

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a light blue color with darker blue outlines for continents. The hourglass is centered on the page.

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Report RL31830

*The Individuals with Disabilities Education Act (IDEA):  
Selected Changes that Would be Made to the Law by H.R.  
1350, 108th Congress*

Nancy Lee Jones, American Law Division; and Richard N. Apling, Domestic Social Policy Division

Updated January 30, 2004

**Abstract.** 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. IDEA has been amended several times, most recently and most comprehensively by the 1997 IDEA reauthorization, P.L. 105-107. Congress is presently examining IDEA again and H.R. 1350, 108th Congress, passed the House on April 30, 2003.

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## **The Individuals with Disabilities Education Act (IDEA): Selected Changes that Would be Made to the Law by H.R. 1350, 108<sup>th</sup> Congress**

**Updated January 30, 2004**

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# The Individuals with Disabilities Education Act (IDEA): Selected Changes that Would be Made to the Law by H.R. 1350, 108<sup>th</sup> Congress

## 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 Originally enacted in 1975, the act responded to increased awareness of the need to educate children with disabilities and to judicial decisions requiring that states provide an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, 108<sup>th</sup> Congress, passed the House on April 30, 2003. In the Senate, S. 1248 was reported out of committee by a unanimous vote on June 25, 2003 and placed on the Senate legislative calendar under general orders on November 3, 2003. For a discussion of the Senate bill see CRS Report RL31971. This report will not be updated.

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# The Individuals with Disabilities Education Act (IDEA): Selected Changes that Would be Made to the Law by H.R. 1350, 108<sup>th</sup> Congress

## 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).<sup>1</sup> 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.<sup>2</sup>

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, 108<sup>th</sup> Congress, passed the House on April 30, 2003 by a vote of 251 to 171. The bill was marked up by the House Subcommittee on Education Reform on April 2 and marked up by the full Committee on Education and the Workforce on April 9 and 10, 2003. The Committee ordered the bill favorably reported by a vote of 29 to 19.<sup>3</sup> This report will discuss the major changes that H.R. 1350, if enacted as passed by the House, would make to current law. Note that when this report refers to H.R. 1350, it is referring to the bill as it was passed by the House on April 30, 2003. In the Senate, S. 1248 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. For a discussion of the Senate bill see CRS Report RL31971.

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<sup>1</sup> 20 U.S.C. §1400 *et seq.*

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

<sup>3</sup> H. Rep. No. 77, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2003).

Several issues relating to IDEA were not included in the final version of H.R. 1350 as passed by the House. Among these were mandatory full funding<sup>4</sup> and parental choice provisions.<sup>5</sup>

## Definitions and Allocation Formula Provisions

### Definitions

The definitions in current law are largely unchanged by H.R. 1350. However, there are a few changes, most notably an amendment adopted during debate on the House floor amending the definition of FAPE. Current law defines FAPE as meaning “special education and related services that – (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under Sec. 614(d).”<sup>6</sup> The amendment would add the following provision at the end of section C: “That is reasonably calculated to provide educational benefit to enable the child with a disability to access the general curriculum.” The intent of the amendment, as expressed by a colloquy during House floor debate, is to codify the interpretation of FAPE contained in the Supreme Court decision *Board of Education of the Hendrick Hudson Central School District v. Rowley*.<sup>7</sup>

In addition, a new definition of “highly qualified” would be added by H.R. 1350 with the same meaning as the term in section 9101 of the Elementary and Secondary Education Act (ESEA). This helps to align IDEA with the new requirements for highly qualified teachers mandated in the No Child Left Behind Act (NCLBA).<sup>8</sup>

Definitions of children with disabilities for the purpose of IDEA were discussed during the House debate on H.R. 1350. An amendment offered by Rep. Shadegg and passed on the House floor provides in part that it is the sense of Congress that “students who have not been diagnosed by a physician or other person certified by a State health board as having a disability (as defined under the Individuals with Disabilities Education Act) should not be classified as children with disabilities for

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<sup>4</sup> For a discussion of full funding issues see CRS Report RL30810, *The Individuals with Disabilities Education Act (IDEA): Issues Regarding ‘Full Funding’ of Part B Grants to States*; and CRS Report RL31480, *The Individuals with Disabilities Education Act (IDEA): State Grant Formulas*.

