

# CRS Report for Congress

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## **The Individuals with Disabilities Education Act (IDEA): Comparison and Analysis of Selected Provisions in H.R. 1350 as Passed by the House and by the Senate, 108<sup>th</sup> Congress**

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(name redacted)  
Legislative Attorney  
American Law Division

(name redacted)  
Specialist in Social Legislation  
Domestic and Social Policy Division

# The Individuals with Disabilities Education Act (IDEA): Comparison and Analysis of Selected Provisions in H.R. 1350 as Passed by the House and by the Senate, 108<sup>th</sup> Congress

## Summary

The Individuals with Disabilities Education Act (IDEA) authorizes federal funding for the education of children with disabilities and requires, as a condition for the receipt of such funds, the provision of a free appropriate public education (FAPE). The statute also contains detailed due process provisions to ensure the provision of FAPE. Originally enacted in 1975, the act responded to increased awareness of the need to educate children with disabilities, and to judicial decisions requiring that states provide an education for children with disabilities if they provided an education for children without disabilities.

IDEA has been amended several times, most recently and most comprehensively by the 1997 IDEA reauthorization, P.L. 105-17. Congress is presently examining IDEA again and H.R. 1350, 108<sup>th</sup> Congress, passed the House on April 30, 2003, by a vote of 251 to 171. On May 13, 2004, the Senate incorporated S. 1248 in H.R. 1350 and passed H.R. 1350 in lieu of S. 1248 by a vote of 95 to 3. This report discusses selected changes that H.R. 1350 (House) and H.R. 1350 (Senate) would make in IDEA. The report will be updated if needed.

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# The Individuals with Disabilities Education Act (IDEA): Comparison and Analysis of Selected Provisions in H.R. 1350 as Passed by the House and by the Senate, 108<sup>th</sup> Congress

## Introduction

The Individuals with Disabilities Education Act (IDEA) is both a grants statute and a civil rights statute. It provides federal funding for the education of children with disabilities and requires, as a condition for the receipt of such funds, the provision of a free appropriate public education (FAPE). The statute also contains detailed due process provisions to ensure the provision of FAPE. Originally enacted in 1975, the act responded to increased awareness of the need to educate children with disabilities and to judicial decisions requiring that states provide an education for children with disabilities if they provided an education for children without disabilities.

IDEA has been amended several times, most recently and most comprehensively by the 1997 IDEA reauthorization, P.L. 105-17, the Individuals with Disabilities Education Act Amendments of 1997. Congress is currently considering the reauthorization of the IDEA, 20 U.S.C. §1400 *et seq.*<sup>1</sup> H.R. 1350, 108<sup>th</sup> Congress, passed the House on April 30, 2003. The Senate bill, S. 1248, 108<sup>th</sup> Congress, was reported out of the Health, Education, Labor and Pensions Committee on June 25, 2003 and placed on the Senate legislative calendar under general orders on November 3, 2003. On May 13, 2004, the Senate incorporated S. 1248 in H.R. 1350 and passed H.R. 1350 in lieu of S. 1248. **Table 1** below lists the amendments considered during Senate floor debate of S. 1248, the major sponsors of the amendments, and the results of the consideration of each amendment. This report discusses selected changes that H.R. 1350 (House) and H.R. 1350 (Senate) would make in IDEA. The report will be updated if needed.

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<sup>1</sup> For an overview of IDEA see CRS Report RL31259, *The Individuals with Disabilities Education Act: Statutory Provisions and Selected Issues*. Numerous other CRS reports are available on various aspects of IDEA.

**Table 1. Senate Floor Amendments**

Major Sponsors	Nature of the Amendment	Result
Sen. Harkin and Sen. Hagel	“Mandatory” funding of Part B grants-to-states program	Failed to reach three-fifths required majority, 56 to 41
Sen. Gregg	Authorization levels for Part B grants-to-states program	Accepted by a vote of 96 to 1
Sen. Clinton	Add U.S. Department of Education (ED) as key partner in the National Children’s Study	Accepted, voice vote
Sen. Murray and Sen. Dewine	Provisions to improve services for homeless children and others moving from LEA to LEA	Accepted, voice vote
Sen. Gregg	Attorneys’ fees	Accepted, voice vote
Sen. Santorum	Authorization of state waivers of certain IDEA requirements to reduce paperwork	Agreed to by unanimous consent
Sen. Gregg and Sen. Kennedy	“Technical” amendments	Agreed to by unanimous consent

## Definitions

Both H.R. 1350 (House) and H.R. 1350 (Senate) leave the definitions section of IDEA largely unchanged. However, several changes, including the following, would be made by the bills.

The House bill, but not the Senate bill, would amend the definition of a free appropriate public education (FAPE).<sup>2</sup> Current law defines FAPE as meaning “special education and related services that — (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under Sec. 614(d).”<sup>3</sup> An amendment adopted during debate on the House floor would add the following provision at the end of subsection C: “That is reasonably calculated to provide educational benefit to enable the child with a disability to access the general curriculum.” The intent of the amendment, as expressed during House floor debate,<sup>4</sup>

<sup>2</sup> H.R. 1350 (House), §602(8).

<sup>3</sup> Section 602(8), 20 U.S.C. §1401(8).

<sup>4</sup> 149 Cong. Rec. H3513 (April 30, 2003).

is to codify the interpretation of FAPE contained in the Supreme Court decision *Board of Education of the Hendrick Hudson Central School District v. Rowley*.<sup>5</sup>

Both the House and Senate bills would add language to the definition of a “child with a disability” with respect to a child ages three to nine years of age.<sup>6</sup> Current law permits a state or a local educational agency (LEA) to include a child in this age group in the definition if he or she is experiencing “development delays” and therefore needs special education and related services. Both bills would add the phrase “or any subset of that age range [i.e., ages 3 to 9], including ages 3 through 5.” This language apparently is not intended to alter who receives services to address development delay but to clarify that states have flexibility to serve subgroups within the general age range of 3 to 9.<sup>7</sup>

H.R. 1350 (Senate) adds a definition of a “core academic subject” by reference to the definition of that term in section 9101 of the Elementary and Secondary Education Act (ESEA).<sup>8</sup> The House bill does not contain a similar provision.

H.R. 1350 (Senate), but not H.R. 1350 (House), would amend the definition of assistive technology device. The Senate bill would exclude surgically implanted medical devices in the definition.<sup>9</sup> Similarly, the Senate bill, but not the House bill would exclude surgically implanted medical devices from the definition of related services.<sup>10</sup>

A definition of “highly qualified,” with respect to instructional staff, would be added by both House and Senate bills in order to help align IDEA with the requirements of the No Child Left Behind Act (NCLBA).<sup>11</sup> The House bill defines the term “highly qualified” with the same meaning as the term in section 9101 of the Elementary and Secondary Education Act (ESEA). H.R. 1350 (Senate) adds an extensive definition of “highly qualified” and “consultative services” to align IDEA with NCLBA requirements with respect to the qualification of educational personnel, while taking into account differences between special education and general education teachers. For example, if a special education teacher provides only “consultative services”<sup>12</sup> to a secondary school teacher teaching core academic subjects to children with disabilities, the special education teacher, to meet the

<sup>5</sup> 458 U.S. 176 (1982).

<sup>6</sup> H.R. 1350 (House), §602(3); H.R. 1350 (Senate) §602(3)

<sup>7</sup> See S. Rep. No. 185, 108<sup>th</sup> Congress, at 7 (November 3, 2003); H. Rep. No 77, 108<sup>th</sup> Congress, at 86 (April 29, 2003).

<sup>8</sup> H.R. 1350 (Senate) §602(4). The ESEA definition lists “English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography” as core academic subjects.

<sup>9</sup> H.R. 1350 (Senate), §602(1).

<sup>10</sup> H.R. 1350 (Senate), §602(25).

<sup>11</sup> H.R. 1350 (House), §602(9) H.R. 1350 (Senate), §602(10).

<sup>12</sup> These services would include, for example, adjustments to the learning environment, modifications to instructional methods, and adaptations of the curriculum.

definition of highly qualified, must meet the standards of the definition for all special education teachers (that is, be fully certified in the state as a special education teacher and demonstrate the knowledge and skills necessary to teach children with disabilities) but need not meet standards with respect to the academic subjects being taught (as the regular teacher must do to be highly qualified under NCLBA).<sup>13</sup>

Definitions of children with disabilities for the purpose of IDEA were discussed during the House debate on H.R. 1350. An amendment offered by Representative Shadegg and passed on the House floor provides in part that it is the sense of Congress that “students who have not been diagnosed by a physician or other person certified by a State health board as having a disability (as defined under the Individuals with Disabilities Education Act) should not be classified as children with disabilities for purposes of receiving services under that Act.” Also, H.R. 1350 (House) would require a GAO study reviewing variation among the states in definitions and evaluation processes relating to the provision of services under IDEA to children having conditions falling under the terms “emotional disturbance,” “other health impairments,” and “specific learning disability.”<sup>14</sup>

## Allocation Formula Provisions

### State and Substate Grants

Both H.R. 1350 (House) and H.R. 1350 (Senate) would make minimal changes in IDEA state and substate grant formulas, none of which would appear to change how IDEA funds are currently allocated.<sup>15</sup> The bills would simplify the language of the Part B grants-to-states formula, most notably by eliminating language on the “interim formula,” which had been in effect before the “permanent formula” became effective in FY2000. After that date, the interim formula would never become effective again. Both bills retain the permanent (i.e., current) formula language with the technical change that (funds permitting) states first are allocated the amount received for FY1999 and then remaining funds are allocated by the population-poverty formula.<sup>16</sup> FY1999 is the effective “base year” amount under current law; so this should not change IDEA allocations. Both bills specify authorization levels for the Part B grants-to-states program. H.R. 1350 (House) would authorize amounts that increase annually from FY2004 (\$11.1 billion authorized — a \$2.2 billion increase over the FY2003 appropriations) and FY2005 (\$13.6 billion authorized — a \$2.5 billion increase over the FY2004 authorization) to FY2010 (\$25.2 billion authorized). After FY2010, authorizations would return to “such sums” for FY2011 and subsequent fiscal years. H.R. 1350 (Senate) authorizes specific amounts for 7 fiscal years, from approximately \$12.4 billion for FY2005 to \$26.1 billion for

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<sup>13</sup> For further information on NCLB teacher requirements, see CRS Report RL30834, *K-12 Teacher Quality: Issues and Legislative Action*.

