



**STATE OF HAWAII**  
STATE COUNCIL  
ON DEVELOPMENTAL DISABILITIES  
919 ALA MOANA BOULEVARD, ROOM 113  
HONOLULU, HAWAII 96814  
TELEPHONE: (808) 586-8100 FAX: (808) 586-7543  
March 30, 2011

The Honorable Marcus R. Oshiro, Chair  
The Honorable Marilyn B. Lee, Vice Chair  
House Committee on Finance  
Twenty-Sixth Legislature  
State Capitol  
State of Hawaii  
Honolulu, Hawaii 96813

Dear Representatives Oshiro and Lee and Members of the Committee:

**SUBJECT: SB 1503 SD2 – RELATING TO SPECIAL EDUCATION**

The position and views expressed in this testimony do not represent nor reflect the position and views of the Department of Health.

The State Council on Developmental Disabilities (DD) **SUPPORTS SB 1503 SD2**. The purpose of the bill is to provide definitions of various private special education schools and programs and requirements for those schools and programs to accept students with disabilities at the Department of Education's (DOE) expense.

SB 1503 SD2 provides definitions for "accredited private special education school or program," "certified or licensed private residential facility," and "nonpublic special education school or program." It requires these types of private special education schools and programs that provide services to students with disabilities who receive State funding to comply with Federal and State laws, rules, and regulations. It requires a nonpublic special education school or program not accredited to apply for accreditation within 90 days from the date of accepting a student with disabilities placed there per a hearing officer's decision, court order, settlement agreement, or decision by DOE.

We understand that the bill reflects the work of the Private School Placement Task Force that included representatives from DOE and the community. The passage of the bill would provide DOE and various private schools who serve students with disabilities clearer guidelines and conditions that comply with Federal and State laws, rules, and regulations when providing special education and related services for students with disabilities.

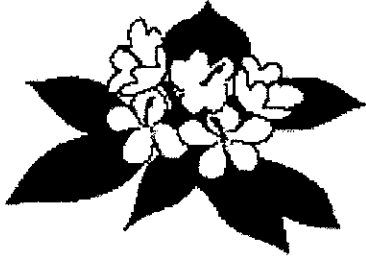
The Honorable Marcus R. Oshiro  
The Honorable Marilyn B. Lee  
Page 2  
March 30, 2011

Thank you for the opportunity to submit testimony supporting SB 1503 SD2.

Sincerely,

  
Liz Ann Salvador  
Chair

  
Waynette K.Y. Cabral, MSW  
Executive Administrator



**S E A C**  
**Special Education Advisory Council**

919 Ala Moana Blvd., Room 101

Honolulu, HI 96814

Phone: 586-8126 Fax: 586-8129

email: spin@doh.hawaii.gov

March 30, 2011

**Special Education  
Advisory Council**

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Ms. Barbara Pretty, Acting  
*Vice Chair*

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Dr. Patricia Sheehy  
Mr. August Suehiro  
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Mr. Duane Yee  
Ms. Carol Young

Jan Tateishi, Staff  
Susan Rocco, Staff

Representative Marcus Oshiro, Chair  
House Committee on Finance  
State Capitol  
Honolulu, HI 96813

RE: SB1503 SD2 - RELATING TO SPECIAL EDUCATION

Dear Chair Oshiro and Committee Members,

The Special Education Advisory Council (SEAC), Hawaii's State Advisory Panel under the Individuals with Disabilities Education Act (IDEA), **supports** the proposed SB1503 SD2 that aims to provide definitions of various private special education schools and programs and the requirements for those schools and programs to accept students with disabilities at the Department of Education's expense.

This bill is an important companion to SB 1284 SD2 HD1 which allows the Department to have access to monitor students with disabilities who are placed, at public expense, at private special education schools and programs. The Department has an obligation under Chapter 60 and IDEA to ensure that these students are provided with an appropriate education that is reasonably calculated to enable the student to receive educational benefits.

SEAC believes that accreditation, certification and/or licensure by the entities named in this proposed legislation is an important step in ensuring appropriate services. Hawaii is the only state that does not currently have standards of certification for private schools and facilities to ensure the appropriateness and benefit of services provided to students at public expense.

