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CHILDHOOD, YOUTH AND
OF THE IDEA IMPROVE-

Hearing on Early Childhood, Youth a...

HEARING
BEFORE THE
SUBCOMMITTEE ON EARLY CHILDHOOD, YOUTH
AND FAMILIES
OF THE
COMMITTEE ON ECONOMIC AND
EDUCATIONAL OPPORTUNITIES
HOUSE OF REPRESENTATIVES
ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, DC, MARCH 7, 1996

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Chairman CUNNINGHAM. Mr. Herr?

**STATEMENT OF STANLEY HERR, PROFESSOR OF LAW,
UNIVERSITY OF MARYLAND SCHOOL OF LAW**

Mr. HERR. Mr. Chairman, I hope I'm one of those warm and nurturing attorneys that school boards and people like Ms. Pratt won't mind having at their side.

I'm here today because I've represented, I guess, thousands of children with disabilities, going all the way back to 1971 when right here in Washington, DC, thousands—tens of thousands of children couldn't get in the schoolhouse door. And I want to tell you that in that case of *Mills v. Board of Education*, we included provisions that dealt with regulation of suspension and discipline because that was the door by which many kids with disabilities were getting indefinitely thrown out.

I want to tell you that I'm here too because, like Mr. Kelly, I'm a parent and I have a son named David—

Chairman CUNNINGHAM. Just take your time.

Mr. HERR. [continuing] with a mild disability, but one for whom the existence of IDEA represents the promise of help when he needs it and the protection of his rights. I dearly hope that you will do everything, as you said Mr. Chairman, to strengthen this bill and not to any way weaken the rights of individuals like Sue's son and my David.

My views are based on personal experience as well as professional training. I've summarized it here. When I have a little more time, I'm going to offer you a supplemental statement.

I want to tell you, there's no way I can summarize the sights and sounds of what it was like in institutions in the early 1970s when I went to Willowbrook and Partlow and places probably in each of your Members' districts. I saw kids who weren't in school, didn't have training and didn't have hope. That was the time before IDEA. Some of those kids had been put there because they were deemed to be disruptive. I want to tell you that IDEA is a tremendous success story and it's something this Congress can be very, very proud of because it has really kept those doors open.

One of the kids that I first represented was a young man named Gregory. Gregory was about seven years old. He hadn't been in school for over a year-and-a-half. He had been indefinitely suspended and what was his capital offense? He had called his teacher, Ms. Nelson, Baby-Face. He had aimed a spitball at one of his classmates and he had been indefinitely suspended until he was told a class for the mentally retarded was available for him. Well, he never got a call and it wasn't until we, as attorneys, brought his case to the attention of the United States District Court that there was relief.

I want to just tell you, there are many good points. I like the push to inclusion. I like the performance standards. I like including kids in assessment. Let me just draw five troubling areas to your attention.

One is, the new funding formula has the potential to lead to the under-identification of children with disabilities and undermine the child-find goal.

Two, attorneys continue to have a vital role in leveling the playing field, both in mediation and other complaint resolutions processes. I strongly encourage you not to bar them from being of assistance to parents at all stages, or you will just have people bypassing mediation. Why should the school district have all its professionals arrayed at its side and the parent not have a representative of his or her choice?

I also want to say that I think that some of the changes on fees are already being taken care of by courts who have the discretion. They are not automatically stamping paid in full anything that a lawyer submits. I tell you that when you add notions like "excessive legal services" or a result proportionate to the hours spent, when you're a parent there is no such thing as excessively being a zealous advocate for your child.

I'd also like to say that introducing these written statements of concern is only going to complicate matters. It's only going to open up new areas for technical barriers that will keep parents from having the help they need. Without these fee shifting procedures, these rights will be hollow because the only people who have lawyers will be the school boards.

On "stay put" provisions and disciplinary safeguards, I just want to tell you that in all the years that I've been representing students, we've never not been able to work things out with cooperative parents, with behavioral modification programs. When you have really seriously disruptive behavior, that's why we have juvenile courts and law enforcement. We shouldn't, as Mr. Kildee said, try to do everything in school discipline.

Chairman CUNNINGHAM. If you could summarize, Mr. Herr?

