United States Senate
Foreign Relations Committee

United Nations Convention on the Rights of Persons with Disabilities

Testimony of
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I would like to thank the Chairman and members of the Committee for the opportunity to testify on this very important issue. Article VI of the Constitution reveals how important this treaty is in our nation's legal framework. Once ratified, a treaty becomes part of the highest law of the land and anything in any state law or state constitution that conflicts with the treaty is null and void.

When the Framers of the Constitution wrote the Supremacy Clause, treaty law and customary international law were limited to the arena of how nations treat nations. There was no concept that the treaty power could be used to impact or control the domestic laws of this nation.

Modern human rights laws have only one purpose—imposing binding legal obligations on state parties to treat their own citizens and other residents in conformance with the legal norms promulgated in the treaty.

Yet, during last year's floor debate on this treaty, then-Senator John Kerry said:

> This treaty isn't about American behavior, except to the degree that it influences other countries to be more like us. This treaty is about the behavior of other countries and their willingness to raise their treatment of people with disabilities to our level. It is that simple. This treaty isn't about changing America, it is a treaty to change the world to be more like America.

Professor Louis Henkin, one of the world's leading experts on international law, gives the appropriate response to this argument:

> By its reservations, the United States apparently seeks to assure that its adherence to a convention will not change, or require change, in U.S. laws, policies or practices, even where they fall below international standards. …
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> Reservations designed to reject any obligation to rise above existing law and practice are of dubious propriety: if states generally entered such reservations, the convention would be

> futile. …Even friends of the United States have objected that its reservations are incompatible with that object and purpose and are therefore invalid.
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> By adhering to human rights conventions subject to these reservations, the United States, it is charged, is pretending to assume international obligations but in fact is undertaking nothing. It is seen as seeking the benefits of participation in the convention (e.g. having a U.S. national sit on the Human Rights Committee established pursuant to the Covenant) without assuming any obligations or burdens. The United States, it is said, seeks to sit in judgment on others but will not submit its human rights behavior to international judgment. To many, the attitude reflected in such reservations is offensive: the conventions are only for other states, not for the United States.[1]

While this erroneous form of American exceptionalism has been implied in the past, our Secretary of State (when he was the Chairman of this Committee) has explicitly made the very argument that Professor Henkin soundly condemns. "This treaty isn't about changing America, it is a treaty to change the world to be more like America." Such assertions are both legally inaccurate and diplomatically troubling.

The precise question that the Senate must answer is this: What will be the legal effect if the United States ratifies the United Nations Convention on the Rights of Persons with Disabilities?

This is a legal question, not a political question. The answer to this question should be determined by an accurate review of all of the relevant legal sources. It is not a question of whether we have compassion for the disabled. Without the help of any international legal source, our nation leads the world in demonstrating compassion for the disabled. We can and should improve our law and policy in this regard. But our ability to provide leadership on

[1] Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker," 89 AM, J. INT'L LAW, 341, 341-44 (1995).

this issue is not dependent on becoming responsible to report our progress to the United Nations.

The proponents of this treaty have relied on pleas for compassion and raw assertions of opinion, not proper legal analysis. This Committee should and must recognize that determining the meaning of a treaty is a legal inquiry. The process employed to determine its meaning should use the same kinds of sources and points of analysis as a serious judicial inquiry. There should be citations of law not mere assertions of opinion.

The basic answer to the legal question I have posed is answered by the United Nations Office of the High Commissioner for Human Rights. Its website accurately summarizes the legal effect of any nation's ratification of a human rights treaty:

> A State party to a treaty is a State that has expressed its consent to be bound by that treaty by an act of ratification, acceptance, approval or accession, etc., where that treaty has entered into force for that particular State. This means that the State is bound by the treaty under international law. See article 2(1)(g) of the Vienna Convention 1969.[2]

The implementation of our international legal obligations requires consideration of two distinct legal spheres—the international legal system and the domestic legal system.

Since a treaty is an international obligation, international law fully controls the substantive law concerning the nature of our obligations. The implementation and enforcement of our international legal obligations requires an intersection with both legal arenas—the international legal system and our domestic legal system.