<sup>5</sup> For a discussion of IDEA and school choice see CRS Report RL31489, *The Individuals with Disabilities Education Act (IDEA): Possible Voucher Issues*.

<sup>6</sup> 20 U.S.C. §1401(8).

<sup>7</sup> 458 U.S. 176 (1982).

<sup>8</sup> P.L. 107-110, codified in part at 20 U.S.C. §6301 *et seq.*, §6601 *et seq.*, §6801 *et seq.*, §7101 *et seq.*, §7201 *et seq.*, §7301 *et seq.*, §7401 *et seq.*, §7702, §7703, §7707, §7709, §7714, §7801 *et seq.* For a discussion of IDEA and NCLBA see CRS Report RL31838, *The Individuals with Disabilities Education Act (IDEA): Implications of Selected Provisions in the No Child Left Behind Act (NCLBA)*.

purposes of receiving services under that Act.” Also, H.R. 1350 would require several GAO studies on various IDEA issues (see below). One of these studies would be a review of variation among the states in definitions and evaluation processes relating to the provision of services under IDEA to children having conditions falling under the terms “emotional disturbance,” “other health impairments,” and “specific learning disability.”<sup>9</sup>

## Allocation Formula Provisions

H.R. 1350 would make minimal changes in IDEA state and substate grant formulas, none of which would appear to change how IDEA funds are currently allocated. The 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. H.R. 1350 would limit the number of children with disabilities ages 3 to 17 that are to be counted for the purposes of determining maximum state grants to 13.5% of all children in that age group within a state.<sup>10</sup> This provision would have no impact on a state’s allocation until the state became eligible for its maximum grant and then only if the number of children with disabilities served was greater than 13.5% of all children ages 3 to 17 in the state.<sup>11</sup> The presumed impact of this change would be to discourage states from “over-identifying” children with disabilities to increase their maximum grants.

Under current law, Part B authority for appropriations is permanent and provides for “such sums as may be necessary.”<sup>12</sup> H.R. 1350 would specify authorized amounts for Part B appropriations, except for the preschool program under section 619. These authorized amounts increase annually from FY2004 (\$11.1 billion authorized—a \$2.2 billion increase over the FY2003 appropriations) and FY2005 (\$13.6 billion authorized—a \$2.5 billion increase over the FY2004 authorization)<sup>13</sup> to FY2010 (\$25.2 billion authorized). After FY2010, authorizations would return to

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<sup>9</sup> This study was added by the Manager’s amendment on the House floor.

<sup>10</sup> 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. For further information on IDEA grant formulas under current law, see CRS Report RL31480, *Individuals with Disabilities Education Act (IDEA): State Grant Formulas*.

<sup>11</sup> Based on currently available data, 4 states’ percentages are greater than 12%: West Virginia, Rhode Island, Maine, and Massachusetts.

<sup>12</sup> Section 611(j), 20 U.S.C. §1411(j).

<sup>13</sup> Note that H.Rept. 108-71 (accompanying H.Con.Res. 95—the Concurrent Resolution on the Budget for FY2004) states that the resolution’s levels for Function 500 “accommodate” a \$2.2 billion increase for Part B grants to states for FY2004 and a \$2.5 billion increase for FY2005 for an FY2005 total of \$13.6 billion (p.88).

“such sums” for FY2011 and subsequent fiscal years. Thus the permanent authorization of Part B grants to states is maintained.<sup>14</sup>

H.R. 1350 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 administration and 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 state grants. 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. Of this amount, states may reserve for state administration 20% or a minimum of about \$570,000,<sup>15</sup> 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.<sup>16</sup>

Although H.R. 1350 apparently retains current-law language related to state set-asides, it would add language (based on an accepted floor amendment offered by Reps. McKeon and Woolsey) that appears to override provisions on how much states can reserve for state-wide activities. Based on this language, for any fiscal year for which a state’s Part B grant is equal to or greater than its FY2003 grant, H.R. 1350 would set the maximum a state could retain for state-level activities at the amount it retained in FY2003.<sup>17</sup> In addition, H.R. 1350 would increase the state minimum for administration to \$750,000; however, this minimum amount would not be inflation-adjusted as it is in current law.

