

November 3, 2004

The Honorable Judd Gregg
Chairman, Committee on Health, Education, Labor and Pensions
United States Senate
Washington, DC 20510

The Honorable Edward M. Kennedy
United States Senate
Washington, DC 20510

The Honorable John Boehner
Chairman, Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable George Miller
U.S. House of Representatives
Washington, DC 20515

Re: IDEA Reauthorization: H.R. 1350 and S. 1248

Dear Senator Gregg, Senator Kennedy, Representative Boehner, Representative Miller,
and Members of the Conference Committee:

The Council of Parent Attorneys and Advocates (COPAA) is a nonprofit organization of attorneys, advocates, and parents whose primary mission is to secure appropriate educational services for children with disabilities. Some lawyers and advocates are in private practice; others work for nonprofit public interest groups and organizations, a number of which serve the poor. Members of COPAA and the National Association of Protection and Advocacy Systems (NAPAS) see the IDEA's successes and failures through thousands of eyes, every day of every year. Critical to IDEA's success is its enforcement scheme, which depends on parents, as private attorneys general, to bring cases when school districts provide educations so inferior that they fail their legal obligations.¹

¹ National Council on Disability, *Back to School on Civil Rights-Advancing the Federal Commitment to Leave No Child Behind*, January 25, 2000, at 6-7, 53. One reason the system is so dependent on parents enforcing their children's rights is that the Department of Education's ability to enforce the law has been kept weak. *See id.* at 41.

Recovering Attorneys' Fees When School Districts Violate the Law

1. House Bill

Negotiations resolve most IDEA disputes; due process hearings are rare.³ But, when a school district has unlawfully denied a child with a disability a free appropriate public education (FAPE), the parents may recover their attorney's fees if they are the "prevailing party." The IDEA fee transfer provision, like provisions in other civil rights laws, is designed this way to ensure vigorous enforcement by citizens who often cannot afford attorneys on their own and because the award is "against a violator of federal law." See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 420 (1978). The House bill runs counter to this design: state officials could cap parents' attorneys' fees as low as they want, thereby deterring lawyers from taking cases, and preventing IDEA enforcement. It would also let the ultimate defendant set the fees, an unprecedented, unreasonable, and illogical proposition. The House provision should be rejected.

2. Attorneys' fees: Senate Bill's Improper Purpose Prong

The Senate bill takes a different approach to the rare alleged abuses by parents. The lawyer for a parent who files a frivolous, unreasonable, or groundless case can be ordered to pay the State or Local Education Agency's legal fees (similar to the *Christiansburg* standard applied to other civil rights actions). But the bill goes farther, allowing fee shifting to parents and their lawyers if the parents sued "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." This standard should be rejected. In all other civil rights cases, prevailing defendants' fees may be shifted only if the rigorous *Christiansburg* test is met, so as not to deter the filing of nonfrivolous actions. The improper purpose standard is taken from Federal Rule of Civil Procedure 11, but lacks the rule's strong procedural protections. Much less-used than Rule 11's frivolousness prong, and much less clear in meaning, the improper purpose prong is likely to chill both counsel and parents who would enforce the IDEA.

Indeed, even parents who prevail, *i.e.*, prove that the school district illegally denied their child FAPE, could have to pay the school district's legal fees if the court believed they acted with an improper purpose. The public benefits when serious complaints are filed; a court finding that an activity is illegal will deter that school district and other districts from doing it again. Of course, the school districts can handle the few parents who repeatedly file frivolous due process complaints by filing early motions to dismiss, thereby allowing school districts to reduce their costs.⁴

³ A 2003 GAO study reported only 5 due process hearings per 10,000 special education students. A 2003 Department of Education study found that 94% of districts had no disputes go to a hearing. Only 0.3% of total spending on special education in 2000 was for mediation, due process hearings, and court cases. 150 CONGRESSIONAL RECORD S.5351 (May 12, 2004) (statement of Senator Kennedy).

⁴ An example was provided during the Senate debate of a California mother who filed a number of due process cases in 5 years. She lost 8, settled or won parts of 6, and withdrew 2. It is not at all clear that she filed the cases for an improper purpose; indeed she won or settled 40% of them. But even if she did, the bad actions of a single person do not demonstrate that there is a widespread or significant problem with parents requesting hearings for an

