

To: Conferees to H.R. 1350
From: Center for Law and Education, National Council on Independent Living,
National Coalition of Parent Centers
Re: **Comments and Recommendations to Conferees re: Reauthorization of the Individuals with Disabilities Education Act**¹
Date: November 1, 2004

PART A – GENERAL PROVISIONS

Short Title; Table of Contents; Findings; Purposes (Sec. 601)

Sec. 601 (c) FINDINGS:

HR 1350 (Senate) and (House), § 601(c)(12) (B) DELETE reference to minority children being “served *in* special education”

§601(c) (12) (E) DELETE use of verb “to place” when used to address disproportionately high number of racial minority students receiving special education. [“have *placed*...minority students *into special education*.”]

COMMENT: Technical correction. Special education is not a place; nor is it a curriculum. Despite recognition at 601(c) (5) (C) that special education is “a service” for children in need of specialized instruction, “rather than a place where they are sent,” inappropriate language of “place” continues to be used in the Act. Here while addressing the issue of racial minority students being disproportionately over-identified as needing special education, the statutory language exacerbates the wrong for all children by referring to these students being “served in” or “placed in” special education as if special education were a curriculum or a placement. It is neither. Rather under the Act, special education is defined as “specialized instruction” that must follow the child so as to enable him/her to participate in the general curriculum with his/her non-disabled peers to the maximum extent possible.

The issue of over-identification or misclassification of minority students becomes no less egregious by using the proper terminology if the determination of eligibility is incorrect.

SEC. 602 DEFINITIONS

- **Assistive Technology Device**

OPPOSE HR 1350 (Senate) § 602(1), which amends current law by adding the following limitation to the definition of assistive technology device: “The term does not include a medical device that is surgically implanted, or the replacement of such device.”

COMMENT: This amendment is unnecessary and myopic. First, the term “medical device” is ambiguous, as is the limiting descriptor “*surgically implanted*, or the replacement of such device.” Will

¹ This document was prepared using private funds.

we once again have to litigate the claims of children with tracheotomy tubes, gastrointestinal feeding tubes or other port-a-casts whether for chemotherapy, iron infusions, or other medication, or of children with colostomies that may need to be tendered to during the school day? Are these children in the clear or, once again will they and their parents be challenged when they request assistance, readjustment or replacement of a dislodged vent or port-a-cast by a nurse, aide or training of teachers in emergency procedure. This represents a significant retreat from longstanding services and rights.

And second, are we so ready to decide without knowledge or informed consideration that a subdural chip implant that interfaces with computer technology but may require monitoring and perhaps, even assistance, should be ruled out –even if it will enable a child who is a quadriplegic to move, to communicate, to learn and to demonstrate learning more easily, and to attend public school?

- **Child with a Disability**

OPPOSE amendment to **HR 1350 (House) § 602(3)** providing that “students who have not been diagnosed by a physician or other person certified by a State health board as having a disability (as defined under the Act) should not be classified as children with disabilities for purposes of receiving services under that Act.”

COMMENT: First, a disability is not necessarily related to a medical condition, and therefore, it is inappropriate to require a “diagnosis” of disability by a physician or other person certified by a State health board. Under existing law, evaluations must be conducted by *trained and knowledgeable persons* who are not necessarily physicians or medically certified psychologists. 20 U.S.C. §614(b)(3)(B)(ii). Further, the regulations require that the child is assessed in all areas related to the suspected disability, including, *if appropriate*, health, vision, hearing, social and emotional status. The purpose of conducting an evaluation of a child’s physical health is, in part, to rule out any physical condition that may be interfering with the child’s learning. While medical personnel may rule out medically related concerns, they do not necessarily have the basis of knowledge to make determinations about whether or not students have disabilities, in particular, specific learning disabilities that make them eligible for special education.

- **Core Academic Subject**

Support HR 1350 (Senate) §602(4) that amends current law by adding the term “core academic subject” that is defined to have “the meaning given the term by section 9101(11) of the Elementary and Secondary Education Act of 1965.”

- **Free Appropriate Public Education (FAPE)**

OPPOSE HR 1350 (House) §602(8)(C) that amends the current definition of the term “free appropriate public education” by adding to subsection “(C) include an appropriate preschool, elementary, or secondary school education in the State involved” the following language: “that is reasonably calculated to provide educational benefits to enable the child with a disability to access the general curriculum” **DELETE amended language.**

COMMENT: In this era of accountability, the right to FAPE (in spite of Rep. Case’s unfortunate amendment under H.R. 1350) has arguably never been more important. As defined by statute, FAPE guarantees students with disabilities a free education consistent with the State’s prescribed preschool, elementary and secondary curriculum that is aligned with the State education agency’s standards (i.e., the

same standards established for ALL students by NCLB), and teaching through specialized instruction, support and related services provided in a manner consistent with the child's IEP. This amendment misrepresents the U.S. Supreme Court's ruling in *Rowley v. Hendrick Hudson Central School District*, which was read in conjunction with the statutory definition which "almost as a checklist" requires the school district to provide each child with a disability a public education without cost to the parent, in accordance with the prescribed curriculum, consistent with state educational agency standards, and through an individualized education program. If this dangerous amendment is enacted, the IDEA will be in conflict with the single accountability system required by NCLB, in particular, the required content and achievement standards. Such amendment will invite litigation under Section 504 of the Rehabilitation Act, the ADA, and the federal and state constitutions.

- **Highly Qualified**

SUPPORT HR 1350 (House) §602(9) that adds the term "highly qualified" that is defined as having the same meaning as that term in section 9101 of the ESEA of 1965.

SUPPORT the intent of HR 1350 (Senate) §602(10)(A) to the extent that it seeks to ensure that teachers, including those teachers providing specialized instruction, who teach core academic subjects must be "highly qualified" as that term is defined for all teachers.

COMMENT: Encourage pre-service and professional development that will ensure that all public school teachers are highly qualified in the core content areas which they teach and, are prepared to teach diverse learners, including the vast majority of students with disabilities. Also recognize the need for special educators, as specialists in consultative roles, and as educators with the kind of special knowledge, skills and training necessary teach specialized instruction in particular to students with low incident disabilities.

- **Limited English Proficient**

SUPPORT HR 1350 (Senate) §602(17) that amends current law by adding the term "limited English proficient" to have the meaning given the term in section 9101(25) of the Elementary and Secondary Education Act of 1965.

- **Parent**

SUPPORT NEED TO AMEND BUT REVISE/CLARIFY HR 1350 (Senate) §602(22) which at subsection (A)(i) amends the term "parent" to mean (I) a natural or adoptive parent of a child; (II) a guardian (but not the State if the child is a ward of the State);(III) *an individual acting in the place of a natural or adoptive parent*, including a grandparent, stepparent, or other relative with whom the child lives or an individual who is legally responsible for the child's welfare; or (IV) except as used in §615(b)(2) and §639(a)(5), an individual assigned under either of those sections to be a surrogate parent;

This subsection is further amended to address specifically homeless children and children in foster care: "and (ii) in the case of a homeless child who is not in the physical custody of a parent or guardian, includes a related or unrelated adult with whom the child is living or other adult jointly designated by the youth and the local educational agency liaison for homeless children and youths (designated pursuant to section 722(g)(I)(J)(ii) of the McKinney-Vento Homeless Assistance Act), in addition to other individuals permitted by law. At subsection (B) "parent" " includes a foster parent" if –(i) the natural or adoptive parents' authority to make educational decisions on the child's behalf has been extinguished under State

law; and (ii) the foster parent (I) has an on-going, long-term parental relationship with the child, (II) is willing to make the educational decisions required of parents under the Act.

ADD: All persons “acting in the place of a parent pursuant to subsection (A)(i)(III) and (IV), subsection (ii) and subparagraph (B) must participate in State sponsored training about the rights of the child and the responsibilities of the parent, including a surrogate parent. 20 U.S.C. §1415(b)(2); 34 C.F.R. §300.515(b), (c)(2)(iii).

COMMENT: This definition is somewhat confusing. Subparagraph (III) broadly defines a parent as “an individual acting in the place of a natural or adoptive parent *including* a grandparent, stepparent, or other relative with whom the child lives or an individual who is legally responsible for the child’s welfare.” The term “includes” is defined by regulation to mean that “the items named are not all the possible items that are covered, whether like or unlike the ones named.” 34 C.F.R. §300.14. This suggests that this clause, subsection (A)(i)(III), would incorporate both subsection (ii) the individual with whom a homeless child is living and a foster parent as more specifically conditioned upon the terms set out in subparagraph (B), which arguably would more appropriately be promulgated through regulation. In any event, what needs to be clarified is that every child who is not living with a parent or person acting in place of the parent who has a legal responsibility for the child, who may or may not be a ward of the State as that term is defined by state law, ought to be assigned a surrogate parent pursuant to 20 U.S.C. §1415(b)(2). If a child’s parents or guardian are not known or cannot be located after reasonable efforts, or if the child is a ward of the state (as defined by State law), a surrogate parent must be appointed to fulfill the role otherwise played by parents under the IDEA. The surrogate parent must have the knowledge and skills to ensure that the child will be adequately represented. Thus, while any of the persons acting in the place of a natural or adoptive parent who fall within subsection (III), and (IV), subsection (ii), or subparagraph (B) (foster parents who meet the prescribed conditions), may be appointed as “surrogate parents,” the State has an obligation to ensure that any “person acting as parent” “has knowledge and skills that ensure adequate representation of the child.” Once appointed, the surrogate is responsible for representing the child in all matters related to Part B and part C rights. 20 U.S.C. §1415(b)(2).

- **Related Services**

OPPOSE HR 1350 (Senate) §602(25) that amends the definition of related services by expressly excluding “...a medical device that is surgically implanted, or replacement of such device.

COMMENT: See above comment addressing “assistive technology device.”

- **Ward of the State**

OPPOSE HR 1350 (Senate) §602(36) that amends the Act by defining the term a “ward of the State” as “a child who, as defined by the State where the child resides, is a foster child, a ward of the State or is in the custody of a public child welfare agency.”

COMMENT: A “ward of the state” is necessarily a term that is defined by state law. The proposed definition is confusing; on one hand, it is limiting and on the other, over-inclusive. Some children are in the physical custody of the state, e.g., juvenile detention facilities, but their parents are neither unknown nor unavailable, and because their legal rights to educational decision-making have not been terminated, the child is not considered a “ward of the State” for *educational* purposes. Because the status of such

children and the rights of their parents are determined on the basis of state law, in some states children are not considered wards of the state requiring appointment of a surrogate parent, as their parents are available and their rights to make educational decisions for their children have not been terminated.

SEC. 604 ABROGATION OF STATE SOVEREIGN IMMUNITY

SUPPORT and retain State sovereign immunity as set forth in HR 1350 (Senate) §604. This provision is a prerequisite for holding States accountable.

COMMENT: In *Dellmuth v. Muth*, 491 U.S. 223, 325 (1989), the Supreme Court determined that Congress had not acted clearly to abolish the states' Eleventh Amendment immunity under the Education for Handicapped Act (EHA). Congress subsequently amended the statutes in 1990 to expressly address the concerns raised by the *Dellmuth* decision and to explicitly abrogate Eleventh Amendment immunity.

SEC. 607 – REQUIREMENTS FOR PRESCRIBING REGULATIONS

OPPOSE REQUIREMENTS LIMITING PRESCRIPTION OF REGULATIONS --HR 1350 (House) §607(a) states that the Secretary of Education “may issue regulations under this Act only to the extent that such regulations are *reasonably* necessary to ensure there is compliance with the specific requirements of the Act.” **HR 1350 (Senate) §607(a)** similarly allows the Secretary to issue regulations “only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements of the Act.”

COMMENT: The provision in both bills is unreasonably restrictive and may result in questions being raised about current regulations, and be a source of confusion and ambiguity for OSERS in monitoring and enforcing the Act, including through leadership and guidance.

REVISE HR 1350 (Senate) §607(b)(1) re/Protections Provided to Children. The proposed bill amends this longstanding provision that was explicitly designed to protect children with disabilities from politicization. Under current law this subsection reads: “the Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this Act that would procedurally or substantively lessen the protections provided to children with disabilities under this Act, as embodied in the regulations in effect July 20, 1983 (particularly as such regulations relate to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluation personnel at individualized educational program meetings, or qualified personnel), except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation.”

