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Amendments Relating to the Discipline of Children with Disabilities in H.R. 1 and S.1, 107th Congress

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Summary

On May 23, 2001 the House passed amendment number 13 to H.R.1, the No Child Left Behind Act of 2001 and on June 14, 2001, the Senate passed amendment number 604 to S. 1, the Better Education for Students and Teachers Act. Both of these amendments changed the provisions relating to the discipline of children with disabilities to make the disciplinary procedures applicable to children with disabilities more like those applicable to children without disabilities. The amendments would also eliminate the requirement for educational services to children with disabilities in certain situations.

Background and Current Statutory Language Relating to Discipline

The Individuals with Disabilities Education Act (IDEA) provides federal funds to the states to assist them in providing an education for children with disabilities. As a condition for the receipt of these funds, IDEA contains requirements on the provision of services and detailed due process procedures. In 1997 Congress amended IDEA in the most comprehensive and controversial reauthorization since IDEA's original enactment in 1975. One of the most contentious issues addressed in the 1997 legislation related to the disciplinary procedures applicable to children with disabilities.

IDEA was originally enacted in 1975 because children with disabilities often failed to receive an education or received an inappropriate education. This lack of education led to numerous judicial decisions, including *PARC v. State of Pennsylvania*[1] and *Mills v. Board of Education of the District of Columbia*[2] which found constitutional infirmities with the lack of education for children with disabilities when the states were providing

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[1] 343 F. Supp. 279 (E.D.Pa. 1972).

[2] 348 F. Supp. 866 (D.D.C. 1972).

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.[3] Congress responded with the grant program still contained in IDEA but also delineated specific requirements that the states must follow in order to receive these federal funds. The statute provided that if there was a dispute between the school and the parents of the child with a disability, the child must "stay put" in his or her current educational placement until the dispute is resolved. A revised stay put provision remains in IDEA.

Issues relating to children with disabilities who exhibit violent or inappropriate behavior have been raised for years and in 1988 the question of whether there was an implied exception to the stay put provision was presented to the Supreme Court in *Honig v. Doe*.[4] Although the Supreme Court did not find such an implied exception, it did find that a ten day suspension was allowable and that schools could seek judicial relief when the parents of a truly dangerous child refuse to permit a change in placement. In 1994, Congress amended IDEA's stay put provision to give schools 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.

In 1997 Congress made significant changes to IDEA in P.L. 105-17 and attempted to strike "a careful balance between the LEA's (local education agency) 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."[5] This current law does not immunize a child with a disability from disciplinary procedures but these procedures may not be identical to those for children without disabilities. In brief, if a child with a disability commits an action that would be subject to discipline, school personnel have the following options:

- suspending the child for up to ten days with no educational services provided,

- 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. If the child's behavior is a manifestation of the child's disability, the school may review the child's placement and, if appropriate, initiate a change in placement.

- placing the child in an interim alternative education setting for up to forty five days (which can be renewed) for situations involving weapons or drugs, and

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[3] For a detailed discussion of the intent behind the enactment of P.L. 94-142 see (name redacted), "The Individuals with Disabilities Education Act: Congressional Intent," CRS Report 95-669.

[4] 484 U.S. 305 (1988).

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

- asking a hearing officer to order that a child be placed in an interim alternative educational setting for up to forty-five days (which can be renewed) if it is demonstrated that the child is substantially likely to injure himself or others in his current placement.

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.[6]

Amendment to H.R. 1, 107th Congress, the No Child Left Behind Act of 2001

Representative Norwood sponsored an amendment to H.R. 1which he described as allowing "special needs students to be disciplined under the same policy as nonspecial needs students in the exact same situation."[7] Essentially the amendment would eliminate 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.

More specifically, the amendment would add a section 5155 to the Elementary and Secondary Education Act of 1965 providing that states receiving funds under the act shall require each local education agency (LEA) to have in effect a policy allowing school personnel to discipline a child with a disability in the same manner as a child without a disability is disciplined if the child with a disability (1) carries or possesses a weapon to or at a school, on school premises, or to or at a school function, (2) knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance at school, on school premises or at a school function, or (3) commits an aggravated assault or battery at a school, on school premises, or at a school function. The disciplinary action may include expulsion or suspension and school personnel may modify the disciplinary action on a case by case basis. The child with a disability who is disciplined may also assert a defense that the carrying of a weapon or the use, sale or solicitation of an illegal drug was unintentional or innocent. If the child with a disability is suspended or expelled, he or she is not entitled to receive educational services although the LEA may choose to provide educational or mental health services. If such services are provided they do not have to be at any particular level and their location is at the discretion of the LEA. The amendment also contains definitions of "controlled substance," "illegal drug," and "weapon."

The rationale advanced for the amendment by Representative Norwood was that current Federal law requires schools to have two different discipline policies, one for children with disabilities and one for children without disabilities, and that this created a

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[6] For a more detailed discussion of these provisions see (name redacted), "Individuals with Disabilities Education Act: Discipline Provisions in P.L. 105-17," CRS Report 98-42 (April 19, 1999).

