Congressional Research Service

Report 98-385

INDIVIDUALS WITH DISABILITIES EDUCATION ACT: PROPOSED AMENDMENT ON UNIFORM DISCIPLINARY POLICIES

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Updated May 5, 1998

Abstract. An amendment to the disciplinary procedures under the Individuals with Disabilities Education Act (IDEA) has been proposed. This amendment would allow state and local educational agencies to establish and implement uniform policies with respect to discipline for all children within their jurisdiction, including children with disabilities, and is identical to one offered and defeated during debate on IDEA reauthorization last year.

98-385 A
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Individuals with Disabilities Education Act: Proposed Amendment on Uniform Disciplinary Policies

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Summary

An amendment to the disciplinary procedures under the Individuals with Disabilities Education Act (IDEA) was proposed and withdrawn by Senators Gorton and Faircloth to H.R. 2646. This amendment would have allowed state and local educational agencies to establish and implement uniform policies with respect to discipline for all children within their jurisdiction, including children with disabilities, and was identical to one offered and defeated during debate on IDEA reauthorization last year. The amendment would have essentially returned the authority to the schools regarding discipline and the cessation of educational services that existed prior to the enactment of P.L. 94-142, the predecessor to IDEA. Although the proposed amendment was withdrawn, Senator Gorton indicated that it would be added to another education bill. This report discusses the arguments for and against the amendment's adoption and analyzes the legal implications of the proposed amendment. For a more detailed discussion of the existing disciplinary provisions in IDEA see Jones, "Individuals with Disabilities Education Act: Discipline Provisions in P.L. 105-17," CRS Report 98-42 (January 12, 1998).

Uniform Discipline Policies Amendment

Senators Gorton and Faircloth proposed an amendment to H.R. 2646, a bill to amend the Internal Revenue Code to allow tax-free expenditures from education individual retirement accounts for elementary and secondary school expenses which is currently pending in the Senate. The amendment, no. 2061, stated that section 615(k) of the Individuals with Disabilities Education Act shall be amended by adding the following provision: "Uniform disciplinary policies.--Notwithstanding any other provision of this Act, each State educational agency or local educational agency may establish and implement uniform policies with respect to discipline and order applicable to all children within its jurisdiction to ensure safety and an appropriate educational atmosphere in its

schools."[1] The amendment was withdrawn from H.R. 2646 but Senator Gorton indicated that "The present Gregg-Gorton amendment, or something very similar to it, will be presented at an early opportunity on some other bill that relates directly or indirectly to education. It will not go away. But I hope the next time that it is presented, it is presented on a bill that is almost certain to be signed by the President of the United States rather than vetoed by the President of the United States."[2]

The supporters of this type of amendment argue that it would eliminate a double standard with respect to the discipline of children with and without disabilities and give decision-making authority to the state and local authorities so they could tailor their policies to their particular situations.[3] The opponents of such an amendment argue that it would eliminate the rights of children with disabilities by giving school officials authority to remove these children if their behavior violated a uniform policy even if such behavior was a manifestation of a disability.[4]

Current Law

Under current law, a child with a disability is not immune from disciplinary procedures but neither are those procedures identical to those for children without disabilities. IDEA contains detailed due process protections for children with disabilities including the "stay-put" provision requiring that unless the state or local educational agency and the parents otherwise agree, the child shall remain in the then current educational placement of the child during any dispute over the child's education.[5] If a parent feels that a child with a disability is not receiving a free appropriate public education, a parent may invoke due process and ask for a hearing on the issue.

These provisions were included in IDEA due to congressional findings that children with disabilities were often not receiving an education or were receiving an inappropriate education. 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."[6] In addition, at the time of enactment of P.L. 94-142 there were a number of judicial decisions finding constitutional infirmities with the lack of education for children with disabilities when the states were providing

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[1] 144 Cong. Rec. S2436 (daily ed. March 23, 1998).

[2] 144 Cong. Rec. S3353 (daily ed. April 21, 1998)(Remarks of Senator Gorton).

[3] See 143 Cong. Rec. S4402 (daily ed. May 14, 1998)(Remarks of Senator Gorton).

[4] See 143 Cong. Rec. S4403 (daily ed. May 14, 1998)(Remarks of Senators Frist and Harkin).

