

MARCH 28, 2003

**STATEMENT OF  
THE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES REGARDING  
THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT**

The Council of Parent Attorneys and Advocates (COPAA) is an independent, nonprofit organization of attorneys, advocates and parents established to improve the quality and increase the quantity of legal assistance available to parents of children with disabilities. COPAA members see the successes and failures of the IDEA through thousands of eyes, every day of every week of every year. Through its website, annual conference, and listservs, COPAA provides training and support to families and the advocates and attorneys who work with them to ensure that children with disabilities can receive the appropriate special education services to which they are entitled. While our experiences are as unique as every child whose appropriate education we seek to ensure, we have a common goal that may be succinctly stated as follows:

To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.

This is, of course, the first stated purpose of the IDEA. There are others, and we support them as well. We believe that the law as currently written is fair, fundamentally sound and generally well suited to accomplish its stated goals. Inconsistency or failure of implementation, not the law itself, is the major problem on which we believe attention should be focused.

That implementation is the problem is clear to us from our individual and collective experiences. We strongly agree with the January, 2000 report of the National Council on Disability, "Back to School on Civil Rights" ("NCD Report"). That report provided undeniable and overwhelming evidence that all fifty states had been and continued to be out of compliance with the IDEA and that government at all levels had defaulted on its obligation to make sure the law was enforced. Given the current IDEA reauthorization process, however, COPAA offers this document as our position regarding revision of this extraordinarily important statute.

In establishing the President's Commission on Excellence in Special Education, President Bush stated that "the education of all children, regardless of background or disability, while chiefly a State and local responsibility, must always be a national priority." COPAA wholeheartedly agrees. In addition, we applaud the President's support of the principles and goals, including the goals quoted above, set out in the IDEA. Accordingly, COPAA believes that effective implementation of the IDEA requires achievement of the following objectives:

- 1) Equal access to public information

- 2) Procedural Protections
  - a) Improved access to legal and advocacy assistance
  - b) Competent and impartial administrative hearing system
  - c) Additional procedural safeguards
- 3) Independent systemic compliance mechanisms
- 4) Increased training and support of education and service providers
- 5) Inclusion of parents as equal partners in the special education process
- 6) Increased funding for the costs of special education

As noted above, COPAA is comprised of parents, advocates and attorneys. Some of us are new to the system and work to improve the life of a single child. Others have years or decades of experience working for and with hundreds of children. One thing we share, however, is a sense of history and the need to learn from it.

In 1975, Congress found that there were 8 million “handicapped children in the United States,” half of whom were not receiving appropriate educational services “that would enable them to have full equality of opportunity,” that 1 million children were excluded entirely from education with their public school peers, and that parents were often left to fend for themselves because the public schools were not meeting their children’s needs. 20 U.S.C. § 1400(b) (1990). In 1997, Congress found that while most children had access to special education services, the fulfillment of the promise of special education had been hampered by low expectations for children with disabilities. Further, the NCD report issued in 2000 showed that no state was in substantial compliance with the IDEA’s requirements. COPAA believes that we should and can do better and that if existing federal requirements are enforced and strengthened, we will. Then, and only then, will no child be left behind. We offer the following recommendations as a position statement.

### **1. Equal Access to Public Information**

In re-authorizing the IDEA in 1997, Congress strengthened provisions designed to assure full, fair, and equal participation by parents in the special education process. Parents’ ability to do so is inhibited, however, by numerous factors, one of which is lack of access to public information. Such access is severely limited because of the prohibitive cost of many of the basic documents required by parents and their representatives to ascertain what the law requires, even though these documents are public information. By contrast, this information is widely available to school districts and their advisors and is often funded by taxpayers. This imbalance can be easily remedied through use of the Internet as follows:

- a) Require states immediately to post all current hearing decisions on a public web site.
- b) Require states to add historical hearing decisions over a sliding scale period of up to three years depending upon the number of historical decisions, *e.g.*, those with the most decisions would have the longer time period.

c) Require OSEP to post all “policy letters” (current and historical) within two years (itself or through contractor).

d) Authorize a grant program for posting on public web site of state and federal court decisions within three years, and include funding for maintenance (updating).