Furthermore, unlike the *Christiansburg* standard, "improper purpose" is more amorphous and open to subjective interpretation and manipulation. Parents are unlikely to know what is or is not improper, and thus, likely to be deterred from filing cases when the school district has violated the law. Threatened by school districts with the charge that their case was brought for an improper purpose, parents and counsel are likely to drop even meritorious cases—out of fear of having to pay thousands of dollars in fees, or bear the expense of costly satellite litigation to fight a fees order. As a bipartisan Congress recognized in enacting the IDEA fee shifting provision in 1986, relationships between school district and parents are far from equal, and parents are easily intimidated. School districts have incentives to chill individual parents (with whom they have long-term relationships), other parents (who learn about the fee threats and awards), and counsel who would bring IDEA enforcement actions. Even the biggest public interest organizations do not have unlimited pockets; smaller public interest organizations and independent counsel in private practice have shallower ones; and most parents, even shallower ones. A 1997-2002 Illinois study found that representation by counsel was the "most important single factor" in determining whether parents won a due process hearing: 50.4% of parents represented by counsel won their hearings; only 16.8% of parents without lawyers did.⁵ There is already a shortage of counsel willing to take IDEA enforcement actions in many parts of the country.⁶ When IDEA actions are chilled, the law goes unenforced and children suffer the consequences.

Moreover, in at least two Circuits, fees can be awarded against a party who filed a case intending to vindicate her legal rights (a proper purpose) but who also had an improper purpose. Hence, the fact that one of the parent's purposes was improper could prevent the filing of cases that vindicate the child's rights to a free appropriate public education.

improper purpose. Rule 11 punishes the filing of cases that were frivolous or filed for an improper purpose in federal court; IDEA due process decisions may be appealed to federal court. If there were a large number of frivolous or improper purpose IDEA cases in federal court, one would expect to see many decisions ordering Rule 11 sanctions. Instead, there have been only a handful of reported IDEA cases in which Rule 11 was applied.

⁵ M. Archer, *Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois, 1997-2002* (Dec. 2002).

⁶ Only 668 low-cost or free attorneys regularly take IDEA cases, which works out to about 1 attorney per 10,000 special education students. 150 CONGRESSIONAL RECORD S.5351 (May 12, 2004) (statement of Senator Kennedy). State data shows that parents often go to due process without lawyers, facing school districts represented by counsel. For example, California parents had attorneys 21% of the time; schools, 42%. In Illinois, parents had attorneys 35% of the time; schools, 91%. New York parents had lawyers 31% of the time; schools, 100%. *Id.*

3. Senate Bill: Unequal Treatment of Attorneys' Fee Issues

Under the IDEA, 20 U.S.C. 1415(i)(3)(F), a court can reduce a parent's attorneys' fees if the parent unreasonably protracted the litigation; the fee unreasonably exceeded the prevailing rate for the community; or the time and legal services spent were excessive. The Senate bill allows courts for the first time to shift SEA's and LEA's fees to parents and their counsel under limited conditions. Consequently, the same rule should apply to reduce SEA and LEA legal fees if they unreasonably protract litigation; their fee unreasonably exceeds the prevailing rate in the community; or the time and legal services spent were excessive. This is only fair and equitable. Otherwise, parents are treated unequally.

In one recent case, a law firm that represents school districts all over the country charged a Georgia school district \$1.3 million in attorneys' fees, expert fees, and costs. The parents had simply requested an Independent Educational Evaluation for their child with autism. Rather than comply, the school district's counsel filed due process, beginning a long, drawn-out case. The parents' lawyers had sent over 8 settlement offers, only one of which received a response. The school district has since fired their lawyer, and the case was settled in federal district court with the child receiving an independent evaluation. In another case, *Walker County v. Bennett*, the same law firm on behalf of the school district engaged in full-blown discovery, with 19 depositions in a one-week period. The school district lost in due process, district court and the Court of Appeals. In the end, the parents' counsel fees were \$200,000 and the District's fees, \$420,000. The parents tried to settle the case at every juncture. If the case had ended after due process, their legal fees would only have been \$15,000.

The Ravenswood, California school district paid the same law firm's bills of \$2.1 million, about 5.5% of its annual budget. About \$1.5 million was for work by lawyers and paralegals; the remainder, for meals and other expenses. The firm has since been replaced with county counsel who is paid \$30,000 a year. In *Central Bucks S.D. v. Brendan B.*, a Pennsylvania case, the school district filed due process to remove a child from the regular classroom to a life-skills class, a significant change in placement. The parents made a settlement offer before the hearing began; the school district rejected it and went to the hearing, calling 9 witnesses. The dispute consumed an entire year, including a 10-day hearing which the parents won hands down. The win was affirmed on appeal. Two years later, the school district apologized to the family for making them endure the hearing.

