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Individuals with Disabilities Education Act (IDEA): Discipline Provisions in P.L. 105-17

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(name redacted)
Legislative Attorney
American Law Division

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Summary

The 1997 Amendments to the Individuals with Disabilities Education Act are the most comprehensive and significant changes made since its original enactment. Several of the most important changes were made regarding the discipline of children with disabilities. Congress attempted to strike “a careful balance between the LEA’s (local educational agency’s) duty to ensure that school environments are safe and conducive to learning for all children, including children with disabilities, and the LEA’s obligation to ensure that children with disabilities receive a free appropriate public education.”

Generally, the new provisions give schools increased flexibility for dealing with children with disabilities who misbehave. A school may now place a child with a disability in an interim alternative educational setting for not more than forty-five days if the student has been involved with drugs or weapons (not just firearms as under previous law). An impartial hearing officer may order a change in placement for a child with a disability to an interim alternative educational placement for up to forty-five days if the hearing officer finds that the school has demonstrated by substantial evidence that leaving the child in the current placement is substantially likely to result in injury to the child or others. In addition, P.L. 105-17 codifies the previous interpretation by the Department of Education that educational services may not cease for children with disabilities who have been suspended or expelled. Final regulations, issued by the Department of Education on March 12, 1999, elaborated upon these statutory requirements. This report examines both the statutory and regulatory provisions relating to discipline as well as recent proposed amendments. It will be updated as necessary.

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Individuals with Disabilities Education Act (IDEA): Discipline Provisions in P.L. 105-17

Introduction

On June 4, 1997, the Individuals with Disabilities Education Act Amendments of 1997, P.L. 105-17, were signed into law. These amendments are the most comprehensive and significant changes made to the Individuals with Disabilities Education Act (IDEA) since its enactment in 1975. Several of the most important changes were made regarding the discipline of children with disabilities. Congress attempted to strike “a careful balance between the LEA’s duty to ensure that school environments are safe and conducive to learning for all children, including children with disabilities, and the LEA’s continuing obligation to ensure that children with disabilities receive a free appropriate public education.”¹

Although much of the previous statute, case law, regulations and policy guidance was incorporated in the new statutory language, several provisions were added which give schools increased flexibility for dealing with children with disabilities who misbehave. The IDEA Amendments of 1997 allow a school to place a child with a disability in an interim alternative educational setting for not more than forty-five days if the student has been involved with drugs or weapons (not just firearms as under previous law). An impartial hearing officer may order a change in placement for a child with a disability to an interim alternative educational placement for up to forty-five days if the hearing officer finds that the school has demonstrated by substantial evidence that leaving the child in the current placement is substantially likely to result in injury to the child or others. In addition, P.L. 105-17 codifies the previous interpretation by the Department of Education that educational services may not cease for children with disabilities who have been suspended or expelled.

The Department of Education promulgated final regulations under P.L. 105-17 on March 12, 1999 after receiving comments from about 6,000 individuals, public agencies and organizations.² The regulatory provisions on discipline were controversial, especially those aspects relating to short term suspensions, and these provisions were changed from what the Department had put forth in its proposed regulations.³

¹ S.Rept. 105-17, 105th Cong., 1st Sess. 28 (1997); H.Rept. 105-95, 105th Cong., 1st Sess. 108 (1997).

² 64 F.R. 12405 (March 12, 1999). For an overview of the final regulations see Jones and Apling, “The Individuals with Disabilities Education Act: Department of Education Final Regulations,” CRS Report RL30103 (March 22, 1999).

³ Proposed regulations, 62 F.R. 55025 (Oct. 22, 1997).

