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The Individuals with Disabilities Education Act (IDEA): Selected Changes that Would be Made to the Law by S. 1248, 108th Congress

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Summary

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 Originally enacted in 1975, the act responded to increased awareness of the need to educate children with disabilities, and to judicial decisions requiring that states provide an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

IDEA has been amended several times, most recently and most comprehensively by the 1997 IDEA reauthorization, P.L. 105-17. Congress is presently examining IDEA again and H.R. 1350, 108th Congress, passed the House on April 30, 2003, by a vote of 251 to 171. In the Senate, S. 1248 was introduced by Senators Gregg and Kennedy and referred to the Senate Health, Education, Labor and Pensions Committee on June 12, 2003. The bill was reported out of committee by a unanimous vote on June 25, 2003 (S.Rept. 108-185) and placed on the Senate legislative calendar under general orders on November 3, 2003. Currently, S. 1248 is scheduled for the Senate floor the week of May 10, 2004. This report discusses selected changes that S. 1248, as reported, would make in IDEA. It will be updated as necessary. For a discussion of the House bill, see CRS Report RL31830.

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Introduction

The Individuals with Disabilities Education Act (IDEA) authorizes federal funding for the education of children with disabilities and requires, as a condition for the receipt of such funds, the provision of a free appropriate public education (FAPE).¹ The statute also contains detailed due process provisions to ensure the provision of FAPE. Originally enacted in 1975, the act responded to increased awareness of the need to educate children with disabilities, and to judicial decisions requiring that states provide an education for children with disabilities if they provided an education for children without disabilities.²

IDEA has been amended several times, most recently and most comprehensively by the 1997 IDEA reauthorization, P.L. 105-17. Congress is presently examining IDEA again and H.R. 1350, 108th Congress, passed the House on April 30, 2003, by a vote of 251 to 171.³ In the Senate, S. 1248 was introduced by Senators Gregg and Kennedy and referred to the Senate Health, Education, Labor and Pensions Committee on June 12, 2003. The bill was reported out of committee on June 25, 2003⁴ and placed on the Senate legislative calendar under general orders on November 3, 2003. Currently, S. 1248 is scheduled for the Senate floor the week of May 10, 2004. In their introductory statements, Senators Gregg and Kennedy emphasized that S. 1248 was a bipartisan bill. Senator Gregg stated that the bill “strikes the appropriate balance between protecting the educational rights of children with disabilities while simultaneously making IDEA less litigious and compliance based.”⁵ The bill does not address the issue of full funding. Senator Gregg noted that “Senator Kennedy and I decided at the very outset to postpone that issue to the floor,

¹ 20 U.S.C. §1400 *et seq.*

² For an overview of IDEA see CRS Report RL31259, *The Individuals with Disabilities Education Act: Statutory Provisions and Selected Issues*.

³ For a discussion of H.R. 1350 see Nancy Lee Jones and Richard N. Apling, “The Individuals with Disabilities Education Act (IDEA): Selected Changes that Would be Made to the Law by H.R. 1350, 108th Congress,” CRS Report RL31830 (as updated May 2, 2003).

⁴ S. Rep. No. 108-185, 108th Cong.

⁵ 149 Cong. Rec. S7836 (daily ed. June 12, 2003)(remarks of Sen. Gregg).

since that is an issue that merits the attention and active participation of the entire Senate.”⁶

Definitions and Allocation Formula Provisions

Definitions

The definitions in current law are, for the most part, unchanged by S. 1248. However, S. 1248 would amend the definitions of assistive technology device and related services to eliminate coverage of surgically implanted medical devices, the post-surgical maintenance, programming, or replacement of such devices, or external devices connected with the use of a surgically implanted medical device. The routine maintenance and monitoring of an external device at the same time the child is receiving IDEA services is permitted.

The bill would add language to the definition of a “child with a disability” with respect to a child ages three to nine years of age. Current law permits a state or a local educational agency (LEA) to include a child in this age group in the definition if he or she is experiencing “development delays” and therefore needs special education and related services. S. 1248 would add the phrase “or any subset of that age range [i.e., ages 3 to 9], including ages 3 through 5.” This would appear to codify a practice permitted under current IDEA regulations of providing flexibility to states in determining which children in the age group 3 to 9 the term developmental delay applies.⁷

S. 1248 adds a definition of a “core academic subject” by reference to the definition of that term in section 9101 of the Elementary and Secondary Education Act (ESEA).⁸ This helps to align IDEA with the new requirements for teacher qualifications in the No Child Left Behind Act (NCLBA).

In addition, S. 1248 adds an extensive definition of “highly qualified” and “consultative services,” again to align IDEA with NCLBA requirements with respect to the qualification of educational personnel, while taking into account differences between special education and general education teachers. For example, if a special education teacher provides only “consultative services”⁹ to a secondary school teacher teaching core academic subjects to children with disabilities, the special

⁶ *Id.* Senator Kennedy stated: “We will have an opportunity to debate this issue and others in our committee and in the Senate in the weeks ahead.”

⁷ The U.S. Department of Education's IDEA regulations (at 34 C.F.R. 300.313(a)) permit states to determine whether developmental delay “applies to children ages 3 through 9, or a subset of that age range (e.g., ages 3 through 5)”.

⁸ The ESEA definition lists “English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography” as core academic subjects.

