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# Individuals with Disabilities Education Act (IDEA): Discipline Provisions in P.L. 108-446

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## Summary

The Individuals with Disabilities Education Improvement Act of 2004 is a comprehensive reauthorization of the previous law on special education. Several important changes are made by this law to provisions on the discipline of children with disabilities.

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 school days not only if the student has been involved with drugs or weapons but also if the student has inflicted serious bodily injury upon another person while at school. 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 school days if the hearing officer determines that maintaining the child in the current placement is substantially likely to result in injury to the child or others. In addition, P.L. 108-446 keeps the basic concept of a manifestation determination but attempts to clarify its application. The new law also changes the "stay-put" provision in the appeals section.

This report examines the statutory provisions relating to discipline. It will be updated as necessary.

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# Individuals with Disabilities Education Act (IDEA): Discipline Provisions in P.L. 108-446

## Introduction

On December 3, 2004, President Bush signed the Individuals with Disabilities Education Improvement Act, P.L. 108-446. This act is the first reauthorization of IDEA since 1997 and although the new law preserves the basic structure of IDEA, it also makes significant changes in the law.[1] Some of the most controversial changes were made regarding the discipline of children with disabilities.

Several provisions were added which give schools increased flexibility for dealing with children with disabilities who misbehave. The 2004 reauthorization allows a school to place a child with a disability in an interim alternative educational setting for not more than forty-five school days if the student has been involved with drugs or weapons or has inflicted serious bodily injury on another person. 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 school 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.

The concept of a manifestation determination, a procedure to determine whether or not the behavior of a child with a disability was caused by the child's disability, is kept in P.L. 108-446. However, the manner in which such a determination is made is changed by the new law. Changes are also made regarding the placement of a child with a disability when a parent or LEA disagrees with any decision regarding placement or the manifestation determination.[2]

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[1] For an overall analysis of the changes made by P.L. 108-448 see CRS Report RL32716, *Individuals with Disabilities Education Act (IDEA): Analysis of Changes Made by P.L. 108-446*.

[2] 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).

## 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.[3] 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.

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."[4] 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

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[3] 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.

[4] 484 U.S. 305, 323 (1988)(emphasis in the original).

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."[5] This statement about the school's right to seek judicial relief has come to be know 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 and is further expanded in the 2004 reauthorization to include situations where a student has inflicted serious bodily injury upon another person while at school.

The Department of Education had received numerous questions from schools about discipline and in 1995 issued a memorandum discussing numerous discipline issues including the use of manifestation determinations.[6] 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 in 1997 by P.L. 105-17 as was the regulatory interpretation that educational services cannot cease for children with disabilities even if they have been suspended or expelled. Both of these provisions are kept in P.L. 108-446, but the manifestation determination and the stay put on appeals provisions are amended.

# Discipline Provisions in the Individuals with Disabilities Education Improvement Act of 2004

## Overview of Disciplinary Procedures

Generally, under P.L. 108-446 a child with a disability is not immune from disciplinary procedures; however, these procedures are not identical to those for children without disabilities. The House passed bill, H.R. 1350, 108th Cong., had required school personnel to treat all children in the same manner with regard to discipline except that for children with disabilities educational services would continue. The Senate bill, S. 1248, contained an approach similar to that of previous law but attempted to "make it simpler, easier to administer, and more fair to all

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[5] *Id.* at 325-326.

[6] OSEP Memorandum 95-16, 22 IDELR 531 (April 26, 1995).

students."[7] Under final enacted law, if a child with a disability commits an action that would be subject to discipline, school personnel have several options. These include

- removing a child with a disability who violates a code of student conduct from her current placement to another setting or suspension for up to ten school days.
- conducting a manifestation determination review to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability or was the direct result of the local educational agency's (LEA) failure to implement the individualized education program (IEP). 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.
- placing the child in an interim alternative education setting for up to forty-five school days for situations involving weapons, drugs, or if the student has inflicted serious bodily injury upon another person while at school.
- asking a hearing officer to order a child be placed in an interim alternative educational setting for up to 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 others.

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.