Although significant changes were made in the 1997 reauthorization of IDEA, amendments have been proposed since then to further amend the discipline provisions. Several of these have passed the House or Senate but have not become law. The 108th Congress passed H.R. 1350 in both the House and Senate but conferees have not yet been appointed. Prior to a more detailed discussion of the 1997 statutory and regulatory changes as well as more recent proposed changes, it is important to briefly examine the history of IDEA's discipline provisions.⁴

History of IDEA's Discipline Procedures

The manner in which children with disabilities can be disciplined may seem quite complex but the logic involved is much more apparent when IDEA's history is examined. IDEA was originally enacted in 1975 as the Education for All Handicapped Children Act, P.L. 94-142. The primary motive for its enactment was the fact that children with disabilities often failed to receive an education or received an inappropriate education.⁵ This lack of education gave rise to numerous judicial decisions, notably *PARC v. State of Pennsylvania*, 343 F.Supp. 279 (E.D.Pa. 1972), and *Mills v. Board of Education of the District of Columbia*, 348 F.Supp. 866 (D.D.C. 1972). These decisions found constitutional infirmities with the lack of education for children with disabilities when the states were providing education for children without disabilities. As a result, the states were under considerable pressure to provide such services, and they lobbied Congress to assist them.

In enacting P.L. 94-142, Congress provided grants to the states to help pay for education for children with disabilities and also delineated specific requirements the states must follow in order to receive these federal funds. These requirements did not contain a discipline provision *per se* but rather contained a requirement that if there is a dispute between the school and the parents of a child with a disability, the child "stays put" in his or her current educational placement until the dispute is resolved using the due process procedures set forth in the statute. The concept of "stay put" was placed in the statute to help eliminate the then common discriminatory practice of expelling children with disabilities from school. A revised "stay put" provision remains as law in the current version of IDEA.

⁴ Although it is beyond the scope of this report to examine studies on the implementation and efficacy of discipline approaches, it should be noted that there is some research data available. For example see GAO, *Student Discipline: Individuals with Disabilities Education Act*, GAO-01-210 (January 2001); GAO, *Special Education: Clearer Guidance Would Enhance Implementation of Federal Disciplinary Provisions*, GAO-03-550 (May 2003); Safe and Responsive Schools Project at the Indiana Education Policy Center, *Preventing School Violence: A Practical Guide to Comprehensive Planning*; Indiana Education Policy Center, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* (Aug. 2000); Fordham Foundation and the Progressive Policy Institute, *Rethinking Special Education for a New Century* (May 2001).

⁵ The House and Senate Reports for P.L. 94-142 both noted statistics indicating that there were more than eight million children with disabilities and that "only 3.9 million such children are receiving an appropriate education, 1.7 million handicapped children are receiving no educational services at all, and 2.5 million handicapped children are receiving an inappropriate education." H.Rept. 94- 332, 94th Cong., 1st Sess. 11 (1975); S.Rept. 94-168, 94th Cong., 1st Sess. 8, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1432.

Issues relating to children with disabilities who exhibited violent or inappropriate behavior have been raised for a number of years. In 1988, the question of whether there was an implied exception to the stay put rule was presented to the Supreme Court in *Honig v. Doe*, 484 U.S. 305 (1988). *Honig* involved emotionally disturbed children one of whom had choked another student with sufficient force to leave abrasions on the child's neck and who had kicked out a window while he was being escorted to the principal's office. The other child in the *Honig* case had been involved in stealing, extorting money and making lewd comments. The school had sought expulsion but the Supreme Court disagreed finding that "Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school."⁶ However, the Court observed that this holding did "not leave educators hamstrung...Where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 school days....And in those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts under section 1415(e)(2), which empowers courts to grant any appropriate relief."⁷ This statement about the school's right to seek judicial relief has come to be known as a *Honig* injunction.

The Supreme Court's interpretation of IDEA in *Honig* did not quell all concerns about discipline and children with disabilities. In 1994, Congress amended IDEA's stay put provision to give schools the unilateral authority to remove a child with a disability to an interim alternative educational setting if the child was determined to have brought a firearm to school. This provision was expanded upon in the IDEA Amendments of 1997 to include weapons, not just firearms, and drugs.