HR 1350 §607(b)(1) amends this provision by inserting “(1) violates or contradicts any provision of this Act; and” prior to (2) procedurally or substantively lessens the protections...”

REVISE by changing the conjunction “and” to “or” after subparagraph (1) so that both conditions do not have to be met in order to bar a weakening amendment.

OPPOSE HR 1350 (Senate) §607(c) changes in the public comment period on any regulation proposed under Part B or Part C from “at least 90 days” to “not more than 90 days”.

OPPOSE proposed amendment in HR 1350 (House) §607(c) that would reduce the public comment period on any regulation proposed under Part B or Part C from “at least 90 days” to “at least 60 days.”

COMMENT: Public comment on regulations is critical to accountability. Particularly today, as IDEA moves to align more closely with NCLB, the issues are complex and require appropriate time for review and comment. The importance of regulations promulgated for the purpose of providing guidance, direction and clarification, is too great for the process of review, consideration and comment to be thwarted by unduly rigid and unnecessary timelines.

SEC. 608 STATE ADMINISTRATION

AMEND subsection (b) Support and Facilitation of both HR 1350 (House) §608 and HR 1350 (Senate) §608 by **adding** after “challenging State academic achievement standards” the phrase “and other non-academic standards consistent with State standards or students’ needs as recognized by their IEPs.”

COMMENT: The IDEA requires that each student with a disability receive FAPE through special education and related services individually designed to address the student’s disability related educational and non-educational needs that impede the student in learning what all students are expected to learn. Without this clarification, this provision is likely to be misunderstood and used to bar, in particular, State rules, regulations, and policies specific to the provision of supports necessary to enable students to meet what may be separate social, emotional and/or functional goals that may be independent of academic standards set by the State.

SUPPORT amendment re/ paperwork study in HR 1350 (House) §608 requiring the Comptroller General to: conduct (1) multiple reviews, to be completed no later than two years after the date of enactment of the Act, on paperwork, disability definitions, distance learning, professional development, and limited English proficiency; and to issue (2) a report to Congress to be completed no later than 2 years after the date of enactment of the Act, on resulting paperwork and strategies for reducing burdens on teachers, related services providers, and school administrators. **OPPOSE HR 1350 (House) §617(e)** that grants waivers of paperwork requirements under this part for a period not to exceed 4 years with respect to not more than 10 States based on proposals submitted by States for addressing reduction of paperwork and non-instructional time spent fulfilling statutory and regulatory requirements.

OPPOSE HR 1350 (Senate) §608(b) that provides 15 states an opportunity to participate in a pilot program that will allow them to obtain waivers from the Department of Education to reduce paperwork.

COMMENT: Granting waivers to states without defining “paperwork” and without differentiating between instructional and extraneous paperwork, is irresponsible – especially at this critical time when the focus is on aligning IDEA with NCLB. A GAO study defining the nature and scope of “paperwork” and substantiating the needs, to the extent it actually exists, ought to be a prerequisite to any consideration of the Senate proposal. The same GAO study ought to address the issue of “paperwork” (appropriately defined to ensure improved educational outcomes) in the context of its recently released report on State Compliance and Enforcement of IDEA.

PART B – ASSISTANCE FOR EDUCATION OF ALL CHILDREN WITH DISABILITIES

Sec. 611 – Authorization; Allotment; Use of Funds; Authorization of Appropriations

Sec. 612 – State Eligibility

Sec. 613 – Local Educational Agency Eligibility

Sec. 614 – Evaluations, Eligibility Determinations, Individualized Education Programs, and Educational Placements

Sec. 615 – Procedural Safeguards

Sec. 616 – Monitoring, Technical Assistance, and Enforcement

Sec. 616 – Withholding and Judicial Review

Sec. 617 – Administration

Sec. 618 – Program Information

Sec. 619 – Preschool Grants

Sec. 611 AUTHORIZATION; ALLOTMENT; USE OF FUNDS; AUTHORIZATION OF APPROPRIATIONS

MAXIMUM STATE GRANTS - make mandatory state obligation to provide all eligible children 3-5 a FAPE, and **DELETE** conditional reference to “if the State was eligible for a grant under section 619 (for providing FAPE to eligible children 3-5) at HR 1350 (House) and (Senate) §611(a)(2)(A)(i). See also HR 1350 (House) and (Senate) §611(d)(2). **DELETE reference to “3 through 5 and” at HR 1350 (House) and (Senate) §612(a)(1)(B).**

COMMENT: Given the research concerning the importance of early childhood education, States should be compelled to make available FAPE to all preschool age children with disabilities who are from 3 through 5 years old.

SUPPORT provisions in the funding formula and allocation of monies under both HR 1350 (Senate) and HR 1350 (House) that are designed to limit fiscal incentives for over-identifying and, in effect, misclassifying students as having disabilities. This practice is at least, in part, responsible for the disproportionate identification of racial minority students and students from low-income families as having disabilities and being in need of special education.

STATE – LEVEL ACTIVITIES –

SUPPORT HR 1350 (Senate) §611(e)(1)(A)(i) that increases the minimum set-aside for state administration to \$800,000 or the amount allowed for fiscal year 2003, whichever is greater, adjusted for inflation.

SET - ASIDES

OPPOSE HR 1350 (Senate) §611(e)(2)(A) that limits the amount a state can set-aside for other state-level activities to not more than 10 percent of the overall Part B allocation to the state for fiscal years 2004 and 2005.

COMMENT: Placing a 10% limit on the amount that a state can set aside for other state level activities will preclude the state from effectively ensuring that the needs of students with disabilities are addressed in order to improve student achievement and outcomes. Funds can and should continue to be used to support innovative programs, projects and activities designed to improve student learning and instruction, and to educate and empower the parents of students with disabilities whose participation is critical to improved achievement and student outcomes. Such funds can and should be used to prepare students for transition, with a focus in particular, on helping them develop a voice to represent themselves and their peers while preparing for post secondary education, employment opportunities, and active citizenship.

REQUIRED ACTIVITIES

Revise HR 1350 (Senate) §611(e)(2)(B) that requires state funds be used for monitoring, enforcement, and complaint investigation; to establish and implement mediation, including costs of mediators and support personnel; to support the State protection and advocacy system **DELETE “.”** after “system” **ADD:** “and other community-based non-profit legal services organizations serving students with disabilities from *low-income families*,” to advise and assist parents in the areas of – dispute resolution and due process, voluntary mediation, and opportunity to resolve complaints, **ADD:** “distinguishing legal from non-legal work that the Parent Training Centers, as defined under this Act, should be funded under this part to perform in conjunction with their parent activities.”

OPPOSE HR 1350 (House) §611(e)(4) that requires the use of any funds not used for providing direct services or state administration to be used for technical assistance and personnel development, administrative costs of monitoring and complaint investigation, to establish and implement mediation and *voluntary binding arbitration* processes, to help LEAs address personnel shortage, to contribute toward activities designed to meet the performance goals established by the State, to support paperwork reduction activities, “to develop and maintain a comprehensive, coordinated, **prereferral educational support system for students in kindergarten through grade 12** (with a particular emphasis on students in kindergarten through grade 3) who are not enrolled in special education but who need additional academic and behavioral support to succeed in a general education environment.”

COMMENT: Students with disabilities, their parents and advocates oppose the use of voluntary binding arbitration as inconsistent with a highly prescriptive statute providing eligible students with disabilities an entitlement to a free appropriate public education. In addition, when such disproportionately high numbers of students with disabilities across the nation are failing to meet their respective state achievement standards, it is an inappropriate use of limited funds to cover the costs of educating non-disabled students for K – 12 who are determined not to need nor will they be provided special education and related services pursuant to an individualized education program, but nor will they receive the protections of the Act.

SUPPORT HR 1350 (Senate) §611(e)(2)(C) that permits additional state-level activities, including providing technical assistance, personnel preparation, and professional development, assisting LEAs in providing positive behavioral interventions and supports and mental health services; improving the use of technology in the classroom; supporting the development and use of technology, including universally designed technologies, to maximize accessibility; development and implementation of transition programs; support for capacity building activities; support for alternative programming for children, including children in charter schools; and support for the provision of appropriate accommodations, including the provision of alternate assessments in accordance with sections 1111(b) and 6111 of the ESEA of 1965 (NCLB).

HIGH COST SPECIAL EDUCATION AND RELATED SERVICES.

SUPPORT HR 1350 (Senate) §611(e)(3)(A) that requires States to use 2% of the State’s grant to assist local educational agencies to address the needs of “high-need” children with disabilities, who are those students receiving FAPE that costs more than 4 times the national average per pupil expenditure, about \$7500 in FY2002-2003.

COMMENT: The Senate bill unlike the House bill [HR 1350 §611(e)(3)] that authorizes 40% of the money received for state-level activities to be used to support LEAs in providing high cost special education and related services, mandates use of funds for this purpose. Students with disabilities, their parents and advocates support this mandatory use of funds to contribute toward the high costs of special education and related services which should help reduce backlash at the local school and school district levels—especially at this time when No Child Left Behind is being used in conjunction with IDEA and Section 504 to focus on the critical need to improve educational achievement and educational outcomes for these students, as all other students.

SEC. 612 STATE ELIGIBILITY

- **IN GENERAL**

OPPOSE proposed language at HR 1350 (Senate) §612(a) and HR 1350 (House) §612(a) that weakens the existing mandate that each State “demonstrates to the satisfaction of” the Secretary that it has in effect policies and procedures in order to be eligible for a grant under Part B with “provides assurances to” the Secretary at HR 1350 (Senate) §612(a); and with “reasonably demonstrates to” the Secretary...at HR 1350 (House) §612(a).

COMMENT: Both the Senate and House versions weaken the requirement that each State demonstrate – interpreted by ED as requiring submission of documentary evidence to support a procedural checklist-that it has policies and procedures in effect. Committee reports indicate that these targeted changes were made to eliminate these administrative procedural requirements. See S.Rep.No. 185, 108th Congress, at 14 (Nov. 3, 2003); H. Rep. No. 77, 108th Congress, at 94 (April 29, 2003). Both the Senate and House changes reduce State accountability at a time when all efforts ought to be on ensuring that students with disabilities are not being left behind. The recent GAO Report underscores the lack of State compliance and the need to ensure that IDEA provisions are properly aligned with the No Child Left Behind Act.

- **FREE APPROPRIATE PUBLIC EDUCATION**

AMEND HR 1350 (House) §612(a)(1)(B)(ii) and HR 1350 (Senate) §612(a)(1)(B)(ii). Despite the purported intent to align IDEA with NCLB (the single accountability system for ALL children and youth) and to improve educational outcomes for ALL, no changes are made in the statute to delete the exception for children with disabilities (some as young as 12-15 years) who are convicted as adults under State law and incarcerated in adult prisons from being denied FAPE based on state law.

- **STATE FLEXIBILITY**

OPPOSE HR 1350 (Senate) § 612(a)(1)(C) that permits a State that provides early intervention services under Part C to a child who is eligible for pre-school services under section 619 of Part B, **NOT** to provide such child with a free appropriate public education.

COMMENT: While the IDEA Amendments of 1997 authorized the continuance of early intervention services through an IFSP with the agreement by parents and school personnel, research does not support –as this proposed provision would -- excluding an educational component as part of that continuing IFSP. Such position is contrary to efforts to improve Headstart and to ensure all students, including those who are poor and/or with disabilities receive an educational component consistent with FAPE to improve their school readiness. While parents of an individual child not of compulsory school age may, in exercising their constitutional right to raise their child, elect not to partake of these services, it does not alter the obligation of the school district and the State to ensure that programs serving children 3 years of age and older must provide FAPE. Without this protection, many parents will elect to keep their children under IFSPs that do not provide for FAPE –contrary to research findings pertaining to early childhood development. This change in the law will also encourage the development of a dual system of preschool –one for low-income parents who will need to move their children to the public preschool for children with disabilities to receive the educational component and one for wealthier parents who will keep their children under an IFSP but will contract privately for educational services.