## Case-by-Case Determination

The 2004 reauthorization adds a specific section giving school personnel the authority to consider unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct. (§615(k)(1)(A))

## The Ten School Day Rule

School personnel may remove a child with a disability who violates a code of student conduct from his current placement to an appropriate interim alternative educational setting, another setting, or suspension for not more than ten school days. These options are to be applied to the same extent that they would be applied to children without disabilities. (§615(k)(1)(B)) The ten day rule was added to IDEA in 1997 and codified what was existing practice. The Supreme Court in *Honig v. Doe*, *supra*, had allowed ten-day suspensions under prior law. The 2004 reauthorization reworded the provision and changed ten days to ten *school* days. It should be noted that the time limitations regarding disciplinary procedures generally

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[7] S.Rep. No. 185, 108th Cong. 43 (2003).

refer to *school* days, not days. The regulations promulgated under the 1997 reauthorization defined day as meaning calendar day unless otherwise indicated. School day is defined in the regulation as any day that students are in attendance at school for instructional purposes.[8] Thus the new law would appear to add additional time to the ten day rule and to other provisions where the term "school day" is used.

## Services Provided a Child with A Disability who is Placed in an Interim Alternative Educational Setting

The Individuals with Disabilities Education Improvement Act of 2004 provides that when a child with a disability is removed from the child's current placement to an interim alternative educational setting pursuant to section 615(k)(1)(G) or a change in placement is ordered due to a behavioral violation as described in section 615(k)(1)(C), the child is to continue to receive educational services. These services must enable the child to continue to participate in the general educational curriculum and to progress toward meeting the child's IEP goals. The child with a disability must also receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications designed to prevent reoccurrence of the child's behavioral violation. (§615(k)(1)(D)) These provisions are similar to, but not identical to, those in previous law.

## Manifestation Determination

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. This requirement was codified by P.L. 105-17 in 1997 and amended by the 2004 reauthorization.

The Individuals with Disabilities Education Improvement Act of 2004 requires that within ten school days of a decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, parent, and relevant members of the IEP team shall review all the relevant information in the child's file to determine: (1) if the conduct was caused by, or had a direct and substantial relationship to, the child's disability; or (2) if the conduct was the direct result of the local educational agency's failure to implement the IEP. An exception to this requirement is made for situations involving the authority of school personnel to remove a child for not more than ten school days. The relevant members of the IEP team are to be determined by the parent and the LEA. The material to be reviewed shall include the child's IEP, any teacher observations, and any relevant information provided by the parents. (§615(k)(1)(E)(i)) If either of these two determinations are made by the parent, LEA, and relevant members of the IEP team, the conduct shall be determined to be a manifestation of the child's disability. (§615(k)(1)(E)(ii))

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[8] 34 C.F.R. §300.9 (2002).

Once the behavior has been determined to be a manifestation of the child's disability, the IEP team must conduct a functional behavioral assessment and implement a behavioral intervention plan for the child, unless the LEA had conducted this assessment prior to the behavior in question. Where a behavior intervention plan has been developed, the IEP team shall review the plan and modify it, as necessary, to address the behavior. The IEP team must also return the child to the placement from which he or she was removed unless the parent and the LEA agree to a change in placement as part of the modification of the behavior intervention plan or school personnel remove a child to an interim alternative educations setting for not more than forty five school days as discussed below. (§615(k)(1)(F))

The conference report for P.L. 108-446 specifically addresses the manifestation determination. "The Conferees intend to assure that the manifestation determination is done carefully and thoroughly with consideration of any rare or extraordinary circumstances presented....The Conferees intend that if a change in placement is proposed, the manifestation determination will analyze the child's behavior as demonstrated across settings and across time when determining whether the conduct in question is a direct result of the disability. The Conferees intend that in situations where the local educational agency, the parent and the relevant members of the IEP team determine that the conduct was the direct result of the child's disability, a child with a disability should not be subject to discipline in the same manner as a non-disabled child. The Conferees intend that in order to determine that the conduct in question was a manifestation of the child's disability, the local educational agency, the parent and the relevant members of the IEP team must determine the conduct in question be (sic) the direct result of the child's disability. It is intention (sic) of the Conferees that the conduct in question was caused by, or has a direct and substantial relationship to, the child's disability, and is not an attenuated association, such as low self-esteem, to the child's disability."[9]

