ISSUE BRIEF

INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): EARLY PREPARATION FOR REAUTHORIZATION

BACKGROUND

On December 3, 2004, President Bush signed the long-awaited *Individuals with Disabilities Education Improvement Act of 2004* that reauthorized the *Individuals with Disabilities Education Act* (IDEA). The original IDEA was passed in 1975 and its primary purpose remains unchanged—to guarantee a free, appropriate public education to every child with a disability.

Although scheduled to be reauthorized in 2011, reauthorization could be delayed until 2013 or later. Before addressing IDEA, Congress is expected to reauthorize the *Elementary and Secondary Education Act* (ESEA) which we hope will be completed in 2012. However, if there are delays, IDEA could be pushed back even later.

At the time of the last reauthorization, NSBA had secured great bipartisan support on Capitol Hill that fostered outstanding leadership in negotiating final language of the bill. NSBA lobbied successfully for significant changes that shifted program emphasis from one of legal process to improving education outcomes and accountability for all students

Although NSBA had strong bipartisan congressional support, it is important to be aware that many in the disability community, particularly those who lacked trust in the school due process system, initially felt that the students with disabilities suffered a great loss in terms of protections. As a result, those individuals and interest groups have continued to monitor actions by school officials. Although many in the disability community have witnessed positive shifts resulting from the new legislation, there are others who remain dissatisfied with the current language of the law. We expect that some of these advocates will attempt to regain many of the compliance requirements that were terminated.

PART I – IDEA: Identifying Major Issues for the Next Reauthorization

In preparation for the next IDEA reauthorization NSBA has established a working group composed of school attorneys to identify a broad range of issues and develop recommendations related to IDEA reauthorization. The first conference call was held on October 24, 2011. This process proved very beneficial in preparation for the last IDEA reauthorization and in framing issues for subsequent discussions with local school boards across the nation in developing local school board priorities.

The working group will continue its deliberations through conference calls and special meetings held in conjunction with other meetings hosted by the NSBA Council of School Attorneys (COSA). Additionally, surveys and focus group meetings are expected to be held in conjunction with meetings hosted by the state associations, the Council of Urban Boards of Education (CUBE), the Urban Legislative Action Group, the Rural Legislative Action Group and other NSBA-sponsored meetings.

Based on feedback received to date from local school boards across the nation IDEA reauthorization is expected to include many challenges due to conflicting decisions issued at the Circuit Court level. Among those issues currently under discussion:

- Parental revocation of consent for special education services
- Representation by non-attorneys
- Allocation of sue of federal funds
- Due process
- Individual education\programs (IEP)
- Discipline
- Teacher quality/effectiveness

Related Legislative and Regulatory Issues

Two issues have emerged that will require the attention of local school boards: (1) the inappropriate use of restraints and seclusion; and (2) the impact of the Equal Employment Opportunity Commission (EEOC) regulations implementing the Americans with Disabilities Amendments Act of 2008 on local school districts as both educational institutions and employers.

Inappropriate Use of Restraints and Seclusion

Restraints and seclusion have been used in various situations to deal with violent or noncompliant behavior. There are legal issues concerning the use of these techniques in schools, including their application both to children covered by the Individuals with Disabilities Education Act (IDEA) and to those not covered by IDEA. The primary issues revolve around whether federal laws should be enacted to prohibit the use of restraints and seclusions in public schools and if so, to what extent.

According to the Congressional Research Services (CRS) Report for Congress, *The Use of Seclusion and Restraint in Public Schools: The Legal Issues*, issued December 16, 2009, several reports have documented instances of deaths and injuries resulting from the use of restraints or seclusion in schools. In May 2009, the Government Accountability Office (GAO) released a study examining the use of restraints and seclusion in the education setting, finding hundreds of cases of alleged abuse and death due to the use of restraints and seclusion. Further, CRS reported that federal law does not contain general provisions relating to the use of restraints and seclusion, and there are no specific federal laws concerning the use of restraints and seclusion in public schools. Although there are some judicial cases, they do not provide clear guidance on when, if ever, restraints and seclusion may be used in schools.

Also in 2009, the White House hosted a meeting to discuss the use of restraints and seclusion in schools as an appropriate approach with children with behavioral disorders. The focus of the meeting was directed to a report released in January 2009 by the National Disability Rights Network (NDRN), *School is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools*. The Report focused on the fact that 41 percent of the states had no laws, that children were being abused in schools, and that federal legislation is needed to ensure greater consistency among state policies. In July 2009, U.S. Secretary of Education Arne Duncan sent letters to Chief State School Officers noting the problems identified by the GAO Report and encouraged each state to review its current policies in preparation for further discussions.