- **CHILDREN IN PRIVATE SCHOOLS**

SUPPORT PROVISION §612(a)(10)(A)(i) of both HR 1350 (House) and HR 1350 (Senate) clarifying that “to the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children...” the Senate bill adds after “secondary schools” the clarifying phrase “in the school district served by a local educational agency” while the House adds the phrase “in the area served by such agency.”

OPPOSE provisions of both HR 1350 (House) §§612(a)(10)(A)(v), (vi) and HR 1350 (Senate) §612(a)(10)(A)(vi) authorizing a proportionate share of federal funds under the IDEA for providing direct services to parentally placed children with disabilities enrolled in private schools directly or through contracts with public and private agencies, organizations and institutions that are **NOT** required to meet the standards of the State and to otherwise comply with the requirements of the IDEA, including, for example, regarding highly qualified teachers and other persons providing related services.

CLARIFY that students with disabilities who are placed consistent with parental choice in private schools do not have an individual entitlement to receive direct services.

- **PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY**

SUPPORT HR 1350 (House) §612(a)(10)(C)(iv)(I) setting forth the exception to the notice requirement for cost reimbursement and establishing the standards that the cost reimbursement “*shall not be* reduced or denied for failure of the parent to provide such [required] notice, if (consistent with the standard established by current law), “compliance with clause (iii)(1) *would likely result in physical harm to the child...*”

OPPOSE HR 1350 (House) § 612(a)(10)(C)(iv)(II) and HR 1350 (Senate) §612(a)(10)(C)(iv)(II) that leave it to the “*discretion of a court or a hearing officer*” to determine that the cost reimbursement not be reduced or denied for parent failure to provide notice if –(aa) the parent is illiterate or cannot write in English; or (bb) compliance with clause(iii)(I) *would likely result in serious emotional harm to the child. Revise this paragraph consistent with current law by making these two exceptions non-discretionary under HR 1350 (House) §612(a)(10)(C)(iv)(I) above.*

OPPOSE HR 1350 (SENATE) §612(A)(10)(C)(IV) that uses the standard “*would likely have resulted in physical or serious emotional harm to the child.*” This standard would require a determination based on looking back in time trying to speculate what the outcome likely would have been instead of being required to project as if in the shoes of the parent at the time the decision were made.

- **COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT.**

ADD/RETAIN current law, 20 U.S.C §1412(a)(14), requiring the State to have in effect a comprehensive system of personnel development that is designed to ensure an adequate supply of ADD: “highly” qualified special education, regular education, and related services personnel to meet the purposes of the Act,

COMMENT: Given the difficulty coming to terms with what is a highly qualified teacher of special education and the significant need for core subject area teachers who are highly qualified in their particular content area and knowledgeable about utilizing different strategies and effective instruction to teach diverse learners, including those with disabilities, it is especially odd that the CPSD that has been required for 30 years would be deleted, instead of revitalized and reformed, as necessary.

- **PERSONNEL STANDARDS**

SUPPORT HR 1350 (SENATE) §612(a)(14)(A) requiring the State to establish and maintain standards to ensure that personnel necessary to carry out the Act are appropriately and adequately prepared and trained, “including that those personnel have the content knowledge and skills to serve children with disabilities.”

SUPPORT HR 1350 (House) §612(a)(14)(B)(i) and (ii) requiring that “special educators who teach in core academic subjects are” [as all other teachers] “highly qualified in those subjects;” and meet standards consistent with any State – approved or recognized certification, licensing, etc. or other comparable

requirements that apply to the professional discipline in which those personnel are providing special education or related services...

SUPPORT HR 1350 (Senate) §612(a)(14)(B)(i)(ii) requiring that related services and paraprofessionals meet standards consistent with State approved or recognized certification, licensing, registration,...and ensure that related services personnel who deliver services in their discipline or profession . . .have not had certification or licensure requirements waived..."

SUPPORT HR 1350 (Senate) §612(a)(14)(C)(i) providing that based on applicable standards for special education, special education teachers in the state shall be *highly qualified* [but, as previously proposed, consistent with NCLB for those teaching students core academic subject, not based on HR 1350 [Senate]§602 (10)(A) that should be DELETED] not later than the end of the 2006-2007 school year.

OPPOSE HR 1350 (Senate) §612(a)(14)(C)(ii) DELETE as unnecessary.

SUPPORT HR 1350 (Senate) §612(a)(14)(C)(iii) adding a provision that when an LEA responds to a request under the "parents' right to know" provision of NCLB, the LEA must include information demonstrating that special education teachers meet the certification or licensure requirements under IDEA and the definition of highly qualified under IDEA –which as proposed by our comments would be consistent with NCLB for those special education teachers who teach students with disabilities core academic subjects

OPPOSE HR 1350 (House) and HR 1350 (Senate) deletion of current statutory law at 20 U.S.C. §1412(a)(15)(B)(ii) requiring that to the extent the standards being used in the State are not based on the highest requirements in the State applicable to the profession or discipline, the State is taking steps to require retraining or hiring of personnel that meet appropriate professional requirements in the State. See also 20 U.S.C.§1412(a)(14) CSPD.

SUPPORT HR 1350 (Senate) §612(A)(15)(D) requiring LEAs in each state to take measurable steps to recruit, hire, train, and retain *highly qualified* personnel. This provision replaces the "good faith requirement" under current law and raises the level of obligation of the LEA. [Note: definition of highly qualified as proposed by our comments is consistent with HR 1350 (House) §602(9) re/special educators teaching core academic subjects; also HR 1350 (House) §612(A)(14)(B)(i) [special educators teaching academic core subjects], (ii) [special education teachers, including those who teach core and those who do not] and HR 1350 (Senate) §612(a)(14)(B)(i)(ii) re/related services personnel and paraprofessionals.

OPPOSE HR 1350 (Senate) §612(a)(14)(E) Rule of Construction that precludes parents whose children with disabilities are not provide "highly qualified" special educators who teach core academic subjects or a special educator who provides consultative services and/or direct specialized instruction to the student but does not meet the state requirements, or providers of related services who meet the required standards for the discipline from bringing an action under the Act for failure of a particular SEA or LEA staff person to be highly qualified.

COMMENT: This rule of construction is an inartful attempt to limit state and/or school district liability, and invites challenge as its premise is inconsistent with the rest of the statute. A child with a disability who is constructively denied a public education consistent with state standards because her assigned math teacher lacks the knowledge to teach algebra and geometry and/or how to teach students with learning disabilities when the student is provided no other specialized instruction and

support services necessary to enable her to access the curriculum to learn what the other students are expected to learn in the general curriculum, will indeed have a strong basis for challenging a denial of FAPE under IDEA – despite this rule of construction - as well as for bringing an action based on a denial of her state constitutional right to an adequate public education, the non-discrimination provisions of Section 504, the ADA, and the Fourteenth Amendment.

- **PERFORMANCE GOALS AND INDICATORS**

SUPPORT HR 1350 (Senate) § 612(a)(15) (A) that amends current law to require state performance goals for students with disabilities to be “the same as the State’s definition of adequate yearly progress” under NCLB. Also the State is required to address the **graduation rates** of students with disabilities, in addition to drop-out rates and other State identified factors.

- **PARTICIPATION IN ASSESSMENTS (Sec. 612(a)(16))**

SUPPORT HR 1350 (Senate) §612(a)(16) *but REVISE* to read as follows: “(A) In general. All children with disabilities are included in the State’s single system of accountability required by Section 1111 of the Elementary and Secondary Education Act of 1965 as amended by the NCLBA, including by participating in all large scale State and districtwide assessments, with appropriate accommodations when necessary, as determined by the student’s IEP team, or through an alternate assessment developed by the State, particularly for those students unable to participate in the regular assessment, even with accommodations.”

SUPPORT AS MODIFIED HR 1350 (HOUSE AND SENATE) §612(A)(16)(B) The bills are virtually the same but the House bill states: “developed and *implemented* guidelines for the provision of accommodations” that under the Senate bill, must be “appropriate”. After developed: ADD “and implemented” and before “accommodations” ADD “appropriate”.

SUPPORT HR 1350 (SENATE) §612(a)(16)(C)(ii) and (iii).

Support HR 1350 (Senate) §612(a)(16)(D).

Support HR 1350 (Senate) §612(a)(16)(E)

COMMENT: The proposed changes are consistent with the assessment and reporting requirements under NCLB, including the regulations promulgated on December 9, 2003, to address assessment of students with significant cognitive disabilities

- **DISPUTE RESOLUTION**

OPPOSE HR 1350 (House) §612(a)(17) requiring that the State have in effect “systems of mediation and *voluntary binding arbitration* pursuant to section 615(e).”

COMMENT: Binding arbitration –whether voluntary or not, is inconsistent with the principle of law that the substantive rights under the IDEA belong to the child. Just as courts have ruled that parents cannot represent their own children in courts of law, because the rights belong to the child, the same is true with respect to arbitration.

- **STATE ADVISORY PANEL**

SUPPORT as revised HR 1350 (Senate) §612(a)(20)(B) and (C) which attempts to ensure greater diversity on the panel. However, without guaranteed proportional representation for children and students with disabilities and their parents, their voice is diluted by adding all the other representatives of the welfare agency, of the juvenile justice system, the higher education system, and state and local officials carrying out activities under McKinney-Vento Homelessness Assistance Act, school administrators, teachers, representatives of disabled children who are wards of the state, in foster care, advocates of children with disabilities in military families. **Revise §612(a)(20) to specify that of the 51% of the panel membership that must consist of individuals with disabilities and parents of children and young adults with disabilities from 0-26 years, a minimum of 25% of said group shall be high school and post secondary education age students with disabilities up to 26 years of age.**

COMMENT: Disability remains one of the few areas in which those who are the presumed beneficiaries of a Civil Rights Act, here the IDEA, are invisible with limited, if any voice. Given the full range of disabling conditions, it is hard to fathom a reason why those who are most knowledgeable and most affected by the Act, its policies and practices, have been given so minimal a voice. The State Advisory panel could become an authentic source for student learning, growth, skill building and leadership development while tapping a virtual pool of knowledge and experience and expertise.

- **Instructional Materials**

SUPPORT HR 1350 (Senate) §612(a)(22) concerning Access to Instructional Materials

- **Prohibition on Psychotropic Medication**

SUPPORT HR 1350 (House) §612(a)(25) requiring that school personnel be prohibited from requiring a child to obtain a prescription for certain substances as a condition for attending school or receiving services. Clarify that this prohibition is not intended to quash school personnel from referring students for evaluation, from engaging in conversations with parents about their children’s learning and in school behavior, or from sharing information with parents about professional lresources.

SEC. 613 LOCAL EDUCATIONAL AGENCY ELIGIBILITY

- **In General**

OPPOSE proposed language at HR 1350 (Senate) §613(a) and HR 1350 (House)§613(a) that replaces the existing mandate that each local educational agency (LEA) “*demonstrates to the satisfaction of*” the *State educational agency* that it meets each of the following conditions...” in order to be eligible for funding under Part B with “*provides assurances to*” the State at HR 1350(Senate) §613(a); and with “*reasonably demonstrates to*” the State at HR 1350 (House) §613(a).

COMMENT: As discussed above at p.9 (above) with respect to SEA eligibility pursuant to current law, 20 U.S.C. §1412(a), both the Senate and House versions weaken the standard for each LEA to meet as a condition of eligibility for IDEA funds. With States, schools and school districts required to make AYP so as to meet each respective State’s proficiency standard by 2013-2014, now is not the time to be

weakening the requirements for ensuring compliance by the schools and school districts. It is clear from the nationwide data that students with disabilities have not been adequately educated in the general curriculum and not been provided opportunities to learn to standards set for all, and thus, have the furthest to go in order to make AYP. See also the most recent GAO Report: *Special Education, Improved Timeliness and Better Use of Enforcement actions Could Strengthen Education's Monitoring System*, September 2004, describing the abysmal state of non-compliance throughout the nation in meeting the IDEA requirements and underscoring the critical need to ensure that IDEA provisions are properly aligned with the No Child Left Behind Act.

