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By Mail

Hon. Judd Gregg
United States Senate
Russell Senate Office Building, Room 393
Washington, DC 20510

Dear Senator Gregg:

The reauthorization of the Individuals with Disabilities Education Act ("IDEA") has been pending for many months. In April, the House passed H.R. 1350, which would make very dramatic changes to protections that have been part of the law since it was enacted in 1975. On November 3, S. 1248 was reported out of committee in the Senate, and it is expected to reach the floor this fall or early next year.

Neither H.R. 1350 nor S. 1248 represents an optimal approach to achieving IDEA's statutory purposes:

- "To ensure that all children 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";
- To protect the rights of students and parents; and
- To support states and localities in providing and continually improving services to infants and toddlers, children and young adults with disabilities.

While we see ample room for improvement in both bills, we commend the Senate Health, Education, Labor and Pensions ("HELP") Committee for its bipartisan approach to reauthorization, and we believe that the version of IDEA reported out of committee in the Senate is vastly superior to the version passed by the House. H.R. 1350 contains many troubling, seemingly ill-considered provisions that represent a wholesale rejection of crucial principles and protections of IDEA. Accordingly, we believe S. 1248 will be a more appropriate reference point for the Bush Administration and for members of both houses on the Conference Committee than H.R. 1350, especially if, as we hope, specific flaws are addressed by amendments on the Senate floor. We have therefore addressed most of our comments to what we regard as flaws or omissions in S. 1248.

Full Funding

There is no issue more fundamental to successful reauthorization of IDEA than full funding. For more than a quarter century, the absence of full funding as originally contemplated by Congress has been a significant barrier to the realization of the promises of IDEA.

When IDEA was enacted in 1975, Congress made a commitment that the federal government would fund 40% of the additional educational costs of children with disabilities (*i.e.*, the difference between general education and special education costs), with state and local funds making up the remainder. While funding for Part B increased by 13% or $1 billion in Fiscal Year 2003, the federal government currently funds only 18% of the excess cost of educating children with disabilities, thereby requiring states and local communities to absorb the shortfall.

Faced with an unfunded federal mandate of nearly $11 billion annually, and budget deficits in the range of $82 billion nationwide, states have been unable to assure the provision of a free and appropriate public education to *all* children with disabilities, no matter how hard they try. Local districts lack sufficient funds to hire qualified personnel to serve the increasing number of children in need of special education and related services. As a result, service

providers are over-burdened with large caseloads, which directly impacts on the level and quality of services provided to students.

While we applaud many of the programmatic reforms included in both bills, the potential for such reforms to result in improved education outcomes for children with disabilities is severely undermined by the lack of full funding. By not providing states and localities with the funding they need to comply with IDEA's mandates, we are setting them (and the children they serve) up for failure. We therefore urge the Senate to attach an amendment to accomplish full funding gradually over six years.

Cap on Attorneys' Fees

We regard the provision of H.R. 1350 that would allow states to cap attorneys' fees that could be recovered by parents as antithetical to the remedial purposes of statutory fee-shifting provisions, as such a cap would make it even more difficult for parents to obtain counsel. Indeed, a playing field that is typically already uneven due to a district's greater available resources would become still more uneven. We believe that litigation over special education is an indication of the need for progress in providing effective services to students with disabilities. Creating a punitive disadvantage for parents does not remedy deficiencies in the system for delivering such services.

Discipline

We support the goal of simplifying the implementation of the provisions of IDEA governing discipline of students with disabilities. The current law and regulations are unnecessarily confusing, making compliance more problematic than it needs to be. We also commend the Senate committee compromise for upholding the principle that students with disabilities should not be subjected to punishment for conduct resulting from their disabilities. One of the most troubling aspects of H.R. 1350 is that it would tolerate punishment for relatively minor offenses without regard to whether the disability caused the behavior at issue. While S. 1248 is better than H.R. 1350 in this regard, we believe that even S. 1248 removes certain vital protections.

Manifestation determination review

Current law provides that students can be suspended for up to 45 days for conduct involving weapons or drugs if the behavior at issue did not result from the disability, or, using the statutory language, the conduct is not a manifestation of the disability. S. 1248, Section 615(k)(1)(B) would simplify the process of making that determination, but would go too far in doing so. Most notably, it would authorize the draconian penalty of long-term suspension for non-violent and non-drug code violations of a minor nature. We fear the results of disruption of services not justified by safety and security concerns, and doubt that such disruption is likely to result in improved behavior. Reliance on long-term suspension, which has been shown to be counter-productive in influencing educational outcomes *or* behavior, presents an inconsistency with emphasis elsewhere in the bill on scientific, research-based interventions.

