



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 10, 1996
(House)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

H.R. 3268 - IDEA Improvement Act of 1996
(Rep. Cunningham (R) CA and 11 others)

The Administration supports House passage of H.R. 3268. In many respects, this bill incorporates the major themes advanced by the Administration in its reauthorization proposal. H.R. 3268 would: (1) improve educational results for children by promoting their greater inclusion in the general curriculum, general assessments, and State and local reform efforts; (2) focus even more on teaching and learning by reducing paperwork and increasing administrative flexibility; and (3) provide families and teachers with the knowledge and training they need to support students' learning effectively. The Administration, however, has significant concerns about a number of the bill's provisions and will work to address the following and other concerns as the bill moves through Congress.

- o New restrictions should not be placed on the use of non-binding guidance from the Department of Education under the Individuals with Disabilities Education Act (IDEA). The Administration strongly objects to a provision of H.R. 3268 that would place severe restrictions on the use of policy letters or other correspondence from the Department of Education that interpret the IDEA or its implementing regulations. These letters do not impose new legal requirements, but merely explain what current law already requires in particular circumstances. They are helpful to thousands of agencies and individuals who routinely receive them and rely on them for guidance. H.R. 3268 would force these agencies and individuals to ignore that guidance and submit individual requests to the Department, imposing an unnecessary burden on them and resulting in wasteful delay, uncertainty, and litigation.
- o IDEA reauthorization legislation should include clear authority for the Department to support the development and promotion of technology that can help improve educational results for children with disabilities. H.R. 3268 would provide for various national, State, and local activities aimed at improving educational, early intervention, and transitional services and opportunities for children with disabilities. However, the bill should also include explicit authority, along the lines of the Administration's proposal, for the development and promotion of technology. Instructional technology is an important tool in helping children with disabilities improve their academic performance. Similarly, assistive technology has helped children with physical and sensory impairments to function more effectively and independently.

- o It is premature to set a termination date for the Department's authority to support captioning of the full range of television programming and other media. The Telecommunications Act of 1996 (P.L. 104-104) directs the Federal Communications Commission to require the captioning of video programming. However, it does not establish a deadline for captioning to occur, and it permits exemptions in cases of significant difficulty or expense. The Department of Education's current authority to fund captioning activities may need to be extended beyond the cut-off date in H.R. 3268, in case the Telecommunications Act results in gaps in the availability of captioning.
- o Language giving school officials unilateral authority to make a long-term change in the educational placement of children with disabilities who have caused serious injury is unnecessary and overly broad. The Administration strongly supports language in H.R. 3268 that would: (1) allow school officials to change unilaterally the educational placement of children with disabilities who bring weapons or illegal drugs to school; and (2) give impartial hearing officers the same authority courts now have to remove children who are substantially likely to cause injury to themselves or others.

Separate language allowing school personnel to remove unilaterally children who have caused serious injury is unnecessary in light of these provisions and the authority that school personnel already have to remove children, both disabled and non-disabled, for up to ten days for misbehavior. In addition, H.R. 3268 would define "serious injury" to include endangerment to someone's emotional health through a purely verbal assault, even if the child's outburst was a manifestation of the child's disability. This authority would tip the balance far too much against children with disabilities by allowing school personnel to change their placement on the basis of highly subjective determinations about the effect of mere speech on someone's mental health.

- o The Administration strongly supports provisions that make it easier to remove children who bring weapons or illegal drugs to school, but children with disabilities who have been suspended or expelled should not be completely cut off from educational services. The Nation's schools must be safe, disciplined, and drug-free. In order to reach that goal, schools must be able to discipline children, including children with disabilities, through such measures as suspension and expulsion in appropriate cases. This Administration has made tremendous strides toward this goal through a variety of measures, including a Presidential Directive to enforce the "zero tolerance" measures outlined in the Gun-Free Schools Act, strengthening and expanding the Safe and Drug-Free Schools and Communities Act, and proposing important initiatives to make the juvenile justice system tougher and smarter and to make children free of drugs and guns. However, terminating educational services to disabled children who have already been suspended or expelled is not needed to help ensure a classroom that is safe and conducive to learning. Instead, it would reduce the odds that these children, who are among the least likely to return to school, will be productive, law-abiding members of their communities.

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E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

08-May-1996 02:06pm

TO: Diana M. Fortuna

FROM: Lisa B. Fairhall
 Office of Mgmt and Budget, HRD

CC: Constance J. Bowers
CC: Naomi M. Tinklepaugh
CC: Barry White

SUBJECT: RE: comments on discipline parts of idea sap

Barry White, Naomi and I have looked at your draft rewrite of the discipline section of the letter. Ken will not be able to look at the material until after a 2:30 meeting with AFT, but we felt comfortable with passing back our comments to you now.

We suggest one change -- to replace the last sentence of your first paragraph (This is in addition to the harm . . .) with another sentence from ED's version: " Moreover, we know that educational results for students with disabilities who are excluded from educational services are significantly worse than for non-disabled children who are excluded from those services."

This would allow you to make your primary point, about safety, while continuing to emphasize the educational benefits of continuing services after a child has been removed from the classroom.

Let us know if you have any questions.

EXECUTIVE OFFICE OF THE PRESIDE
EXECUTIVE OFFICE OF THE PRESIDE

08-May-1996 01:07pm

TO: (See Below)

FROM: Diana M. Fortuna
Domestic Policy Council

SUBJECT: Special education discipline; please look at this t
SUBJECT: _____

Education has talked to Senate staff as we requested on the special ed discipline issue. Attached is a summary of what they learned.

You will recall that the question was whether to cease services for kids who bring guns or drugs to school. The Senate has cleared this in committee, and the House is considering whether to do the same.

Education was not able to come up with entirely complete or helpful answers from Feinstein, Dorgan, and Lieberman, because their staffs aren't that knowledgeable on special education issues, and so they couldn't predict where the member would finally come down if things got tough.

The House committee markup on the bill may be tomorrow, although it will more likely be delayed. But, since we don't know for sure, we have to move quickly. Education has sent OMB its draft letter to the Hill opposing cessation, and wants to get it out asap.

Next Steps: Carol is tentatively prepared to go with the Department's recommendation and oppose cessation, but wants to know your take on this.

Attached is my revision of Education's draft language to go to the Hill, to give us something a little more concrete to work off of. I made a number of changes, and focused it more on our concern about public safety.

(One thing that surprised me is that Education's draft urges states and locals not to cease services even for non-special ed kids. We have not taken that position previously. However, I think they have decided to drop this.)

Rewrite of education's draft:

It is critical that children understand the importance of following school rules, and the consequences, to themselves and others, of their misconduct. To ensure that classrooms are safe, it is sometimes necessary to remove a child from the classroom.

However, cutting off children with disabilities completely from educational services threatens the safety of our communities, since leaving children idle and with no structure whatsoever increases the odds that they will engage in criminal behavior. This is in addition to the harm it causes children in terms of their ability to lead a useful and productive life.

I am, therefore, concerned that HR 3286 would permit school districts to completely terminate education services to children with disabilities for certain types of misconduct if their behavior is judged not to be a manifestation of their disability. Children with disabilities whose behaviors are not a manifestation of their disabilities ought, with appropriate safeguards, to be subject to the same rules and disciplinary measures as non-disabled children are, but they should not be completely cut off from education.

In addition, we have a special obligation to children with disabilities because of the history of these children being excluded from school, often with discipline used as an excuse for exclusion. Therefore, I am particularly opposed to terminating services for children with disabilities who commit "assault and battery", as the bill would permit. Determining whether a particular action, such as throwing an eraser or pushing another child on the playground, constitutes assault and battery in the school setting is a highly subjective undertaking, and one that could easily be misused against children with disabilities.

Moreover, certain disabilities, such as autism, cause children to engage in behaviors more frequently than other children that could fit within a state's definition of assault and battery, or that school officials may be tempted to characterize as assault and battery. Because the determination of whether a particular act was, or was not, a manifestation of the child's disability is also a subjective and imprecise undertaking, we are fearful mistakes will be made, and children will be cut off from education services that are essential to his or her chances of leading a productive and independent life.

Furthermore, it seems likely that any final bill will make it easier for schools to remove children temporarily from the classroom, through changes to the "stay put" provisions. We believe that schools should exercise these new powers and see what benefits they bring in terms of discipline, rather than considering going further to authorize cessation of services.