- **Treatment of Federal Funds In Certain Fiscal Years**

SUPPORT HR 1350(HOUSE) §613(a)(2)(C)(i) and (ii) that continue the requirements from current law re: Part B funds being used to supplement not supplant other special education funds; that, with limited exceptions subject LEAs to “maintenance of effort”; continue to allow LEAs to count up to 20% of the increase in IDEA grants from one year to the next for “maintenance of effort”; and pursuant to new subsection (ii), if an LEA chooses to use this authority (counting up to 20% of increase for MOE), the LEA must use the local funds to provide additional funding for the Elementary and Secondary Education Act, including but not limited to, programs that address student achievement, comprehensive school reform, literacy, teacher quality and professional development, school safety, before and after-school learning opportunities.

OPPOSE HR 1350(Senate)§613(a)(2)(C)(i) and (ii) permitting LEAs to “treat as local funds” for the purpose of meeting “supplement not supplant” and “maintenance of effort” requirements 8% of their total Part B grants, and once a State received its maximum grant [§611(a)(2)], to use up to 40% of the grant as local funds. Also, **OPPOSE HR 1350(Senate), §613(j)** that provides similar exceptions for states that fund at least 80% of the non-federal costs of educating children with disabilities and states that are the “sole provider of free appropriate public education or direct service” for such children.

OPPOSE HR 1350(Senate) §613(a)(2)(C)(iii) directing use of allowed portions of the 8% and 40% to provide early intervening educational services pursuant HR 1350(Senate) §613(f) to students from pre K to grade 12 who are not determined eligible for Part B programming, services, and procedural protections.

COMMENT: For at least the past 20 years, multiple studies conducted by OSEP, the National Council on Disability, and the GAO, including the most recent GAO Report *Special Education: Improved Timeliness and Better Use of Enforcement Actions Could Strengthen Education's Monitoring System*, September 2004, have found a significant majority of States failing to comply with Part B of the IDEA, in particular, the obligation to provide all children with disabilities an appropriate education in the general education curriculum to enable students to meet standards set for all. Despite poor outcomes for students with disabilities –no longer hidden given the disaggregated data requirements of No Child Left Behind – it is especially ironic that new Part B funds would be deflected away from the intended beneficiaries, instead of being targeted to improve teaching and learning of students a with disabilities so that they may too may learn what all other students are expected to learn, and to provide critically needed professional development to teachers –both special educators who lack content based knowledge in the disciplines they teach - and regular teachers who lack the knowledge and skills to teach diverse learners with disabilities.

- **SEA Authority**

SUPPORT HR 1350(House)§613(a)(2)(C)(iii) that amends current law by mandating that if the SEA “determines that a local educational agency is unable to establish and maintain programs of free

appropriate public education...”, the SEA “shall prohibit” the LEA from treating such funds as local funds. Current law gives the SEA discretion in whether or not to take such action once it determines that an LEA is not meeting the requirements of Part B.

COMMENT: *See immediately prior comment.*

- **PERSONNEL DEVELOPMENT**

Oppose deleting from current law at 20 U.S.C. §1413(a)(3)(B) authorization of LEAs to make contribution and to use the comprehensive system of personnel development in both HR 1350(House)§613(a)(3) and HR 1350(Senate) §613(a)(3).

- **PERMISSIVE USE OF FUNDS**

- **Prereferral and Early Intervening Services**

OPPOSE HR 1350(House) §613(a)(4)(B) and §613(f) [as written] and HR 1350(Senate) §613(a)(4)(A)(ii) and §613(f)[as written] that authorize LEAs to use up to 15% of their Part B grants for prereferral or early intervening services for students from kindergarten through grade 12 who have not been identified as in need of special education. [See comment below at §613(f) proposing alternative provision]

- **High Cost Education and Related Services**

OPPOSE HR 1350(House) §613(a)(4)(C) authorizing LEAs to use such funds “[t]o establish and implement...consortia, or cooperatives for the agency itself, or for local educational agencies working in consortium of which the local educational agency is a part, to pay for high cost special education and related services.”

SUPPORT HR 1350 (Senate) §612(a) that requires States to establish “risk pools” for this purpose. See above, p. 8.

COMMENT: Particularly in light of the effect of NCLB’s disaggregation requirements, we have serious concern that these funds will be used to isolate and re-segregate students with more significant disabilities in separate schools.

- **Supplemental Educational Services for Children with Disabilities in Schools Designated in Need of Improvement**

SUPPORT HR 1350 (House) §613(a)(4)(E) that authorizes use of the above described funds for “reasonable additional expenses (as determined by the local educational agency) of any necessary accommodations to allow children with disabilities, including those eligible only under section 504 of the Rehabilitation Act, who are being educated in a school identified for school improvement [under the ESEA] to be provided supplemental educational services under section 1116(e) of [the ESEA] on an equitable basis.

- **Treatment of Charter Schools and Their Students**

DELETE unlawful limiting clause at HR 1350(House) §613(a)(5) and HR 1350 (Senate) §1350(a)(5) that requires each LEA “to serve children with disabilities attending charter schools in the same manner as it serves such students in its other schools, including providing supplemental and related services on site at the charter school” **DELETE: “when the local educational agency has a policy or practice of providing those services on site to its other schools...”**

COMMENT: “Supplemental educational services” is a technical term from the ESEA which requires schools receiving Title I funds to provide such services when the school has failed to make AYP for three consecutive years. The terms do not change based on a school policy when children with disabilities attend such a school required to provide SES. Related services must also be provided to any child with a disability who needs such services in order to benefit from the specialized instruction she needs to receive effective SES. Such services must be provided whenever they are needed by a student with a disability, they may not be limited based on a determination by a school district deciding that a particular charter school will not be open to students with disabilities. In no case can provision of these services be lawfully conditioned on whether an LEA has a policy that would discriminate and obviously preclude children with disabilities from attending PUBLICLY funded charter schools, thereby denying them comparable, aids, benefits and options available to others.

- **Purchase of Instructional Materials**

SUPPORT HR 1350(House) §613(a)(6) and HR 1350(a)(6)(Senate)

- **Prereferral Services and Early Intervening Services**

OPPOSE HR 1350 (House) §613(f) and HR 1350 (Senate) §613(f) that allows the use of up to 15 percent of funds received under Part B) to develop and implement comprehensive, coordinated, early intervening educational services for students who have *not been identified* as needing special education or related services but “who need additional academic and behavioral support to succeed in the general education environment.” (Senate Sec. 613(f)(1)). Both bills authorize either prereferral support (House) or early intervening services (Senate) for such students in kindergarten through grade 12 (with a particular emphasis on students in grades kindergarten through 3).

COMMENT: Without demonstrated evidence of need, this provision allows LEAs to use already limited IDEA funds to identify and serve students without disabilities from K – 12, without providing them the protections, including non-discriminatory evaluations, IEPs, the limited procedural protections that remain under the law, and the substantive right to receive FAPE, including during any period of exclusion in excess of 10 school days. This is not about incidental benefit, but has the potential to be abused at the expense of students whose disabilities may never be identified nor specifically addressed based on a multidisciplinary evaluation or IEP. **This provision creates an incentive not to identify students with disabilities at a time when many schools and school districts find themselves to be identified as “in need of improvement” under NCLB because the population of students with disabilities, when reported on the basis of disaggregated data, are shown not to have made Adequate Yearly Progress.** This provision will allow schools and school districts to manipulate numbers –to keep the number of students with disabilities in the schools of a district below the minimum “n” required for reporting AYP. Thus, these students “who *“need additional academic and behavioral support to succeed in the general education environment”* (but whose needs are apparently determined NOT to be related to a disability) will be denied their right to receive FAPE thorough IEPs and the right to substantive and procedural protections, including the right to be educated in the least restrictive

environment, and to continue to be educated during any period of exclusion in excess of 10 school days. Furthermore, because these students will not be identified and counted among those with disabilities, they will be averaged into the general student population, allowing schools to stay below the “n” with respect to students with disabilities and not be identified as “in need ion requirement” thus undermining the NCLB and the purported effort to align IDEA with NCLB. Because they are not entitled to the protection of IDEA, those with behavioral issues will be at risk of being transferred to alternative schools and excluded from school with **no overriding right to FAPE**.

While some have suggested revising this section of both bills by limiting the age from K-3, query why this provision should be needed given that children who are experiencing developmental delay –as reflected in physical, cognitive, social and emotional development, may already be provided programming and services under the IDEA. **The proposed §613(f) found in both bills is harmful to children and undermines the legal requirements and policy mandates of the IDEA and NCLB.**

SEC. 614 EVALUATIONS, ELIGIBILITY DETRMINATIONS, INDIVIDUALIZED EDUCATION PROGRAMS, AND EDUCATIONAL PLACEMENTS

- **Parental Consent**

- **Consent for Services**

SUPPORT HR 1350 (House) §614(a)(1)(D)(i)(II) requiring an agency responsible for FAPE to obtain informed consent from the parent a child with a disability before providing special education and related services.

- **Absence of Consent – For Services; Refusal or Failure to Consent**

OPPOSE HR 1350 (House) §614(a)(1)(D)(ii)(II) and HR 1350 (Senate) §614(a)(1)(D)(iii). REVISE HR 1350 (House) §614(a)(1)(D)(ii)(II) as follows: after “...the local educational agency shall not provide special education and related services to the child” **DELETE:** “through the procedures described in section 615.” **ADD:** “. The local educational agency shall utilize mediation and due process procedures under section 615, except to the extent inconsistent with State law relating to parental consent.”

COMMENT: When a child has been determined to be a child with a disability in need of special education, the State and LEA has an obligation to obtain consent from the parent and to provide the child with FAPE. Because a State has the ultimate responsibility for providing all eligible children with FAPE, it must ensure that the policy and procedures are in place to require the LEA to affirmatively use mediation and due process procedures. Through mediation or due process, if needed, the burden would be on the LEA to demonstrate the need for providing the eligible child with special education and related services. Because the right to FAPE belongs to the child, and the denial of specialized instruction and related services in the least restrictive environment could constructively deny the child his constitutional and statutory rights under federal and state law, if necessary the child might require separate representation.

- **Effect on Agency**

OPPOSE HR 1350 (House) §614(a)(1)(D)(ii)(III); HR 1350 (Senate) §614(a)(1)(D)(iii).

COMMENT: The proposed changes to current law seek to eliminate the affirmative obligations of local school districts to ensure that all eligible children in need of specialized instruction are provided a free appropriate public education. The denial of specialized instruction and related services may constructively deny an eligible child their right to education. The proposed amendment cannot exonerate the school district from its responsibility to ensure that each eligible child receives FAPE by shifting the blame to the parent for not consenting to her child’s receiving special education and related services, or for failing to respond to a request to provide the consent.

- **Wards of State**

REVISE HR 1350 (SENATE) §614(a)(1)(D)(iv) that provides that “informed consent shall not be required to obtain informed consent from the parents of a ward of the state for an initial evaluation to determine whether the child is a child with a disability” **ADD:** “or prior to receiving special education and related services” and after “if such child is a ward of the State and is not residing with the child’s parent” **ADD:** “who has not retained educational decision-making under State law” and after “consent has been given by” **ADD:** “a surrogate parent who consistent with 20 U.S.C.§1415(b)(2) ought to be assigned immediately upon the child being considered for evaluation.” **DELETE:** “an individual with has appropriate knowledge of the child’s educational needs, including the judge appointed to the child’s case or the child’s attorney, guardian ad litem, or court appointed special advocate.”

COMMENT: A child who is a ward of the state whose parent is unavailable or has lost their educational decision-making rights is entitled to have a surrogate parent appointed to act in the place of his/her parent. Under the regulations promulgated under IDEA, the State has an affirmative obligation to ensure that the surrogate is trained and knowledgeable about the child’s educational rights. None of the other parties identified have a legal responsibility for the child’s education. The surrogate must act in place of the parent.

- **Rule of Construction**

OPPOSE HR 1350 (House) §614(a)(1)(D). This provision is unnecessary and creates ambiguity when none currently exists. The term “screening” is undefined and not utilized in the Act. A screening of a student by a teacher or specialist does not meet the definition of “evaluation” under the Act or the regulations.

- **Reevaluations**

OPPOSE HR 1350 (House) §614(a)(2)(B) and HR 1350 (Senate) §612(a)(2)(B) that authorize a mandatory triennial evaluation be waived if “*the parent and local educational agency agree that a reevaluation is unnecessary.*” (emphasis added).