## **2. Procedural Protections**

### **A. Improved Access to Legal and Advocacy Assistance**

School districts routinely have access to counsel; parents do not, despite the possibility of recovering attorneys’ fees. Parents cannot realistically expect to win administrative hearings without an attorney; parents often report, however that they are unable to obtain attorneys because there are no lawyers in their area who handle special education cases, because the publicly-funded attorneys in their area who handle special education cases are stretched too thin and unable to handle additional cases, or because the cost of a private attorney is prohibitive, especially given the other financial burdens parents must bear.

This has resulted in enormous inequity. School districts have denied needed services knowing that their decisions will not be reviewed pursuant to IDEA’s procedural safeguards. Parents who invoke those safeguards without representation by an attorney stand little chance of success. And most school district attorneys are well equipped, by experience and resources, to represent the district’s interests, especially against unrepresented parents.

This imbalance should be addressed by:

- 1) Authorizing a grant program to increase public and private legal assistance, for example, financial support to fund one publicly supported special education attorney or experienced advocate per every 10,000 children in each state on IEPs through P & A’s, etc.
- 2) Authorizing a grant program for development of minimum criteria and training for “advocates,” *e.g.*, persons with special knowledge, 20 USC §1415(b)(1).
- 3) Authorizing, as an effective and efficient way of resolving disputes early, federal financial support for “in-house ombudsman” positions in school districts located in large metropolitan areas.
- 4) Establishing extensive training programs about IDEA for juvenile court systems - including judges, probation officers, prosecutors and public defenders nationwide.
- 5) Prohibiting states from preventing parents from appearing at IEPs, hearings, or

otherwise with advocates instead of attorneys and fees for advocates who are not attorneys should be reimbursable under the prevailing party rule.

6) Clarifying that the term “prevailing party” under IDEA has the meaning applied to that term prior to the Supreme Court decision in *Buckhannon v. W. Va. Board and Care*. Since the purpose of the fee transfer provision, especially when read with the due process and other parental participation provisions, is to make sure that parents are able to be equal partners in the process of educating their children, school districts should be required to pay the fees when their position vis-a-vis the child is changed and the child obtains something that he or she did not have before the parent was forced to resort to due process. Parents should be considered prevailing parties if they obtain judgments, consent decrees, settlement agreements, contracts or other agreements and/or if their hearing requests acted as “catalysts” for their school district’s providing previously withheld special education and related services.

7) Requiring school districts to report all expenditures on their part for attorneys and expert witnesses. These reports should be made available to anyone who requests them for no more than the actual cost of copying.

Current law provides school districts with more than ample opportunity to minimize fee liability by virtue of the exhaustion requirements, mediation option, offer of settlement provision, and prohibition of fees for attorney attendance at IEP meetings. No further protections are needed.

#### B. Competent and Impartial Administrative Hearing System

The integrity and utility of IDEA’s procedural safeguards is substantially premised on a competent and impartial administrative hearing system. Based upon the available evidence, there are overwhelming indications that many, perhaps most, state administrative hearing systems meet neither of these criteria. See, for example, Access and Equity in the Due Process System: Attorney Representation and Hearing /Outcomes in Illinois, 1997-2002, a recent report analyzing due process hearings in Illinois. The report found that hearing officers rule in favor of the school system in 80-100% of the due process hearings they handle and that unrepresented parents face particular problems. A competent and impartial hearing system benefits everyone by reducing litigation and related costs, instilling confidence in the system and assuring the realization of IDEA’s goals. Moreover, if courts could increasingly rely upon sound and well-reasoned administrative hearing decisions, judicial burdens might even be reduced. The following steps would go a long way toward ensuring the fairness of the due process hearing system:

1) Fund an independent study of all state due process systems, including hearing structure and practices, hearing officer qualifications, hearing officer authority, method of selection and training of hearing officers and general review of fairness of decisions.