The Department of Education had also received numerous questions from schools about discipline and in 1995 issued a memorandum discussing numerous discipline issues including the use of manifestation determinations.⁸ If a school sought to suspend or expel a child with a disability for more than ten days, the school must first make a "manifestation determination," a determination concerning whether the student's misconduct was related to his or her disability. If the behavior was not related to the disability, the school could suspend or expel for more than ten days but must continue to provide education services. If the behavior was related to the disability, the school must give notice of any recommended change in placement and, if the parent objected, the parent could invoke the stay put provision. The Department found that *Honig* injunctions, court orders to change the placement of a child with a disability, were proper when a school believed that maintaining the child in his or her current placement was "substantially likely to result in injury to the student or others." The concept of a manifestation determination was placed in statutory language by P.L. 105-17. Similarly, the new statutory language continues the regulatory interpretation that educational services cannot cease for children with disabilities even if they have been suspended or expelled.

⁶ 484 U.S. 305, 323 (1988).

⁷ *Id.* at 325-326.

⁸ OSEP Memorandum 95-16, 22 IDELR 531 (April 26, 1995).

Discipline Provisions in the IDEA Amendments of 1997

With the preceding background in mind, the specific changes made by P.L. 105-17 will now be examined. First, however, it should be emphasized that much of what Congress intended to do was to codify existing law that was found in the regulations, case law, and policy guidance. The changes that were made were among the most contentious in a long and controversial reauthorization. The House and Senate reports described the changes in general.

The committee recognizes that school safety is important to educators and parents. There has been considerable debate and concern about both if and how those few children with disabilities who affect the school safety of peers, teachers, and themselves may be disciplined when they engage in behavior that jeopardizes such safety. In addition, the committee is aware of the perception of a lack of parity when making decisions about disciplining children with and without disabilities who violate the same school rule or code of conduct. By adding a new section 615(k) to IDEA, the committee has attempted to strike a careful balance between the LEA's duty to ensure that school environments are safe and conducive to learning for all children, including children with disabilities, and the LEA's continuing obligation to ensure that children with disabilities receive a free appropriate public education. Thus, drawing on testimony, experience, and common sense, the committee has placed specific and comprehensive guidelines on the matter of disciplining children with disabilities in this section.⁹

Generally, a child with a disability is not immune from disciplinary procedures; however, these procedures are not identical to those for children without disabilities. If 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, and
- asking a hearing officer to order a child be 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,
- 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.

⁹ S.Rept. 105-17, 105th Cong., 1st Sess. 28 (1997); H.Rept. 105-95, 105th Cong., 1st Sess. 108 (1997).

School officials may also seek a *Honig* injunction as discussed previously if they are unable to reach agreement with a student's parents and they feel that the new statutory provisions are not sufficient.

The Ten Day Rule

School personnel can order a change in placement for not more than ten days to an appropriate interim alternative educational setting, another setting or suspension to the same extent that these options would be applied to children without disabilities. This new provision in P.L. 105-17 codifies what was existing practice. The Supreme Court in *Honig v. Doe, supra*, had allowed ten-day suspensions under the prior law.

However, the new statutory language does not state whether the ten days are ten days for the school year or ten consecutive days and this became a point of controversy in the proposed regulations. The final regulations responded to this criticism with a compromise. School personnel may order the removal of a child with a disability from the child's current placement for not more than ten consecutive school days for any violation of school rules to the extent that the same removal would be applied to children without disabilities.¹⁰ In addition, the school may remove a child with a disability for periods of not more than ten consecutive school days in the same school year for other incidents of misconduct as long as these removals do not constitute a change in placement as described in §300.519(b). Section 300.519(b) states that a change in placement occurs if "the child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another."

For suspensions after suspensions for the first ten days of the school year, the final regulations state that schools must provide services to the extent necessary to enable the child to appropriately progress in the general curriculum and meet the child's IEP (individualized educational placement) goals.¹¹ If the child is removed for not more than ten consecutive days and there is *not* a change in placement, the school personnel make the determination of which services are necessary.¹² If there is a change in placement, certain obligations are triggered for the LEA. The IEP team must meet and develop a behavior assessment plan,¹³ manifestation determinations are required,¹⁴ and certain services to meet the FAPE requirement must be provided.¹⁵

¹⁰ 34 C.F.R. §300.520(a)(1).

