ARIASE
Association of Rhode Island Administrators of Special Education

Brad Wilson - H5833 – Against

Sent via email to HouseEducation@rilegislature.gov

March 23, 2021

Rep. Joseph M. McNamara
Chairman
House Education Committee
Rhode Island General Assembly
73 Smith Street
Providence, RI 02903

Dear Chairman McNamara,

I write as President of the Association of Rhode Island Administrators of Special Education ("ARIASE") to submit this written testimony in opposition to H 5833 on behalf of our membership. ARIASE is the lone statewide association of special education administrators in Rhode Island, and we are passionately committed to serving students with disabilities and working collaboratively and constructively with their families to enhance educational opportunities and outcomes.

We appreciate the spirit of H 5833, but we take issue with its contents. Best intentions aside, the bill presents a series of questionable solutions in search of a problem. In its current form, H 5833 would mandate a dizzying array of new obligations and procedures that are either redundant, confusing or, in some cases, contradictory to the IDEA. We offer some specific examples and explanations below to illustrate our points, and we would welcome the opportunity to confer with the bill's sponsors to better understand their desired ends and perhaps collaborate to explore more viable means.

As an initial matter, we note that §16-24-19(1)(iii) would require an LEA to conduct an initial evaluation of every student who has been identified as potentially having a qualifying disability under the IDEA. However, under Sec. 300.300 of the federal regulations issued by the U.S. Department of Education to implement the requirements of the Individuals with Disabilities Education Act (IDEA), an LEA is not required to proceed with an initial evaluation absent parental consent. So, although H 5833 is undoubtedly intended to better inform and advocate for students with disabilities and their parents, in this instance it would actually undercut parental rights with respect to the education of their children.

Also, as a matter of housekeeping, the bill repeatedly references students with disabilities who are "over the age of eighteen (18) through twenty-one (21) and enrolled in school." We note that although the Federal District Court decision in K.L. v. Rhode Island Bd. of Educ., 907 F.3d 639, 652 (1st Cir. 2018) made it clear that a school district's obligation to provide special education extends to an eligible student's twenty-second birthday, or until the student receives a regular high school diploma, the Rhode Island Regulations still state that "Under 34 C.F.R § 300.101(a), provide FAPE until the child's twenty-first (21st) birthday or until the child receives a regular high school diploma," 200 R.I. Code R. 20-30-6.5. With that in mind, some clarification regarding that obligation would be advisable in this bill.

In a number of instances, we fear that the proposed language of §16-24-20(a) is so vague and sweeping that it would invite more potential confusion and conflict than it would address. For example, the ombudsperson would serve as an advocate, coordinator and point of contact for students and families "when dealing with school districts and the districts' compliance with the applicable individualized education program (referred to hereinafter in this section and §§ 16-20 24-21, 16-24-22, 16-24-23, 16-24-24, and 16-24-26 as an "IEP"), 504 plans established pursuant to the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) (which plans are hereinafter referred to in this section and §§ 16-24-21, 16-24-22, 16-24-23, 16-24-24, and 16-25-25 as "504 plans"), and related supports and services for students with disabilities who are provided special services pursuant to this chapter and federal law, including, but not limited to, the Individuals with Disabilities Education Act (20 U.S.C. Section 1400 et seq.), and the minimum accountability standards as they pertain to the individual student." As experts in the field, even we are left to wonder and guess as to which "minimum accountability standards" are implicated in this context beyond the state and federal laws specifically referenced. The virtually infinite scope attached to the ombudsperson's purview with this overly broad language is problematic.

There are also some issues with the mechanics of how the ombudsperson is appointed. For example, it is unclear who appoints the attorney, parent, school administrator and special educator to the nominating committee described in §16-24-20(b). Moreover, this bill would potentially create an indeterminate number of ombudspersons, as §16-24-20(d)(9) would grant the ombudsperson the power to appoint as many assistants as he/she can pay or persuade to volunteer. Each of those assistants would operate as de facto ombudspersons as well, entrusted with "powers and duties... similar to those imposed upon the ombudsperson by law" without any formal vetting or appointment process. Under §16-24-20(c) in the bill, we note that "The ombudsperson shall have the discretion to ensure all IEP documents, 504 plans, related supports and services to students with disabilities are properly documented and implemented, and the goals and objectives are being met, and that appropriate related supports and services are being provided." This begs the question of how the ombudsperson would ensure all of these things. The unfettered discretion proposed in this provision would arguably empower the ombudsperson to substitute his/her judgment for that of the IEP team and, potentially, for

that of a hearing officer, in ways that are wildly inconsistent with the IDEA and applicable regulations. And there is no apparent limitation on the ombudsperson's discretion to dictate how an IEP or 504 plan should be implemented, no apparent procedure for how that discretion would be exercised, and no indication of whether and how such determinations would be reported or substantiated, nor whether or how they might be subject to appeal.