⁹ These services would include, for example, adjustments to the learning environment, modifications to instructional methods, and adaptations of the curriculum.

education teacher, to meet the definition of highly qualified, must meet the standards of the definition for all special education teachers (that is, be fully certified in the state as a special education teacher and demonstrate the knowledge and skills necessary to teach children with disabilities) but need not meet standards with respect to the academic subjects being taught (as the regular teacher must do to be highly qualified under NCLBA).¹⁰

Formula Allocation Provisions

S. 1248 would make minimal changes in current IDEA state and substate grant formulas, none of which would appear to change how IDEA funds are currently allocated. The Senate bill would simplify the language of the Part B grants-to-states formula, for example, by eliminating language on the “interim formula,” which had been in effect before the “permanent formula” became effective in FY2000. After that date, the interim formula would never become effective again. S. 1248 retains the permanent (i.e., current) formula language with the technical change that (funds permitting) states first are allocated the amount received for FY1999 and then remaining funds are allocated by the population-poverty formula.¹¹ FY1999 is the effective “base year” amount under current law; so this should not change IDEA allocations. S. 1248 would continue the authorization for Part B at “such sums as may be necessary.” Part B (including section 619, which authorizes state grants for IDEA preschool programs) would continue to be permanently authorized.

S. 1248 would specify a calculation of the maximum amount available “for awarding grants under this part for any fiscal year.” This total would be calculated based on the total number of children with disabilities served for school year 2002-2003 times 40% of national average per pupil expenditure (APPE).¹² The total amount for each successive year would be determined by increasing this amount by an annual factor derived 85% from overall growth in child population and 15% from overall growth in children living in poor families.¹³ This amount would presumably be distributed to states, outlying areas,¹⁴ and the Bureau of Indian Affairs according to current-law provisions. Thus S. 1248 apparently would eliminate the provision in

¹⁰ For further information on NCLB teacher requirements, see CRS Report RL30834, *K-12 Teacher Quality: Issues and Legislative Action*.

¹¹ For further information on IDEA grant formulas under current law, see CRS Report RL31480, *Individuals with Disabilities Education Act (IDEA): State Grant Formulas*.

¹² Maximum state grants (the basis of “full funding” for IDEA) are calculated based on 40% of the national average per pupil expenditure (APPE) times the number of children with disabilities the state serves.

¹³ These percentages parallel the weights given to and the age ranges for population and poverty in the grants-to-states formula. Age ranges for population and poverty vary according to the age ranges for children with disabilities in the various states.

¹⁴ S. 1248 would make a change in funding for the “freely associated states” of the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau. Under current law, these entities receive IDEA Part B funds through a competition funded as part of the set-aside for outlying areas and the freely associated states. Under S. 1248, each of these entities would receive a grant equal to the amount received for FY2003 under Part B. For FY2003, the total amount for these entities is about \$6.6 million.

current law determining a state's maximum state grant at 40% of APPE times the number of children with disabilities the state serves. This provision would have no impact on a state's allocation until the state became eligible for its maximum grant. The presumed eventual impact of this change would be to remove incentives for states to "over-identify" children with disabilities to increase their maximum grants. It is important to note that such a limitation on child count for the purposes of determining maximum state grants has no impact on who must be served under Part B of IDEA.

S. 1248 would make certain changes in provisions governing state reserves for administration and other state-level activities. Under current law, the maximum amounts states may reserve from their Part B grants for state-level activities are determined by increasing the prior-year reserve by the lesser of the rate of inflation or the percentage increase, if any, in a state's grant. Since appropriations for the Part B grants-to-states program have been growing at rates well above inflation, the state reserves have been increased from year to year by inflation, i.e., at rates well below growth rates of overall grants to states. Of the amount reserved, states may designate for state administration 20% or a minimum of about \$570,000,¹⁵ whichever is greater. Currently these provisions mean that states can retain for state purposes, on average, about 10% of their state grants and about 2% of state grants, on average, for administration. But these percentages vary somewhat from state to state, and, under current law, will almost certainly change (probably decreasing) in the future.¹⁶ The amount remaining from the total state reserve after subtracting the amount for state administration can be used for other state-level activities, such as direct services provided by states and assistance to LEAs in meeting personnel needs.¹⁷

S. 1248 would permit states to reserve for state administration the maximum reserved for FY2003 or \$800,000, whichever amount is greater. Apparently these amounts would be increased by inflation each year. With the exception of the increased minimum for administration, states' administrative reserves should be the same as those under current law. S. 1248 would change the maximum amount states could reserve for other state activities and would enlarge the scope of those activities. For FY2004 and FY2005, states could reserve up to 10% of their total grants after subtracting the amount reserved for state administration.¹⁸ Beginning in FY2006, the maximum amount for other state activities would be adjusted by the rate of inflation. This approach would continue through FY2009. Under the Senate proposal, amounts for other state activities could be appreciably larger than under current law for fiscal years 2004 and 2005. For the next 4 fiscal years, the growth rate would be the same

¹⁵ This minimum amount is also inflation-indexed under current law.

¹⁶ Current maximum state set-asides vary from 8.3% to 11.5% of state grants (based on data from the U.S. Department of Education (ED) Budget Service).

¹⁷ S. 1248 apparently repeals LEA capacity-building and improvement grants — the so-called "sliver grants."

¹⁸ State, for which the maximum reserve for state administration is \$800,000, would be permitted to reserve up to 12% of their total grant (after subtracting the amount for administration) for FY2004 and FY2005 for other state-level activities.

as the current-law growth rate if overall state grants grow at rates above inflation.¹⁹ However, these growth rates would be applied to a higher base than under current law.