Most of Hawaii's private schools have already received accreditation. For those that are not accredited, this bill allows for student placement as long as the nonpublic special education school or program applies for accreditation within ninety days of placement.



Testimony on SB1503 SD2  
March 30, 2011  
Page 2

There are a number of reasons for students being placed in a private special education school or program at public expense. The IEP team may have determined that the private school or facility is the appropriate placement for the student. Other students are unilaterally placed by their parents and then awarded reimbursement through a due process hearing decision or settlement agreement. Still other students are Court ordered to a private setting.

In our seven-year examination of special education dispute resolution in Hawaii SEAC has found that a parent's filing of a due process hearing request precipitates the majority of private placements at public expense. We are hopeful that this bill will result in a more comprehensive listing of appropriate placement options that IEP teams may use in determining where the student's unique needs can be met, thus reducing costly litigation and parent/school conflict.

Thank you for the opportunity to provide testimony on this issue. Should you have any questions, I would be happy to answer them.

Respectfully,

Ivalee Sinclair, Chair

# SmartStart: Judicial Actions -- Tuition Reimbursement

[Overview](#) | [Key Points](#) | [Links](#) | [Additional Resources](#)

This SmartStart is updated with references to the IDEA 2004 statute, the 2006 IDEA Part B regulations, and the 2008 amendments to the Part B regulations.

## Overview

Traditionally, tuition reimbursement was an equitable remedy that was commonly awarded by courts. *Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 556 IDELR 389 (U.S. 1985); and *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (1993). Congress later added the tuition reimbursement remedy to the IDEA. See 34 CFR 300.148. This SmartStart examines the issues involved in an award of tuition reimbursement under the IDEA.

## Key Points

These key-point summaries cannot reflect every fact or point of law contained within a source document. For the full text, follow the link to the cited source.

### PRIVATE SCHOOL TUITION REIMBURSEMENT

- Private school tuition reimbursement is available as a remedy under the IDEA where a court or hearing officer finds that the public agency did not make FAPE available to the student in a timely manner prior to the private enrollment and the private placement is determined to be appropriate. 34 CFR 300.148(c).
- Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child and the question of financial responsibility are subject to the due process procedures in 34 CFR 300.504 through 34 CFR 300.520. *Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Reg. 46,599 (2006).

### REIMBURSEMENT FOR STUDENTS NEVER ENROLLED IN PUBLIC SCHOOL SYSTEM

- In *Forest Grove School District v. T.A.*, 52 IDELR 151 (U.S. 2009), the U.S. Supreme Court held that the receipt of special education and related services through the public school system is not a prerequisite for tuition reimbursement under the IDEA. Because 20 USC 1415(i)(2)(C)(iii) gives courts broad authority to grant such relief as they determine is appropriate, a court can order reimbursement if it finds that the district failed to make FAPE available to the student. However, the Court noted that parents still need to demonstrate the appropriateness of the private placement and show that there are no equitable bars to reimbursement.
- Tuition reimbursement may also be an appropriate remedy for a school district's failure to meet its obligations to comply with the child find requirement, which requires schools to locate, identify, and evaluate students with disabilities. *Doe v. Metropolitan Nashville Pub. Schs*, 27 IDELR 219 (6th Cir. 1998), *cert denied*, 111 LRP 10730, 525 U.S. 813 (1998). See [SmartStart: Referral for Evaluation and Child Find Under IDEA](#) and [SmartStart: Child Find Under Section 504](#).

### STANDARD FOR EVALUATION OF A PROPOSED PUBLIC PLACEMENT

- The appropriateness of the proposed public placement is evaluated prospectively, without comparison to the current private placement, and consistently with the standard enumerated in *Board of Education of the Hendrick Hudson School District v. Rowley*, 553 IDELR 656 (U.S. 1982). *Kerkam v. Superintendent, D.C. Pub. Sch.*, 17 IDELR 808 (D.C. Cir. 1991). See [SmartStart: FAPE -- Standards for Appropriate Education under IDEA](#).
- The test of the appropriateness of a proposed public placement for a student who had previously attended a private school as a result of a unilateral placement was not whether the private school's program benefited the student in the past and would likely continue to do so in the future, but whether the proposed public placement had the potential to provide the student with educational benefit. *Lewis v. School Bd.*, 19 IDELR 712 (E.D. Va. 1992).