<sup>14</sup> This study was added by the Manager’s amendment on the House floor.

<sup>15</sup> H.R. 1350 (House), §611; H.R. 1350 (Senate), §611.

<sup>16</sup> For further information on IDEA grant formulas under current law, see CRS Report RL31480, *Individuals with Disabilities Education Act (IDEA): State Grant Formulas*.

FY2011,<sup>17</sup> with “such sums” authorized for FY2012 and subsequent years. Thus the permanent authorization of Part B grants to states is maintained in both bills.<sup>18</sup>

## Maximum State Grants

The bills differ substantially with respect to the provision for providing maximum state grants (or “full funding”) under the grants-to-states program. H.R. 1350 (House) would retain the current calculation of maximum grants except that it would limit the number of children with disabilities ages 3 to 17 that are to be counted for the purposes of determining maximum state grants to 13.5% of all children in that age group within a state.<sup>19</sup> The presumed impact of this change would be to discourage some states from “over-identifying” children with disabilities to increase their maximum grants.

H.R. 1350 (Senate) would substantially change the calculation of the “full funding” amount.<sup>20</sup> The bill would specify a calculation of the maximum amount available “for awarding grants under this section for any fiscal year.” This total would be calculated based on the total number of children with disabilities served for school year 2002-2003 times 40% of national average per pupil expenditure (APPE). The total amount for each successive year would be determined by increasing this amount by an annual factor derived 85% from overall growth in child population and 15% from overall growth in children living in poor families.<sup>21</sup> This amount would presumably be distributed to states, outlying areas,<sup>22</sup> and the Bureau of Indian Affairs according to current-law provisions. Thus H.R. 1350 (Senate) would eliminate the provision in current law determining a state’s maximum state grant at 40% of APPE

<sup>17</sup> \$26.1 billion appears to be the most recent CBO estimate of ‘full funding’ under current law for FY2011.

<sup>18</sup> Both bills also would maintain the permanent authorization of the preschool program authorized under section 619 of Part B (Section 619(j), 20 U.S.C. §1419).

<sup>19</sup> H.R. 1350 (House) §611(a)(3). Maximum state grants (the basis of “full funding” for IDEA) are calculated based on 40% of the national average per pupil expenditure (APPE) times the number of children with disabilities the state serves. For further information on IDEA grant formulas under current law, see CRS Report RL31480, *Individuals with Disabilities Education Act (IDEA): State Grant Formulas*.

<sup>20</sup> H.R. 1350 (Senate) §611(a)(2).

<sup>21</sup> These percentages parallel the weights given to and the age ranges for population and poverty in the grants-to-states formula. Age ranges for population and poverty vary according to the age ranges for children with disabilities in the various states.

<sup>22</sup> H.R. 1350 (Senate) would make a change in funding for the “freely associated states” of the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau. Under current law, these entities receive IDEA Part B funds through a competition funded as part of the set-aside for outlying areas and the freely associated states. Under H.R. 1350 (Senate), each of these entities would receive a grant equal to the amount received for FY2003 under Part B (H.R. 1350 (Senate) §611(b)(1)(B)). For FY2003, the total amount for these entities is about \$6.6 million. The Senate bill also adds a section (§610) stating that the freely associated states “shall continue to be eligible for competitive grants. . . .” H.R. 1350 (House) would eliminate payments to the freely associated states.



times an annually updated number of children with disabilities the state serves. This provision would have no impact on a state's allocation until the state became eligible for its maximum grant. The presumed eventual impact of this change would be to remove incentives for any state to "over-identify" children with disabilities to increase their maximum grants. It is important to note that such a limitation on child count for the purposes of determining maximum state grants has no impact on who must be served under Part B of IDEA.

## State Reserves

Both bills would make certain changes in provisions governing state reserves for administration and other state-level activities. Under current law, the maximum amounts states may reserve from their Part B grants for administration and for state-level activities are determined by increasing the prior-year reserve by the lesser of the rate of inflation or the percentage increase, if any, in state grants. Since appropriations for the Part B grants-to-states program have been growing at rates well above inflation, the state reserves have been increased from year to year by inflation. Of this amount, states may reserve for state administration 20% or a minimum of about \$500,000 (adjusted for inflation),<sup>23</sup> whichever is greater. Currently these provisions mean that states can retain for state purposes, on average, about 10% of their state grants and about 2% of state grants, on average, for administration. But these percentages vary somewhat from state to state, and, under current law, will almost certainly change (probably decreasing) in the future.<sup>24</sup>

Although H.R. 1350 (House) apparently retains current-law language related to state set-asides, it would add language (based on an accepted floor amendment offered by Representatives McKeon and Woolsey) that appears to override provisions on how much states can reserve for state-wide activities. Based on this language, for any fiscal year for which a state's Part B grant is equal to or greater than its FY2003 grant, H.R. 1350 (House) would set the maximum a state could retain for state-level activities at the amount it retained in FY2003.<sup>25</sup> In addition, H.R. 1350 (House) would increase the state minimum for administration to \$750,000; however, this minimum amount would not be inflation-adjusted as it is in current law.

H.R. 1350 (Senate) would permit states to reserve for state administration the maximum reserved for FY2003 or \$800,000, whichever amount is greater.<sup>26</sup> Apparently these amounts would be increased by inflation each year. With the exception of the increased minimum for administration, states' administrative reserves should be the same as those under current law. H.R. 1350 (Senate) would change the maximum amount states could reserve for other state activities and would

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<sup>23</sup> This minimum amount is currently about \$570,000.

<sup>24</sup> Current maximum state set-asides vary from 8.3% to 11.5% of state grants (based on data from the U.S. Department of Education (ED) Budget Service).

<sup>25</sup> H.R. 1350 (House) §611(f)(4). Apparently if a state's grant was less than its FY2003 amount, current language would apply; that is, its maximum reserve would be its prior-year reserve increased by inflation.

<sup>26</sup> H.R. 1350 (Senate) §611(e)(1).

enlarge the scope of those activities.<sup>27</sup> For FY2004 and FY2005, states could reserve up to 10% of their total grants after subtracting the amount reserved for state administration.<sup>28</sup> Beginning in FY2006, the maximum amount for other state activities would be adjusted by the rate of inflation. This approach would continue through FY2009. Under the Senate proposal, amounts for other state activities could be appreciably larger than under current law for fiscal years 2004 and 2005. For the next 4 fiscal years, the growth rate would be the same as the current-law growth rate if overall state grants grow at rates above inflation.<sup>29</sup> However, these growth rates would be applied to a higher base than under current law.

**Table 2** shows how the bills might impact state set-asides for a hypothetical state that received a FY2003 IDEA grant of \$50 million, growing at 15% annually in subsequent years. The total set-aside under current law would grow at the rate of inflation (2% per year in the example). The current-law administrative set-aside would be 20% of the state set-aside. The set-aside for other state-level activities would be the total set-aside minus the administrative set-aside. Based on the House provision discussed above, state set-asides under the House bill would remain at the FY2003 level. The administrative set-aside under the Senate bill would grow by the rate of inflation and be the same as the current-law amounts. The difference the Senate bill would make can be seen in comparing amounts for other state-level activities, which would grow significantly for FY2004 and FY2005.

**Table 2. Hypothetical Example of Maximum State Set-Asides Under Current Law and House and Senate Bills**

	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009
	(dollars are in \$000)						
Hypothetical state grant	\$50,000	\$57,500	\$66,125	\$76,044	\$87,450	\$100,568	\$115,653
Maximum state reserve for other state activities (current law)	\$4,000	\$4,080	\$4,162	\$4,245	\$4,330	\$4,416	\$4,505
Maximum state reserve other state activities (House bill)	\$4,000	\$4,000	\$4,000	\$4,000	\$4,000	\$4,000	\$4,000
Maximum state reserve other state activities (Senate bill)	\$4,000	\$5,648	\$6,508	\$6,639	\$6,771	\$6,907	\$7,045

<sup>27</sup> H.R. 1350 (Senate) §611(e)(2).

<sup>28</sup> States, for which the maximum reserve for state administration is \$800,000, would be permitted to reserve up to 12% of their total grant (after subtracting the amount for administration) for FY2004 and FY2005 for other state-level activities.

<sup>29</sup> If future growth rates in Part B grants to states are below inflation, growth in state set-asides under H.R. 1350 (Senate) would be greater than under current law, which pegs set-aside growth rate to the lesser of inflation or a state's overall grant growth rate.

	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009
	(dollars are in \$000)						
Maximum state reserve for admin. (current law)	\$1,000	\$1,020	\$1,040	\$1,061	\$1,082	\$1,104	\$1,126
Maximum state reserve for admin. (House bill)	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000
Maximum state reserve for admin. (Senate bill)	\$1,000	\$1,020	\$1,040	\$1,061	\$1,082	\$1,104	\$1,126
Hypothetical inflation rate	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%

## High Cost Children with Disabilities

Both bills make some provision for funding high-cost services for certain children with disabilities. This issue gained increased prominence when the Supreme Court decided the case *Cedar Rapids Community School District v. Garret F.*<sup>30</sup> Garret F. was a child paralyzed from the neck down as a result of a motorcycle accident but who retained his mental abilities. His family had arranged for his physical care during the day for a number of years but eventually they requested the school to accept financial responsibility for his health care services during the school day. The Supreme Court, interpreting the definition of related services, held that the extensive services required by Garret F. must be provided by the school as long as they were not medical services that must be provided by a physician.<sup>31</sup>

H.R. 1350 (House) would allow states to use up to 40% of the amount reserved for state-level activities for establishing and implementing “cost or risk sharing funds, consortia, or cooperatives to assist local educational agencies in providing high cost special education and related services.” This provision (together with the permitted use of local funds discussed below) addresses the issue of educating children with low incidence, high cost disabilities.<sup>32</sup>

Under H.R. 1350 (Senate), states would be required to use 2% of the state’s total grant (after reserving an amount for state administration) to assist LEAs to address the needs of “high-need” children with disabilities.<sup>33</sup> The Senate bill defines a high-need child as one for whom providing a free appropriate public education (FAPE)

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<sup>30</sup> 526 U.S. 66 (1999).

<sup>31</sup> For a more detailed discussion see CRS Report RS20104, *Cedar Rapids Community School District v. Garret F.: The Individuals with Disabilities Education Act and Related Services*.

<sup>32</sup> H.R. 1350 (House) §611(e)(3).