By March 2009, the Chairman of the Senate Health, Education, Labor and Pensions Committee, Senator Tom Harkin (D-IA); and the Chairman of the House Committee on Education and the Workforce, Representative George Miller (D-CA-7) voiced their strong intentions to introduce legislation during the 111th Congress, and began holding Congressional Hearings. On December 9, 2009, Chairman George Miller introduced the *Keeping All Students Safe Act*, *H.R. 4247* with 40 co-sponsors. On February 4, 2010, the House Education and Workforce Committee held the full Committee mark-up. Chairman Miller offered an amendment in the form of a substitute bill, and the Committee reported the bill as amended to the full House

by vote of 34–10, which included bi-partisan support. On March 3, 2010, the bill passed the full House 262–153.

Also, on December 9, 2009, the *Preventing Harmful Restraint and Seclusion in Schools Act, S. 2860*, was introduced by Senator Dodd (D-CT). However, following months of discussions with both proponents and opponents of the bill, agreement could not be reached regarding two major issues: (1) the authority to reference the use of restraints in the IEP, and (2) acceptable accommodations for states that had already passed legislation addressing the issue. On September 29, 2010, Senator Dodd was able to secure the support of Senator Richard Burr (R-NC) as co-sponsor and introduced a modified bill, *Keeping All Students Safe Act, S. 3895*. However, without agreement on a few major issues, the new Senate bill was never placed on the calendar before the Senate HELP committee, and thus never made it to the full Senate for a floor vote before the 111th Congress adjourned.

During the first session of the 112th Congress, these same bills were reintroduced: On April 6, 2011, Rep. George Miller (D-CA) along with 29 co-sponsors introduced Keeping All Students Safe Act, H.R. 1381, having similar language to the bill he introduced on December 9, 2009. On December 16, 2011, Sen. Tom Harkin (D-IA) introduced Keeping All Students Safe Act, S. 2020, having similar language to the bill introduced by former Sen. Chris Dodd (D-CT) on December 9, 2009. The Senate HELP committee will hold a hearing on the bill in early May 2012.

Many of the provisions in both the House and Senate bills are similar:

1. Directed the Secretary of Education to establish minimum standards that:
    1) Prohibited elementary and secondary school personnel from managing any student by using any mechanical or chemical restraint, physical restraint or escort that restricts breathing or aversive behavioral intervention that compromises student health and safety.
    2) Prohibited such personnel from using physical restraint or seclusion, unless such measures are required to eliminate an imminent danger of physical injury to the student or others and are accompanied by certain precautions.
    3) Required states and local educational agencies (LEAs) to ensure that a sufficient number of school personnel receive state-approved training and certification in first aid and certain safe and effective student management techniques.
    4) Prohibit physical restraint or seclusion from being written into a student's education plan, individual safety plan, behavioral plan, or individual education program as planned intervention.
2. Required schools to establish procedures to quickly notify parents if physical restraint or seclusion is imposed on their child. (Note: The Senate bill also required procedures to quickly notify the state Protection and Advocacy System if the child is seriously injured or dies from such measures and a formal debriefing session with all school personnel involved within 72 hours).
3. Authorized the Secretary to award grants and, through them, competitive subgrants to LEAs to (1) establish, implement, and enforce policies and procedures to meet such standards, and (2) implement school-wide positive behavior supports. (Note: The Senate bill would have allowed such grants to be used to improve LEA capacity to collect and analyze data related to physical restraint and seclusion.)
4. Directed the Secretary to conduct a national assessment of the Act's effectiveness.
5. Directed the Secretary of Health and Human Services to establish standards for Head Start agencies that are consistent with the minimum standards for the management of elementary and secondary school students.
6. Authorized the Secretary to allocate funds to the Secretary of Health and Human Services to assist Head Start agencies in establishing, implementing, and enforcing policies and procedures to meet such standards.
7. Directed states to collect data and publicly report, leaving to states the authority to determine responsibilities, if any, for LEAs.

Issues regarding the use of restraints and seclusion are expected to be addressed in IDEA reauthorization.

