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*reply to:*

43 Winter Street  
8<sup>th</sup> floor  
Boston, MA 02108  
617-451-0855  
fax 617-451-0857

1875 Connecticut Ave., NW  
Suite 510  
Washington, D.C. 20009  
202-986-3000  
Fax 202-986-6648

August 3, 2003

Honorable Judd Gregg  
Honorable Edward M. Kennedy  
United States Senate  
Dirksen Building  
Washington, D.C. 20510

Dear Senator Gregg and Senator Kennedy:

When Senate Bill 1248 was unanimously reported from the Health, Education, Labor and Pension Committee in late June, the proposed legislation to reauthorize the Individuals with Disabilities Education Act was lauded for being “bipartisan” and promoting increased accountability of schools and improved education results for students with disabilities. As H.R.1350, S.1248 is being hailed by Committee members and staff alike as effectively aligning the IDEA with the No Child Left Behind Act (NCLB). *Nothing is further from the truth.*

S. 1248 is a major step backward from the IDEA Amendments of 1997 that ensured students with disabilities a full and meaningful opportunity to participate in the general education curriculum, to learn the knowledge and skills expected for all and to participate in state assessments. Today in reauthorizing IDEA, the Senate, as the House before it, has put the basic principles of NCLB at risk and is proposing to strip IDEA of key protections. These protections were expressly designed to help all students, including those with behavioral needs, who, when given the opportunity and necessary supportive services, can learn to high standards by participating in the regular curriculum and receiving specialized instruction from highly qualified teachers with content-based knowledge and instructional skills. Rather than focusing on implementation of these outcome driven provisions, we are once again on the defensive -- reacting to a backlash unleashed by those with low expectations of students with disabilities who may well have been excluded from the regular education curriculum and lack content based knowledge and skills.<sup>1</sup> This is not the time for Congress, educators, families, or advocates to retreat from what must be seen as our shared commitment to IDEA so that students with disabilities might be enabled to learn to high standards consistent with their right to a free appropriate public education.

Without effective special education, services, accommodations and adaptations targeted at meeting their respective state’s learning standards, many of these students are unlikely *in the short-term* to achieve grade level content consistent with their non-disabled peers. Those administrators and educators who seek to limit their accountability to students with disabilities are fearful that their schools and school districts will, as they should, be exposed under NCLB. Presumably that is what was intended

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<sup>1</sup> See State Accountability for All Students (Project SAAS), Preliminary Findings, June 30, 2003 (States with high school graduation tests tend to place students with disabilities in more restrictive settings). [www.sscsco.org/saas/](http://www.sscsco.org/saas/)

by NCLB's accountability provisions --to identify, not punish, those under-performing schools and districts that may require intervention and technical assistance for ALL students, *even those with disabilities*, to learn to the standards set for ALL.

### **S. 1248's proposed changes that undermine IDEA and contravene NCLB**

The following changes proposed by S. 1248 are among those that undermine disabled students' right to high quality education under IDEA and belie the principles of NCLB:

#### **I. Eliminating the right to "stay-put" during appeals; encouraging disciplinary exclusions, drop-outs, and removals of students who will NOT be "counted" for purposes of AYP.**

Despite two GAO studies<sup>2</sup> indicating a dearth of supporting data to justify modifying the discipline protections accorded students with disabilities under IDEA, S. 1248 proposes to amend the statute to authorize school personnel to remove even more students from their educational programs. S.1248 also eliminates for students with disabilities who violate school codes (e.g., rules against tardiness, smoking, use of profanity, cutting class, insubordination) the right to "stay-put" in their current educational placement during resolution of a complaint/appeal to challenge a determination that the behavior was not a manifestation of disability or the quality of the education or placement being provided during the potentially quite lengthy disciplinary period. It is well established that these students are disproportionately racial/ethnic minorities, academically performing below their non-disabled peers, subject to higher rates of suspension and exclusion, and once excluded, are less likely to graduate with a regular high school diploma, to attend post secondary education programs, and to be employed.

