) are satisfied.

(3) A team of qualified professionals and the parent may not identify a student as having autism spectrum disorder if the student's educational performance is adversely affected primarily because the student has an emotional disability pursuant to subsection (e).

(b) Deaf. A student shall be eligible under the disability category of deaf if the student has a hearing loss averaging greater than 70 decibels in the speech frequencies (500Hz to 4,000Hz) and:

(1) The hearing loss impairs the student's auditory processing of linguistic information through hearing, with or without amplification; or

(2) The hearing loss adversely affects the student's educational performance.

(c) Deaf-blindness. A student shall be eligible under the category of deaf-blindness:

(1) If the student meets the criteria under the category of deaf, or the category of hard of hearing, and the category of visual disability; and

(2) The concomitant hearing and visual disabilities cause severe communication and other developmental and educational needs.

(d) Developmental delay.

(1) A student, aged three through five, shall be eligible for any eligibility category in this subchapter if the applicable criteria are met, or for the

category of developmental delay if, as measured by appropriate diagnostic instruments and procedures, one or more of the following is met:

(A) Cognitive development and adaptive behavior are delayed equivalent to one and one-half standard deviations below the mean when compared with the standard score expected for the chronological age.

(B) One of the following areas is delayed one and one-half standard deviations below a standard score for:

(i) Motor development, including fine motor, gross motor, sensory motor, and perceptual-motor development;

(ii) Communication, including speech and language development;

(iii) Academic development;

(iv) Adaptive behavior;

(2) A student, aged six through eight, shall be eligible for any eligibility category in this subchapter if the applicable criteria are met, or for the category of developmental delay if as measured by appropriate diagnostic instruments and procedures, three of the five areas are delayed one and one-half standard deviations below a standard score for:

(A) Motor development, including fine motor, gross motor, sensory motor, and perceptual-motor development;

(B) Communication, including speech and language development;

(C) Academic development;

(D) Adaptive behavior;

(E) Cognition.

(3) If assessment materials would not conclusively demonstrate eligibility as required under paragraphs (1) or (2), the team of qualified professionals and the parent may find the student eligible under the category of developmental delay if the team determines the student's patterns of learning deviate from age expectations across settings. The documentation of eligibility required by section 8-60-38 shall include a statement of the patterns of learning that deviate from age expectations across settings and the basis and method used in determining eligibility

(e) Emotional disability.

(1) A student shall be eligible under the disability category of emotional disability if the student exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affect the student's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal; relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression;

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(2) A student shall not be determined to be a student with a disability under this category, if paragraph (1) is primarily the result of cultural, or language differences, or both.

(3) Emotional disability includes schizophrenia. Emotional disability does not apply to a student who is socially maladjusted, unless it is determined that the student has an emotional disability.

f) Hard of hearing. A student shall be eligible under the disability category of hard of hearing if the student has a hearing loss, whether permanent or fluctuating, averaging 26 to 70 decibels in the speech frequencies (500 Hz to 4,000 Hz), and:

(1) The hearing loss impairs the student's auditory processing of linguistic information, with or without amplification; or

(2) The hearing impairment adversely affects the student's educational performance.

(g) Intellectual disability. A student shall be eligible under the disability category of intellectual disability when all of the following are met:

(1) The student has subaverage general intellectual functioning, as demonstrated by evidence of intellectual functioning two or more standard deviations below the mean;

(2) The subaverage intellectual functioning exists concurrently with deficits in at least two adaptive skill areas; and

(3) The subaverage intellectual functioning and deficits in adaptive skill areas were manifested during the developmental period and adversely affect the student's educational performance.

(h) Multiple disabilities.

(1) A student shall be eligible under the category of multiple disabilities if the student has concomitant impairments, the combination of which causes severe educational needs and all of the following criteria are met:

(A) The student has subaverage general intellectual functioning, as demonstrated by evidence of intellectual functioning three or more standard deviations below the mean;

(B) The subaverage intellectual functioning exists concurrently with deficits in at least two adaptive skill areas;

(C) The subaverage intellectual functioning and deficits in adaptive skill areas were manifested during the developmental period and adversely affect the student's educational performance; and

(D) The student is not eligible under the category of deaf-blindness, as set forth in subsection (c), and the student is eligible under one or more of the following disability categories:

(i) Autism spectrum disorder, as set forth in subsection (a);

(ii) Deaf, as set forth in subsection (b);
(iii) Hard of hearing, as set forth in subsection (f);
(iv) Orthopedic disability, as set forth in subsection (i);
(v) Other health disability, as set forth in subsection (j); or
(vi) Visual disability including blindness, as set forth in subsection (n);

(2) If assessment materials would not conclusively demonstrate eligibility as required under paragraph(1), the team of qualified professionals and the parent may find the student eligible under the category of multiple disabilities if the criteria in paragraph (1)(A) to (C) are met and the team documents the existence of a concomitant disability in the determination of eligibility. The documentation of eligibility shall include a statement of the concomitant disability and the basis and method used in determining eligibility.

(i) Orthopedic disability. A student shall be eligible under the disability category of orthopedic disability if there is medical evidence that a severe orthopedic disability exists that adversely affects the student's educational performance. The term includes disabilities caused by congenital anomaly, disabilities caused by disease (e.g., poliomyelitis, bone tuberculosis), and disabilities from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

(j) Other health disability. A student shall be eligible under the category of other health disability if both of the following are met:

(1) The student has limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems or a medically fragile condition such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(2) The health disability adversely affects the student's educational performance.

(k) Specific learning disability.

(1) General. Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia;

(2) Disorders not included. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities; intellectual disability; emotional disability; or environmental, cultural, or economic disadvantage.

(l) Speech or language disability. A student shall be eligible under the category of speech or language disability when a significant problem in the comprehension or production, or both, of an oral communication system, which is not consistent with the student's other developmental or cognitive abilities, or both, adversely affects the student's educational performance and is evident in one or more of the following:

(1) Articulation or phonological condition, or both;

(2) Voice condition;

(3) Fluency condition;

(4) Language conditions, as documented by:

(A) Multiple sources of data; and

(B) A discrepancy of one and one-half standard deviations between the student's estimated cognitive level and performance on at least two standardized measures in the areas of semantics or grammar, or both.

(m) Traumatic brain injury.

(1) A student shall be eligible under the category of traumatic brain injury if both of the following are met:

(A) There is medical evidence that the student has an acquired injury to the brain, caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both that adversely affects the student's educational performance; and

(B) The traumatic brain injury is either an open or closed head injury, resulting in impairments in one or more areas such as:

(i) Cognition;

(ii) Language;

(iii) Memory;

(iv) Attention;

(v) Reasoning;

(vi) Abstract thinking;

(vii) Judgment;

(viii) Problem-solving;

(ix) Sensory, perceptual and motor abilities;

(x) Psychosocial behavior;

(xi) Physical functions;

(xii) Information processing;

(xiii) Speech.

(2) The team of qualified professionals and the parent may not identify a student as having a traumatic brain injury if the brain injury is congenital or degenerative, or induced by birth trauma.

(n) Visual disability including blindness. A student shall be eligible for the disability category of visual disability, including both partial sight and blindness, if the impairment in vision, even with the best correction, adversely affects the student's educational performance and one or more of the following are met:

(1) Partially-sighted. The student's visual acuity is 20/70 to 20/200 in the better eye and with the best correction;

(2) Blind. The student's visual acuity is 20/200 in the better eye and with the best correction, or less, or the student has a subtended visual field of less than 20 degrees, regardless of central visual acuity;

(3) The student has a progressive visual impairment, such as retinitis pigmentosa, that will lead to eventual visual disability as set forth in paragraphs (1) and (2). [Eff 11/26/09] (Auth: 20 U.S.C. 1414(b)(4) and (5), HRS §302A-1112) (Imp: HRS §§302A-101; 302A-439; 34 C.F.R. §§300.8, 300.306, and 300.534)

§8-60-40 Additional group members. The determination of whether a student suspected of having a specific learning disability is a student with a disability as defined in section 8-60-39(k), shall be made by the student's parents and a team of qualified professionals, which shall include:

(1) (A) The student's regular teacher;

(B) If the student does not have a regular teacher, a regular classroom teacher qualified to teach a student of his or her age; or

(C) For a student of less than school age, an individual qualified by the department to teach a student of his or her age; and

(2) At least one person qualified to conduct individual diagnostic examinations of students, such as a school psychologist, speech-language pathologist, or remedial reading teacher. [Eff 11/26/09] (Auth: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6); HRS §302A-1112) (Imp: 34 C.F.R. §300.308)

§8-60-41 Determining the existence of a specific learning disability. (a) The group described in section 8-60-38 may determine that a student has a specific learning disability, as defined in section 8-60-39(k), if:

(1) (A) The student does not achieve adequately for the student's age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the student's age or State-approved grade-level standards:

(i) Oral expression;

(ii) Listening comprehension;

(iii) Written expression;

(iv) Basic reading skill (including phonemic awareness, phonics, and/or vocabulary);

(v) Reading fluency skills;

(vi) Reading comprehension;

(vii) Mathematics calculation;

(viii) Mathematics problem solving; or

(B) The student demonstrates a severe discrepancy between actual achievement and intellectual ability by a difference of at least one and one-half standard deviations in one or more of the areas in subparagraph(A); and

(2) (A) The student does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified in paragraph(1)(A) when using a process based on the student's response to scientific, research-based intervention; or

(B) The student exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with sections 8-60-36 and 8-60-37; and

(3) The group determines that its findings under paragraphs (1)(A) and (2)(A) are not primarily the result of:

(A) A visual, hearing, or motor disability;

(B) Intellectual disability;

(C) Emotional disability;

(D) Cultural factors;

(E) Environmental or economic disadvantage; or

(F) Limited English proficiency.

(b) To ensure that underachievement in a student suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group shall consider, as part of the evaluation described in sections 8-60-36 through 8-60-38:

(1) Data that demonstrate that prior to, or as a part of, the referral process, the student was provided appropriate instruction in regular education settings, delivered by qualified personnel; and

(2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the student's parents.

(c) The department shall promptly request parental consent to evaluate the student to determine if the student needs special education and related services, and shall adhere to the timeframes described in sections 8-60-33 and 8-60-35, unless extended by mutual written agreement of the student's parents and a group of qualified professionals, as described in section 8-60-38(a)(1):

(1) If, prior to a referral, a student has not made adequate progress after an appropriate period of time when provided instruction, as described in subsections (b)(1) and (b)(2); and

(2) Whenever a student is referred for an evaluation. [Eff 11/26/09] (Auth: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6), HRS §302A-1112) (Imp: 34 C.F.R. §300.309)

§8-60-42 Observation. (a) The department shall ensure that the student is observed in the student's learning environment (including the regular classroom setting) to document the student's academic performance and behavior in the areas of difficulty.