COMMENT: Three year reevaluations are crucial, as they provide schools the information they need to shape appropriate programming and services so as to be able to respond to the changing needs of individual children. Outcome data reflecting poor educational achievement of students with disabilities, high attrition and retention rates, low graduation rates, and high rates of unemployment reflect poorly on the education of this population group and underscore the need for students with disabilities to be re-

evaluated at least every three years. Furthermore, studies show that a significant percentage of three year reevaluations result in the diagnosis of previously undiagnosed medical conditions which may or may not interfere with learning of disproportionately poor and minority students.

- **Conduct of Evaluation**

SUPPORT HR 1350 (House) §614(b)(2)(A), HR (Senate) §614(b)(2)(A), adding “academic”: “relevant functional, developmental, and academic information,…”

SUPPORT HR 1350 (Senate) §614(b)(2)(B) that expands the requirement of current law by stating that the LEA shall “(B) not use any single procedure, *measure*, or *assessment* as the sole criterion for determining whether a child is a child with a disability …”

- **Additional Requirements**

SUPPORT AS REVISED HR 1350 (House) §614(b)(3)(A) requiring “*assessments and other evaluation measures* used to assess a child under this section—(ii) are provided and administered in the language and form most likely to yield accurate academic and developmental data, unless it is clearly not feasible to do so; (iii) are used for ADD: the *specific* purpose for which ADD: “*use of*” the assessments or measures is valid and reliable.

SUPPORT HR 1350 (Senate) §614(b)(3)(D) regarding assessment of homeless children with disabilities, those who are wards of the state, and those in military families.

- **Determination of Eligibility and Educational Need**

SUPPORT HR 1350 (House) §614(b)(4) adding emphasis by referencing “the educational needs”

- **Specific Learning Disability**

SUPPORT HR 1350 (House) §Sec. 614(b)(6) and HR 1350 (Senate) §614(b)(6) as both bills prohibit the required use of the severe discrepancy between achievement and intellectual ability.

- **EVALUATIONS BEFORE CHANGE IN ELIGIBILITY**

SUPPORT HR 1350 (House) §614(c)(5) that explicitly requires that an LEA “shall evaluate a child with a disability… prior to graduation” ADD: “with a regular diploma”. . .

OPPOSE HR 1350 (House) §614(c)(5) DELETE: language limiting required evaluation to be conducted before a change in placement, including graduation “only in instances where the IEP Team is not in agreement regarding the regarding the change in eligibility.”

COMMENT: An evaluation prior to terminating educational rights under IDEA, including through graduation with a regular diploma, protects the student who is likely to have additional years of potential educational eligibility. Even if the student’s IEP team is in agreement, the reevaluation as a source of information offers protection to the student as well as helpful information to guide the student in post secondary planning, including in education, employment, or independent living.

Sec. 614(d) Individualized Education Programs

- “academic achievement and functional performance”

SUPPORT HR 1350 (Senate) §614(d)(1)(A)(i)(I) that replaces “educational performance” in “a statement of the child’s present levels of *educational performance*” with “academic achievement and functional performance.”

- **Short-term objectives or Benchmarks**

OPPOSE HR 1350 (House) §614(d)(1)(A)(i)(I)(cc) that phases out required “benchmarks or short-term objectives, except in the case of children with disabilities who take alternate assessments aligned to alternate achievement standards, ...”

OPPOSE HR 1350 (Senate) §612(d)(1)(A)(i)(II) that eliminates “benchmarks or short-term objectives” from current law. *REVISE as follows: “(II) a statement of measurable annual academic, developmental and functional goals, with instructional objectives and benchmarks, designed to meet the child’s needs...*

COMMENT: By deleting written “benchmarks or short-term objectives” integral to a student’s “measurable annual goals,” the proposed legislation fails to align the IEP under the IDEA with the accountability system under NCLB. For most students with disabilities, the IEP under current law should be written in the context of the general education curriculum, articulate measurable *annual* goals aligned with state standards, and describe *how* teachers, service providers and parent(s) will support the student as she seeks to achieve those annual goals. Thus, the *how* portion of the IEP describes specialized instruction and any supportive, developmental or corrective services, and identifies “*benchmarks or short-term objectives*” as indicators to determine whether the teaching and learning are effective and the student on track for meeting the measurable annual goals.

What is more ironic than Congress couching its legislative agenda as aligning IDEA with NCLB while deleting the very indicators of effective teaching and learning that permit students, and presumably teachers, to use IEPs as tools for accountability? Tools for improving teaching and learning? For example, both teachers and parents can be expected to use short-term objectives to identify deficiencies in teaching and learning; to identify what instructional strategies and modes are working, which are not; to identify what components of the learning standards that the student is learning and which he is not.

- **Assessments**

SUPPORT AS REVISED HR 1350 (Senate) §614(d)(1)(A)(i)(VI)(aa) to read as follows: “a statement of any individual appropriate accommodations or modifications that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16)(A)

- **Rule of Construction**

OPPOSE HR 1350 (House) §614(d)(1)(A)(ii) and HR 1350 (Senate) §614(d)(1)(A)(ii) setting forth a rule of construction that no additional information need be included in the child's IEP beyond what is explicitly required in this section of the law addressing the IEP.

COMMENT: This Rule is unnecessary and will cause confusion with state law requirements and will discourage use of the IEP as a tool for improving student achievement and educational outcomes.

- **IEP Team Members – Participation**

OPPOSE HR 1350 (House) §614(d)(1)(B)(ii) that proposes to limit the involvement of the regular education teacher at IEP meetings. This is the first of a number of provisions that seek to limit the involvement of particular members of the IEP team whose participation is intended to help the child.

- **Ward of the State – Surrogate Parent**

OPPOSE HR 1350 (Senate) §614(d)(1)(B)(viii) that identifies a number of persons who might have an interest in a child who is a ward of the state, but fails to specify an educational surrogate who must be appointed to act in place of the child's parent.

COMMENT: This provision is unnecessary. A child with a disability who is a ward of the state, whose parent is unavailable and has lost the right to make educational decisions for the child, must be represented by an educational surrogate whose role is to act in place of the parent. This new treatment of wards of the state is confusing, unnecessary, and inconsistent with statutory and regulatory interpretations.

- **Participants in IEP Meetings**

OPPOSE HR 1350 (House) §614(d)(1)(D) and (Senate) §614(d)(1)(C) that eliminate mandatory attendance of designated school personnel at IEP meetings if the LEA and the parents agrees that the particular member's attendance is not necessary and the member can be excused. This proposal places an unfair burden on parents who risk antagonizing their child's teachers if they want them to participate. The role and concept of the IEP Team is undermined by the proposed changes to required attendance by the limited members. Once again the timing is odd given that this Reauthorization was purportedly designed to align IDEA with NCLB. **Also oppose HR 1350 (House) §614(d)(3)(D).**

- **Coordination for Homeless students and Students in Foster Care**

SUPPORT HR 1350 (Senate) §614(d)(2)(C) seeking better coordination for those children with disabilities who are homeless and foster children transfer school districts and coordination between school districts on assessments and evaluations.

OPPOSE HR 1350 (Senate) §612(d)(3)(D) and HR 1350 (House) §614(d)(3)(E) that allow the parents and the LEA to agree not to reconvene the IEP team but instead develop a written document to amend or modify the child's IEP. Given the new focus on aligning IDEA with NCLB it is important to ensure that

parents and schools have a meeting of minds. This change is all too likely to have serious unintended consequences based on misunderstandings not clearly communicated face to face.

- **Multi-year IEPs**

OPPOSE both HR 1350 (House) §614(d)(5), HR 1350 (Senate) §614(d)(5) that permit multi year IEPs; the House bill permits an IEP not to exceed three years, while the Senate bill permits a three year IEP for a student with disabilities who is 18 years of age, and which is designed to serve the student during the student's final 3-year transition period.

Comment: Arguably these last 3 years of eligibility may be the most critical for a student with a disability who has failed to meet the standards set for all.

- **Alternative Means of Participation –IEP Meetings**

SUPPORT HR 1350 (House) §614(f) and HR 1350 (Senate) §614(f) that authorize the use of alternative means of participating in IEP meetings, including video conferencing and relying on conference calls for conducting IEP meetings.

SEC. 615 PROCEDURAL SAFEGUARDS

TYPES OF PROCEDURES

- **Due Process Complaint Notice**

OPPOSE HR 1350 (House) §615(b)(2)(7)(A), (B), and OPPOSE HR 1350 (Senate) §615(b)(2), (7), (c)(2). The proposed legislative provisions at the above noted sections should be eliminated and current law should be retained. Both the House and Senate bills attempt to legislate behavior and have created a new, unnecessary layer of pre-hearing “resolution” and “preliminary” meetings under the auspices of improving communication and to seek informal resolution of disputes between parents and school authorities.

Both bills require a legally prescribed notice to be sent to the other party with a copy to the State. Under the Senate bill, the party on whom the notice is served has 20 days to determine whether the notice meets the requirements of §615(b)(7)(A). If the notice is challenged by the party against whom the complaint has been filed, the SEA's due process officer has 5 days to review the notice to determine if the complaint contains the minimally required components and is understandable. (Senate) §615(c)(2). Pre-hearing meetings are not convened until this process is complete. HR 1350 (Senate) §615(b)(7)(b). A due process hearing cannot be convened until the complaining party has filed a notice that meets the prescriptive notice. HR 1350 (Senate) §615(b)(8), HR 1350 (House) §615(b)(8). Under the Senate bill this means that while the child's educational issue remains unresolved, 25 days can pass before the parent is informed that their notice complaint is defective. Once the parent is informed that the notice is defective, the parent may amend the due process complaint notice with a new timeline that commences when the amended notice is filed. Hence, another 25 days can lapse while the child's education issue waits to be addressed by a hearing officer.

COMMENT: Both the House and Senate bills are overly and unnecessarily prescriptive. The proposed legislation creates a laborious process that results in delay, and conceivably deliberate delay by the opposing party. The Senate bill illogically empowers the school defendant, who has the authority to presumably resolve the problem, to hold the complaint for 20 days before filing a challenge with the hearing Officer who has an additional 5 days to determine whether it meets basic notice requirements. Thus, this process that could be resolved in a purely administrative, non-adversarial manner within 48 hours of a state’s administrative hearing officer receiving and reviewing the complaint, now can take 25 days just to decide whether the complaint meets the basic requirements set forth in subsection (b)(7)(A), including, name of child, address, name of school, description of nature of problem, proposed resolution.

OPPOSE HR 1350 [Senate], §615(b)(8) requirement that the LEA shall send a prior written notice in response to a parent’s due process complaint notice that the LEA has failed to provide such notice, e.g., proposed change in placement, if the LEA has not already done so, regarding the subject matter in the parent’s due process complaint notice.

COMMENT: Retain current law; it is not clear what the purpose of this provision is other than to “cover up” non-compliance or to suggest that such non-compliance is not significant.

- **Content of Prior Written Notice**

OPPOSE HR 1350 (HOUSE) §615(c)(3) that deletes prior written notice requirement under current law providing students and their parents a description of any other options that the agency considered and the reason why those options were rejected.

OPPOSE HR 1350 (House) §615(c) that deletes requirement under current law: “a description of any other factors that are relevant to the agency’s proposal or refusal;”

COMMENT: Such descriptions of options considered and reasons why those options were rejected by a school or school district, and of any other factors relevant to the LEA’s proposal or refusal to initiate or change a child’s program or placement are critical to a parent being provided “informed consent.”

- **Procedural Due Process Notice to Parents**

OPPOSE HR 1350(House) §615(d) (1); SUPPORT WITH REVISION HR 1350 (Senate) §615(d) which contrary to current law, requires that a copy of available procedural safeguards only be given to the parents of a child with a disability upon initial referral or parent request for evaluation, annually at the beginning of the school year, and upon parental written request. The Senate bill would also require the procedural safeguards be distributed upon the filing of a complaint for a due process hearing. There is no requirement that parents receive a copy of the safeguards prior to the convening of an IEP meeting as under current law. **ADD** from current law, requirement to provide notice “upon each notification of an individualized education program meeting and upon reevaluation of the child.” **20 U.S.C. §1415(d)(1)**

COMMENT: The cut back in disseminating copies of procedural due process is illogical. Numerous studies and reports indicate that states and school districts are not in compliance with the IDEA, that students with disabilities are far behind their non-disabled peers in attainment of high achievement standards, graduation rates, post secondary education, and employment. Given the need to

ensure alignment of IDEA with NCLB and to address the widespread non-compliance with IDEA most recently reported by GAP, the statement in the Committee Report that “parents, as well as district personnel, have often criticized the frequent distribution of this notice within a year” seems weak at best. It is also noteworthy that failure to receive due process notice is a defense to the statute of limitations.