EEOC Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended

The ADA Amendments Act (ADAAA) of 2008 was signed into law on September 25, 2008 and became effective on January 1, 2009. The legislation was introduced to respond to several Supreme Court decisions in the employment context that effectively narrowed the ADA's definition of disability. Many legislators and advocates in the disability community believed that the court decisions were inconsistent with the intent of the law, and believed that a more expanded definition of a disability would be appropriate. NSBA fully supported the goals and objectives of the law but voiced concerns that the broader definition and expansion of coverage could create operational problems for local school districts and lead to increased and costly litigation.

The ADAAA made changes to definitions of disability in Section 504 of the Rehabilitation Act of 1993. However, the changes to Section 504 may result in more students being covered under this statute who are not eligible for services under IDEA. For example, while a student must have a physical or mental impairment that substantially limits a major life activity in order to be covered by Section 504, those terms must be construed broadly rather than narrowly resulting potentially in a significant increase of those students eligible. The standard for what it means to be substantially limited has been reduced, and the effects of mitigating measures may not be considered in determining if a student is a student with a disability under Section 504. In April of 2009 the U.S. Department's Office for Civil Rights (OCR) revised its *Frequently Asked Questions About Section 504* and the *Education of Children with Disabilities* to include changes made by the ADAAA, see http://www2.ed.gov/about/offices/list/ocr/504faq.html. To date, OCR has not amended its Section 504 regulations.

On September 23, 2009, EEOC published proposed regulations and requested public comments by November 23, 2009. Pending release of final rulemaking, EEOC Commissioner Lipnic initiated discussions with NSBA regarding the operational impact of proposed regulations. NSBA also was able to discuss its position regarding the proposed regulations with Commissioner Feldblum, the EEOC's other new Commissioner. Local school board members, administrators, and superintendents have provided additional information regarding the current operational impact of the new federal law.

Local school boards have already expressed concerns over the increased numbers of students now eligible under Section 504, and areas of potential conflict between IDEA and ADA. This increased attention may also result in legislative remedies prior to the IDEA reauthorization.

NSBA STRATEGY

NSBA will continue to be strategic in its approach while maintaining its strong emphasis on improved education outcomes for students with disabilities. Therefore, in preparation for the next IDEA Reauthorization, NSBA will:

- Continue to support legislative language that recognizes the authority of local school boards and oppose unnecessary, burdensome, and costly reporting and data collection requirements related to IDEA reauthorization or other related bills.
- Engage our state school boards associations in providing opportunities for local school boards to identify issues of concern and to offer recommendations for modifications to the current law.
- Reactivate the IDEA listserv to fully engage interested school attorneys in identifying potential issues, recommending modifications to the current law in response to Circuit Court decisions, and developing proposed legislative language.
- Continue its participation in national coalitions to address issues of mutual interest such as the National Universal Design for Learning (UDL) Task Force, the National Coalition on Personnel Shortages in Special Education and Related Services, and other education and disability associations.

- Conduct focus groups and surveys to identify other issues of concern related to school district and school-level operations.
- Continue its collaboration with other major stakeholders concerned with ensuring valid and reliable assessments for students with disabilities.
- Continue to lobby members of Congress and the Administration in addressing the priority concerns of local school board members across the nation.

In preparing for the next reauthorization, NSBA encourages local school board members to review the key issues addressed during the 2004 Reauthorization, under Part II of this paper.

PART II—IDEA Reauthorization in 2004: Expanded Authority to Local School Boards

The 2004 reauthorization resulted in a complex law that included many new provisions. The good news is that many of the changes contained in the 2004 reauthorization were changes formally recommended by school boards, local school officials, teachers, and parents. School boards and school administrators now have far greater authority and flexibility in the delivery of educational programs for all students. More importantly, these legislative changes result in improved education outcomes for students with disabilities and a much less adversarial relationship between parents and school officials.

Additionally, the 2004 reauthorization addressed the procedural rights of children with disabilities while at the same time removed unnecessary bureaucracy, paperwork, legal process, and expense from the program. These improvements have tended to reduce many of the adversarial relationships that had previously existed between families and school officials. More importantly, the 2004 reauthorization shifted program emphasis from one of compliance to one of improving education outcomes and accountability for all students.

Due process

Prior to 2004, if parents of students with disabilities did not agree with the way issues relating to their children were resolved, lengthy, expensive litigation would often result. Outcomes of the litigation were often determined on procedural grounds and various legal standards were often applied. The 2004 reauthorization has not eliminated the possibility of litigation; rather, it made the litigation process less cumbersome and less expensive by encouraging out-of-court mediation, clarifying the authority and requirements of hearing officers, and lessening procedural requirements for school districts.

