

## RECENT DEVELOPMENTS IN **Special Education Law**

### School Law Briefing Insert

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**Loop Office:**

140 S. Dearborn St.  
Suite 600  
Chicago, Ill. 60603  
Tel.: (312) 782-7606  
Fax: (312) 782-0943

**DuPage County Office:**

511 West Wesley St.  
Wheaton, Ill. 60187  
Tel.: (630) 682-4047  
Fax: (312) 782-0943

**Lake County Office:**

415 W. Washington St.  
Waukegan, Ill. 60085  
Tel.: (847) 244-8682  
Fax: (847) 244-8671

**E-mail:**

ancel@interaccess.com

The usually tranquil summer vacation months of June and July have seen a flurry of changes in the laws that affect school districts this year. Special education administrators and teachers especially are faced with the difficult task of becoming familiar with the new (and improved?) Individuals with Disabilities Act (IDEA) Reauthorization Bill signed into law on June 4, 1997. This insert will highlight some of the more important changes to the IDEA in an effort to assist those of you in the special education field as you embark on a new school year under a new set of rules.

### IDEA Reauthorization

After over two years of debate, the United States Congress has finally passed the much anticipated IDEA (Individuals with Disabilities Education Act) Reauthorization Bill. The bill was signed into law by President Clinton on Wednesday, June 4, 1997. How will the new law affect your school district? Following is a discussion of the more important changes contained in the law, which will undoubtedly change the way your school district provides services to disabled children. You should note that while the National School Board Association (NSBA) did applaud certain provisions contained in the new law, it did not endorse the bill outright.

#### Discipline

*Cessation of Services.* Despite a national trend to the contrary, the IDEA bill does **not** allow the cessation of services to special education students under any circumstance, including expulsion, even if the misconduct was not a manifestation of the child's disability. The new law clarifies that children whose conduct is unrelated to their disability may be disciplined just like any other child, except that services must continue during the disciplinary period. This is not good news to school district advocates who argued (and continue to argue) that disabled students can forfeit their rights under the IDEA when their misconduct is severe enough to warrant expulsion.

*Regular Education Students.* Students who have not been identified as requiring special education services may seek IDEA protections when facing disciplinary action if the school district "had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." School districts will be found to have such knowledge under four circumstances:

- ✍ the parent has expressed concern in writing (unless illiterate or otherwise unable to write);
- ✍ the child's behavior or performance demonstrate the need for such services;
- ✍ the parent has requested an evaluation of the child; or
- ✍ the child's teacher or other school district personnel have expressed concern about the child's behavior or performance to any school district personnel.

This new provision concerning regular education students facing disciplinary proceedings will undoubtedly result in an increase in litigation. Regular education students can now argue that they are protected under the IDEA if the school district had some notice that they were in need of special education services.

*Continued on following page*

*Alternative Settings.* Prior to the new law, school districts could only place disabled students in alternative educational settings for up to 45 days when they brought firearms to school. The law now provides that school districts have this same remedy for students who (1) bring **any** weapon to school, or (2) who possess, use, sell, or solicit illegal drugs while at school or at school functions. However, the law requires school districts to demonstrate “by **more than a preponderance of the evidence** that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.” Previous versions of the bill contained the less onerous burden of “substantial evidence.”

### Individualized Education Plans (IEP’s)

*Contents of the IEP.* The Reauthorization Bill greatly expanded and clarified what information must be contained in an IEP. The law now requires that particular emphasis be placed on the school’s general education program as it relates to the disabled child. For example, IEP’s must now outline how a child’s disability affects his or her progress in the general education program, include goals and short-term objectives identifying the services that the child needs to succeed in the regular education program, and the IEP must also include an explanation of the extent to which the child will not participate in the general education program. It remains to be seen whether these new provisions will help or hinder school districts; commentators have expressed mixed opinions on the issue.

*Assessments.* Disabled students must be allowed to take statewide and local assessments with modifications, if necessary. Modifications must be set forth in the child’s IEP. If participation in assessments is not appropriate, the IEP must indicate why and explain how the child will otherwise be assessed.

