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December 2, 2016

The Honorable Chuck Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Leahy:

We are several of the founding members of Thompson & Horton, a law firm that represents many educational institutions throughout the state of Texas. We advise clients regularly in the area of compliance with federal and state laws pertaining to special education. Today we learned of several recent news stories carried in national magazines and websites, describing opposition to the appointment of Senator Jeff Session to the post of Attorney General on the basis of Senate floor statements he made in 2000 relative to laws serving students with disabilities. The stories inaccurately described certain floor comments from Senator Sessions which were made during the last reauthorization of the Individuals with Disabilities Education Act. The actual remarks made by Senator Sessions are attached as Exhibit A to this letter. These stories, we believe, are taken completely out of context and do not reflect the actual circumstances of the Senate testimony nor even the testimony itself.

We worked on behalf of many school districts during this general time to insure that lawmakers clearly understood the details of the law and the impact it had upon classroom environments.¹ Our clients voiced a common concern regarding the impact of one provision in the law pertaining to the discipline of students with disabilities. The law at that time, Section 615(k)(7)(C) of P.L. 105-17, passed in 1997, resulted in many instances where students who violated a school's code of conduct remained in their current educational setting if they challenged the disciplinary consequences through the law's provision for a due process hearing, a situation known as "stay-put." This was true even if the child's behavior had been determined not to have been a manifestation of his or her disability by their IEP team. Often times this time period of "stay-put" lasted months, even years, following the offense as it was required during the pendency of the hearing and any appeals. As a result, many students with disabilities who committed code of conduct offenses (which, again, were unrelated to their disability) were never actually removed to disciplinary placements but remained in their regular classroom on the

¹ At that time, the authors were affiliated with the law firm of Bracewell and Patterson in Houston, Texas.



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basis of the legal challenge to the disciplinary placement. Senator Sessions' testimony was made in the context of the issue of this application of "stay-put" to disciplinary placements and this aspect of the law at the time. This provision in the law at the time often led to exactly the types of situations described by Senator Sessions in the cited testimony.


Senator Edward Kennedy and other members of the HELP committee saw the problem with such an approach and replacement language was written that placed the evidentiary burden back onto the party challenging the discipline. The law was changed in 2004, P.L. 108-446, and now requires that, during a parent's appeal, the child shall remain in the interim alternative educational setting chosen by the IEP team pending the hearing officer's decision or until the time period for the disciplinary action expires. The law requires that the child still be provided an appropriate education during the time spent in the alternative disciplinary placement. Importantly, the law still allows for a parent to challenge that placement via an expedited hearing.

The remarks reported in news stories are, in our opinion, misrepresentative and do not reflect the reality of the law or context of the time period when the law was being reauthorized between 2000 and 2004. We write, on our own accord and with actual knowledge of the circumstances and law surrounding the cited remarks, to ensure an accurate depiction of the comments referenced.

Sincerely,

Thompson & Horton LLP


Christopher P. Borreca


Janet L. Horton

CPB/JLH/bg
Enclosure

cc: Members of the Committee on the Judiciary

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Mr. SESSIONS. Mr. President, I want to share some additional thoughts with the members of the Senate and those watching what we can do to improve education in America.

I believe in public education. I have taught and my wife has taught in public schools. I say that to express how deeply I care about it. We have been active in PTA as our kids have gone forward. We want to improve the system. We want to make learning occur more regularly. We want to help teachers. I believe in American teachers. They are some of the finest in the world. They are well trained. They give their hearts and souls to it, only to be frustrated by regulations, paperwork, and discipline problems resulting from mandated rules passed by this Congress.

I am going to share some thoughts today, and those in education in any state of America will know what I am saying is true. They will have heard these kinds of examples time and time again. But the vast majority of Americans will not believe it; they will not believe these things occur.

Over 25 years ago, for example, we passed a federal disabilities act. It was designed to mandate to school systems and require that they not shut out disabled kids from the classroom and that they be involved in the classroom. If they have a hearing loss, or a sight loss, or if they have difficulty moving around, in a wheelchair, or whatever, the school system must make accommodations for them. They would be mainstreamed. They would not be treated separately.

That was a good goal, a goal from which we should not retreat. I hope no one interprets what I say today as a retreat from that goal. But in the course of that time, we have created a complex system of federal regulations and laws that have created lawsuit after lawsuit, special treatment for certain children, and that are a big factor in accelerating the decline in civility and discipline in classrooms all over America. I say that very sincerely.

Teachers I have been talking to have shared stories with me. I have been in 15 schools around Alabama this year. I have talked to them about a lot of subjects. I ask them about this subject in every school I go to, and I am told in every school that this is a major problem for them. In fact, it may be the single most irritating problem for teachers throughout America today.