(b) The group described in section 8-60-38(a)(1), in determining whether a student has a specific learning disability, shall decide to:

(1) Use information from an observation in routine classroom instruction and monitoring of the student's performance that was done before the student was referred for an evaluation; or

(2) Have at least one member of the group described in section 8-60-38(a)(1) conduct an observation of the student's academic performance in the regular classroom after the student has been referred for an evaluation and parental consent, consistent with section 8-60-31(a), is obtained.

(c) In the case of a student of less than school age or out of school, a group member shall observe the student in an environment appropriate for a student of that age. [Eff 11/26/09] (Auth: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6), HRS §302A-1112) (Imp: 34 C.F.R. §300.310)

§8-60-43 Specific documentation for the eligibility determination. (a) For a student suspected of having a specific learning disability, the documentation of the determination of eligibility, as required in section 8-60-38(a)(2), shall contain a statement of:

(1) Whether the student has a specific learning disability;

(2) The basis for making the determination, including an assurance that the determination has been made in accordance with section 8-60-38(c)(1);

(3) The relevant behavior, if any, noted during the observation of the student and the relationship of that behavior to the student's academic functioning;

(4) The educationally relevant medical findings, if any;

(5) Whether:

(A) The student does not achieve adequately for the student's age or to meet State-approved grade-level standards consistent with section 8-60-41(a)(1)(A) or the student demonstrates a severe discrepancy between actual achievement and intellectual ability consistent with section 8-60-41(a)(1)(B); and

(B) (i) The student does not make sufficient progress to meet age or State-approved grade-level standards consistent with section 8-60-41 (a)(2)(A); or

(ii) The student exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards or intellectual development consistent with section 8-60-41(a)(2)(B);

(6) The determination of the group concerning the effects of a visual, hearing, or motor disability; intellectual disability; emotional disability;

cultural factors; environmental or economic disadvantage; or limited English proficiency on the student's achievement level; and

(7) If the student has participated in a process that assesses the student's response to scientific, research-based intervention:

(A) The instructional strategies used and the student-centered data collected; and

(B) The documentation that the student's parents were notified about:

(i) The State's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided;

(ii) Strategies for increasing the student's rate of learning; and

(iii) The parents' right to request an evaluation.

(b) Each group member shall certify in writing whether the report reflects the member's conclusion. If it does not reflect the member's conclusion, the group member shall submit a separate statement presenting the member's conclusions. [Eff 11/26/09] (Auth: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6), HRS §302A-1112) (Imp: 34 C.F.R. §300.311)

SUBCHAPTER 6

INDIVIDUALIZED EDUCATION PROGRAMS AND EDUCATIONAL PLACEMENTS

§8-60-44 Definition of individualized education program. (a) General. As used in this chapter, the term individualized education program or IEP means a written statement for each student with a disability that is developed, reviewed, and revised in a meeting in accordance with sections 8-60-44 through 8-60-48, and that shall include:

(1) A statement of the student's present levels of academic achievement and functional performance, including:

(A) How the student's disability affects the student's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled students); or

(B) For preschool students, as appropriate, how the disability affects the student's participation in appropriate activities;

(2) A statement of measurable annual goals, including academic and functional goals and a description of short-term objectives or benchmarks designed to:

(A) Meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and

(B) Meet each of the student's other educational needs that result from the student's disability;

(3) A description of:

(A) How the student's progress toward meeting the annual goals described in paragraph (2) will be measured; and

(B) When periodic reports on the progress the student is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the student, or on behalf of the student, and a statement of the program modifications or supports for school personnel that will be provided to enable the student:

(A) To advance appropriately toward attaining the annual goals;

(B) To be involved in and make progress in the general education curriculum in accordance with paragraph (1), and to participate in extracurricular and other nonacademic activities; and

(C) To be educated and participate with other students with disabilities and nondisabled students in the activities described in this section;

(5) An explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class and in the activities described in paragraph (4);

(6) (A) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the student on statewide assessments consistent with section 612(a)(16) of the Act; and

(B) If the IEP team determines that the student shall take an alternate assessment instead of a particular regular State assessment of student achievement, a statement of why:

(i) The student cannot participate in the regular assessment; and

(ii) The particular alternate assessment selected is appropriate for the student; and

(7) The projected date for the beginning of the services and modifications described in paragraph (4), and the anticipated frequency, location, and duration of those services and modifications.

(b) Transition services. (1) For each student beginning at age 14 (or younger if determined appropriate by the IEP team), and updated annually, the IEP shall include a statement of the transition service needs of the student under the applicable components of the student's IEP that focuses on the student's courses of study (such as participation in advanced-placement courses or a vocational educational program).

(2) Beginning not later than the first IEP to be in effect when the student turns 16, or younger if determined appropriate by the IEP team, and updated annually, thereafter, the IEP shall include:

(A) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

(B) The transition services needed to assist the student in reaching those goals, including, if appropriate, a statement of the interagency responsibilities or any needed linkages.

(c) Transfer of rights at age of majority. Beginning not later than one year before the student reaches the age of majority under State law, the IEP shall include a statement that the student has been informed of the student's rights under Part B of the Act, if any, that will transfer to the student on reaching the age of majority under section 8-60-74.

(d) Construction. Nothing in this section shall be construed to require:

(1) That additional information be included in a student's IEP beyond what is explicitly required in section 614 of the Act; or

(2) The IEP team to include information under one component of a student's IEP that is already contained under another component of the student's IEP. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(d)(1)(A) and (d)(6), HRS §302A-1112) (Imp: 34 C.F.R. §300.320)

§8-60-45 IEP team. (a) General. The department shall ensure that the IEP team for each student with a disability includes:

(1) The parents of the student;

(2) Not less than one regular education teacher of the student (if the student is, or may be, participating in the regular education environment);

(3) Not less than one special education teacher of the student, or where appropriate, not less than one special education provider of the student;

(4) A representative of the department who:

(A) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of students with disabilities;

(B) Is knowledgeable about the general education curriculum; and

(C) Is knowledgeable about the availability of and has the authority to commit the resources of the department.

(5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (2) through (6);

(6) At the discretion of the parent or the department, other individuals who have knowledge or special expertise regarding the student, including related services personnel as appropriate; and

(7) Whenever appropriate, the student with a disability.

(b) Transition services participants. (1) In accordance with subsection(a)(7), the department shall invite a student with a disability to attend the student's IEP team meeting if a purpose of the meeting will be the consideration of the postsecondary goals

for the student and the transition services needed to assist the student in reaching those goals under section 8-60-44(b).

(2) If the student does not attend the IEP team meeting, the department shall take other steps to ensure that the student's preferences and interests are considered.

(3) To the extent appropriate, with the consent of the parents or a student who has reached the age of majority, in implementing the requirements of paragraph (1), the department shall invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services.

(c) Determination of knowledge and special expertise. The determination of the knowledge or special expertise of any individual described in subsection (a)(6) shall be made by the party (parents or department) who invited the individual to be a member of the IEP team.

(d) Designating the department representative. The department may designate another department member of the IEP team to also serve as the department representative, if the criteria in subsection (a)(4) are satisfied.

(e) IEP team attendance. (1) A member of the IEP team described in subsections (a)(2) through (a)(5) is not required to attend an IEP team meeting, in whole or in part, if the parent of a student with a disability and the department agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(2) A member of the IEP team described in paragraph (e)(1) may be excused from attending an IEP team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if:

(A) The parent, in writing, and the department consent to the excusal; and

(B) The member submits, in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting.

(f) Initial IEP team meeting for student under Part C. In the case of a student who was previously served under Part C of the Act, an invitation to the initial IEP team meeting shall, at the request of the parent, be sent to the Part C service coordinator or other representatives of the Part C system to assist with the smooth transition of services. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(d)(1)(B)-(d)(1)(D), HRS §302A-1112) (Imp: 34 C.F.R. §300.321)

§8-60-46 Parent participation. (a) Department responsibility: general. The department shall take steps to ensure that one or both of the parents of a student with a disability are present at each IEP team meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) Information provided to parents. (1) The notice required under subsection (a) (1) shall:

(A) Indicate the purpose, time, and location of the meeting and who will be in attendance; and

(B) Inform the parents of the provisions in sections 8-60-45(a)(6) and (c) (relating to the participation of other individuals on the IEP team who have knowledge or special expertise about the student), and section 8-60-45(f) (relating to the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP team meeting for a student previously served under Part C of the Act).

(2) For a student with a disability beginning at age 14, or younger if appropriate, the notice shall also;

(A) Indicate that a purpose of the meeting will be the development of a statement of the transition service needs of the student required in section 8-60-44(b)(1) and

(B) Indicate that the department will invite the student.

(3) For a student with a disability beginning not later than the first IEP to be in effect when the student turns 16, or younger if determined appropriate by the IEP team, the notice also shall:

(A) Indicate:

(i) That a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the student, in accordance with section 8-60-44(b); and

(ii) That the department will invite the student; and

(B) Identify any other agency that will be invited to send a representative.

(c) Other methods to ensure parent participation. If neither parent can attend an IEP team meeting, the department shall use other methods to ensure parent participation, including individual or conference telephone calls, consistent with section 8-60-51 (related to alternative means of meeting participation).

(d) Conducting an IEP team meeting without a parent in attendance. A meeting may be conducted without a parent in attendance if the department is unable to convince the parents that they should attend. In this case, the department shall keep a record of its attempts to arrange a mutually agreed on time and place, such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) Use of interpreters or other action, as appropriate. The department shall take whatever action is necessary to ensure that the parent understands the proceedings of the IEP team meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) Parent copy of student's IEP. The department shall give the parent a copy of the student's IEP at no cost to the parent. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(d)(1)(B)(i), HRS §302A-1112) (Imp: 34 C.F.R. §300.322)

§8-60-47 When IEPs shall be in effect. (a) General. At the beginning of each school year, the department shall have in effect, for each student with a disability within its jurisdiction, an IEP, as defined in section 8-60-44.

(b) IEP for students aged three through five. In the case of a student with a disability aged three through five, in the development of an IEP, the IEP team shall consider the IFSP content (including the natural environments statement) described in section 636 (d) of the Act and its implementing regulations (including an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills for students with IFSPs under this section who are at least three years of age).