[5] 20 U.S.C. §1415(j).

[6] H.Rep.No. 332, 94th Cong., 1st Sess. 11 (1975); S.Rep.No. 168, 94th Cong., 1st Sess. 8, *reprinted in* U.S.Code Cong. & Ad. News 1425, 1432.

education for children without disabilities.[7] In fact, one of these decisions, *Mills v. Board of Education,* involved seven school age children who had been excluded from the public schools and had been labeled as behavior problems, mentally retarded, emotionally disturbed, or hyperactive and received no education. The district court found that this denial of an education was a denial of constitutional due process.

The protections against a school unilaterally ceasing services to a child with a disability do not mean that school officials have no options regarding disciplining such children. School personnel may

- suspend a child with a disability for up to ten days,
- place a child with a disability in an interim alternative educational setting for up to forty five days for situations involving weapons and drugs,
- ask a hearing officer to order a child to be placed in an interim alternative educational setting for up to forty-five days if it is demonstrated that the child is substantially likely to injure himself or others in his current placement,
- conduct 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 long term suspension or expulsion may occur, except that educational services may not cease.

Legal Implications of the Amendment

If an amendment like the one proposed to H.R. 2646 were to be enacted, states and localities would be free to establish and implement their own disciplinary policies as long as these were uniformly applied to all children. This would essentially return the authority to the schools regarding discipline and the cessation of educational services that existed prior to enactment of P.L. 94-142. The states and localities would be free to establish disciplinary policies that are the same as current law, or more or less stringent than current law.

It could be argued that the requirement for uniformity would be a distinction from the pre P.L. 94-142 law and would provide some protections for children with disabilities since they could not be specifically singled out for exclusion. However, it could also be argued that the requirement for uniformity might work to the detriment of children with disabilities. For example, if a school district had a policy for expulsion for all children who injured other children, a situation could arise where a child with a seizure disorder could accidently hit and injure another child. If treated uniformly with the situation involving a child who beat up another child, both situations could result in expulsion. Similarly, if a school's policy was suspension or expulsion for the use of profane

[7] *PARC v. State of Pennsylvania,* 343 F.Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Education of the District of Columbia,* 348 F.Supp. 866 (D.D.C. 1972). The House Report for P.L. 94-142 indicated that following these decisions there were "46 cases which are completed or still pending in 28 States." H.Rep.No. 332, 94th Cong., 1st Sess 3 (1975).

language, a child with Tourette's syndrome which is often characterized by uncontrollable verbal expressions, could be treated similarly to a child without a disability and be subjected to the same disciplinary procedures under the proposed amendment.

An amendment like that proposed to H.R. 2646 would only change IDEA's due process protections with regard to discipline and order; a parent's due process rights with regard to placement and other non disciplinary matters would be unchanged. However, the proposed amendment could be a significant limitation on the due process protections available to children with disabilities since parents would not have a federally guaranteed right to challenge the change in placement of a child with a disability resulting from disciplinary action. The exact limitations, if any, would depend on the specific policies that the states and localities adopted.

Another issue raised by the amendment proposed to H.R. 2646 is whether parents could pursue other legal avenues when disputes arise concerning discipline. The Supreme Court has not dealt with the constitutional issues presented by *PARC* and *Mills*, but it has discussed these cases in the context of IDEA's statutory provisions. In *Board of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982), the Court examined the legislative history of P.L. 94-142 and noted the importance attached to *PARC* and *Mills*, finding that the principles they established were the principles that guided the drafters of the legislation. Similarly, in *Honig v. Doe*, 484 U.S. 305 (1988), the Court found that the decisions in *PARC* and *Mills* "demonstrated that many disabled children were excluded pursuant to state statutes or local rules and policies, typically without any consultation with, or even notice to, their parents." *Id.* At 309-310.

It could be argued that if language like that in the amendment proposed to H.R. 2646 were enacted, constitutional arguments may be advanced challenging the policies of state and local educational agencies. It might also be possible for parents to sue under the Americans with Disabilities Act (ADA), 42 U.S.C. §§12101 *et seq.*, or section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. The likelihood of success of cases brought under the constitution and these statutes is not clear since the Supreme Court has not spoken on the issues and lower courts have infrequently addressed them due to the existence of the statutory protections of IDEA.