It was really brought to my attention a little over a year ago when a longtime friend, District Attorney David Whetstone, in Baldwin County, Alabama, called me about a youngster in the school system classified as having a disability. It is called "emotional conflict." He was emotionally conflicted. He could not, or would not, behave. An aide would meet him in the morning at his home, get on the bus with him, and go to school, sit through the class all day, and ride home on the school bus with him. This student was known to curse principals and teachers openly in the classroom. Because he was a disabled student, he could not be disciplined in the normal way. The maximum ten-day suspension rule—and 45 days is the maximum a child can be disciplined under this federal law and then they are back in the classroom. One day, he attacked the school bus driver on the way home. The aide tried to restrain him. He then attacked the aide. District Attorney Whetstone told me, "I was never more stunned when I talked to school officials and they told me this is common in our county."

We have children we cannot control because of this federal law. He came to Washington, and we sat up in the gallery and talked about it. I respect David Whetstone and his views. He said this cannot be. I began to ask around, is this true? As a matter of fact, this very incident was focused on in Time Magazine There was a full-page story about it called "The Meanest Kid in Alabama," and 60 Minutes did a story about it because it is, unfortunately, so common around the country.

What can we do about it? I began to ask leaders in education around the state. The state superintendent: "Absolutely, it is one of the biggest problems we have." I talked to Paul Hubbard, head of the teachers union in Alabama: "Absolutely, it is a big problem." "I am tired," he said in the newspaper recently, "of children cursing my teachers in the classroom and nothing being done about it."

Then we began to talk to teachers, principals, and school board superintendents. They talked about the lawyers and the complicated regulations with which they deal. It is really unacceptable. Teachers who have been trained with masters' degrees in special education to deal with these children have also overwhelmingly told me this is not a healthy thing, that we are telling special children with physical disabilities, or disabilities as defined by the federal law, that they don't have to adhere to the same standards other children do. Right in the classroom, we create, by federal law, two separate standards for American citizens. You can say to one child: You can't do this, you are out of school. But we can say to another children: You can do it, and you are only out 10 days, or maybe 45 days, and then you are back in the classroom. That is not defensible.

I want to share some of the letters I began to receive from teachers who care about this problem and want me and you and the members of this Congress to do something about it. I believe we can. I hope it will be part of the debate this year in our political arena. Maybe we can make some progress with it.

First, I want to mention that when Congress passed the IDEA—Individuals with Disabilities Education Act—in 1975, we committed to pay the states, whom we were requiring to do it—we require these states to meet these standards. We agreed to pay 40 percent of the cost. We have never paid more than 15 percent of the cost. It has been below 10 percent in most years. We had testimony in the Health, Education, Labor, and Pensions Committee, of which I am a member, from a superintendent in Vermont who testified to our committee that 20 percent of the cost of the school system in his county is for special education children. This is a major factor in education today. Let me share some stories with you about this.

An experienced educator in Alabama shared these thoughts with me in a letter:

"We have a student who is classified emotionally conflicted, learning disabled, and who has attention deficit disorder. While this student has been enrolled, students, teachers, and staff have been verbally threatened with physical harm. Fits of anger, fighting, and outbursts of verbal abuse have been commonplace. Parents and students have expressed concern over the safety of their children due to the behavior of this young man. Teachers have also become extremely apprehensive toward the presence of the student due to his explosive behavior. His misbehavior has escalated to the point that the instructional process of the entire school has been jeopardized."

Here is another one:

"I have taught for 25 years. I plan to continue teaching, but the problems with discipline are getting out of hand. We are not allowed to discipline certain students. Any student labeled as "special needs" must be accommodated, not disciplined. A student recently brought a gun to my school. He made threats to students and teachers which he claims were jokes. I was one of those teachers. This student has been disruptive and belligerent since I first encountered him in the ninth grade. Now, he is a senior. After bringing a gun to school, he was given another "second chance." He should have been expelled. What is his handicap? He has a problem with mathematics. While this may be an extreme situation, it is not isolated."

Still reading from the letter:

"Teachers are told to handle discipline in the classroom. The government has taken most of the teachers' rights away; our hands are tied."