- 2) Propose the key elements of a model code for due process procedures, including hearings, and alternative dispute resolutions, with the objective of reducing the complexity and overall cost of hearings.
- 3) Require that each state's hearing officers be subject to the state's code of judicial ethics and require each state to have a mechanism for complaints about hearing officers.
- 4) Specify the criteria for assuring that administrative hearing officers are impartial (begin by barring attorneys who represent or, within the last five years, have represented schools or parents, and persons who were formerly employed by school districts).
- 5) Require that parent and advocacy groups participate and concur in the selection and award of contracts for hearing officer training.
- 6) Discourage the appearance in an administrative hearing of an attorney for a school district when a parent appears alone or with a parent advocate, or, alternatively, ensure that parents have access to representation by an attorney if the school district is represented.
- 7) Clarify that hearing officers have the authority and obligation, when required by the facts of the case, to order all remedial steps necessary to provide a child with FAPE including, when necessary, system-wide (local or state) remedies.
- 8) Authorize and define criteria for "class actions" at an administrative hearing level with special masters to address systemic issues within specific districts.

C. Additional procedural safeguards

Since parents are the primary enforcers of the IDEA it is essential that their ability to represent their child's interests be enhanced. To this end, we urge the following:

- 1) All current due process and attorney's fees provisions of the IDEA must be maintained or strengthened;
- 1) With regard to attorney's fees, it must be made clear that no other law, whether state or federal, can or shall be used to protect states, counties, towns, cities, districts (including the District of Columbia) from having to pay attorney's fees when parents are prevailing parties;
- 1) It must be made clear that fees are available for expert witnesses as well as for attorneys;
- 2) School districts must be required to provide advance written notice of all IEP meetings, placements, or other decisions pertaining to children and these notices must be provided to parents in their native language;

- 3) There should be no statute of limitations on claims for compensatory education;

### **3. Independent Systemic Compliance Mechanisms**

A quarter century's experience with the IDEA has provided valuable insight into a complex system of oversight and litigation. Compliance with the IDEA would be significantly improved by the following steps:

- A) Provision of funding for NCD to conduct comprehensive reviews of the state of IDEA implementation on a regular basis.
- A) Adoption of a focused monitoring system. Focused monitoring is the selection of a small group of priorities, agreed upon by a broad group of people with an interest in and commitment to special education, that are then monitored using data-based indicators, with interventions such as capacity-building efforts and technical assistance and enforcement options that are utilized as necessary. Adoption of such a system would ensure the development of explicit criteria for what constitutes non-implementation of the IDEA (noncompliance) and clear consequences for such nonimplementation. These issues are addressed in a focused monitoring proposal being developed by a diverse group of stakeholders, including attorneys and advocates, parent training center staff, OSEP staff, Part C administrators, and state special education directors.
- A) Establishment of an independent entity or office to seek IDEA implementation by state education agencies.
- A) Creation of an independent entity in each state to respond to complaints about the state and local education agencies.
- A) Continued focus on compliance with the IDEA's procedural safeguards to the extent necessary to ensure that parents are fully afforded their right to participate as partners in their children's education.

COPAA believes that "compliance" has been defined too narrowly as simply adherence to procedural requirements. In fact, compliance is equivalent to implementation of the IDEA, and the negative connotation associated with the word must be dispelled. COPAA believes that schools should be held accountable for the results of all their students, including those with disabilities. True compliance with the IDEA means that its requirements are implemented: parents and school staff work together to create individually-designed education programs for students, make modifications as necessary, and continually monitor progress to ensure that results, that is, that the goals of the IDEA are fulfilled for each child with disabilities.

### **4. Increased Training and Support of Education and Service Providers**

IDEA 1997 requires that a school district's comprehensive system of personnel development be "integrated, to the maximum extent possible, with other professional development plans and activities" in that district. Professional development must include development of the skills necessary to teach special education students effectively, must be systematically linked to district or school goals for student improvement, and should be driven by a coherent strategic plan for the district and the schools within the district.

Unfortunately, this vision is rarely realized. Often, professional development for special educators is disconnected from district or school goals for student improvement and is focused on legal requirements or procedural issues, rather than on topics such as curriculum adaptation or modifications. Further, professional development is often provided in the form of full or half-day workshops supplemented by conferences and courses at higher education institutions. This has been determined to be an ineffective way of approaching professional development. (Toward Better Teaching: Professional Development in 1993-94, National Center for Education Statistics, 1998). More effective is professional development that includes theory, demonstration, modeling, on-site coaching, mentoring, and guided practice.

