

GOVERNMENTAL AFFAIRS
OFFICE

DIRECTOR
Robert D. Evans
(202) 662-1765
rdevans@staff.abanet.org

SENIOR LEGISLATIVE COUNSEL
Denise A. Cardman
(202) 662-1761
cardmand@staff.abanet.org

Kevin J. Driscoll
(202) 662-1766
driscollk@staff.abanet.org

Lillian B. Gaskin
(202) 662-1768
gaskinl@staff.abanet.org

LEGISLATIVE COUNSEL
R. Larson Frisby
(202) 662-1098
frisbyr@staff.abanet.org

Kristi Gaines
(202) 662-1763
gainesk@staff.abanet.org

Mondi Kumbula-Fraser
(202) 662-1789
kumbulam@staff.abanet.org

Ellen McBarnette
(202) 662-1767
mcbarnee@staff.abanet.org

E. Bruce Nicholson
(202) 662-1769
nicholsonb@staff.abanet.org

DIRECTOR GRASSROOTS
OPERATIONS
julie M. Strandlie
(202) 662-1764
strandlj@staff.abanet.org

INTELLECTUAL PROPERTY
LAW CONSULTANT
Hayden Gregory
(202) 662-1772
gregoryh@staff.abanet.org

STAFF DIRECTOR FOR
STATE LEGISLATION
Kenneth Goldsmith
(202) 662-1780
goldsmithk@staff.abanet.org

STAFF DIRECTOR FOR
INFORMATION SERVICES
Sharon Greene
(202) 662-1014
greenes@staff.abanet.org

EDITOR WASHINGTON LETTER
Rhonda J. McMillion
(202) 662-1017
mcmillionr@staff.abanet.org

May 11, 2004

Dear Senator:

I am writing on behalf of the American Bar Association to express our strong support for S.1248, legislation to reauthorize the Individuals with Disabilities Education Act (IDEA). As approved by the Senate Committee on Health, Education, Labor and Pensions, S.1248 represents a balanced, bipartisan effort to reauthorize and strengthen IDEA.

The ABA strongly supports key procedural provisions in S.1248. In particular, we support the provisions strengthening availability of voluntary mediation procedures and the continued right of parents to be fully represented by counsel. H.R.1350, legislation narrowly passed in April 2003 by the House of Representatives proposes new provisions that would throw due process protections for children with disabilities and their parents out of balance. In particular, we oppose House provisions which would impose a new arbitration process and would circumscribe the ability and right of parents to maintain adequate representation by attorneys of their choice. We urge you to reject amendments that may be offered in the Senate to include these provisions in S.1248.

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 IDEA provides special placement protection and "change of placement" provisions for students with disabilities. It favors, insofar as possible, the inclusion of students with disabilities in as many school activities as possible by mandating that students with disabilities be placed in the "least restrictive environment" based on the child's individualized education program.

Concerns have existed since IDEA was first enacted that these provisions conflict with school administrators power to suspend or expel a student for disorderly behavior and with other students' educational experiences. These concerns have

been considered and resolved through the mechanisms the law provides to adjust student placements.

The current procedural safeguards in IDEA have enabled children and parents to work with local schools and states to assist children with disabilities in reaching their educational potential. The safeguards have helped clarify and resolve issues that prevented children from receiving an appropriate free public education. Such provisions have stood the test of time. Any exceptions to the current procedural safeguards of IDEA must be carefully and narrowly drafted to preserve every child's right to a free and appropriate education.

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 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 S.1248 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. Without legal representation, parents, who often are unaware of their own rights in the process, may 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 with children with disabilities help to assure a "level playing field."

S.1248 maintains the rights of parents of children with disabilities to be fully represented by

counsel and to receive attorneys fees for that representation. The House-passed bill would sharply circumscribe parents' rights to attorney representation, including the ability of the attorney to accompany parents throughout the process. It would restrict and restructure the award of attorneys fees with an end result of eviscerating the ability of parents to be fully represented by counsel. S.1248 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.

We believe S.1248 offers the opportunity to move forward on thoughtful and well-considered amendments to IDEA that will help continue the Act's historic role of guaranteeing the rights of individuals with disabilities to obtain a public education. We urge you to support S.1248 without amendments that would weaken due process protections in IDEA.

Sincerely,

Robert D. Evans