Mr. HERR. Yes, sir.

I would just say the carve-out of ten LEAs is not a good idea because I think it will leave those students without the same equal rights.

In conclusion, I do hope that the reauthorization lives up to its name of the IDEA Improvement Act. I know there's much here that will merit the support of the parent community, the advocacy community. For the sake of America's Gregory's, for the sake of my son and your children and grandchildren, please keep the IDEA strong and intact.

Thank you very much, Mr. Chairman.

Chairman CUNNINGHAM. Thank you, Mr. Herr.

[The prepared statement of Mr. Herr follows:]



UNIVERSITY OF MARYLAND
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STATEMENT OF
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THE IDEA IMPROVEMENT ACT OF 1996

HEARING BEFORE THE SUBCOMMITTEE ON
EARLY CHILDHOOD, YOUTH, AND FAMILIES
HOUSE OF REPRESENTATIVES

ROOM 2175
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MARCH 7, 1996

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Mr. Chairman, and distinguished members of the Subcommittee on Early Childhood, Youth, and Families:

1. Introduction

This reauthorization is fundamental to the national disability policy we need to frame and to implement. I am honored by your invitation to present my views and humbled by the magnitude of the questions confronting us that are of decisive importance to children with disabilities and their families. Over the past twenty-six years, I have spent most of my time advocating for persons with disabilities, from my role as counsel starting in 1971 in the landmark Mills v. Board of Education of the District of Columbia precedent to my current position as the supervising attorney in the Clinical Law Office of the University of Maryland School of Law where I oversee the school's disabilities clinic. In my role as a professor of law, my student-attorneys and I represent low-income persons with disabilities, including students in IDEA placements. I am also acquiring other relevant personal experience as the very proud parent of a son with a disability and draw considerable strength from knowing that the United States is a country that will protect the rights and interests of our children and young persons with disabilities so that we never return to the tragic days of their banishment and exclusion from appropriate education.

2. Qualifications and Experience

I offer this statement in abbreviated form, since I have requested and received permission from the Committee's majority staff members to provide you with a fuller supplemental statement after the hearing. Thanks to this kind permission I will be able to amplify and document my views for the record, as well as address any questions from Committee members or staff that might require fuller responses.

My views are based on a variety of personal experiences, professional training, and knowledge of the literature and caselaw pertaining to the Individuals with Disabilities Education Act (IDEA) as well as the constitutional infirmities and dehumanizing conditions that existed prior to the enactment of Public Law 94-142 in 1975. That personal background is summarized in the biographical note that appears below.¹ But I cannot find words adequate

¹ Professor of Law at the University of Maryland School of Law, and Director of Clinical Law Office programs on Disabilities and Homelessness-Prevention Advocacy. Schell Senior Research Fellow at the Yale Law School's Schell Center for International Human Rights. Kennedy Public Policy Fellow focusing on domestic policy with reference to persons with disabilities from 1993 to 1995 while on public service leave. Co-founder and Vice President of the Homeless Persons Representation Project, board member of the National Law Center on Homelessness and Poverty, and member of the American Bar Association's Editorial Advisory Board to the Mental and Physical Disability Law Reporter. Prior service on the Boards of the American Association on Mental Retardation and the International Academy of Law and Mental Health Commission on disability law. The Maryland Governor's Commission to Revise the Mental Retardation and Developmental Disabilities Law. Past-chair of the Maryland State Bar Association Committee on Legal Aid to Disabled Individuals, and the U.S. Association for Retarded Citizen's Legal Advocacy Committee. The Greater Baltimore Shelter Network, Action for the Homeless. Rockefeller Foundation Fellow for Human Rights at Columbia University. Prior teaching in disability law at Harvard Law School, Catholic University Law School, and the Tel Aviv University and Hebrew University of Jerusalem as a Fulbright Senior Scholar. Author of over eighty articles, monographs, and books including Rights and Advocacy for Retarded People and Legal Rights and Mental Health-Care. Graduated with B.A., cum laude, from Yale College,

