United States Senate
Foreign Relations Committee

against the

United Nations Convention on the Rights of Persons with Disabilities

Testimony of
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Mr. Chairman, thank you for the honor of being invited to testify before this Committee.

My name is Michael Farris. I am the Chancellor of Patrick Henry College where I teach Constitutional Law, Public International Law, and coach our six-time national champion moot court team. I earned my Juris Doctorate from Gonzaga University back in 1976 and my LL.M. in Public International Law just last year from the University of London. I am also the Chairman and Founder of the Home School Legal Defense Association—the largest homeschooling advocacy group in the world.

There are three categories of arguments that I bring in support of the view that the United States Senate should not ratify the UN Convention on the Rights of Persons With Disabilities.

1. The promises made by the supporters of the treaty concerning the impact both on Americans and on disabled persons in other countries are clearly false and callously misleading.

2. The changes to American law that will be required to comply with the provisions of this treaty are profound and utterly unacceptable. Specifically, the changes regarding the rights of parents who have children with disabilities—which includes thousands of homeschooling families—are absolutely inconsistent with the IDEA and the basic constitutional principles of parental rights.

3. The ratification of this treaty would constitute the most dangerous departure from the principles of American sovereignty and personal liberty in the history of the United States Senate.

The Proponents of this Treaty Make False and Misleading Promises

The advocates of this UN treaty promise two kinds of alluring benefits that will supposedly result from Senate ratification. First, it will help disabled Americans travelling abroad. Second, it will give

the United States greater moral authority to coax unwilling states into appropriate treatment of disabled persons within such states.

Neither of these claims have any foundation in law or in fact.

Let me explain why I take these false and misleading claims quite personally.

My mother has had Multiple Sclerosis for over forty years. I have had the honor of pushing my mother's wheel chair through the halls of Congress as well as through museums, castles, and cathedrals in Switzerland, Austria, and France. There is no doubt that the United States leads the whole world in providing appropriate access to persons with disabilities.

We lead—not because international law has required us to do so—rather; we lead because in the United States we believe that every single person is endowed by our Creator with certain inalienable rights. And it is that belief system, and not international law, which will continue to provide Americans with disabilities with any necessary changes to the law in the years ahead.

I deeply resent the attempt by the advocates of this treaty to mislead members of the disabled community with the false promise that the U.S. ratification of this treaty will lead to material improvements when Americans with disabilities travel to other nations.

U.S. ratification of this treaty creates absolutely no rights for Americans with disabilities when they travel abroad. It is an utterly false contention. If the United States becomes party to a treaty, all of the legal consequences which flow from this act of ratification will be limited to the territory of the United States. There are no extra-territorial rights created for American travelers, businessmen, service members, or veterans.

This is the nature of this kind of treaty. See, Article 29, *Vienna Convention on the Law of Treaties.* It is a promise from the state party to change its own laws and practices so that disabled persons will have greater access and equality.

If an American were traveling in Portugal, for example, he or she would receive no claim whatsoever to improved access from Portugal by virtue of American ratification of this treaty. Portugal's obligation to disabled persons arises from Portugal's own ratification of this treaty—assuming that it lives up to its obligation to enact compliant domestic law.

It is equally disingenuous to claim that U.S. ratification will lead to improved treatment for disabled persons from other countries. This is especially true in light of the package of reservations that the State Department proposes.

The proponents of this treaty, together with the proposed reservations, are attempting to lead the Senate to believe that the United States is already fully compliant with this convention.

Professor Louis Henkin writing in the American Journal of International Law criticizes this approach:

> 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. The object and purpose of the human rights conventions, it would seem, are to promote respect for human rights by having countries—mutually—assume legal obligations to respect and ensure recognized rights in accordance with international standards. Even friends of the United States have objected that its reservations are incompatible with that object and purpose and are therefore invalid.

> …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.[1]

In light of this approach, the United States will not be sending any kind of signal worth sending. The message will not be that other nations need to match our comprehensive package of state and federal laws concerning the proper treatment of disabled persons. Rather, the message will be that treaties are for show and have no more impact than you want them to have.