¹¹ 34 C.F.R. §300.121(d)(2).

¹² 34 C.F.R. §300.121(d)(3).

¹³ 34 C.F.R. §300.520(b).

¹⁴ 34 C.F.R. §300.523.

¹⁵ 34 C.F.R. §300.121(d).

School Initiated Interim Alternative Educational Placements

A major change made by P.L. 105-17 was the expansion of when an interim alternative educational placement can be used. Under prior law, school officials could make such a placement only when a student carried a firearm to school or a school function. The IDEA Amendments of 1997 expand upon this authority to allow schools to make such a placement not only for firearms but for weapons¹⁶ and drugs. P.L. 106-25, the Education Flexibility Partnership Act of 1999, made a technical amendment to this provision clarifying that the schools may remove a child who has possession of a weapon at school and is not limited to situations where a weapon is carried to school. The appropriate interim alternative education setting is to be determined by the child's individualized education program (IEP) team.

An important addition made by P.L. 105-17 concerns behavior intervention plans. Within ten days after deciding to move a child with a disability to an interim alternative educational setting, if there was not already a functional behavior assessment and a behavioral intervention plan, the local education agency must convene an IEP meeting to develop an assessment plan. If there was already a behavior intervention plan, the IEP team is to review and, if necessary, modify the plan.¹⁷ This requirement is in addition to the new statutory provision providing that in developing a child's IEP, where a child's behavior impedes his or her learning or the learning of others, the IEP team shall consider, when appropriate, strategies, including positive behavioral interventions, and supports to address the behavior.¹⁸

Hearing Officer Initiated Interim Alternative Educational Placements

A new situation where an interim alternative educational placement may be used was added by P.L. 105-17. Under certain circumstances, an impartial hearing officer may order a change in placement to an interim alternative educational setting for not more than forty-five days. The hearing officer must: determine that the school has demonstrated by substantial evidence that maintaining a child's current placement is "substantially likely to result in injury" to the child or others; consider the appropriateness of the child's current placement; consider whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement; determine that the interim alternative educational setting has been selected so as to enable the child to continue to participate in the general curriculum and to continue to receive those services and modifications that will enable the child to meet the goals set out in his or her IEP; and determine that the interim alternative educational placement shall include services and modifications designed to address

¹⁶ Weapon is defined as having the meaning of "dangerous weapon" under paragraph (2) of the first subsection of 18 U.S.C. sec. 930. Dangerous weapon is defined in this subsection as meaning "a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except such term does not include a pocket knife with a blade of less than 2 ½ inches."

¹⁷ Section 615(k)(1)(B).

¹⁸ Section 614(d)(3)(B)(I).

the behavior that led to the disciplinary action so that the behavior does not reoccur.¹⁹

Manifestation Determination Review

As was noted previously, the concept of a manifestation determination originated in policy interpretations of IDEA by the Department of Education. The theory is that when behavior, even inappropriate behavior, is caused by a disability, the response of a school must be different than when the behavior is not related to the disability. P.L. 105-17 codifies this requirement by mandating that a determination regarding the relationship between a child's disability and his or her behavior must be made by the IEP team in certain circumstances. These circumstances, as specified in the statute, are when school personnel contemplate ordering a change in placement for disciplinary reasons to an interim alternative educational setting for not more than forty-five days; when a hearing officer contemplates ordering a change in placement for disciplinary reasons; or if a disciplinary action involving a change in placement of more than ten days is contemplated for a child with a disability who has engaged in any other behavior that has violated a school's rule or conduct of conduct.²⁰

If the child's behavior is related to his or her disability, the school may review the child's placement and, if necessary, initiate a change in the child's placement. The school also has the option of suspending the child for ten school days or less and seeking a *Honig* injunction.