- **Content of Notice**

SUPPORT AS REVISED HR 1350 (Senate) §615(d)(2)(E) and (K) that after “opportunity to present complaints,” ADD: “including –(i) time period in which to make those complaints; (ii) the opportunity for the agency to resolve the complaint; (iii) the availability of mediation;”

SUPPORT AS REVISED, HR 1350 (Senate) §615(d)(2)(K) after “civil actions,” ADD: “including the time period in which to file such actions; “

SUPPORT HR 1350 (Senate) §615(d)(2)(E) that requires in addition to current law that the notice to parents include “(i) the time period in which to make those complaints; (ii) the opportunity for the agency to resolve the complaint; and (iii) the availability of mediation.”

OPPOSE HR 1350 (House) §615(d)(2) that eliminates the requirement of current law to provide a “full explanation” of procedural safeguards, stating that “the procedural safeguards notice shall include a description of the procedural safeguards...”

- **Statute of Limitations**

OPPOSE HR 1350 (HOUSE) §615(b)(6) that establishes a one year statute of limitations for a parent of a child with a disability to file a complaint following an incident.

SUPPORT HR 1350 (Senate) §615(f)(3)(D) establishing a two year statute of limitations from the time a parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing, in such time as the State law allows.

- **Voluntary Binding Arbitration**

OPPOSE HR 1350 (House) §615(e) that requires the State educational agency to put procedures in place for resolving disputes through voluntary binding arbitration. Requiring voluntary binding arbitration as a mechanism for resolving someone else’s rights raises serious legal and ethical issues. This proposal is premature. Substantial groundwork needs to be done if this proposal is to be taken seriously. In the meantime, the IDEA currently contains adequate and appropriate dispute resolution mechanisms.

COMMENT: First, the IDEA currently contains mechanisms for mediation, administrative remedies and judicial remedies. Although the President’s Commission on Excellence in Special Education which included voluntary binding among its recommendations warns of overwhelming and costly litigation of IDEA claims, the evidence does not support this concern. The number of hearing requests far exceeds the number of hearings held, indicating that many individuals are making use of the alternative dispute mechanisms currently provided by the statute or otherwise informally settling their disputes. See Due Process Hearings: 2001 Update. Eileen Ahern, PhD. www.directionservice.org/cadre/hearupdate.cfm These figures suggest that there is not a strong need for another alternative dispute mechanism. Adding

an arbitration mechanism might, actually, complicate rather than simplify the options for parents and schools. Parents considering whether to engage in mediation, arbitration, or a due process hearing would have to compare three different methods. They also must consider the “high stakes” aspect of arbitration, which has a binding effect and limits their right to appeal.

Second, arbitration should not be adopted in the IDEA setting because it lacks sufficient accountability to the educational rights of children. Current IDEA dispute resolution mechanisms hold due process and reviewing officers accountable to both the procedures specified in the IDEA and the standard of “free and appropriate public education” through the possibility that these issues will be reviewed by a state or district court. An arbitrator is less accountable to the FAPE standard because courts are restricted in their review of an arbitrator’s application of the law. Courts review the procedure but not the substance of arbitration decisions. It is also necessary to consider this question about arbitrating a child’s rights in the context of parents being barred by courts from representing their own children

Third, if an arbitration mechanism is added to the IDEA, it should contain procedural safeguards to ensure that a parent’s waiver of judicial remedies is “knowing and voluntary.” Current arbitration statutes and case law, primarily developed in commercial or employment settings, is not sufficiently protective of the educational civil rights of children under IDEA.

- **Impartial Due Process Hearing**

OPPOSE HR 1350 (House) §615(f)(1) eliminates the State option to create a two-tier system for holding impartial due process hearings by the State educational agency or by the local educational agency, as determined by State law or the SEA.

- **Resolution Session and Opportunity to Resolve Complaint**

OPPOSE HR 1350 (House) §615(f)(1)(B) and OPPOSE HR 1350 (Senate) §615(f)(1)(B)

STRIKE BOTH PROVISIONS AND RETAIN CURRENT LAW.

The proposed legislated “resolution session” or “preliminary meeting” meetings with their accompanying timelines and procedures are more likely to delay resolution of parents’ complaints pertaining to the education of their children. Nothing in current law precludes LEAs from meeting informally with parents after a parent has filed a complaint.

- **Limitation on Hearing**

SUPPORT HR 1350 (Senate) §615(f)(3)(A) that amends the law to require a hearing officer to “(ii) possess a fundamental understanding of this Act, Federal and State regulations pertaining to this Act and interpretations of this Act by State and Federal courts; (iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and (iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.”

- **Subject matter of Hearing**

OPPOSE HR 1350 (House) §615(f)(3)(B) and OPPOSE HR 1350 (Senate) §615(f)(3)(B) both bills unnecessarily seek to limit issues heard at the due process hearing to those issues identified in notice filed.

COMMENT: This is a matter that need not be legislated but properly falls within the discretionary authority of the Hearing Officer.

- **Rule of Construction**

SUPPORT HR 1350 (Senate) §615(f)(3)(C) making clear that “nothing in this section 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.”

- **Timeline for Requesting Hearing**

SUPPORT AS REVISED HR 1350 (Senate) §615(f)(3)(D) providing that “a parent or public agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that is the basis of the complaint, or , if the State has an explicit time limitation [ADD: “that is more generous”] for requesting such a hearing under this part, in such time as the State law allows.”

- **Exception to the Timeline**

SUPPORT HR 1350 (Senate) §615(f)(3)(E)

- **Decision of Hearing Officer**

OPPOSE HR 1350 (Senate) §615(f)(3)(F)(i) that under the heading “**In General**” states “Subject to clause (ii) [Procedural Issues], a hearing officer’s decision shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.” This provision is confusing, especially as it appears under the heading “In General.” It will lead to unfair results and more litigation because it will be misunderstood and misapplied to bar valid substantive claims that do not pertain to the provision of FAPE. If the intent of this legislation is to distinguish between those claims alleging a violation of FAPE based on substantive and procedural grounds, then this provision and paragraph (ii) that follows fail to accomplish this purpose.

Despite the likely intent of this provision, the problem with proposed subparagraph (i) is not cured by the reference to subparagraph (ii) because the plain language of (i) states that “a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.” Clearly this cannot be what was intended by the drafters as it is inconsistent with current law [20 U.S.C. 1415(b)(6)] granting parents a right to complain about any matter pertaining to identification, evaluation, programming, placement, or provision of FAPE. IDEA articulates many important “substantive” rights in addition to the broad, overarching right to FAPE. These include, by way of example, the right to be educated in the general curriculum and to be educated to the maximum extent appropriate with non-disabled students, the right to participate in and to receive accommodations, as needed, on state- and district-wide assessments, the right to a fair and comprehensive evaluation by qualified persons, the right to be evaluated in one’s native language, and the right to receive positive behavioral supports consistent with a student’s IEP. Despite the presumed intent of the drafters, the proposed provision, as written, would preclude children from enforcing and vindicating these substantive rights in any meaningful way before an administrative hearing officer.

The Congressional Research Services report on *The Individuals with Disabilities Education Act (IDEA): Selected Changes that Would be Made to Law by H.R. 1350*, 108th Congress, April 15, 2003, described these provisions as follows: “In addition, HR 1350 [Senate] would require that the decision of the hearing officer must be based on a determination of whether or not the child received a free appropriate public education. This would eliminate any ruling based on procedural violations of the statute that did not result in a denial of FAPE.” Id., CRS-10. See also CRS Analysis, June 15, 2004, at CRS-20.

OPPOSE HR 1350 (Senate) §615(f)(3)(F)(ii). Similarly, even assuming paragraph (i) were clarified, this provision as written is ambiguous and despite its likely intent, will be read to preclude a Hearing Officer using his/her authority to grant equitable relief as appropriate, including requiring the provision of appropriate compensatory education after finding a procedural violation that in and of itself may not warrant a finding that the student was denied FAPE. Just as the provision above fails to accomplish the presumed intended purpose, this provision also fails.

- **Rule of Construction**

SUPPORT HR 1350 (Senate) §615(f)(3)(G) that adds a construction clause to the effect that nothing in Sec. 615 affects a parent’s right to file a complaint with the State Educational Agency.

- **Appeal**

SUPPORT HR 1350 (Senate) §615(g) that retains the provision that due process hearings conducted by an LEA under state law may be appealed to the SEA which shall conduct an impartial review and make an independent decision. **OPPOSE HR 1350 (House) §615(f)(1), (g)** deletes the option for States to create a dual system. 20 U.S.C. §1415(f)(1).

- **Safeguards**

SUPPORT HR 1350 (House) §615(h)(1) that explicitly adds right to be “represented” at an administrative due process hearing by counsel and by non-attorney advocates” and to be accompanied and advised by “individuals with special knowledge or training with respect to the problems of children with disabilities...”.

COMMENT: Current law, though ambiguous, has been interpreted by many jurisdictions to allow non-attorney advocates to provide advice and assistance and to speak for parents while other jurisdictions have allowed non-attorney advocates to appear but not speak for parents. Given the lack of affordable attorneys, non-attorney advocates play a critical role in assisting parents. Clarify that this “representation” of parents at due process hearings does not constitute the “practice of law.”

- **Administrative Procedures**
 - **Limitations**

OPPOSE HR 1350 (Senate) §615(i)(2)(B) Limitations -- This provision imposes a limitation of 90 days from the date of the hearing officer’s decision for an aggrieved party to appeal the decision. This is too short a period that will disparately effect low-income parents lacking access to legal counsel. **If a period were to be imposed, at minimum it should be no less than 6 months or 180 days or more generous, consistent with state law.**

- **Attorneys' Fees**

OPPOSE HR 1350(House) §615(i)(2)(C); and Oppose HR1350 (Senate) §615(i)(3)(B)(i)(1) as both bills will seriously impede parents of children with disabilities to obtain legal representation to pursue their children's rights under IDEA. Unlike current law that authorizes in any action or proceeding brought under Section 615, a court in its discretion, to award reasonable attorney's fees as part of the costs to the parents of a child with a disability who is the prevailing party [20 U.S.C. §1415(i)(3)(B)], the House amendment reads: Fees awarded under this paragraph shall be based on rates determined by the Governor of the State (or other appropriate State official) in which the action or proceeding arose for the kind and quality of services furnished." The House bill does define the pre-hearing "resolution" session which we oppose, as a non administrative and a non judicial meeting. The Senate bill also bars fees for the "preliminary" pre-hearing meeting.

COMMENT: There is a poor precedent that should not be imposed on parents of children with disabilities. In no other instance are attorney's fees for the pursuit of civil rights, in particular rights which the State is primarily responsible for ensuring, established by the Governor or other state official. [We take no solace that the rights of the parents of children with disabilities to seek fees as prevailing parties in actions brought in the District of Columbia are thwarted by their having a similar barrier.]

OPPOSE HR1350 (Senate) §615(i)(3)(B)(i)(1). The Senate bill, while preserving current law leaving the authority to the court to award fees significantly changes the fee shifting statute by authorizing that defendants may be prevailing parties. While current law and the House bill authorize attorney fees awards only to parents as the prevailing party, the Senate bill authorizes fee awards to the State educational agency and school districts as prevailing parties against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or who continues to litigate after the litigation clearly became frivolous, unreasonable or without foundation. In addition, the SEA or LEA may be awarded attorney fees against the attorney of a parent or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass or to cause unnecessary delay.

The seriousness of this march down the slippery slope is heightened by the Senate's also amending the Act HR 1350 (Senate) §615(i)(4) to authorize parents to represent their own children in court, without the assistance of counsel, notwithstanding any other provision of Federal [not state??] law regarding attorney representation (including the Federal Rules of Civil Procedure).