The United States should lead the world in only ratifying treaties with which we intend to fully, faithfully, and vigorously comply. We should not lead the world in cheap and compromised promises.

The fact that no sensible person would dare to suggest that we ratify this treaty without this class of reservations is proof that this treaty is simply too dangerous to ratify.

The way for the United States to continue to lead the world in this area is to ensure that American law and practice live up to the promises of the Declaration of Independence rather than the amorphous standards of a committee of 18 experts in Geneva.

International law that is not translated into domestic law and practice is nearly worthless.

If International Law actually led to greater rights for the citizens of other nations, then why are North Koreans still deprived of any semblance of any human right? That nation has ratified five major human rights treaties and enforces none of them.

Why do Germany and Sweden ban homeschooling and persecute and harass homeschooling parents despite their ratification of

[1] Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, The American Journal of International Law, Vol 89 No 2, 343-344 (Apr. 1995).

human rights treaties which promise that the rights of parents to choose alternatives to public education are prior to the claims of the state?

How has American leadership and example in ratifying human rights instruments led to any help for German or Swedish homeschoolers? In fact, this administration is seeking to deport a German homeschooling family that was awarded asylum by an administrative law judge. What has America done of any substance to help those in the concentration camps of North Korea?

Leadership comes not from ratification of treaties—it comes from effective action. Human rights treaties are empty promises that the do little more than guarantee the right of a professional class of international bureaucrats to full employment and their right to travel to conferences where they shake their heads and ultimately write a report in diplomatic code that does little good for anyone at all.

U.S. ratification of this treaty has no extra-territorial application for our citizens whatsoever. It is a fraudulent charade to claim otherwise.

This Treaty Requires Radical Changes to American Law

The most basic rule of international law is *pacta sunt servanda*—agreements must be kept. Ratification of the UNCRPD requires the United States to act in good faith—and to conform our law to the standards set forth in this UN treaty.

The proposed declaration that this treaty is non-self-executing does not change this duty in any way. Such a declaration simply removes the possibility of direct judicial imposition of the provisions of the treaty. The United States has made a solemn promise that we *will* change our statutory law to conform to the requirements of the

treaty. If we fail to do so, we are in breach of our international legal obligations.

I want to focus on one area of the required changes in American law—the impact that the UNCRPD would have on the rights of parents concerning the education of their disabled and special needs children.

The UNCRPD follows the trend of the second generation of human rights treaties which promote the idea that government, not parents, have the ultimate voice in decisions concerning their children.

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."[2] 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…."[3]

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

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[2] 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).

[3] Marleen Eijkholt, "The Right to Found a Family as a Stillborn Right to Procreate?" 18 Med. L. Rev. 127, 134 (2010).

> 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.

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 their 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 imbedded 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.

The National Dissemination Center for Children with Disabilities lists eight particular rights of parents contained in the IDEA[4]:

> The right of parents to receive a complete explanation of all the procedural safeguards available under IDEA and the procedures in the state for presenting complaints
>
> Confidentiality and the right of parents to inspect and review the educational records of their child
>
> The right of parents to participate in meetings related to the identification, evaluation, and placement of their child, and the provision of FAPE (a free appropriate public education) to their child
>
> The right of parents to obtain an independent educational evaluation (IEE) of their child
>
> The right of parents to receive "prior written notice" on matters relating to the identification, evaluation, or placement of their child, and the provision of FAPE to their child
>
> The right of parents to give or deny their consent before the school may take certain action with respect to their child
>
> The right of parents to disagree with decisions made by the school system on those issues
>
> The right of parents and schools to use IDEA's mechanisms for resolving disputes, including the right to appeal determinations

I have litigated an additional right of parents under the IDEA—the right to pursue private and home education at one's own expense.