to the task of describing for this Committee the sights and sounds I confronted back in 1972 in institutions like Willowbrook and Partlow and other state institutions for persons with mental retardation where I saw school-age children with no education, no training, and no hope. Nor can I find ways to tell you of the deep sadness of Gregory J., my first client in Washington, D.C., who in 1971 before the enactment of the due process rights and the stay-put provisions of IDEA, sat at home doing absolutely nothing for over a year after he had been suspended and told to wait until "we have a small class for the retarded." But the call from the schools never came, and Gregory, an inner-city child who I doubt was really mentally retarded, drew pictures of the college football player he one day hoped to be. I will never forget what Gregory's mother wrote the D.C. Schools to get them to finally readmit him: "How will my son ever get to college if I can't even get him back into elementary school?" This was the legacy that led Congress to enact P.L. 94-142 and to codify in statutory form the constitutional protection of equal protection and due process so that there would be "a stay-put" provision and a right against unjust transfers. This was the legacy that prodded Congress to insure that the education of all the future Gregorys of America would not be subject to whim and administrative caprice.

J.D. from Yale Law School, and doctorate on disability law from Oxford University. Recipient in 1996 of the Humanitarian Award of the American Association on Mental Retardation. IDEA experience includes individual and group advocacy for low-income families in Baltimore and elsewhere; counsel in *Mills*, *Wyatt v. Stickney* and similar class-action cases; writing, teaching, consulting on numerous issues related to the laws on special education.

3. Major Conclusions

On balance and on a fair reading of the historical record, IDEA is one of the most successful pieces of federal legislation ever enacted in the field of education. It largely eliminated the exclusion of over 1,000,000 children with disabilities who had been entirely barred from the public school system. It significantly enabled thousands of children who had been vegetating on institutional backwards to leave institutions for community-based living and education (for instance, a drop from 100,000 to 4,000 such children in state mental retardation institutions alone as a result of IDEA and related public policy advances).² It upgraded special education services across the country and across the spectrum of placement settings. It changed the status of children with disabilities and their parents from beggars for services to empowered partners in the development of plans individualized to each child's unique needs for free and appropriate public education. In light of this success and a special education law and system that is now one of the world's best, I urge you not to do anything to weaken the rights and legal protection that you have quite properly accorded children and youth with disabilities. I commend you for areas of change that offer prospects for improvement, such as the new performance goals and indicators as well as the participation of children with disabilities in general assessment programs (Sec. 612). But I caution that before you do anything that might erode, dilute, or otherwise undermine the constitutionally-

² Robert Prouty and Charlie Lakin (eds.), Residential Services for Persons with Developmental Disabilities: Status and Trends Through 1994 20-21 (University of Minnesota Research and Training Center on Community Living, June 1995) (school-age census in institutions declining from a peak in 1965 of some 95,184 individuals aged 21 and under to 4,000 such individuals in 1994).

based safeguards for such children you should put the adherents of change to the test of compelling proof, not the telling of anecdotes. In view of the severe limits of the available time, please allow me to focus on some troubling aspects of the February 29th Staff Discussion Draft bill.

4. The funding formula and its potential to lead to the underidentification of children with disabilities.

"Child Find" requirements of IDEA compel states to identify, locate and evaluate all children with disabilities residing within their borders. However, the new funding formula moves away from funding based on the actual identification of children with disabilities. It therefore may produce disincentives on state and local levels to properly fulfill this child find mission and may actually penalize states and localities that have high-concentrations of children with disabilities because of lead exposure or other environmental factors.

5. Attorneys have a vital role in leveling the playing field in both mediation and other complaint-resolution processes.

Attorneys should not be barred from participating in mediation. Contrary to Section 615(e)(2)(G), they should be able to attend or otherwise participate in the mediation process. This is in the child's best interest since the school district will have considerable expertise available to it, while the parents may not have the representative of their choice.

In due process hearings, attorney fees are currently awarded only to parents who prevail. The House bill should not cut back on the concept of the prevailing party by introducing inquiries into what is a result proportionate to the hours spent.

It is also troubling to see that fees may be reduced if parents do not provide a written statement of concerns to the school district before they place their child in a private setting. The school district will already be aware of their concerns through the outcome of the mediation or due process hearing. Thus this technical, procedural requirement may simply penalize parents who are inexperienced in pursuing IDEA claims or lead to extended disputes about what is an adequate statement of concerns.