Please let me know your views as soon as possible.

Feinstein: Staff says she feels strongly about guns, but also about education, and may oppose cessation of services.

Dorgan: Personally he opposes cessation of services, so he wouldn't criticize us if we opposed cessation. But it is not clear if he would stand with us.

Lieberman: He wouldn't criticize us if we opposed cessation, but not clear if he'd stand with us.

Harkin: He must support the compromise he has already endorsed, which allows cessation of services for guns or drugs, but as a long-time disability advocate his heart isn't in it. He wouldn't criticize us if we oppose cessation. At a later date, if things go badly enough in conference, he might argue he was no longer obligated to support the Senate compromise.

For what it's worth, Education also wanted us to know that Cong. Miller, who worked with Dorgan and Feinstein on the gun measure, opposes cessation, along with California's elected chief state school officer.

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001**

LRM NO: 4354

FILE NO: 2002

5/7/96

LEGISLATIVE REFERRAL MEMORANDUMTotal Page(s): 13**URGENT**

TO: Legislative Liaison Officer - See Distribution below:

FROM: Janet FORSGREN *Janet Forsgren* (for) Assistant Director for Legislative Reference

OMB CONTACT: Connie BOWERS 395-3803 Legislative Assistant's Line: 395-7362

C=US, A=TELEMAIL, P=GOV+EOP, O=OMB, OU1=LRD, S=BOWERS, G=CONSTANCE, I=J
bowers_c@a1.eop.gov

SUBJECT: EDUCATION Proposed Report RE: HR3268, IDEA Improvement Act of 1996

DEADLINE: 2:00 p.m. Wednesday, May 08, 1996

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: The House Committee on Economic and Educational Opportunities is scheduled to mark up H.R. 3268 on Thursday, May 9th. Therefore, this deadline is firm.

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LRM NO: 4354
FILE NO: 2002

Please include the LRM number shown above, and the subject shown below.

FROM: _____ (Date)
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☐ Concur
☐ No Objection
☐ No Comment
☐ See proposed edits on pages _____
☐ Other: _____
☐ FAX RETURN of _____ pages, attached to this response sheet

DRAFT

May 7, 1996

3:00 PM

Honorable William F. Goodling
Chairman
Committee on Economic and Educational Opportunities
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I am writing to express the views of the Department of Education on H.R. 3268, the IDEA Improvement Act of 1996. This legislation would reauthorize the Individuals with Disabilities Education Act (IDEA), which plays a vital role in helping to ensure that millions of children with disabilities receive an equal educational opportunity.

I am pleased that, in many respects, this bill incorporates the major themes advanced by the Administration in its reauthorization proposal, introduced last year as H.R. 1986: improving educational results for children with disabilities by promoting their greater inclusion in the general curriculum, in general assessments, and in State and local reform efforts; focusing even more on teaching and learning by reducing paperwork and increasing administrative flexibility; and providing families and teachers with the knowledge and training they need to effectively support students' learning. I urge your Committee and the entire House to speedily pass legislation that reflects these approaches so that children with disabilities can benefit from them, and so that States, local school districts, parents, and others can promptly implement them.

While it is gratifying that H.R. 3268 embodies a substantial amount of what we have proposed, there are several significant provisions of the bill that are objectionable or that need improvement.

Discipline

In order to maintain safety and a classroom environment conducive to learning, schools must be able to discipline all children, including children with disabilities. Subject to appropriate safeguards and properly administered, discipline is essential in correcting misconduct and in teaching children, including children with disabilities, to live by rules. Proposed section 615(k), however, goes too far by providing school districts substantially expanded authority that could greatly

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harm children with disabilities and that can be misused to inappropriately remove children from the classroom.

1. "Stay put." As you know, we proposed to expand current law, which allows school officials to unilaterally transfer a child with a disability who brings a gun to school to an interim educational placement for up to 45 days, to apply to other types of weapons. I am pleased that H.R. 3268 includes this proposal, and I support the bill's further expansion of this authority to cover children who bring illegal drugs to school. The use of illegal drugs is a grave threat to our children's physical and mental health, and illegal drugs have no place in our schools. However, the bill should include a clear and objective definition of the terms "weapon" and "illegal drugs", so that children with disabilities are not subject to arbitrary and unequal application of vague or subjective definitions.

My concerns about the potential for misuse of disciplinary provisions against children with disabilities also leads me to object to language in the bill that would weaken the "stay put" provisions of the Act by allowing school personnel to unilaterally change the placement of children with disabilities who commit assault and battery at school. The bill would allow school personnel to unilaterally change the placement of such a child for up to 55 school (not calendar) days (and, if the parents contest that change, until that dispute is resolved) even if the child's behavior was relatively minor, caused no injury or damage, and was clearly a manifestation of the child's disability.

Moreover, the bill includes our proposal to allow hearing officers (but not school personnel) to change the placement of a child who is substantially likely to cause injury. Because this new authority is sufficient to deal with cases of assault and battery, the bill should omit as unnecessary any separate treatment of that misconduct.

Finally, we need to remember that the sad history before the "stay put" protection was added to Federal law was that school officials routinely used disciplinary measures to remove children with disabilities simply because they were difficult to educate. We must guard against weakening the "stay-put" protection in ways that could result in the exclusion of children with disabilities from educational opportunities.

2. Cessation of services. [TO BE SUPPLIED]

(2)

Insert - p 2 of
⑤ letter on HR 3268

5/7/96

2. Cessation of services. I think we can all agree that children need to understand the importance of following school rules and the consequences, to themselves and others, of their misconduct and that removal of children from the classroom is sometimes necessary to ensure safety and discipline. However, I firmly believe that children who have been expelled or suspended from school will do better in the long run if they continue to receive educational services in some other setting than if they are completely cut off from those services, and I would encourage States and school districts, as a matter of State and local policy, to continue providing services to all children who have been suspended or expelled. Among other benefits, this approach can help keep children and youth from engaging in activities that threaten the safety of their communities.

I am, therefore, concerned that H.R. 3286 would move in the opposite direction by permitting school districts to completely terminate educational services to children with disabilities for certain misconduct if their behavior is not a manifestation of their disability and if services would be terminated for non-disabled children for the same misconduct. We know that educational results for students with disabilities who are excluded from educational services are significantly worse than for non-disabled children who are excluded from those services. It is contrary to the goals of the IDEA, as well as the 20-year-old statutory obligation to provide a free appropriate public education (FAPE) to all children with disabilities, to permit students with disabilities to be excluded entirely from educational services. Children with disabilities whose behaviors are not a manifestation of their disabilities ought, with appropriate safeguards, to be subject to the same rules and disciplinary measures as non-disabled children are, but they should not be completely cut off from education.

I am particularly opposed to the termination of services for children with disabilities who commit an assault and battery, as the bill would permit. Determining whether a particular action, such as throwing an eraser or pushing another child on the playground, constitutes assault and battery in the school setting -- and outside the safeguards and standards of the criminal law -- is a highly subjective undertaking, and one that could easily be misused against children with disabilities. Moreover, certain disabilities cause children to engage in behaviors, more frequently than other children, that could fit within a State's definition of assault and battery or that school officials may be tempted to characterize as assault and battery. Because the determination of whether a particular act was, or was not, a manifestation of the child's disability is also a subjective and imprecise undertaking, the odds are thus unacceptably high that a child with a disability will be inaccurately determined to have committed assault and battery that is not a manifestation of his or her disability and, as a result, will be cut off from educational services that are

essential to him or her chances of leading a productive and independent life.

My objections to allowing the complete cessation of services are heightened by the bill's failure to include adequate safeguards for the affected children. For example, there is no provision for automatic review of an IEP team's determination that the behavior was not a manifestation of the disability. Because many parents, particularly low-income parents, do not have the resources to challenge that determination, their children will be cut off from the educational system. In addition, the factors to be considered in determining whether or not a child's behavior was a manifestation of the child's disability are highly subjective and no rules of decision are provided for the IEP team to know which way any of these factors cut.

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Waivers of IDEA requirements

I firmly believe that we need to provide States and LEAs flexibility in carrying out Federal programs, including the IDEA. That is why we proposed a variety of measures to reduce paperwork and increase flexibility, which will allow all school districts, not just a small number of them, to devote more time to teaching and learning, and to be more innovative in improving results for children with disabilities. These proposals preclude the need for any separate authority to waive requirements of the Act.