[4] http://nichcy.org/schoolage/parental-rights

For example, in the Eighth Circuit case of *Fitzgerald v. Camdenton R-III School Dist.*, 439 F.3d 773 (8th Cir. 2006), the court reinforced important parental rights concepts. "[T]he IDEA allows parents to decline services and waive all benefits under the IDEA. See 20 U.S.C. § 1414(a)(1)(D)(ii)(II). When parents waive their child's right to services, school districts may not override their wishes. See *id.*" Id. at 775.

In that case, we contended that parents did not even have to agree to allow the school district to force the child to go through the initial IDEA evaluation. The evidence showed that this homeschooling family had already had their child independently evaluated and the child was receiving private special needs services at the parents' own expense. The school district wanted to force the family to undergo its special needs evaluation even though the school recognized that it could not force this family to accept the recommended services at the end of the process.

The Eighth Circuit ruled for the family saying that the school could not compel this IDEA evaluation under these circumstances.

All of these parental rights will be eviscerated by the mandatory application of the "best interest of the child" standard which is set forth in Article 7 of the UNCRPD.

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 (and was one of my professors at the University of London), clearly explains the meaning and application of this best interests standard in her course material.

> 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.[5]

Section 7 of the UNCRPD uses the exact 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.

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 that parent knows to be best for their child. 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.

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

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 which conflict with the treaty are overridden by the treaty.

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.

Second, we must analyze the impact of the ratification of this treaty based on the presumption that we are going to comply with the treaty in good faith. Accordingly, even with the presumption of the non-self-executing nature of the treaty, if the Senate ratifies this treaty, Congress will have the duty to revise the IDEA to comply with the provisions of the UNCRPD. Therefore, unless we intend to breach our international legal obligations, Congress will be required to modify the IDEA to ensure that government decision-makers, and not parents, have the final say as to what they believe is best for a child.

Thousands of homeschooling parents have children with special needs and disabilities. The ratification of this treaty is considered by our community to be the equivalent of an act of utter betrayal.

As other parents of special needs children come to understand the meaning of these phrases in the UNCRPD, they too will be aghast to learn that this Senate is giving serious consideration to a legally binding international agreement that would undermine their rights as American parents.

No proposed reservation can cure this problem. And unless we adopt a reservation that explicitly says: *We are not serious about any duty to comply with this treaty and are ratifying only for PR*

purposes—I can think of no means of drafting a reservation that cures this huge defect.

Here is the plain fact. American law and international law are not compatible when it comes to parental rights. I can think of no good reason why we should even try. Americans should make the law for America—we do not need a committee of experts in Geneva to look over our shoulders to help us determine what kind of policy we need to best protect Americans with special needs and disabilities.

Although there are a great number of other difficulties that are latent in this treaty, I want to focus just on one other issue. This treaty appears to take sides on the public policy issues concerning abortion.

Article 25(a) of the UNCRPD requires state parties to:

> Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;

This provision has led the nations of Poland, Malta, and Monaco to adopt reservations or declarations that proclaim that these states do not recognize any right to an abortion or mandatory state-funding for the same.

Under *Roe v. Wade*, of course, we live under a regime where it is proclaimed that women have the constitutional right to abortion. There is great controversy over that decision—and Congress has generally avoided federal funding for abortion. It would reasonably appear that Article 25(a) commits the United States to providing free abortion services to persons with disabilities. A vote for this treaty is a vote for abortion funding.

Of course, our State Department has not proposed anything like the reservations from Poland, Malta, or Monaco. And I doubt that the omission was a mere oversight.

This Treaty Would Violate the Principles of American Sovereignty and Liberty

The Founders of this Republic understood treaties to be exclusively devoted to the subject matter of how nations treat other nations. The idea that international law would be used to dictate the policies that our nation would follow concerning the rights of our own citizens would, frankly, astonish and bewilder the founding generation.

In the most basic terms, American sovereignty means that Americans should make the law for America. No foreign power should have the ability to lay claim to a power to dictate what our internal domestic law should be.

This treaty would alter that balance. I return to Professor van Bueren for an explanation of the impact on sovereignty by the ratification of this kind of treaty. Although her comments were directed toward the ratification of the UNCRC, they are fully applicable here.

