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Dear Conferee:

We understand that a House-Senate conference committee will meet soon to resolve differences between the House and Senate versions of legislation to reauthorize the Individuals with Disabilities Education Act (IDEA). I am writing on behalf of the American Bar Association to express our strong support for reauthorization of IDEA and specifically to urge your support for key Senate-passed provisions to be considered by your conference committee.

Due Process Protections. The ABA strongly supports key procedural provisions in the Senate-passed bill. In particular, we support the provisions strengthening availability of voluntary mediation procedures and the continued right of parents to be fully represented by counsel. The House-passed bill, narrowly passed in April 2003, proposes new provisions that would throw out of balance due process protections for children with disabilities and their parents. In particular, we oppose House provisions that would impose a new arbitration process and would circumscribe the ability and right of parents to maintain adequate representation by attorneys of their choice.

Maintaining core due process rights is critical to the purposes of the Act. IDEA is an essential component of the federal government's commitment to the civil rights of persons with disabilities. Like other civil rights statutes, IDEA provides legal recourse for parents of children with disabilities when school districts refuse to comply with the law. Under current law, parents are entitled to a due process hearing to challenge the identification, evaluation and educational placement of their child.

The ABA supported 1997-enacted amendments to the Act that expanded its due process guarantees to include a right to pursue a claim through mediation. If properly implemented, mediation can be a cost-effective form of alternative dispute resolution. However, proper implementation requires that the mediation process include adequate safeguards to protect the constitutional rights of students with disabilities to an appropriate free education. Because mediation is an informal method of dispute resolution, it lacks the procedural protections of litigation. Mediation must be structured to ensure that the process is fair and just to both parties. Mediation should be voluntary and non-binding and should not preclude a parent's option to proceed to the due process hearing guaranteed in IDEA.

The ABA strongly supports the proposed further expansion of mediation opportunities and resources under the Senate bill in almost all respects, but is opposed to provisions that would make mediation agreements “mandatory and binding.” While the ABA supports expansion of mediation opportunities under IDEA and has supported voluntary binding arbitration in some contexts, we are opposed to the House provisions that would cut off the right of parents to a due process hearing. Mediation is working well in IDEA as an informal, voluntary, non-binding, conciliatory alternative to litigation. The Act’s basic guarantee to a due process hearing with full legal due process should remain an inviolable right.

The role of attorneys is integral to the balance of rights to be protected under IDEA. School personnel are repeat players in the process and have had extended involvement with the legal requirements of IDEA. Furthermore, school personnel have easy access to legal representation and enjoy an abundance of in-house experts (e.g. school psychologists, educational diagnosticians, therapists) to serve as no-cost expert witnesses at hearings. For parents, on the other hand, there are few private attorneys who have expertise in the provision of special education to children with disabilities, and many parents lack the resources to acquire their services. Achieving a level playing field in attorney representation remains a distant goal for IDEA parents. State data collected by the Department of Education in 2003 shows that schools are represented by attorneys at due process hearings much more often than are IDEA parents. For example, in New York IDEA proceedings, parents had attorneys 31 percent of the time while schools had attorneys 100 percent of the time. In California, parents had attorneys only 21 percent of the time while schools had attorneys 42 percent of the time. More than half the states lack sufficient low-cost or free attorneys who take IDEA cases. Parents today often must choose to represent their children alone in due process proceeding or let the school continue to violate their child’s rights.

Without legal representation, parents, who often are unaware of their own rights in the process, will often be at an unfair disadvantage in the proceedings. Retention of existing IDEA fee provisions are necessary to ensure that effective legal representation is available to low- and moderate-income parents by assisting parents in paying the costs of counsel. Furthermore, prevailing parents should be able to receive attorney’s fees for services rendered at all stages of the dispute resolution process, including pre-hearing and pre-trial settlements. Provision for attorney’s fees under the Act for parents of children with disabilities helps to assure a “level playing field.”