H.R. 1350 would allow states to use up to 40% of the amount reserved for state-level activities for establishing and implementing “cost or risk sharing funds, consortia, or cooperatives to assist local educational agencies in providing high cost special education and related services.” This provision (together with the permitted use of local funds discussed below) 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.*<sup>18</sup> 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

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<sup>14</sup> H.R. 1350 would also maintain the permanent authorization of the preschool program authorized under section 619 of Part B (Section 619(j), 20 U.S.C. §1419).

<sup>15</sup> This minimum amount is also inflation-indexed under current law.

<sup>16</sup> 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).

<sup>17</sup> Apparently if a state’s grant was less than its FY2003 amount, current language would apply; that is, its maximum reserve would be its prior-year reserve increased by inflation.

<sup>18</sup> 526 U.S. 66 (1999).



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.<sup>19</sup>

Current law specifies uses for reserves for state-level activities, including providing direct services to children with disabilities, administering monitoring and complaint resolution, and establishing the mediation process. H.R. 1350 would add several permitted uses of funds for state-level activities, including implementing voluntary binding arbitration and developing and maintaining a prereferral educational support system (discussed below).<sup>20</sup> H.R. 1350 would require states to distribute the remaining amount to local educational agencies (LEAs).

## State and Local Eligibility

### State Eligibility

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).<sup>21</sup> H.R. 1350 would change the language of section 612(a) by striking “demonstrates to the satisfaction of” and inserting “reasonably demonstrates to.” The exact implications of this change are not clear. However, “reasonably demonstrates to” would appear to be a less stringent requirement than the current law version of “demonstrat(ing) to the satisfaction of the Secretary.”

The House report discusses this change and indicates that it was made in response to a concern about the Department of Education overemphasizing compliance with process. The report states: “the bill includes language modifying the standard of oversight to allow States to reasonably demonstrate to the Secretary that the State has in effect policies and procedures to ensure compliance with the Act. The Committee does not intend this to imply that States do not need to implement effective policies or procedures under the Act or demonstrate the existence of effective policies and procedures. The change in language is not intended to provide a rationalization to States for failure to effectively implement the Act. Instead, the change is intended to ensure that the Secretary is focused on ensuring overall compliance with the Act and not forcing States to change individual words or phrases

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<sup>19</sup> 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*.

<sup>20</sup> H.R. 1350 would maintain the requirement under current law for states to use a portion of increases in state grants for local capacity-building and improvement grants (often termed “sliver grants”) (sec. 611(f)(4), 20 U.S.C. 1411(f)(4)).

<sup>21</sup> 20 U.S.C. §1412(a).

within their laws, policies, or regulations unless there is a clear contradiction of substantive portions of the Act.”<sup>22</sup>

H.R. 1350 would modify some state eligibility requirements (in Section 612) to bring them in line with principles and requirements of the No Child Left Behind Act (NCLBA).<sup>23</sup> H.R. 1350 would amend requirements for state personnel standards and performance goals and indicators to align them with NCLBA requirements. For example, states would have to “ensure that special education teachers who teach core academic subjects [e.g., mathematics and reading and language arts] are highly qualified in those subjects.”<sup>24</sup> H.R. 1350 would apparently remove requirements regarding a state comprehensive system of personnel development and regarding hiring and retraining personnel to meet highest state personnel standards.<sup>25</sup> Required state performance goals for children with disabilities would have to be “the same as the State’s definition of adequate yearly progress . . . under section 1111(b)(2)(C) of the Elementary and Secondary Education Act of 1965,” which NCLBA reauthorized and significantly amended.<sup>26</sup>

## Private Schools

The state eligibility sections of IDEA contain provisions relating to children with disabilities in private schools generally, including when these children are unilaterally placed in private schools by their parents and when they are placed in private schools by public agencies.<sup>27</sup> Under current law, and the House bill, when children with disabilities are unilaterally placed by their parents in a private school, 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

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<sup>22</sup> H.Rept. 108-77 at 94.

<sup>23</sup> For further information on NCLB, see CRS Report RL31284, *K-12 Education: Highlights of the No Child Left Behind Act of 2001 (P.L. 107-110)*.

<sup>24</sup> For further information on NCLB teacher requirements, see CRS Report RL30834, *K-12 Teacher Quality: Issues and Legislative Action*.

<sup>25</sup> 20 U.S.C. §1412(a)(14) and (15).