In general, I strongly believe that IDEA's existing fee shifting provisions should be retained because they promote early settlement of cases and because without such provisions school districts may engage in needless delay and obstruction. The award of such fees is a relatively rare event given the millions of children covered by IDEA. Without such a potential for recouping the costs of going to due process hearing or to the court, parents may have only symbolic procedural rights under the IDEA.

6. The "stay-put" provision and safeguards against arbitrary school suspension or exclusion by school officials are vital protections under IDEA.

As I know from my personal experience in Mills v. Board of Education, children whose disabilities include emotional disorders or learning disabilities need protection from being ousted from beneficial instruction under the guise of disciplinary process. If Gregory

J. had had the benefit of the existing IDEA safeguards, school officials would have developed educational solutions for him rather than pushing him out the door. And what was Gregory's offense? He had called his teacher, Miss Nelson, "baby face" and for this he was labeled mentally retarded and indefinitely expelled. In my subsequent quarter-century of experience in special education matters, I have never encountered a case under the IDEA in which the school was not able to work out a solution involving behavior modification, instructional modification, or some other cooperative approach with the child's parents. In fact, the exercise by a student of his or her stay-put rights is a very rare occurrence. Experienced school administrators with whom I have spoken have informed me that they either never encountered a problem arising from the stay-put provision or else they were able to quickly get a temporary restraining order in the one or two cases they encountered in the course of a long career in special education. We are all concerned about safe and orderly school environments. However, impartial hearing officers not school personnel acting unilaterally are the proper agents to resolve the extremely rare serious disciplinary matter.

7. Students' rights and other Part B requirements should not be waived under the proposed carve-out of ten LEAs under proposed Section 613(g).

Students should not face a global waiver of their rights and other Part B requirements simply because the Secretary of Education wants to encourage experiment. School districts and some parents should not be able to abrogate the educational rights that are available to children with disabilities everywhere else in the country. The results of such a carve-out

would not yield the desired "adequate and reliable data" since these local educational agencies would be preselected on the basis of their already achieving "successful results for children with disabilities." (p. 88). Hence, evaluators would not know what role the waiver or modification of requirements would have in any non-demonstration school districts. We should not ask the children in ten districts to play Russian Roulette with their educational rights. We can encourage innovation without this type of barter.

8. Retain the Full Educational Opportunity Goal now expressed in current law Section 612(a)(2) since it reflects the constitutional underpinning of IDEA.

Although the precise language may require some modification, the full educational opportunity goal is still a vital signpost. It tells parents and school administrators no child with a disability can be denied appropriate public education. Unfortunately I know from the case of Nokomus M., a inner-city Baltimore child who was excluded from school in the late 1980s, that such children always face some jeopardy to their equal educational opportunity rights.

9. Save from repeal some of the vital provisions of current law such as laws on Family Support Services, Personnel Development, and related provisions.

Although these programs are small and in some cases have not yet been implemented, the cost savings of eliminating them are illusory. For example, the law on family support

services expresses principles vital to maximizing the independence of children with disabilities and their families. Let us not hastily discard these principles.

10. Ensure that this reauthorization lives up to its name as the "The IDEA Improvement Act of 1996".

There are many positive changes proposed in your bill that will merit the support of the advocacy and parent communities. However, to gain that support I sincerely believe that you will need to make some of the modifications to your draft bill that are identified in this testimony. For the sake of America's Gregorys and Nokomuses -- for the sake of my son and your children and grandchildren -- please keep the IDEA strong and intact as a beacon for children's rights.

SUPPLEMENTAL STATEMENT OF
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THE IDEA IMPROVEMENT ACT OF 1996

FOR THE HEARING RECORD COMPILED BY THE SUBCOMMITTEE ON
EARLY CHILDHOOD, YOUTH, AND FAMILIES
COMMITTEE ON ECONOMIC AND EDUCATIONAL OPPORTUNITIES
HOUSE OF REPRESENTATIVES

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WASHINGTON, DISTRICT OF COLUMBIA

APRIL 23, 1996

Mr. Chairman and distinguished members of the Subcommittee on Early Childhood, Youth, and Families:

Thank you for having granted me permission to supplement my written and oral testimony before this Subcommittee's hearing of March 7, 1996. For the record and your deliberations, I would like to focus on the following four issues critical to the well-being and human rights of children with disabilities and their families:

- I. Access to Legal Counsel and the Importance of Attorneys' Fees
- II. Access to the Representative of One's Choice in Mediation
- III. Access to Education for IDEA Students Subject to Allegations of Disruption
- IV. Access to Education Through an Equitable Child-Based Funding Formula

Although there are some improvements in the proposed Reauthorization of IDEA, reversal of the rights of children and youth with disabilities in any of the above areas would seriously undermine the constitutionally based equal protection and due process guarantees that Public Law 94-142 was designed to codify.

- I. Access to Legal Counsel and the Importance of Attorneys' Fees

IDEA will not adequately protect the rights of children with disabilities without continuing to secure their access to counsel, and such access will shrivel without the

ability of courts to award attorneys' fees in appropriate cases. Claims made to your Subcommittee that administrative hearing officers award unwarranted attorneys' fees in special education proceedings in which parents prevail are simply not grounded in reality.

First, hearing officers are not empowered to award fees. This authority is reserved, in law and practice, to the Federal district courts. The Handicapped Children's Protection Act of 1986 ("HCPA") states in relevant part: "In any action or proceeding brought under this subsection, *the court*, in its discretion, may award reasonable attorney's fees" 20 U.S.C. § 1415(e)(4)(B) (1986)(emphasis added).

Second, existing case law already appropriately dictates the circumstances under which the courts will deny, reduce, or award attorneys' fees. Under that authority, based on the language of the Handicapped Children's Protection Act and Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933 (1983), courts now issue predictable and fair decisions regarding the award of fees to prevailing parents.¹ Based on our review of some fifty reported and unpublished decisions involving attorneys' fees, we conclude that Hensley is the correct standard, that Congress should reaffirm it in the context of special education proceedings, and that courts routinely apply the concepts of "prevailing party" and "excessive" time spent

¹ One area of variability already limits attorney's fees to prevailing parents due to the lack of a clearly established statute of limitations for bringing such a claim. See, e.g., Dell v. Board of Education, Township High School District 113, 32 F.3d 1053 (7th Cir. 1994) (120-day limitation disputed); Reed v. Mokena School District No. 159, 1994 WL 163189 (N.D.Ill. 1994)(dismissed for failure to timely file); Day v. Radnor Township School District, 1994 WL 683375 (E.D.Pa. 1994)(holding that filing must occur within two weeks of judgment).

to reduce or deny attorneys' fees. Thus, if the plaintiff is only successful in obtaining a small part of the relief requested, then the court must reduce the award accordingly. *Id.* at 434. If the plaintiff is successful on some claims, but unsuccessful on other unrelated claims, then the court should deny fees entirely for the failed claims. *Id.* at 435.

This Subcommittee should delete proposed new hurdles to obtaining proper attorneys' fees since these hurdles are either redundant or confusing. See, for example, "Sec. 615 Procedural Safeguards", (i)(F)(v) on attorneys' fees "not in proportion to the number of hours expended on the issues involved or on the issues on which the parents prevailed." This verbiage is simply unnecessary in light of the "excessive" standard and the Hensley test discussed above. Congress should retain consistency with the long line of past special education decisions, as well as adhere to current standards that foster the original intent of the HCPA: consistency with other fee-shifting statutes. This clear, traditional standard permits judges to consistently and correctly administer the statute, and fulfills past Congressional intent. In speaking in favor of the now current statute, Rep. Williams of Montana stated that "[t]he right of reimbursement of reasonable attorneys' fees provided for in the conference report is exactly the same right that Congress has extended to other persons protected by fees statutes--no more and no less." 132 Cong.Rec. H4841-01. Children with disabilities were to be treated with equality, and judges were empowered to award fees "consistent with the committee's position that handicapped children should be provided fee awards on a basis similar to other fee shifting statutes when securing the rights guaranteed to

them by the EHA." *Id.* 1986 U.S.C.C.A.N. 1799 at 1804.² Even in a case denying attorney's fees, an appellate court expressly stated that interpretations of such key language as "prevailing party" under IDEA is to be interpreted in the same manner, and by the same cases, as those arising under the §1988 civil rights statute. Combs v. School Board of Rockingham County, 15 F.3d 357, 359 (4th Cir. 1994).