*Members of Team.* The new law mandates that parents be part of the team making placement decisions, adds regular education teachers when appropriate, and provides that one of the team members must be able to interpret evaluation test results. The IEP team must now consider a specific list of factors during the evaluation: the child’s strengths, parental concerns, evaluation/reevaluation results and language, communication, and assistive technology needs. In all likelihood, your IEP teams already take these fac-

tors into consideration; the new law simply clarifies what the IEP team *must* consider. This will have the unfortunate effect of strengthening parents’ cases when a school district fails to address a required factor in the IEP. The best advice here is to teach your teams to write comprehensive IEP’s. You should also consider reviewing at least a sampling of these forms with an attorney knowledgeable with special education issues.

### Attorneys’ Fees

*Requirements.* School districts won some ground on the issue of attorneys’ fees. The new law provides that attorneys’ fees can be reduced or denied if the parent does not give the school district the following information **before** filing due process proceedings: the child’s name, address, school, a summary of the problem, and a proposed resolution to the problem. Also, the new law provides that attorneys’ fees may not be awarded relating to any IEP team meetings or for mediation conducted prior to the filing of a due process action, with limited exceptions.

### Related Services

The new law kept intact the previous definition of “related services” and added two related services: orientation and mobility services. Such services include assistance in traveling to, from, or around the school and school property. This type of service can be as simple as teaching a disabled student how to get from one classroom to another.

### Policy Letters

The old law did not address the weight to be given to policy letters that are routinely issued by the Education Department. The new law clarifies that the Education Department is prohibited from establishing rules through the use of policy letters. The Education Department must formally promulgate its rules using public notice and comment in the Federal Register. Importantly, the new law requires that policies of general applicability which were originally included in policy letters must be widely disseminated to school districts and other educational agencies, parents, and all other interested people. The new law further requires the Education Department to publish copies of its responses to queries quarterly in the Federal Register. These requirements are in part intended to ensure that laws pertaining to the education of

students with disabilities are maintained in one location and not in a large collection of policy letters, which are not easily researched.

### Enrollment in Private Schools

The new law makes a number of changes regarding private school enrollments. For example, the new law provides, as it did previously, that local educational agencies must spend a proportionate share of federal IDEA funds on disabled students attending private or parochial schools. However, the new law specifically states that local educational agencies need not provide special education and related services when parents enroll a child in a private or parochial school when the public school had ensured that a free, appropriate public education was available to the child. Parents do have recourse, however, if the public school did not make an appropriate placement in a timely manner.

If parents fail to inform the IEP team that the proposed placement is rejected and they enroll a child in a private school, a demand for reimbursement may be denied or reduced. Parents have to so inform the public school district either at the

most recent IEP team meeting they attended or ten business days in advance of making the unilateral placement.

Additionally, a court or hearing officer can reduce a reimbursement if the parents did not make the child available for an evaluation or if the parents otherwise acted unreasonably. These are welcome changes for school districts who often struggle with placement issues.

It is crucial for special education professionals to understand the amended IDEA since the changes will significantly impact how school districts serve children with disabilities.

### Incidental Instruction

Prior to the passage of the new law, Education Department policy provided that schools had to keep track of how much time special education instructors spent in regular education classes to ensure that IDEA-funded teachers were not providing incidental instruction to non-disabled students. The new law rescinds this policy and provides that educators can provide incidental benefits to regular education students when serving disabled students according to their IEP's.

### Reevaluations

The law previously provided that reevaluations were required once every three years. The new law maintains the three year provision, but adds that a reevaluation must be conducted when conditions warrant, at a parent's or teacher's request.

In addition, the new law provides an exception to the three year rule. After reviewing an IEP, if the IEP team determines that the child is still eligible and that no further information is needed, a reevaluation need not be conducted. However, the IEP team must inform the parents of this finding and include information on the parents' right to request a reevaluation. Parental consent is necessary before conducting a reevaluation, unless the school district can show that it tried to obtain parental consent and the parents failed to respond.

### Conclusion

It is crucial for special education personnel to become familiar with the new IDEA as soon as possible. The Reauthorization Bill made some fundamental changes to the IDEA that will change the way that you serve special education students in the future.