1. Section 615(k)(1)(D)(iii) unnecessarily and without justification expands the authority of school personnel to remove unilaterally students with behavioral needs.
2. Section 615(k)(1)(C) weakens the manifestation determination requirements. S. 1248 eliminates the obligation to determine first and foremost if the child's IEP is appropriate; and second eliminates the very basic requirement that the team making the determination include "other qualified persons" who are knowledgeable about the nature of the child's disability and the student, him/ herself, and presumably reduce the likelihood of erroneous determinations.
3. Section 615(k)(4) of S. 1248, as H.R. 1350, eliminates the long established right of students with disabilities [previously abrogated only for those excluded for weapons, illegal drugs, dangerousness] to "stay-put" in their current educational placements during the pendency of any complaint/appeal challenging the disciplinary action or procedures, manifestation determination, interim alternative placement, provision of FAPE.
4. Section 615(k)(5) eliminates protections for children not yet eligible for special education and related services

Whether excluded students are placed in alternative interim settings, such as alternative schools, or homebound instruction, or excluded from school, these changes will undermine the key accountability principles of NCLB. These changes, when read in conjunction with NCLB, create a major loophole and incentive for schools to shed students ---especially those hard to teach students with disabilities who have not made Adequate Yearly Progress --- so they will not be counted for purposes of AYP, at least with

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<sup>2</sup> GAO 03-550, *Special Education: Clearer Guidance Would Enhance Implementation of Federal Disciplinary Provisions*, May 2003; GAO-01-210, *Student Discipline: Individuals with Disabilities Education Act*, Jan. 2001.

respect to holding accountable those with direct responsibility for educating them.

Under NCLB a school will only be found to make AYP if its overall student body and each of the subgroups of students – economically disadvantaged students, students with limited English proficiency, students from each major racial and ethnic group, and students with disabilities – are making AYP. Failure to make AYP has consequences for schools and districts, including giving parents whose children attend schools in need of improvement with options to obtain free supplemental services, such as tutoring, or transfer to a better performing public school.

However, one group of students whose assessment results are NOT counted for accountability purposes are those students who do NOT STAY IN ONE SCHOOL for the full academic year. If they remain in the same district but attend a different school –e.g., an alternative school, their assessment results count with respect to whether the district is making AYP but not with respect to either school. See 34 C.F.R. 200.20(e)

By making it easier for school personnel to remove a student with disabilities and by eliminating the right of the parent to “stay” the child’s exclusion by triggering the “stay-put” provision, Congress has through S. 1248 and H.R.1350 succumbed to the backlash to “Accountability for ALL” from school and school district administrators who fear that students with disabilities will not make “Adequate Yearly Progress.” How else to explain the unnecessary changes to the IDEA that have the effect of creating a major exception to the No Child Left Behind Act? Despite not an iota of ‘scientifically validated evidence’ derived from not one but two GAO studies on discipline of students with disabilities, S. 1248 - as H.R. 1350 - has stripped students of their protections and taken us back to pre-*Honig* days when school personnel unilaterally excluded students with disabilities from public schools.

School administrators have reason for concern. They know that substantial numbers of these students have been isolated and denied meaningful opportunities to participate in the general curriculum and to learn to state standards. They are fully aware that a number of schools will not be able to demonstrate that students with disabilities are making “adequate yearly progress,” and will be identified as under-performing and ‘in need of improvement.’