In large part, our domestic legal system must be relied upon for the implementation and enforcement of any human rights treaty obligation. But our obligation to comply with the treaty's requirements is never extinguished by any limitation imposed by

[2] http://www2.ohchr.org/english/bodies/treaty/glossary.htm

our domestic legal system. In fact, if our domestic legal system prohibits us from fully complying with our international legal obligations, we are presumptively in violation of our treaty obligations for which there are international legal consequences.

The international legal system claims preeminence over domestic law and national sovereignty.

A past president of the European Court of Human Rights has explained the prevailing view in the international legal system:

> Treaty obligations are in case of doubt and in principle not to be interpreted in favor of State sovereignty. It is obvious that this conclusion can have considerable conclusions for human rights conventions: Every effective protection of individual freedoms restricts State sovereignty, and it is by no means State sovereignty which in case of doubt has priority. Quite the contrary, the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights on one hand and restrictions on State activities on the other.[3]

The Committee on the Rights of Persons with Disabilities has lost no time in asserting the supremacy of the CRPD over the domestic law and sovereignty of the state parties—including its supremacy over national constitutions.

In a Communication proceeding before the CRPD Committee, six Hungarian citizens filed a formal complaint that Hungary's Constitution was in violation of the provisions of the CRPD. All six persons "suffer from intellectual disability" and had been placed under partial or general guardianship pursuant to judicial decision. Under the Hungarian Constitution, persons placed under guardianship for such intellectual disabilities were ineligible to vote.[4]

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[3] Rudolf Bernhardt, *Evolutive Treaty Interpretation, Especially of the European Court of Human Rights,* 42 German Y.B. Int'l L. 11, 14 (1999) as quoted in Louis Henken et al., *Human Rights: Second Edition,* Foundation Press (New York), 2009, p. 206-207.

[4] Committee on the Rights of Persons with Disabilities, Communication No. 4/2011, Views adopted, 9 September 2013. Copy attached for the convenience of the Committee.

The CRPD Committee ruled that Hungary was in violation of its obligations under the CRPD. While the Committee did not claim the authority to directly order Hungary to amend its Constitution, its ruling made it clear that in order for that nation to be in compliance with its treaty obligations, it should do so.

The impact of this decision was trumpeted by Human Rights Watch, a major NGO in this field: "The ruling applies to all 137 countries that have adopted the international disability rights treaty. These governments are required to review their laws and practices to eliminate any provisions that prevent people from voting due to their disabilities."[5]

In making its determination of the meaning of the CRPD's provisions, the Committee placed significant reliance on its statements concerning the meaning of the treaty in its prior Concluding Observations. It is clear that the CRPD Committee considers its so-called recommendations as authoritative interpretations of the meaning of the treaty.

In the Committee's October 8, 2013 review of El Salvador's compliance with the treaty, it expressed concern that El Salvador had taken a reservation to the effect that the nation's obligations were limited by the provisions of its constitution.[6] The treaty must not be subservient to a nation's constitution according to the CRPD Committee.

One of the most important themes in the CRPD Committee's review and conclusions relates to the definition of disability. Important U.S. advocates for ratification claim that the lack of a definition of "disability" in the treaty means that every nation has the power to define "disability" under its own law. The Committee defiantly rejects this view in a proposed General Comment.

> In consideration of the initial reports of the different States Parties that have been reviewed so far, the Committee has

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[5] http://www.hrw.org/news/2013/10/01/hungary-change-discriminatory-voting-laws.
[6] See, para. 6, CRPD/C/SLV/CO/1, copy attached. Spanish language only.