As noted above, S. 1248 would increase the scope of other state-level activities — presumably justifying increased maximum state set-asides for these purposes. In addition to a variety of required and permitted uses of these funds, states would be required to use 2% of the state’s total grant (after reserving an amount for state administration) to assist LEAs to address the needs of “high-need” children with disabilities. The Senate bill defines a high-need child as one for whom providing a free appropriate public education (FAPE) costs more than 4 times the national average per pupil expenditure (APPE).²⁰ States would distribute funds to approved LEAs to pay 75% of the special education and related services costs that exceed 4 times APPE.

This provision addresses the issue of educating children with low incidence, high cost disabilities. This issue gained increased prominence when the Supreme Court decided the case *Cedar Rapids Community School District v. Garret F.*²¹ Garret F. was a child paralyzed from the neck down as a result of a motorcycle accident but who retained his mental abilities. His family had arranged for his physical care during the day for a number of years but eventually they requested the school to accept financial responsibility for his health care services during the school day. The Supreme Court, interpreting the definition of related services, held that the extensive services required by Garret F. must be provided by the school as long as they were not medical services that must be provided by a physician.²²

State and Local Eligibility

In General

Section 612(a) of IDEA provides for state eligibility “if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:....” These conditions include the core requirements of IDEA for the provision of FAPE and an individualized education program (IEP).²³ S. 1248 would change the language of section 612(a) by striking “demonstrates to the satisfaction of” and inserting “submits a plan that

¹⁹ If future growth rates in Part B grants to states are below inflation, growth in state set-asides under S. 1248 would be greater than under current law, which pegs set-aside growth rate to the lesser of inflation or a state’s overall grant growth rate.

²⁰ The applicable APPE for school year 2002-2003 is about \$7,500.

²¹ 526 U.S. 66 (1999).

²² For a more detailed discussion see CRS Report RS20104, *Cedar Rapids Community School District v. Garret F.: The Individuals with Disabilities Education Act and Related Services*.

²³ 20 U.S.C. §1412(a).

provides assurances to.” The Secretary of Education has interpreted current law to require the states to submit documents to support a procedural checklist. This change would eliminate these administrative procedural requirements.²⁴

Personnel Standards and Student Assessment

Although many of the state eligibility requirements in section 612 would not be changed under S. 1248, the bill would make some notable changes, in many cases to bring IDEA into alignment with and to elaborate on requirements under NCLBA. S. 1248 would amend requirements for state personnel standards and performance goals and indicators to align them with NCLBA requirements. For example, states would be required to “ensure that each special education teacher in the State who teaches in an elementary, middle, or secondary school is highly qualified not later than the 2006-2007 school year.” (See above the proposed definition of “highly qualified.”) S. 1248 would change the provision that states have a policy requiring LEAs to make “an ongoing good faith effort” in recruiting and hiring “appropriately and adequately trained personnel” to requiring LEAs to “take measurable steps to recruit, hire, train, and retain highly qualified personnel.” S. 1248 would apparently remove requirements regarding a state comprehensive system of personnel development and regarding hiring and retraining personnel to meet highest state personnel standards.²⁵ S. 1248 would require that providers of related services (such as, physical therapy and counseling services) meet standards that “are consistent with” state requirements “that apply to the professional discipline in which” related services are being provided.²⁶

S. 1248 would align IDEA performance goals and indicators with requirements for adequate yearly progress (AYP),²⁷ standards, and assessments under NCLBA. In general, children with disabilities would be required to participate in state and districtwide testing programs as under NCLBA. As determined by the individualized education program (IEP) team, depending on each child’s needs, he or she could take assessments with or without accommodations (e.g., alternative testing environments, such as a quieter location than the regular classroom). Such assessments must be aligned with the state’s “challenging academic content and academic achievement standards.” For some, presumably more severely disabled children, alternative assessments can be used. These alternative assessments are to be aligned with the

²⁴ S. 1248 would make a similar change to section 613 regarding LEA eligibility (20 U.S.C. §1413(a)).

²⁵ 20 U.S.C. §1412(a)(14) and (15).

²⁶ S. 1248 would permit a parent to complain to the state educational agency (SEA) if he or she believed staff were not highly qualified as defined by the act but would not create “a right of action on behalf of an individual student” if a parent claimed that a staff person were not highly qualified. That is, the parent would have the right to complain to the SEA but would not have the right to seek remedies through the courts.

²⁷ Apparently S. 1248 would require separate reporting on drop out rates and graduation rates for children with disabilities. NCLBA requires that graduation rates be reported as part of the AYP requirements but does not explicitly require that they be disaggregated by subgroups of students, such as children with disabilities.

state's "challenging academic content and academic achievement standards" or with a state's content standards but with **alternative achievement standards**.