Further, the conflicts inherent in the powers this bill would grant the ombudsperson are profoundly problematic, both legally and ethically. The ombudsperson would have the power to investigate any school with regard to any IEP, and the discretion to dictate whatever measures he/she deems necessary to ensure that the IEP is being "properly" implemented to the ombudsperson's subjective satisfaction. In conducting these investigations, however, the ombudsperson would have a statutory duty to advocate for parents *and* a statutory duty of confidentiality with regard to all teachers and school personnel involved. So not only would the ombudsperson serve as the investigator, the advocate and the arbiter in a special education dispute, but he/she would also owe a duty of confidentiality to the adverse party. This is simply an impossible construct.

Further, the rule-making power granted to the ombudsperson in the bill conflicts directly with the delegation of regulatory authority to RIDE found in §16-24-2. According to §16-24-20(7), "The ombudsperson shall establish minimum compliance measures to ensure that copies of all relevant documents which are discussed at any family meeting involving a student receiving services pursuant to this chapter are given to the student's family at least five (5) days in advance of any scheduled meeting at which these documents are to be discussed." That conflict aside, this provision seems reasonable on its face, but the wording is problematic. The five-day advance notice requirement is expressed in absolute terms and is applied, without exception, to *any* meeting involving a family member of a student with a disability, which presumably would include impromptu and emergency meetings that may be necessary from time to time and may not have anything to do with an IEP or 504 Plan.

There are a number of similar instances in which the wording of the bill is unclear. For example, §16-24-20(8) requires that the ombudsperson "shall investigate any retaliatory act alleged or committed by any administrator, school district, state department or other agency." It seems that the intent is that the ombudsman would be required to investigate any allegation of retaliation against such parties, but as written it compels the ombudsman to investigate allegations of retaliation made *by* "any administrator, school district, state department or other agency," but does not authorize investigation of those entities *unless and until* the ombudsperson somehow possesses knowledge that they have actually committed an act of retaliation.

Another instance where questionable drafting creates confusion can be found in §16-24-20(8), which requires that "[a]ll records or files of the ombudsperson shall be readily available to any parent, guardian or caretaker of a student with disabilities or a student with disabilities who is over the age of eighteen (18) through twenty-one (21) and enrolled in school to inspect and/or copy for purposes of any agency or judicial proceeding." First, although the intent is surely not to make *all* of the records or files the ombudsperson has pertaining to *all* students available to *any* parent, the plain language of the bill would do exactly that. That absurdity aside, this provision fails to afford similar access to school districts, so even if this provision were appropriately confined to records of a single student, it would nevertheless be biased and detrimental to the transparency and accountability of this newly proposed position.

Among the confusing legal aspects of this bill is its assurance that "All student records shall remain confidential and compliant with the Health Insurance Portability and Accountability Act (HIPAA)." HIPAA generally does not apply to schools because they are not HIPAA covered entities. The Family Educational Rights and Privacy Act is the applicable statute in this arena.

The reporting regime contemplated in §16-24-20(e) is also confusing, not to mention redundant. RIDE already gathers and reports on data regarding special education complaints and dispute resolution, and does so impartially. It is unclear how shifting this responsibility to an ombudsperson who is statutorily defined as a student/parent advocate would improve on the current practice.

In fact, we attach RIDE's most recent reports on state complaints, due process hearings and mediations, both as evidence of their completeness and also because the statistics they reveal undercut the perceived need for an ombudsperson for special education that is the premise of this bill. Rhode Island's resources for fielding and addressing complaints regarding special education – whether from a parent regarding a child's IEP or from an organization regarding a more general LEA practice or policy – are far from overwhelmed. According to the Center for Appropriate Dispute Resolution in Special Education, the aggregate per capita number of state and due process complaints filed in Rhode Island in 2018-19 was half the national average. And Rhode Island successfully mediated due process complaints at a rate 66% higher than the national average. The processes in place are working as intended.

The evaluations proposed in §16-24-21 are objectionable in their one-sidedness. The beauty of the IEP team is that every member has input. Adding an evaluation that only a parent completes is inconsistent with that spirit. And a parent's evaluation of an IEP meeting is simply that – it may be useful as parental feedback on how a meeting was conducted, but is not inherently about the student, nor is it an education record that belongs in that student's file. But if it were, it would be protected by FERPA, and not by HIPAA.

The Local Advisory Committees ("LACs") described in §16-24-24 of H 5833 are virtually identical to the first four provisions of the regulations that currently exist regarding LACs (see 200 R.I. Code R. 20-30-6.10.1(A)1-4). Our membership has a great deal of hands-on experience working with LACs since their inception. We have seen LACs thrive in some communities and become dormant in others. To codify in statute a system that has yielded such mixed results in practice would seem to be a missed opportunity. ARIASE encourages further study on a better path forward for the LAC concept, and welcomes the opportunity to provide feedback on our collective experience with LACs in their current form if the committee is interested.

In closing, we offer all of the foregoing observations not because we eschew oversight or begrudge parents or advocates, but because, based on our experience, we truly believe that, as written, H 5833 would exacerbate the confusion and conflict it aims to remedy. As this Committee knows, words matter in statutes. Precision is of paramount importance. Had ARIASE been consulted on this bill prior to its introduction, we would have gladly offered our input constructively. We are now left to offer our criticism – also constructively – of the bill as it has been proposed. In its current form, ARIASE must oppose it. Thank you for your consideration.

Sincerely,

Brad Wilson

Brad Wilson
ARIASE President