This is a letter from a young teacher in a small town of about 25,000 in Alabama. This is a story by which I think anybody would be moved:

"As a special educator of six years, I consider myself 'on the front lines' of the ongoing battles that take place on a daily basis in our nation's schools. I strongly believe that part of the 'ammunition' that fuels these struggles are the 'right' guaranteed to certain individuals by IDEA '97. The law, though well-intentioned, has become one of the single greatest obstacles that educators face in our fight to provide all of our children with a quality education delivered in a safe environment. There are many examples that I can offer firsthand. However, let me reiterate that I am a special educator. I have dedicated my life to helping children with special needs. It is my job to study and know the abilities and limitations of such children. I have a bachelor's degree in psychology, a masters degree in special education, and a Ph.D. in good old common sense. No where in my educational process have I been taught a certain few "disabled" students should have a "right" to endanger the right to an education of all other disabled and nondisabled children. It's nonsense; it's wrong; it's dangerous; and it must be stopped."

There is no telling how many instructional hours are lost by teachers in dealing with behavior problems. In times of an increasingly competitive global society it is no wonder American students fall short. Certain children are allowed to remain in the classroom robbing the other children of hours that can never be replaced.

There is no need to extend the school day. There is no need to extend the school year. If politicians would just make it possible for educators to take back the time that is lost on a daily basis to certain individuals there is no doubt we would have a better educated students.

It is even more frustrating when it is a special education child who knows and boasts "they can't do anything to me" and he is placed back in the classroom to disrupt it day after day, week after week.

It is clear that IDEA '97 not only undermines the educational process it also undermines the authority of educators. In a time when our profession is being called upon to protect our children from increasingly dangerous sources our credibility is being stripped from us.

I am sure you have heard the saying: The teachers are scared of the principals, the principals are scared of the superintendents, the superintendents are scared of the parents, the parents are scared of the children, and the children are scared of no one. And why should they be?

I have experienced the ramifications of the "new and improved" law firsthand. I had one child attempt to assault me—he had been successful with two other teachers. He was suspended for one day. I had another child make sexual gestures to me in front of the entire class. Despite the fact that every child in my class and a majority of the children in the school knew of it, I was told by my assistant principal that nothing could be done because "these special ed kids have rights."

I literally got in my car to leave that day, but my financial obligations to my family and my moral responsibilities to the children I had in my class kept me there.

The particular child I spoke about frequently made vulgar comments and threats to my girls in my class on every opportunity he had when there was no adult present. Fortunately, the girls, also special ed, could talk to me about it. Unfortunately, they had to put up with it because "nothing could be done."

I know of a learning disabled child who cut a girl in a fight. The learning disabled child and her parents then attempted to sue the school system because the child was burned when she grabbed a coffee pot to break it over the other child's head. I know of another specific incident where three children brought firearms to school. The two "regular" children were expelled. The special education student was back to school the following week.

I fully expect that you and your colleagues in Washington will do what it takes to take our schools back from this small group of children who feel it is their right to endanger the education of every other child in school. As my grandmother said, "right is right and wrong is wrong" and to enable this to continue is just wrong.

She does have a right to expect members of this Congress to confront this issue and not allow it to continue. This is a letter from a town in Alabama with a population of 20,000, or so, from another special education teacher.

"As a special educator teacher for 27 years, may I applaud your efforts to make special education students as accountable as any other student for any behavior they exhibit while in school. I fully support the idea that just because they are students in need of special education services that it in no way diminishes their ability to tell right from wrong. When teachers and administrators cannot provide some type of appropriate punishment, then the students are taught that their behavior has no consequences. Just the other day, we had a student, who had been offered detention to avoid missing school time, he responded that they could just go ahead and suspend him because he was not going to come to school on Saturday and that it was not going to hurt his grades because 'he' was allowed to make up all the work. When students find out about this 'loophole' then they often feel they have free reign to do or say whatever they feel and that there is nothing that anyone can do."

He is correct about that. This is a federal law. We provide 7 percent of the cost of education in America. But we don't hesitate to mandate these kinds of rules in every school system in the country.

These federal rules often make teaching very difficult, and it penalizes the students who come to school to try and improve themselves.

He is teaching a class of special education students, and wants all of them to learn. Many of them are there trying to learn, and they find it more difficult because of these rules.

I feel that for the best interest of the students and of the entire education population, changes in this policy must take place.

Mr. President. I don't want to disrupt the system. But I have some more comments that I am prepared to make.

This is a letter from a small town in Alabama.

"Due to the federal rules and the situation they create, I cannot spend time in my class discussing a lesson. I do not do something to tantalize the students, they become disruptive. I can no longer simply explain a concept. I now must spend over half my time disciplining the disruptive students. I am no longer a teacher, I am a threatened and battered baby-sitter who is not allowed to do her job. Give us back our classrooms and our schools. Give the teacher the right to have these disruptive students removed. Please help us."

This is a letter from an assistant principal.