If the child's behavior is not related to his or her disability, the relevant disciplinary procedures that are 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 a free appropriate public education must be made available to the child even if he or she is expelled or suspended. Parents have a right to request a hearing if they disagree with the determination that the child's behavior was not a manifestation of the child's disability or with any decision concerning placement. In these cases, there shall be an expedited hearing.²¹

In order to find that a child's behavior was not related to his or her disability, the IEP team must consider all relevant information and must make three determinations. First, the IEP team must find that in relation to the behavior in question, the child's IEP and placement were appropriate and the special education services and behavior intervention strategies were provided according to the child's IEP and placement. Second, the IEP team must find that the child's disability did not impair the child's ability to understand the impact and consequences of the behavior subject to disciplinary action. Finally, the IEP team must find that the child's disability did not impair the ability of the child to control the behavior subject to the disciplinary action.²²

¹⁹ Section 615(k)(2) and (3).

²⁰ Section 615(k)(4)(A).

²¹ Section 615(k)(6)(A).

²² Section 615(k)(4)(C). The final Department of Education regulations reiterate the (continued...)

Child's Placement During Appeals

If the parents request a hearing regarding a disciplinary action involving an interim alternative educational setting or manifestation determination, their child with a disability shall remain in the interim alternative educational setting. This placement is where the child stays until the hearing officer's decision or until the expiration of the specified time periods unless the parents and the LEA or SEA agree otherwise.²³ If the child is placed in an interim alternative educational setting for more than ten days and the school wants to change the child's placement after the time in the interim alternative educational setting, and if the parents challenge the proposed placement, the child stays put in the placement the child was in prior to the interim alternative educational placement.²⁴ If school personnel feel that this would be dangerous, there may be an expedited hearing.²⁵

The final regulations reiterate the statutory language and make clear that the expedited hearing procedure may be repeated.²⁶ In addition, the final regulations note that "if the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for the purposes of paragraph (a) of this section."²⁷ Paragraph (a) is the regulatory recitation of the stay put requirement.

Continuation of Educational Services

One of the most controversial aspects of the discipline issue during the reauthorization of IDEA involved the cessation of educational services for children with disabilities. IDEA has from its inception required that each state receiving funds have in effect a policy that assures all children with disabilities the right to a free appropriate public education (FAPE). P.L. 105-17 added to this requirement, indicating that it includes "children with disabilities who have been suspended or expelled from school."²⁸

²² (...continued)

statutory language regarding manifestation determinations and do not require a manifestation determination for a ten day suspension. See 34 C.F.R. §300.523.

²³ Section 615(k)(7).

²⁴ *Id.*

²⁵ Section 615(k)(7)(C).

²⁶ 34 C.F.R. §300.526(c).

²⁷ 34 C.F.R. §300.514(c).

²⁸ Section 612(a)(1)(A).

The statutory addition tracked the interpretation of the law by the Department of Education's Office of Special Education Programs (OSEP)²⁹ which had been criticized as being beyond the scope of IDEA's statutory language. Previously, the state of Virginia refused to comply with the OSEP interpretation. This led to several judicial decisions and the Fourth Circuit Court of Appeals found that the plain language of IDEA did not condition the receipt of IDEA funds on the continued provision of educational services to expelled children with disabilities and that in order for Congress to place conditions on the state's receipt of federal funds, Congress must do so clearly and unambiguously.³⁰ The clear signal sent to Congress by the courts was that if Congress wanted to avoid judicial controversies and impose a requirement that educational services cannot cease for children with disabilities, it should amend the statute to do so. Congress responded by adding the qualifying phrase to the FAPE requirement in P.L. 105-17 indicating that FAPE extends to children with disabilities who have been suspended or expelled.

The Department of Education's final regulations addressed the meaning of the new FAPE language when read in connection with the rule on ten day suspensions. The final regulations interpreted the statute as not requiring services during the first ten days a child is removed from school³¹ but for subsequent suspensions, schools are required to provide certain services.³²

Children who are not yet Eligible for Special Education and Related Services

One of the situations Congress sought to address during the reauthorization concerned children who were the subject of a disciplinary action and who alleged after the action occurred that they were disabled and thus entitled to the protections of IDEA.³³ P.L. 105-17 allows such a child to assert 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 law specifically states that the LEA is deemed to have such knowledge if

- the parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents such expression) to personnel of the agency that the child is in need of special education and related services;
- the behavior or performance of the child demonstrates the need for such services;

²⁹ OSEP Memorandum 95-16, 22 IDELR 531, 536 (OSEP 1995).