Private Schools

The state eligibility sections of IDEA contain provisions relating to children with disabilities in private schools, including when these children are unilaterally placed in private schools by their parents and when they are placed in private schools by public agencies. Under current law, when children with disabilities are unilaterally placed in a private school by their parents, the states must spend a proportionate amount of IDEA funds on these children. Special education and related services may be provided on the premises of private schools including parochial schools, and the requirements regarding child find are applicable to such children.²⁸

Currently, IDEA provides that when children with disabilities are placed in or referred to private schools by public agencies, the costs are to be paid by the public agency.²⁹ And, under current law, a court or a hearing officer may require an educational agency to reimburse the parents for the cost of the enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to the enrollment.³⁰ Current law allows for limitations on reimbursement in certain situations, such as notice that parents are required to provide or when there is a judicial determination of unreasonableness with respect to actions taken by the parents.³¹ Current law also provides for exceptions to this notice requirement, where the cost of reimbursement may not be reduced or denied for failure to provide notice if (1) the parent is illiterate, (2) compliance would result in physical or serious emotional harm to the child, (3) the school prevented the parent from providing such notice, or (4) the parents had not received the notice that the educational agency was required to provide.³²

S. 1248 would make changes in the current law regarding children enrolled in private schools by their parents. Currently IDEA states that "To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children...."³³ S. 1248 would add the phrase "in the school district served by a local educational agency" after the phrase "secondary schools." In addition, S. 1248 would add a phrase to the current law indicating that the funds expended for parentally placed private school children include direct services to these children and requiring these services "to the extent practicable." S. 1248 also would add detailed provisions concerning record keeping and child find,

²⁸ Section 612(a)(10)(A), 20 U.S.C. §1412(a)(10)(A).

²⁹ Section 612(a)(10)(B), 20 U.S.C. §1412(a)(10)(B).

³⁰ Section 612(a)(10)(C), 20 U.S.C. §1412(a)(10)(C).

³¹ *Id.*

³² *Id.*

³³ Section 612(a)(10)(A)(i), 20 U.S.C. §1412(a)(10)(A)(i).

including a consultation process with the LEA and representatives of children with disabilities parentally placed in private schools, and a compliance procedure that would give a private school official the right “to complain” to the SEA that the LEA did not engage in meaningful and timely consultation or did not give due consideration to the views of the private school official. A private school official would also have a right “to complain” to the Secretary of Education.

The current law regarding children with disabilities who are placed in private schools by public agencies would remain unchanged in S. 1248. However, changes would be made to the current law regarding payment for the education of children who are enrolled in private schools without the consent of the public agency. These changes would involve the exceptions to the limitation on reimbursement. S. 1248 would require that reimbursement shall not be reduced due to the parents’ failure to provide notice if the school personnel prevented the parent from providing such notice or the parents had not received notice of the notice requirement. In addition, S. 1248 would provide that the cost of reimbursement may, in the discretion of a court or hearing officer, not be reduced or denied if the parent is illiterate and cannot write in English, or compliance with the notice requirement would likely have resulted in physical or serious emotional harm to the child.

Local Eligibility

Section 613 contains requirements that LEAs must meet to be eligible to receive IDEA funds. Among these requirements are certain financial conditions to ensure that federal funds increase spending on special education rather than substitute for state and local spending. LEAs must ensure that Part B funds are used to supplement, not supplant (SNS) other special education funding, and that (with certain exceptions) LEAs cannot decrease spending for special education from one year to the next (the maintenance of effort (MOE) requirement). Under current law, one exception to these requirements is that LEAs can use up to 20% of the increase in their IDEA grants from one year to the next for meeting SNS and MOE requirements. S. 1248 would significantly change this exception by permitting LEAs to “treat as local funds” for the purpose of meeting SNS and MOE requirements up to 8% of their total Part B grants. Once a state received its maximum grant (discussed above), LEAs in that state could treat up to 40% of their grants as local funds. Presumably the purpose of these provisions is to provide LEAs with the potential of using funds otherwise required for special education for other purposes.³⁴

Under current law, the “treat as local” exception to SNS and MOE is available only to LEAs, not to states. S. 1248 would provide similar exceptions for states that fund at least 80% of the non-federal cost of educating children with disabilities and for states that are “the sole provider of free appropriate public education or direct service” for children with disabilities. Such states may treat IDEA funds “as general funds available” for supporting “educational purposes.” In the case of states, it would be the Secretary of Education who would prohibit states from exercising these

³⁴ As in current law, this option is not available to an LEA that the state determines “is unable to establish and maintain programs of free appropriate public education that meet the requirements of this subsection.”

exceptions based on the inability to provide adequate free appropriate public education.

S. 1248 would add certain local uses for IDEA funds. The Senate bill would allow LEAs to use IDEA funds for technology to implement case management activities. The Senate bill would permit LEAs to use up to 15% of their Part B grant for prereferral services. These services could be provided to students (from kindergarten to 12th grade but emphasizing those in kindergarten to 3rd grade) “who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment.” Activities that a LEA could undertake include provision of educational and behavioral services and support (“including scientifically based literacy instruction”) and professional development for teachers to provide such services. The Senate bill notes that “nothing in this subsection shall be construed to either limit or create a right to a free appropriate public education under this part.”

Evaluations and Individualized Education Programs (IEPs)

Provisions relating to evaluations and assessments and the IEP would be amended by S. 1248. Current law requires informed parental consent prior to the evaluation to determine whether a child qualifies under IDEA. It also provides some leeway to an LEA if a parent does not consent but it is deemed necessary to evaluate the child. S. 1248 would expand the LEA’s flexibility, if the parent does not provide consent or the parent does not respond to a request from the LEA to provide consent. In those cases, the LEA may proceed with an initial evaluation. In addition, if the parent does not provide consent for IDEA services or fails to respond to the LEA’s request, the LEA “shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide the special education and related services for which the local educational agency requested such informed consent.” With respect to the determination of whether a child has a specific learning disability, an LEA would “not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability.”³⁵

S. 1248 would make certain changes in the IEP. Some of these changes would be related to assessments and standards and would help align the IEP with state requirements under NCLBA requirements (discussed above). For example, the IEP would contain “a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments.”