> observed that there is a general misunderstanding of the exact scope of the obligations of States Parties under Article 12. Until now there has been a general failure to understand that the human-rights based model of disability implies the shift from a substitute decision-making paradigm to one that is based on supported decision-making. The present general comment has the purpose of exploring the general obligations that are derived from the different components of Article 12.[7]

China was told that its definition of "disability" was improper under the treaty because it employed a medical definition rather than a human rights definition. [8] Argentina was found wanting for the exact same reason—using a definition of disability different from that imposed by the CRPD. [9] Hungary,[10] Peru, [11] Tunisia,[12] Australia,[13] and Austria[14] have also been informed that their national definitions of "disability" are contrary to the definition found in the CRPD. It is equally clear that the Committee is of the opinion that these nations are obligated to conform their definitions to the one the Committee believes is found in the treaty.

We have clearly demonstrated that the U.S. advocates for ratification are simply wrong when they assert that our nation is free to adopt our own definition of "disability" and still be in compliance with our obligations under the treaty.

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[7] Draft General Comment on Article 12 of the Convention, Adopted 2-13 September 2013, para. 6. Copy attached.
[8] Concluding Observations, China, 15 October 2012, CRPD/C/CHN/CO/1, para. 9. Copy attached.
[9] Concluding Observations, Argentina, 8 October 2012, CRPD/C/ARG/CO/1, para. 19-20. Copy attached.
[10] Concluding Observations, Hungary, 22 October 2012, CRPD/C/HUN/CO/1, para. 10. Copy attached.
[11] Concluding Observations, Peru, 16 May 2012, CRPD/C/PER/CO/1, para. 6 (a). Copy attached.
[12] Concluding Observations, Tunisia, 13 May 2011, CRPD/C/TUN/CO/1, para. 8-9. Copy attached.
[13] Concluding Observations, Australia, 21 October 2013, CRPD/C/AUS/CO/1, para. 47. Copy attached.
[14] Concluding Observations, Austria, 30 September 2013, CRPD/C/AUT/CO/1, para. 8-9. Copy attached.

However, it is important for the Senate to consider the substantive rules that will be imposed if we ratify this treaty. The difference between the "human rights" definition of "disability" and the "medical" definition of "disability" profoundly impacts upon our laws.

Important organizations that support the ratification of the CRPD agree with our basic contention—the CRPD imposes legal obligations on the United States that differ from existing law.

> There's something that may be superior to the ADA. The United Nations came up with their own disability policy: the Convention on the Rights of People with Disabilities (CRPD).
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> The UN brought up the CRPD to the General Assembly for signatures in December 2006. Now, CRPD is a fully operational policy as of May 2008. The CRPD is like the ADA on steroids; the policy doesn't just cover provisions for employing, accessibility to public place/information, and communication… Human rights is deeply integrated with the CRPD, so it covers disabled people's rights to an adequate standard of living, rehabilitation, and to preserve their dignity. With the CRPD's provisions, the mission to form a perfect society is clearly defined.
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> In comparison, the ADA is surprisingly restrictive. It only covers our rights to get a job, access public places, and accessible communication. It doesn't discuss how we are all human beings with dignity. It doesn't discuss our right to an adequate standard of living. It doesn't encourage cultivating a sense of identity with our communities.[15]

Consider the opinion of Ratifynow.org:

> Although the Americans with Disabilities Act (ADA) has been very important to the daily lives of many Americans with

[15] http://www.thebuffandblue.net/?p=7502. The "Buff and Blue" is a student publication at Gallaudet University established in 1892. Gallaudet is a premier institution of higher learning dedicated to education of disabled persons.

> disabilities, it does not, and cannot, fully cover all the basic human rights to which people with disabilities are entitled. The CRPD would supplement the power of the ADA to ensure that people with disabilities have stronger access to all the same human rights to which all people are entitled. Also, if the United States signs and ratifies the CRPD, it would help send a strong message to other countries that we, too, support human rights for people with disabilities. This may help inspire more countries to ratify the CRPD so that more people with disabilities around the world can enjoy its protections.[16]

The jurisprudence of the CRPD Committee, the opinion of legal experts such as Louis Henken, and these intellectually honest advocates for CRPD ratification join us in our core contention: If the United States ratifies this treaty, it undertakes a duty to comply with international legal standards which are different from our existing law. Some people contend that this diminishment of our sovereignty is justified by the increase in protections for the disabled. We disagree. Our contention is that the United States should use the process of American self-government under the Constitution to continually improve our policies which are designed to ensure equality and justice for disabled persons.