I am particularly opposed to the approach set out in proposed section 613(g) of the Act, which would require the Department to waive one or more requirements of Part B of the IDEA for up to 10 school districts or groups of school districts, in order to identify and improve educational results for children with disabilities. This could lead to the loss of protections and rights that are vital to ensuring the provision of a free appropriate public education, such as IEPs and due process protections, for children in those districts.

Attorney fees

I regret that H.R. 3268 includes an assault on the right of parents of children with disabilities to recover attorney fees under the IDEA when school districts are found to have violated the rights of their children under the Act. Consistent with other Federal civil rights statutes that authorize courts to award reasonable fees to prevailing parties, the IDEA currently gives courts broad discretion in deciding whether to award fees at all and, if so, in determining what fee is reasonable. Current law protects against excessive fee awards by, for example, directing courts to take into account such factors as the extent of the parents' success, the number of hours claimed, and the hourly rate normally charged in the community for similar services.

The availability of fees is essential to the vindication of many children's rights under the IDEA, which relies principally on parents, rather than the Federal Government, to ensure that individual children receive the services to which they are entitled under the Act. Many parents simply could not otherwise afford to hire lawyers to pursue their children's rights under the IDEA, particularly because most claims are for prospective relief (such as a change in placement or the provision of a particular service) rather than for monetary damages.

I therefore object to three provisions of the bill that would be highly detrimental to parents, particularly poor parents, seeking to vindicate their children's rights under the Act.

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First, section 615(e) (2) (I) would make fees unavailable for work performed in connection with mediation of disputes. This broad prohibition would preclude recovery of fees for work done in preparation for mediation, even if that work is directly relevant to subsequent due process proceedings and could otherwise be included in an award of fees. The unfortunate consequence will be to prompt parents to forego mediation, a result directly at odds with the bill's laudable objective of promoting mediation as a method of resolving disputes that is less expensive, less contentious, and less time-consuming for both parents and school districts. It will also force courts to determine which legal services were "in connection" with the mediation.

Second, section 615(i) (3) (F) (iv) would require a reduction of attorneys' fees if the parents did not provide the school district a written "statement of concerns", presumably before filing a due-process complaint. This cryptic language is overly broad and implies that parents would have to identify in writing every possible "concern" that might come up in the course of their relationship with a school district. Its effect would be to force parents to hire a lawyer before they file a complaint in order to make sure that their complaint is comprehensive. In addition to making due process even more time-consuming, costly, and contentious than it currently is, this would present an all-but-insurmountable barrier to poor parents seeking to protect the rights of their disabled children. Although I do not believe that any new provision is needed on this point, I would not object to a simple requirement that parents give advance notice of their intention to file a complaint. The House bill, however, is far too onerous.

Third, section 615(i) (3) (F) (v) would require that fee awards be in proportion to the issues on which the parents prevailed. This standard is inconsistent with 42 U.S.C. 1988, which is the attorneys' fees provision for legal actions under the civil rights laws. The IDEA currently takes the same approach as section 1988, which simply permits reasonable attorneys' fees for a prevailing party. The House bill would create a disincentive to raise all necessary issues and could impede the ability of the court to reach a fair resolution or result in piecemeal litigation. Moreover, notwithstanding its apparent mathematical precision, it can be virtually impossible to apply in a case involving multiple related claims. In its 1983 decision in Hensley v. Eckhardt, the Supreme Court rejected the standard set out in the bill in favor of a standard based on the overall extent of a plaintiff's success. That is the standard that should continue to govern fee awards under the IDEA.

Policy letters

I strongly object to proposed section 605(c) (3) of the IDEA, which would bar anybody from using any policy letters or other

(6)

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correspondence from the Department that interprets the IDEA or the regulations under it for any purpose in any due-process proceeding, or in any compliance review by the Department or any State educational agency, except in a proceeding or review involving the particular facts or agency that were addressed in that correspondence. This provision is evidently based on the erroneous belief that the Department uses its correspondence with individual States, school districts, and parents to establish new legal requirements that it then applies throughout the Nation. In fact, the Department's policy letters, which are generally prepared in response to specific questions posed by interested agencies and individuals, merely explain what current law already requires. These letters are, however, very helpful, both to the particular individuals or agencies to whom they are addressed, and to the thousands of school districts, parents, and others who carry out, or benefit from, the Act on a daily basis. They also provide useful guidance to hearing officers and courts who must apply the Act to cases that are similar to those addressed in those letters.

The House bill, however, would force all these agencies and individuals to act as if the Federal agency that administers the Act (and that would continue to be obligated by section 617 of the Act to provide technical assistance to the States in carrying out the Act) had never spoken, even though the immediately preceding paragraphs of the bill require the Department to "widely disseminate" information about these letters and to publish quarterly lists of them in the Federal Register. Knowing that the Department has already stated its understanding of the law on a particular issue to somebody else, anybody who wanted to make use of the Department's views on that issue (including a hearing officer or judge) would nonetheless have to send in their own request. The unfortunate results will include increased and unnecessary burdens on parents and school officials to individually request guidance from the Department, the potential for increased litigation in the absence of that guidance, and a substantial and wasteful increase in demands on the Department's administrative resources.

Streamlining notice requirements

I am disappointed that H.R. 3268 fails to adopt the Administration's proposal to streamline notice requirements by reducing the amount of information concerning certain topics that must be given to parents on the various occasions, such as a proposed change of a child's placement, on which a school district must give advance notice to the parents. We proposed that, in most situations, that notice, while providing most of the information required by the current statute and regulations, would have to provide only a summary of the procedural safeguards relating to due-process hearings, State-level appeals, civil actions, and attorney fees. A full explanation of those

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safeguards would be provided whenever the parents request it or whenever they file a complaint. Similarly, we proposed that school districts be required to provide parents a comprehensive explanation of the safeguards concerning access to educational records when requested by the parents, rather than as part of every notice. These proposals will benefit parents by ensuring that they receive "user-friendly" notices with the information they need when they need it and that they are not overwhelmed by lengthy and legalistic statements of all their rights on multiple occasions, and benefit LEAs by allowing them to substantially shorten the routine notices they must provide. The House bill, however, would continue to require a full explanation of these safeguards at every IEP meeting, at initial referral for evaluation, and whenever parents file a complaint, even if there is no indication that parents need all this information at that time.

Part B formula

I am pleased that the House bill recognizes the need to modify the current formula for allocating Part B funds to the States, which is based on the number of children with disabilities who received special education services, and that it includes a variation on our proposal to allocate funds on the basis of the total population of children, both disabled and non-disabled, in each State. Instead of adopting our proposal to apply this new approach only to funds above the 1995 level, however, the House bill would apply the new formula (including an element tied to poverty) to a gradually increasing portion of all Part B funds, so that it would govern the allocation of 100 percent of those funds 10 years from now. I continue to believe that the Administration's proposal is a less disruptive way to move to a new allocation method.

State improvement grants

I applaud the House bill for proposing a separate program that is specifically designed to help States examine a variety of Statewide issues relating to the education of children with disabilities and to make needed reforms on a systemic basis.

I am particularly pleased that the program that would be authorized by the new Part D of the IDEA includes a rigorous focus on performance and results that is needed to make sure that this program actually brings about changes that benefit children with disabilities. Similar to the Administration's proposal, for example, it would require States to analyze the performance of children with disabilities on State assessments and to develop strategies for holding local school districts accountable for results.

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I also agree with the sponsor[s] [At the moment, there's only one.] of the House bill that, for a Statewide reform program to produce the changes that will lead to better results for children with disabilities, it needs to ensure that participating States devote considerable attention and resources to the area of professional development. However, the bill's requirement that each State use at least 75 percent of its funds under this new program for professional development is excessive. It will unduly constrain State flexibility and is inappropriate to impose on all States, many of which are already using other funds for professional development. A 50 percent reservation, as proposed by the Administration, would guarantee a major focus on professional development without unduly limiting State discretion. I also recommend that the bill require some of these funds to be devoted to professional development in the area of early intervention, so that that important area is not slighted.