³⁵ This provision presumably responds to criticism of the so-called “discrepancy model” for identifying children with learning disabilities. See, for example, Reid Lyon, et al. “Rethinking Learning Disabilities” in *Rethinking Special Education in a New Century*. Chester E. Finn, Jr., Andrew J. Rotherham, and Charles R. Hokanson, Jr. (eds.). Washington, D.C. Published by the Thomas B. Fordham Foundation and the Progressive Policy Institute, May 2001.

Presumably to reduce burden and paperwork, a member of the IEP team could be excused from attending if the parent of a child with a disability, the IEP member in question, and the LEA agree. The parent's agreement would have to be in writing. In a similar vein, the parent and the LEA can agree to make alterations to the IEP during the school year through a written process, rather than reconvening the IEP team to agree on alterations. Apparently, the IEP team would be required to meet at least annually to assess the IEP. Also with a view to reducing paperwork and burden, the LEA may offer the option of a three-year IEP to cover the last three years in the program for children with disabilities who have reached the age of 18.

Procedural Safeguards

Introduction

IDEA contains detailed procedural safeguards designed to ensure the provision of FAPE. One of the goals of S. 1248 is to "alleviate the stress in disagreements between schools and parents"³⁶ and to further this goal some changes were made in the procedural safeguards section of IDEA.

Statute of Limitations and Procedural Safeguards Notice

S. 1248 would add two new provisions regarding statutes of limitations: there is a statute of limitations requirement regarding the filing of a due process complaint and a statute of limitations requirement regarding filing a civil action after the decision of a hearing officer. The statute of limitations regarding the right to present complaints would require that a parent or a public agency request an impartial due process hearing within two years of the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint. However, "if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows." In addition, the Senate bill would provide for exceptions to the statute of limitations. The statute of limitations does not apply if the parent was prevented from requesting the hearing due to (1) the failure of the local educational agency to provide prior written or procedural safeguards notices, (2) false representations that the local educational agency was attempting to resolve the problem forming the basis of the complaint, or (3) the local educational agency's withholding of information from the parents. S. 1248 also requires that a party filing a civil action "shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action, in such time as the State law allows."

The Senate bill would also change the current requirements regarding when a copy of procedural safeguards is given to the parents of a child with a disability. Generally, the Senate bill would require that a copy of the procedural safeguards available be given to the parents only one time a year except that a copy would also be given (1) upon initial referral or parental request for evaluation, (2) upon

³⁶ 149 Cong. Rec. S7836 (daily ed. June 12, 2003)(remarks of Sen. Gregg).

registration of a complaint under subsection (b)(6), and (3) upon request by a parent. The contents of the procedural safeguards notice would be unchanged from current law.

Due Process Hearings and Preliminary Meetings

Under current law, when a complaint is received from a parent of a child with a disability under IDEA with respect to the identification, evaluation, educational placement, provision of a free appropriate public education or placement in an alternative educational setting, the parents have an opportunity for an impartial due process hearing³⁷ with a right to appeal.³⁸ Any party to this hearing has the following rights:

- to be accompanied and advised by counsel and by individuals with special knowledge or training regarding children with disabilities,
- to present evidence and confront, cross-examine, and compel the attendance of witnesses,
- to receive a written or electronic version of the verbatim record of the hearing, and
- to receive the written or electronic findings of facts and decisions.³⁹

The decision made in the hearing is final, except that any party may appeal and has the right to bring a civil action in state or federal court. At the court's discretion, attorneys' fees may be awarded as part of the costs to the parents of a child with a disability who is the prevailing party.⁴⁰

The Senate bill would make changes to the IDEA due process procedures. First, a due process hearing may be requested by either the parents of a child with a disability or the LEA. Second, S. 1248 would add a requirement for a preliminary meeting prior to a due process hearing to provide an opportunity to resolve the complaint. This meeting must occur within fifteen days of receiving notice of the parents' complaint, include a representative of the public agency who has decision making authority, and cannot include an attorney for the LEA unless the parent is also accompanied by an attorney. At the meeting, the parents shall discuss their complaint and the specific issues that form the basis of the complaint and the LEA is to be provided an opportunity to resolve the complaint. The parents and the LEA may agree in writing to waive the preliminary meeting or agree to use the mediation process. If the LEA has not resolved the complaint to the satisfaction of the parents within fifteen days of the receipt of the complaint, the due process hearing may occur, with its applicable time lines. If an agreement is reached at the preliminary meeting, the agreement shall be set forth in a written settlement agreement, signed by the parents and a representative of the public agency who has decision making

³⁷ 20 U.S.C. §1415(f), P.L. 105-17 §615(f).

³⁸ 20 U.S.C. §1415(g), P.L. 105-17 §615(g).

³⁹ 20 U.S.C. §1415(h), P.L. 105-17 §615(h).

⁴⁰ The provision on attorneys' fees was added by Congress in the Handicapped Children's Protection Act, P.L. 99-372.

authority, that is enforceable in court. The Senate bill would not allow attorneys' fees for the preliminary meeting.

The Senate bill also would add requirements to the procedures requiring that either party, or the attorney representing a party, provide a due process complaint notice to the other party. Under current law, the requirement for notice is applicable only to the parents of a child with a disability; the Senate bill would impose these requirements on either party. The Senate bill would also provide that a due process hearing may not occur until the party, or the attorney representing the party, files a notice that meets specified requirements, including a new requirement that in the case of a homeless child or youth available contact information for the child and the name of the school the child is attending must be included.⁴¹ In addition, S. 1248 states that this due process notice shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer in writing that he or she believes the notice has not met the requirements. This written notification must be sent within twenty days of receiving the complaint and within five days of receipt, the hearing officer shall make a determination concerning whether the notification meets the requirements of section 615(b)(7)(A).