Mediation

More specifically, mediation is encouraged in a number of ways. Parents and the district must meet within 15 days before a due process hearing to resolve complaints. Parties must be offered the option to meet with a disinterested party to encourage the use of mediation and explain the benefits of the mediation process. Mediation conducted by a qualified and impartial mediator is paid for by the state and must be offered if parties are interested. Attorneys for the local school district may not be present during the mediation or optional sessions before the hearing unless an attorney accompanies the parent. Any discussions occurring during the mediation process must be considered confidential and cannot be used as evidence in any subsequent due process hearing or civil proceeding.

Hearing Officers Qualifications and Decisions

The decisions of hearing officers are less arbitrary as a result of a number of changes. First, hearing officers qualifications are revised to ensure they possess content knowledge, and are able to conduct a hearing. Second, decisions by hearing officials based only on procedural errors are eliminated, unless the procedural errors adversely affect the implementation of the individualized education program (IEP). Third, decisions on whether to have a hearing must be made on the basis of whether the school district has provided a free, appropriate public education. Finally, the hearing officer is restricted from serving if he or she is an employee

of the state education agency or local school district or has any personal or professional interests that conflict with his or her objectivity.

Other Improvements

A number of additional changes make the process of resolving complaints faster and less labor intensive for school districts:

- Complainants (parents) must give notice to the district of all issues before the hearing or the complainant risks not having the issue addressed during the hearing.
- There is a statute of limitations of two years regarding complaints.
- Only one copy of the procedural rights needs to be provided annually to parents, except upon: (1) initial referral or parental request for evaluation, (2) the first occurrence of the filing of a complaint; and (3) request of the parent.

Attorney fees

New provisions under the 2004 reauthorization regarding attorneys' fees were intended to discourage litigation with no merit. New provisions also limit the amount of attorneys' fees parents can recover from school districts. Specifically, the 2004 reauthorization permits school districts to collect attorney fees from parents who file frivolous, unreasonable complaints or lawsuits with no foundation. It also permits a reduction in the attorneys' fees if a parent attorney unnecessarily delays a lawsuit. Fees paid must be based on rates prevailing in the community, and no bonus or multiplier may be used in calculating the fees. Finally, school districts are prohibited from reimbursing fees under some limited circumstances after there is a written offer of settlement.

Pilot Demonstration Program

A number of changes under the 2004 reauthorization were made regarding the development and administration of Individual Education Plans (IEPs)—which are the individual "*blueprint*" for educating students with disabilities—to make the process more flexible and less bureaucratic. For example, the 2004 reauthorization called for a pilot demonstration program to identify ways to reduce paperwork burdens and other administrative duties, including the option to develop multi-year IEPs for up to three years. As part of the pilot program, if approved by the secretary of education, the state may waive statutory and regulatory requirements up to four years—but cannot waive civil rights requirements.

IEP Team Members and Meetings

In terms of the IEP process, new flexibility in the current law includes the following: Any member may be excused from attending the IEP team meeting if agreed to by both parent and local school district official. Team members may submit written information without being present if the parent and district official agree. In making changes to the IEP after the annual IEP meeting for the school year, the parent and school district official may agree not to convene an IEP meeting and instead may develop a written document to amend or modify the IEP. Any changes to the IEP may be made either by the entire team or by amending the IEP rather than redrafting the entire plan. Finally, parents and school officials may agree to use alternative means of participating in IEP meetings, such as video conferencing and conference calls.

Discipline

Disciplining students with disabilities remains a source of confusion and conflict among many school administrators, school boards, and parents. The following new and revised provisions under the 2004 reauthorization were intended to make disciplining students with disabilities much less complicated or burdensome.

- Although the requirement for manifestation determinations (whether the behavior justifying the discipline is a manifestation of the disability) remained in the new law, local school districts have the

authority on a case-by-case basis to determine if the student should be removed from the classroom and placed in an alternative setting, pending such determinations.

