



# 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) through 2011. NSBA lobbied effectively for significant changes that shifted program emphasis from one of compliance to improving education outcomes and accountability for all students. 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.

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

It is not too early to begin to identify issues that need to be addressed in the next reauthorization of IDEA. Although the current law is scheduled to expire in 2011, reauthorization could be delayed until 2012 or later. Before addressing IDEA, Congress is expected to complete the reauthorization of the *Elementary and Secondary Education Act* (ESEA) which is not expected to be reauthorized before 2010—and possibly not until 2011 which would delay IDEA reauthorization until 2012 or later.

In preparing for the next reauthorization, it is important to be aware of the conditions and environment during the 2004 reauthorization process. At that time, NSBA had secured great bipartisan support on Capitol Hill that provided outstanding leadership in negotiating final language of the bill.

Although NSBA had strong bipartisan congressional support, it is important to be aware that many in the disability community who lacked trust in the school system felt that the disability community suffered a great loss in terms of protections. Many viewed changes to the procedural process as eliminating protections for students and their families. As a result, those individuals and interest groups continued to monitor actions by school officials. Additionally, we expect that some groups will attempt to regain many of the compliance requirements that were terminated.

### **Inappropriate Use of Restraints and Seclusion**

Issues regarding the use of restraints and seclusion are expected to be addressed in IDEA reauthorization. In fact, given the attention focused to date, federal legislation on this issue may be enacted prior to IDEA reauthorization.

Early in 2009, the White House and Capitol Hill began hosting meetings to discuss the use of restraints and seclusion in schools as an appropriate approach with children with behavioral disorders. Much of the activities have focused attention on a report released by the National Disability Rights Network, “School is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools.” This report seeks raise the level of attention by local, state, and federal officials.

A central theme being expressed by many in the disability community is that federal legislation is needed, including full prohibition. A central theme being expressed by NSBA—and concurred in by many from the general education community—is that federal prohibition against the *all* use of restraints and seclusion would not provide sufficient flexibility to address the wide range of unique circumstances, including safety for students and school personnel. Rather, NSBA believes that the focus should be on preventing the *inappropriate use* of restraints and seclusion for *all* students.

Additional concerns being raised by both the education and disabilities communities include the need for increased resources from both the state and federal levels. Fortunately, subsequent discussions continue to affirm the need to expand the scope of the legislation to all students enrolled in elementary and secondary schools.

The U.S. Education Department has acknowledged that while federal guidelines and standards currently exist regarding adults and children in other environments, such guidelines do not extend to students attending public and non-public schools. Department officials have also acknowledged that training in de-escalation and on how to build more collaborative efforts is also needed.

The White House Domestic Policy Council is committed to addressing the harmful impact of restraints and seclusion. Legislation, the *Preventing Harmful Restraint and Seclusion in School Act* (H.R. 4247), was introduced on December 9, 2009 in the House by Representative George Miller (D-CA-7), Chairman, House Committee on Education and Labor, with bipartisan co-sponsorship from 35 members of Congress. Senate legislation, the *Preventing Harmful Restraint and Seclusion in Schools Act* (S. 2860), was also introduced on December 9, 2009 by Senator Christopher Dodd (D-CT).

On February 4, 2010, the House Education and Labor Committee held the full Committee mark-up. Chairman Miller (D-CA-7) offered an amendment in the form of a substitute bill. The Committee reported the bill as amended to the full House by vote of 34-10, which included bi-partisan support.

The substitute bill offers the following changes:

- 1) Clarifies the applicability to private schools to only those schools that receive or serve students who receive support in any form from a program supported in whole or in part, with funds appropriated to the Department of Education.
- 2) Clarifies that handcuffs may be used by school resource officers in the case when a student's behavior poses an imminent danger or physical injury to the student, school personnel or others; or lawful exercise of law enforcement duties; and where less restrictive interventions would be ineffective.

Although some interest groups lobbied for the authority to include the use of restraints and seclusion in individual education program plans (IEPs), the bill reported out of the House Committee does not provide such authorization.

In terms of implementation:

- 1) The Secretary would have 180 days from the date of enactment of the law to issue regulations.
- 2) State Educational Agencies (SEAs) would have two years after the Secretary promulgates regulations (and each year thereafter) to submit state plans addressing the new requirements.
- 3) State Educational Agencies (SEAs) would have two years after the Secretary promulgates regulations (and each year thereafter) to submit and make public reports with respect to each local educational agency (LEA) the number of incidents in which physical restraints or seclusion were imposed, and whether such restraints were imposed by certified school personnel.

- 4) No specific funding has been identified.

Both the House and Senate bills are essentially the same:

- Directs the Secretary of Education to establish minimum standards that:
  - 1) Prohibit 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) Prohibit 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) Require 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;
- Requires schools to establish procedures to quickly notify parents if physical restraint or seclusion is imposed on their child. (Note: The Senate bill also requires 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).
- Authorizes 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 allow such grants to be used to improve LEA capacity to collect and analyze data related to physical restraint and seclusion.
- Directs the Secretary to conduct a national assessment of the Act's effectiveness.
- Directs 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.
- Authorizes 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.
- Data Collection and Reporting Requirements are levied on state educational agencies that will determine responsibilities, if any, for LEAs.

### **Proposed Expanded Data Collection**

On September 11, 2009, The U. S. Department of Education published in the Federal Register its request for proposed changes for the annual mandatory collection of data for elementary and secondary data for EdFacts. There are a number of changes to this data collection. For example, the data collection includes collecting data on disciplinary actions against students without disabilities and on restraints and seclusion. More importantly, the proposed request includes definitions that are not totally consistent with definitions in sections 595(d) of the Public Health Service Act (42 U.S.C. 290jj(d)).

NSBA believes that data collection processes should not drive the policy. If local school districts had to operate with these overbroad definitions there could be significant misrepresentation leading to unintended consequences and increased litigation.

### **Recent Court Decisions and Program Implementation**

While litigation has reduced, there have been many key cases that have resulted in conflicting decisions by the Circuit Courts. These decisions have had significant impact on program operations in those affected states. Therefore, it is necessary that the reauthorization of IDEA also address the following:

- Parental Revocation of Consent for Special Education Services
- Representation by Non-Attorneys
- Allocation and Use of Funds;
- Due Process
- Individual Education Programs (IEP)
- Discipline
- Teacher Quality

## **NSBA STRATEGY**

NSBA will continue to be strategic in its approach while maintaining our 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 to provide opportunities for local school boards to identify issues of concern as well as to offer recommendations for modifications to the current law.
- Reactivate the IDEA e-mail 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 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 & 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 (1) upon initial referral or parental request for evaluation; (2) upon the first occurrence of the filing of a complaint; and (3) upon 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 & 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 10 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, as well as 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:

<u>Fiscal Year</u>	<u>Authorization</u>	<u>Appropriation</u>	<u>ARRA</u>	<u>Federal Commitment</u>
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*	31%*
2010	\$23.8B			

\* The investments in education programs provided through the *American Recovery & Reinvestment Act* (ARRA) represent a two-year funding increase available for use during the 2009-10 and 2010-2011 school terms.

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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