> Underpinning this approach are the legal consequences of states becoming party to the Convention on the Rights of the Child. The United Nations Convention on the Rights of the Child moves the borders for the state of what is political and what can be subject to a legal challenge in courts, particularly in resource allocation and budgetary matters. The Convention and other international laws in effect narrows what were previously unfettered discretionary powers of governments. Before governments become party to human rights treaty they are obliged to ensure that there are the resources, either to implement the Convention on becoming party or shortly

> thereafter, in accordance with international law. Hence, there is no interference with national sovereignty, the nationally sovereign decisions on how resources on children's rights to be expended have already been taken. In essence, the government has exercised its political powers, and it has to live with the legal consequences.[6]

There is a once for all decision that effectively exhausts our sovereignty. If we ratify this treaty, our ability to have absolute freedom of choice concerning our public policy on this subject has been extinguished. It is akin to the states being under a federal mandate. Sure, the states have a bit of discretion in how the federal mandate will be implemented, but their range of policy choices are circumscribed by the duty to implement the will of Congress. In a similar fashion, if the Senate ratifies this treaty—the nationally sovereign decisions will be made once for all. Generations of Americans will be forced to live with this decision—under a permanent duty to live under UN supervision for compliance with our international legal obligations.

There is a second, more specific problem with this particular treaty.

Human rights treaties in general seek to guarantee five sectors of rights—political, civil, economic, social, and cultural rights. The Universal Declaration of Human Rights (which was a statement of altruism and not binding international law) encompassed all five of these components of international law.

However, in the years that followed, there was a great division between two sectors of human rights. Political and civil rights are called negative rights. These rights are what government cannot do to us or take from us. The United States Bill of Rights is the world's greatest collection of negative rights.

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[6] Geraldine Van Bueren, *International Rights of the Child, Section D*, University of London, 36 (2006).

However, economic, social, and cultural rights are called positive rights. These rights encompass services that the government must provide its citizens—the right to health care, the right to food, the right to employment.

When the UN attempted to translate the UDHR into formal treaty language—this divide between civil and political rights vs. economic, social, and cultural rights took center stage. The west, led by the United States, supported the creation and ratification of civil and political rights. The Soviet Union and its allies, however, opposed civil and political rights and instead urged the creation of economic, social, and cultural rights.

The attempt to create a single treaty encompassing all of the principles of the UDHR failed. Instead, the UN promulgated two separate treaties—the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.

The United States ratified the ICCPR. The Soviet Union ratified the ICESCR.

To this very day, the United States has never ratified a UN human rights treaty that has economic, social, and cultural rights at the core of the treaty.

Why is this? Professor van Bueren explains:

> The essence of economic and social, and to an extent, cultural rights is that they involve redistribution, a task with which, despite the vision of human rights, most constitutional courts and regional and international tribunals are distinctively uncomfortable.[7]

[7] Geraldine Van Bueren, *Combating Child Poverty—Human Rights Approaches*, Human Rights Quarterly, Vol. 21, p. 680, 680-681 (1999).

Like these courts, the United States Senate—up until this present time—has shared this concern about committing our nation to the task of redistribution.

This treaty would break all precedent of this body. It would be the first time in the history of the Senate that the United States commits itself to a treaty that requires the redistribution of the resources of Americans. We must take resources from some Americans and give them to other Americans.

There is little wonder that the Union of Soviet Socialist Republics favored this kind of redistributive right. But, up until today, the United States Senate has never ratified a treaty embracing these so-called positive rights which are nothing more than the international entitlement to the redistribution of resources.

You may call it what you will. I see such treaties as a dramatic loss of American freedom in favor of coercive international socialism.

Conclusion

It was American self-government and not international law that led to the significant advancements that this nation has seen in the appropriate law and policies concerning persons with disabilities.

International law has no track record of success that could lead any reasonable person to believe that international law would have any claim of superiority over American self-government.

We should pass whatever laws we need to ensure proper policies and practices for Americans with disabilities. But we should not give away our policy prerogatives to the superintendence of a committee of UN experts sitting in Geneva.