The new proposed restriction requiring a written statement of concerns is also redundant and unjust. It is redundant because parents will have already disclosed their concerns when they request a due process hearing. It is unjust in that it adds an unfair procedural requirement and penalizes parents who are inexperienced in the niceties of legal process. It may also lead to hyper-technical disputes about what constitutes an adequate "written statement of concerns."

II. Access to the Representative of One's Choice in Mediation

Since mediation is voluntary, parents should not be discouraged from using it. They

² The Senate Report was consistent in urging the sufficiency of the Hensley standard. See the Additional Comments of Senator Hatch et.al., stating: "It is the committee's intent that the terms 'prevailing party' and 'reasonable' be construed consistent with the U.S. Supreme Court in Hensley v. Eckerhart, 461 U.S. 424 at 440." 1986 U.S.C.C.A.N. 1799, 1803. Thus, Republicans and Democrats alike agreed that "section 2 should be interpreted consistent with fee provisions of statutes such as Title VII of the Civil Rights Act of 1964 . . ." *Id.* (discussing fees for administrative proceedings). Commenting on judges being empowered to award fees, the Senate legislative history concurs that this "is consistent with the committee's position that handicapped children should be provided fee awards on a basis similar to other fee shifting statutes when securing the rights guaranteed to them by the EHA." *Id.*

should be able to be accompanied by the representative of their choice. The ouster of lawyers may simply deter parents who wish to be represented by a lawyer from invoking mediation. This possibility negates what is generally viewed as a less costly, more efficient alternative to a due process hearing. Parents will instead regard with suspicion this option, and simply request a hearing for a matter that might otherwise have been resolved by their counsel through mediation. This proposal also perpetuates a power disparity since the school district already has abundant professional resources at its disposal. It is misleading to say that the presence of an attorney for the child will force the school district to retain an attorney of its own since mediation is not a coercive, law-bound process. Surely, the playing field becomes a bit more level when a parent confronted by a phalanx of school officials has the representative of choice by her side.

The proposed language of this bill barring the presence of attorneys in mediation would be unprecedented in the annals of federal legislation. Our research indicates that no existing federal statute bars attorneys from participating in mediation. Indeed, the only reference in existing federal law alluding to the representation of parties in mediation makes plain that attorneys are permitted to participate in alternative means of dispute resolution in the administrative process.³ While we make no claim that only attorneys should be permitted to assist parents in the IDEA mediation process, parents should be free to choose a representative whom they feel has the necessary training, competence and grasp of the issues

³ Pub.L. 101-552, § 9(a)(2), at note to 5 U.S.C. § 571 (1991). This statute also leaves some discretion in agencies to bar nonattorneys where the matters are "so complex or specialized that only attorneys may adequately provide such representation or assistance."

to effectively guide them through the maze of an increasingly complex special education bureaucracy.

In response to suggestions from some school officials that mediation be made mandatory, we reject this unwarranted attempt to force everyone through a time-consuming, multi-tiered process. Forced mediation and the curtailed choice of representation in the mediation process is manifestly unfair. In contrast, voluntary mediation is an approach that has the support of Professor Rosenfeld and other witnesses: "I recommend that mediation be made available to parents and school districts, but not required. Since mediation is not binding, there is no guarantee that the parties will agree which could simply lengthen the litigation process."⁴

III. Access to Education for IDEA Students Subject to Allegations of Disruption

Congress should resist efforts to reinstate exclusion and cessation of services as a way of sweeping under the carpet the school system's failure to provide appropriate and effective instructional programs for some children with disabilities. Cases like Mills and Pennsylvania Association for Retarded Children show the historic harms of permitting disciplinary procedures to be one-way tickets out of the education system for children with

⁴ Prepared Testimony of Joseph G. Rosenfeld, Ph.D., Professor and Director, School Psychology Program, Temple University, Before the House Economic and Educational Opportunities Committee, Subcommittee on Early Childhood, Youth and Families on Reauthorization of the Individuals with Disabilities Education Act, June 27, 1995, 1995 WL 10387605 at 4.

disabilities.