(c) Initial IEPs; provision of services. The department shall ensure that:

(1) A meeting to develop an IEP for a student is conducted within 15 days after the receipt of parental consent for the initial provision of special education and related services by the department; and

(2) As soon as possible following development of the IEP, special education and related services are made available to the student in accordance with the student's IEP.

(d) Accessibility of student's IEP to teachers and others. The department shall ensure that:

(1) The student's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and

(2) Each teacher and provider described in paragraph (1) is informed of:

(A) His or her specific responsibilities related to implementing the student's IEP; and

(B) The specific accommodations, modifications, and supports that shall be provided for the student in accordance with the IEP.

(e) IEPs for students who transfer from another state. If a student with a disability (who had an IEP that was in effect in a previous public school in another state) transfers and enrolls in a Hawaii public school, within the same school year, the new public school (in consultation with the parents) shall provide the student with a FAPE (including services comparable to those described in the student's IEP from the previous public school), until the new public school:

(1) Conducts an evaluation pursuant to sections 8-60-36 through 8-60-38 (if determined to be necessary); and

(2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in sections 8-60-44 through 8-60-48.

(f) Transmittal of records. To facilitate the transition for a student described in subsection (e), the new public school in which the student enrolls shall take reasonable steps to promptly obtain the student's records, including the IEP and supporting

documents and any other records relating to the provision of special education or related services to the student, from the previous public school in which the student was enrolled, pursuant to 34 CFR §99.31(a)(2). [Eff 11/26/09] (Auth: 20 U.S.C. 1414(d)(2)(A)-(C), HRS §302A-1112) (Imp: 34 C.F.R. §300.323)

§8-60-48 Development, review, and revision of IEP. (a) Development of IEP: (1) General. In developing each student's IEP, the IEP team shall consider:

(A) The strengths of the student;

(B) The concerns of the parents for enhancing the education of their student;

(C) The results of the initial or most recent evaluation of the student; and

(D) The academic, developmental, and functional needs of the student.

(2) Consideration of special factors. The IEP team shall:

(A) In the case of a student whose behavior impedes the student's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

(B) In the case of a student with limited English proficiency, consider the language needs of the student as those needs relate to the student's IEP;

(C) In the case of a student who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP team determines, after an evaluation of the student's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the student's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the student;

(D) Consider the communication needs of the student including students who are deaf or hearing impaired. This consideration includes a review of the student's language and communication needs, opportunities for direct communications with peers and professional personnel in the student's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the student's language and communication mode; and

(E) Consider whether the student needs assistive technology devices and services.

(3) Requirement with respect to regular education teacher. A regular education teacher of a student with a disability, as a member of the IEP team, shall, to the extent appropriate, participate in the development of the IEP of the student, including the determination of:

(A) Appropriate positive behavioral interventions and supports and other strategies for the student; and

(B) Supplementary aids and services, program modifications, and support for school personnel consistent with section 8-60-44(a)(4).

(4) Agreement. (A) In making changes to a student's IEP after the annual IEP team meeting for a school year, the parent of a student with a disability and the department may agree not to convene an IEP team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the student's current IEP.

(B) If changes are made to the student's IEP in accordance with subparagraph (A), the department shall ensure that the student's IEP team is informed of those changes.

(5) Consolidation of IEP team meetings. To the extent possible, the department shall encourage the consolidation of reevaluation meetings for the student and other IEP team meetings for the student.

(6) Amendments. Changes to the IEP may be made either by the entire IEP team at an IEP team meeting, or as provided in paragraph (4), by amending the IEP rather than by redrafting the entire IEP. A parent shall be provided with a revised copy of the IEP with the amendments incorporated.

(b) Review and revision of IEPs: (1) General. The department shall ensure that, subject to paragraphs (2) and (3), the IEP team:

(A) Reviews the student's IEP periodically, but not less than annually, to determine whether the annual goals for the student are being achieved; and

(B) Revises the IEP, as appropriate, to address:

(i) Any lack of expected progress toward the annual goals described in section 8-60-44(a)(2), and in the general education curriculum, if appropriate;

(ii) The results of any reevaluation conducted under section 8-60-35;

(iii) Information about the student provided to, or by, the parents, as described under section 8-60-37(a)(2);

(iv) The student's anticipated needs; or

(v) Other matters.

(2) Consideration of special factors. In conducting a review of the student's IEP, the IEP team shall consider the special factors described in subsection (a)(2).

(3) Requirement with respect to regular education teacher. A regular education teacher of the student, as a member of the IEP team, shall, consistent with subsection (a)(3), participate in the review and revision of the IEP of the student.

(c) Failure to meet transition objectives:

(1) Participating agency failure. If a participating agency, other than the department, fails to provide the transition services described in the IEP in accordance with section 8-60-44(b), the department shall reconvene the IEP team to identify alternative strategies to meet the transition objectives for the student set out in the IEP.

(2) Construction. Nothing in this chapter relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet the eligibility criteria of that agency.

(d) Students with disabilities in adult prisons:

(1) Requirements that do not apply. The following requirements do not apply to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(A) The requirements contained in section 612(a)(16) of the Act and section 8-60-44(a)(6) (relating to participation of students with disabilities in general assessments)

(B) The requirements in section 8-60-44(b) (relating to transition planning and transition services) do not apply with respect to the students whose eligibility under this chapter will end, because of their age, before they will be eligible to be released from prison based on consideration of their sentence and eligibility for early release.

(2) Modifications of IEP or placement. (A) Subject to subsection (d)(2)(B), the IEP team of a student with a disability who is convicted as an adult under State law and incarcerated in an adult prison may modify the student's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(B) The requirements of sections 8-60-44 (relating to IEPs), and 8-60-15, do not apply with respect to the modifications described in subsection (d)(2)(A). [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(1), 1412(a)(12)(A)(i), 1414 (d) (3), (4)(B), and (7); and 1414(e), HRS §302A-1112) (Imp: 34 C.F.R. §300.324)

§8-60-49 <u>Private school placements by the department.</u> (a) Developing IEPs. (1) Before the department places a student with a disability in, or refers a student to, a private school or facility, the department shall initiate and conduct a meeting to develop an IEP for the student in accordance with sections 8-60-44 and 8-60-48.

(2) The department shall ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the department shall use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.

(b) Reviewing and revising IEPs. (1) After a student with a disability enters a private school or facility, any meetings to review and revise the student's IEP may be initiated and conducted by the private school or facility at the discretion of the department.

(2) If the private school or facility initiates and conducts these meetings, the department shall ensure that the parents and a department representative:

(A) Are involved in any decision about the student's IEP; and

(B) Agree to any proposed changes in the IEP before those changes are implemented.

(c) Responsibility. Even if a private school or facility implements a student's IEP, responsibility for compliance with Part B of the Act remains with the department. [Eff 11/26/09] (Auth: 20 U.S.C. 1412 (a) (10) (B), HRS §302A-1112) (Imp: 34 C.F.R. §300.325)

§8-60-50 Educational placements. Consistent with section 8-60-56(c), the department shall ensure that the parents of each student with a disability are members of any group that makes decisions on the educational placement of their student. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(e), HRS §302A-1112) (Imp: 34 C.F.R. §300.327)

§8-60-51 Alternative means of meeting participation. When conducting IEP team meetings and placement meetings pursuant to this chapter, and carrying out administrative matters under section 615 of the Act (such as scheduling, exchange of witness lists, and status conferences), the parent of a student with a disability and the department may agree to use alternative means of meeting participation, such as video conferences and conference calls. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(f), HRS §302A-1112) (Imp: 34 C.F.R. §300.328)

SUBCHAPTER 7

STATE COMPLAINT PROCEDURES

§8-60-52 State complaint procedures. (a) Applicability. This subchapter applies to the filing, investigation, and resolution of a complaint, including a complaint filed by an organization or individual from another state regarding an alleged violation by the department of one or more requirements of any of the following:

(1) Provisions of the Hawaii Revised Statutes relating to the education of students with a disability or this chapter; or

(2) Part B of the Act or the implementing regulations (34 C.F.R. Part 300).

(b) The department shall widely disseminate to parents and other interested individuals, including parent training and information centers, protection and advocacy

agencies, independent living centers, and other appropriate entities, the State procedures under sections 8-60-52 through 8-60-54.

(c) Remedies for denial of appropriate services. In resolving a complaint in which the department has found a failure to provide appropriate services, the department, pursuant to its general supervisory authority under Part B of the Act, shall address:

(1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the student (such as compensatory services or monetary reimbursement); and

(2) Appropriate future provision of services for all students with disabilities. [Eff 11/26/09] (Auth: 20 U.S.C. 1221e-3, HRS §302A-1112) (Imp: 34 C.F.R. §300.151)

§8-60-53 Minimum State complaint procedures. (a) Time limit; minimum procedures. Within 60 days after a complaint is filed under section 8-60-54. The department shall:

(1) Carry out an independent on-site investigation, if the department determines that an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Provide the public school with the opportunity to respond to the complaint, including, at a minimum:

(A) At the discretion of the public school, a proposal to resolve the complaint and

(B) An opportunity for a parent who has filed a complaint and the public school, to voluntarily engage in mediation consistent with section 8-60-60;

(4) Review all relevant information and make an independent determination as to whether the public school, is violating a requirement of Part B of the Act or of this chapter; and

(5) Issue a written decision to the complainant that addresses each allegation in the complaint and contains:

(A) Findings of fact and conclusions; and

(B) The reasons for the department's final decision.

(b) Time extension; final decision; implementation. The department's procedures described in subsection (a) also shall:

(1) Permit an extension of the time limit under subsection (a) only if:

(A) Exceptional circumstances exist with respect to a particular complaint; or

(B) The parent and the public school, agree to extend the time to engage in mediation pursuant to subsection (a)(3)(B), or to engage in other alternative means of dispute resolution; and

(2) Include procedures for effective implementation of the department's final decision, if needed, including:

(A) Technical assistance activities;

(B) Negotiations; and

(C) Corrective actions to achieve compliance.

(c) Complaints filed under this section and due process hearings under section 8-60-61 and sections 8-60-75 through 8-60-77.

(1) If a written complaint is received that is also the subject of a due process hearing under section 8-60-61 or sections 8-60-75 through 8-60-77, or contains multiple issues of which one or more are part of that hearing, the department shall set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action shall be resolved using the time limit and procedures described in subsections (a) and (b).