<sup>33</sup> H.R. 1350 (Senate) §611(e)(3).

costs more than 4 times the national average per pupil expenditure (APPE).<sup>34</sup> States would distribute funds to approved LEAs to pay 75% of the special education and related services costs that exceed 4 times APPE.

## Other State Activities

In addition to provisions dealing with “high cost” disabilities, both bills add certain required and permitted state activities. H.R. 1350 (House) would add several permitted uses of funds for state-level activities, including implementing voluntary binding arbitration and developing and maintaining a prereferral educational support system (discussed below).<sup>35</sup> Examples of permitted activities under H.R. 1350 (Senate) include assisting LEAs to provide positive behavioral interventions, to improve classroom use of technology, and to develop and implement transition services to postsecondary activities for students with disabilities.

## State and Local Eligibility

### In General

Section 612(a) of IDEA provides for state eligibility “if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:....” These conditions include the core requirements of IDEA for the provision of FAPE and an individualized education program (IEP).<sup>36</sup> Both bills would amend this language but in different ways. H.R. 1350 (Senate) would change the language of section 612(a) by striking “demonstrates to the satisfaction of” and inserting “submits a plan that provides assurances to.”<sup>37</sup> H.R. 1350 (House) would change the language of section 612(a) by striking “demonstrates to the satisfaction of” and inserting “reasonably demonstrates to.”<sup>38</sup> The Secretary of Education has interpreted current law to require the States to submit documents to support a procedural checklist. The changes in the bills were made to eliminate these administrative procedural requirements.<sup>39</sup>

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<sup>34</sup> The applicable APPE for school year 2002-2003 is about \$7,500.

<sup>35</sup> H.R. 1350 (House) would maintain the requirement under current law for states to use a portion of increases in state grants for additional local grants (often termed “sliver grants”) (sec. 611(f)(4), 20 U.S.C. 1411(f)(4)). Under current law, these grants are to be used for local improvement and capacity building. Under H.R. 1350 (House), the grants are for LEAs identified as needing improvement under ESEA. (See CRS Report RL31487: *Education for the Disadvantaged: Overview of ESEA Title I-A Amendments Under the No Child Left Behind Act* for a discussion of related ESEA requirements.) H.R. 1350 (Senate) would eliminate the “sliver grant” provision.

<sup>36</sup> Section 612(a), 20 U.S.C. §1412(a).

<sup>37</sup> H.R. 1350 (Senate), §612(a).

<sup>38</sup> H.R. 1350 (House), §612(a).

<sup>39</sup> See S. Rep. No. 185, 108<sup>th</sup> Congress, at 14 (November 3, 2003); H. Rep. No 77, 108<sup>th</sup> (continued...)

## Personnel Standards and Student Assessment

Both bills would modify some state eligibility requirements (in Section 612) to bring them in line with principles and requirements of the No Child Left Behind Act (NCLBA).<sup>40</sup> H.R. 1350 (House) would amend requirements for state personnel standards and performance goals and indicators to align them with NCLBA requirements. For example, states would have to “ensure that special education teachers who teach core academic subjects [e.g., mathematics and reading and language arts] are highly qualified in those subjects.”<sup>41</sup> H.R. 1350 (House) would remove requirements regarding a state comprehensive system of personnel development and regarding hiring and retraining personnel to meet highest state personnel standards.<sup>42</sup>

H.R. 1350 (Senate) would also amend requirements for state personnel standards and performance goals and indicators to align them with NCLBA requirements. For example, states would be required to “ensure that each special education teacher in the State who teaches in an elementary, middle, or secondary school is highly qualified not later than the 2006-2007 school year.”<sup>43</sup> (See above the proposed definition of “highly qualified.”) H.R. 1350 (Senate) would change the provision that states have a policy requiring LEAs to make “an ongoing good faith effort” in recruiting and hiring “appropriately and adequately trained personnel”<sup>44</sup> to requiring LEAs to “take measurable steps to recruit, hire, train, and retain highly qualified personnel.”<sup>45</sup> Like H.R. 1350 (House), H.R. 1350 (Senate) would remove requirements regarding a state comprehensive system of personnel development and regarding hiring and retraining personnel to meet highest state personnel standards.<sup>46</sup> H.R. 1350 (Senate) would require that providers of related services (such as, physical therapy and counseling services) meet standards that “are consistent with” state requirements “that apply to the professional discipline in which” related services are being provided.<sup>47</sup>

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<sup>39</sup> (...continued)

Congress, at 94 (April 29, 2003).

<sup>40</sup> For further information on NCLB, see CRS Report RL31284, *K-12 Education: Highlights of the No Child Left Behind Act of 2001 (P.L. 107-110)*.

<sup>41</sup> H.R. 1350 (House) §612(a)(14)(B). For further information on NCLB teacher requirements, see CRS Report RL30834, *K-12 Teacher Quality: Issues and Legislative Action*.

<sup>42</sup> 20 U.S.C. §1412(a)(14) and (15).

<sup>43</sup> H.R. 1350 (Senate) §612(a)(14)(C)(i).

<sup>44</sup> 20 U.S.C. §1412(a)(15)(C).

<sup>45</sup> H.R. 1350 (Senate) §612(a)(14)(D).

<sup>46</sup> 20 U.S.C. §1412(a)(14) and (15).

<sup>47</sup> H.R. 1350 (Senate) §612(a)(14)(B)(i). H.R. 1350 (Senate) would permit a parent to complain to the state educational agency (SEA) if he or she believed staff were not highly qualified as defined by the act but would not create “a right of action on behalf of an  
(continued...)”

Under both bills, required state performance goals for children with disabilities would have to be “the same as the State’s definition of adequate yearly progress . . . under section 1111(b)(2)(C) of the Elementary and Secondary Education Act of 1965,”<sup>48</sup> as amended by NCLBA.<sup>49</sup> Under both bills, children with disabilities would be required to participate in state and districtwide testing programs as under NCLBA. Both bills, depending on each child’s needs, would permit assessments to be taken with accommodations (e.g., alternative testing environments, such as a quieter location than the regular classroom). For some, presumably more severely disabled children, alternative assessments can be used. H.R. 1350 (Senate) would require such assessments to be aligned with the state’s “challenging academic content and academic achievement standards.”<sup>50</sup>

## Private Schools

The state eligibility sections of IDEA contain provisions relating to children with disabilities in private schools, including when these children are unilaterally placed in private schools by their parents and when they are placed in private schools by public agencies. Under current law, when children with disabilities are unilaterally placed in a private school by their parents, the states must spend a proportionate amount of IDEA funds on these children. Special education and related services may be provided on the premises of private schools, including parochial schools, and the requirements regarding child find are applicable to such children.<sup>51</sup>

The House and Senate bills would make changes in the current law regarding children enrolled in private schools by their parents. Currently, IDEA states that “to the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children....”<sup>52</sup> H.R. 1350 (Senate) would add the phrase “in the school district served by a local educational agency” after the phrase “secondary schools.” H.R. 1350 (House) would add the phrase “in the area served by such agency.” In addition, H.R. 1350 (Senate) would add a phrase

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<sup>47</sup> (...continued)

individual student” if a parent claimed that a staff person were not highly qualified. That is, the parent would have the right to complain to the SEA but would not have the right to seek remedies through the courts.

<sup>48</sup> H.R. 1350 (House) §612(a)(15)(A)(ii) and H.R. 1350 (Senate) §612(a)(15)(A)(ii). For further information on NCLB testing requirements, see CRS Report RL31407, *Educational Testing: Implementation of ESEA Title I-A Requirements Under the No Child Left Behind Act*; CRS Report RL31487, *Education for the Disadvantaged: Overview of ESEA Title I-A Amendments Under the No Child Left Behind Act*.

<sup>49</sup> H.R. 1350 (Senate) would require separate reporting on drop out rates and graduation rates for children with disabilities. NCLBA and H.R. 1350 (House) require that graduation rates be reported by subgroups of students, such as children with disabilities.

<sup>50</sup> H.R. 1350 (Senate) §612(a)(16)(C)(ii).

<sup>51</sup> Section 612(a)(10)(A), 20 U.S.C. §1412(a)(10)(A).

<sup>52</sup> Section 612(a)(10)(A)(i), 20 U.S.C. §1412(a)(10)(A)(i).

to the current law indicating that the funds expended for parentally placed private school children include direct services to these children and would require these services to be provided “to the extent practicable.” Both bills would add detailed provisions concerning child find (i.e, locating and determining the IDEA eligibility for children with disabilities) including a consultation process with the LEA and representatives of children with disabilities parentally placed in private schools, and a compliance procedure that would give a private school official the right “to complain” to the SEA that the LEA did not engage in meaningful and timely consultation or did not give due consideration to the views of the private school official. A private school official would also have a right “to complain” to the Secretary of Education.

Currently, IDEA provides that when children with disabilities are placed in or referred to private schools by public agencies, the costs are to be paid by the public agency.<sup>53</sup> And, under current law, a court or a hearing officer may require an educational agency to reimburse the parents for the cost of the enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to the enrollment.<sup>54</sup> Current law allows for limitations on reimbursement in certain situations, such as when notice that parents are required to provide is not provided or when there is a judicial determination of unreasonableness with respect to actions taken by the parents.<sup>55</sup> Current law also provides for exceptions to this notice requirement, where the cost of reimbursement may not be reduced or denied for failure to provide notice if (1) the parent is illiterate, (2) compliance would result in physical or serious emotional harm to the child, (3) the school prevented the parent from providing such notice, or (4) the parents had not received the notice that the educational agency was required to provide.<sup>56</sup>

The current law regarding children with disabilities who are placed in private schools by public agencies would remain unchanged in both bills. However, changes would be made to the current law regarding payment for the education of children who are enrolled in private schools without the consent of the public agency. These changes would involve the exceptions to the limitation on reimbursement. H.R. 1350 (Senate) would require that reimbursement shall not be reduced due to the parents’ failure to provide notice if the school personnel prevented the parent from providing such notice or the parents had not received notice of the notice requirement. In addition, H.R. 1350 (Senate) would provide that the cost of reimbursement may, in the discretion of a court or hearing officer, not be reduced or denied if the parent is illiterate and cannot write in English, or compliance with the notice requirement would likely have resulted in physical or serious emotional harm to the child. H.R. 1350 (House) would require that reimbursement shall not be reduced due to the parents’ failure to provide notice if the school personnel prevented the parent from providing such notice, the parents had not received notice of the notice requirement or compliance with the requirements would likely result in physical harm to the child.