Both these amendments are irresponsible. Contrary to statements read into the record by the Honorable Senators Grassley and Gregg, parents, especially poor parents without access to counsel, will be discouraged from pursuing legitimate complaints. One of the primary arguments for providing administrative and judicial fees under this Act in 1988 was the lack of legal counsel available to represent parents, especially low and middle income families. There is NO evidence to suggest that there are an abundance of hearings; to the contrary, the data shows that less than 10% of all complaints result in administrative hearings. From GAO and NCD reports, non-compliance by states and school districts is substantial, continuing and widespread. Thus, it is not lack of issues but lack of available and affordable counsel that limits parents from pursuing complaints. Through HR 1350 § 615(g)(1) the House has expressly authorized non-attorneys advocates to represent parents at administrative due process hearings, presumably because of the lack of affordable and available representation.. Most states interpret current law to allow non attorney advocates to represent parents at hearings. The Senate apparently believed that

lack of affordable counsel of sufficient concern that they were willing to overstep the authority of the courts as guided by the Federal Rules of Civil Procedure, to authorize parents to represent their child in court.

Senator Grassley argued that this amendment “would give school districts a little relief from abuse of the due process rights found in IDEA and to ensure that our taxpayer dollars go toward educating children., not lining the pockets of unscrupulous trial lawyers.” Apparently these trial lawyers, however, we choose to describe them, were successful in representing the parents of children with disabilities who, in order to be awarded fees, were determined to be the prevailing parties in the very limited cases that even go to hearing. Query given the continued state of reported non-compliance, whether our concern ought not to be for the thousands of families who lack adequate representation and who therefore cannot bring their issues of non-compliance to court because they cannot find free or affordable counsel.

Senator Gregg in his remarks correctly noted that the standard for a plaintiff’s action being held “frivolous unreasonable or without foundation” as applied in the *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978), is “very high...and prevailing defendants are rarely able to meet it and obtain a reimbursement of their attorneys’ fees...” However, the standard of applied in *Christiansburg* was based on Rule 11 of the Federal Rules of Civil Procedure. That is NOT the standard that the Senate has used to amend the Act. To the contrary, HR 1350 (Senate) §615(i)(3)(B)(i)(II) extrapolates the phrase “frivolous, unreasonable, or without foundation” from Rule 11, but ignores the protections accorded counsel practicing in federal court –including the “safe harbor provision” that gives attorneys the right to withdraw any pleadings within 21 days.

To hold parents who are now given the right to represent their own children in court or counsel who represent parents of children with disabilities to bring claims under IDEA less rights and protections than those counsel entitled to Rule 11 protections is wrong and if left uncorrected, cannot be argued NOT to have been designed to have a chilling effect.

Finally, if this provision is allowed to stand, at a minimum, incorporate by reference Rule 11 of the Federal Rules of Civil Procedure and comparable rules of state courts.

- **Parents Representing their Children in Court**

OPPOSE HR 1350 (Senate) §615(i)(4) which authorizes parents of students with disabilities to represent their own children in federal or state court, without the assistance of counsel, subject to the transfer of rights provision for students who have reached the age of majority, and “notwithstanding any other provisions of Federal law regarding attorney representation (including the Federal Rules of Civil Procedure)...”

COMMENT: While this proposed amendment by the Senate may represent some acknowledgement about the dearth of available affordable counsel, the solution as underscored by the courts that have ruled against parents representing their children, is to obtain, and if necessary, for the courts to appoint qualified counsel for children with disabilities whose rights are at issue. There is a split in the Circuit Courts of Appeal as to whether parents of students with disabilities ought to be able to represent, without assistance of counsel, their child in court. It is significant that the divided courts have raised in their decisions questions about the meaning of “pro se” –whose rights are these, an issue that also has significance with respect to the question of so – called “voluntary binding arbitration”, issues of

competence, legal knowledge and skills, fairness, implications to attorney fees under Rule 11, and the right of students to their own legal representation.

The Third Circuit Court of Appeals in denying parents seeking to enforce their child's right to an appropriate education under IDEA may not represent their child in federal court stated:

"The district court had erroneously failed to instruct the jury regarding tolling the statute of limitations in cases involving minors. We directly attribute this error to [the father's] lack of experience and training as a lawyer." *Collinsgru v. Palmyra Board of Education*, 161 F.3d 225, 231 (3d. Cir. 1998).

"First, there is a strong state interest in regulating the practice of law. Requiring a minimum level of competence protects not only the party that is being represented but also his or her adversaries and the court from poorly drafted, inarticulate, or vexatious claims." *Id.*

"Not only is a licensed attorney likely to be more skilled in the practice of law, but he or she is also subject to ethical responsibilities and obligations that a lay person is not. In addition, attorneys may be sued for malpractice." *Id.*

The Second Circuit also ruled against the parent of a student with a disability in *Wegner v. Canastota Central School District*, 146 F.3d 123 (2d. Cir. 1998), citing a non-IDEA case, *Cheung v. Youth Orchestra Found. of Buffalo, Inc.* 906 F.2d 29 (2d. Cir. 1990) that focused on the meaning of *pro se*. The Court said:

"The choice to appear *pro se* is not a true choice for minors who under state law cannot determine their own legal actions." 906 F.2d at 61.

"Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected. There is nothing in the guardian- minor relationship that suggests that the minor's interests would be furthered by representation by the non-attorney guardian." *Id.*

But see *Maroni v. Pemi-Baker Regional School District*, 346 F.3d 247, 257 (1st Cir. 2003), granting parents the right to proceed *pro se* stating "a rule prohibiting *pro se* representation would subvert Congress's intent by denying many children with special needs their day in court."

Devine v. Indian River County School Board, 121 F.3d 576 is the first case to address the Rule 17(c), Federal Rules Civil Procedure, (commonly called the "next friend" rule) provision concerning representation of children. That rule, according to this court and subsequent courts, allows for parents to bring causes of action on behalf of children, but not to serve as counsel on their behalf. Again, the court explains what *pro se* means, and that a parent representing a child is not a parent representing him or herself, by definition. In discussing IDEA specifically, the court analogizes IDEA provisions with Rule 17(c). IDEA permits parents to bring claims on behalf of their children, but not to serve as their counsel. The court goes further to explain that it is aware of no situation where a parent may represent the interests of his or her child, *pro se*, and sees no reason why to read this peculiar provision into IDEA.

"Congress intended to carry this requirement over to federal court proceedings. In the absence of such intent, we are compelled to follow the usual rule--that parents who are not attorneys may not bring a *pro se* action on their child's behalf--because it helps to ensure that children rightfully entitled to legal relief are not deprived of their day in court by unskilled, if caring, parents." 121 F.3d at 582. (*emphasis added*).

Provisions Concerning School Discipline

SUPPORT THE PROVISIONS UNDER EXISTING LAW THAT PERTAIN TO DISCIPLINE OF STUDENTS WITH DISABILITIES.

- **Placement in Alternative Educational Setting**

SUPPORT AS REVISED HR 1350 (Senate) §615(k)(1)(A) that is consistent with current law except it has introduced the phrase “code of student conduct”: “School personnel may order a change in the placement of a child who violates a *code of student conduct*” **ADD: “of the local educational agency that applies to all students”** “to a appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities).”

- **Additional Authority and Manifestation Determination**

OPPOSE EXCLUSIONS WITHOUT TIME LIMITS AND WEAKENING OF MANIFESTATION STANDARDS
REVISE HR 1350 (SENATE) §615(k)(1)(B) and (C); OPPOSE HR 1350 (HOUSE) §615(k)(1)(B), (C)

The Senate provision is preferable to its House counterpart because it is more fair, equitable and just in that it maintains the safety net for students with disabilities by recognizing that students with disabilities cannot be punished for their status or the school’s failure to provide for their needs. However, the Senate language weakens current law and is unacceptable as written.

REVISE HR 1350 (Senate) §615(k)(1)(B). Limit the period of exclusion for students with disabilities who violate the school code (policy) **for whom there is no manifestation** to no more than 45 school days or consistent with the record applied to non-disabled students, if less.

After “subparagraph (C), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which the procedures would be applied to children without disabilities, except as provided in section 612(a)(1) **DELETE “.” ADD” “and, that in no case shall such placement in the Interim Alternative Educational Setting exceed a period of 45 school days.”**

COMMENT: This limitation is consistent with the period of exclusion imposed on a child with a disability who (i) carries or possesses a weapon to or at school, on school premises, or to or at a school function...or (ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school or a school function ...or (iii) has committed serious bodily injury upon another person while at school or at a school function under the jurisdiction of a State or local educational agency, school personnel may remove a student to an interim alternative educational setting for not more than 45 school days, *without regard to whether the behavior is determined to be a manifestation of the child’s disability.*”

REVISE/OPPOSE DELETION of requirement in current law to conduct a “functional behavioral assessment and to develop a “behavioral intervention plan.” 20 U.S.C. §1415(k)(1)(B).

REVISE/OPPOSE DELETION in current law of §1415(k)(3)(B) defining an *Interim Alternative Educational Setting* providing for services and modification designed to address behavior so that it does not recur.

REVISE HR 1350 (Senate) §615(k)(1)(C). The proposed provisions regarding manifestation determinations severely weaken current law, unfairly shift the burden of proof and will afford children little protection against inappropriate and draconian discipline for the consequences of disability. The following changes will restore critical provisions of current law as amended in 1997, which itself represented a serious dilution of pre-1997 rights and protections.

At subparagraph (C)(i) after “In general, Except as provided in subparagraphs (A) and (D), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct” **ADD: “applicable to all students,”** “the IEP Team” **ADD: “and other qualified personnel”** “shall review all relevant information” **ADD: “, including, but not limited to,** information in the student’s file,” **ADD: “evaluation and diagnostic results,”** “any information provided by the parents, and teacher **ADD: “and other relevant”** observations” **ADD: “of the child, may”** “determine” **DELETE: “.”** **ADD: “that the behavior or conduct of the child was not a manifestation of such disability only if the IEP team and other qualified personnel determine”** **DELETE: “that”** “(I) if the before conduct **ADD: “child’s disability impaired the child’s ability to control”** “the conduct in question” **DELETE: “was the result of the child’s disability”** **ADD: “or to understand its impact and consequences;”** or after **“if”** **DELETE “the conduct in question resulted from”** **“the failure to implement the IEP or to implement behavioral interventions as required by section 614d(3)(B)(i)”** **DELETE “.”** **ADD “,** or other appropriate specialized instruction, related services and supplementary aids and services contributed to the conduct in question.

COMMENTS: (1) Congress in 1997 correctly recognized that standing alone, the IEP team, as defined by statute, lacks the expertise to make manifestation determinations. Given the consequences of a finding of “no manifestation,” it is critical that these determinations be made in the first instance by a group that includes individuals with the appropriate professional expertise. Removing the mandate for “qualified personnel” will have a tremendous adverse impact on children from low-income families, whose parents are unable to retain their own “qualified personnel.”

(2) Because schools often fail to evaluate or reevaluate students on a timely basis or students have moved from other schools and school districts, their student files often lack current evaluation and diagnostic results. The explicit requirement that a manifestation determination be based upon such information thus remains as necessary now as it was in 1997.

(3) Limiting the relevant “observations” to those made by a teacher will exclude relevant observations of the student and/or the incident in question by the other myriad members of the school community, consultants, other professionals, etc., as well as by others who may have insight based upon observations of the student in other community settings.

(4) Restoring the manifestation standards from current law will promote a fair and meaningful manifestation review and determination more reflective of the actual, complex interrelationships among disability, educational opportunity, environment and behavior. These changes continue to place the burden of proof on the LEA through the IEP team and other qualified persons who presumably have the knowledge base as oppose to the parents who should not have to prove a negative. These changes derived form current law are also necessary to ensure that students with disabilities are not discriminated against on the basis of disability, by being subjected to punitive measures for disability-related characteristics, or because of a school system’s failure to appropriately understand or address disability-related, educationally-relevant, characteristics.