(2) If an issue raised in a complaint filed under this section has previously been decided in a due process hearing involving the same parties:

(A) The due process hearing decision is binding on that issue; and

(B) The department shall inform the complainant to that effect.

(3) A complaint alleging a school's failure to implement a due process hearing decision shall be resolved by the department.

[Eff 11/26/09] (Auth: 20 U.S.C. 1221e-3, HRS §302A-1112) (Imp: 34 C.F.R. §300.152)

§8-60-54 Filing a complaint. (a) An organization or individual may file a signed written complaint under the procedures described in sections 8-60-52 through 8-60-53.

(b) The complaint shall include:

(1) A statement that the department has violated a requirement of Part B of the Act or of this chapter;

(2) The facts on which the statement is based;

(3) The signature and contact information for the complainant; and

(4) If alleging violations with respect to a specific student:

(A) The name and address of the residence of the student;

(B) The name of the school the student is attending;

(C) In the case of a homeless student or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the student, and the name of the school the student is attending;

(D) A description of the nature of the problem of the student, including facts relating to the problem; and

(E) A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.

(c) The complaint shall allege a violation that occurred not more than one year prior to the date that the complaint is received in accordance with section 8-60-52.

(d) The party filing the complaint shall submit the complaint to the department. [Eff 11/26/09] (Auth: 20 U.S.C. 1221e-3, HRS §302A-1112) (Imp: 34C.F.R. §300.153)

SUBCHAPTER 8

PROCEDURAL SAFEGUARDS

§8-60-55 Procedural safeguards. General. Procedural safeguards identified. Students with disabilities and their parents shall be afforded the procedural safeguards, that meet the requirements of sections 8-60-56 through 8-60-81. [Eff 11/26/09] (Auth: 20 U.S.C. 1412(a)(6)(A), HRS §302A-1112) (Imp: 34 C.F.R. §300.121)

§8-60-56 Opportunity to examine records; parent participation in meetings. (a) Opportunity to examine records. The parents of a student with a disability shall be afforded an opportunity to inspect and review all education records with respect to:

(1) The identification, evaluation, and educational placement of the student; and

(2) The provision of a FAPE to the student.

(b) Parent participation in meetings. (1) The parents of a student with a disability shall be afforded an opportunity to participate in meetings with respect to:

(A) The identification, evaluation, and educational placement of the student; and

(B) The provision of a FAPE to the student.

(2) The department shall provide notice consistent with sections 8-60-46(a)(1) and (b)(1) to ensure that parents of students with disabilities have the opportunity to participate in meetings described in paragraph (1).

(3) A meeting does not include informal or unscheduled conversations involving department personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that department personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

(c) Parent involvement in placement decisions. (1) The department shall ensure that a parent of each student with a disability is a member of any group that makes decisions on the educational placement of the parent's student.

(2) In implementing the requirements of paragraph (1), the department shall use procedures consistent with the procedures described in section 8-60-46(a) through (b)(1).

(3) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their student, the department shall use other methods to ensure their participation,

including individual or conference telephone calls, or video conferencing.

(4) A placement decision may be made by a group without the involvement of a parent, if the department is unable to obtain the parent's participation in the decision. In this case, the department shall have a record of its attempt to ensure their involvement. [Eff 11/26/09] (Auth: 20 U.S.C. 1414(e), 1415(b)(1), HRS §302A-1112) (Imp: 34 C.F.R. §300.501)

§8-60-57 Independent educational evaluation. (a) General. (1) The parents of a student with a disability have the right to obtain an independent educational evaluation of the student, subject to subsections (b) through (e).

(2) The department shall provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the department criteria applicable for independent educational evaluations as set forth in subsection (e).

(3) For the purposes of this chapter:

(A) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the department; and

(B) Public expense means that the department either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the department, subject to the conditions in paragraphs (2) through (4).

(2) If a parent requests an independent educational evaluation at public expense, the department shall, without unnecessary delay, either:

(A) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(B) Ensure that an independent educational evaluation is provided at public expense, unless the department demonstrates in a hearing pursuant to sections 8-60-61 through 8-60-67 that the evaluation obtained by the parent did not meet department criteria.

(3) If the department files a due process complaint notice to request a hearing and the final decision is that the department's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the department may ask for the parent's reason why he or she objects to the public evaluation. However, the department may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or

filing a due process complaint to request a due process hearing to defend the public evaluation.

(5) A parent is entitled to only one independent educational evaluation at public expense each time the department conducts an evaluation with which the parent disagrees.

(c) Parent-initiated evaluations. If the parent obtains an independent educational evaluation at public expense or shares with the department an evaluation obtained at private expense, the results of the evaluation:

(1) Shall be considered by the department, if it meets department criteria, in any decision made with respect to the provision of a FAPE to the student; and

(2) May be presented by any party as evidence at a hearing on a due process complaint under this chapter regarding that student.

(d) Requests for evaluations by hearing officers. If a hearing officer requests an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation shall be at public expense.

(e) Department criteria. (1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria that the department uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

(2) Except for the criteria described in paragraph (1), the department may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(b)(1) and (d)(2)(A), HRS section 302A-1112) (Imp: 34 C.F.R. section 300.502)

§8-60-58 Prior notice by the department; content of notice. (a) Notice. Written notice that meets the requirements of subsection (b) shall be given to the parents of a student with a disability a reasonable time before the department:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of a FAPE to the student; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of a FAPE to the student.

(b) Content of notice. The notice required under subsection (a) shall include:

(1) A description of the action proposed or refused by the department;

(2) An explanation of why the department proposes or refuses to take the action;

(3) A description of each evaluation procedure, assessment, record, or report the department used as a basis for the proposed or refused action;

(4) A statement that the parents of a student with a disability have protection under the procedural safeguards of this chapter and, if this notice is not

an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(5) Sources for parents to contact to obtain assistance in understanding the provisions of this chapter;

(6) A description of other options that the IEP team considered and the reasons why those options were rejected; and

(7) A description of other factors that are relevant to the department's proposal or refusal.

(c) Notice in understandable language. (1) The notice required under subsection (a) shall be:

(A) Written in language understandable to the general public; and

(B) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(2) If the native language or other mode of communication of the parent is not a written language, the department shall take steps to ensure:

(A) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(B) That the parent understands the content of the notice; and

(C) That there is written evidence that the requirements in subparagraphs (A) and (B) have been met. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(b)(3) and (4), 1415(c)(1), 1414(b)(1), HRS §302A-1112) (Imp: 34 C.F.R. §300.503)

§8-60-59 Procedural safeguards notice. (a) General. A copy of the procedural safeguards available to the parents of a student with a disability shall be given to the parents only one time a school year, except that a copy also shall be given to the parents:

(1) Upon initial referral or parent request for evaluation;

(2) Upon receipt of the first State complaint under sections 8-60-52 through 8-60-54 and upon receipt of the first due process complaint under section 8-60-61 in a school year;

(3) In accordance with the discipline procedures in section 8-60-75(h); and

(4) Upon request by a parent.

(b) Contents. The procedural safeguards notice shall include a full explanation of all of the procedural safeguards available under section 8-60-27, sections 8-60-52 through 8-60-54, section 8-60-31, sections 8-60-57 through 8-60-58, sections 8-60-60 through 8-60-72, sections 8-60-75 through 8-60-81, and section 8-60-84 relating to:

(1) Independent educational evaluations;

(2) Prior written notice;

(3) Parental consent;

(4) Access to education records;

(5) Opportunity to present and resolve complaints through the due process complaint and State complaint procedures, including:
  (A) The time period in which to file a complaint;
  (B) The opportunity for the department to resolve the complaint; and
  (C) The difference between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures;
(6) The availability of mediation;
(7) The student's placement during the pendency of any due process complaint;
(8) Procedures for students who are subject to placement in an interim alternative educational setting;
(9) Requirements for unilateral placement by parents of students in private schools at public expense;
(10) Hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations;
(11) Civil actions, including the time period in which to file those actions; and
(12) Attorneys' fees.

(c) Notice in understandable language. The notice required under subsection (a) shall meet the requirements of section 8-60-58(c). [Eff 11/26/09] (Auth: 20 U.S.C. 1415(d), HRS §302A-1112) (Imp: 34 C.F.R. §300.504)

§8-60-60 Mediation. (a) General. The department shall offer mediation to allow parties to disputes involving any matter, including matters arising prior to the filing of a due process complaint, to resolve disputes through a mediation process.

(b) Requirements. The department shall ensure the mediation process:
(1) Is voluntary on the part of the parties;
(2) Is not used to deny or delay a parent's right to a hearing on the parent's due process complaint, or to deny any other rights afforded under Part B of the Act; and
(3) Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques, and
(4) The State shall bear the cost of the mediation process, including the costs of meetings
(5) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.
(6) If the parties resolve a dispute through the mediation process, the parties shall execute a legally binding agreement that sets forth that resolution and that:
  (A) States that all discussions that occurred during the mediation process will remain confidential and may not be used as

evidence in any subsequent due process hearing or civil proceeding; and

(B) Is signed by both the parent and a representative of the department who has the authority to bind the department.

(7) A written, signed mediation agreement under this paragraph is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(8) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any Federal court or State court of a State receiving assistance.

(c) Impartiality of mediator. (1) An individual who serves as a mediator under this chapter:

(A) May not be an employee of the department that is involved in the education or care of the student; and

(B) Shall not have a personal or professional interest that conflicts with the person's objectivity.

(2) A person who otherwise qualifies as a mediator is not an employee of the department solely because he or she is paid by the department to serve as a mediator. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(e), HRS §302A-1112) (Imp: 34 C.F.R. §300.506)

§8-60-61 Filing a due process complaint. (a) General. (1) A parent or the department may file a due process complaint on any of the matters described in sections 8-60-58(a)(1) and (2) (relating to the identification, evaluation or educational placement of a student with a disability, or the provision of a FAPE to the student).

(2) The due process complaint shall allege a violation that occurred not more than two years before the date the parent or department knew or should have known about the alleged action that forms the basis of the due process complaint, or, within the timeframe specified in state statute for a unilateral special education placement, where the request is for reimbursement of the costs of the placement, including special education and related services. The unilateral special education placement timeframe begins on the student's first day of attendance.

(b) Information for parents. The department shall inform the parent of any free or low-cost legal and other relevant services available in the area if:

(1) The parent requests the information; or

(2) The parent or the department files a due process complaint under this section. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(b)(6), HRS §302A-1112) (Imp: 34 C.F.R. §300.507,HRS §302A-443)

§8-60-62 Due process complaint. (a) General. (1) The department shall have procedures that require either party, or the attorney representing a party, to provide to the other party a due process complaint (which shall remain confidential).