This current manifestation determination differs from previous law which had the manifestation determination review conducted by the IEP team and other qualified personnel. The previous law found that the IEP team may determine that the behavior of the child was not a manifestation of the child's disability only if the IEP team considered certain listed factors and then determined that the child's IEP and placement were appropriate and special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement. In addition, under previous law, the IEP team had to determine that the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior and that the child's disability did not impair the ability of the child to control the behavior. (P.L. 105-17, §615(k)(4))

P.L. 108-446 provides that 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 and for the same duration in which they would be applied to children without disabilities except that a free

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[9] H. Conf. Rep. No. 779, 108th Cong, 2d Sess. 224-225 (2004).

appropriate public education must be made available to the child. The free appropriate public education may be provided in an interim alternative educational setting. (§615(k)(1)(C))

## School Initiated Interim Alternative Educational Placements

A major change made by P.L. 108-446 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 or possessed weapons to or at school or a school function or knowingly possessed or used illegal drugs or sold or solicited the sale of a controlled substance while at school or a school function. The Individuals with Disabilities Education Improvement Act of 2004 adds a new situation where school officials may make such a placement: when a child with a disability has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a state or local educational agency. (§615(k)(1)(G)) Serious bodily injury is defined as meaning "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." (§615(k)(7)(D)(citing to 18 U.S.C. §1365(h)(3))

The appropriate interim alternative education setting with regard to the ten school day suspension and the school initiated interim alternative educational setting is to be determined by the child's IEP team. (§615(k)(2))

## Hearing Officer Initiated Interim Alternative Educational Placements

As discussed above, a LEA may unilaterally place a child with a disability in an interim alternative educational setting in certain circumstances. In addition, if a LEA believes that maintaining the current placement of a child with a disability is substantially likely to result in injury to the child or to others, the LEA may request a hearing. The hearing officer may order a change in placement to an 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. (§615(k)(3)) The Senate report noted that this requirement was to "address situations such as when a school cannot make a unilateral change in the child's placement because his behavior was a manifestation of his disability: the school deems the child to be too dangerous to stay in a regular classroom, but has been unable to reach agreement with the parents as to an appropriate alternative placement for the child."[10] A similar provision was contained in previous law but under the 1997 reauthorization the hearing officer had to make several specific determinations prior to ordering a change in placement.[11]

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[10] S.Rep. No. 185, 108th Cong., 1st Sess. 45 (2003).

[11] P.L. 105-17, Section 615(k)(2) and (3). These previous sections required that the hearing officer must: determine that the school has demonstrated by substantial evidence that (continued...)

## Child's Placement During Appeals

The 2004 reauthorization allows a parent who disagrees with any decision regarding placement or the manifestation determination, or a LEA that believes that maintaining the current placement of the child is substantially likely to injure the child or others, to request a hearing. (§615(k)(3)(A)) The new law specifically delineates the authority of a hearing officer. First, a hearing officer is to hear and make a determination regarding any hearings requested pursuant to §615(k)(3)(A). In making this determination, the hearing officer may order a change of placement which may include:

- returning a child with a disability to the placement from which he or she was removed, and
- ordering a change in placement 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 others. (§615(k)(3)(B))

The Individuals with Disabilities Education Improvement Act of 2004 changes the "stay put" provision in the appeals section. It should be noted that one of the core requirements of the original 1975 law, and one which remains in the current statute, is the requirement that a child with a disability remains in his or her current educational placement during the pendency of §615 proceedings. (§615(j)) The rationale for this provision was to ensure that children with disabilities were not excluded from receiving an education while a parent disputed issues relating to the provision of a free appropriate public education. However, an exception to this general provision was made for children with disabilities who are placed in interim alternative educational settings in the 1997 reauthorization and this exception is amended by the 2004 reauthorization.