Professional development

Several revisions are needed to the bill in the important area of professional development. With respect to Part B, I urge the deletion of section 612(a)(13)(C), which would allow States to temporarily waive the requirement that personnel serving children with disabilities meet State standards that normally apply, if there is a shortage of qualified personnel in a particular geographic area, without any assurance that the quality of services provided to children will not decline. This authority, which could easily be abused, could result in children being served by unqualified individuals and the application of inconsistent standards within the same State.

With respect to both Part B and the program for infants and toddlers with disabilities under current Part H (to be redesignated as Part C), the bill would drop the current requirement that participating States implement comprehensive systems of personnel development to ensure, among other things, that there is an adequate supply of qualified special education teachers and other categories of personnel needed to serve children with disabilities. If States participate in the new program for systemic State reform, the requirements of that program relating to the preparation and skills of personnel would suffice. But if some States choose not to participate in that program, or if Congress doesn't provide appropriations for it, then Parts B and H should continue to require systems for personnel development, along the lines of the Administration's proposal.

Finally, the authority for the discretionary grant programs, to be relocated in Part D of the Act, needs to clearly articulate the important role that the Federal Government will continue to play in assisting States and school districts meet their needs for qualified personnel. In addition to carrying out broad-based

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activities that will improve practice among special education personnel generally and address issues that cut across States, the Department should be given clear authority to address the need for the development of two categories of professionals that are unlikely to be adequately met by non-Federal resources: those serving children with low-incidence disabilities and those who will fill such leadership positions as administrators, researchers, and teacher trainers.

Discretionary grant programs

In addition to my concerns with professional development outlined above, I believe that the bill fails to provide a sufficiently clear and comprehensive statement of the important Federal role that the discretionary programs are meant to fill in such areas as research, technical assistance, and outreach, and that the activities authorized by the bill are too narrow. For example, I urge the Committee to add to Part D explicit authority for community parent resource centers along the lines proposed by the Administration. These centers would provide valuable services to parents, particularly minority and low-income parents, who need information and assistance in helping their children obtain needed services, and who are unlikely to get that information from other sources, including the State-level parent training and information centers that would continue to be authorized by the bill.

I also recommend that the Committee include language to clearly authorize the Department to support the development and promotion of technology that can help improve educational results for children with disabilities. The IDEA should continue to support activities in this important area.

Infants and toddlers with disabilities - services to at-risk children

I urge the Committee to add to the bill the Department's proposed changes that would make it easier for States to extend services to infants and toddlers who are at risk of developmental delay. Our proposal would not require any State to serve more children or change the way States are currently serving at-risk children. Instead, it would give States that wish to serve at-risk children, but that do not wish to provide the full array of services required under current law, the option of using program funds to provide service coordination to link at-risk children with appropriate service providers. Giving States more flexibility to serve at-risk children would: (1) help to prevent further developmental delays and secondary disabilities; and (2) increase the likelihood that infants and toddlers with disabilities are identified as early as possible. The Federal Interagency Coordinating Council would play the same important role with respect to these at-risk children that it currently

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fills, helping to ensure that the numerous Federal agencies and programs that support infants and toddlers with disabilities and their families work together effectively.

I applaud you and the other members of the Committee for acting quickly on this vital legislation, and I urge you to report out a bill that reflects the views I have expressed. We would be happy to work with the Committee to address our concerns.

The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's program.

Yours sincerely,

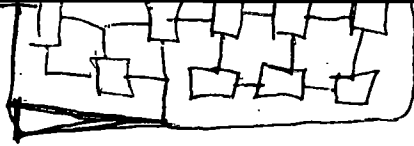
Richard W. Riley

(18)

NO SA

Pending
P.

Ashcraft - anecdote - offered and
made it easier for students
records from school to school.



- At least one will have discipline issue
- Another has amendment in the car on driving fees.

[Continuing services - not being weaker
- Don't know -
- Party to working to working it out -
amendment comes from]

- Education community(?) -

Dorgan's staff thought they would go the other way - Doesn't expect Dorgan to be there.

- Briggs gun to school - he'll come down the other way -

- Harlein {

- Senate direct -

IDEA -- SUMMARY OF DISCIPLINE PROVISIONS

Current Law:

Change of Placement. A school may change the placement of a student with a disability for up to 10 days (for example, from a regular classroom to a separate classroom or alternative school), whether or not the parent agrees. If the parent agrees with the change of placement, the change may continue. If the parent disagrees, the child must be returned to his original placement until the dispute is resolved by a due process hearing (except that a school district can go to court at anytime to get an order to change the student's educational placement if the child poses a danger).

Suspension and Expulsion. A school may suspend any student with a disability for up to 10 days, whether or not the misconduct is a manifestation of the disability.

When it is determined by a group of people knowledgeable about the child that the conduct is a manifestation of the disability, the student may not be expelled or suspended for more than 10 days.

When it is determined by a group of people knowledgeable about the child that the conduct is not a manifestation of the disability, the student may expelled or suspended for more than 10 days. However:

- (1) the state must ensure that the student who is expelled receives appropriate educational services (which can be provided at home or in an alternative educational setting); and
- (2) if the parent disagrees with the determination that it is not a manifestation, the child must remain in school until a due process hearing resolves that issue (although a district can go to court at anytime to get an order to remove the child from school if the child poses a danger).

Firearms. When a student brings a firearm to school, the school may place the child in an alternative setting for up to 45 days. If the parents initiate a due process proceeding, the student remains in the alternative setting until the matter is resolved.

Administration Proposal

Maintains current law (including the requirement that students who are expelled for more than 10 days must receive educational services), except:

Would extend the firearm provision to cover other dangerous weapons such as knives

Would permit schools to go to hearing officers (rather than a court) to get quick decisions about whether a child is dangerous and may be removed from the classroom.

House Bill

(which is scheduled for full committee mark-up as early next Wednesday)

Ceasing all educational services. The House bill would require schools to apply to children with disabilities the relevant disciplinary procedures that would apply to children without disabilities when children with disabilities engage in misconduct involving a weapon, drugs, or assault and battery and that behavior has been determined by an IEP team not to be a manifestation of the child's disability. This would allow schools not only to expel students with disabilities who engage in this type of misconduct where it is the policy to cease services for nondisabled children who engage in this type of misconduct (which is permitted under current law), but also to cease all educational services to them. The terms "weapon," "drugs," and "assault and battery," are defined by state law or policy.

Authority to Move Students to Alternative Placements. The House bill would authorize school personnel to remove a child to an alternative educational setting for up to 45 days in the case of misconduct involving weapons, drugs, and assault and battery. These terms would be defined in accordance with State law or policy. The House bill, like the Administration's bill, would authorize a hearing officer, to the same extent as a court, to remove a child to an alternative educational setting for up to 45 days where maintaining the child in the current placement is substantially likely to result in injury to the child or others.

Senate Bill

(which was marked-up by the full committee March 21)

Ceasing all educational services. The Senate bill would allow cessation of services for students with disabilities who bring weapons or drugs to school (if services are ceased for non-disabled students under the same circumstances). The terms "weapons" and "drugs" are defined by federal law. In addition, it would allow school personnel to remove a child to an alternative educational setting, recommended by the IEP team, in the case of misconduct involving a dangerous weapon, drugs, or behavior likely to result in serious bodily injury pending resolution of a due process hearing. It would also allow school personnel to remove a child in the case of seriously disruptive behavior to an alternative educational setting if the principal determines in writing, based on a record over an extended period of time of disruptive behavior and documented evidence of efforts to address the behavior--such as through behavior management plans--that have failed, that the continued presence of the child would significantly impair the education the child or classmates and the ability of the teacher to teach. It also provides for immediate review by a hearing officer of a school's decision to remove disruptive students.

5/1/96

DISCIPLINE ISSUES IN IDEA REAUTHORIZATION

	Cessation	Stay-put
Current Law	No	Guns Removal for up to 45 days ("Jeffords amdt")
Dept. of Education proposal	No	Add weapons to above Hearing officer can remove if "dangerous"
Senate	For drugs or weapons, if not a manifestation of child's disability	Removal for "disruptive" behavior (lesser standard than "dangerous") Includes some protections
House	Same as Senate, plus assault & battery Allows for state definition of terms	??
Dept. of Education draft reaction	Cessation bad, but particularly fight assault & battery and state definition of terms in House bill	??