(2) The party filing a due process complaint shall submit a copy of the due process complaint to the department.

(b) Content of complaint. The due process complaint required in paragraph (1) shall include:

(1) The name of the student;

(2) The address of the residence of the student;

(3) The name of the school the student is attending;

(4) In the case of a homeless student or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the student, and the name of the school the student is attending;

(5) A description of the nature of the problem of the student relating to the proposed or refused initiation or change, including facts relating to the problem; and

(6) A proposed resolution of the problem to the extent known and available to the party at the time.

(c) Notice required before a hearing on a due process complaint. A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of subsection (b).

(d) Sufficiency of complaint. (1) The due process complaint required by this section shall be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not meet the requirements in subsection (b).

(2) Within five days of receipt of notification under paragraph (1), the hearing officer shall make a determination on the face of the due process complaint of whether the due process complaint meets the requirements of subsection (b), and shall immediately notify the parties in writing of that determination.

(3) A party may amend its due process complaint only if:

(A) The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to section 8-60-64; or

(B) The hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins.

(4) If a party files an amended due process complaint, the timelines for the resolution meeting in section 8-60-64(a) and the time period to resolve in section 8-60-64(b) begin again with the filing of the amended due process complaint.

(e) Department response to a due process complaint. (1) If the department has not sent a prior written notice under section 8-60-58 to the parent regarding the subject matter contained in the parent's due process complaint, the department shall, within 10 days of receiving the due process complaint, send to the parent a response that includes:

(A) An explanation of why the department proposed or refused to take the action raised in the due process complaint;

(B) A description of other options that the IEP team considered and the reasons why those options were rejected;

(C) A description of each evaluation procedure, assessment, record, or report the department used as the basis for the proposed or refused action; and

(D) A description of the other factors that are relevant to the department's proposed or refused action.

(2) A response by the department under paragraph (1) shall not be construed to preclude the department from asserting that the parent's due process complaint was insufficient, where appropriate.

(f) Other party response to a due process complaint. Except as provided in subsection (e), the party receiving a due process complaint shall, within 10 days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(b)(7), 1415(c)(2), HRS §302A-1112) (Imp: 34 C.F.R. §300.508)

§8-60-63 Model forms. (a) The department shall provide a model form to assist parents and public schools in filing a due process complaint in accordance with sections 8-60-61(a) and 8-60-62(a) through (c) and to assist parents and other parties in filing a State complaint under sections 8-60-52 through 8-60-54. However, the department may not require the use of the model forms.

(b) Parents, public schools, and other parties may use the appropriate model form described in subsection (a), or another form or other document, so long as the form or document that is used meets, as appropriate, the content requirements in section 8-60-62(b) for filing a due process complaint, or the requirements in section 8-60-54(b) for filing a State complaint. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(b)(8), HRS §302A-1112) (Imp: 34 C.F.R. §300.509)

§8-60-64 Resolution process. (a) Resolution meeting. (1) Within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing under section 8-60-65, the department shall convene a meeting with the parent and the relevant member or members of the IEP team who have specific knowledge of the facts identified in the due process complaint that:

(A) Includes a representative of the department who has decision-making authority on behalf of the department; and

(B) May not include an attorney of the department unless the parent is accompanied by an attorney.

(2) The purpose of the meeting is for the parent of the student to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the department has the opportunity to resolve the dispute that is the basis for the due process complaint.

(3) The meeting described in paragraph (1) and (2) need not be held if:

(A) The parent and the department agree in writing to waive the meeting; or

(B) The parent and the department agree to use the mediation process described in section 8-60-60.

(4) The parent and the department determine the relevant members of the IEP team to attend the meeting.

(b) Resolution period. (1) If the department has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.

(2) Except as provided in subsection (c), the timeline for issuing a final decision under section 8-60-69 begins at the expiration of this 30-day period.

(3) Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs (1) and (2), the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

(4) If the department is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented using the procedures in section 8-60-46(d)), the department may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint.

(5) If the department fails to hold the resolution meeting specified in subsection (a) within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.

(c) Adjustments to 30-day resolution period. The 45-day timeline for the due process hearing in section 8-60-69(a) starts the day after one of the following events:

(1) Both parties agree in writing to waive the resolution meeting;

(2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;

(3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or department withdraws from the mediation process.

(d) Written settlement agreement. If a resolution to the dispute is reached at the meeting described in subsections (a)(1) and (2), the parties shall execute a legally binding agreement that is:

(1) Signed by both the parent and a representative of the department who has the authority to bind the department; and

(2) Enforceable in any State court of competent jurisdiction or in a district court of the United States.

(e) Agreement review period. If the parties execute an agreement pursuant to subsection (d), a party may void the agreement within 3 business days of the agreement's execution. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(f)(1)(B), HRS §302A-1112) (Imp: 34 C.F.R. §300.510)

§8-60-65 Impartial due process hearing. (a) General. Whenever a due process complaint is received under section 8-60-61 or section 8-60-77, the parents or the department involved in the dispute shall have an opportunity for an impartial due process hearing, consistent with the procedures in sections 8-60-61, 8-60-62, and 8-60-64.

(b) The hearing described in subsection (a) shall be conducted by the department.

(c) Impartial hearing officer. (1) At a minimum, a hearing officer:

(A) Shall not be:

(i) An employee of the department that is involved in the education or care of the student; or

(ii) A person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(B) Shall possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts;

(C) Shall possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(D) Shall possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(2) A person who otherwise qualifies to conduct a hearing under paragraph (1) is not an employee of the department solely because he or she is paid by the department to serve as a hearing officer.

(3) The department shall keep a list of the persons who serve as hearing officers. The list shall include a statement of the qualifications of each of those persons

(d) Subject matter of due process hearings. The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under section 8-60-62(b), unless the other party agrees otherwise.

(e) The hearing officer shall conduct a pre-hearing conference. The hearing officer may conduct all or part of the pre-hearing conference by telephone if both parties or party representatives have an opportunity to participate in and hear the entire

proceeding while it is taking place. The pre-hearing conference shall include the identification of the precise issues to be heard under section 8-60-61(a).

(f) Timeline for requesting a hearing. A parent or the department shall request an impartial hearing on their due process complaint within two years of the date the parent or the department knew or should have known about the alleged action that forms the basis of the due process complaint. The request for a due process hearing regarding reimbursement of all costs of the private placement including special education and related services shall be filed within the timeframe specified by state statute.

(g) Exceptions to the timeline. The timeline described in subsection (f) does not apply to a parent if the parent was prevented from filing a due process complaint due to:

(1) Specific misrepresentations by the department that it had resolved the problem forming the basis of the due process complaint; or

(2) The department's withholding of information from the parent that was required to be provided to the parent. [Eff Nov.26, 2009] (Auth: 20 U.S.C. 1415(f)(1)(A), 1415(f)(3)(A)-(D), HRS §302A-1112) (Imp: 34 C.F.R. §300.511)

§8-60-66 Hearing rights. (a) General. Any party to a hearing conducted pursuant to sections 8-60-61 through 8-60-67 or sections 8-60-75 through 8-60-79, or an appeal conducted pursuant to section 8-60-68, has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of students with disabilities;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(A) The party initiating the due process complaint has the burden of proof.

(B) The burden of proof is the responsibility of the party initiating and seeking relief in an administrative hearing under the IDEA or this chapter is to prove, by a preponderance of the evidence, the allegations of the complaint.

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

(4) Obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing; and

(5) Obtain written, or, at the option of the parents, electronic findings of fact and decisions.

(b) Additional disclosure of information. (1) At least five business days prior to a hearing conducted pursuant to section 8-60-65(a), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(2) A hearing officer may bar any party that fails to comply with paragraph (1) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(c) Parental rights at hearings. Parents involved in hearings shall be given the right to:

(1) Have the student who is the subject of the hearing present;

(2) Open the hearing to the public; and

(3) Have the record of the hearing and the findings of fact and decisions described in subsections (a)(4) and (5) provided at no cost to parents. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(f)(2), 1415(h), HRS §302A-1112) (Imp: 34 C.F.R. §300.512)

§8-60-67 Hearing decisions. (a) Decision of hearing officer on the provision of a FAPE. (1) Subject to paragraph (2), a hearing officer's determination of whether a student received a FAPE shall be based on substantive grounds.

(2) In matters alleging a procedural violation, a hearing officer may find that a student did not receive a FAPE only if the procedural inadequacies:

(A) Impeded the student's right to a FAPE;

(B) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's student; or

(C) Caused a deprivation of educational benefit.

(3) Nothing in subsection (a) shall be construed to preclude a hearing officer from ordering the department to comply with procedural requirements under sections 8-60-56 through 8-60-81.

(4) Following the placement of a student in a private school, for continued placement, the private school cannot be deemed an appropriate placement by the hearing officer unless the private school allows the department to exercise its responsibility to ensure the provision of a FAPE under sections 8-60-29 and 30.

(b) Separate request for a due process hearing. Nothing in sections 8-60-56 through 8-60-81 shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

(c) Findings and decision to advisory panel and general public. The department, after deleting any personally identifiable information, shall:

(1) Transmit the findings and decisions referred to in section 8-60-66(a)(5) to the State advisory panel; and

(2) Make those findings and decisions available to the public. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(f)(3)(E) and (F), 1415(h)(4), 1415(o), HRS §302A-1112) (Imp: 34 C.F.R. §300.513)

§8-60-68 Finality of decision; appeal. A decision made in a hearing conducted pursuant to sections 8-60-61 through 8-60-67 or sections 8-60-75 through

8-60-79 is final, except that any party involved in the hearing may appeal the decision under the provisions of section 8-60-70. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(g) and (h)(4), 1415(i)(1)(A), 1415(i)(2), HRS §302A-1112) (Imp: 34 C.F.R. §300.514)

§8-60-69 Timelines and convenience of hearings and reviews. (a) The department shall ensure that not later than 45 days after the expiration of the 30 day period under section 8-60-64(b), or the adjusted time periods described in section 8-60-64(c):

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) A hearing officer may, for good cause, grant specific extensions of time beyond the period set out in subsection (a) at the request of either party. Each extension shall be no more than 45 days.