³⁰ *Virginia Department of Education v. Riley*, 86 F.3d 1337 (4th Cir. 1996).

³¹ 34 C.F.R. §300.121(d)(1).

³² 34 C.F.R. §300.121(d)(2).

³³ Two court cases were examined by Congress concerning this issue: *Hacienda La Puente School District v. Honig*, 976 F.2d 487 (9th Cir. 1992); and *M.P. by D.P. v. Grossmont Union High School District*, 858 F.Supp. 1044 (S.D. Calif. 1994).

- the parent of the child has requested an evaluation of the child; or
- the teachers of the child or other LEA personnel have expressed concern about the behavior or performance of the child to the special education director or to other personnel of the agency.³⁴

This last category caused some concern among school officials who feared that it would indicate that the LEA had knowledge that the child was a child with a disability if there were casual hallway comments. In the final regulations, the Department of Education stated that this concern had to be expressed to the director of special education “or to other personnel in accordance with the agency’s established child find or special education referral system.”³⁵

Law Enforcement and Judicial Entities

Prior judicial decisions also gave rise to the issue of when children with disabilities could be referred to law enforcement officials.³⁶ P.L. 105-17 specifically states that nothing in Part B of IDEA shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent state law enforcement and judicial authorities from exercising their responsibilities.³⁷

Transfer of Disciplinary Information

The IDEA Amendments of 1997 also provide for the transfer of disciplinary information on a child with a disability since it was felt that there was an increased possibility of violence when a local school system was not adequately informed about the child’s past. The Amendments specifically allowed a state, at its discretion, to require a local educational agency to include a statement of any current or previous disciplinary actions that have been taken against a child with a disability, in the records of the child. The statement can include a description of the behavior the child engaged in, a description of the disciplinary action taken, and other information that is relevant to the safety of the child and other individuals. This information can be transmitted to the same extent that such information would be transmitted with the records of children who do not have disabilities.³⁸ In the final regulations, the Department of Education discussed the relationship of this provision to the Family

³⁴ Section 615(k)(8)(A) and (B).

³⁵ 34 C.F.R. §300.527(b)(4).

³⁶ See *Morgan v. Chris L.*, 25 IDELR 227 (6th Cir. 1997), *cert. denied*, 520 U.S. 1271 (1997).

³⁷ See *State of Connecticut v. David F.*, 1998 Conn. Super. LEXIS 3247 (Nov. 6, 1998), where the court interpreted this provision to allow a juvenile delinquency proceeding. The court stated that “the juvenile court’s jurisdiction will not frustrate the IDEA or its ‘stay put’ provisions.”

³⁸ Section 613(j).

Educational Rights and Privacy Act (FERPA) and found that IDEA permits transmission of records only to the extent permitted by FERPA.³⁹

Proposed Amendments to IDEA Discipline Provisions Since 1997

Legislation Prior to the 108th Congress.

Although Congress described its 1997 changes to discipline provisions as a “careful balance,” it was not long before amendments to change the provisions surfaced. Amendments were offered to H.R. 1, 107th Cong., and its companion bill, S. 1.⁴⁰ Both these amendments passed their respective Houses but the conference committee did not include them as part of the final legislation which became P.L. 107-110.

Representative Norwood described his amendment to H.R. 1 as allowing “special needs students to be disciplined under the same policy as nonspecial needs students in the exact same situation.”⁴¹ Essentially the amendment would have eliminated the mandated provision of educational services to children with disabilities who have been suspended or expelled for actions involving drugs, weapons, or aggravated assault or battery in a state that does not require educational services in that situation for children without disabilities.

The amendment offered by Senator Sessions to S. 1, like the House amendment, would have implemented uniform disciplinary policies regarding the discipline of children with disabilities in certain circumstances. The Senate amendment was not limited to specific disciplinary situations like those involving weapons but would have amended IDEA by adding a new subsection relating to uniform policies on discipline when the behavior at issue is not a manifestation of the child’s disabilities, providing for certain procedural protections, and providing for alternative placements of children with disabilities in certain situations.

