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 2015 or later. Before addressing IDEA, Congress is expected to reauthorize the Elementary and Secondary Education Act (ESEA) which we hope will be completed in 2015. However, if there are delays, IDEA could be delayed 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 in 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 lack trust in the school district’s due process system, initially felt that the students with disabilities act suffered a loss in terms of protections. As a result, many 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. This process proved very beneficial in preparation for the last IDEA reauthorization and has been reinstated.

The working group submitted its draft report in January 2013 which supports the development of NSBA positions. Additionally, we are continuing extensive outreach to include focus groups, surveys,
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 federal funds
- Due process
- Individual education programs (IEP)
- Discipline
- Teacher quality/effectiveness

INAPPROPRIATE USE OF RESTRAINTS AND SECLUSION

Another related issue that has gained White House and Congressional attention is the inappropriate use of restraints and seclusion which 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 IDEA and to those with no coverage. 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.

Background

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

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NSBA Office of Advocacy
August 13, 2014
Workforce, Rep. 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 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 Sen. Chris 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, Sen. Dodd, now retired, was able to secure the support of Sen. 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 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 112th Congress, these same bills were reintroduced: On April 6, 2011, Rep. Miller 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. Harkin introduced *Keeping All Students Safe Act*, S. 2020, having similar language to the bill introduced by retired Sen. Dodd on December 9, 2009. The Senate HELP committee initially scheduled a hearing for July 12, 2012 with NSBA issuing a Statement for the Record. However, the hearing was cancelled. No additional legislative action took place during the 112th Congress.

Also in 2012, the US Department of Education released its paper, *Restraint and Seclusion* Resource Document that offers the Administration’s philosophy and guidance regarding the use of restraint and seclusion. While the document carries no legislative or regulatory weight, over time, the document has been cited in Letters of Findings, thus misrepresenting the authority of the document and indirectly if not directly forcing compliance. Such tactics reflect, in our view, another example of federal overreach.

During the 113th Congress, Chairman Miller reintroduced the “*Keeping All Students Safe Act*”, H.R. 1893, on May 8, 2013. Subsequently, Senate HELP Committee Chairman, Tom Harkin introduced the “*Keeping All Students Safe Act*”, S 2016.

**Key Provisions**

Key provisions in both House and Senate bills addressing the inappropriate use of restraints and seclusion include the following:

1) Directs the Secretary of Education to establish minimum standards that prohibits 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) Prohibits 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) Requires 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) Prohibits 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.

5) Requires schools to establish procedures to quickly notify parents if physical restraint or seclusion is imposed on their child.

6) Authorizes the Secretary to award grants and, through them, competitive subgrants to LEAs to establish, implement, and enforce policies and procedures to meet such standards, and implement school-wide positive behavior supports.

7) Directs the Secretary of Education to conduct a national assessment of the Act’s effectiveness.

8) 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.

9) 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.

10) Directs states to collect data and publicly report, leaving to states the authority to determine responsibilities, if any, for LEAs.

11) Prohibits incorporating the use of physical restraints as a planned intervention into a student’s education plan, individual safety plan, plan developed pursuant to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), individualized education program or individualized family service plan (as defined in section 602 of the Individuals with Disabilities Education Act (20 U.S.C. 1401), or any other planning document for an individual student.

This prohibition has raised much discussion among major stakeholders. In some instances, groups opposing the prohibition believe that certain plans should be able to include the use of restraints where fully agreed by the plan team. Other groups in support of the prohibition believe that unless there is a specific prohibition, many states and school districts would place undue pressure on parents and simply continue business as usual. From a state and local school district perspective, the Senate bill, S 2016 offers some relief by offering an exception to this prohibition if State law allows for the use of physical restraint as part of such program or plan, as agreed upon by school personnel, the family of the student, and the individualized education program committee if such individuals meet certain requirements including: a) consideration of less restrictive means to address behavioral concerns; b) conducting research-based behavioral analysis, and c) implementing a corresponding positive intervention plan based on such analysis. These conditions are fairly extensive and require further debate.
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.
- Continue to engage the COSA IDEA Working Group 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 our participation in national coalitions to address issues of mutual interest such as the National Universal Design for Learning (UDL) Task Force, and other education and disability associations.
- Conduct focus groups and surveys to identify additional issues of concern related to school district and school-level operations.
- Continue our 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.

PART II—IDEA REAUTHORIZATION IN 2004: EXPANDED AUTHORITY TO LOCAL SCHOOL BOARDS
In preparing for the next reauthorization, NSBA encourages local school board members to review the key issues addressed during the 2004 reauthorization and applicable court decisions.

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.

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2010   $23.8B  $11.5B          25.1%**
2011   $23.8B  $11.5B          17.2%
2012   ****  $11.5B          17.0%
2013   ****  $10.9B           < 15.0%
2014   ***   $11.4B          15.2%

* 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)
**** Such sums as necessary.

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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