The UN CRPD Committee's Definition of *Disability* Would Require a Substantial Change in American Law

We have previously quoted paragraph 3 from the draft General Comment on Article 12. It proclaims that a nation that employs a "substitute decision-making" model is in violation of the treaty. Similar comments may be found in the Concluding Observations previously cited. What does this mean in practical terms? The Committee gives us its answer:

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[16] http://www.ratifynow.org/ratifynow-faq/. "RatifyNow is an international nonprofit organization that supports grassroots advocates worldwide working to persuade their nation to ratify, implement, and enforce the CRPD. Membership is free and open to both individuals and organizations."

> Regimes of substitute decision-making can take many different forms, including plenary guardianship, judicial interdiction, and partial guardianship. However, these regimes have some common characteristics. Substitute decision-making regimes can be defined as systems where 1) legal capacity is removed from the individual, even if this is just in respect of a single decision, 2) a substituted decision-maker can be appointed by someone other than the individual, and this can be done against the person's will, and 3) any decision made by a substitute decision-maker is bound by what is believed to be in the objective "best interests" of the individual –as opposed to the individual's own will and preferences.
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> The obligation to replace regimes of substitute decision-making by supported decision-making requires both the abolishment of substitute decision-making regimes, and the development of supported decision-making alternatives. The development of supported decision-making systems in parallel with the retention of substitute decision-making regimes is not sufficient to comply with Article 12.[17]

There can be no doubt that this definitional rule and the implications that flow from it are based not just on this draft General Comment, but on the same holding found in the finalized Concluding Observations that have been issued to a number of state parties.[18]

It is important to understand what this means. The parents of a profoundly intellectually disabled adult will not be permitted to be named their child's guardian with the ability to substitute their judgment for that of their adult child. "All forms of support to exercise legal capacity (including more intensive forms of support) must be based on the will and preference of the individual, not on the perceived/objective best interests of the person."[19]

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[17] Draft General Comment on Article 12, Para. 23-24.
[18] See, e.g., Concluding Observations, Austria, op. cit., para. 28.
[19] General Comment on Article 12, op. cit, para. 25 (b).

The Senate Foreign Relations Committee is properly not the venue to debate the wisdom of this new approach to the rights of the profoundly disabled. But what is absolutely clear is this—the rules under the CRPD are different from existing American law and practice. And it is also absolutely clear that the UN Committee believes the United States will be legally obligated to conform our definitions and practices to the Committee's standards and not our own.

Domestic Law Provides No Excuse for a Failure To Fully Implement the Provisions of the CRPD

This brings us to the broad question of the domestic impact of the ratification of the CRPD. By ratifying the treaty, the United States undertakes a solemn legal obligation to implement and follow the treaty in good faith.

Reservations, Understandings, and Declarations can only have impact on which agency of government will have authority and responsibility to implement the provisions of the treaty. But no RUD can remove the legal duty of the United States to comply with this treaty if it is ratified.

A non-self-executing RUD will only have the effect of ensuring that the judiciary will not be the agency to initially implement the CRPD into domestic law. In short, Congress and the Executive Branch will have the duty to implement the treaty through statutes and regulations. Once such implementing laws are issued, then the courts are also permitted to engage in the enforcement of the treaty.

A non-self-executing RUD does not mean that Congress can avoid its duty to implement the treaty. It has the duty to enact law that conforms to the requirements of the CRPD.

A federalism RUD has a similar impact. A properly constructed RUD can, at most, ensure that certain of the duties of compliance fall on the state governments rather than on the federal government. But in international law, if the states fail to comply, it

is the federal government that is liable for the failure to properly implement the treaty. A federalism RUD does not excuse a national government from non-compliance.