It should come as no surprise that groups representing school administrators, educators and policy makers have been pitching as never before the need for “alternative schools” --*albeit* this time, a new improved model where mental health supports will be provided, as if such services were not already mandated as part of FAPE by 20 U.S.C. 1412(a)(1)(A). The New York Times got it right last week when the headlines read: “*To Cut Failure Rate, Schools Shed Students,*” *NYT, July 31, 2003.*

## **II. Quashing the affirmative duty to provide FAPE to eligible children so that ALL might learn**

1. Proposed section 614(a)(1)(D)(1)(iii) removes the long established affirmative obligation of State and local school districts to ensure eligible children in need of specialized instruction are provided a free appropriate public education by providing, “If the parent of a child [evaluated and determined to need specialized instruction] does not provide informed consent to receipt of special education and related services, or the parent fails to respond to a request to provide the consent, the *local education agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child.*” *(Emphasis added)*
2. Proposed Section 613(f) (1) authorizes funding but not protections or accountability under IDEA to be accorded students from K through grade 12, who have not been identified as

needing special education or related services but who require additional academic and behavioral supports to succeed in a general education environment. The failure to identify the behaviorally related educational needs –particularly of older students when that behavior impedes the ability to succeed in school will result in their being denied rights under IDEA (e.g., behavior treated as an education matter) and/or Section 504 of the Rehabilitation Act (e.g., related services in the form of tutoring, counseling, behavioral management programming and services) and protections including, the right not to be discriminated against, unfairly subjected to disciplinary exclusion, or denied education during the period of any such exclusion. Significantly, Title I of NCLB already requires provision of effective interventions for students who are not achieving who attend Title I targeted assistance schools or school-wide programs serving low-income students.

In this era of accountability, the right to FAPE (in spite of Rep. Case’s unfortunate amendment under H.R. 1350) has arguably never been more important. As defined by statute, FAPE guarantees students with disabilities a free education consistent with the state’s prescribed curriculum that is aligned with the state education agency’s standards (i.e., the same standards established for ALL students by NCLB), and teaching through specialized instruction, support and related services provided in a manner consistent with the child’s IEP. Moreover, the right to FAPE so as to enable the student to participate meaningfully in the regular education curriculum to the maximum extent appropriate – belongs to the eligible child with a disability –not his parent. A provision allowing a school district to walk from its legal obligations under IDEA to educate a child effectively, when a parent is non-responsive or disagrees, or when the LEA fails to address behavior as an educational need is misplaced, contrary to the language and intent of IDEA, section 504, NCLB and most, if not all, state constitutions.

### **III. Failing to connect “short-term objectives or benchmarks” with accountability under NCLB**

1. Proposed section 614(d)(1)(A)(1)(II) of S.1248 deletes from the required components of an eligible child’s Individualized Education Program, written “benchmarks or short-term objectives” that are integral to students meeting mandated “measurable annual goals.” Under current law, the IEP for most students, as written in the context of the general education curriculum, articulates measurable *annual* goals aligned with state standards, and describes *how* teachers, service providers and parent(s) will support the student as she seeks to achieve those annual goals. The *how* portion of the IEP describes specialized instruction and any supportive, developmental or corrective services, and identifies “*benchmarks or short-term objectives*” as indicators of whether the teaching and learning are effective and the student on track for meeting the measurable annual goals.

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

This irrational elimination is justified on the basis of the purported “paperwork burden” that the SPeNSE 2002 study<sup>3</sup> of the typical special education teacher defines as 5 hours per week spent on administrative duties and paperwork [median =4.6; mean=6.3] or 0.4 hours per week per child taught. It is not possible to distinguish based on the reported study between educationally relevant tasks (e.g., keeping

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<sup>3</sup> SPeNSE, *Final Report of the Paperwork Substudy*, Carlson, et al., Westat, March 24, 2003.

behavioral logs for those students whose IEPs address behavioral needs that interfere with a student's learning) and tasks that the teachers might consider the basis for a union complaint (e.g., stuffing envelopes). Significantly, more than half of the special education teachers participating in the study considered documenting students' present level of performance and writing short-term objectives the most helpful aspects of the IEP process.