The current severe shortage of special educators and the concerns raised by many people about the quality of the special educators who are teaching mandate that the comprehensive system of personnel development requirements be strengthened and implemented fully. Local and state education agencies must be held accountable for their implementation of their comprehensive systems of personnel development. Professional development plans must include provisions for meaningful evaluation of the effectiveness of professional development, and implementation of the plans must be tracked, monitored, and enforced.

Additionally, COPAA recommends the following:

- A) To ensure licensure of teachers or, if teacher shortages exist and waivers are being granted, funding should exist to ensure that a parent may have the option of privately funded services up front during the time period that a licensed teacher is not available.
- B) Provide additional financial incentives to states who serve special education students by the use of teachers who have status as master teachers.
- C) Establish a National Training Center for Teachers and Related Services Personnel Who Work with Children with Disabilities to create and design promising practices for teaching of the child with a disability. Practices would be widely disseminated throughout the U.S. to help states provide assistance to districts. Moreover, states experiencing severe teacher shortages in special education areas could contract for additional resource assistance to train teachers.

## **5. Inclusion of Parents as Equal Partners in the Special Education Process**

COPAA firmly believes that the parents must be given the opportunity to participate as equal partners in the special education process. The IDEA mandates the inclusion of parents as partners, but often this does not occur. To increase the ability of parents to participate meaningfully in the special education process for their children, COPAA recommends the following:

- A) Provision of information to families prior to IEP and other team meetings. In addition to provision of procedural safeguards, parents should be given copies of any assessments or other reports to be reviewed at the meeting and a draft IEP if the school district develops draft IEPs. These documents should be provided to families in their native language.
- A) Families should be included in training and professional development activities offered to school staff.
- A) Families should be notified of any relevant statute of limitations. The school system must demonstrate the provision of written notice. The statute of limitations applicable to special education cases should be the statute of limitations applicable to other civil rights actions in the state.

## **6. Increased Funding for the Costs of Special Education**

COPAA fully supports any effort to increase the amount of funding available for the provision of IDEA services to students and for the strengthening of state infrastructures so that states can ensure the implementation of the IDEA for each student within the state. Such infrastructure includes the ability to monitor and enforce the IDEA effectively. Additionally, states must be subject to a maintenance of effort requirement to ensure that increased federal funding is not used to supplant current state investment in special education. Increased funding must be tied to accountability measures as demonstrated by improved monitoring and enforcement and increased implementation of the IDEA.

### **General comments:**

- 1) “Pre-referral” interventions: COPAA supports the use of interventions with students who are not identified as having disabilities, with two caveats. First, the use of these interventions must not delay a referral to Child Find for a child who clearly has a disability or who has been formally referred to Child Find, and second, funding for “pre-referral” interventions should not come out of Part B funds, which already are insufficient to meet the needs of students with identified disabilities.
- 2) The Special Education Process
  - A) Child Find: Research shows that the earlier a child’s needs are identified, the easier they are to meet. Yet COPAA members routinely and repeatedly are confronted by

school officials who routinely fail to identify children with disabilities whose parents seek services as well to comply with its mandate to independently locate and identify children with disabilities. While the 1997 amendments clarified the responsibility of SEAs and LEAs to “find” children in private, charter and parochial schools, this often is not done.