This was made clear by the CRPD Committee in its ruling concerning Austria:

> The Committee recalls that article 4, paragraph 5, of the Convention clearly states that the administrative particularities of a federal structure do not allow a State party to avoid its obligations under the Convention.
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> The Committee recommends that the State party ensure that federal and regional governments consider adopting an overarching legislative framework and policy on disability in Austria, in conformity with the Convention.[20]

THE CRPD Threatens the Rights of Homeschooling Families

Early human rights instruments were very supportive of the rights of parents to direct the education and upbringing of their children.

It is beyond dispute that the Universal Declaration of Human Rights, adopted in 1948 by the unanimous vote of the UN General Assembly, arose "out of the desire to respond forcefully to the evils perpetrated by Nazi Germany."[21] The UDHR's view regarding parents and children is no exception to this rule. Article 26(3) of the UDHR proclaims: "Parents have a prior right to choose the kind of education that shall be given to their children." Numerous human rights instruments have been drafted in reaction to "the intrusion of the fascist state into the family…."[22]

The rejection of the Nazi view of parents and children was translated from the aspirational articles of the UDHR into the

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[20] Concluding Observations, Austria, op. cit., para. 10-11.
[21] Kathleen Renee Cronin-Furman, "60 Years of the Universal Declaration of Human Rights: Towards an Individual Responsibility to Protect," 25 AM. U. INT'L L. REV. 175, 176 (2009).
[22] Marleen Eijkholt, "The Right to Found a Family as a Stillborn Right to Procreate?" 18 Med. L. Rev. 127, 134 (2010).

binding provisions of the two core human rights treaties of our era—the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social, and Cultural Rights (1966). Article 18(4) of the ICCPR provides:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 13(3) of the ICESCR repeats and expands on this same theme:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

This pro-parent view of human rights has given way to a decidedly different view in the UN Convention on the Rights of the Child (UNCRC) and now in the UN Convention on the Rights of Persons with Disabilities.

It is very important to observe what is missing from the CRPD. No provision within the CRPD affirms the right of parents to choose the form of education for their children. Article 19 protects a right of the child to "know and be cared for by their parents." Article 23(1) protects the rights of disabled parents—an important provision but one that is inapplicable in the case of a nondisabled parent with a disabled child. Article 23(4) prohibits the separation of disabled children from their parents in most cases.

It is Article 24 of the CRPD that deals with education. The word "parent" does not appear in this article. Parents are assured of no rights in the education of their children.

It is not just what is *absent* in the CRPD that is important; what is *included* also substantially impacts parental rights.

The UNCRPD incorporates several key elements from the UNCRC that, as I will demonstrate, lead to the conclusion that parental rights in the education of disabled children are supplanted by a new theory of governmental oversight and superiority. In short, government agents, and not parents, are being given the authority to decide all educational and treatment issues for disabled children. All of the rights that parents have under both traditional American law and the Individuals with Disabilities Education Act will be undermined by this treaty.

Article 7 is the key. Sections 2 and 3 directly parallel provisions of the UNCRC.

> 2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
>
> 3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

Section 2 directly parallels Article 2(1) of the CRC. Section 3 closely follows Article 12(1) of the CRC.

The "best interest of the child" standard is a familiar one to anyone who has ever participated in family or juvenile law in American courts. However, in that context it is a dispositional standard. This means that after a parent has been convicted of abusing or neglecting his child, then and only then can the government substitute its view of what it best for the child for that of the parent. Or, in the divorce context, once a judge determines the family unit is broken, the judge must settle the contest between the competing parents and decide for herself what she thinks is in the best interest of the child.

In an intact family, where there is no proof of abuse or neglect, government agents—whether school officials, social workers, or judges—cannot substitute their judgment of what is best for a child over the objection of the parents.

This legal principle is firmly embedded into the Individuals with Disabilities Education Act. Parents have a great deal of authority concerning the education and treatment of their children under this act.

Geraldine van Bueren, who is one of the world's leading experts on the international rights of the child and helped to draft the UNCRC, clearly explains the meaning and application of this best interests standard.

> Best interests provides decision and policy makers with the authority to substitute their own decisions for either the child's or the parents', providing it is based on considerations of the best interests of the child.[23]

Section 7 of the UNCRPD uses precisely the same legal terms as those contained in the UNCRC.