Under the 2004 reauthorization, when an appeal has been requested by either a parent or the LEA under §615(k)(3) (which concerns appeals regarding a manifestation determination or a placement in an interim alternative educational setting), the child is to remain in the interim alternative educational setting pending the decision of the hearing officer or until the time period for the disciplinary infraction ends. Under previous law, the child was to remain in the interim alternative educational setting for forty-five days unless the school and the parents agreed or a hearing officer rendered a decision. (P.L. 105-17, §615(k)(7)) The new

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[11] (...continued)
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 the behavior that led to the disciplinary action so that the behavior does not reoccur.

law requires that the State educational agency (SEA) or LEA must arrange for an expedited hearing that must occur within twenty school days from when the hearing is requested. The hearing determination must be made within ten school days after the hearing. (§615(k)(4))

The Senate report discussed this provision noting that the committee did not intend that a hearing officer's reversal of a manifestation determination would allow a child with a disability who had been placed in an interim alternative educational setting for a violation regarding weapons, drugs, or serious bodily injury to be removed early form this placement. "However, if a parent contests facts surrounding the claim the child actually carried a weapon, brought drugs to school, or committed a serious bodily injury, then the child may be returned to his or her original placement if a hearing officer overturns the school district's decision. Similarly, if a parent successfully contests the provision of a free appropriate public education (FAPE) in the interim alternative educational setting chosen by the IEP team, the child's placement could be changed before the 45 day period expires."[12]

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

One of the situations Congress grappled with during the 1997 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. This situation had been presented in several judicial decisions which raised the issue of possible abuse of IDEA protections.[13]

The 2004 reauthorization keeps much of the previous law regarding the protections afforded children who have not yet been identified as eligible for special education. The Senate report stated that the committee maintained "its intent that children who have not yet been identified for IDEA should be afforded certain protections under the law."[14] However, several changes were made regarding when a LEA is deemed to have knowledge that a child is a child with a disability. Generally, a LEA is deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action:

- the parent of the child expressed concern, in writing, to supervisory or administrative personnel of the LEA or the child's teacher that the child is in need of special education and related services,

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[12] S.Rep. No. 185, 108th Cong., 1st Sess. 45 (2003).

[13] 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). In *M.P. by D.P. v. Grossmont Union High School District*, the court observed that the student had benefitted from using IDEA. "The plaintiff is a senior who was facing expulsion and thus would not have graduated with his class. Because IDEA's hearing process will take several months to complete, even if the student is ultimately found not to be disabled, by invoking IDEA the plaintiff will achieve the goal of graduating with his class and avoiding expulsion."

[14] S. Rep. No. 185, 108th Cong., 1st Sess. 45 (2003).

- the parent has requested an evaluation, or
- the teacher of the child or other LEA personnel has expressed specific concerns about a pattern of behavior directly to the director of special education or other supervisory personnel. (§615(k)(5))

Under previous law, a LEA was deemed to have knowledge that a child is a child with a disability if the behavior or performance of the child demonstrated the need for such services. This section was deleted from P.L. 108-446. The Senate report stated that this provision was deleted because a teacher could make an isolated comment to another teacher expressing concern about behavior and that could trigger the protections.[15]

The 2004 reauthorization also contains a new exception stating that a LEA shall not be deemed to have knowledge that a child is a child with a disability if the parent of the child has not allowed an evaluation of the child, or has refused services, or the child has been evaluated and it was determined that the child was not a child with a disability. (§615(k)(5)(C))

The provisions in previous law regarding the conditions that apply if the LEA has no basis of knowledge that a student is a child with disability are kept in the 2004 reauthorization. Essentially if the LEA is not found to have such knowledge, the child may be subject to the same disciplinary measures that are applicable to children without disabilities except that if a request for an evaluation is made during the time period in which the child is subjected to disciplinary measures, the evaluation shall be conducted in an expedited manner. If the child is found to be a child with a disability, special education and related services shall be provided. (§615(k)(5)(D))

## Law Enforcement and Judicial Entities

Judicial decisions also gave rise to the issue of when children with disabilities could be referred to law enforcement officials prior to the 1997 reauthorization.[16] The 2004 reauthorization keeps the previous requirements concerning referral to law enforcement authorities. Nothing in Part B is to be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities. Like previous law, an agency reporting a crime committed by a child with a disability shall ensure that copies of certain records are transmitted. (§615(k)(6))

## Transfer of Disciplinary Information

The Individuals with Disabilities Education Improvement Act of 2004 keeps the provisions of previous law regarding the transfer of disciplinary information. These provisions were added in the 1997 reauthorization to address the potential for an increased possibility of violence when a local school system was not adequately

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[15] S. Rep. No. 185, 108th Cong., 1st Sess. 45-46 (2003).

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

informed about the child's past. The law specifically allows 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 may 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. (§613(i))