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<sup>53</sup> Section 612(a)(10)(B), 20 U.S.C. §1412(a)(10)(B).

<sup>54</sup> Section 612(a)(10)(C), 20 U.S.C. §1412(a)(10)(C).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

The House bill would provide that the cost of reimbursement may, in the discretion of a court or hearing officer, not be reduced or denied if the parent is illiterate and cannot write in English, or compliance with the notice requirement would likely have resulted in serious emotional harm to the child.

## Local Eligibility

Both bills would make several changes to section 613 regarding local educational agency (LEA) eligibility. H.R. 1350 (House) would add a new section allowing funds provided to an LEA to be used “to establish and implement cost or risk sharing funds, consortiums, or cooperatives for the agency itself, or for local educational agencies working in consortium of which the local education agency is a part to pay for high cost special education and related services.”<sup>57</sup>

H.R. 1350 (House) would continue local financial requirements, such as requiring that Part B funds be used to supplement, not supplant (SNS) other special education funding, and that (with certain exceptions) LEAs cannot decrease spending for special education from one year to the next (the maintenance of effort (MOE) requirement). H.R. 1350 (House) would continue the exception that LEAs can count up to 20% of the increase in their IDEA grants from one year to the next as helping to meet SNS and MOE requirements, with the addition that these increased IDEA funds could then be used to provide additional funding for ESEA programs.<sup>58</sup> H.R. 1350 (House) would modify state oversight of this provision. Under current law, the SEA “may prohibit” an LEA from exercising this provision if it “determines that a local educational agency is not meeting the requirements of this part.” H.R. 1350 (House) would **require** the SEA (if authorized by state law) to prohibit a LEA from exercising this provision if it “determines that a local educational agency is unable to establish and maintain programs of free appropriate public education. . . .”<sup>59</sup>

H.R. 1350 (Senate) would significantly change this exception by permitting LEAs to “treat as local funds” for the purpose of meeting SNS and MOE requirements up to 8% of their total Part B grants. Once a state received its maximum grant (discussed above), LEAs in that state could treat up to 40% of their grants as local funds.<sup>60</sup>

Under current law, the “treat as local” exception to SNS and MOE is available only to LEAs, not to states. H.R. 1350 (Senate) would provide similar exceptions for states that fund at least 80% of the non-federal cost of educating children with disabilities and for states that are “the sole provider of free appropriate public education or direct service” for children with disabilities. Such states may treat

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<sup>57</sup> H.R. 1350 (House) §613(a)(4)(C). H.R. 1350 (Senate) would require states to establish “risk pools” for this purpose. See above.

<sup>58</sup> H.R. 1350 (House) §613(a)(2)(C)(ii).

<sup>59</sup> H.R. 1350 (House) §613(a)(2)(C)(iii).

<sup>60</sup> H.R. 1350 (Senate) §613(a)(2)(C). As in current law, this option is not available to an LEA that the state determines “is unable to establish and maintain programs of free appropriate public education that meet the requirements of this subsection.”



IDEA funds “as general funds available” for supporting “educational purposes.”<sup>61</sup> In the case of states, it would be the Secretary of Education who would prohibit states from exercising these exceptions based on the inability to provide adequate free appropriate public education.

Both bills would add several permitted uses of funds provided to an LEA. For example, H.R. 1350 (House) would allow these funds to be used for “reasonable additional expenses...of any necessary accommodations to allow children with disabilities who are being educated in a school identified for school improvement ...to be provided supplemental educational services....” This section would help to align IDEA to the requirements of the No Child Left Behind Act (NCLBA).<sup>62</sup> Both bills would permit purchasing technology to maintain case management systems.

Both bills would permit LEAs to use up to 15% of their Part B grant for prereferral or early intervention services.<sup>63</sup> These services could be provided to students (from kindergarten to 12<sup>th</sup> grade but emphasizing those in kindergarten to 3<sup>rd</sup> grade) who have not been identified as requiring special education or related services “but who need additional academic and behavioral support to succeed in a general education environment.”<sup>64</sup> Activities that an LEA could undertake include provision of educational and behavioral services and support (“including scientifically based literacy instruction”) and professional development for teachers to provide such services. Both bills note that “nothing in this subsection shall be construed to either limit or create a right to a free appropriate public education under this part.”<sup>65</sup>

## **Evaluations and Individualized Education Programs (IEPs)**

Current law requires informed parental consent prior to the evaluation to determine whether a child qualifies under IDEA. It also provides some leeway to an LEA if a parent does not consent, but it is deemed necessary to evaluate the child. Both bills would expand the LEA’s flexibility, if the parent does not provide consent or the parent does not respond to a request from the LEA to provide consent. In those cases, both bills would permit the LEA to proceed with an initial evaluation. In addition, if the parent does not provide consent for IDEA services or fails to respond to the LEA’s request, both bills free the LEA from obligations under the act, although the bills’ language differ. In these circumstances, under H.R. 1350 (House),

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<sup>61</sup> H.R. 1350 (Senate) §613(j).

<sup>62</sup> H.R. 1350 (House) §613(a)(4)(E). H.R. 1350 (Senate) does not contain this permitted use. For further information on supplemental services under NCLBA, see CRS Report RL31329, *Supplemental Educational Services for Children from Low-Income Families Under ESEA Title I-A*.

<sup>63</sup> H.R. 1350 (House) §613(f) and H.R. 1350 (Senate) §613(f).

<sup>64</sup> H.R. 1350 (House) §613(f)(1) and H.R. 1350 (Senate) §613(f)(1).

<sup>65</sup> H.R. 1350 (House) §613(f)(3) and H.R. 1350 (Senate) §613(f)(3).

the LEA “shall not provide special education and related services.”<sup>66</sup> In addition, the LEA is not obligated to hold an IEP meeting or prepare an IEP. H.R. 1350 (House) stipulates that, the LEA “shall not be considered to be in violation of any requirement under this part (including the requirement to make available a free appropriate public education).”<sup>67</sup> Under H.R. 1350 (Senate), if the parent does not provide consent or does not respond, the LEA “shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide the special education and related services for which the local educational agency requested such informed consent.”<sup>68</sup>

Both bills would add a new provision regarding determining when a child has a specific learning disability and prohibiting the required use of a discrepancy between achievement and intellectual ability for this purpose.<sup>69</sup> Both bills note that the LEA, when determining whether a child has a specific learning disability, “shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, basic reading skill, reading comprehension, mathematic calculation, or mathematical reasoning.”<sup>70</sup>

Both bills would make changes to the requirements of an IEP that are, at least in part, intended to reduce paperwork requirements for teachers and schools.<sup>71</sup> In many cases, the proposed changes are the same or similar in both bills. For example, both bills would:

- discontinue a current-law requirement for the IEP to contain benchmarks and short term objectives;<sup>72</sup>

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<sup>66</sup> H.R. 1350 (House) §614(a)(1)(D)(ii)(II).

<sup>67</sup> H.R. 1350 (House) §614(a)(1)(D)(ii)(II)(aa).

<sup>68</sup> H.R. 1350 (Senate) §614(a)(1)(D)(iii).

<sup>69</sup> This provision presumably responds to criticism of the so-called “discrepancy model” for identifying children with learning disabilities. See, for example, Reid Lyon, et al. “Rethinking Learning Disabilities” in *Rethinking Special Education in a New Century*. Chester E. Finn, Jr., Andrew J. Rotherham, and Charles R. Hokanson, Jr. (eds.). Washington, D.C. Published by the Thomas B. Fordham Foundation and the Progressive Policy Institute, May 2001.

<sup>70</sup> H.R. 1350 (House) §614(b)(6); H.R. 1350 (Senate) §614(b)(6).

<sup>71</sup> For a discussion of IDEA and paperwork see CRS Report RS21226, *The Individuals with Disabilities Education Act: Paperwork in Special Education*. It should also be noted that one of the GAO studies which would be required by H.R. 1350 (House) provides for a review of federal and selected state and local requirements related to IDEA that “result in excessive paperwork.” There are also provisions in the amendments to section 616, discussed *infra*, which would authorize the Secretary of Education to grant waivers of paperwork requirements.

<sup>72</sup> 20 U.S.C. 1414(d)(1)(A)(ii). H.R. 1350 (Senate) appears to eliminate this provision entirely; H.R. 1350 (House) eliminates the requirement beginning in school year 2005-2006 (§614(d)(1)(A)(i)(I)(cc)).

- allow the parents of a child with a disability and the LEA to jointly excuse any member of the IEP team from attending all or part of an IEP team meeting;<sup>73</sup>
- allow the parents and LEA to agree not to reconvene the IEP team but instead develop a written document to amend or modify the child's current IEP;<sup>74</sup> and
- allow for the use of alternative means of meeting participation, such as video conferences and conference calls when agreed to by the parents of a child with a disability and the LEA.<sup>75</sup>

Although both bills would permit multi-year IEPs, H.R. 1350 (House) would permit “multi-year IEP, not to exceed three years, that is designed to cover the natural transition points for the child;”<sup>76</sup> whereas, H.R. 1350 (Senate) would permit three-year IEPs only for students with disabilities who have reached 18 years of age “designed to serve the child for the final three-year transition period.”<sup>77</sup>

## Procedural Safeguards

### Introduction

IDEA contains detailed procedural safeguards designed to ensure the provision of FAPE. Both the House and Senate bills would amend the procedural safeguards available under IDEA with the House bill making the more significant changes. The changes made by the Senate bill have been described as helping to “alleviate the stress in disagreements between schools and parents.”<sup>78</sup> The changes made by H.R. 1350 (House) have been described as helping to “reduce litigation and restore trust between parents and school systems.”<sup>79</sup>

### Statute of Limitations and Procedural Safeguards Notice

Both the House and Senate bills would add a statute of limitations to the right to present complaints. The House bill allows an opportunity to present complaints only for “a violation that occurred not more than one year before the complaint is filed”<sup>80</sup> while the Senate bill requires that the due process hearing be requested “within two years of the date the parent or public agency knew or should have known

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<sup>73</sup> H.R. 1350 (House) §614(d)(3)(D) and H.R. 1350 (Senate) §614(d)(1)(C).

<sup>74</sup> H.R. 1350 (House) §614(d)(3)(E) and H.R. 1350 (Senate) §614(d)(3)(D).