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

APR 26 1995

OSEP- 95-16

OSEP MEMORANDUM

TO : Chief State School Officers
FROM : Judith E. Heumann *J. Heumann*
Assistant Secretary
Office of Special Education and
Rehabilitative Services

Thomas Hehir *TH*
Director
Office of Special Education Programs

SUBJECT: Questions and Answers on Disciplining Students with Disabilities

The purpose of this memorandum is to provide guidance about the current legal requirements of the Individuals with Disabilities Education Act (IDEA) for addressing misconduct of students with disabilities and to correct the misunderstanding that students with disabilities are exempt from discipline under current law. This memorandum also includes a discussion of the recent amendments made to IDEA by the Improving America's Schools Act and the recently enacted Gun-Free Schools Act as they apply to students with disabilities who bring firearms to school. If changes are made to current law in the reauthorization of the IDEA, further guidance will be issued to reflect them.

Two other Federal laws that are enforced by the Department's Office for Civil Rights (OCR)--Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act of 1990 (ADA), Title II--also govern school districts' obligations to provide educational services to disabled students. Unless otherwise noted, compliance with the IDEA requirements as set forth in this memorandum would satisfy the requirements of Section 504 and Title II of the ADA.

Public Law 94-142, the Education for All Handicapped Children's Act of 1975 [now Part B of IDEA] was enacted to address concerns that disabled students, particularly those whose disabilities had behavioral components, were excluded from any public education or were not provided an education appropriate to their unique learning needs. Thus, IDEA recognizes the right of each disabled

Page 2 - Chief State School Officers

student to a free appropriate public education (FAPE), which includes an array of rights and procedural protections for eligible students and their parents. One of the central tenets of IDEA is the requirement that each disabled student's program and placement must be individually designed to meet his or her unique learning needs. Today, as school safety takes on increasing importance for all of us, we want to underscore the compatibility of guaranteeing the rights of students with disabilities with the goal of school safety.

Clearly, school safety starts with the commitment of every student to take full responsibility for his or her own safety and the safety of others both in and out of school. This commitment to personal responsibility is essential to ensuring that the goal of safe schools is realized. For any student who misbehaves, a school should decide what action is most likely to correct the misconduct. For a disabled student, this decision may need to take into account the student's disability.

As we travel throughout the country, we have met with parents and school officials, who have underscored the importance of working cooperatively to address concerns when signs of misconduct by students with disabilities first appear before more drastic measures are considered. We also have visited schools that have implemented models for behavior management so effectively that, in many instances, the need for subsequent interventions has been greatly reduced, or even eliminated entirely. The Department encourages and supports the development and dissemination, at the local, State and national levels, of effective classroom and behavior management practices. We also believe that there are a number of positive steps that educators can take to address misconduct as soon as it appears to prevent the need for more drastic measures. For students whose disabilities have behavioral aspects, preventive measures, such as behavior management plans, should be considered and can be facilitated through the individualized education program (IEP) and placement processes required by IDEA. Teacher training initiatives in conflict management and behavior management strategies also should be considered as these strategies are implemented.

If the steps described above are not successful, the appropriate use of measures such as study carrels, time-outs, or other restrictions in privileges could also be considered, so long as they are not inconsistent with a student's IEP. In addition, a disabled student may be suspended from school for up to ten school days. No prior determination of whether the misconduct was a manifestation of the student's disability is required before any of the above measures can be implemented. If the misconduct is such that more drastic measures would be called for, educators should review the student's current educational program and placement and consider whether a change in placement would be an appropriate measure to address the misconduct.

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Where educators believe that more drastic measures are called for, a disabled student may be removed from school for more than ten school days only if the following steps are taken. First, a group of persons knowledgeable about the student must determine whether the student's misconduct was a manifestation of his or her disability. If this group determines that the misconduct was not a manifestation of the student's disability, the student may be expelled or suspended from school for more than ten school days, provided applicable procedural safeguards are followed and educational services continue during the period of disciplinary removal.

However, if the group determines that the student's misconduct was a manifestation of his or her disability, the student may not be expelled or suspended from school for more than ten school days. Educators still can address the misconduct through appropriate instructional and/or related services, including conflict management and/or behavior management strategies, student and teacher training initiatives, measures such as study carrels, time-outs, or other restrictions in privileges, so long as they are not inconsistent with a student's IEP, and, as a last resort, through change of placement procedures in accordance with IDEA. Moreover, the school district has the option of seeking a court order at any time to remove the student from school or to change the student's placement if it believes that maintaining the student in the current educational placement is substantially likely to cause injury.

In addition, recent amendments to IDEA made by the Improving America's Schools Act permit educators to make immediate interim changes of placement for students with disabilities who bring firearms to school for up to 45 calendar days. If the student's parents request a due process hearing, the student must remain in the interim placement until the completion of all proceedings, unless the parents and school district can agree on another placement.

The questions and answers with this memorandum provide a description of the options outlined above in greater detail. We hope that this information will be helpful as we all strive to promote safe and effective schools. We urge you and your staff to review this information carefully and to disseminate it to interested individuals and organizations throughout your State. For easy reference a table of contents, setting forth all sixteen questions and their corresponding page numbers, immediately follows.

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Further questions can be directed to the Office of Special Education Programs by contacting Ms. Rhonda Weiss at (202) 205-8824 or Dr. JoLeta Reynolds at (202) 205-1507.

Attachment

cc: State Directors of Special Education
RSA Regional Commissioners
Regional Resource Centers
Federal Resource Center
Special Interest Groups
Parent Training Centers
Independent Living Centers
Protection and Advocacy Agencies

Elc-
FYI

BRIEFING BOOK MEMO

April 30, 1996
10:45 - 11:15 a.m.
Carol Rasco's office

FROM: Diana Fortuna

SUBJECT: Legislative Issues in IDEA Reauthorization

PARTICIPANTS: Judy Heumann, Howard Moses, Tom Hehir, and Judy's personal assistant; Sara Davis of minority side of House Ed/Labor subcommittee (Rep. Kildee's staffer). (Bob Silverstein from Sen. Harkin's staff was invited, but probably can't make it)

PURPOSE: Judy requested this meeting in order to go over with you current issues on the reauthorization of IDEA. Her goal is for you to be up to speed on these issues. The biggest issue by far is discipline; others include attorneys' fees; whether a general ed teacher should be required to be part of the IEP team; and the structure of the Department's discretionary grants program.

In the Senate, a bill has passed out of the full Labor/Human Resources Committee. It may go to the floor soon. Senators Harkin and Frist both endorsed this bill, although it contains some provisions on discipline that many in the advocacy community are concerned about.

Key players in the House are Cunningham (R), subcommittee chair, and Kildee, who is the ranking minority member. The bill was just marked up in subcommittee last week; the subcommittee chose to punt on all the controversial issues by passing a staff draft of the bill and agreeing that the full committee would reconsider all these issues (full committee is chaired by Goodling). From the disability advocates' perspective, the House bill is worse than Senate's, although it does include a few of the reforms that Education has proposed. The National School Boards Association is the only major "anti-IDEA" group that prefers the House bill.

AGENDA: Judy will organize the discussion/briefing. Your role is to listen and ask any questions you may have.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

25-Apr-1996 12:01pm

TO: justice

FROM: owner-justice

SUBJECT: CCD Education Task Force Alert

Justice For All

beckyo@names.org

CCD Education Task Force Alert

The Consortium for Citizens with Disabilities (CCD) Education Task Force has informed JFA of the following alert pertaining to the reauthorization of the Individuals with Disabilities Education Act (IDEA).

It is reported on April 24, the House of Representatives Subcommittee on Early Childhood, Youth and Families, Chaired by Rep. Duke Cunningham(R-CA), approved H.R. 3268, the Individuals with Disabilities Education Act(IDEA)Improvement Act of 1996 by a voice vote and without any amendments. Yet, this bill does not have the support of most of the Committee Democrats. CCD has grave concerns about this legislation, and to date withholds its support of the bill until it is significantly modified to address these concerns.

CCD believes that modifications must be made on the provisions dealing with discipline, attorneys fees, personnel standards, personnel development, comprehensive system of personnel development, captioning and video description, waivers for local educational agencies, and family support.