<sup>26</sup> For further information on NCLB testing requirements, see CRS Report RL31407, *Educational Testing: Implementation of ESEA Title I-A Requirements Under the No Child Left Behind Act*; CRS Report RL31487, *Education for the Disadvantaged: Overview of ESEA Title I-A Amendments Under the No Child Left Behind Act*, notice of proposed rule making regarding Title I and children with disabilities (68 Fed. Reg. 13796 (March 20, 2003)); and ED non-regulatory draft guidance on NCLBA standards and assessments (March 10, 2003), available at: [<http://www.ed.gov/topics/topicsTier2.jsp?&top=Policy&subtop=Policy+guidance&subtop2=Elementary+%26+secondary+education&type=T>].

<sup>27</sup> For a more detailed discussion of current law regarding IDEA and children in private schools see CRS Report 98-85 *Individuals with Disabilities Education Act: Services in Private Schools under P.L. 105-17*.

schools including parochial schools, and the requirements regarding child find are applicable to such children.<sup>28</sup>

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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup>

H.R. 1350 would not change the general requirement that states spend a proportionate amount of IDEA funds on children who are unilaterally placed in private schools by their parents. However, the bill would make a number of other changes. The committee report notes that the bill “clarifies that the proportional amount of money obliged to be used to provide special education and related services to children in the State with disabilities who have been placed by their parents in private schools must be used to provide some direct services.”<sup>33</sup>

The House bill also contains specific provisions relating to child find,<sup>34</sup> would add requirements concerning consultation and a right to appeal, and would make changes to the requirements concerning when the parents of the child with a disability are to be reimbursed for private school placement. H.R. 1350 would make some additions to the provisions in current law relating to child find by, for example, ensuring that the child find process for children in private schools be completed in a time period comparable to that for other students attending public schools. Consultation by the local education agency or the state educational agency with representatives of children parentally placed in private schools would be required. A private school official would have the right to complain to the state educational agency that the local educational agency did not engage in meaningful and timely consultation and did not give due consideration to the views of the private school

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

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

<sup>30</sup> Section 612(a)(10)(C), 20 U.S.C. §1412(a)(10)(C).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> H.Rept. 108-77 at 94.

<sup>34</sup> Child find refers to the statutory requirement that the states are obligated to identify, locate and evaluate children with disabilities. Section 612(a)(3), 20 U.S.C. §1412(a)(3).

official. The private school official, if dissatisfied with the state’s decision, would be able to complain to the Secretary of Education. In addition, H.R. 1350 would change the exception provisions to the notice requirement by providing that reimbursement shall not be reduced or denied if (1) the school prevented the parent from providing such notice, (2) the parents had not received notice that the educational agency is required to provide, or (3) compliance with the notice requirements would likely result in physical harm to the child. H.R. 1350 also would provide that reimbursement may not be reduced, in the discretion of a court or a hearing officer, for failure by the parents to provide notice if the parent is illiterate or cannot write in English or compliance with the requirement would likely result in serious emotional harm to the child.

## Local Agency Eligibility

H.R. 1350 would make several changes to section 613 regarding local educational agency eligibility. H.R. 1350 would add a new section allowing funds provided to a local educational agency (LEA) to be used “to establish and implement cost or risk sharing funds, consortiums, or cooperatives for the agency itself, or for local educational agencies working in consortium of which the local education agency is a part to pay for high cost special education and related services.”

H.R. 1350 would continue local financial requirements, such as requiring that Part B funds be 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). H.R. 1350 would continue the exception that LEAs can count up to 20% of the increase in their IDEA grants from one year to the next as meeting SNS and MOE requirements, with the addition that these increased IDEA funds could then be used to provide additional funding for ESEA programs. H.R. 1350 would modify state oversight of this provision. Under current law, the SEA “may prohibit” an LEA from exercising this provision if it “determines that a local educational agency is not meeting the requirements of this part.” H.R. 1350 would **require** the SEA (if authorized by state law) to prohibit a LEA from exercising this provision if it “determines that a local educational agency is unable to establish and maintain programs of free appropriate public education. . . .”