The Senate bill would change the issues that are allowed to be raised in the due process hearing. The party requesting the due process hearing would not be allowed to raise issues at the due process hearing that were not raised in the notice required by section 615(b)(7)(A) unless the other party agrees otherwise. However, the bill would allow a parent to file a separate due process complaint on an issue separate from the due process complaint already filed. The Senate bill also would require that the decision made by a hearing officer be made on substantive grounds "based on a determination of whether the child received a free appropriate public education." However, if a matter alleges a procedural violation of IDEA, S. 1248 would allow a hearing officer to find that a child did not receive FAPE under the following conditions. The procedural inadequacies must have:

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

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

The Senate bill also would expand upon the requirements of the hearing officer. Under current law, the hearing officer may not be an employee of the state educational agency or the local educational agency involved in the education or care

⁴¹ The other requirements are essentially those in current law. The notice must include the name of the child, his or her address, the name of the school he or she is attending, a description of the nature of the problem of the child relating to such proposed initiation or change in placement, including the facts relating to such problem, and a proposed resolution of the problem to the extent known and available to the party at the time. 20 U.S.C. §1415(b)(7).

of the child.⁴² This requirement is kept by the Senate bill and, in addition, S. 1248 would require that the hearing officer (1) not be a person having a personal or professional interest that conflicts with the person's objectivity in the hearing, (2) possess a fundamental understanding of the act and federal and state regulations and judicial interpretations, (3) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice, and (4) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

S. 1248 would amend current administrative procedures to specifically authorize the parent of a child with a disability to represent the child in judicial actions without the assistance of an attorney.

Discipline Issues

The Senate bill would make changes in the manner in which children with disabilities who violate a school rule are treated. Senator Gregg described the bill as simplifying “the framework for schools to administer the law, while ensuring the rights and the safety of all children.”⁴³

Current Law. Generally, under current law, a child with a disability is not immune from disciplinary procedures; however, these procedures are not identical to those for children without disabilities.⁴⁴ If a child with a disability commits an action that would be subject to discipline, school personnel have several options. These include:

- a suspension for up to ten days,
- placement in an interim alternative education setting for up to forty-five days for situations involving weapons or drugs,
- asking a hearing officer to order a child placed in an interim alternative educational setting for up to forty-five days if it is demonstrated that the child is substantially likely to injure himself or others in his current placement, and
- conducting a manifestation determination review to determine whether there is a link between the child's disability and the misbehavior. If the child's behavior is not a manifestation of a disability, long term disciplinary action such as expulsion may occur, except that educational services may not cease.⁴⁵

Changes in Placement. S. 1248 would revise the language in current law to allow school personnel to order a change in the placement of a child with a disability who violates a code of student conduct to an appropriate interim alternative

⁴² 20 U.S.C. §1415(f)(3).

⁴³ 149 Cong. Rec. S7836 (daily ed. June 12, 2003)(remarks of Sen. Gregg).

⁴⁴ For a more detailed discussion of discipline and IDEA see CRS Report 98-42, *The Individuals with Disabilities Education Act: Discipline Provisions in P.L. 105-17*.

⁴⁵ 20 U.S.C. §1415(k), P.L. 105-17 §615(k).

educational setting, another setting or suspension for not more than ten school days. In addition, when the school personnel seek a change in placement that would exceed ten school days, the Senate bill would allow children with disabilities to be disciplined in the same manner as children without disabilities if the behavior in question was not a manifestation of the child's disability, except that educational services could not cease.⁴⁶

The Senate bill also would change the current law relating to interim alternative educational settings. The bill provides that school personnel may remove a student to an interim alternative educational setting for not more than forty-five days, regardless of whether the behavior is determined to be a manifestation of a disability where a child with a disability

- carries or possesses a weapon at school, on school premises, or a school function, under the jurisdiction of a state or local educational agency,
- knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a state or local educational agency, or
- has committed serious bodily injury⁴⁷ upon another person while at school or at a school function under the jurisdiction of a state or local educational agency.

S. 1248 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. When a child with a disability is removed from his or her current placement pursuant these authorities, S. 1248 would require that 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. In addition, the bill would require that the child receive behavioral intervention services designed to address the behavior violation so that the violation does not recur and a behavior assessment if the LEA did not conduct one prior to when the violation occurred.

Under S. 1248, 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

⁴⁶ S. 1248 does not directly change the provision in current law requiring that educational services be provided to children with disabilities even if they have been suspended or expelled. Current law 20 U.S.C. §1412(a)(1)(A). However, as noted previously, S. 1248 would change the general statement of state eligibility from “demonstrates to the satisfaction” of the Secretary to “provides assurances to.”

⁴⁷ Serious bodily injury would be a new category added by S. 1248. The Senate bill defines the term in the same manner as in 18 U.S.C. §1365(h)(3) which states: “the term ‘serious bodily injury’ means bodily injury which involves — (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”

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, S. 1248 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.