While there are many concerns CCD is encouraged by some portions of H.R.3268, particularly in the areas of including students with disabilities in state and district assessments and maintaining the preschool programs and early intervention system. CCD is also pleased to see language on the development of the individualized education program(IEP)which takes into account needs related to particular children, such as behavior management plans for children whose behavior impedes learning, language needs of children with limited English proficiency, and braille for children who are blind or visually impaired. CCD is very disappointed that the House bill drops language from previous drafts specific to the communication needs of deaf and hard of hearing children. Their communication needs are unique and should be treated

as such in the IEP process.

As previously stated, CCD at this date withholds their support of H.R. 3268 until the above issues are modified. Our message is very clear:

THE RIGHTS OF CHILDREN WITH DISABILITIES CANNOT BE REDUCED!!!

IDEA LEGISLATION CANNOT BE ENACTED WITHOUT BI-PARTISAN SUPPORT AND THE SUPPORT OF THE ENTIRE DISABILITY COMMUNITY.

CCD expects H.R. 3268 to be considered by the full committee on Economic and Educational Opportunities as early as May 1, 1996, so do not hesitate to voice your opinions early and often on the reauthorization of IDEA.....

Talking points on the issues to be resolved:

DISCIPLINE: Both Chambers of Congress are supporting radical modifications pertaining to the discipline issues in IDEA. CCD strongly opposes the cessation of education services to students with disabilities in any shape, form or fashion. CCD is committed to the principles of IDEA, no child should be denied an appropriate education. Despite claims that IDEA's due process procedures hamstringing school personnel, current law as confirmed by the United States Supreme Court allows schools to maintain schools safety and to dispense discipline. Congress is supporting the establishment of new categories of behavior and using manifestation determinations, which are inherently complex and are often unduly subjective, as a means to deny education services to children with disabilities. CCD adamantly opposes this. CCD is also firmly opposed to the use of state law definitions of weapons, drugs and assault and battery.

ATTORNEYS FEES: H.R. 3268 includes provisions that will upset the careful balance between family rights and school responsibilities in IDEA. These provisions should be completely overhauled. For example, the bill requires parents to provide notice twice when filing for due process. Moreover, the provision to reduce fees that are not in proportion to the numbers of hours expended on issues on which parents prevail is unduly prescriptive and will inappropriately limit judicial discretion to weigh the particular facts and circumstances in each case.

PERSONNEL STANDARDS: The exception allowance with the personnel standards provision must be deleted. While personnel shortages continue to exist in professions associated with special education, changing the standards to permit unqualified personnel to serve children with disabilities is unacceptable. In addition, this section can be interpreted as a violation of state's right by allowing a state's licensure laws and other laws to be ignored. Since the exception provision applies to "any public agencies affected," it purportedly reaches beyond the State Education Agency to other public agencies which have their own, separate, applicable laws.

CAPTIONING AND VIDEO DESCRIPTION: CCD opposes the language in H.R.3268 to limit funding for captioning and video description solely to "educational programming." Thanks to the seed money currently authorized in IDEA for captioning and video description,

the television industry has leveraged private funding to provide accessible programming. Currently, all prime time and children's programming on network broadcasts are captioned, mostly through such leveraged funding. Captioning and video description provide access for individuals with hearing or visual disabilities to cultural and political mainstream of our society, as seen through news, weather, sports, recreation, entertainment, education, medical, legal and other programming. By limiting the scope of accessible programming, we isolate this underserved audience even further.

PART 1, FAMILY SUPPORT: The House bill repeals Part I, the Families of Children with Disabilities Support Act. CCD urges the continuation of this vital law which is being used as a model by families of children with disabilities for state-level legislation activities across the country.

More will be printed later on personnel development and the issue surrounding comprehensive system of personnel development as it is currently being decided in H.R. 3268.

JUSTICE FOR ALL!!!!

Becky Ogle
E-mail: beckyo@names.org
Voice: 703-836-6263

May 01, 1996

TO: Carol Rasco

FROM: Ken Apfel *Ken*

SUBJECT: Today's meeting on the special education discipline provisions.

Attached is a memo that describes the discipline provisions in IDEA, the Administration's reauthorization proposal, and the House and Senate bills for your use.

Marked with corrections

SUBJECT: Discipline provisions in IDEA, the Administration's reauthorization proposal, and the House and Senate bills.

Discipline provisions in current law: Public Law 94-142, the Education for All Handicapped Children's Act of 1975 (now part B of the current IDEA) was enacted to address concerns about disabled students being excluded from any public education or not being provided an appropriate education.

Under current law, in order to receive federal funding, States must ensure that disabled students have access to a free appropriate public education (FAPE). Schools can not suspend or expel from school disabled students whose misconduct is a manifestation of their disability. In addition, schools can not remove disabled students for more than 10 days except when the student has brought a gun to school. This is a relatively new provision, enacted as part of the Improving America's School Act in 1994, after extensive debate. With guns, the school may remove a disabled student from school for 10 days, and then place the student in an interim alternative placement for up to 45 days. During that period, the student's Individual Education Plan (IEP) team must agree on a new placement. The gun provision

for more
than
10
days

No!
Can
remove if
not
a manifestation,
but can't
cease
services

ED's interpretation of current law: ED has interpreted the FAPE requirement --that States must ensure disabled students a free appropriate public education-- to mean that even if a disabled student has been expelled from school, the State must continue to provide them educational services (either at home or at an alternative educational setting).

Discipline provisions in the Administration's reauthorization proposal: The Administration's proposal retains the FAPE requirement, and expands current law by: (1) providing school districts with the authority to remove for up to 45 days disabled students who bring guns, as well as other "weapons" to school, as defined by federal law; and (2) giving impartial hearing officers, which already exist in the States for other IDEA purposes, the same authority the courts have to temporarily change the placement of disabled students who, in their current placements, are substantially likely to injure themselves or others.

Secretary Riley has put a lot of effort into garnering support for the discipline provisions in the Administration's bill, and is personally committed to defending these. Generally, there is agreement among the educational interest groups and Governors regarding the need for States to continue to provide disabled students with educational services regardless of their conduct. Among the disability-centered education groups and regular education groups, there is some disagreement regarding the flexibility schools should be provided in terms of their authority to remove disabled students in cases of weapons, drugs, or bodily injury.

Discipline provisions in the House and Senate bills:

Changing a disabled student's placement:

No! does ~~not~~ allow expulsion if not a manifestation

• **House bill** provides school personnel with the authority to unilaterally change the placement of, but not to permanently expel, a disabled student in cases of weapons, drugs, and assault or battery, as defined by the State.

for 45 days

• **Senate bill** provides principals, with a recommendation from an IEP team, with this authority, where weapons, drugs, and "behavior likely to result in serious bodily harm" are defined by federal law. The Senate bill also provides principals with the authority to remove (not clear for how long), after meeting various conditions, disabled students who are seriously disruptive.

ED argues that it is more appropriate to provide hearing officers, rather than school personnel, with the authority to change the placement of disabled students likely to cause injury since they are expected to be more objective.

ED is not likely to object to incorporating "illegal drugs" into the list of reasons why schools could remove disabled students to alternative educational settings for up to 45 days, though they have not said this publicly.

Also, ED argues that the bill should include clear and objective definitions of "weapons" and "illegal drugs," so that disabled students are not subject to arbitrary applications.

Cessation of educational services to disabled students:

• **House bill** provides schools with the authority to cease all services to disabled students whose conduct is not a manifestation of their disability, in cases of weapons, drugs, and assault or battery.

• **Senate bill** provides schools with this authority in cases of weapons or drugs.

The Administration's bill would require schools to continue to provide educational services to disabled students who are removed from school, while their placement is being reviewed.

omit

ED argues that studies show that the educational results for disabled students who are excluded from educational services are significantly worse than for non-disabled students who are excluded from those services.

Relation of misconduct to disability:

• Under both the **House** and **Senate** bills, the decision regarding whether or not the student's misconduct is "related" to their disability would be made by the IEP team, without any automatic review by a hearing officer.

ED argues that since determining whether a particular act was or was not a manifestation of a disability is highly subjective, it is likely that many will be unjustly cut off from educational services. Neither of the House or Senate bills provide: (a) adequate guidelines for determinations; or (b) an automatic review of an IEP team's determination.