<sup>75</sup> H.R. 1350 (House) and H.R. 1350 (Senate) §614(f).

<sup>76</sup> H.R. 1350 (House) §614(d)(5).

<sup>77</sup> H.R. 1350 (Senate) §614(d)(5).

<sup>78</sup> 149 Cong. Rec. S7836 (daily ed. June 12, 2003)(remarks of Sen. Gregg).

<sup>79</sup> 149 Cong. Rec. E527 (March 20, 2003)(remarks of Rep. Castle).

<sup>80</sup> H.R. 1350 (House), §615(b)(6).

about the alleged action that forms the basis of the complaint.”<sup>81</sup> The Senate bill also provides for the use of a state time limitation “if the State has an explicit time limitation for requesting such a hearing under this part.”<sup>82</sup> In addition, the Senate bill would provide for exceptions to the statute of limitations. The statute of limitations does not apply if the parent was prevented from requesting the hearing due to (1) the failure of the local educational agency to provide prior written or procedural safeguards notices, (2) false representations that the local educational agency was attempting to resolve the problem forming the basis of the complaint, or (3) the local educational agency’s withholding of information from the parents. H.R. 1350 (Senate) also requires that a party filing a civil action “shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action, in such time as the State law allows.”<sup>83</sup>

IDEA currently requires that a copy of available procedural safeguards be given to the parents of a child with a disability at a minimum upon initial referral for evaluation, upon each notification of an individualized education program (IEP) meeting, upon reevaluation, and upon registration of a complaint.<sup>84</sup> The Senate report noted that “while the procedural safeguards notice is critical for notifying parents and children with disabilities of their rights under the law, parents, as well as district personnel, have often criticized the frequent distribution of this notice within a year.”<sup>85</sup>

These concerns have resulted in both the House and Senate bills amending the current requirements. The House bill would delete the current requirement for giving a copy of procedural safeguards to the parents of a child with a disability on each notification of an IEP meeting and upon reevaluation and registration of a complaint. Under H.R. 1350 (House), a copy of the procedural safeguards notice would be given “at a minimum — (A) upon initial referral or parental request for evaluation; (B) annually, at the beginning of the school year; and (C) upon written request by a parent.”<sup>86</sup> The Senate bill would require that a copy of the procedural safeguards available be given to the parents only one time a year except that a copy would also be given (1) upon initial referral or parental request for evaluation, (2) upon registration of a complaint under subsection (b)(6), and (3) upon request by a parent.

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<sup>81</sup> H.R. 1350 (Senate), §615(f)(3)(D).

<sup>82</sup> *Id.*

<sup>83</sup> H.R. 1350 (Senate), §615(i)(2)(B).

<sup>84</sup> Section 615(d), 20 U.S.C. §1415(d).

<sup>85</sup> S. Rep. No. 185, 108<sup>th</sup> Congress, at 36 (November 3, 2003).

<sup>86</sup> H.R. 1350 (House), §615(d)(1). The House and Senate bills contain some differences regarding the specific items to be included in the procedural safeguards notice. For example, the Senate bill, but not the House bill, requires the notice to include the time period in which to file civil actions while the House bill, but not the Senate bill, requires the notice to include a description of early dispute resolution and voluntary binding arbitration.

The content of the procedural safeguards notice would also change under H.R. 1350 (House). Current law requires a “full explanation” of the procedural safeguards while H.R. 1350 (House) states that “the procedural safeguards notice shall include a description of the procedural safeguards....”<sup>87</sup> The Senate bill would not change the current law requirement for a “full explanation.”

## **Voluntary Binding Arbitration**

H.R. 1350 (House) would add new provisions relating to voluntary binding arbitration. The Senate bill, like current law, does not include provisions for voluntary binding arbitration. The House bill would require that a state educational agency ensure that procedures are available to resolve disputes through voluntary binding arbitration, which is to be available when a hearing is requested. The voluntary binding arbitration is to be voluntarily and knowingly agreed to in writing by the parties and conducted by a qualified, impartial arbitrator. The LEA or SEA shall ensure that parents understand that the process is in lieu of a due process hearing and is final unless there is fraud by a party or the arbitrator or misconduct on the part of the arbitrator. The parties jointly agree to use an arbitrator from a list maintained by the state and the arbitration is to be conducted according to state law on arbitration or, if there is no applicable state law, consistent with the revised uniform arbitration act. The voluntary binding arbitration is to be scheduled in a timely manner and held in a location that is convenient to the parties to the dispute.

## **Due Process Hearings, Resolution Sessions and Preliminary Meetings**

Under current law, when a complaint is received from a parent of a child with a disability under IDEA with respect to the identification, evaluation, educational placement, provision of a free appropriate public education or placement in an alternative educational setting, the parents have an opportunity for an impartial due process hearing<sup>88</sup> with a right to appeal.<sup>89</sup> Any party to this hearing has the following rights:

- to be accompanied and advised by counsel and by individuals with special knowledge or training regarding children with disabilities,
- to present evidence and confront, cross-examine, and compel the attendance of witnesses,
- to receive a written or electronic version of the verbatim record of the hearing, and
- to receive the written or electronic findings of facts and decisions.<sup>90</sup>

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<sup>87</sup> H.R. 1350 (House), §615(d)(2).

<sup>88</sup> 20 U.S.C. §1415(f), P.L. 105-17 §615(f).

<sup>89</sup> 20 U.S.C. §1415(g), P.L. 105-17 §615(g).

<sup>90</sup> 20 U.S.C. §1415(h), P.L. 105-17 §615(h).

The decision made in the hearing is final, except that any party may appeal and has the right to bring a civil action in state or federal court.

Both House and Senate bills would make significant changes to IDEA due process procedures. First, a due process hearing may be requested by either the parents of a child with a disability or the LEA, and the House bill provides that the due process hearing is to be conducted by the SEA. Under current law the hearing is conducted by either the LEA or SEA depending upon state law. Second, both bills would add meetings prior to the opportunity for a due process hearing. H.R. 1350 (House) would add a new “resolution session” which the House report noted “is intended to improve the communication between parents and school officials, and to help foster greater efforts to resolve disputes in a timely manner so that the child’s interests are best served.”<sup>91</sup> The Senate bill would add a “preliminary meeting” as “a forum to resolve matters in a more informal way before moving to a more adversarial process.”<sup>92</sup>

The Senate and House provisions on the resolution session and the preliminary meeting are similar but not identical. Both bills would require that this meeting

- must occur within fifteen days of receiving notice of the parents’ complaint,
- allow the parents to discuss their complaint, and the specific issues that form the basis of the complaint, and
- provide the LEA with an opportunity to resolve the complaint.

However, unlike the House bill, the Senate bill would specifically require that the meeting include the IEP team, and a representative of the public agency who has decision making authority, and that the meeting cannot include an attorney for the LEA unless the parent is also accompanied by an attorney. Both the House and Senate bills provide that the parents and the LEA may agree in writing to waive the preliminary meeting and the Senate bill also allows the parents and the LEA to agree to use the mediation process. Both bills provide that if the LEA has not resolved the complaint to the satisfaction of the parents within a certain number of days the due process hearing may occur, with its applicable time lines. The Senate bill allows fifteen days after the receipt of the complaint, while the House bill allows for thirty days before the due process hearing. The Senate bill, but not the House bill, requires that if an agreement is reached at the preliminary meeting, the agreement shall be set forth in a written settlement agreement, signed by the parents and a representative of the public agency who has decision making authority, that is enforceable in court. The Senate bill would not allow attorneys’ fees for the preliminary meeting. H.R. 1350 (House) specifically states that the resolution session meeting is not a meeting convened as a result of an administrative hearing or judicial action or for purposes of section 615(h)(3). Section 615(h)(3) provides for procedural safeguards for hearings. Thus, procedural safeguards such as the right to be accompanied by counsel or other individuals, the right to present evidence, the right to cross-examine

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<sup>91</sup> H. Rep. No 77, 108<sup>th</sup> Congress, at 114 (April 29, 2003).

<sup>92</sup> S. Rep. No. 185, 108<sup>th</sup> Congress, at 38 (November 3, 2003)

witnesses, or the right to a written record would not be available with regard to the resolution session.

The House and Senate bills both include limitations on issues that are allowed to be raised in the due process hearing.<sup>93</sup> The House bill provides that “no party” shall be allowed to raise issues at the due process hearing that were not raised in the complaint, discussed in the resolution session, or properly disclosed pursuant to the subsection on disclosure of evaluations and recommendations. The Senate bill provides that “the party requesting the hearing shall not be allowed to raise the issues.” The Senate bill would bar issues that were not raised in the notice under §615(b)(7) which concerns the due process complaint notice. Both bills contain, in a separate subsection, a provision that allows a hearing officer to bar a party that failed to comply with the required disclosures of evaluations and recommendations from introducing the relevant evaluation or recommendation.<sup>94</sup> Both bills would allow for raising of issues or the disclosure of evaluations or recommendations if the other party agrees. The Senate bill, but not the House bill, contains a rule of construction providing that the sections shall not be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

The Senate bill also would require that the decision made by a hearing officer be made on substantive grounds “based on a determination of whether the child received a free appropriate public education.” However, if a matter alleges a procedural violation of IDEA, H.R. 1350 (Senate) would allow a hearing officer to find that a child did not receive FAPE under the following conditions. The procedural inadequacies must have:

- compromised the child’s right to an appropriate public education,
- seriously hampered the parents’ opportunity to participate in the process, or
- caused a deprivation of educational benefits.

In addition, the hearing officer would not be precluded from ordering a local educational agency to comply with the procedural requirements of the section.<sup>95</sup>

## **Attorneys’ Fees**

The House and Senate bills differ in their provisions on attorneys’ fees with the House bill allowing the Governor of a state to set the rates for the fees while the Senate bill would allow attorneys’ fees for a SEA or LEA, if they are prevailing and if the complaint is frivolous, unreasonable or without foundation. Under current law, at the court’s discretion, attorneys’ fees may be awarded as part of the costs to

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<sup>93</sup> H.R. 1350 (House), §615(f)(3)(B); H.R. 1350 (Senate), §615(f)(3)(B).

<sup>94</sup> H.R. 1350 (House), §615(f)(2); H.R. 1350 (Senate), §615(f)(2).