**Ancel, Glink, Diamond, Cope & Bush, P.C.** is a law firm that has represented Illinois school districts and other educational-based governments for more than sixty-five years. It serves its clients from three offices in the Chicago metropolitan area. The firm represents educational and governmental clients as regular corporate counsel and on special assignments such as litigation, personnel and collective bargaining matters. The firm is composed of more than twenty lawyers whose practices are centered in the representation of public bodies and governmental self-insurance pools.

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## Revision of Illinois' Due Process Hearing System

**B**OTH FEDERAL AND STATE LAW REQUIRE that children with disabilities and their families be given a number of procedural safeguards, including a comprehensive due process system to be used in the event of disputes. The due process system used in Illinois was two-tiered, consisting of a Level I and a Level II review since its inception in the 1970's. However, Illinois law was amended on August 14, 1996, to provide for a single level of review, which was intended to shorten the amount of time between a hearing and final decision and provide better trained hearing officers under new selection criteria.

All requests for due process hearings made on or after July 1, 1997, will be heard under the new one-tier review law contained at 105 ILCS 5/14-8.02a. Thus, there will be a short period of time when the two-level hearings are phased out.

While the most significant change in the law deals with streamlining the levels of review, the new law contains a number of other provisions that will substantially change the way that due process hearings are conducted.

### Hearing Officers

One goal of the new law was to compile a small group of competent and highly trained hearing officers to govern over all due process hearings in an effort to promote consistent and well-drafted opinions. The new law provides for the recruitment, training, and selection of only approximately fifteen hearing officers. These hearing officers will be appointed to cases on a rotating basis — no more striking names from a list. Each party will have the opportunity to make one substitution of the appointed hearing officer per case. The hearing officers will be extensively trained by an outside agency hired by the Illinois State Board of Education.

The hearing officers will be appointed for two-year terms and will receive a base annual stipend in addition to a *per diem* allowance for each hearing. The State Board of Education must monitor, review, and evaluate the decisions of the hearing officers and must also consider evaluations completed by participants in due process hearings.

The hearing officers are specifically prohibited from participating in any *ex-parte* communications with the parties, except to arrange and confirm the dates, places and times of prehearing conferences and due process hearings.

### Prehearing Conference

The new law provides that the parties may *choose* to participate in a prehearing conference for the purpose of aiding “the fair, orderly, and expeditious conduct of the hearing.” The prehearing conference must take place no later than 14 days prior to the hearing and may be conducted in person or by telephone. The parties must disclose the following at the conference:

1. whether they are represented by legal counsel;
2. the matter(s) which they believe to be in dispute and the specific relief they are seeking;
3. whether there are any additional evaluations that they intend to introduce at the hearing;
4. a list of all documents they intend to introduce into the hearing record, including a description of each document and its date; and
5. the names of all witnesses they intend to call to testify at the hearing.

### Evidence

An important new provision in the law is that each party must disclose and

provide to each other all evidence that they intend to introduce at the hearing no later than five days before the hearing. If a party fails to do this, the opposing party has the right to prohibit the introduction of this evidence.

The law also gives hearing officers broad subpoena powers to compel the testimony of any witness or the production of documents relevant to the resolution of the matter.

### Decision and Clarification

The hearing officer has only ten days after the conclusion of a hearing to issue a written decision, including findings of fact and conclusions of law. The decision must specifically provide what special education and related services must be provided to the child. Any party may request a clarification (not reconsideration) of a final decision in writing within five days after receiving the decision. This request stays implementation of those portions of the decision for which clarification is sought. The hearing officer shall issue a written clarification within ten days.

The new hearing procedures will truly change the way that special education due process hearings are conducted. It is too soon to tell whether the changes will have an impact on the outcome of due process hearings or whether the decisions will take on a “pro-school” or “pro-parent/child” slant. Your legal counsel can help ease the transition over the coming year by clearly explaining how the new hearings are being conducted and informing you what some of the more recent decisions have held. The Illinois State Board of Education is presently drafting regulations implementing the new law which should help further clarify how the hearings are to be conducted. These regulations are expected to be finalized within the coming months.