### STANDARDS FOR PRIVATE SCHOOL PLACEMENTS

<http://www.specialedconnection.com/LrpSecStoryTool/printDoc.jsp?docid=10005&chunk...> 3/29/2011

- A parental placement can be appropriate, even if it does not meet state standards. *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S. 1993); and 34 CFR 300.148(c). *But see Gagliardo v. Arlington Cent. Sch. Dist.*, 48 IDELR 1 (2d Cir. 2007).
- Under the Supreme Court's *Carter* decision, a court may order reimbursement for a parent who unilaterally withdraws his child from a public school that provides an inappropriate education under the IDEA and enrolls the child in a private school that provides an education that is otherwise proper, but does not meet the state standards that apply to education provided by the SEA and LEAs. The Court noted that these standards apply only to public agencies' own programs for educating children with disabilities and to public agency placements of children with disabilities in private schools, for the purpose of providing a program of special education and related services. *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S. 1993).

### AMOUNT OF TUITION REIMBURSEMENT AWARDED

- Courts have broad discretion in fashioning relief with regard to tuition reimbursement. However, total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable. *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S. 1993).
- In *Carter*, the Supreme Court provided no further guidance on how to determine when costs are "unreasonable." See SmartStart: Private Schools -- Expenditure of Funds on Parentally Placed Students.

### LIMITS ON TUITION REIMBURSEMENT

- An award of tuition reimbursement may be reduced or denied if the court or hearing officer finds that:
  - The parents did not provide notice to the school district that they believe the proposed IEP does not provide FAPE. Parents should notify the school district of their concerns and their intent to enroll their child in a private school at public expense at the most recent IEP meeting that the parents attended prior to removal of the child from the public school or at least 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school. 34 CFR 300.148(d)(1)(ii).
  - Prior to the parents' removal of the child from the public school, the public agency informed the parents of its intent to evaluate the child (pursuant to 34 CFR 300.503(a)(1)) -- including a statement of the purpose of the evaluation and why it was appropriate and reasonable -- but the parents did not make the child available for the evaluation. 34 CFR 300.148(d)(2). See also SmartStart: Procedural Safeguards -- Notice to Parents and SmartStart: Procedural Safeguards -- Consent Under the IDEA.
  - The parents acted unreasonably. 34 CFR 300.148(d)(3).
- Notwithstanding the above listed parental notice limitation, the cost of reimbursement must not be reduced or denied if the school prevented the parents from providing notice, the parent did not receive notice of the removal pursuant to 34 CFR 300.148(d)(2), or where the compliance with section 34 CFR 300.148(d)(1) would result in physical harm to the child.

### WAIVER OF THE PARENTAL NOTICE REQUIREMENT

- Parents may be excused from compliance with the requirement to notify schools about a unilateral private school placement under specific circumstances, which counteract the use of the discretion to limit or deny reimbursement awards. 34 CFR 300.148(e). These situations include:
  - The parent is illiterate and cannot write in English; (*but see, Ms. M. v. Portland Sch. Committee*, 40 IDELR 228 (1st Cir. 2004)).
  - Compliance with the notice requirement would likely result in physical or serious emotional harm to the child.
  - The school prevented the parent from providing the notice.
  - The parents did not receive notice of the notice requirement.

### TUITION REIMBURSEMENT AS A REMEDY FOR DENIAL OF FAPE UNDER SECTION 504

- Tuition reimbursement can also be an appropriate remedy for denials of FAPE under Section 504. *Borough of Palmyra Bd. of Educ. v F.C.*, 28 IDELR 12 (D.N.J. 1998).

### Links

<http://www.specialedconnection.com/LrpSecStoryTool/printDoc.jsp?docid=10005&chunk...> 3/29/2011

- [SmartStart: Placement - Factors Limiting Private School Tuition Reimbursement](#)
- [SmartStart: Judicial Actions -- Scope of Remedies](#)
- [SmartStart: Judicial Actions -- Remedies Beyond the IDEA](#)
- [Form: Tuition Reimbursement Agreement](#)
- [Tuition Reimbursement: How does equity affect an award of tuition reimbursement?](#)

## Additional Resources

Additional resources on this topic are available for purchase from LRP Publications:

- [What Do I Do When ...® The Answer Book on Special Education Law - Fifth Edition](#) by John Norlin, Esq.