<sup>95</sup> S.1248, §615(f)(3)(F).

the parents of a child with a disability who is the prevailing party.<sup>96</sup> Attorneys' fees are based on the rates prevailing in the community, and no bonus or multiplier may be used. There are specific prohibitions on attorneys' fees and reductions in the amounts of fees. Fees may not be awarded for services performed subsequent to a written offer of settlement to a parent in certain circumstances including if the court finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement. Also, attorneys' fees are not to be awarded relating to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action or, at the state's discretion, for a mediation. Current law specifically provides that an award of attorneys' fees and related costs may be made to a parent who is the prevailing party if the parent was substantially justified in rejecting a settlement offer. Attorneys' fees may be reduced in certain circumstances including where the court finds that the parent unreasonably protracted the final resolution of the controversy; the amount of attorneys' fees unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation and experience; where the time spent and legal services furnished were excessive considering the nature of the action or proceedings; and when the court finds that the parent did not provide the school district with the appropriate information in the due process complaint.<sup>97</sup>

H.R. 1350 (House) would amend these provisions by changing the general statement under current law that attorneys' fees may be awarded at the court's discretion to read: "Fees awarded under this paragraph shall be based on rates determined by the Governor of the State (or other appropriate State official) in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection." In addition, the amendment provides that the Governor or other appropriate official shall make these rates available to the public on an annual basis. The other provisions of current law regarding the prohibition of attorneys' fees in certain situations, the exception to this prohibition, and the reduction of attorneys' fees in certain circumstances were not amended although the House bill at §615(f)(1)(B)(ii) defines the resolution session as a non administrative and non judicial meeting.

The Senate bill keeps most of the provisions of current law, including the current provision relating to the determination of the amount of attorneys' fees by a court. The Senate bill specifically would not allow attorneys' fees for the preliminary meeting and would also allow for the reduction of attorneys' fees when the parents' attorney unreasonably protracts the proceedings. The Senate bill would add a new subsection specifically allowing parents to represent their children in court.<sup>98</sup> An

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<sup>96</sup> The provision on attorneys' fees was added by Congress in the Handicapped Children's Protection Act, P.L. 99-372.

<sup>97</sup> 20 U.S.C. §1415(i), P.L. 105-17 §615(i).

<sup>98</sup> The IDEA cases that have specifically addressed this issue have generally found that parents cannot proceed *pro se* on behalf of their child. See e.g., *Collinsgru v. Palmyra Board of Education*, 161 F.3d 225, 227 (3d Cir. 1998), where the third circuit held that "parents seeking to enforce their child's substantive right to an appropriate education under (continued...)



amendment on attorneys' fees was agreed to on the Senate floor which would allow the court to award fees to a SEA or LEA against the attorney of a parent or a parent in certain circumstances. The attorney of a parent may be required to pay the SEA's or LEA's fees if he or she

- files a complaint that is frivolous, unreasonable, or without foundation,
- continues to litigate when the litigation clearly became frivolous, unreasonable or without foundation or
- if the complaint or subsequent cause of action was presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The parent of a child with a disability who files a complaint may be required to pay the SEA's or LEA's attorneys' fees if the complaint or subsequent cause of action was presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The Senate also included a provision that nothing in the subparagraph shall be construed to affect the attorneys' fees provisions applicable to the District of Columbia.

In the Senate debate on the attorneys' fees amendment, Senator Grassley stated that the amendment would "in no way limit or discourage parents from pursuing legitimate complaints against a school district if they feel their child's school has not provided a free appropriate public education. It would simply give school districts a little relief from abuses of the due process rights found in IDEA and ensure that our taxpayer dollars go toward educating children, not lining the pockets of unscrupulous trial lawyers."<sup>99</sup> Senator Gregg also emphasized the need for the attorneys' fee amendment. He noted that the concept that a defendant should be able to obtain attorneys' fees when a plaintiff's actions were "frivolous, unreasonable, or without foundation" has been applied to title VII of the Civil Rights Act of 1964. The Supreme Court in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*<sup>100</sup> held that prevailing defendants should recover attorneys' fees when a plaintiff's actions were frivolous, unreasonable, or without foundation in order to "protect defendants from burdensome litigation having no legal or factual basis."<sup>101</sup> Senator Gregg observed that the standard is "very high...and prevailing defendants are rarely able to meet it and obtain a reimbursement of their attorneys fees" and that

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<sup>98</sup> (...continued)

the IDEA may not represent their child in federal court." However, a recent first circuit case, *Maroni v. Pemi-Baker Regional School District*, 346 F.3d 247, 257 (1<sup>st</sup> Cir. 2003), granted parents the right to proceed *pro se* stating "a rule prohibiting *pro se* representation would subvert Congress's intent by denying many children with special needs their day in court."

<sup>99</sup> 150 Cong. Rec. S5349 (May 12, 2004).

<sup>100</sup> 434 U.S. 412 (1978).

<sup>101</sup> *Id.* at 420.

case law “directs courts to consider the financial resources of the plaintiff in awarding attorney’s fees to a prevailing defendant.”<sup>102</sup>

The attorneys’ fee amendment also allowed defendants to recover fees if lawsuits were brought for an improper purpose. Senator Gregg noted that this concept was drawn from Rule 11 of the Federal Rules of Civil Procedure<sup>103</sup> and that “in interpreting this language from Rule 11, courts must apply an objective standard of reasonableness to the facts of the case.”<sup>104</sup>

## Discipline Issues

Both the House and Senate bills would make changes in the manner in which children with disabilities who violate a disciplinary rule are treated. The House bill would make more significant changes to current law.

**Current Law.** Generally, under current law, a child with a disability is not immune from disciplinary procedures; however, these procedures are not identical to those for children without disabilities.<sup>105</sup> If a child with a disability commits an action that would be subject to discipline, school personnel have several options. These include:

- a suspension for up to ten days,
- placement in an interim alternative education setting for up to forty-five days for situations involving weapons or drugs,
- asking a hearing officer to order a child placed in an interim alternative educational setting for up to forty-five days if it is demonstrated that the child is substantially likely to injure himself or others in his current placement, and
- conducting a manifestation determination review to determine whether there is a link between the child’s disability and the misbehavior. If the child’s behavior is not a manifestation of a disability, long term disciplinary action such as expulsion may occur, except that educational services may not cease.<sup>106</sup>

**Changes in Placement.** Both House and Senate bills would keep the ability of school personnel to suspend a child with a disability for up to ten school days but they differ regarding other changes in placement. The House bill would

<sup>102</sup> 150 Cong. Rec. S5349 (May 12, 2004).

<sup>103</sup> *Id.* Rule 11 states in relevant part that an attorney by signing pleadings, motions and other documents certifies to the court that “to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, — (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation...”

<sup>104</sup> 150 Cong. Rec. S5349 (May 12, 2004).

<sup>105</sup> For a more detailed discussion of discipline and IDEA see CRS Report 98-42, *The Individuals with Disabilities Education Act: Discipline Provisions in P.L. 105-17.*

<sup>106</sup> 20 U.S.C. §1415(k), P.L. 105-17 §615(k).

delete many of the provisions in current law while the Senate bill would make some revisions. The House Report states that “(t)he discipline improvements in the bill provide for a uniform school discipline code and substantially reduce the confusion and complexity of the current system.”<sup>107</sup> Under H.R. 1350 (House), school personnel would be able to order a change in placement of a child with a disability who violates a code of student conduct to an appropriate interim alternative educational setting selected so as to enable the child to continue to participate in the general education curriculum and to progress toward IEP goals for not more than 45 school days (to the extent such alternative and such duration would be applied to children without disabilities). In addition, this action “may include consideration of unique circumstances on a case-by-case basis.” H.R. 1350 (House) specifically states that this change in placement could last beyond 45 school days if required by state law or regulation for the violation in question, to ensure the safety and appropriate educational atmosphere in the schools. Both House and Senate bills would provide that when a child with a disability is removed from his or her current placement pursuant these authorities, the child continue to receive educational services so as to enable the child to continue to participate in the general educational curriculum and to progress toward meeting the IEP goals. Both the House and Senate bill also contain provisions relating to the receipt of behavioral intervention services.

The Senate report describes the Senate changes regarding discipline as making the procedures “simpler, easier to administer, and more fair to all students.”<sup>108</sup> The Senate bill would change the current law relating to interim alternative educational settings. The bill provides that school personnel may remove a student to an interim alternative educational setting for not more than forty-five days, regardless of whether the behavior is determined to be a manifestation of a disability, where a child with a disability

- carries or possesses a weapon at school, on school premises, or a school function, under the jurisdiction of a state or local educational agency,
- knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a state or local educational agency, or
- has committed serious bodily injury<sup>109</sup> upon another person while at school or at a school function under the jurisdiction of a state or local educational agency.

H.R. 1350 (Senate) would require that the LEA notify the parents of the decision to take disciplinary action and all the procedural safeguards available under section 615, not later than the date on which the decision to take disciplinary action is made.

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<sup>107</sup> H. Rep. No 77, 108<sup>th</sup> Congress, at 118 (April 29, 2003).

<sup>108</sup> S. Rep. No. 185, 108<sup>th</sup> Congress, at 43 (November 3, 2003).

<sup>109</sup> Serious bodily injury would be a new category added by H.R. 1350 (Senate). The Senate bill defines the term in the same manner as in 18 U.S.C. §1365(h)(3) which states: “the term ‘serious bodily injury’ means bodily injury which involves — (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”

Under H.R. 1350 (Senate), a hearing may be requested by the parent of a child with a disability who disagrees with any decision regarding disciplinary action, placement or the manifestation determination under this subsection, or by a LEA that believes the maintenance of the current placement of the child is substantially likely to result in injury to the child or others. As provided in current law, H.R. 1350 (Senate) also would allow a hearing officer to order a change in placement for a child with a disability to an appropriate interim alternative educational setting for not more than forty-five school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

**Manifestation Determination.** One of the significant differences between the House and Senate bills concerns the use of a manifestation determination. H.R. 1350 (House) would delete the requirement in current law that a determination be made concerning whether a child's action was a manifestation of his or her disability and also would delete the provision in current law that if the child's behavior was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except that educational services may not cease.<sup>110</sup>

H.R. 1350 (Senate) keeps the concept of a manifestation determination but contains revised language. Manifestation determinations do not have to be conducted prior to taking a disciplinary action for ten consecutive school days or less or for a removal in cases involving weapons, drugs, or serious bodily injury. In other situations, the Senate bill would require that within ten school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the IEP team shall review all relevant information in the student's file, any information provided by the parents, and teacher observations to determine: (1) if the conduct in question was the result of the child's disability; or (2) if the conduct in question resulted from the failure to implement the IEP or develop and implement behavioral interventions. If either of these two conditions is applicable, the Senate bill provides that the conduct is determined to be a manifestation of the child's disability.