If, however, Congress decides to use the improper purpose standard, it must also apply to school districts which bring due process complaints against parents with an improper purpose, such as to harass, delay or chill the filing of IDEA enforcement cases or complaints with the State Education Agency. For example, in a recent Massachusetts case, an elementary school student with cerebral palsy faced access and learning issues that could not be met effectively by the school district's program. The family went to a hearing to place the child in a private school program she needed. The district drove the costs up by refusing repeatedly to provide documents, placing obstacles in the way of experts the parents needed to have observe the student's program, ignoring the clearly appropriate advice from the experts, and other means. The mother's settlement offers had been rebuffed. The young child testified for a half-hour using a

communications device; the school district cross-examined her for two hours, including using a document that had not previously been disclosed as the rules require. The next day, the special education director offered to place the child in the private school, as originally requested. The parents had to pay all of their fees and costs for the hearing up until that time.

4. Statute of Limitations: Ongoing Violations

Both the House and Senate bills set statutes of limitations. The Senate bill's two year statute of limitation is better, although states should not be permitted to shorten it. The final bill needs to include language from the Senate Report stating:

[W]here the conduct or services at issue are ongoing to the previous two years, the claim for compensatory education services may be made on the basis of the most recent conduct or services and the conduct or services that were more than two years old at the time of due process or the private placement.

Senate Report 108-185 at 40. This preserves the right to bring an IDEA enforcement action when a school district has illegally denied a child a free appropriate public education for a continuing period. Many under-educated parents, including those who are poor, less literate, less aware of their rights, or have poor English skills, are unlikely to know that the IDEA is being violated. COPAA members repeatedly are confronted by school officials who fail their legal obligation to "find" and identify children with disabilities for years, or who provide educations and IEPs so inadequate that they violate federal law for years. In *Reid v. District of Columbia*, the school district failed to identify a child in second grade--when he was about a year behind his peers in reading--even though his learning disabilities should have been apparent to trained educators. He was finally identified as disabled in fifth grade, but the school district still failed to serve him appropriately. His learning deficits deepened with each year of neglect, so that at age 12, he was four years behind in reading. In *J.A.P. v. Leon County School Board*, the court awarded four years of compensatory education to a child finishing high school because the school district had not identified her language impairment and thus, had failed to provide a free appropriate public education. At the time she left high school, J.A.P. was years behind: reading at a fifth-grade level and doing math at a seventh-grade level.

Indeed, without legal liability for continuing violations of the IDEA, school districts have incentives to avoid their Child Find obligations as long as possible, and to under-serve those children who are identified, since they will only be responsible for the last year or two of illegal conduct. Because courts are increasingly unwilling to pay attention to legislative history and will not even look at history if they conclude that statutory language is clear, it is imperative that the ongoing violation language be put into the bill.

5. Discipline

The Consortium for Citizens with Disabilities, to which COPAA belongs, has written an outstanding analysis of the discipline issues in the two IDEA bills. The House bill would allow the removal of a child from the classroom for any conduct code violation, even if a manifestation of the disability. The Senate has recognized the importance of the manifestation review, but, as

pointed out in the CCD paper, the Senate bill weakens the review. Among other things, it is critically important that the manifestation determination include the requirement that the team "considers, in terms of the behavior subject to disciplinary action. . . (III) the child's IEP and placement" See Section 615(k)(4)(C)(i)(III) of the IDEA. The Senate bill eliminates this. See Section 615(k)(1)(C) of the bill. If the child's IEP or placement are inappropriate, remedying this will enable the child to remain in his/her classroom environment with the supports and services he/she requires to learn adaptive behaviors, so that he/she no longer violates school rules. This is a win-win for everyone. There is no reason to send such a child to an alternative placement, where studies show children are much less likely to learn and more likely to drop out.

Moreover, a Positive Behavioral Intervention Plan based on a functional behavioral assessment is a vital component of the "specially designed instruction" needed by students with disabilities, and the Senate should strengthen the requirements for positive interventions. Individual, classroom, and school-wide positive behavior supports are evidence-based practices that are highly effective in keeping schools safe and students learning in all grades. We urge Congress to strengthen the discipline provisions in both the House and Senate bills, so that the rights of children are protected.

Conclusion

Many children receive good special education services that make the difference between school success and failure. Yet, it is also true that schools do fail their legal obligations to provide a free appropriate public education. In those situations, a strong IDEA enforcement scheme is critical if children are to benefit from their education, including an appropriate attorneys' fee provision and the ability to bring actions for continuing violations of the law.

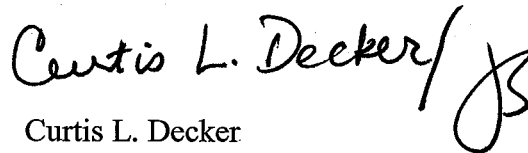
Sincerely,



Jodi Siegel

Chair

The Council of Parent Attorneys and Advocates, Inc.



Curtis L. Decker

Executive Director

National Association of Protection and Advocacy Systems