- School personnel may remove a child with a disability who violates a code of student conduct from his or her current placement for up to ten days without a hearing.
- School personnel may remove a child with a disability for not more than 45 school days to an interim alternative educational setting without regard to a manifestation of the disability if the child has inflicted serious bodily injury to another person, and if the child has a weapon or uses or sells illegal drugs.
- When an appeal has been requested by the parent or school district, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer unless the parent and the state or local school district agree that the child should be moved. This is a significant change from previous law where the "*stay-put*" provision prohibited removing the student until a manifestation determination was made.
- During the appeal process, the student may remain in the alternative placement pending an expedited hearing. The burden of proof no longer rests solely with the school district.
- Education services must continue to be provided to students with disabilities even if they are removed from the classroom or the school.

Teacher Quality

The 2004 reauthorization included changes related to teacher qualifications that reflected changes to teacher quality requirements in the *No Child Left Behind Act*. The specific requirements, as discussed below, depend on whether a teacher is solely instructing students with disabilities and whether the teacher is new to the profession or is a veteran teacher.

Exclusive Teachers of Students with Disabilities

The qualifications of special education teachers who exclusively teach children with disabilities shall be based on assessments tied to the alternate achievement standards of the students, rather than the requirements of the *No Child Left Behind Act*. In these circumstances, the teacher may meet the requirements through the elementary, middle, or secondary teacher certification requirements or demonstrate subject matter knowledge appropriate to the level of instruction being provided as determined by the state.

Veteran Special Education Teachers

The qualifications of veteran special education teachers who teach two or more core academic subjects exclusively to children with disabilities must be based on demonstrated competence in all core academic subjects in the same manner as required for other teachers. This determination may be based on a single, high objective uniform state standard of evaluation (HOUSSE) covering multiple subjects. New special education teachers who teach multiple subjects must meet the highly qualified requirements under NCLB in mathematics, language arts, or science—which may also include HOUSSE—within two years after employment.

Funding—Appropriations

Although Congress has promised to pay 40 percent of the average per pupil expenditure for each student with a disability, appropriations by Congress continue to short-change local school districts—even with the unprecedented increase of $11.3 billion as a result of the *American Recovery and Reinvestment Act* that was signed into law on February 17, 2009. While several key education organizations, including NSBA, sought a mandatory funding requirement under the 2004 reauthorization, final language did not include mandatory funding for IDEA.

The 2004 reauthorization, however, only provided for increases in authorizations by approximately $2.3 billion each year—which would achieve the congressional promise by 2011, had the appropriations kept pace with the new authorization levels. It is important to note that given the increases in appropriations since the

2004 reauthorization and the significant allocation of $11.3 billion with the economic stimulus package, federal funding is about $1 billion below the authorized levels for FY 2010.

Fiscal Year	Authorization	Appropriation	ARRA	Federal Commitment
2005	$12.4B	$10.6B		18.5%
2006	$14.6B	$10.6B		17.7%
2007	$16.9B	$10.8B		17.1%
2008	$19.2B	$10.9B		17.2%
2009	$21.5B	$11.5B	$11.3B*	25.1%**
2010	$23.8B	$11.5B		25.1%**
2011	$23.8B	$11.5B***		17.2%
2012	****	$11.5B***		17.0%

* The investments in education programs provided through the *American Recovery & Reinvestment Act* (ARRA) represent a two-year funding increase available for use during the 2009-2010 and 2010-2011 school terms.
** This assumes the $11.3B in ARA funds were allocated 50 percent in FY 2009 and FY2010.
***Appropriations included in FY2012 appropriations (Dec. 2011)
**** Pending reauthorization.

With any projected increases for IDEA in the FY 2010 Appropriations process, the federal funding level would be commensurate to the authorized level of $23.8 billion for FY 2010, or exceed this amount. However, the need to continue this level of federal funding after the stimulus program ends is enormous.

Risk pools

One of the most difficult issues for school districts—particularly small, rural districts—is paying for the expenses of even one student with a disability who needs particularly costly services. The 2004 reauthorization allows states to establish risk pools to assist local school districts in serving high-need children with disabilities.

Each fiscal year, states can reserve for this purpose up to 10 percent of their funds for state-level activities. These funds must be used by the local school districts—not the state—although a portion of funding for each fiscal year may be used to support innovative and effective ways of cost sharing among local school districts. The funds may be used to implement a placement-neutral cost sharing and reimbursement program of high-need, low incidence, catastrophic, or extraordinary aid. The risk-sharing pools may not be used to pay costs that otherwise would be reimbursed as medical assistance for a child with a disability under the state Medicaid program. Additionally, the funds may not be used to support legal fees or court costs.

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