In 1999 the Senate passed S. 254, 106th Cong., the Violent and Repeat Juvenile Accountability and Rehabilitation Act of 1999, and the House passed H.R. 1501, 106th Cong., the Child Safety and Protection Act, both of which contained amendments to IDEA. These amendments would have changed section 615 of IDEA to eliminate IDEA’s different disciplinary procedures for children with disabilities in certain situations. In the Senate the amendment applied to children with disabilities who carry a gun or firearm while in the House the amendment would have covered a weapon. These amendments were not enacted.⁴²

³⁹ 34 C.F.R. §300.529.

⁴⁰ For a more detailed discussion of these amendments see CRS Report RS20947, *Amendments Relating to the Discipline of Children with Disabilities in H.R. 1 and S. 1, 107th Congress*, by (name redacted).

⁴¹ 147 Cong. Rec. H2583 (daily ed. May 23, 2001).

⁴² For a more detailed discussion of these amendments see CRS Report RS20558, *The* (continued...)

Two amendments relating to children with disabilities were offered and accepted during House Education and Workforce Committee markup of H.R. 4141, 106th Cong., the Elementary and Secondary Education Act Amendments. One amendment, offered by Representative Norwood, concerned the discipline of a child with a disability who carries or possesses a weapon. The other amendment, offered by Representatives Talent, McIntosh and Tancredo, concerned the discipline of a child with a disability who knowingly possesses or uses illegal drugs at school or commits an aggravated assault or battery at school. These amendments were not enacted.⁴³

Legislation in the 108th Congress.

In the 108th Congress, the IDEA reauthorization bills both included amendments that would change the current law relating to the discipline of children with disabilities. H.R. 1350, 108th Congress, passed the House on April 30, 2003. On May 13, 2004, the Senate incorporated S. 1248 in H.R. 1350 and passed H.R. 1350 in lieu of S. 1248. Conferees have not yet been appointed.⁴⁴

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 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.”⁴⁵ 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.

⁴² (...continued)

Individuals with Disabilities Education Act: Proposed Discipline Amendments, by (name redacted).

⁴³ *Id.*

⁴⁴ For a more detailed discussion of the House and Senate bills see CRS Report RL32415, *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, 108th Congress*, by (name redacted) and (name redacted).

⁴⁵ H. Rep. No. 77, 108th Cong., at 118 (April 29, 2003).

The Senate report describes the Senate changes regarding discipline as making the procedures “simpler, easier to administer, and more fair to all students.”⁴⁶ The Senate bill would change the current law relating to interim alternative educational settings by adding a provision allowing school personnel to 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 has committed serious bodily injury upon another person while at school or at a school function under the jurisdiction of a state or local educational agency.⁴⁷ 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.

Both House and Senate bills would provide that when a child with a disability is removed from his or her current placement pursuant to 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.

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.

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. H.R. 1350 (Senate) would keep 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

⁴⁶ S. Rep. No. 185. 108th Cong., at 43 (Nov. 3, 2003).

⁴⁷ The Senate bill defines the term “serious bodily injury” 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 facility.”

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.

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; however, there are some changes regarding stay put for placements during appeals regarding a disciplinary action, the interim alternative educational setting, or the manifestation determination. Both the House and Senate bills would make changes to the current law regarding placement of a child with a disability during these appeals by a parent. 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.

The Senate bill would require 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. The Senate bill also would delete the provision in current law regarding current placement and expedited hearings.

In the House bill, the stay put requirement is applicable to a change in placement as described in §615(j)(1)(B), H.R. 1350 (House), which would allow school personnel to order a change in placement for a child with a disability who violates a code of student conduct. 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. The House and Senate bills would delete the provisions in current law regarding current placement during appeals and expedited hearings. 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. The Senate bill, but not the House bill, would add a requirement that the state or local educational agency arrange for an expedited hearing which shall occur within twenty school days of the date the hearing is requested.

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. 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

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