**Placement During Appeals and "Stay Put."** One of the key provisions of IDEA concerns where a child with a disability shall be placed during the pendency of a due process proceeding. The House and Senate bills do not change the general stay put provision in current law which requires that a child remain in his or her then-current educational placement during the pendency of due process procedures;<sup>111</sup> however, there are some changes regarding stay put for placements during appeals.

Both the House and Senate bills would make changes to the current law regarding placement of a child with a disability during appeals by a parent.

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<sup>110</sup> H.R. 1350 (House) does not directly change the provision in current law requiring that educational services be provided to children with disabilities even if they have been suspended or expelled. Current law at 20 U.S.C. §1412(a)(1)(A).

<sup>111</sup> 20 U.S.C. §1415(j); H.R. 1350 (Senate), §615(j).

Generally, as in current law, both bills would require that the child remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided, unless the parent and the state or local educational agency agree otherwise. H.R. 1350 (Senate) differs from current law and provides for the child with a disability to remain in the interim alternative education setting pending the decision of the hearing officer or the expiration of the time period in the following situations:

- when a parent requests a hearing regarding disciplinary procedures described in §615(k)(1)(B) which concerns the application of the disciplinary procedures when the actions of the child with a disability are not determined to be a manifestation of the child's disability;
- when there is a challenge to the interim alternative educational setting (same as current law); or
- when there is a challenge to the manifestation determination.<sup>112</sup>

The Senate bill requires the State or local educational agency to arrange for an expedited hearing to occur within twenty school days of the date of the request for the hearing.<sup>113</sup> The Senate bill also would delete the provision in current law regarding current placement and expedited hearings.<sup>114</sup>

In the House bill, the stay put requirement is applicable to a change in placement as described in §615(j)(1)(B) which would allow school personnel to order a change in placement for a child with a disability who violates a code of student conduct.<sup>115</sup> Under current law, this exception to the general "stay put" requirement is more limited and applies to situations involving weapons, drugs or where a hearing officer has determined that maintaining the current placement is substantially likely to result in injury to the child or others.<sup>116</sup>

The House and Senate bills would delete the provisions in current law regarding current placement during appeals and expedited hearings.<sup>117</sup> Under current law, if a child with a disability is placed in an interim alternative educational setting and school personnel propose to change the child's placement after the expiration of the interim alternative placement, the child is to remain in the child's placement prior to the interim alternative education setting pending the result of the proceeding.<sup>118</sup> The Senate bill, but not the House bill, would add a requirement that the state or local

<sup>112</sup> H.R. 1350 (Senate), §615(k)(4).

<sup>113</sup> *Id.*

<sup>114</sup> 20 U.S.C. §1415(k)(7)(B)-(C).

<sup>115</sup> H.R. 1350 (House), §615(j)(4). The House bill at §615(j)(1)(B) would also provide that this placement may last longer than 45 days if required by state law or regulation.

<sup>116</sup> 20 U.S.C. §1415(k)(7), P.L. 105-17 §615(k)(7).

<sup>117</sup> 20 U.S.C. §1415(k)(7)(B)-(C), P.L. 105-17 §615(k)(7)(B)-(C).

<sup>118</sup> 20 U.S.C. §1415(k)(7)(B), P.L. 105-17 §615(k)(7)(B).

educational agency arrange for an expedited hearing which shall occur within twenty school days of the date the hearing is requested.

**Protections for Children not Yet Eligible for Special Education and Related Services.** Current law provides that a child who has not been determined to be eligible for special education and related services and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, may seek the protections of IDEA if the local educational agency had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. The current law sets forth certain situations where a local educational agency shall be deemed to have knowledge that a child is a child with a disability.<sup>119</sup> The House and Senate bills contain similar provisions; however, the House bill requires the teacher or school personnel to express concern in writing about the behavior or performance of the child to the director of special education or other personnel while the Senate bill requires that the teacher or school personnel express concern about a pattern of behavior demonstrated by the child to the director of special education or other administrative personnel. The Senate bill, but not the House bill, would add a new situation where the LEA is deemed to have knowledge: where the child has engaged in a pattern of behavior that should have alerted LEA personnel that the child may be in need of special education and related services. In addition, the Senate bill, but not the House bill, would add an exception where the LEA is deemed not to have knowledge that the child has a disability if the parent of the child has not agreed to allow an evaluation of the child.

## Oversight and Administrative Provisions

### Monitoring, Withholding, and Judicial Review

Both the House and Senate bills would make substantial changes to section 616.<sup>120</sup> This section, currently entitled “Withholding and Judicial Review,” requires the Secretary of Education to withhold some or all of a state’s Part B funding, or refer the matter for appropriate enforcement action, if “there has been a failure by the State to comply substantially with any provision of this part” or if an LEA or SEA fails to comply with its conditions of eligibility under Part B.<sup>121</sup> The withholding may be limited to programs or projects, or portions thereof, affected by the failure. In addition, the section provides for judicial review, if a state “is dissatisfied with the Secretary’s final action with respect to the eligibility of the State under section 616.”<sup>122</sup>

H.R. 1350 (House) would retain these provisions but would add new monitoring and enforcement provisions. H.R. 1350 (House) would require the Secretary to

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<sup>119</sup> 20 U.S.C. §1415(k)(8), P.L. 105-17 §615(k)(8).

<sup>120</sup> 20 U.S.C. §1416, P.L. 105-17 §616.

<sup>121</sup> 20 U.S.C. §1416(a), P.L. 105-17 §616(a).

<sup>122</sup> 20 U.S.C. §1416(b), P.L. 105-17 §616(b).

“monitor the implementation of this Act” using “focused monitoring,” which would concentrate on improving “educational results for all children with disabilities, while ensuring compliance with program requirements.”<sup>123</sup> The House bill would require the Secretary to monitor specified state indicators of educational outcomes for children with disabilities, such as academic achievement, graduation rates, and dropout rates. The Secretary could also review other permitted indicators, such as the implementation of education of children with disabilities in the least restrictive environment and the transition of children with disabilities from special education to post-school experiences (e.g., postsecondary education and employment).

If the Secretary determines that a state “is not making satisfactory progress in improving educational results for children with disabilities,” under the House bill one or more actions must be taken, including provision of technical assistance and withholding between 20% and 50% of the amount a state may retain for state-level activities. If the Secretary determines that “a State is not in substantial compliance with any provision of this part,” additional actions would be required, such as requiring the preparation of “a corrective action plan or improvement plan,” imposing “special conditions on the State’s grant,” and further withholding of funds for state-level activities.<sup>124</sup> If “special conditions” have been imposed and a state has not corrected violations after 3 consecutive years, “the Secretary shall take such additional enforcement actions” based on specified actions in the bill. The House bill also contains the same withholding requirements as are in current law.<sup>125</sup>

The Senate bill’s provisions were described in the Senate report as representing “a significant departure from past practice of Federal monitoring and enforcement of IDEA.”<sup>126</sup> H.R. 1350 (Senate) would require the Secretary to “monitor implementation of this Act” through oversight of the states’ exercise of general supervision using “focused monitoring,” which would concentrate on improving “educational results and functional outcomes for all children with disabilities, while ensuring compliance with program requirements, with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities.”<sup>127</sup> The bill would require the Secretary and the states to monitor priority areas: the provision of FAPE in the least restrictive environment, the provision of transition services, state exercise of general supervisory authority and over representation of racial and ethnic groups in special education. The Secretary also may examine other relevant information and data.

The Senate bill would require the Secretary to implement and administer a system of required indicators that measures the progress of states in improving their performance. Using these indicators, the Secretary would review the performance of children with disabilities in the state on assessments, dropout rates and graduation

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<sup>123</sup> H.R. 1350 (House), §616(a).

<sup>124</sup> H.R. 1350 (House), §616(d).

<sup>125</sup> H.R. 1350 (House), §616(e).

<sup>126</sup> S. Rep. No. 185, 108<sup>th</sup> Congress, at 46 (November 3, 2003).

<sup>127</sup> H.R. 1350 (Senate), §616(a)(2).

rates, and compare these results to the performance and rates for all children. H.R. 1350 (Senate) also would require the state to have a compliance plan developed in collaboration with the Secretary. Under the Senate bill, the Secretary would be required to examine relevant state information and data annually to determine if the state is making satisfactory progress toward improving educational results for children with disabilities and is in compliance with the provisions of IDEA. If the Secretary determines that a state is not making satisfactory progress, one or more actions must be taken, including directing the use of state level funds for technical assistance and withholding between 20% and 50% of the amount a state may retain for state-level activities. If the Secretary determines that a state has failed to meet the benchmarks in the state compliance plan and make satisfactory progress in improving educational results at the end of the fifth year after the Secretary has approved the compliance plan, the Secretary may take further actions, including suspending payment to a recipient. However, H.R. 1350 (Senate) also provides that if the Secretary determines that “a State is not in substantial compliance with any provision of this part,” additional actions would be required, such as requiring the preparation of “a corrective action plan or improvement plan,” imposing “special conditions on the State’s grant,” and further withholding of funds for state-level activities.<sup>128</sup> In addition to this graduated approach to sanctions, H.R. 1350 (Senate) also contains a provision for “egregious noncompliance.” At any time that the Secretary determines that a state is in egregious noncompliance or is willfully disregarding the provisions of IDEA, the Secretary may take the actions specified above and may also institute a cease and desist action and refer the case to the Office of the Inspector General. If action is taken regarding an egregious violation or after five years from the approval of the compliance plan, the Secretary would be required to report to Congress on the specific action taken and the reasons for the action.

H.R. 1350 (Senate) would give the Secretary discretion when withholding payments to limit the withholding to programs or projects, or portions thereof, that are affected by the failure. If a state is dissatisfied with the Secretary’s final action, the state may seek judicial review in the appropriate U.S. court of appeals and such decision may be appealed to the Supreme Court.

Finally, the Senate bill would require that the State educational agency monitor and enforce implementation of IDEA. H.R. 1350 (Senate) would require the SEA, upon determination that an LEA is not meeting the requirements of Part B, to prohibit the LEA from treating funds received under Part B as local funds.