H.R. 1350 would also add several activities to permitted uses of funds provided to a local educational agency. For example, H.R. 1350 would allow these funds to be used for “reasonable additional expenses...of any necessary accommodations to allow children with disabilities who are being educated in a school identified for school improvement ...to be provided supplemental educational services....” This section would help to align IDEA to the requirements of the No Child Left Behind Act (NCLBA).<sup>35</sup> Other activities permitted under H.R. 1350 include establishing mechanisms to fund high cost special education and related services, purchasing

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<sup>35</sup> For further information on supplemental services under NCLBA, see CRS Report RL31329, *Supplemental Educational Services for Children from Low-Income Families Under ESEA Title I-A*.

technology to maintain case management systems, and prereferral services discussed below.<sup>36</sup>

H.R. 1350 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 12<sup>th</sup> grade but emphasizing those in kindergarten to 3<sup>rd</sup> 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 an 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 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 H.R. 1350. H.R. 1350 would also add a new section regarding determining when a child has a specific learning disability and prohibiting the use of a discrepancy between achievement and intellectual ability.

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. H.R. 1350 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 provide special education and related services.” Under such circumstances, the LEA is not obligated to hold an IEP meeting or prepare an IEP. In addition, the LEA “shall not be considered to be in violation of any requirement under this part (including the requirement to make available a free appropriate public education).”

H.R. 1350 would make significant changes to the requirements of an IEP, apparently intended to reduce paperwork requirements for teachers and schools.<sup>37</sup>

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<sup>36</sup> H.R. 1350 would add these activities to 20 U.S.C. §1413(a)(4), which currently allows certain benefits for non-disabled children and for certain other purposes. This paragraph exempts funds for these activities from local financial requirements in subparagraph (2)(A) regarding prohibitions against supplanting and reduction of local expenditures for special education. By adding activities to paragraph (4), it would appear that funds used for these new activities would also be exempt from supplanting and maintenance of effort provisions in (2)(A).

<sup>37</sup> For a discussion of IDEA and paperwork see CRS Report RS21226, *The Individuals with Disabilities Education Act: Paperwork in Special Education*. It should also be noted that (continued...)

Among the changes that the House bill would make is the discontinuation of a requirement for the IEP to contain benchmarks and short term objectives beginning in school year 2005-2006. H.R. 1350 would also

- limit the participation of regular education teachers in IEP team meetings in certain circumstances;
- allow the parents of a child with a disability and the LEA to jointly excuse any member of the IEP team from attending all or part of an IEP team meeting;
- allow the parents and LEA to agree not to reconvene the IEP team and instead develop a written document to amend or modify the child's current IEP;
- allow the LEA to offer to the parent of a child with a disability the option of developing a comprehensive multi-year IEP, not to exceed three years; and
- allow for the use of alternative means of meeting participation, such as video conferences and conference calls when agreed to by the parents of a child with a disability and the LEA.

## Procedural Safeguards

### Introduction

IDEA contains detailed procedural safeguards designed to ensure the provision of FAPE. However, these safeguards have been criticized as encouraging litigiousness and decreasing trust between parents of children with disabilities and schools. One of the goals of H.R. 1350 is to “reduce litigation and restore trust between parents and school systems”<sup>38</sup> and, in an attempt to reach this goal, H.R. 1350 would make significant changes in the procedural safeguards that are currently available to parents of children with disabilities.

### Statute of Limitations and Procedural Safeguards Notice

H.R. 1350 would add a statute of limitations to the right to present complaints, allowing an opportunity to present complaints only for “a violation that occurred not more than one year before the complaint is filed.” The substance of the prior written notice provided by the LEA is changed by H.R. 1350. The bill deletes requirements

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<sup>37</sup> (...continued)

one of the GAO studies which would be required by H.R. 1350 provides for a review of federal and selected state and local requirements related to IDEA that “result in excessive paperwork.” There are also provisions in the amendments to section 616, discussed *infra*, which would authorize the Secretary of Education to grant waivers of paperwork requirements.

<sup>38</sup> 149 Cong.Rec. E527 (March 20, 2003)(remarks of Rep. Castle). The House report states: “The reauthorization will allow for more productive and less hostile relations between parents and schools to ensure that the focus of the Act remains on educating children with disabilities.” H.Rept. 108-77 at 112.

in current law for a description of any other options the agency considered and why they were rejected, a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action, and a description of any other factors that are relevant to the agency's proposal or refusal.