"I am an assistant principal in Alabama. I taught middle school before taking this administrative position. As a teacher I saw a 'small picture' of the problem, as an administrator I see a much 'larger picture.' You have chosen a much-needed, but difficult battle. Most of the special education students are wonderful (emphasis added) unfortunately, a few are literally destroying the public education process in our country. We are teaching them that they have excuses not to follow rules or obey laws, then we act shocked when violence occurs. Now, perhaps more than ever in our history, we need to teach our children right from wrong and that there will be consequences for their actions. Instead we develop more and more excuses for unacceptable, sometimes criminal behavior. Thank you for anything you can do to help save our children, as well as our country's future."

I have a letter from a student in a good school system in Alabama.

"I would like to let you know I agree with changing the section on IDEA law. I am in high school and I know how difficult it is for you to learn if there is disruption in the classroom. I think if there is a student who does not want to learn, they should be put in an alternative school or separate class."

Amen, young student. I agree.

Another student from an average town in Alabama.

"I'm seeing more and more teachers getting out of education because of the ridiculous lawsuits by special education students."

We are losing good teachers today in America. If you check around, one of the biggest reasons is frustration over their inability to maintain discipline in the classroom. Talk to them about it. In most schools, that is a real problem. It is hurting public education. These laws don't apply to private schools. Teachers in private schools don't have these problems and are able to be more effective in creating a learning atmosphere. In a way, it hurts our ability to maintain public education as a competitive enterprise. We need to make sure what we do in Congress does not make it more difficult for our teachers to teach. First, do no harm.

The letter continues,

"We have been told to give the parents whatever they want. They have individual education plans for each student. A lot of times, that is very helpful. But they have become almost contracts with the parents, and schools have to obey them to the letter of the law. There are frequently lawsuits over whether the school is following the IEP, the individual education plan. It is sad.

We have been told if they sue us we are going to lose. Because of this, special education students are suffering and so are those students around them. They can disrupt class at will and take away from the education of the majority of the students. Often they do less, and even no work, and we are told to pass them anyway."

Then he makes an interesting point:

"When these students leave school and enter the real world, they will not have things given to them as they do in school. They will not be prepared to function as a regular citizen should be. As a parent, I fear for my son's safety in school. He has already had one confrontation with a special needs child. The disabled student assaulted my child. In self-defense, my son hit the student back. The student was known to get into fights. My son was hauled off to the police station. His grades suffered. The special ed student could go on repeatedly assaulting, with very little consequence. As you can see, this is both an emotional and professional issue for me. I am glad you are aware of the large problem our educational system is having. I hope something can be done before it gets worse. We will see the repercussions for years to come if we don't change this system."

Another letter from a teacher:

" I have over 30 years experience as a teacher, principal, federal program coordinator, and school superintendent. I am greatly concerned about the future of public education in this country. IDEA has given local superintendents grief beyond description. First, in 1975, the law was first passed, Congress promised to pick up 40 percent of the cost to operate the program, and according to figures I have seen, 10 percent has been the norm since then. Second, this has made every system fair game, with litigation costs consuming more than education dollars. While our system is small, we have had to deal with a number of weapons cases in the last few years. Two of the cases students were caught with weapons they admit they accidentally left in their vehicles coming to school grounds from target shooting. The first boy was expelled one year. He never returned to school to graduate. According to him, the situation was just too embarrassing. Although the second boy was in the exact same position as the first, having accidentally left the weapon in his car, instantly we were told he was a special education student and has an IEP. He was then assigned to an alternative school for 45 days and is now back in our school. Both of these young men were not troublemakers at school. Senator, it is impossible to explain to the family of the first student that their son was deserving of more punishment. Think about that."

This family is now bitter toward me and toward the American system because they, in grave error, believe that all Americans have the same legal right and they were unaware that Congress now decides what rights we are entitled to hold as American citizens. As said in Animal Farm: All are equal, but some are more equal than others.

The second student's handicap does not prevent him from knowing right from wrong. I'm sorry that I'm old fashioned and believe we should be teaching all students to be responsible for their behavior. We should be helping them develop good decision-making skills, not telling them that you are not responsible for your behavior and that there will be no consequences, or minimal consequences, regardless of your behavior.

I became a teacher in 1965 and I do not remember hearing of gun shootings prior to 1975 when Congress began telling ten percent of our students you are not responsible.

I think these teachers make a point. It is a matter we need to give careful consideration to, not overreact, not undermine the great principles of the Disabilities Act Program. But at the same time, we need to say that a child is not allowed to commit crimes, to disrupt classroom, to curse teachers, principals and students, and abuse them and do so with impunity.

I thank the Chair for the time and yield the floor.

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