The rhetorical claims that schools are being overrun by IDEA lawsuits and costs have exaggerated concerns on this issue and are at odds with reality. The vast majority of IDEA parents do not file cases, and the vast majority of schools are not facing IDEA litigation. A 2003 GAO study found that there were only five due process hearings per 10,000 special education students. A 2003 Department of Education national study showed that 94 percent of school districts had no disputes go to due process hearings. A Department of Education study released in 2000 found that only .3 percent of funds spent on special education nationwide went to school expenses for mediation, due process hearings, and court cases, at an average cost of \$24 per student for the 6 million students served by IDEA.

The Senate bill maintains the rights of parents of children with disabilities to be fully represented by counsel and to receive attorney's fees for that representation. The Senate approved an amendment offered by Senator Judd Gregg, however, that provides for the award of attorney's fees to prevailing state or local agencies to be assessed against the attorney of a parent "who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation...". Despite the assurances on the Senate floor that this is a narrow, specific standard that will impact only cases that should not be brought, we are concerned that courts may award attorney's fees more broadly under the vague term "unreasonable." Such awards and the threat of such awards we believe will discourage parents from filing meritorious IDEA cases to protect their children's rights and to hold schools appropriately accountable for their duty to provide an appropriate educational opportunity under IDEA.

The House-passed provisions on the issue of attorney access are far worse for parents and for an effective IDEA Act. The House-passed bill would sharply circumscribe parents' current rights to attorney representation, including the ability of the attorney to accompany parents throughout the process. It would restrict and restructure the award of attorney's fees with an end result of eviscerating the ability of parents to be fully represented by counsel. The Senate bill adds a dubious provision allowing schools to gain award of attorney's fees from parents and their attorneys in some cases, but overall takes a more careful approach, strengthening the processes under the Act to encourage communication and conciliation and thereby lessen the resort to litigation, without stripping away fundamental due process rights of children with disabilities and their parents under IDEA.

Access Rights for Foster Children, Homeless Children and Youth With Disabilities. The ABA also supports the Senate provision to assure uninterrupted access to appropriate special education and related services under IDEA for homeless children, foster children and youth with disabilities. We support the Senate-approved amendment offered by Senators Murray, DeWine and Feingold which addresses this critically needed strengthening of IDEA. Today fully 30 percent of the nearly 500,000 children nationwide in foster care have disabilities that are significant barriers to their education. These children are often shuttled between different homes and schools. Foster children are also likely not to have parents to advocate for their educational needs. The result is that foster children often languish for years with unrecognized disabilities or insufficient services to help them succeed in school.

Homeless children also face significant hurdles to succeed in school, and these hurdles are even higher for homeless children with disabilities. As a result of extreme poverty and unstable living conditions, children and youth who are homeless suffer from disabilities at a disproportionate rate -- twice the rate of other children -- and suffer from emotional or behavioral problems that interfere with learning at almost three times the rate of other children.

Despite this evidence, children who are homeless are underserved by special education programs. In 1997, 20 of 47 states reporting data to the U.S. Department of Education reported that special education was a major need of children and youth in homeless situations. Yet, 39 percent of states also reported that those students had difficulties accessing special education programs. In a 2002 Department of Education evaluation, states reported that, more than other federal programs, homeless children and youth have some or great difficulty accessing special

education services. Barriers to special education services include: lack of timely transfer of special education records between schools; lack of timely evaluations and assessments of students suspected of having special education needs; lack of timely provision of services, lack of awareness of homelessness and the educational rights of the McKinney-Vento Homeless Assistance Act among special education personnel; lack of coordination between special education and McKinney-Vento personnel; and, for those very vulnerable youth who are homeless on their own, lack of an appropriate adult advocate to help them access special education services.

The Senate provision would ensure that foster care and homeless children receive special education and related services within reasonable time frames, ensure continuity of services, provide access to special education for homeless unaccompanied youth, increase access to early intervention services for infants and toddlers who are homeless, and help ensure educational stability. The provisions make fairly minor changes to the law, yet the changes are essential to ensure that very vulnerable children receive the services they need to succeed in school.

For these reasons, we urge you to support the Senate provisions on due process and attorney representation and fees, and those which focus on foster and homeless children and youth with disabilities.

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans". The signature is written in black ink and is positioned below the word "Sincerely,".

Robert D. Evans