The House bill would also delete the current requirement for giving a copy of procedural safeguards to the parents of a child with a disability on each notification of an IEP meeting and upon reevaluation and registration of a complaint. Under H.R. 1350, a copy of the procedural safeguards notice would be given “at a minimum– (A) upon initial referral or parental request for evaluation; (B) annually, at the beginning of the school year; and (C) upon written request by a parent.” The content of the procedural safeguards notice would also change under H.R. 1350. Current law requires a “full explanation” of the procedural safeguards while H.R. 1350 states that “the procedural safeguards notice shall include a description of the procedural safeguards....”

## **Voluntary Binding Arbitration and Mediation**

H.R. 1350 would add new provisions relating to voluntary binding arbitration and “resolution sessions.” Current law requires a state or local educational agency to ensure that procedures are established to allow for the resolution of disputes through mediation, at a minimum when a due process hearing is requested. H.R. 1350 would require that these procedures for mediation be available also for matters arising prior to the filing of a complaint. In addition, H.R. 1350 would require that a state educational agency ensure that procedures are available to resolve disputes through voluntary binding arbitration, which is to be available when a hearing is requested. The voluntary binding arbitration is to be voluntarily and knowingly agreed to in writing by the parties and conducted by a qualified, impartial arbitrator. The LEA or SEA shall ensure that parents understand that the process is in lieu of a due process hearing and is final unless there is fraud by a party or the arbitrator or misconduct on the part of the arbitrator. The parties jointly agree to use an arbitrator from a list maintained by the state and the arbitration is to be conducted according to state law on arbitration or, if there is no applicable state law, consistent with the revised uniform arbitration act. The voluntary binding arbitration is to be scheduled in a timely manner and held in a location that is convenient to the parties to the dispute.

## **Due Process Hearings and Resolution Sessions**

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 hearing<sup>39</sup> with a right to appeal.<sup>40</sup> Any party to this hearing has the following rights:

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<sup>39</sup> 20 U.S.C. §1415(f), P.L. 105-17 §615(f).

<sup>40</sup> 20 U.S.C. §1415(g), P.L. 105-17 §615(g).

- 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,
- to receive the written or electronic findings of facts and decisions.<sup>41</sup>

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.<sup>42</sup> The changes to the attorneys' fee provision are discussed below.

H.R. 1350 would make significant changes to 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, and the due process hearing is to be conducted by the SEA. Under current law the hearing is conducted by either the LEA or SEA depending upon state law. Second, H.R. 1350 would add a new "resolution session." Under this proposed change, prior to the opportunity for an impartial due process hearing, the LEA shall convene a meeting with the parents and a team of qualified professionals within 15 days where the parents discuss their complaint, the specific issues, and the LEA has the opportunity to resolve the complaint. The parents of a child with a disability and the LEA may agree in writing to waive the meeting. If the LEA has not resolved the complaint to the satisfaction of the parents within thirty days of the receipt of the complaint, the due process hearing shall occur. H.R. 1350 specifically states that the resolution session meeting is not a meeting convened as a result of an administrative hearing or judicial action or for purposes of section 615(h)(3). Section 615(h)(3) provides for procedural safeguards for hearings. Thus, procedural safeguards such as the right to be accompanied by counsel or other individuals, the right to present evidence, the right to cross-examine witnesses, or the right to a written record would not be available with regard to the resolution session.

H.R. 1350 also would change the issues that are allowed to be raised in the due process hearing. Parents of a child with a disability would not be allowed to raise issues at the due process hearing that were not raised in the complaint, discussed during the "resolution session" meeting, or properly disclosed under the subsection relating to the disclosure of evaluations and recommendations unless both parties agree otherwise.

## Attorneys' Fees

An amendment offered and accepted during full Committee markup would change the determination of the amount of attorneys' fees by requiring the Governor,

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<sup>41</sup> 20 U.S.C. §1415(h), P.L. 105-17 §615(h).

<sup>42</sup> The provision on attorneys' fees was added by Congress in the Handicapped Children's Protection Act, P.L. 99-372.



or other appropriate state official, to determine rates. Under current law, attorneys' fees are determined by the court hearing the case.