Stay Put Provision and Placement During Appeals. 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 Senate bill does 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;⁴⁸ however, there are some changes regarding stay put for placements during appeals. Under current law, when a parent requests a hearing regarding a disciplinary action where a child may be placed 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 expiration of the time period.⁴⁹ S. 1248 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(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.⁵⁰

The Senate bill requires the State or local educational agency to arrange for an expedited hearing to occur within twenty school days of the date of the request for the hearing.⁵¹ S. 1248 also would delete the provision in current law regarding current placement and expedited hearings.⁵²

Manifestation Determination. S. 1248 also contains revised language regarding the manifestation determination. Manifestation determinations do not have to be conducted prior to taking a disciplinary action for ten consecutive school days or less or for a removal in cases involving weapons, drugs, or serious bodily injury.

⁴⁸ 20 U.S.C. §1415(j); S. 1248, §615(j).

⁴⁹ 20 U.S.C. §1415(k)(7).

⁵⁰ S. 1248, §615(k)(4).

⁵¹ *Id.*

⁵² 20 U.S.C. §1415(k)(7)(B)-(C).

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. Current law contains similar requirements including the requirement that the IEP team consider all relevant information. However, the current law specifically lists examples of the information that must be considered.⁵³

Protections for Children not Yet Eligible for Special Education and Related Services. Current law provides that a child who has not been determined to be eligible for special education and related services and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, may seek the protections of IDEA if the local educational agency had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. The current law sets forth certain situations where a local educational agency shall be deemed to have knowledge that a child is a child with a disability.⁵⁴ S. 1248 would amend this provision, in part, by adding 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 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.

Electronic Mail. S. 1248 would allow the parent of a child with a disability to elect to receive the notices required under section 615 by email if the public agency makes such option available.

Oversight and Administrative Provisions

Monitoring, Withholding, and Judicial Review

S. 1248 would make substantial changes to section 616.⁵⁵ This section, currently entitled "Withholding and Judicial Review," requires the Secretary of Education to withhold some or all of a state's Part B funding, or refer the matter for appropriate enforcement action, if "there has been a failure by the State to comply substantially with any provision of this part" or if an LEA or SEA fails to comply

⁵³ 20 U.S.C. §1415(k)(4)(C).

⁵⁴ 20 U.S.C. §1415(k)(8).

⁵⁵ 20 U.S.C. §1416.

with its conditions of eligibility under Part B.⁵⁶ The withholding may be limited to programs or projects, or portions thereof, affected by the failure. In addition, the section provides for judicial review, if a state “is dissatisfied with the Secretary’s final action with respect to the eligibility of the State under section 612.”⁵⁷

S.1248 would make substantial changes to these provisions. S. 1248 would require the Secretary to “monitor implementation of this act” through oversight of the States’ exercise of general supervision using “focused monitoring,” which would concentrate on improving “educational results and functional outcomes for all children with disabilities, while ensuring compliance with program requirements, with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities.” The bill would require the Secretary and the states to monitor priority areas: the provision of FAPE in the least restrictive environment, the provision of transition services, state exercise of general supervisory authority and over representation of racial and ethnic groups in special education. The Secretary also may examine other relevant information and data.

The Senate bill would require the Secretary to implement and administer a system of required indicators that measures the progress of states in improving their performance. Using these indicators, the Secretary would review the performance of children with disabilities in the state on assessments, dropout rates and graduation rates, and compare these results to the performance and rates for all children. S. 1248 also would require the state to have a compliance plan developed in collaboration with the Secretary.

Under the Senate bill, the Secretary would be required to examine relevant state information and data annually to determine if the state is making satisfactory progress toward improving educational results for children with disabilities and is in compliance with the provisions of IDEA. If the Secretary determines that a state is not making satisfactory progress, one or more actions must be taken, including directing the use of state level funds for technical assistance and withholding between 20% and 50% of the amount a state may retain for state-level activities. If the Secretary determines that a state has failed to meet the benchmarks in the state compliance plan and make satisfactory progress in improving educational results at the end of the fifth year after the Secretary has approved the compliance plan, the Secretary may take further actions, including suspending payment to a recipient. However, S. 1248 also provides that if the Secretary determines that “a State is not in substantial compliance with any provision of this part,” additional actions would be required, such as requiring the preparation of “a corrective action plan or improvement plan,” imposing “special conditions on the State’s grant,” and further withholding of funds for state-level activities. In addition to this graduated approach to sanctions, S. 1248 also contains a provision for “egregious noncompliance.” At any time that the Secretary determines that a state is in egregious noncompliance or is willfully disregarding the provisions of IDEA, the Secretary may take the actions specified above and may also institute a cease and desist action and refer the case to

⁵⁶ 20 U.S.C. §1416(a).

⁵⁷ 20 U.S.C. §1416(b).

the Officer of the Inspector General. If action is taken regarding an egregious violation or after five years from the approval of the compliance plan, the Secretary would be required to report to Congress on the specific action taken and the reasons for the action.

S. 1248 would give the Secretary discretion when withholding payments to limit the withholding to programs or projects, or portions thereof, that are affected by the failure. If a state is dissatisfied with the Secretary's final action, the state may seek judicial review in the appropriate U.S. court of appeals and such decision may be appealed to the Supreme Court.

Finally, the Senate bill would require that the State educational agency monitor and enforce implementation of IDEA. S. 1248 would require the SEA, upon determination that an LEA is not meeting the requirements of Part B, to prohibit the LEA from treating funds received under Part B as local funds.

ED Administration and Program Information

Section 617 authorizes certain activities for the Secretary of Education to carry out, such as issuing necessary regulations to carry out provisions of Part B of IDEA, maintaining confidentiality of personal information, and hiring qualified personnel to carry out various duties. S. 1248 would add to this section a requirement that the Secretary "publish and widely disseminate" model forms, such as a model IEP form.