OPPOSE HR 1350 (House) §615(k)(1)(B). HR 1350 (House) contains no manifestation determination

- This provision grants school authorities extraordinary discretion to remove students with disabilities from school and to punish them for their status and the school's failure to provide appropriate programming and services.
- Contrary to §504 and the 14th Amendment, it ostensibly removes any affirmative obligation on the part of school authorities not to punish students for behavior that is a manifestation of disability or the school's failure to treat the behavior through appropriate educational programming and related services..
- It authorizes students with disabilities –irrespective of manifestation and irrespective of the seriousness of the offense or their educational needs - to be excluded and placed in an IAES for up to 45 school days or 9 weeks of school, to the extent such alternative and such duration would be applied to non-disabled students.
- It even authorizes exclusion beyond 45 days if required by State law or regulation for the violation at issue (including overlybroad zero tolerance statutes), under a vague and nebulous standard “to ensure the safety and educational atmosphere in the schools.”
- This provision makes no distinction between a student with a disability who violates a school code policy –e.g., being insubordinate, running in the halls, being truant or tardy for school or class, using profanity, and a student with a disability whose behavior may be dangerous to self or others, or who possesses a dangerous weapon, or is in possession of or using illegal drugs at school/school function.
- This provision removes the safety net created for students with disabilities

- **SPECIAL CIRCUMSTANCES/SERIOUS BODILY INJURY**

OPPOSE/DELETE: HR 1350 (Senate) §615(k)(1)(D)(iii). DELETE: “or (iii) has committed serious bodily injury upon another person while at school or at a school function under the jurisdiction of a State or local educational agency, “

COMMENT: Using this category of behavior is unnecessary, unfair, and, based upon past experience, likely to be abused. It applies to children for whom the behavior in question is a manifestation of disability and, furthermore, makes no distinction between injury committed knowingly, and injury that is a result of other kinds of conduct. Current law and the proposed Senate legislation provide ample authority for schools to respond to the small number of students who may commit serious bodily injury, including applying to a hearing officer for permission to remove such students to an interim alternative educational setting following a unilateral suspension of 10 school days.

- **Appeal**

OPPOSE HR 1350 (House) 615(k)(3) and OPPOSE AND REVISE HR 1350 (Senate) §615(k)(3)(B)

The proposed provision describes the standard for all decisions as “appropriate.” It fails to describe the different standards to be applied to the different decisions that are subject to appeal by parents. These decisions require examining whether the students were provided due process and standards set forth in IDEA for removing students under and over 10 school days, whether the school district demonstrated based on the preponderance of the evidence that the student as properly excluded; whether the Interim Alternative Educational Setting chosen by the IEP team provides the student an appropriate public

education; whether with respect to the manifestation determination the public agency demonstrated that the child's behavior was not a manifestation of such child's disability consistent with the requirements of sec. 615(k)(4)(C)..

- **STAY-PUT DURING APPEAL**

OPPOSE HR 1350 (House) § 615(k)(4) and HR 1350 (Senate) § 615(k)(4) as both seriously undermine the existing “stay-put” rights of students with disabilities. Unlike current law that abrogates *stay-put* rights only for children involved with weapons and illegal drugs, and whose behavior is substantially likely to result in injury to self or others, the House and Senate bills abolish the right to stay-put during the pendency of appeal for all students with disabilities who have been excluded or otherwise removed from school for a period in excess of 10 school days, including *for non-emergency, non-dangerous/drug/weapon offenses, but for violating the school's student code of conduct.*

DENIAL OF stay-put protection consistent with current federal law will result in the unnecessary and educationally costly disruptions of educational programs and services for students with disabilities – students who are already at higher risk of school failure, retention and drop-outs. Without “stay-put” protection, these children will be removed from their current educational placements, including during an appeal of a non-dangerous, non-weapon/drug, non-emergency disciplinary exclusion or an exclusion in excess of 10 school days when an IEP team finds no relationship between behavior and disability. Despite the research showing the critical need to minimize disruption of educational programming and supports, children with disabilities who are accused of such school code violations as tardiness, insubordination, using profanity, skipping detention, fighting, etc., and who challenge the denial of determination that such behavior was not a manifestation of disability or the product of poor education and related services being provided during the potentially quite lengthy disciplinary period.

Instead of aligning IDEA with NCLB to close the achievement gap, the Senate and House by striking this critical educational protection for students with disabilities, has encouraged the opposite outcome. By eliminating a student's right to “stay put” while his/her parent challenges the basis for the exclusion or the school district's finding of “no manifestation,” the proposed legislation guarantees that the student's educational program will be disrupted ---even if the student is proven innocent of the charge, or a nexus is found between the student's behavior and his/her disabling condition. Barring compensatory education after the fact, there is little recourse for a student who is wrongly excluded for so-called “code violations.” Again, despite the rhetoric of aligning IDEA with No Child Left Behind, both HR 1350 (House and Senate) reduce school and school district accountability to students with disabilities.

- **Children Not Previously Identified**

Both HR 1350 (Senate) §615(k)(5)(B) and HR 1350(House) §615(k)(5) weaken current law. Current law identifies 4 bases for determining that an otherwise unidentified student is an eligible for special education, related services and procedural protections: 1) parent expresses concern in writing that the child is in need of special education unless the parent is illiterate or has other disability that prevents compliance; the child's behavior or performance demonstrates the need for such services; the parent has requested an evaluation of the child; the teacher of the child, to other personnel from the LEA, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency.

OPPOSE - The House bill drops the criteria from current law that a child’s behavior or performance demonstrates a need for special education and related services is removed as a basis for deeming the child eligible for services.

SUPPORT AS REVISED HR 1350 (Senate) §615(k)(5)(B)(iii). The Senate bill drops the same behavior/performance criteria as the House. It adds an indicator, namely, that “the child has engaged in a *pattern of behavior* that should have alerted personnel of the local educational agency that the child may be in need of special education and related services.” This latter provision should be in addition to, not instead of, the descriptive indicator: “the behavior or performance of the child demonstrates the need for such services...” To address the concern of educators, consider heightening the level of emphasis by inserting as follows: “the unusual behavior or performance of the child demonstrates the need for such services...” The Senate bill requires the teacher to have expressed concern in writing to the special education director or “other administrative personnel” not just to the special education director or “other personnel.”

SECTION 616 MONITORING AND ENFORCEMENT

Sec. 616 – Monitoring, Technical Assistance, and Enforcement

Sec. 616 – Withholding and Judicial Review

Sec. 617 – Administration

Sec. 618 – Program Information

Sec. 619 – Preschool Grants

Monitoring, Technical Assistance, and Enforcement, HR 1350 (Senate) §616

Monitoring, Enforcement, Withholding, and Judicial Review, HR 1350 (House) §616

- **Focused Monitoring**

SUPPORT HR 1350 (House) §616(a)(2) that requires the Secretary to monitor implementation of IDEA through “Focused Monitoring activities designed to improve educational results for all children with disabilities, while ensuring compliance with program requirements, with “a particular emphasis on those most closely related to improving educational results for children with disabilities.”

COMMENT: The House bill provides greater flexibility to the federal government to respond to data base findings specific to the State and local school districts being reviewed for compliance with the substantive and procedural requirements of the Act that related to improving educational achievement and other outcomes for students with disabilities.

OPPOSE HR 1350 (SENATE) §616(A)(3) that with no flexibility based on information and data garnered from the State or regions being monitored, mandate the Secretary to monitor and the States to monitor four pre-designated priority areas regardless of their relevance to the real issues of the State and school districts of the State: 1) Provision of a free appropriate public education in the least restrictive environment; 2) provision of transition services; 3) State exercise of general supervisory authority, including the effective use of complaint resolution and remediation; 4) overrepresentation of racial and ethnic groups receiving special education and related services, to the extent the overrepresentation is the result of inappropriate policies, procedures, and practices.

- **Indicators**

SUPPORT HR 1350 (House) §616(b) Indicators. Pursuant to this section the Secretary “must examine relevant information and data related to States’ progress on improving educational results for children with disabilities by reviewing –achievement results of students with disabilities, including those taking the State or district assessments with accommodations; achievement results of children with disabilities on State or district alternate assessments; graduation rates of children with disabilities as compared to the rates of non-disabled students; dropout rates for children with disabilities as compared to dropout rates of nondisabled children.

OPPOSE HR 1530 (Senate) §616(b)(2) (A)(i) that defines the information and data the Secretary shall review against the following indicators: performance of children with disabilities in the State on assessments including alternate assessments, dropout rates and graduation rates, *which for purposes of this paragraph means the number and percentage of students with disabilities who graduate with a regular diploma within the number of years specified in a student’s IEP*

- **Permissive Indicators and Priorities**

SUPPORT HR 1350 (House) §616(a)(2)(A) identifying Permissive Indicators that the Secretary may in his discretion establish among other priorities for review of relevant information and data, including data provided by State. **Under the House bill, but not the Senate’s, the Secretary has flexibility to review relevant State data, to respond to information, research findings, and evidence in deciding which priorities to pursue. The Secretary may give priority** to education in the least restrictive environment, education of students with disabilities with their non-disabled persons, access to the general curriculum, provision of appropriate programming and services to address students’ behavioral needs; participation of children with disabilities, participation in all state assessments, secondary transition to examine degree that students with disabilities successfully exit the program in which they received special education, and the and the State exercise of general supervisory authority, including “effective monitoring an duse of complaint resolution, mediation”[DELETE: “, and voluntary binding arbitration.”]

- **Priorities for Part C**

SUPPORT HR 1350 (House) §616(a)(2)(B) giving the Secretary the discretionary authority to give priority under Part C to monitoring on child find and public awareness, provision of early intervention services that enhance the development of the child, and provision of services in the children’s natural environment, effective early childhood transition, and State exercise of general supervisory authority.

- **Additional Priorities**

SUPPORT HR 1350 (House) §616(c)(2) that authorizes the Secretary to provide a public comment of at least 30 days on any additional priority proposed under this part or part C.

- **Compliance**

SUPPORT HR 1350 (House) §616(d) under this section the Secretary shall review the State data for purposes of determining if the State is in compliance with the Act. Unlike the Senate bill which established a system of ‘one size fits all’ setting out every priority for every state and measuring each state

against the same indicators without regard to available monitoring information and data, the House bill provides the Secretary with flexibility to examine the data, and to consider his response.

- **Lack of Progress**

If, after examining the data, the Secretary determines that is state is not making satisfactory progress in improving educational results for children with disabilities, the Secretary shall, based on HR 1350 (House) §616(a)(2), choose one or more of the following actions –providing technical assistance, advice, and assistance, that may include expertise in the area on non-compliance, assistance in implementing professional development, instructional strategies, and methods of instruction, drawing upon qualified personnel, namely, superintendents, principals, regular and special educators, etc. to provide support and assistance, additional strategies such as collaboration with institutions of higher education, educational service agencies, and parent training information centers. Alternatively or in addition thereto, the Secretary shall direct the use of State level funds for technical assistance in providing assistance to the areas of unsatisfactory performance, and/or each year withhold at least 20% but no more than 50% of the State’s funds.

- **Substantial Non-Compliance and Continuing non Compliance**

Support HR 1350 §616(d) establishes a process for the Secretary determining whether nor not there was a condition of substantial non-compliance, and if yes, the beginning the first steps so preparation of a “corrective action plan.” Support at §616(d)(3)(B) setting out action steps to be taken by the Secretary if he makes a finding of substantial non-compliance for 3 consecutive years –from identifying the state as high-risk grantee and imposing special conditions on the grant to requiring the grantee to enter into a compliance agreement to the Secretary’ seeking to recover funds, or withholding funds, or imposing other governmental sanctions. Federal action may include any of the above actions including a report on this matter to the Congress.

Consider integrating appropriate components of HR 1350 (Senate) §616(c)(2)(C) that would authorize additional Secretarial action if, after five years from approval of the State’s compliance plan, it were determined that a State has failed to meet benchmarks in the plan and make satisfactory progress in improving educational results for children with disabilities, the Secretary can take 1 or more of 4 actions including: Seek to recover funds under GEPA; After meeting notice and hearing procedures, withhold any or all payments to the state under Part B; After meeting notice and hearing procedures, refer the matter for enforcement including referral to the Department of Justice; and Procedures to allow the Secretary, pending hearing outcomes related to withholding payment, to suspend payments or suspend authority to obligate funds.

OPPOSE HR 1350 (Senate) §616(c)(3) that develops the standard for finding a grantee to be in egregious noncompliance.