Under current law, 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.<sup>43</sup> Attorneys' fees are based on the rates prevailing in the community, and no bonus or multiplier may be used. There are specific prohibitions on attorneys' fees and reductions in the amounts of fees. Fees may not be awarded for services performed subsequent to a written offer of settlement to a parent in certain circumstances including if the court finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement. Also, attorneys' fees are not to be awarded relating to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action or, at the state's discretion, for a mediation. Current law specifically provides that an award of attorneys' fees and related costs may be made to a parent who is the prevailing party if the parent was substantially justified in rejecting a settlement offer. Attorneys' fees may be reduced in certain circumstances including where the court finds that the parent unreasonably protracted the final resolution of the controversy; the amount of attorneys' fees unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation and experience; where the time spent and legal services furnished were excessive considering the nature of the action or proceedings; and when the court finds that the parent did not provide the school district with the appropriate information in the due process complaint.<sup>44</sup>

H.R. 1350 would amend these provisions by changing the general statement under current law that attorneys' fees may be awarded at the court's discretion to read: "Fees awarded under this paragraph shall be based on rates determined by the Governor of the State (or other appropriate State official) in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection." In addition, the amendment provides that the Governor or other appropriate official shall make these rates available to the public on an annual basis. The other provisions of current law regarding the prohibition of attorneys' fees in certain situations, the exception to this prohibition, and the reduction of attorneys' fees in certain circumstances were not amended.

## Discipline Issues

H.R. 1350 would make significant changes in the manner in which children with disabilities who violate a disciplinary rule are treated. Generally, under current law, a child with a disability is not immune from disciplinary procedures; however, these

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<sup>43</sup> The provision on attorneys' fees was added by Congress in the Handicapped Children's Protection Act, P.L. 99-372.

<sup>44</sup> 20 U.S.C. §1415(i), P.L. 105-17 §615(i).

procedures are not identical to those for children without disabilities.<sup>45</sup> 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.<sup>46</sup>

H.R. 1350 would keep the ability of school personnel to suspend a child with a disability for up to ten school days but would delete many of the other provisions. Under H.R. 1350, school personnel would be able to order a change in placement of a child with a disability who violates a code of student conduct to an appropriate interim alternative educational setting selected so as to enable the child to continue to participate in the general education curriculum and to progress toward IEP goals for not more than 45 school days (to the extent such alternative and such duration would be applied to children without disabilities). In addition, this action "may include consideration of unique circumstances on a case-by-case basis." H.R. 1350 specifically states that this change in placement could last beyond 45 school days if required by state law or regulation for the violation in question, to ensure the safety and appropriate educational atmosphere in the schools. H.R. 1350 would delete the requirement in current law that a determination be made concerning whether a child's action was a manifestation of his or her disability and also would delete the provision in current law that if the child's behavior was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except that educational services may not cease.<sup>47</sup> In addition, H.R. 1350 would add a provision to the section on personnel preparation programs to include providing high quality professional development for principals, superintendents, and other administrators. One of the types of training specifically mentioned is "behavioral supports in the school and classroom."

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<sup>45</sup> 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*.

<sup>46</sup> 20 U.S.C. §1415(k), P.L. 105-17 §615(k).

<sup>47</sup> H.R. 1350 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, H.R. 1350 would change the general statement of state eligibility from "demonstrates to the satisfaction" of the Secretary to "provides assurances to."

H.R. 1350 would add provisions to section 618 of IDEA regarding the data states are required to provide to the Secretary of Education. The requirement that states provide the number of children with disabilities who are subject to long-term suspensions or expulsions would be amended to include data by “race, ethnicity, and disability category.” In addition, the requirement that states collect data to determine if significant disproportionality based on race is occurring with regard to identification and placement would be amended to include data on disproportionality with regard to “the incidence, duration, and type of disciplinary actions, including suspensions and expulsions.”

An amendment offered by Rep. Kirk and passed by the House added a section to H.R. 1350 which states that “it is the sense of the Congress that safe and drug-free schools are essential for the learning and development of children with disabilities.” Another amendment offered by Rep. Shadegg and passed by the House would provide in part that it is the sense of Congress that “students with behavioral problems who have not been diagnosed by a physician or other person certified by a State health board as having a disability should be subject to the regular school disciplinary code.”