- A) Eligibility: COPAA strongly strongly opposes any effort to limit eligibility by narrowing or eliminating disability categories. The IDEA correctly recognizes that every child is unique. The current list of disabling conditions and the definition of eligibility recognize both the scope of disabilities children may have as well as the fact that children fall along a continuum of severity for every type of disability.
- B) IEP Meetings: COPAA opposes any changes to the current IDEA provisions regarding meeting participants. A review of the IDEA makes clear that only three or four persons are required to attend IEP meetings. While additional people may attend as warranted, the law’s requirements are not burdensome.
- C) Three Year IEPs: COPAA opposes elimination of annual IEP development or revision. At a time when our nation is focused on increased accountability for the education of our children, any effort to reduce the oversight of the special education services provided to children with disabilities is seriously misguided. Three years in the life of a child, particularly one with disabilities, is a significant amount of time. Annual IEP reviews are essential to ensure that children with disabilities are receiving services designed to meet their needs.
- D) Required Content of IEP: COPAA opposes any changes to the required content of the IEP. The documentation that is often perceived as burdensome, excessive paperwork is not, in fact what is required by the IDEA. Rather, the excessive paperwork is the result of misguided or bad policy on the part of a state or local education agency. Elimination of objectives would be a serious mistake; objectives or benchmarks are an essential means of marking the path that will be taken to reach achievement of the goal identified for the student. Additionally, objectives help make goals measurable. At a time when our nation is insisting on better measurement of our student’s skills overall, it is inconsistent to eliminate the most viable means of measuring the skills of students with disabilities.

We realize that some have suggested that fewer requirements should be imposed on schools to allow them to do their jobs. History has shown, however, both before and under IDEA that, left to their own devices school systems sometimes fail to do exactly that. COPAA members are willing, upon request, to provide information regarding these issues.

### 3) Dispute Resolution:

- A. Mandatory Mediation: COPAA believes that mediation is unlikely to be effective if one or both parties are unwilling to mediate. However, there are many instances when parents want to proceed to mediation and the school system refuses. In those cases, mediation should be mandatory.
- B. Voluntary Arbitration: COPAA opposes arbitration of special education disputes. First, it is unlikely that many parents will fully understand or appreciate

that by arbitrating a case they give up their right to appeal a decision with which they disagree. Second, it is unlikely that a sufficient number of skilled and knowledgeable arbitrators exist to arbitrate special education matters. Third, the procedural requirements necessary to ensure a fair arbitration process are so similar to those required for due process hearings that arbitration would offer no benefit as compared to due process hearings. Finally, the number of due process hearings has decreased since 1996 at a rate of 4% per year. The vast majority of special education disputes are resolved prior at the IEP team level, at mediation, or prior to due process hearings. There is no reason to add an arbitration provision to the IDEA.

- 4) Discipline: COPAA opposes any change in the current discipline regulations. Contrary to the anecdotal reports that have circulated publicly about the discipline provisions of the IDEA, the General Accounting Office (GAO) found that the vast majority of school administrators interviewed have not found their ability to discipline students with disabilities impeded in any way by the IDEA regulations. Particularly, COPAA opposes any effort to reverse the prohibition against cessation of services for students with disabilities. Denying educational and related services to students will only lead to increased academic, behavioral, and other problems on the part of students, and may result in increased delinquency and dropout rates.
- 4) Vouchers: Current law already provides for public funds to be used to send students with disabilities to private schools when their public district is unable to provide the educational services they need. Sending students to private schools that do not have expertise will leave more children without educational supports and services. “Jeopardizing A Legacy: A Closer Look at IDEA and Florida’s Disability Voucher Program”, the March 6, 2003 report issued by People for the American Way and the Disability Rights Education and Defense Fund, offers a devastating account of a program that has operated with no accountability on the part of the state, leaving many students without appropriate services and many parents funding portions of their children’s education.

## CONCLUSION

The IDEA is an essential law. While focus during periods of reauthorization is often on the problems encountered with implementation of the statute, it is important to remember that many, many children throughout the country receive good special education services that mark the difference between school success and school failure. It is true, however, that for a significant number of students, the promise of the IDEA has not been completely fulfilled. The challenge is to recognize the difference between any weaknesses in the statute that might result in implementation problems and poor policies and practices at the state and local levels that may be causing the implementation problems. Dismantling the IDEA in some or all of the ways being discussed by the President’s Commission, the Administration, and Congress will not solve identified problems. Moreover, children will be harmed if current proposals are pursued legislatively. While COPAA recognizes that provisions of the IDEA could certainly be

strengthened ,COPAA also believes that preservation of the IDEA essentially in its current form is paramount and supports the improvement of IDEA implementation without changes to the current statute.