## **ED Administration and Program Information**

Section 617 authorizes certain activities for the Secretary of Education to carry out, such as issuing necessary regulations to carry out provisions of Part B of IDEA, maintaining confidentiality of personal information, and hiring qualified personnel to carry out various duties.<sup>129</sup> Both bills would add requirements that the Secretary “publish and widely disseminate” model forms, such as a model IEP form with the

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<sup>128</sup> H.R. 1350 (Senate), §616(c)(2).

<sup>129</sup> 20 U.S.C. §1417, P.L. 105-17 §617.



Senate adding a requirement for a model individualized family service plan (IFSP) form.<sup>130</sup> Both bills would add a provision authorizing the Secretary of Education to grant waivers of paperwork requirements for a period of time not to exceed four years with respect to not more than ten states (House) and 15 states (Senate) based on proposals submitted by states for addressing reduction of paperwork and non-instructional time spent fulfilling statutory and regulatory requirements. The Senate bill prohibits the Secretary from waiving “any statutory requirements of, or regulatory requirements relating to, applicable civil rights requirements. Under both bills, the Secretary also would be required to include in the annual report information relating to the effectiveness of the waivers.<sup>131</sup>

Section 618 requires states and the Secretary of the Interior (because the Bureau of Indian Affairs receives IDEA funds) to provide data to the Secretary of Education.<sup>132</sup> The House and Senate bills would amend this provision and contain similar language but differ in some respects. For example, the House bill would require data on graduation rates and voluntary binding arbitration and the Senate bill would add, in various subsections, requirements for data on children with limited English proficiency and gender. In addition, the Senate bill would require data on due process complaints and hearings, reporting requirements related to disciplinary actions and procedural safeguards.

## **Preschool, Infants and Toddlers, and National Programs**

Both bills make only relatively modest changes to section 619, which authorizes services for preschool children with disabilities, and to Part C, which authorizes services for infants and toddlers with disabilities. For example, both bills would include certain children with disabilities ages 3 to 5 in the definition of an infant or toddler with a disability.<sup>133</sup> The Senate bill has somewhat more detail about this provision: According to the Senate bill, such programs would be developed and implemented by the state educational agency (SEA) and the Part C lead state agency (if different from the SEA). The programs would have to include “an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills.” Participation of children with disabilities ages 3 to 5 in such programs would be based on informed written parental consent. In addition, parents of participating children would receive annual information on their rights to pursue services for their children under these Part C provisions or under Part B and differences in services and parental rights under the two programs. Part B funds (in addition to Part C funds) could be used to support this program. H.R. 1350 (Senate) stipulates that “nothing in this subsection shall be construed to require a provider of

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<sup>130</sup> H.R. 1350 (House), §617(g), H.R. 1350 (Senate), §617(d).

<sup>131</sup> H.R. 1350 (House), §617(e), H.R. 1350 (Senate) §609(b).

<sup>132</sup> 20 U.S.C. §1418, P.L. 105-17 §618.

<sup>133</sup> H.R. 1350 (House) §635(5)(C) and H.R. 1350 (Senate) §635(5)(B)(ii).

services under this part [i.e., Part C] to provide a child served under this part with a free appropriate public education.”<sup>134</sup>

Both bills would modify the exception in Part C that infants and toddlers with disabilities be served in “natural environments,” (i.e., with nondisabled infants and toddlers), although the bills’ exceptions differ. Under current law, the exception to this requirement occurs “only when early intervention cannot be achieved satisfactorily . . . in a natural environment.” H.R. 1350 (House) would add to this exception: “or in a setting that is most appropriate, as determined by the parent and the individualized family service plan team.”<sup>135</sup> H.R. 1350 (Senate) would add the exception: “unless a specific outcome cannot be met satisfactorily for the infant or toddler in a natural environment.”<sup>136</sup>

Under H.R. 1350 (Senate) (but not under H.R. 1350 (House)), one change of possible significance to Part C involves additional language regarding states’ definition of developmental delay. Part C aims to serve infants and toddlers experiencing delay in physical, cognitive, and other areas of development. Current law requires states to determine a definition of developmental delay as a criterion for eligibility for Part C grants, but leaves it to states to determine their own definition. H.R. 1350 (Senate) would require, at a minimum, that the definition include all infants and toddlers experiencing a developmental delay of 35% or more in one area of development or a delay of 25% or more in two or more areas of development.<sup>137</sup>

Part D of IDEA currently authorizes various national activities aimed at improving the education of children with disabilities. Subpart 1 authorizes competitive state improvement grants aimed at improving states’ systems for providing special education and related services. Although these grants may be used for various purposes, the emphasis is on improving the supply of teachers and other personnel serving children with disabilities. Subpart 2 of Part D aims at improving special education through a variety of approaches, such as research, technical assistance, and parental support.

Both bills would substantially revise Part D. In brief, some of the changes are a matter of re-arranging language. For example, Part D of current law provides findings in several sections, while both bills place all findings at the beginning of the part — including some findings in current law and adding some new findings. Both bills continue some provisions of Part D, although sometimes with substantial changes. For example, both bills would retain the state competitive grants program authorized under Subpart 1 of Part D. However, the House bill would focus these grants on professional development activities even more than current law does by requiring that at least 90% of the grants be used for these activities. (Current law requires 75% of funds be used to ensure sufficient numbers of skilled and

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<sup>134</sup> H.R. 1350 (Senate) §635(b).

<sup>135</sup> H.R. 1350 (House) §635(a)(16)(B).

<sup>136</sup> H.R. 1350 (Senate) §635(a)(16).

<sup>137</sup> H.R. 1350 (Senate) §634(a)(1)(B).

knowledgeable special education personnel. H.R. 1350 (Senate) would require at least 75% of grant funds to be used for professional development activities.)

While H.R. 1350 (House) would continue to authorize these grants as competitive, under H.R. 1350 (Senate) these grants would remain competitive only until appropriations reached \$100 million.<sup>138</sup> When that amount is reached, the Secretary would first allocate sufficient funds to ensure that multi-year grants already underway would be funded to completion. Remaining funds would be distributed to states by a formula based on each state's share of the overall amount states received under the Part B grants-to-states program for the preceding year,<sup>139</sup> except that no state would receive less than ¼% “of the amount made available under this part.”

Both bills would continue other provisions of Part D with little change. For example, both bills would continue to authorize grants for Community Parent Resource Centers to help “ensure that underserved parents of children with disabilities . . . have the training and information they need to enable them to participate effectively in helping their children with disabilities . . . .”<sup>140</sup>

Finally, both bills would add new provisions to Part D. For example, both bills would establish a National Center for Special Education Research to conduct research on improving special education and related services for children with disabilities.<sup>141</sup> H.R. 1350 (Senate) would authorize new activities under subpart 4 of Part D related to interim alternative settings, behavioral support, and “whole school” intervention. This subpart would authorize the Secretary of Education to make grants to LEAs or consortia of LEAs and other entities, such as institutions of higher education and community-based organizations, to establish or enhance practices related to student behavior. These practices might include, for example, early identification of children “at risk for emotional and behavioral difficulties” and training of school personnel “on effective strategies for positive behavior intervention.” Grants also could focus on improving interim alternative settings providing FAPE for children with disabilities removed from their current placements for reasons of behavior problems.

## GAO Reports

In addition to the amendments to IDEA discussed above, H.R. 1350 (House) would require the General Accounting Office (GAO) to undertake a series of reports on IDEA and special education. These include:

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<sup>138</sup> The current appropriation for state improvement grants is about \$51 million.

<sup>139</sup> For example, a state that received 1% of applicable funds during the previous fiscal year, would receive 1% of the funds available for allocation under this program.

<sup>140</sup> H.R. 1350 (House) §673(a), H.R. 1350 (Senate) §672(a).

<sup>141</sup> H.R. 1350 (House) would establish the center within the Institute of Education Sciences through language in IDEA; H.R. 1350 (Senate) would amend the Education Sciences Reform Act of 2002 to establish the center.

- A review of federal and selected state and local requirements related to IDEA that “result in excessive paperwork;”
- A review of differences among the states in the definition and identification of certain groups of children with disabilities — for example, those identified as “emotionally disturbed” or “specific learning disabled;”
- A study of distance learning and other technological approaches for delivering professional development programs for special education personnel;
- A study of how limited English proficient students are served under IDEA; and
- A study of state costs for complying with the requirements of IDEA.

H.R. 1350 (Senate) requires the GAO to review and report on federal, state, and local special education requirements that result in “excessive paperwork” and to study services provided under “early intervention services.” The Senate bill also requires a GAO study of child medication usage.<sup>142</sup>

## **Amendments to the Rehabilitation Act of 1973**

The Senate bill, but not the House bill, includes a number of amendments to the Rehabilitation Act of 1973. These amendments would emphasize services to assist students make a transition from school to vocational rehabilitation (VR) services. Title I of the Rehabilitation Act authorizes funds for state vocational rehabilitation agencies to support a wide range of VR services to assist persons with disabilities engage in gainful employment. Services include assessment of an individual’s VR needs, counseling and guidance, and vocational and other training services. Persons are eligible for VR services if they have a physical or mental impairment that substantially impedes employment. Under the law, all individuals with disabilities are presumed to have the potential to engage in employment and to benefit from VR services.

H.R. 1350 (Senate) would add a new authorization of appropriations under Title I for services to students with disabilities. Funds authorized are to be used to help students transition from school to vocational rehabilitation and achieve post-school goals. Funds are to be used by state VR agencies to provide vocational guidance, career exploration, job search skills and technical assistance to students, as well as outreach to students eligible for VR services. In addition, funds are to be used for training and technical assistance to state and local educational agencies and state personnel responsible for planning services to students. Under the bill, students are defined as those age 14-21 who are eligible for VR services, and eligible and receiving IDEA services, or are eligible under Section 504 of the Rehabilitation Act.

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<sup>142</sup> The House bill contains a provision prohibiting school personnel from requiring a child to obtain a prescription for substances covered by section 202(c) of the Controlled Substances Act (21 U.S.C. §812(c)) as a condition of attending school or receiving services. H.R. 1350, House, §612(a)(25).

The bill also requires that the act's standards and indicators that are used to assess the VR program's effectiveness, include measures of performance regarding transition assistance to help students achieve post-school goals. State VR agencies must specify in their state plans the strategies they will use to improve transition services to students.<sup>143</sup>

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<sup>143</sup> This section was written by Carol O'Shaughnessy.

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