

HAWAII ADMINISTRATIVE RULES

TITLE 8

DEPARTMENT OF EDUCATION

SUBTITLE 2

EDUCATION

PART 1

PUBLIC SCHOOL

Chapter 61

NONDISCRIMINATION ON THE BASIS OF DISABILITY
IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL
FINANCIAL ASSISTANCE

SUBCHAPTER 1

GENERAL PROVISIONS

§8-61-1 Purpose. (a) As a matter of commitment, policy, and compliance with federal and state laws, the department assures that it will provide an equal educational opportunity to all students with a disability in its jurisdiction, regardless of the nature and severity of the disabilities.

(b) Provisions of this chapter shall be construed as supplemental to, and in the context of, Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §§705, 794; 34 C.F.R. Part 104) and the Americans with Disabilities Act (42 U.S.C. sections 12101 et seq.; 28 C.F.R. Part 35) and longstanding interpretations of Section 504 issued by the United States Department of Education. [Eff 8/20/09] (Auth: HRS §302A-1112) (Imp: HRS §§302A-1101, 302A-1112; 29 U.S.C. §794; 42 U.S.C. §12132; 34 C.F.R. §104.4)

§8-61-2 Definitions. As used in this chapter:

"Department" means the state department of education.

"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:

- (1) if the conduct in question was caused by, or had a direct and substantial relationship to the student's disability, or
- (2) if the conduct in question was the direct result of a failure to implement the 504 Plan.

"Parent" means:

- (1) A natural or adoptive parent of a student with a disability;
- (2) A guardian appointed by the court but not the State if the student is a ward of the State; or
- (3) A surrogate parent who has been appointed in accordance with section 8-61-12.

"Section 504" is in reference to Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §§705, 794; 34 C.F.R. Part 104). [Eff 08/20/09] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112; 29 U.S.C. §705; 34 C.F.R. §104.3)

SUBCHAPTER 2

EVALUATION AND REEVALUATION

§8-61-3 General evaluation requirement. (a) The department shall conduct an evaluation of any student who, because of disability, needs or is believed to need services under this chapter before taking any action with respect to the initial placement of the student.

(b) The department shall establish implementation guidelines for the evaluation of students who may qualify for services under this

chapter. An evaluation may consist of the review of existing evaluation data, when no additional data are necessary. [Eff 8/20/09] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112; 29 U.S.C. §794; 34 C.F.R. §104.35)

§8-61-4 Reevaluation. A student with a disability shall be reevaluated periodically in accordance with the implementation guidelines, section 8-61-5 and 34 C.F.R. section 104.35, including before a significant change in placement. [Eff 8/20/09] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112; 29 U.S.C. §794; 34 C.F.R. §104.35)

SUBCHAPTER 3

PROCEDURAL SAFEGUARDS

§8-61-5 General responsibility. The department shall provide each student with a disability and the student's parent with procedural safeguards. [Eff 8/20/09] (Auth: 8-61-23 HRS §302A-1112) (Imp: HRS §302A-1112; 29 U.S.C. §794; 34 C.F.R. §104.36)

§8-61-6 Procedural safeguards. (a) The department shall establish and implement a system of procedural safeguards that includes:

- (1) Notice of the department's duty under section 504 of the Rehabilitation Act of 1973, as amended;
- (2) An opportunity for the parents to examine relevant records;
- (3) An impartial hearing in accordance with chapter 91-9, Hawaii Revised Statutes; and
- (4) A review procedure.

(b) The department shall establish implementation guidelines for the system of procedural safeguards. [Eff 8/20/09] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112; 29 U.S.C. §794; 34 C.F.R. §104.36)

§8-61-7 Parental consent. (a) Parental consent shall be obtained before:

(1) Conducting an initial evaluation involving individually administered assessments pursuant to section 8-61-5; and

(2) The initial provision of special education, within the meaning of Section 504, or related services to a student with a disability.

(b) Parental consent is not required before reviewing existing data as part of an evaluation or reevaluation. [Eff 8/20/09] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112; 29 U.S.C. §794; 34 C.F.R. §104.36)

§8-61-8 Alternative dispute resolution. The department and students with a disability and their parents are encouraged to seek resolution of disputes under this chapter through alternative dispute resolution, including mediation. Alternative dispute resolution is intended to be an informal process conducted in a non-adversarial atmosphere to resolve issues relating to the identification, evaluation, or educational placement of a student with a disability or the provision of a free appropriate public education to the student. [Eff 8/20/09] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112; 29 U.S.C. §794; 34 C.F.R. §104.36)

§8-61-9 Impartial due process hearing. (a) Within the time specified in state law, a parent may initiate an impartial hearing regarding the department's proposal or refusal to initiate or change the identification, evaluation, or educational placement of a student with a disability, or the provision of a free appropriate public education to the student.

(b) All requests for an impartial due process hearing shall be filed in writing with the complex area superintendent of the student's complex of enrollment.

(c) Upon receipt of a request for a due process hearing, the department shall:

(1) Notify the parties of the receipt of the contact information for the impartial hearing officer;

(2) Inform the parent of the availability of alternative dispute resolution, including mediation; and

(3) Inform the parent of the availability of an interpreter, if requested.