(1) The hearing officer shall consider the following factors before an extension is granted:

(A) The negative effects of extending the time in which a student's education is in abeyance;

(B) The requesting party's ability to have avoided the necessity for an extension;

(C) If the requesting party is the petitioner, whether the requesting party had an opportunity to adequately prepare before filing a hearing request;

(D) The negative effects denying the request for an extension;

(E) The intent of this chapter and federal laws to expedite an informal administrative proceeding; and

(F) Whether granting the extension will override the intent of the law in favor of the convenience of the parties.

(2) Absent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted. Agreement of the parties is not a sufficient basis for granting an extension.

(3) The impartial hearing officer shall respond in writing to each request for an extension. The response shall include findings of fact and conclusions as to why good cause exists. The response shall become part of the record. The impartial hearing officer shall set a new date for rendering his or her decision, and notify the parties in writing of such date.

(c) Each hearing and each review involving oral arguments shall be conducted at a time and place that is reasonably convenient to the parents and student involved. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(f)(1)(B)(ii), 1415(g), 1415(i)(1), HRS §302A-1112) (Imp: 34 C.F.R. §300.515)

§8-60-70 Civil action. (a) General. Any party aggrieved by the findings and decision made under sections 8-60-61 through 8-60-67 or sections 8-60-75 through 8-60-79 has the right to bring a civil action with respect to the due process complaint

notice requesting a due process hearing under section 8-60-61 or sections 8-60-75 through 8-60-77. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) Time limitation. The party bringing the action shall have 30 days from the date of the decision of the hearing officer to file a civil action, or, in the time allowed by State law.

(c) Additional requirements. In any action brought under subsection (a), the court:

(1) Receives the records of the administrative proceedings;

(2) Hears additional evidence at the request of a party; and

(3) Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

(d) Jurisdiction of district courts. The district courts of the United States have jurisdiction of actions brought under section 615 of the Act without regard to the amount in controversy.

(e) Rule of construction. Nothing in this chapter restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of students with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures under sections 8-60-61 and 8-60-68 shall be exhausted to the same extent as would be required had the action been brought under section 615 of the Act.
[Eff 11/26/09] (Auth: 20 U.S.C. 1415(i)(2) and (3)(A), 1415(l), HRS §302A-1112) (Imp: 34 C.F.R. §300.516)

§8-60-71 Attorneys' fees. (a) In general. In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to:

(1) The prevailing party who is the parent of a student with a disability;

(2) To a prevailing party who is the department against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(3) To the department prevailing against the attorney of a parent, or against the parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(b) Prohibition on use of funds. (1) Funds under Part B of the Act may not be used to pay attorneys' fees or costs of a party related to any action or proceeding under section 615 of the Act and sections 8-60-56 through 8-60-81.

(2) Paragraph (1) does not preclude the department from using funds under Part B of the Act for conducting an action or proceeding under section 615 of the Act.

(c) Award of fees. A court awards reasonable attorneys' fees under section 615(i)(3) of the Act consistent with the following:

(1) Fees awarded under section 615(i)(3) of the Act shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this paragraph.

(2) (A) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 615 of the Act for services performed subsequent to the time of a written offer of settlement to a parent if:

(i) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(ii) The offer is not accepted within 10 days; and

(iii) The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(B) Attorneys' fees may not be awarded relating to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action, or at the discretion of the State, for a mediation described in section 8-60-60.

(C) A meeting conducted pursuant to section 8-60-64 shall not be considered:

(i) A meeting convened as a result of an administrative hearing or judicial action; or

(ii) An administrative hearing or judicial action for purposes of this subchapter.

(3) Notwithstanding paragraph (2), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(4) Except as provided in paragraph (5), the court reduces, accordingly, the amount of the attorneys' fees awarded under section 615 of the Act, if the court finds that:

(A) The parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(B) The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(C) The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(D) The attorney representing the parent did not provide to the department the appropriate information in the due process request notice in accordance with section 8-60-62.

(5) The provisions of paragraph (4) do not apply in any action or proceeding if the court finds that the department unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the Act. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(i)(3)(B)-(G), HRS §302A-1112) (Imp: 34 C.F.R. §300.517)

§8-60-72 Student's status during proceedings. (a) Except as provided in section 8-60-78, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under section 8-60-61, unless the department and the parents of the student agree otherwise, the student involved in the complaint shall remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the student, with the consent of the parents, shall be placed in the public school until the completion of all the proceedings.

(c) If the complaint involves an application for initial services from a student who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the student has turned three, the department is not required to provide the Part C services that the student had been receiving. If the student is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under section 8-60-31(b), then the department shall provide those special education and related services that are not in dispute between the parent and the department.

(d) If the hearing officer in a due process hearing conducted by the department agrees with the student's parents that a change of placement is appropriate, that placement shall be treated as an agreement between the State and the parents for purposes of subsection (a). [Eff 11/26/09] (Auth: 20 U.S.C. 1415(j), HRS §302A-1112) (Imp: 34 C.F.R. §300.518)

§8-60-73 Surrogate parents. (a) General. The department shall ensure that the rights of a student are protected when:

(1) No parent (as defined in section 8-60-2 can be identified;

(2) The department, after reasonable efforts, cannot locate a parent;

(3) The student is a ward of the State under the laws of that State; or

(4) The student is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)).

(b) Duties of the department. The duties of the department under subsection (a) include the assignment of an individual to act as a surrogate for the parents. This shall include a method:

(1) For determining whether a student needs a surrogate parent; and

(2) For assigning a surrogate parent to the student.

(c) Wards of the State. In the case of a student who is a ward of the State, the surrogate parent alternatively may be appointed by the judge overseeing the student's case, provided that the surrogate meets the requirements in subsections (d)(2)(A) and (e).

(d) Criteria for selection of surrogate parents. (1) The department may select a surrogate parent in any way permitted under State law.

(2) The department shall ensure that a person selected as a surrogate parent:

(A) Is not an employee of the department or any other agency that is involved in the education or care of the student;

(B) Has no personal or professional interest that conflicts with the interest of the student the surrogate parent represents; and

(C) Has knowledge and skills that ensure adequate representation of the student.

(e) Non-employee requirement; compensation. A person otherwise qualified to be a surrogate parent under subsection (d) is not an employee of the department solely because he or she is paid by the department to serve as a surrogate parent.

(f) Unaccompanied homeless youth. In the case of a student who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogate parents without regard to subsection (d)(2)(A), until a surrogate parent can be appointed that meets all of the requirements of subsection (d)..

(g) Surrogate parent responsibilities. The surrogate parent may represent the student in all matters relating to:

(1) The identification, evaluation, and educational placement of the student; and

(2) The provision of a FAPE to the student.

(h) Department responsibility. The department shall make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after the department determines that the student needs a surrogate parent. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(b)(2), HRS §302A-1112) (Imp: 34 C.F.R. §300.519)

§8-60-74 <u>Transfer of parental rights at age of majority.</u> General. A State may provide that, when a student with a disability reaches the age of majority under State law that applies to all students (except for a student with a disability who has been determined to be incompetent under State law):

(a) (1) The department shall provide any notice required by this chapter to both the student and the parents; and

(2) All rights accorded to parents under Part B of the Act transfer to the student;

(b) All rights accorded to parents under Part B of the Act transfer to students who are incarcerated in an adult or juvenile, State or local correctional institution; and

(c) Whenever the State provides for the transfer of rights pursuant to subsection (a), the department shall notify the student and the parents of the transfer of rights. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(m), HRS §302A-1112) (Imp: 34 C.F.R. §300.520)

SUBCHAPTER 9

DISCIPLINE PROCEDURES

§8-60-75 Authority of school personnel. (a) Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this subchapter, is appropriate for a student with a disability who violates chapter 8-19.

(b) General.

(1) School personnel under this subchapter may remove a student with a disability who violates school rules from the student's current placement to an appropriate interim alternative educational setting, another setting, or suspension for not more than 10 cumulative school days (to the extent those alternatives are applied to students without disabilities) in that same school year for one or separate incidents of misconduct;

(2) After a student with a disability has been removed from the student's current placement for ten school days in the same school year, during any subsequent days of removal the department shall provide services to the extent required under subsection (d);

(3) "Current educational placement" means the type of educational placement of the student as described in the student's annual IEP. 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; regular classroom with resource room support; special class; special school; home, etc.).

(c) Additional authority. For disciplinary changes in placement that would exceed ten consecutive or cumulative school days, if the behavior that gave rise to the violation of chapter 8-19 is determined not to be a manifestation of the student's disability pursuant to subsection (e), school personnel may apply the relevant disciplinary procedures to students with disabilities in the same manner and for the same duration as

the procedures would be applied to students without disabilities, except as provided in subsection (d).

(d) Services.

(1) A student with a disability who is removed from the student's current placement pursuant to subsection (c) or (g), shall:

(A) Continue to receive educational services, as provided in section 8-60-3(a), so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP; and

(B) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur;

(2) The services required by paragraphs (1), (3), and (4) may be provided in an interim alternative educational setting.

(3) When a student with a disability has been removed from his or her current placement for 10 school days or less in the same school year, that student may be provided with an alternate educational option (such as homework, projects, class assignments) in the same manner as a student without a disability who is similarly removed, in accordance with chapter 8-19.

(4) If the removal is a change of placement under section 8-60-81, the student's IEP team determines appropriate services under paragraph (1), except as stated in paragraph (5).

(5) For crisis removals that exceed the ten cumulative school days in a school year, school personnel, in consultation with at least one of the student's teachers, determine the extent to which services are needed so as to enable the student to continue to participate in the general education curriculum although in another setting, and to progress in meeting the goals set out in the student's IEP.

(e) Manifestation determination.

(1) Excluding subparagraph (g)(2)(A), within ten school days of any decision to change the placement of a student with a disability because of a violation of Chapter 19, the department, the parent, and relevant members of the student's IEP team (as determined by the parent and the department) shall review all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine:

(A) If the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or

(B) If the conduct in question was the direct result of the department's failure to implement the IEP;

(2) The conduct shall be determined to be a manifestation of the student's disability if the department, the parent, and relevant members of the

student's IEP team determine that a condition in either paragraph (1)(A) or (B) was met;

(3) If the department, the parent, and relevant members of the student's IEP team determine the condition described in paragraph (1)(B) was met, the department shall take immediate steps to remedy those deficiencies.

(f) Determination that behavior was a manifestation. If the department, the parent, and relevant members of the IEP team make the determination that the conduct was a manifestation of the student's disability, the IEP team shall:

(1) Either:

(A) Conduct a functional behavioral assessment, unless the department had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the student; or

(B) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in subsection (g), return the student to the placement from which the student was removed, unless the parent and the department agree to a change of placement as part of the modification of the behavioral intervention plan.