## Oversight and Administrative Provisions

### Monitoring, Withholding, and Judicial Review

H.R. 1350 would make substantial changes to section 616.<sup>48</sup> 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 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 with its conditions of eligibility under Part B.<sup>49</sup> 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.”<sup>50</sup>

H.R. 1350 would retain these provisions but would add new monitoring and enforcement provisions. H.R. 1350 would require the Secretary to “monitor the implementation of this Act” using “focused monitoring,” which would concentrate on improving “educational results for all children with disabilities, while ensuring compliance with program requirements.” The bill would require the Secretary to monitor specified state indicators of educational outcomes for children with disabilities, such as academic achievement, graduation rates, and dropout rates. The Secretary could also review other permitted indicators, such as the implementation of education of children with disabilities in the least restrictive environment and the transition of children with disabilities from special education to post-school experiences (e.g., postsecondary education and employment).

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<sup>48</sup> 20 U.S.C. §1416.

<sup>49</sup> 20 U.S.C. §1416(a).

<sup>50</sup> 20 U.S.C. §1416(b).

If the Secretary determines that a state “is not making satisfactory progress in improving educational results for children with disabilities,” one or more actions must be taken, including provision of 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 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. If “special conditions” have been imposed and a state has not corrected violations after 3 consecutive years, “the Secretary shall take such additional enforcement actions” based on specified actions in the bill.

## ED Administration

In addition to amendments to section 616, H.R. 1350 would amend current section 617<sup>51</sup> regarding the administration of IDEA to provide for a pilot program on paperwork and to require the publication of model forms. H.R. 1350 would add a provision authorizing the Secretary of Education to grant waivers of paperwork requirements for a period of time not to exceed four years with respect to not more than ten states based on proposals submitted by states for addressing reduction of paperwork and non-instructional time spent fulfilling statutory and regulatory requirements. The Secretary also would be required to include in the annual report information relating to the effectiveness of the waivers.

H.R. 1350 also would require the Secretary to publish and disseminate a model IEP form, a model form for the procedural safeguards notice, and a model form for the prior written notice in section 615(b)(3).<sup>52</sup>

## Preschool, Infants and Toddlers, and National Programs

H.R. 1350 appears to make only relatively modest changes to section 619, which authorizes services for preschool children with disabilities, and to Part C, which authorizes services for infants and toddlers with disabilities. For example, H.R. 1350 would include certain children with disabilities ages 3 to 5 in the definition of an infant or toddler with a disability and, based on an approved floor amendment offered by Rep. Nethercutt, would modify the exception in Part C that infants and toddlers with disabilities be served in “natural environments,” i.e., with nondisabled infants and toddlers. Under current law, the exception to this requirement occurs “only when early intervention cannot be achieved satisfactorily . . . in a natural environment.” H.R. 1350 would add to this exception: “or in a setting that is most appropriate, as determined by the parent and the individualized family service plan team.”

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<sup>51</sup> 20 U.S.C. §1417.

<sup>52</sup> 20 U.S.C. §1415(b)(3).

Part D, which authorizes national activities, has been substantially revised. In brief, some of the changes are a matter of re-arranging language. For example, Part D of current law provides findings in several sections, while H.R. 1350 places all findings at the beginning of the part—including some findings in current law and adding some new findings. H.R. 1350 continues some provisions of Part D, although sometimes with substantial changes. For example, the bill would retain the state competitive grants program authorized under Subpart 1 of Part D. However, it would focus these grants on professional development activities even more than current law does by requiring that at least 90% of the grants be used for these activities. (Current law requires 75% of funds be used to ensure sufficient numbers of skilled and knowledgeable special education personnel.)

H.R. 1350 would continue other provisions of Part D without change. For example, the bill would continue to authorize grants for Community Parent Resource Centers to help “ensure that underserved parents of children with disabilities . . . have the training and information they need to enable them to participate effectively in helping their children with disabilities . . . .”

Finally, H.R. 1350 would add new provisions to Part D. For example, the bill would establish a National Center for Special Education Research to conduct research on improving special education and related services for children with disabilities.

## GAO Reports

In addition to the amendments to IDEA discussed above, H.R. 1350 would require the General Accounting Office (GAO) to undertake a series of reports on IDEA and special education. These include:

- A review of federal and selected state and local requirements related to IDEA that “result in excessive paperwork;”
- A review of differences among the states in the definition and identification of certain groups of children with disabilities—for example, those identified as “emotionally disturbed” or specific learning disabled;”
- A study of distance learning and other technological approaches for delivering professional development programs for special education personnel;
- A study of how limited English proficient students are served under IDEA; and
- A study of state costs for complying with the requirements of IDEA.