Please share your experience and expertise. Forward any suggested additions or changes to this or other Smart Starts to [SmartStarteditor@lrp.com](mailto:SmartStarteditor@lrp.com).

*Last updated: February 15, 2011*



COMMUNITY CHILDREN'S COUNCIL OF HAWAII  
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TEL: (808) 586-5363 • TOLL FREE: 1-800-437-8641 • FAX: (808) 586-5366

March 30, 2011

Senator Marcus Oshiro  
Chair Finance Committee

Chairs Oshiro, Members of the Committee

RE: SB1503 with amendments

The 17 Community Children's Councils (CCCs) of Hawaii continues to strongly support the passage of SB1503 as purposed by the Special Education Advisory Council.

We have reviewed this purposed amendment and urge their conclusion so there are clear standards for both the Department of Education and private schools/facilities. The purpose of this bill is to ensure that students who are placed at private schools/placements/facilities that are placed at public expense receive a quality education. For those schools/placements/facilities that are not accredited, the accreditation process must be started within 90 days of the of the student's placement. This sets a standard level of quality throughout the state.

CCCs are community based bodies comprised of parents, professionals in both public and private agencies and other interested persons. CCCs are in rural and urban communities organized around the Complexes in the Department of Education. Membership is voluntary and advisory in nature. CCCs are concerned with specialized services provided to Hawaii's students.

We respectfully request your consideration of SB1503 with the amendments purposed. Parents of children in our public schools have first hand information essential to the Board of Education. Community members provide a diverse viewpoint and can generate a broader base of support for our schools.

Should you have any questions or need additional information, please contact the Community Children's Council Office (CCCO) @ 586-5363 or email us at the address above.

Thank you for considering our testimony

Tom Smith, Co-Chair

Jessica Wong-Sumida, Co-Chair

(Original signatures are on file with the CCCO)





## **HAWAII DISABILITY RIGHTS CENTER**

1132 Bishop Street, Suite 2102  
Honolulu, Hawaii 96813

*Phone/TTY: (808) 949-2922 Fax: (808) 949-2928 Toll Free: 1-800-882-1057*

*E-mail: [info@hawaiidisabilityrights.org](mailto:info@hawaiidisabilityrights.org)  
Website: [www.hawaiidisabilityrights.org](http://www.hawaiidisabilityrights.org)*

### **THE HOUSE OF REPRESENTATIVES THE TWENTY-SIXTH LEGISLATURE REGULAR SESSION OF 2011**

#### **Committee on Finance Testimony in Opposition to S.B. 1503, SD2 Relating to Special Education**

**Wednesday, March 30, 2011, 2:00 P.M.  
Conference Room 308**

Chair Oshiro and Members of the Committee:

I am Louis Erteschik, Staff Attorney at the Hawaii Disability Rights Center, and am testifying in opposition to this bill.

The purpose of the bill is to require that certain private schools that provide special education to students with disabilities receive accreditation from various accrediting agencies .

Limiting private placements to schools approved by the DOE or to schools approved by private accreditation agencies sanctioned by the DOE would conflict with federal law and, thus, be preempted.

School districts are required to provide a FAPE – a free and appropriate education to children who qualify for special education services under the IDEA. If they fail to do so, placement at a private facility is an option which the law allows. Inasmuch as many due process hearings involve unilateral placements, this bill would violate federal law under the IDEA, which says that hearings officers and the Courts may decide placement and

order the school district to reimburse the cost if the private school is found to be appropriate. The States have no authority to impose more restrictive requirements, such as the accreditation proposed in this measure. Such a bill would be in conflict with and preempted by the IDEA.

Furthermore, as a result of the Felix case, it was recognized that there is a large component of these special education programs that need to focus on the behavioral needs of the child. For that reason, some of the placements that are utilized in Hawaii to satisfy the IDEA requirements are CARF accredited as mental health treatment facilities. In light of that, we submit that the organizations specified in this bill are not properly qualified to carry out the accreditation functions, inasmuch as they have no background or competence in the certification of facilities that provide mental health services or the activities that they provide.