Existing federal law provides adequate means for a school district to override, where injurious, a parent's insistence on "stay-put" provisions. Testimony previously received by this Subcommittee, for instance, reveals that "the school districts can go to court to obtain a temporary restraining order to permit it to remove the child. [Unfortunately,] some parents and teachers are threatened by being in court and feel more comfortable in the less formal hearing situation. However, since judges are full-time employees and hearing officers are usually called when needed, in some jurisdictions it may be quicker to obtain a judicial decision than a decision by a hearing officer." *Rosenfeld Testimony*, Ibid. at 5. School officials need to be less timid in the exercise of the powers they already have. We do not need to recreate the trap-doors of the past that led to one million children being excluded from schools.

Properly managed, the "stay-put" provision will have no real effect on the potential for disruption in school. The Supreme Court in *Honig v. Doe* specifically outlined safeguards available to school systems which permit the management of children with emotional and other disabilities who need behavioral supports. See Lisa K. Arnett, Note, *Mootness and the Education For All Handicapped Children Act: Timely Decision Saves Judicial and Social Costs* - *Honig v. Doe*, 108 S.Ct. 552 (1988), 57 U. Cin. L. Rev. 1101, 1117 (1989). "In light of the United States' egregious history of neglect in educating its handicapped students--one that left the educational needs of eighty-two percent of all

emotionally handicapped unmet as recently as 1974⁵ -- it is heartening that the Supreme Court has adamantly refused to allow public schools to push handicapped children with behavioral disorders out the doors which were only so recently open to them." *Id.* at 1117. It is important to also remember that the stay-put provision is a measure of last resort and educational policy-makers can develop mechanisms and teaching approaches to diminish its use.⁶

Furthermore, the entire issue of disciplinary infractions by students with disabilities is overblown. They are far from the main source of disruption in the schools. "In fact, students with disabilities are more likely to be the victims of violence and disruption than its perpetrators." *Hearing on the Reauthorization of the Individuals with Disabilities Education Act (IDEA) Hearing Before the Subcomm. on Select Education and Civil Rights of the House Comm. on Education & Labor 103d Cong., 2d Sess. 103 (1994) at 20 (statement of Elizabeth Truly) cited in Disciplining Children with Disabilities Under the Individuals with Disabilities Education Act, 12 Journal of Contemporary Health Law and Policy 155, 181 (1995).*

⁵ *Honig v. Doe*, 484 U.S. 305, 309, 108 S.Ct. at 596-97 (1988) (citing S. Rep. No. 168, 94th Cong., 1st Sess. 8, reprinted in 1975 U.S. Code Cong. & Admin. News at 1425)[footnote number changed from the original].

⁶ See Gail Paulus Sorenson, *The Many Faces of the EHA's "Stay-Put" Provision*, 62 Ed. Law Rep. 833 (1990).

IV. Access to Education Through an Equitable Child-Based, Funding Formula

Congress should retain the current child-based funding formula since states and localities should not be penalized for effective "child find" programs. It seems most unlikely that a change in formula is needed to reduce over-labeling of children under the IDEA since local and state revenues already support 92 percent of the cost of providing such children a free and appropriate public education. They will hardly overlabel when they bear the lion's share of the costs.

We should not undercut "Child Find" efforts under the IDEA that compel states to identify, locate and evaluate all children with disabilities residing within their borders. Congress should be cautious not to introduce disincentives on state and local levels that hinder this child find mission and penalize states and localities that have high-concentrations of children with disabilities for entirely understandable environmental reasons.

V. Conclusion

On behalf of the five million children with disabilities, their families, friends and allies, we urge you to keep the IDEA strong and intact. The recommendations in this statement on attorneys' fees, the opportunity for attorney presence at mediation, the retention of "the education for all children with disabilities" standard, and a child-based funding formula will accomplish that end. Please continue to protect these children -- our most vulnerable children -- from exclusion and neglect.*

* **Acknowledgment:** For research assistance, thanks are due to Mark A. Machi, Dirk Schwenk and Booth M. Ripke, former, present and future research assistants in the University of Maryland School of Law and student-attorneys in its Clinical Law Office.