In addition, S. 1248, Section 615(k)(1)(C) would eliminate an essential issue from consideration in the manifestation determination process. Currently, the multi-disciplinary team must determine whether a student's Individualized Education Program ("IEP") is appropriate before moving on to whether the behavior resulted from the disability. Section 615(k)(1)(E) of S. 1248 would assume that the IEP is appropriate. We believe that this lowers the threshold too much.

We agree that, if flaws in the IEP have no logical nexus to the conduct at issue, they should not preclude consideration of the relationship between the disability and the conduct. Therefore, we acknowledge the need to modify current law. However, this acknowledgment does not conflict with our belief that consideration should always be given to whether the conduct resulted from an inappropriate IEP. Moreover, if it is discovered that the IEP is inappropriate, efforts should be made immediately to remedy the problem(s) regardless of the outcome of the manifestation determination review.

We believe that the laudable goals of ensuring safety and an appropriate academic environment, and of clarifying and simplifying discipline procedures under IDEA, can be achieved without sacrificing vital protective features of the current law.

Pre-referral intervention

Provision 613(f) allows a Local Educational Agency ("LEA") to use 15% of its IDEA funds to develop and implement "early intervening services" (also known as pre-referral interventions). We strongly support funding for pre-referral interventions, but question whether such funding must come out of the resources available to educate children with disabilities, particularly since many school systems face shortages of mandated special education services. Pre-referral intervention will not reduce the need for the most costly of special education programs. For this reason, we support provision 613(f), *but only if tied to full funding of IDEA*. Moreover, provision 613(f) should include mechanisms to ensure that diverted funds actually reach the children most at-risk for special education referral. The bill currently requires LEA's to report to states on the number of children who receive pre-referral interventions but are subsequently referred to special education. This requirement could create a disincentive for LEA's to focus pre-referral resources on children most at-risk.

Weakening of parents' rights

We applaud the movement over the last six years toward promoting greater parental involvement in the special education process. While we recognize the current need to reduce paperwork and other administrative barriers to the provision of adequate services, we are concerned that the proposed relaxation of certain procedural requirements will undermine some of the gains made in parental involvement.

For example, proposed Sections 614(a)(2)(B) and 614(d)(1)(C), which allow parents to waive the right to a three-year reevaluation and the right to have all members of the IEP team present at an IEP meeting, respectively, are likely to lead to the inadvertent forfeiture of significant rights. We believe it is necessary for children to be re-evaluated every three years so that changes in their educational needs can be identified and addressed; and we fear the consequences of allowing this important right to be waived. Parents often feel intimidated at IEP meetings, due in part to language, cultural, or socio-economic barriers. Thus, there is a great likelihood that, if the LEA suggests a parent waive either of these rights, the parent will do so without fully appreciating the consequences of his or her actions.

Teachers and service providers are also vulnerable to intimidation and pressure by supervisors and administrators not to attend IEP meetings for students they serve. Excusing *any* of the current federally mandated team participants is a bad idea. For decades, federal and state authorities have insisted that the IEP meeting is not a gathering to rubber stamp decisions made by school personnel prior to the meeting, but rather a consensus-driven and decision-making process for students with disabilities. Teachers and service providers have critical insights about what is working and what is not working for the students they serve. If teachers and service providers are left out of the decision making process, students may get the supports and services the administration is willing to make available, rather than what they need.

Requiring IEP team members excused from participation to provide written input to the team is both insufficient and self-defeating. It will merely add to the amount of paperwork. Written input will be helpful only if it is provided in addition to, and not in place of, participation at the meeting.

Elimination of short-term objectives

Section 614(d)(1)(A) of S 1248 would eliminate the requirement that IEPs contain benchmarks and short-term objectives to measure attainment of annual goals. Short-term objectives are an important tool that parents use to ensure accountability and measure their children's progress. Eliminating them, seemingly in order to make IDEA consistent with the No Child Left Behind Act (NCLB), would actually *diminish* accountability – one of the cornerstones of NCLB. In addition, it would undermine the principle of individualization that is one of the cornerstones of IDEA. We believe that language could be added to stress the importance of ensuring that goals reflect academic and functional outcomes, while retaining short-term objectives.