Thank you for the opportunity to testify in opposition to this matter.



Hearing date:  
Wednesday,  
March 30,  
2:00 p.m.  
House Committee  
on Education,  
Room 308

To: Representative Marcus Oshiro, Chair  
Representative Marilyn Lee, Vice Chair

From: Elisabeth Chun, Executive Director  
Good Beginnings Alliance

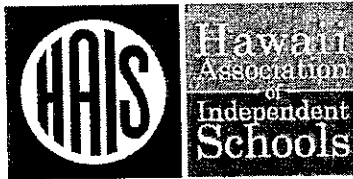
Date: Wednesday, March 30, 2011, 2:00 p.m.  
Conference Room 308

Subject: **SB 1503 SD2:** Requires certain private special education schools and programs that provide services to students with disabilities who receive state funding, to comply with federal and state laws, rules, and regulations. Requires accreditation within a certain time for certain private schools or programs that accept students with disabilities who receive state funding. Effective 7/1/2050. (SD2)

The Good Beginnings Alliance is a policy and advocacy organization focused on Hawaii's youngest children and their families. We strive to ensure a nurturing, safe and healthy development for all children from pre-birth to age eight. We believe all children deserve safe and supportive environments that meet their needs as they grow and develop. Good Beginnings is also a member of One Voice for Hawaii's Children ([www.onevoiceforchildren.net](http://www.onevoiceforchildren.net)), an alliance of organizations and individuals committed to the development of an effective and equitably funded early childhood system that gives all young children the opportunity to arrive at kindergarten safe, healthy and ready to succeed. The following information is provided to help you in your decision-making process.

**Numerous studies throughout the nation have shown that children who participate in high quality early learning programs start kindergarten safe, healthy, and ready to succeed. Moreover, programs accredited by the Western Association of Schools and Colleges, the National Association for the Education of Young Children, or the National Early Childhood Program for Accreditation must meet stringent quality standards and provide excellent learning environments for all children, to include those with disabilities.**

Mahalo for your consideration. For more information contact: Good Beginnings Alliance; phone: 531-5502; [lchun@goodbeginnings.org](mailto:lchun@goodbeginnings.org)



Wednesday, March 30, 2011  
2:00 p.m.  
Conference Room 308

TESTIMONY TO  
THE HOUSE COMMITTEE ON FINANCE

RE: SB 1503 SD 2 – Relating to Special Education

Dear Chair Oshiro, Vice Chair Lee, and Members of the Committee,

My name is Robert Witt and I am executive director of the Hawaii Association of Independent Schools (HAIS), which represents 99 private and independent schools in Hawaii and educates over 33,000 students statewide. My testimony today is on behalf of our member schools, along with the member schools of Hawaii Catholic Schools, with permission from Superintendent Carmen Himenes.

The Association **supports** SB 1503 SD2 – Relating to Special Education, which requires certain private special education schools and programs that provide services to students with disabilities, and thereby receive state funding to do so, to comply with all applicable federal and state laws, along with all applicable rules and regulations.

HAIS also hereby agrees with the Department of Education that to assure high quality, transparent, and reliable services to these students in schools, which are dedicated to their own continuous self-reflection and improvement, that **formal accreditation** via the Western Association of Schools and Colleges, the Hawaii Association of Independent Schools, or any WASC affiliate in Hawaii should and must be the State standard.

HAIS also stipulates that Hawaii Catholic Schools is a WASC affiliate and that the accreditation program it provides meets this new standard.

HAIS wishes to engage with DOE in any and all ongoing efforts, following adoption of this measure, to create administrative rules in alignment with the spirit of this proposed measure. In particular, HAIS will wish to define “access” for the purposes of “monitoring” in ways that are true to the independence of its member schools, while simultaneously allowing DOE to meet its obligations to federal authorities.

Thank you for the opportunity to testify in support of this measure.