(g) Special circumstances.

(1) School personnel may remove a student to an interim alternative educational setting for not more than forty-five school days without regard to whether the behavior is determined to be a manifestation of the student's disability, if the student:

(A) Carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of the department;

(B) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of the department; or

(C) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the department.

(2) (A) If the basis for a crisis removal exists pursuant to chapter 8-19-7, school personnel may order the removal of a student with a disability from the student's current educational placement, for up to ten consecutive school days. If the crisis removal, together with any previous days of disciplinary suspensions or removals, exceeds ten school days, the crisis removal would constitute a change of placement only if the removals constitute a pattern:

(i) because the student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals.

(ii) because of such additional factors such as the length of each removal, the total amount of time the student is removed, and the proximity of the removals one to another.

(B) If school personnel determine the authority for a crisis removal exists pursuant to paragraph [(1)](2)(A):

(i) The crisis removal shall be in accordance with chapter 8-19-7, including the student's right to resume attendance at school as soon as the exclusion pursuant to chapter 8-19-7(a) is no longer necessary;

(ii) The student with a disability shall be provided a free appropriate public education in accordance with subsection (d) during the period of the crisis removal;

(iii) The IEP team shall conduct the functional behavioral assessment in accordance with subparagraph (d)(1)(b);

(iv) If the student's parent disagrees with the determination under paragraph (2), the parent may request a hearing pursuant to section 8-60-77. For purposes of section 8-60-72 on the student's status during the proceedings, the current placement is the free appropriate public education provided in accordance with subsection (d) until the end of the crisis removal, at which time the student shall resume attendance at school; and

(v) For purposes of subsequent disciplinary action, the school days of crisis removal shall be included as days of removal in this section. Nothing in this paragraph prohibits a student from being the subject of a subsequent crisis removal in a given school year if the requirements of chapter 8-19-7, and this subparagraph are met.

(h) Notification. On the date on which the decision is made to make a removal that constitutes a change of placement of a student with a disability because of a violation of a code of student conduct, the department shall notify the parents of that decision, and provide the parents the procedural safeguards notice described in section 8-60-59.

(i) Definitions. For purposes of this subchapter, the following definitions apply:

(1) "Controlled substance" means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c));

(2) "Illegal drug" means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law;

(3) "Serious bodily injury" has the meaning given the term "serious bodily injury" under section 1365(h)(3) of title 18, United States Code.

(4) "Weapon" has the meaning given the term "dangerous weapon" under 18 U.S.C. section 930(g)(2). [Eff 11/26/09] (Auth: 20 U.S.C. 1415(k)(1) and (7); HRS §302A-1112) (Imp: 34 C.F.R. §300.530)

§8-60-76 Determination of setting. The student's IEP team determines the interim alternative educational setting for services under section 8-60-75(c), (d)(4), and (g). [Eff 11/26/09] (Auth: 20 U.S.C. 1415(k)(2); HRS §302A-1112) (Imp: 34 C.F.R. §300.531)

§8-60-77 Appeal. (a) General. The parent of a student with a disability who disagrees with any decision regarding placement under sections 8-60-75 and 8-60-76, or the manifestation determination under section 8-60-75(e), or the department believes that maintaining the current placement of the student is substantially likely to result in injury to the student or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to sections 8-60-61 and 8-60-62(a) and (b).

(b) Authority of hearing officer.

(1) A hearing officer under section 8-60-65 hears, and makes a determination regarding an appeal under subsection (a).

(2) In making the determination under paragraph (1), the hearing officer may:

(A) Return the student with a disability to the placement from which the student was removed if the hearing officer determines that the removal was a violation of section 8-60-75 or that the student's behavior was a manifestation of the student's disability; or

(B) Order a change of placement of the student with a disability to an appropriate interim alternative educational setting for not more than forty-five school days if the hearing officer determines that maintaining the current placement of the student is substantially likely to result in injury to the student or to others.

(3) The procedures under subsection (a) and paragraphs (1) and (2) may be repeated, if the department believes that returning the student to the original placement is substantially likely to result in injury to the student or to others.

(c) Expedited due process hearing.

(1) Whenever a hearing is requested under subsection (a), the parents involved in the dispute or the department shall have an opportunity for an impartial due process hearing consistent with the requirements of sections 8-60-61 and 8-60-62(a) through (c) and sections 8-60-64 through 8-60-68, except as provided in paragraphs (2) through (4).

(2) The department is responsible for arranging the expedited due process hearing, which shall occur within twenty school days of the date the complaint requesting the hearing is filed. The hearing officer shall make a determination within ten school days after the hearing;

(3) Unless the parents and department agree in writing to waive the resolution meeting described in subparagraph (A), or agree to use the mediation process described in section 8-60-60:

(A) A resolution meeting shall occur within seven days of receiving notice of the due process complaint; and

(B) The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within fifteen days of the receipt of the due process complaint;

(4) The State shall ensure that the requirements in sections 8-60-64 through 8-60-68 are met;

(5) The decisions on expedited due process hearings are appealable consistent with section 8-60-68. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(k)(3) and (4)(B), 1415(f)(1)(A); HRS §302A-1112) (Imp: 34 C.F.R. §300.532)

§8-60-78 Placement during appeals. When an appeal under section 8-60-77 has been made by either the parent or the department, the student shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in section 8-60-75(c) or (g), whichever occurs first, unless the parent and the department agree otherwise. Eff 11/26/09] (Auth: 20 U.S.C. 1415(k)(4)(A), HRS §302A-1112) (Imp: 34 C.F.R. §300.533)

§8-60-79 Protections for students not determined eligible for special education and related services. (a) General. A student who has not been determined to be eligible for special education and related services and who has engaged in behavior that violated chapter 8-19, may assert any of the protections provided for in this chapter if the department had knowledge (as determined in accordance with subsection (b)) that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred.

(b) Basis of knowledge. The department shall be deemed to have knowledge that a student is a student with a disability if before the behavior that precipitated the disciplinary action occurred:

(1) The parent of the student expressed concern in writing to supervisory or administrative personnel of the department, or a teacher of the student, that the student is in need of special education and related services;

(2) The parent of the student requested an evaluation of the student pursuant to sections 8-60-31 through 8-60-43; or

(3) The teacher of the student, or other personnel of the department, expressed specific concerns about a pattern of behavior demonstrated by the student directly to the director of special education or to other supervisory personnel of the department.

(c) Exception. The department would not be deemed to have knowledge under subsection (b) if:

(1) The parent of the student:

(A) Has not allowed an evaluation of the student pursuant to sections 8-60-31 through 8-60-43; or

(B) Has refused services; or

(2) The student has been evaluated in accordance with sections 8-60-31 through 8-60-43 and determined to not be a student with a disability.

(d) Conditions that apply if no basis of knowledge.

(1) If the department does not have knowledge that a student is a student with a disability (in accordance with subsections (b) and (c)) prior to taking disciplinary measures against the student, the student may be subjected to the disciplinary measures applied to students without disabilities who engage in comparable behaviors consistent with paragraph (2).

(2) (A) If a request is made for an evaluation of a student during the time period in which the student is subjected to disciplinary measures under section 8-60-75, the evaluation shall be conducted in an expedited manner;

(B) Until the evaluation is completed, the student remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services;

(C) If the student is determined to be a student with a disability, taking into consideration information from the evaluation conducted by the department and information provided by the parents, the department shall provide special education and related services in accordance with this chapter, including the requirements of sections 8-60-75 through 8-60-81 and section 612(a)(1)(A) of the Act. [Eff 11/26/09] (Auth: 20 U.S.C. 1415(k)(5), HRS §302A-1112) (Imp: 34 C.F.R. §300.534)

§8-60-80 <u>Referral to and action by law enforcement and judicial authorities.</u> (a) Rule of construction. Nothing in this chapter prohibits the department from reporting a crime committed by a student with a disability to appropriate authorities

or prevents state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to crimes committed by a student with a disability.

(b) Transmittal of records.

(1) When reporting a crime committed by a student with a disability, the department shall ensure that copies of the special education and disciplinary records of the student are transmitted for consideration by the appropriate authorities to whom the department reports the crime.

(2) The department may transmit copies of the student's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act(20 U.S.C. 1232g). [Eff 11/26/09] (Auth: 20 U.S.C. 1415(k)(6); HRS §302A-1112) (Imp: 34 C.F.R. §300.535)

§8-60-81 Change of placement because of disciplinary removals. For purposes of removals of a student with a disability from the student's current educational placement under sections 8-60-75 through 8-60-80, a change of placement occurs if the removal is for more than ten cumulative school days in the same school year, unless the basis for a crisis removal exists in accordance with sections 8-60-75(d)(5) and 8-60-75(g)(2). [Eff 11/26/09] (Auth: 20 U.S.C. 1415(k), HRS §302A-1112) (Imp: 34 C.F.R. §300.536)

§§8-60-82 to 8-60-83 (Reserved)

SUBCHAPTER 10

CONFIDENTIALITY OF INFORMATION

§8-60-84 Applicability. All of the provisions of the Hawaii administrative rule relating to the Protection of Educational Rights and Privacy of Students and Parents, the Individuals with Disabilities Education Act, and the Family Educational Rights and Privacy Act (20 U.S.C. section 1400 et seq.; 34 C.F.R. sections 300.610 – 627, 20 U.S.C. 1232g)) shall also apply. [Eff 11/26/09] (Auth: 20 U.S.C. 1212e-3,1412(a)(8), 1417(c); HRS §302A-1112) (Imp: 34 C.F.R. §§300.610 to 627)

GOV. MSG. NO. 1232

EXECUTIVE CHAMBERS
HONOLULU

NEIL ABERCROMBIE
GOVERNOR

June 15, 2011

The Honorable Shan Tsutsui, President
and Members of the Senate
Twenty-Sixth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

The Honorable Calvin Say, Speaker
and Members of the House
Twenty-Sixth State Legislature
State Capitol, Room 431
Honolulu, Hawaii 96813

Dear President Tsutsui, Speaker Say and Members of the Legislature:

This is to inform you that on June 15, 2011, the following bill was signed into law:

SB1284 SD2 HD1 CD1 — RELATING TO EDUCATION
Act 129 (11)

Sincerely,

Neil Abercrombie

NEIL ABERCROMBIE
Governor, State of Hawaii

Approved by the Governor
on JUN 15 2011

ACT 129

THE SENATE
TWENTY-SIXTH LEGISLATURE, 2011
STATE OF HAWAII

S.B. NO. 1284 S.D. 2 H.D. 1 C.D. 1

A BILL FOR AN ACT

RELATING TO EDUCATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The department of education is required to pay for the private placement of students with disabilities in private special education schools and placements as a result of hearing officers' decisions, court orders, or programmatic placement. When a student with a disability is placed in a private school or placement, the department of education is often not allowed to monitor each student's progress and educational programming to ensure that each student is afforded the same opportunity to receive rigorous, standards-based instruction and curriculum that are aligned with the Common Core State Standards that are provided to their peers in public schools. Some private placements are not in compliance with federal, state, and county health and safety laws, rules, regulations, and requirements.