DRAFT

May 1, 1996

11:15 AM

Honorable William F. Goodling
Chairman
Committee on Economic and Educational Opportunities
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I am writing to express the views of the Department of Education on H.R. 3268, the IDEA Improvement Act of 1996. This legislation would reauthorize the Individuals with Disabilities Education Act (IDEA), which plays a vital role in helping to ensure that millions of children with disabilities receive an equal educational opportunity.

I am pleased that, in many respects, this bill incorporates the major themes advanced by the Administration in its reauthorization proposal, introduced last year as H.R. 1986: improving educational results for children with disabilities by promoting their greater inclusion in the general curriculum, in general assessments, and in State and local reform efforts; focusing even more on teaching and learning by reducing paperwork and increasing administrative flexibility; and providing families and teachers with the knowledge and training they need to effectively support students' learning. I urge your Committee and the entire House to speedily pass legislation that reflects these approaches so that children with disabilities can benefit from them, and so that States, local school districts, parents, and others can promptly implement them.

While it is gratifying that H.R. 3268 embodies a substantial amount of what we have proposed, there are several significant provisions of the bill that are objectionable or that need improvement.

Discipline

In order to maintain safety and a classroom environment conducive to learning, schools must be able to discipline all children, including children with disabilities. Subject to appropriate safeguards and properly administered, discipline is essential in correcting misconduct and in teaching children, including children with disabilities, to live by rules. Proposed section 615(k), however, goes too far by providing school districts substantially expanded authority that could greatly

harm children with disabilities and that can be misused to inappropriately remove children from the classroom.

1. "Stay put." As you know, we proposed to expand current law, which allows school officials to unilaterally transfer a child with a disability who brings a gun to school to an interim educational placement for up to 45 days, to apply to other types of weapons. I am pleased that H.R. 3268 includes this proposal, and I support the bill's further expansion of this authority to cover children who bring illegal drugs to school. The use of illegal drugs is a grave threat to our children's physical and mental health, and illegal drugs have no place in our schools. However, the bill ~~should include a clear and objective definition~~ of the terms "weapon" and "illegal drugs", so that children with disabilities are not subject to arbitrary and unequal application of vague or subjective definitions.

My concerns about the potential for misuse of disciplinary provisions against children with disabilities also leads me to object to language in the bill that would weaken the "stay put" provisions of the Act by allowing school personnel to unilaterally change the placement of children with disabilities who commit assault and battery at school. The bill would allow school personnel to unilaterally change the placement of such a child for up to 55 school (not calendar) days (and, if the parents contest that change, until that dispute is resolved) even if the child's behavior was relatively minor, caused no injury or damage, and was clearly a manifestation of the child's disability.

Moreover, the bill includes our proposal to allow hearing officers (but not school personnel) to change the placement of a child who is substantially likely to cause injury. Because this new authority is sufficient to deal with cases of assault and battery, the bill should omit as unnecessary any separate treatment of that misconduct.

Finally, we need to remember that the sad history before the "stay put" protection was added to Federal law was that school officials routinely used disciplinary measures to remove children with disabilities simply because they were difficult to educate. We must guard against weakening the "stay-put" protection in ways that could result in the exclusion of children with disabilities from educational opportunities.

2. Cessation of services. I think we can all agree that children need to understand the importance of following school rules and the consequences, to themselves and others, of their misconduct and that removal of children from the classroom is sometimes necessary to ensure safety and discipline. At the same time, I firmly believe that children who have been expelled or suspended from school will do better in the long run if they

continue to receive educational services in some other setting than if they are completely cut off from those services, and I would encourage States and school districts, as a matter of State and local policy, to continue providing services to all children who have been suspended or expelled. Among other benefits, this approach can help keep children and youth from engaging in activities that threaten the safety of their communities.

I am, therefore, opposed to provisions in H.R. 3286 that would permit school districts to completely terminate educational services to children with disabilities for certain misconduct if their behavior is not a manifestation of their disability and if services would be terminated for non-disabled children for the same misconduct. We know that educational results for students with disabilities who are excluded from educational services are significantly worse than for non-disabled children who are excluded from those services. It is contrary to the goals of the IDEA, as well as the 20-year-old statutory obligation to provide a free appropriate public education (FAPE) to all children with disabilities, to permit students with disabilities to be excluded entirely from educational services. Children with disabilities whose behaviors are not a manifestation of their disabilities ought, with appropriate safeguards, to be subject to the same rules and disciplinary measures as non-disabled children are, but they should not be completely cut off from education.

I am particularly opposed to the termination of services for children with disabilities who commit an assault and battery, as the bill would permit. Determining whether a particular action, such as throwing an eraser or pushing another child on the playground, constitutes assault and battery in the school setting -- and outside the safeguards and standards of the criminal law -- is a highly subjective undertaking, and one that could easily be misused against children with disabilities. Moreover, certain disabilities cause children to engage in behaviors, more frequently than other children, that could fit within a State's definition of assault and battery or that school officials may be tempted to characterize as assault and battery. Because the determination of whether a particular act was, or was not, a manifestation of the child's disability is also a subjective and imprecise undertaking, the odds are thus unacceptably high that a child with a disability will be inaccurately determined to have committed assault and battery that is not a manifestation of his or her disability and, as a result, will be cut off from educational services that are essential to his or her chances of leading a productive and independent life.

My objections to allowing the complete cessation of services are heightened by the bill's failure to include adequate safeguards for the affected children. For example, there is no provision for automatic review of an IEP team's determination that the

behavior was not a manifestation of the disability. Because many parents, particularly low-income parents, do not have the resources to challenge that determination, their children will be cut off from the educational system. In addition, the factors to be considered in determining whether or not a child's behavior was a manifestation of the child's disability are highly subjective and no rules of decision are provided for the IEP team to know which way any of these factors cut.

Waivers of IDEA requirements

I firmly believe that we need to provide States and LEAs flexibility in carrying out Federal programs, including the IDEA. That is why we proposed a variety of measures to reduce paperwork and increase flexibility, which will allow all school districts, not just a small number of them, to devote more time to teaching and learning, and to be more innovative in improving results for children with disabilities. These proposals preclude the need for any separate authority to waive requirements of the Act.

I am particularly opposed to the approach set out in proposed section 613(g) of the Act, which would require the Department to waive one or more requirements of Part B of the IDEA for up to 10 school districts or groups of school districts, in order to identify and improve educational results for children with disabilities. This could lead to the loss of protections and rights that are vital to ensuring the provision of a free appropriate public education, such as IEPs and due process protections, for children in those districts.

Attorney fees

I regret that H.R. 3268 includes an assault on the right of parents of children with disabilities to recover attorney fees under the IDEA when school districts are found to have violated the rights of their children under the Act. Consistent with other Federal civil rights statutes that authorize courts to award reasonable fees to prevailing parties, the IDEA currently gives courts broad discretion in deciding whether to award fees at all and, if so, in determining what fee is reasonable. Current law protects against excessive fee awards by, for example, directing courts to take into account such factors as the extent of the parents' success, the number of hours claimed, and the hourly rate normally charged in the community for similar services.

The availability of fees is essential to the vindication of many children's rights under the IDEA, which relies principally on parents, rather than the Federal Government, to ensure that individual children receive the services to which they are entitled under the Act. Many parents simply could not otherwise afford to hire lawyers to pursue their children's rights under

the IDEA, particularly because most claims are for prospective relief (such as a change in placement or the provision of a particular service) rather than for monetary damages.

I therefore object to three provisions of the bill that would be highly detrimental to parents, particularly poor parents, seeking to vindicate their children's rights under the Act.

First, section 615(e)(2)(I) would make fees unavailable for work performed in connection with mediation of disputes. This broad prohibition would preclude recovery of fees for work done in preparation for mediation, even if that work is directly relevant to subsequent due process proceedings and could otherwise be included in an award of fees. The unfortunate consequence will be to prompt parents to forego mediation, a result directly at odds with the bill's laudable objective of promoting mediation as a method of resolving disputes that is less expensive, less contentious, and less time-consuming for both parents and school districts. It will also force courts to determine which legal services were "in connection" with the mediation.