Teresa Chao Ocampo  
215 N. King Street, Apt. 207  
Honolulu, HI 96817

The House Committee on Finance  
Conference Room 308 at 2:00pm

Wednesday, March 30, 2011

To: Rep. Marcus Oshiro, Chair  
Rep. Marilyn Lee, Vice Chair

From: Teresa Chao Ocampo

Re: SB 1503 SD2, RELATING TO EDUCATION

Testimony: In OPPOSITION of SB1503 SD2, Related to Education

I am opposed to SB 1503 SD2 because this bill openly discriminates against a handful of PRIVATELY owned or operated, nonpublic special education schools or programs that are not accredited by the specified affiliations listed in SB 1503 SD2.

There is no guarantee or assurance of programs which ARE currently accredited by the various affiliations identified in SB 1503 SD2 are better able to provide a Free Appropriate Public Education than those schools that are not accredited by those identified in this bill. The needs of a disabled child is wholly dependent upon what and how a school can serve those needs as identified via a due process hearing and determined by an officer of the court.

Accreditation of a private placement is neither mandatory nor relevant to Chapter 60 or IDEA 2004. The issue of accreditation should not even be part of SB 1503 SD2. What is required by IDEA involving a private school is the determination of the appropriateness of a child's educational placement.

In Chapter 60 under 8-60-2, the definition of placement is "an appropriate educational setting for the implementation of the program for a student with a disability based upon the individualized educational program. It does not mean the specific location or school but the type of placement on the continuum of placement options (e.g. regular classroom with support, special class, special school, etc.) Placement must be provided in the least restrictive environment."

It should be obvious that an accredited private school may not be an appropriate placement if the school does not have the resources or trained personnel to implement an IEP. Conversely, a school not accredited as per this bill, could still be determined to be an appropriate placement due to a child's unique learning needs as identified under IDEA.

As an aside, none of the DOE's public schools can be accredited under HAIS or HCS but may be accredited under the Western Association of Schools and Colleges (WASC). Yet, out of the DOE's 286 public schools (including charter schools and excluding post-secondary schools), only 100 are accredited by WASC for 2010-2011. It is ironic that this bill requires the private schools to be accredited and yet the majority of DOE schools is neither accredited nor monitored by any agency outside of itself.

In the same vein, IDEA 2004 requires that private placements meet the same standards that would apply to the DOE's own public schools. With an accreditation requirement as in SB 1503 SD2, it would seem that the public schools would have to be accredited to the same level as their private school peers. Otherwise, it would seem that the DOE would violate both IDEA 2004 and SB 1503 SD2 at the same time. The converse would also be true where NONE of the schools, public or private, would need to be accredited in order to meet both IDEA 2004 and SB 1503 SD2 at the same time. If only the private schools are required to be accredited then based on the differences in standards, this section of the bill is inconsistent with IDEA.

The DOE has targeted a couple of these privately-owned programs for decades. This is a known fact among the DOE administration, community providers, agencies, parents and possibly legislators.

It is shameful that the legislature is a willing participant in the DOE's charades with the outside appearances of supporting the students with disabilities via SB 1503 SD2. The privately owned programs that are targeted in this bill have been deemed appropriate private placements by Hearings Officers many times over the years and the DOE has tried unsuccessfully to close these schools down for as long as these schools have been in existence.

For some severely disabled students in Hawaii, these placements serve their unique and individualized learning needs as required by IDEA. These day schools offer a placement that the DOE does not offer and cannot offer. In some cases these schools serve as a good alternative for those students who would otherwise be placed in an institution on the mainland which would cost the DOE far more than any day school. Other schools provide a small, nurturing and unthreatening environment that allows the disabled students to actually participate in a school environment without having to deal with extremes

ranging from chaos as experienced with the larger DOE special education classrooms to the "baby-sitting" types of environments within other DOE special education classrooms.

Perhaps a better alternative would be to have the DOE and these privately owned schools work collaboratively with the welfare of the disabled students in mind rather than with an on-going adversarial stance. Only then can an overall cooperative solution be potentially achieved.

I urge this Committee to not pass this bill for it is discriminatory and further limits the educational placements available to a small group of children whose unique learning needs are served by these private placements.

Sincerely,

Teresa Chao Ocampo  
(signature on file)