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Testimony on LD 552 for the Education and Cultural Affairs Committee of the Maine Legislature

Dear Senator Rafferty, Representative Brennan, and Members of the Education and Cultural Affairs Committee:

I am writing in regard to proposed LD 552. I write as an attorney who has represented public schools on special education issues for more than 32 years. I recognize that you might view my background as being adversarial to the interests of students with disabilities, but in regard to the subject matter of LD 552, my hope is that you might instead focus on my long history in dealing with disputes between schools and parents over special education programming. Based on my background in special education disputes, I believe that LD 552 would work against the interests of students with disabilities in what is undoubtedly an unintended manner. I will explain below.

Under current law, team decision making is by consensus. When there is no consensus, a school representative (usually the special education director), makes the decision for the team. The parent has a right to challenge the decision through Maine's due process system. If a hearing is requested, the federal law requires that the child remain in the last placement the parties had earlier agreed upon.

The current system works much more favorably for children than would the proposed changes. Under LD 552, no changes can be made to a child's IEP unless all the team members agree. If they do not agree, the IEP remains unchanged until after dispute resolution has occurred. This means the child remains stuck in the old IEP until after a mediation, and if that does not work, a due process hearing. Due process hearings in Maine last approximately 3 months. Throughout that time, the program will remain unchanged, and the child will remain in the old program. In addition, a losing party in a hearing can appeal the ruling. A court appeal lasts approximately a year. This would mean that the child would remain in an unchanged program for approximately a year and a half. This could be even longer if there is an appeal up to the U.S. Court of Appeals.

Because LD 552 would not permit a program change without approval by the entire team, the parties would then have to go through this full process until agreement is reached, simply to move ahead with a change in the child's program. Adults disagree. When the team disagrees, under LD 552, the child's situation will go into lockdown. This could be true even if EVERYONE at the meeting agreed that something needed to change, but did not agree on what the change should be. Perhaps the parents want an out-of-district placement, and school officials think the child just needs more time in special education than he/she is currently receiving. Yet

while the adults fight, the child remains in a program no one thinks is right. For 3 weeks? For 3 months? For a year and a half?

This cannot be a good thing. Under the current system, when there is no consensus among the team about what should happen, the school representative will make a decision and that decision will go into effect. The child's program can change. Yes, the parent can request a hearing and at that point, the law mandates that the child remain in the last agreed upon placement. But most of the time, a family will not request a due process hearing, and will allow the programming change to move ahead. Currently, a minor dispute is unable to freeze the child's program, unchanged. A decision can get made and a new program can move forward.

This current system can look bad only if you assume that special education teachers and special education directors are something less than strong child advocates. But this would be wrong. In my experience, it is often the special educators who are recommending more or better services for children, or who believe that this child truly can benefit from more time with his or her nondisabled peers, rather than less. They are well trained and knowledgeable, with special certification for their jobs. The State requires this. The Maine Department of Education provides them with extensive supports and continuing education opportunities. Maine's special education directors network among themselves to keep up to date on successful educational programming. They work with the Maine Administrators of Services for Children with Disabilities (MADSEC), and their director Jill Adams to coordinate the delivery of necessary information around the State on best practices. These are school leaders focused on children. They are making their best judgments about how best to serve children in need. They have earned your trust over many years. There are undoubtedly thousands of parents around the State who would tell you how well this system has worked for their children, but we are not likely to hear from them here.

LD 552 will require more use of the State's due process system, because no child's IEP could change without due process, when the adults can't agree. Due process is expensive. It pulls staff out of the classroom to prepare to be cross examined by high cost lawyers and to have their interventions put under a microscope. After preparation, they then need to attend the due process hearings, an extremely intense experience that has a long-term impact on those who participate. This is undoubtedly true for families as well. Due process usually leaves both sides feeling worse about each other. Yet in special education, families and school officials need to keep working together for many years. This is not a beneficial process. Any changes in the law that will produce MORE due process rather than less should be looked at skeptically.

All of these problems remain even if LD 552 is amended to prohibit IEP changes without the consent of the parents, rather than the entire team. This leaves the same issue. When the school and parent do not agree, the child's program is unable to change without due process. Under the current law, the child's program will not be stuck in limbo while adults disagree. Even minor disagreements – issues that would never take anyone to hearing normally – can shut down the process and leave the child in limbo. The most child-centered approach to this issue is to leave the system as it now is, permitting a child's program to move forward even when the parent and school cannot agree. Yes, if the disagreement is big enough, the argument may end

up in due process anyway. But this proposed change will unintentionally result in even small disagreements among adults freezing the child's program, and pushing people into due process.

A final point. Another difficulty with LD 552 is that it authorizes an educational technician who may be providing essential services to a child at the time of a team meeting to make his or her own decision to stop serving the child and instead attend a team meeting. School administrators need to have final authority on where staff should be in order to maintain a safe and secure school environment. We should trust that the perspective of educational technicians who work with students with disabilities will be well presented by the special educators who by law supervise them and also work with those students.

In sum, LD 552, perhaps well intended, will instead have the result of putting necessary changes in a child's IEP on hold, while adults push and pull, trying to reach an elusive agreement. The current system is more child focused and should remain intact. Please let me know if I can be of any further help.

Sincerely yours,

/s/ Eric R. Herlan

Eric R. Herlan