Second, section 615(i)(3)(F)(iv) would require a reduction of attorneys' fees if the parents did not provide the school district a written "statement of concerns", presumably before filing a due-process complaint. This cryptic language is overly broad and implies that parents would have to identify in writing every possible "concern" that might come up in the course of their relationship with a school district. Its effect would be to force parents to hire a lawyer before they file a complaint in order to make sure that their complaint is comprehensive. In addition to making due process even more time-consuming, costly, and contentious than it currently is, this would present an all-but-insurmountable barrier to poor parents seeking to protect the rights of their disabled children. Although I do not believe that any new provision is needed on this point, I would not object to a simple requirement that parents give advance notice of their intention to file a complaint. The House bill, however, is far too onerous.

Third, section 615(i)(3)(F)(v) would require that fee awards be in proportion to the issues on which the parents prevailed. This standard is inconsistent with 42 U.S.C. 1988, which is the attorneys' fees provision for legal actions under the civil rights laws. The IDEA currently takes the same approach as section 1988, which simply permits reasonable attorneys' fees for a prevailing party. The House bill would create a disincentive to raise all necessary issues and could impede the ability of the court to reach a fair resolution or result in piecemeal litigation. Moreover, notwithstanding its apparent mathematical precision, it can be virtually impossible to apply in a case involving multiple related claims. In its 1983 decision in Hensley v. Eckerhart, the Supreme Court rejected the standard set

out in the bill in favor of a standard based on the overall extent of a plaintiff's success. That is the standard that should continue to govern fee awards under the IDEA.

Policy letters

I strongly object to proposed section 605(c)(3) of the IDEA, which would bar anybody from using any policy letters or other correspondence from the Department that interprets the IDEA or the regulations under it for any purpose in any due-process proceeding, or in any compliance review by the Department or any State educational agency, except in a proceeding or review involving the particular facts or agency that were addressed in that correspondence. This provision is evidently based on the erroneous belief that the Department uses its correspondence with individual States, school districts, and parents to establish new legal requirements that it then applies throughout the Nation. In fact, the Department's policy letters, which are generally prepared in response to specific questions posed by interested agencies and individuals, merely explain what current law already requires. These letters are, however, very helpful, both to the particular individuals or agencies to whom they are addressed, and to the thousands of school districts, parents, and others who carry out, or benefit from, the Act on a daily basis. They also provide useful guidance to hearing officers and courts who must apply the Act to cases that are similar to those addressed in those letters.

The House bill, however, would force all these agencies and individuals to act as if the Federal agency that administers the Act (and that would continue to be obligated by section 617 of the Act to provide technical assistance to the States in carrying out the Act) had never spoken, even though the immediately preceding paragraphs of the bill require the Department to "widely disseminate" information about these letters and to publish quarterly lists of them in the Federal Register. Knowing that the Department has already stated its understanding of the law on a particular issue to somebody else, anybody who wanted to make use of the Department's views on that issue (including a hearing officer or judge) would nonetheless have to send in their own request. The unfortunate results will include increased and unnecessary burdens on parents and school officials to individually request guidance from the Department, the potential for increased litigation in the absence of that guidance, and a substantial and wasteful increase in demands on the Department's administrative resources.

Streamlining notice requirements

I am disappointed that H.R. 3268 fails to adopt the Administration's proposal to streamline notice requirements by reducing the amount of information concerning certain topics that

must be given to parents on the various occasions, such as a proposed change of a child's placement, on which a school district must give advance notice to the parents. We proposed that, in most situations, that notice, while providing most of the information required by the current statute and regulations, would have to provide only a summary of the procedural safeguards relating to due-process hearings, State-level appeals, civil actions, and attorney fees. A full explanation of those safeguards would be provided whenever the parents request it or whenever they file a complaint. Similarly, we proposed that school districts be required to provide parents a comprehensive explanation of the safeguards concerning access to educational records when requested by the parents, rather than as part of every notice. These proposals will benefit parents by ensuring that they receive "user-friendly" notices with the information they need when they need it and that they are not overwhelmed by lengthy and legalistic statements of all their rights on multiple occasions, and benefit LEAs by allowing them to substantially shorten the routine notices they must provide. The House bill, however, would continue to require a full explanation of these safeguards at every IEP meeting, at initial referral for evaluation, and whenever parents file a complaint, even if there is no indication that parents need all this information at that time.

Part B formula

I am pleased that the House bill recognizes the need to modify the current formula for allocating Part B funds to the States, which is based on the number of children with disabilities who received special education services, and that it includes a variation on our proposal to allocate funds on the basis of the total population of children, both disabled and non-disabled, in each State. Instead of adopting our proposal to apply this new approach only to funds above the 1995 level, however, the House bill would apply the new formula (including an element tied to poverty) to a gradually increasing portion of all Part B funds, so that it would govern the allocation of 100 percent of those funds 10 years from now. I continue to believe that the Administration's proposal is a less disruptive way to move to a new allocation method.

State improvement grants

I applaud the House bill for proposing a separate program that is specifically designed to help States examine a variety of Statewide issues relating to the education of children with disabilities and to make needed reforms on a systemic basis.

I am particularly pleased that the program that would be authorized by the new Part D of the IDEA includes a rigorous focus on performance and results that is needed to make sure that

this program actually brings about changes that benefit children with disabilities. Similar to the Administration's proposal, for example, it would require States to analyze the performance of children with disabilities on State assessments and to develop strategies for holding local school districts accountable for results.

I also agree with the sponsor[s] **[At the moment, there's only one.]** of the House bill that, for a Statewide reform program to produce the changes that will lead to better results for children with disabilities, it needs to ensure that participating States devote considerable attention and resources to the area of professional development. However, the bill's requirement that each State use at least 75 percent of its funds under this new program for professional development is excessive. It will unduly constrain State flexibility and is inappropriate to impose on all States, many of which are already using other funds for professional development. A 50 percent reservation, as proposed by the Administration, would guarantee a major focus on professional development without unduly limiting State discretion. I also recommend that the bill require some of these funds to be devoted to professional development in the area of early intervention, so that that important area is not slighted.

Professional development

Several revisions are needed to the bill in the important area of professional development. With respect to Part B, I urge the deletion of section 612(a)(13)(C), which would allow States to temporarily waive the requirement that personnel serving children with disabilities meet State standards that normally apply, if there is a shortage of qualified personnel in a particular geographic area, without any assurance that the quality of services provided to children will not decline. This authority, which could easily be abused, could result in children being served by unqualified individuals and the application of inconsistent standards within the same State.

With respect to both Part B and the program for infants and toddlers with disabilities under current Part H (to be redesignated as Part C), the bill would drop the current requirement that participating States implement comprehensive systems of personnel development to ensure, among other things, that there is an adequate supply of qualified special education teachers and other categories of personnel needed to serve children with disabilities. If States participate in the new program for systemic State reform, the requirements of that program relating to the preparation and skills of personnel would suffice. But if some States choose not to participate in that program, or if Congress doesn't provide appropriations for it, then Parts B and H should continue to require systems for

personnel development, along the lines of the Administration's proposal.

Finally, the authority for the discretionary grant programs, to be relocated in Part D of the Act, needs to clearly articulate the important role that the Federal Government will continue to play in assisting States and school districts meet their needs for qualified personnel. In addition to carrying out broad-based activities that will improve practice among special education personnel generally and address issues that cut across States, the Department should be given clear authority to address the need for the development of two categories of professionals that are unlikely to be adequately met by non-Federal resources: those serving children with low-incidence disabilities and those who will fill such leadership positions as administrators, researchers, and teacher trainers.

Discretionary grant programs

In addition to my concerns with professional development outlined above, I believe that the bill fails to provide a sufficiently clear and comprehensive statement of the important Federal role that the discretionary programs are meant to fill in such areas as research, technical assistance, and outreach, and that the activities authorized by the bill are too narrow. For example, I urge the Committee to add to Part D explicit authority for community parent resource centers along the lines proposed by the Administration. These centers would provide valuable services to parents, particularly minority and low-income parents, who need information and assistance in helping their children obtain needed services, and who are unlikely to get that information from other sources, including the State-level parent training and information centers that would continue to be authorized by the bill.

I also recommend that the Committee include language to clearly authorize the Department to support the development and promotion of technology that can help improve educational results for children with disabilities. The IDEA should continue to support activities in this important area.

I applaud you and the other members of the Committee for acting quickly on this vital legislation, and I urge you to report out a bill that reflects the views I have expressed. We would be happy to work with the Committee to address our concerns.

Page 10 - Honorable William F. Goodling

The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's program.

Yours sincerely,

Richard W. Riley