The department of education is also charged high-cost tuition and fees for services by private placements. The department of education should pay reasonable tuition and fees for services.

The purpose of this Act is to:

(1) Provide the department of education with the authority to monitor students with disabilities who are placed in private schools or placements;

(2) Require private schools or placements to allow the department of education access to exercise its authority to monitor students;

(3) Require certain private schools or placements to post itemized rates, fees, and tuition each April;

(4) Require certain private schools or placements to charge the department of education the same rates, fees, and tuition charged to parents who unilaterally place a student at the school;

(5) Require the department of education to pay only for private school or placement services that are specified in a student's individualized education program; and

(6) Require the department of education to withhold payment to any private school or placement that restricts or denies monitoring of students by the department of education under this Act.

SECTION 2. Section 302A-443, Hawaii Revised Statutes, is amended to read as follows:

"**§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 one hundred and eighty calendar days of a unilateral special education placement, where the request is for reimbursement of the costs of the placement.

(b) Subsection (a) shall not apply to a parent or guardian of a child with a disability if the parent or guardian was prevented from requesting the hearing due to:

(1) Specific misrepresentations by the department that it had resolved the problem that formed the basis of the complaint; or

(2) The department's withholding from the parent or guardian information that was required by state or federal laws and regulations to provide a free, appropriate public education to a child with a disability.

(c) 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 any party may be present at the proceeding, be accompanied and advised by counsel or individuals with special knowledge or training with respect to the problems of children with a disability, may require witnesses to be under oath, cross-examine witnesses, and obtain a written or electronic verbatim record of the proceedings.

(d) Any party to these hearings or the hearings officer shall have the right to compel the attendance of witnesses upon subpoena issued by the hearings officer. The fees for attendance shall be the same as for the fees of witnesses before

1 circuit court. In case of the failure of any person to comply
2 with a subpoena, a circuit court judge of the judicial circuit
3 in which the witness resides, upon application of the hearings
4 officer, shall compel attendance of the person.
5 (e) No later than twenty days prior to the convening of
6 each regular session of the legislature, the department shall
7 submit a report that provides the total number of requests for a
8 due process hearing relating to the reimbursement of costs for a
9 child's placement filed by a parent or guardian of a child with
10 a disability.
11 (f) The department shall [~~exercise oversight and~~
12 ~~monitoring of~~] be authorized to monitor any child eligible to
13 receive special education and related services who [~~has~~
14 ~~undergone unilateral special education placement as soon as~~
15 ~~practicable after the placement.~~] is placed, whether as the
16 result of a hearing officer's decision, court order, or
17 programmatic placement, at the department's expense, whether by
18 direct payment or through reimbursement to the student's parent,
19 legal guardian, or legal custodian, in any private school or
20 placement as defined by federal and state law, including any
21 implementing regulations or rules, relating to students with
22 disabilities. Any private school or placement that receives

1 funding from the department for the placement of a student with
2 a disability, whether the funding is by direct payment or
3 through reimbursement to the student's parent, legal guardian,
4 or legal custodian, shall allow the department access to
5 exercise its authority under this subsection to monitor any
6 student placed at the private school or placement. Monitoring
7 under this subsection shall include but not be limited to:
8 (1) The monitoring of all private schools and placements
9 to ensure compliance with all applicable federal,
10 state, and county laws, rules, regulations, and
11 ordinances pertaining to health and safety;
12 (2) The monitoring of all students with disabilities
13 placed in a private school or placement to ensure
14 that:
15 (A) Each student is receiving academic education,
16 instruction, and programming as required by the
17 student's individualized education program; and
18 (B) The curriculum and instruction are rigorous,
19 based on content standards, and aligned with the
20 Common Core State Standards;

1 (3) The direct observation of a student with a disability
2 placed in a private school or placement, with or
3 without notice to the private school or placement;
4 (4) The review of all records, notes, or documentation
5 related to students with disabilities placed in a
6 private school or placement; and
7 (5) The right of the department to talk to the student's
8 teachers at the private school or placement at
9 reasonable times.
10 (g) Any private school or placement that receives funds
11 from the department, whether by direct payment or through
12 reimbursement to the student's parent, legal guardian, or legal
13 custodian, shall post with the department by April of each year,
14 the itemized rates, fees, and tuition to be charged for the
15 following school year and shall charge the department the same
16 itemized rates, fees, or tuition it charges parents, legal
17 guardians, or legal custodians who unilaterally place a student
18 at its school, program, or facility. The department shall only
19 pay for services that are specified in a student's
20 individualized education program.
21 (h) Any private school or placement that receives funds
22 from the department, whether by direct payment or through

reimbursement to the student's parent, legal guardian, or legal custodian, shall provide copies of a student's records to the department within three business days of receipt of a request for such records.

(i) The department shall withhold payment to any private school or placement that restricts or denies monitoring by the department pursuant to its authority under subsection (f).

(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; provided that the department may monitor any child at such schools eligible to receive special education and related services at the department's expense.

(k) The department may adopt rules pursuant to chapter 91 to effectuate subsection (f)."

SECTION 3. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 4. This Act shall take effect on July 1, 2011.

APPROVED this 15 day of JUN, 2011

GOVERNOR OF THE STATE OF HAWAII

Report Title:
Students with Disabilities; Private Schools; Monitoring; DOE

Description:
Authorizes the Department of Education (DOE) to monitor students with disabilities who are placed, at DOE's expense, at private schools or placements. Requires private schools or placements to post rates, fees, and tuition by April of each year. Requires DOE to pay only for private school or placement services that are specified in a student's individualized education program and to withhold payment to private schools or placements that restrict or deny monitoring by DOE. Exempts certain schools. (CD1)

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

§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 one hundred and eighty calendar days of a unilateral special education placement, where the request is for reimbursement of the costs of the placement.

(b) Subsection (a) shall not apply to a parent or guardian of a child with a disability if the parent or guardian was prevented from requesting the hearing due to:

(1) Specific misrepresentations by the department that it had resolved the problem that formed the basis of the complaint; or

(2) The department's withholding from the parent or guardian information that was required by state or federal laws and regulations to provide a free, appropriate public education to a child with a disability.

(c) 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 any party may be present at the proceeding, be accompanied and advised by counsel or individuals with special knowledge or training with respect to the problems of children with a disability, may require witnesses to be under oath, cross-examine witnesses, and obtain a written or electronic verbatim record of the proceedings.

(d) Any party to these hearings or the hearings officer shall have the right to compel the attendance of witnesses upon subpoena issued by the hearings officer. The fees for attendance shall be the same as for the fees of witnesses before circuit court. In case of the failure of any person to comply with a subpoena, a circuit court judge of the judicial circuit in which the witness resides, upon application of the hearings officer, shall compel attendance of the person.

(e) No later than twenty days prior to the convening of each regular session of the legislature, the department shall submit a report that provides the total number of requests for a

due process hearing relating to the reimbursement of costs for a child's placement filed by a parent or guardian of a child with a disability.

(f) The department shall be authorized to monitor any child eligible to receive special education and related services who is placed, whether as the result of a hearing officer's decision, court order, or programmatic placement, at the department's expense, whether by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian, in any private school or placement as defined by federal and state law, including any implementing regulations or rules, relating to students with disabilities. Any private school or placement that receives funding from the department for the placement of a student with a disability, whether the funding is by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian, shall allow the department access to exercise its authority under this subsection to monitor any student placed at the private school or placement. Monitoring under this subsection shall include but not be limited to:

(1) The monitoring of all private schools and placements to ensure compliance with all applicable federal, state, and county laws, rules, regulations, and ordinances pertaining to health and safety;

(2) The monitoring of all students with disabilities placed in a private school or placement to ensure that:

(A) Each student is receiving academic education, instruction, and programming as required by the student's individualized education program; and

(B) The curriculum and instruction are rigorous, based on content standards, and aligned with the Common Core State Standards;

(3) The direct observation of a student with a disability placed in a private school or placement, with or without notice to the private school or placement;

(4) The review of all records, notes, or documentation related to students with disabilities placed in a private school or placement; and

(5) The right of the department to talk to the student's teachers at the private school or placement at reasonable times.

(g) Any private school or placement that receives funds from the department, whether by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian, shall post with the department by April of each year, the itemized rates, fees, and tuition to be charged for the

following school year and shall charge the department the same itemized rates, fees, or tuition it charges parents, legal guardians, or legal custodians who unilaterally place a student at its school, program, or facility. The department shall only pay for services that are specified in a student's individualized education program.

(h) Any private school or placement that receives funds from the department, whether by direct payment or through reimbursement to the student's parent, legal guardian, or legal custodian, shall provide copies of a student's records to the department within three business days of receipt of a request for such records.

(i) The department shall withhold payment to any private school or placement that restricts or denies monitoring by the department pursuant to its authority under subsection (f).

(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; provided that the department may monitor any child at such schools eligible to receive special education and related services at the department's expense.

(k) The department may adopt rules pursuant to chapter 91 to effectuate subsection (f). [L 1996, c 89, pt of §2; am L 2005, c 158, §2; am L 2008, c 179, §1; am L 2011, c 129, §2]

Case Notes

Student's placement at a private school was bilateral due to hearing officer's approval in July 2006, and therefore, plaintiffs' request for tuition reimbursement was subject to the two-year statute of limitations in subsection (a)(1); plaintiffs' request was timely. 550 F. Supp. 2d 1238.

Section did not apply as the state statute of limitations in actions for attorney's fees under the Individuals with Disabilities Education Act. 621 F. Supp. 2d 1013.

As claim that health department was legally obligated to pay for child's services at private residential treatment center arose under the federal Individuals with Disabilities Education Act and child did not pursue the remedies available under the federal act to establish health department's obligation to pay for the services, family court lacked jurisdiction to order the department to pay for the services. 96 H. 272, 30 P.3d 878.