Changes to due process hearing requirements

Section 615(f) of S. 1248 would require parents to attend mandatory resolution sessions before holding a due process hearing under IDEA. This provision would allow a thirty-day period to elapse before a hearing is held, in order to allow the district fifteen days before and after the mandatory meeting to resolve the dispute.

We support the use of voluntary measures for resolution of disputes. But we are concerned that an additional, mandatory, step in the process – a meeting that may well be duplicative of those which preceded it – will result in additional delay. In many cases, parents request a hearing only after protracted efforts to come to an agreement and after having waited a lengthy period for their children to receive essential services. In some cases, a child may even be sitting home waiting for a placement. If settlement has not already been reached by this late stage in the process, it is only likely to happen through voluntary dialogue. Indeed, imposing an additional delay is more likely to impede settlement because an imminent hearing date is often the best catalyst for communication of the most reasonable offers and demands.

The section would also limit issues that could be raised by parties at a hearing to those discussed in the request for the meeting. Many parents may not be aware of serious violations of IDEA at the outset of the dispute, especially if they do not have attorneys. Barring unrepresented and/or ill-informed parents from raising potentially vital issues seems to exalt form over substance. The language may also inhibit hearing officers from raising significant denials of IDEA rights – no matter how egregious – unless the parent had raised it before the hearing. A provision added to the bill as reported allows for amendment of a parent's due process complaint, but with limitations and complications that would make it unlikely that parents not represented by counsel could avail themselves of the procedure.

Finally, the section would prohibit hearing officers from finding for the parent based on procedural violations unless it could be shown that the violation at issue had resulted in denial of FAPE, a substantial impairment of parents' participation, or a deprivation of educational benefits. This provision must be viewed in context; the National Council on Disability's 2000 report, Back to School on Civil Rights amply documented that in many states – including New York – procedural safeguards are often ignored. The limitation of relief for procedural violations would render the safeguards merely precatory language.

The requirement that a general-education teacher attend IEP meetings for students who are or might be receiving services in the general-education environment is one example of a procedural requirement with important substantive educational implications. The provision was added in 1997 to ensure that strategies for integration and inclusion were developed based on knowledge of the issues and circumstances likely to arise in the general-education environment. To show that the failure to include such personnel had resulted in denial of FAPE, a parent would have to undertake the burden of demonstrating what their contribution would have been. In addition to undermining compliance with the law, the provision will expand the scope and complexity of the due process hearing. Instead of resolving the relatively straightforward issue of whether there has been compliance with IDEA, hearings will require more time-consuming fact-finding on the substantive impact of non-compliance.

Changes in Evaluation of English Language Learners

We are concerned that provision 614(b)(3) weakens the requirement that evaluations be provided in a child's native language. The current language of the provision requires evaluations to be provided in the child's native language or other mode of communication "unless it is clearly not feasible to do so." The proposed language states that evaluations are required to be provided "to the extent practicable, in the language and form most likely to yield accurate academic and developmental data."

This language contains a standard that is vague and does not offer appropriate guidance to schools struggling to meet the educational needs of students with limited English proficiency. The proposed language allows the professionals involved with each child to determine for themselves the language "most likely to yield accurate academic and developmental data." It has been shown by voluminous psychological and educational data that the most accurate academic and developmental data results from bilingual evaluation including the child's native language. One crucial purpose of the bilingual evaluation

is to determine language dominance. The proposed standard would seem to require a determination *before* the evaluation that requires information developed *through* the evaluation.

An increasing number of school districts in urban and rural areas are confronted with growing populations of students whose first language is not English. These students are often inappropriately classified because of their failure to be evaluated accurately due to language barriers. One study conducted in Riverside, California found that bilingual Hispanic students whose IQ's were tested in English comprised thirty two percent of the students identified as mentally retarded. Over sixty percent of these students had no indicators of cognitive impairment other than their low IQ test scores.

There must be a clear, consistent standard for all schools to follow with regard to testing non-native English speakers. Evaluating non-native English speakers is a sensitive and complex undertaking that requires consideration of a number of factors. We believe that the requirement that evaluations be provided in the child's native language "unless clearly not feasible" is the minimum standard to which all schools should adhere.

Thank you for your careful consideration of these comments.

Very truly yours,

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President

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