[7] 147 Cong. Rec. H2583 (daily ed. May 23, 2001).

system of "preferential treatment" for children with disabilities.[8] Representative Graves also spoke on behalf of the amendment, arguing that "creating a safe learning environment must be a top priority for our schools. Unfortunately, the discipline provisions of IDEA make it impossible for educators to address the needs of all students in the classroom."[9] Similarly, Representative Wicker stated: "There is no hidden agenda here. There is no attempt to deny disabled students the ability to be educated. It is simply a matter of safety in schools and order in schools and discipline in schools."[10]

Several Members spoke in opposition to the amendment. Representative Miller observed that sometimes children with disabilities need to be treated differently because of their disabilities and that if the educational services for a child with a disability are stopped, it is very difficult for the child to catch up. He also emphasized that under current law, a child with a disability has to receive educational services but that he or she does not have to receive them in the school.[11] Representative Kildee also opposed the amendment. He observed, noting the example of a child in Oregon who had been suspended and then went on a shooting rampage, that removing troubled children with disabilities from school without educational services "will lead only to additional juvenile crime."[12] Representative Scott further elaborated on this argument. He stated that hearings on youth crime had shown there was a strong link between dropping out of school and subsequent crime with even higher correlations for children with disabilities and that putting such children on the streets was a danger to the public.

IDEA Amendment to S. 1, 107th Congress, the Better Education for Students and Teachers Act

The Senate amendment, like the House amendment, would implement uniform disciplinary policies regarding the discipline of children with disabilities in certain circumstances. The Senate amendment is not limited to specific disciplinary situations like those involving weapons but amends 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.

Senator Sessions offered the Senate amendment which would add a new subsection to IDEA relating to uniform disciplinary policies. The amendment provides that notwithstanding any other provision of IDEA, a SEA (State educational agency) or LEA may establish and implement uniform policies regarding discipline and order applicable to all children in order to ensure the safety of such children and an appropriate educational atmosphere. This broad grant of authority is limited in situations where the behavior in question is a manifestation of the child's disability. In that situation, the child with a disability who is removed from his or her regular education placement shall receive a free

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[8] *Id.*

[9] *Id.*

[10] *Id.* at H2584. See also statement of Rep. Barr.

[11] *Id.* at. H2583.

[12] *Id.*

appropriate public education which may be provided in an alternative educational setting. The manifestation determination is to be made no later than ten school days after the school personnel decide to remove the child with a disability from the child's regular educational placement. If the behavior is determined not to be a manifestation of the child's behavior, the same disciplinary procedures may apply to the child as are applied to children without disabilities.

The Sessions' amendment also contains a provision relating to procedural safeguards. This section provides school personnel with the discretion to consider all germane factors in each individual case and modify disciplinary action on a case-by-case basis. The child with a disability may assert a defense that the alleged act was unintentional or innocent. If the parents or the LEA disagree with a manifestation determination, the parents or the agency may request a review of the determination through the current IDEA procedures for an impartial due process hearing. During the course of the review, the child with a disability shall receive a free appropriate public education which may be provided in an alternative educational placement.

The last section of the Sessions' amendment allows a LEA, at the written request of a parent, to transfer a child with a disability to any accredited school that is specifically designed to serve children with disabilities, is selected by the child's parents, agrees to accept the child, and carries out a program that the SEA or LEA determine will benefit the child. Certain IDEA funds shall follow the child to this new placement.

Senator Sessions read from a number of letters from educators and students recounting situations where children with disabilities were disrupting classrooms and not receiving appropriate discipline and described his amendment during Senate debate as a "modest attempt at improving the situation. If a child is a disabled child and their misbehavior is not connected to their disability, then they can, and I think should, be treated like any other child in the school."[13] In a colloquy with Senator Kennedy, Senator Sessions affirmed that if the behavior that led to the disciplinary action was a result of the child's disability, alterative educational services are available to that child. Senator Sessions also indicated that if the behavior problem is not related to the disability, the child with a disability would be treated like a child without a disability.[14] Senator Allen argued in support of the Sessions' amendment that it "would properly return the ability to the local schools and principals to establish and implement uniform discipline policies applicable to all children in our States and school districts."[15]

Senator Kennedy expressed concern about the provision of the amendment allowing for the placement of a child with a disability in a school designed to serve children with disabilities resulting in a loss of quality educational experiences.[16] Similarly, Senator Harkin argued that the amendment would segregate children with disabilities, noting that if the behavior is a manifestation of the child's disability the child's free appropriate public education may be provided in an alternative educational setting. He observed that, unlike

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[13] 147 Cong. Rec. S6199-6200 (daily ed. June 13, 2001).

[14] *Id.* at S6200.

[15] 147 Cong. Rec. S6244 (daily ed. June 14, 2001).

[16] 147 Cong. Rec. S6201 (daily ed. June 13, 2001).

current law, there would be no inquiry as to whether or not the child with a disability was provided adequate supportive services. Finally, Senator Harkin argued that there was no data indicating that children with disabilities were causing discipline problems in schools.[17] Senator Kennedy also argued that there was no data to support the contention that IDEA's requirements made imposing school discipline onerous. Several Senators opposed the Sessions' amendment because they felt it should be more carefully examined during the next reauthorization of IDEA.[18]

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[17] *Id.* at S6205.

[18] 147 Cong. Rec. S6245-6246 (daily ed. June 14, 2001).

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