Accordingly, today, under the IDEA parents get to decide what they think is best for their child—including the right to walk away from government services and provide private or home education. Under the UNCRPD, that right is supplanted with the rule announced by Professor van Bueren. Government officials have the authority to substitute their views for the views of parents as well as the views of the child as to what is best. If parents think that private schools are best for their child, the UNCRPD gives the government the authority and the legal duty to override that judgment and keep the child in the government-approved program that the officials think is best for the child.

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[23] Geraldine Van Bueren, *International Rights of the Child, Section D* University of London, 46 (2006).

Ask virtually any parent who has dealt with school officials in the IDEA context: Are you willing to give the government the final say on what it thinks is best for your child's special needs or disability?

School districts have a powerful motivation to do better for disabled and special needs children precisely because they know that parents with real rights are looking over their every move and have the ability to fight for what they know to be best for their children. Remove parental authority and institutional lethargy will take over in many cases.

Children are treated much, much better in the special needs setting whenever their parents have real and certain rights.

Those rights are gone if this Senate ratifies this treaty. There are two reasons this is true.

First, virtually every state has state law provisions which also give parents a number of rights in the educational setting. Article VI of the U.S. Constitution contains our Supremacy Clause which explicitly states that a ratified treaty is the Supreme Law of the land and all state law provisions that conflict with the treaty are overridden by it.

Any and all parental rights provisions in state education laws will be void by the direct application of Article 7 of this treaty. Government—not parents— has the authority to decide what is best for children with special needs if the Senate ratifies the CRPD.

Since the hearings last summer, the American homeschooling community has been intensely focused on a case which illustrates the dangerous gaps in international human rights law that impact the right of a parent to homeschool one's child.

Uwe and Hannelore Romeike came to the United States from Germany in 2008. Germany bans all homeschooling and enforces that ban with police raids on family homes in which the children are seized and placed into government custody. If the parents do not relinquish their desire to homeschool their children, they are threatened with the permanent loss of the custody of their children.

The Romeikes applied for asylum in the United States. The initial immigration judge ruled in favor of the family, granting them political asylum. The current administration appealed this decision to the Bureau of Immigration Appeals. The BIA reversed the immigration judge's decision. We appealed that decision to the Sixth Circuit, which upheld the decision of the BIA. In one of its filings before the Sixth Circuit, the Justice Department recited the history of German courts in their determination that the ban on homeschooling was legitimate. The Justice Department contends that the European Court of Human Rights correctly determined that no human rights standards were violated by the German ban on homeschooling and its egregious enforcement mechanisms.

This case in now pending in the Supreme Court, awaiting determination of our petition for a writ of certiorari.

Here is the lesson learned by the homeschooling community concerning both international law and the attitude of this administration. Despite the fact that the provisions of the ICCPR and the ICESCR could not be clearer in their endorsement of the right of parents to direct the education of their children, German parents cannot find protection for their right to homeschool their children in such instruments. The "best interest of the child" standard prevails. The rights of homeschooling parents are not just diminished; they are obliterated.

It is utterly unreasonable for anyone to believe that this problem can be remedied by RUDs. If an actual treaty provision protecting parental rights in education is insufficient to protect the right of homeschooling both in German and in American asylum claims, then how in the world can anyone expect homeschoolers to believe that RUDs will accomplish what clear treaty language cannot accomplish?

This administration has proven to American homeschoolers that international human rights law is not just an empty promise when it comes to protecting our rights; the best interest of the child

standard in the more recent UN treaties has overcome and supplanted the rights of parents.

We are told that the CRPD will not affect the rights of homeschooling. These naked assertions are not based on any viable reading of the relevant law. And they come from the same sources that told the American public that if we like our current health insurance we can keep it.

Political promises are like morning clouds. They fade away as the day progresses.

The UN CRPD will result in the loss of educational freedom for all parents in this nation with disabled children. Government, not parents, will decide what form of education is best for children.

We urge this Committee and the Senate to reject this treaty.