Section 618 requires states and the Secretary of the Interior (because the Bureau of Indian Affairs receives IDEA funds) to provide data to the Secretary of Education. S. 1248 adds requirements to this section. For example, it adds reporting requirements related to disciplinary actions and related to procedural safeguards.

Preschool, Infants and Toddlers, and National Programs

Section 619 of IDEA, which authorizes services for preschool children with disabilities, appears to be virtually unchanged by S. 1248. Most of the provisions of Part C of IDEA, which authorizes services for infants and toddlers with disabilities, would remain the same under S. 1248. One change of possible significance to Part C involves additional language regarding states' definition of developmental delay. Part C aims to serve infants and toddlers experiencing delay in physical, cognitive, and other areas of development. Current law requires states to determine a definition of developmental delay as a criterion for eligibility for Part C grants, but leaves it to states to determine their own definition. S. 1248 would require, at a minimum, that the definition include all infants and toddlers experiencing a developmental delay of 35% or more in one area of development or a delay of 25% or more in two or more areas of development.

Another addition to Part C under S. 1248 would be the option for states to continue serving section 619-eligible children eligible (that is, preschool children

with disabilities) under Part C until these children reach kindergarten age (usually age 5). Such programs would be developed and implemented by the state educational agency (SEA) and the Part C lead state agency (if different from the SEA). The programs would have to include “an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills.” Participation of children with disabilities ages 3 to 5 in such programs would be based on informed written parental consent. In addition, parents of participating children would receive annual information on their rights to pursue services for their children under these Part C provisions or under Part B and differences in services and parental rights under the two programs. Part B funds (in addition to Part C funds) could be used to support this program. S. 1248 stipulates that “nothing in this subsection shall be construed to require a provider of services under this part [i.e., Part C] to provide a child served under this part with a free appropriate public education.” The bill would require the Secretary to reserve 10% of any increase over the FY2003 appropriation for Part C⁵⁸ for “bonus grants” to states carrying out this option.

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

S. 1248 would make significant changes to Part D. Subpart 1 would focus state grants on personnel preparation and in-service training. These grants would remain competitive until appropriations reached \$100 million.⁵⁹ When that amount is reached, the Secretary would first allocate sufficient funds to ensure that multi-year grants already underway would be funded to completion. Remaining funds would be distributed to states by a formula based on each state’s share of the overall amount states received under the Part B grants-to-states program for the preceding year,⁶⁰ except that no state would receive less than ¼% “of the amount made available under this part.”

Subpart 2 of Part D under S. 1248 would authorize “scientifically based” research, technical assistance, demonstration projects, and dissemination. One significant change that the bill would make is the establishment of a National Center for Special Education Research in the Institute of Education Sciences to sponsor research and evaluation related to IDEA and the needs of children with disabilities. Subpart 3 of Part D under S. 1248 would continue authorization for parent training and information centers and community parent resource centers, which provide

⁵⁸ The FY2003 appropriation for Part C is \$434,159,000.

⁵⁹ The current appropriation for state improvement grants is about \$51 million.

⁶⁰ For example, a state that received 1% of applicable funds during the previous fiscal year, would receive 1% of the funds available for allocation under this program.

assistance to parents of children with disabilities, and for technology development and media services.

S. 1248 would authorize new activities under subpart 4 of Part D related to interim alternative settings, behavioral support, and “whole school” intervention. This subpart would authorize the Secretary of Education to make grants to LEAs or consortia of LEAs and other entities, such as institutions of higher education and community-based organizations, to establish or enhance practices related to student behavior. These practices might include, for example, early identification of children “at risk for emotional and behavioral difficulties” and training of school personnel “on effective strategies for positive behavior intervention.” Grants also could focus on improving interim alternative settings providing FAPE for children with disabilities removed from their current placements for reasons of behavior problems.

Amendments to the Rehabilitation Act of 1973

S. 1248 makes a number of amendments to the Rehabilitation Act of 1973 to emphasize services to assist students make a transition from school to vocational rehabilitation (VR) services. Title I of the Rehabilitation Act authorizes funds for state vocational rehabilitation agencies to support a wide range of VR services to assist persons with disabilities engage in gainful employment. Services include assessment of an individual’s VR needs, counseling and guidance, and vocational and other training services. Persons are eligible for VR services if they have a physical or mental impairment that substantially impedes employment. Under the law, all individuals with disabilities are presumed to have the potential to engage in employment and to benefit from VR services.

S. 1248 would add a new authorization of appropriations under Title I for services to students with disabilities. Funds authorized are to be used to help students transition from school to vocational rehabilitation and achieve post-school goals. Funds are to be used by state VR agencies to provide vocational guidance, career exploration, job search skills and technical assistance to students, as well as outreach to students eligible for VR services. In addition, funds are to be used for training and technical assistance to state and local educational agencies and state personnel responsible for planning services to students. Under the proposal, students are defined as those age 14-21 who are eligible for VR services, and eligible and receiving IDEA services, or are eligible under Section 504 of the Rehabilitation Act.

The bill also requires that the act’s standards and indicators that are used to assess the VR program’s effectiveness, include measures of performance regarding transition assistance to students. State VR agencies must specify in their state plans the strategies they will use to improve transition services to students.⁶¹

⁶¹ This section was written by Carol O’Shaughnessy.