#### **IV. Codifying unequal and low expectations for students with disabilities**

1. Instead of aligning the definition of "highly qualified" special education teachers with NCLB, section 602(10)(i)(II)(iii) of S.1248 will codify unequal and low expectations. The proposed definition creates an exception to the standard under NCLB by authorizing *special education teachers who either provide consultative services to content teachers or provide instruction in a core academic subject to middle or secondary students who are performing at the elementary level to meet a lesser standard –i.e., to be certified at the elementary level.*

First, there seems little obvious rationale for the proposed criterion [elementary certification] to be applied to special education teachers who provide "consultative services" to content area specialists *teaching secondary school students* with disabilities who are *currently* functioning at a lower level. The exception is unwarranted in this context.

Second, applying the proposed exception to special education teachers who provide instruction in a core academic subject to middle or secondary students, who are currently performing at the elementary level, is contrary to the most basic premises of NCLB in applying the same standards to students who have fallen behind. Imagine if, during the development of NCLB, someone suggested that once students (poor, minority, or otherwise) enter secondary school behind their peers and reading, at a 5<sup>th</sup> grade level or performing math at a 4.8 grade level, they should be taught by teachers who are qualified only to teach at an elementary level, rather than qualified to teach the secondary-school level skills and knowledge that all students are expected to learn. This would, quite correctly, have been perceived as contradictory to the most fundamental premises of NCLB regarding the expectations for students who have fallen behind. Any such notion that we would expect students who reach secondary school still performing at an elementary level not to master the same secondary school standards set for all is completely antithetical to NCLB. Yet, S. 1248 would codify into law precisely that unequal and low expectation for any such student if he or she has a disability.

Denied comparable aids, benefits and services, including "highly qualified" teachers as defined by NCLB, so as to enable those who may still be reading at the 5<sup>th</sup> grade level to learn to the standards expected for all, students with disabilities can be expected to raise legitimate claims based on discrimination under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. Moreover, Congressional findings in the IDEA Amendments of 1997 expressly noted that for more than 20 years students with disabilities had been thwarted by low expectations, deprived of opportunities to learn; and that they can be successful learners when they participate in the general curriculum aligned to high standards and receive specialized instruction and related services from *highly qualified* content knowledgeable teachers. The Committee Report further recognized that all teachers must be provided sufficient training and professional development opportunities to teach effectively students with diverse learning needs. See also recently released research from the Research Institute on Secondary Education Reform for youth with disabilities and GAO study on post-secondary education outcomes.<sup>4</sup>

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<sup>4</sup> See National Center for Secondary Education and Transition, Research to Practice Brief, *High Schools with Authentic and Inclusive Practices*, vol. 2, issue 2, 2003; GAO-03-773, *Special Education: Federal Actions Can Assist States in Improving Postsecondary Outcomes for Youth*, July 2003.

## **V. Preserve the protections of IDEA consistent with the principles of NCLB**

Today, as educators are for the first time being held accountable for teaching ALL students to high standards, it is especially disturbing that the IDEA should be so sullied as to deny its beneficiaries – children and youth with disabilities - the protections and supports necessary for them to meet the standards set for all. For this Congress to succumb to a backlash fueled by knowledge that “these kinds of kids” will make schools “look badly” because they have, in fact, NOT been effectively taught what all students are expected to know - is unconscionable. The endgame is clear ---not to confront evidence of the performance gap between students with and without disabilities – but, once again, to disguise the truth because too many schools will be identified as “under performing.” Are we really committed to ensuring that these students are provided the opportunities to learn what all students learn? Did we ever really expect “*these kinds of kids*” to learn? And does ALL really mean “ALL”? If our answer is “yes,” we need to continue to work together to meet this challenge by preserving the crucial protections of IDEA, by using NCLB to identify those schools and districts most in need of providing effective interventions to under-achieving students with disabilities, and by effectively implementing IDEA.

Before it is too late, please correct S. 1248; preserve the rights of students with disabilities under the IDEA as we move forward to Leave No Child Behind.

Yours truly,

Kathleen B. Boundy  
Co-Director