(d) The department shall be responsible for the conduct of the hearing described in subsection (a). [Eff 8/20/09] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112; 29 U.S.C. §794; 34 C.F.R. §104.36)

§8-61-10 Pre-hearing and hearing. (a) The hearing officer shall conduct a pre-hearing conference. The pre-hearing conference shall include the identification of the precise issues to be heard under section 8-61-9, the time and location of the hearing, and the date by which the decision will be rendered and mailed.

(b) Hearings will be conducted in accordance with chapter 91, Hawaii Revised Statutes. [Eff 8/20/09] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112; 29 U.S.C. §794; 34 C.F.R. §104.36)

§8-61-11 Civil action. A decision made in a hearing conducted pursuant to section 8-61-9 or 8-61-16 is final, except that any party aggrieved by the decision has the right to bring a civil action in a court of competent jurisdiction within thirty days of the receipt of the decision. [Eff 8/20/09] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112; 29 U.S.C. §794; 34 C.F.R. §104.36)

§8-61-12 Surrogate parent. (a) The department shall ensure the assignment of an individual to act as a surrogate parent for a student with a disability, when necessary.

(b) The individual assigned to act as a surrogate parent shall not be an employee of the department. [Eff 8/20/09] (Auth: HRS §302A-1112) (Imp: HRS §302A-1112; 29 U.S.C. §794; 34 C.F.R. §104.36)

SUBCHAPTER 4

DISCIPLINE

§8-61-13 General requirements. (a) No student with a disability shall be discriminated against on the basis of disability in the determination of prohibited conduct and disciplinary action, including all standards and procedures under the Hawaii administrative rules governing student discipline.

(b) Disciplinary action that results in the suspension, including crisis removal, or other removal of a student with a disability from the student's current educational placement for ten consecutive or cumulative school days or fewer shall not be considered a change in placement and shall be in accordance with the Hawaii administrative rules governing student discipline.

(c) Disciplinary action that results in the suspension, including crisis removal, or other removal of a student with a disability from the student's current educational placement for more than ten consecutive or cumulative school days in a given school year shall be considered a change in placement and shall be in accordance with the provisions of this subchapter. (29 U.S.C. §§705, 794; 34 C.F.R. Part 104). [Eff 8/20/09] (Auth: HRS §302A-1112) (Imp: Hawaii Const. Art. X, §3; HRS §302A-1101; 29 U.S.C. §794; 34 C.F.R. §§104.35, 104.36)

§8-61-14 Preliminary disciplinary procedures. (a) When a disciplinary removal of a student with a disability results in a significant change of placement, the department shall:

(1) Conduct a reevaluation in accordance with section 8-61-4;

(2) Convene the relevant members of the Section 504 team, including the parent, to review all relevant information in the student's file and any relevant information provided by the parent 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 Section 504 plan; and

(3) Provide the parent of the student with a disability a notice of the department's manifestation determination and the right to request a due process hearing in accordance with section 8-61-16.

(b) If the determination under subsection (a)(2) is that the misconduct is not a manifestation of the student's disability, the student may be suspended or dismissed in accordance with the Hawaii administrative rules governing student discipline, except as provided in section 8-61-16.

(c) Should the Individuals with Disabilities Education Improvement Act ("IDEIA"), commonly known as the Individuals with Disabilities Education Act ("IDEA"), manifestation determination change in the future, the standard in this section shall also change to the most current manifestation standard. [Eff 8/20/09] (Auth: HRS §302A-1112) (Imp: Hawaii Const. Art. X, §3; HRS §302A-1101; 29 U.S.C. §794; 34 C.F.R. §§104.35, 104.36)

§8-61-15 Special circumstances. Notwithstanding section 8-61-14, if the disciplinary action pertains to the use or possession of illegal drugs or alcohol, and the student with a disability is currently engaging in the illegal use of drugs or alcohol, the disciplinary action may be taken to the same extent that disciplinary action is taken against students without a disability pursuant to the Hawaii administrative rules governing student discipline. The procedural safeguards set forth in subchapter 3 and section 8-61-14 shall not apply to the disciplinary action; except that students with a disability who are also eligible as students with a disability in accordance with Hawaii administrative rules for students with disabilities shall be afforded all of the procedural safeguards under those rules. [Eff 8/20/09] (Auth: HRS §302A-1112) (Imp: Hawaii Const. Art. X, §3; HRS §302A-1101; 29 U.S.C. §794; 34 C.F.R. §§104.35, 104.36)

§8-61-16 Impartial due process hearing. The parent of a student with a disability who disagrees with the manifestation determination under section 8-61-14 may request a hearing in accordance with section 8-61-8. [Eff 8/20/09] (Auth: HRS §302A-1112) (Imp: Hawaii Const. Art. X, §3; HRS §302A-1101; 29 U.S.C. §794; 34 C.F.R. §§104.35, 104.36)

§8-61-17 Alternate educational activities. During periods of suspension exceeding ten school days or dismissal in a school year, a student with a disability shall be provided alternate educational activities in accordance with the Hawaii administrative rules

governing student discipline. [Eff 8/20/09] (Auth: HRS §302A-1112)
(Imp: Hawaii Const. Art. X, §3; HRS §302A-1101; 29 U.S.C. §794; 34
C.F.R. §§104.35, 104.36)