RESOLVED, That the American Bar Association supports reauthorization of the Individuals with Disabilities Education Act, or enactment of similar legislation, that guarantees children with mental or physical disabilities a free appropriate public education in the least restrictive environment, and opposes efforts to eliminate, weaken, or circumvent such legislation.

FURTHER RESOLVED, That the American Bar Association encourages lawyers, judges, and state and local bar associations to make available legal services to ensure that children with mental or physical disabilities are not deprived of a free appropriate public education in the least restrictive environment, supports inclusion in the Individuals with Disabilities Education Act or similar legislation provisions that permit individuals to pursue claims through mediation, and supports attorney's fees provisions in federal legislation that help ensure legal assistance for children with disabilities who seek to obtain or continue free appropriate public education.
Introduction

     The Individuals with Disabilities Education Act was enacted in 1975 in response to broad concern that children with disabilities needed, but often did not receive, appropriate education in the public schools. The Act provided federal guarantees of such education. Twenty years later, despite some significant successes under the act, many children with disabilities are still facing widespread segregation from the public education system. Some children are deprived of appropriate services or placed in segregated schools because school systems will not pay for individualized education programs. Through disciplinary procedures, other children are excluded from public schools entirely or placed in segregated schools.

     The Congress will consider IDEA reauthorization this year or next.1 At that time, Congress may consider amendments that would weaken or eliminate some of its most important protections. It is essential that as Congress moves forward, the procedural protections that have sought to guarantee children with disabilities the right to a free and appropriate public education remain intact. The Association should oppose any efforts to eliminate, weaken, or circumvent the protections afforded under current law, particularly the protections providing for disciplinary safeguards, mediation, and reasonable procedures to ensure due process protection.

Background

     Studies performed in Washington, D.C., in the 1960s showed that up to two-thirds of the students placed in special education classes were wrongly identified as needing special education.2 Furthermore, analysis of placement in special education classes revealed that racial minorities were disproportionately placed in special education classes, thus achieving a certain level of de facto segregation.3

     See "Subcommittee Plans to Extend IDEA Provisions for One Year," 18 Rep. on Disability Programs 45 (March 16, 1995).


     Id.
At this time, many states also had statutes specifically banning children with disabilities who were "uneducable and untrainable" or "physically or mentally incapacitated for the work done in the school" from receiving a public education. Where special education classes existed, the label "handicapped" was often misapplied in order to rid "mainstream" classrooms of students who were considered potentially disruptive.

Fortunately, the situation began to change in the 1970s. Court decisions began to reflect changing attitudes about the appropriate role of persons with disabilities in American society by favoring an increased involvement in "mainstream" society. Two federal court cases, in particular, Mills v. Bd. of Educ. of District of Columbia, 348 F.Supp. 866 (D.D.C. 1972) and PARC v. PA, 343 F.Supp. 279 (1972), recognized that many disabled children were excluded from receiving an appropriate education pursuant to state and local rules, policies, and procedures, typically without the consultation or even notice to the parents. Both cases involved the exclusion of hard-to-handle disabled students. Mills, in particular, demonstrated the extent to which schools used disciplinary measures to bar children from the classroom. In fact, the district court went so far as to enjoin future exclusions, suspensions, or expulsions on the grounds of discipline.

By 1975, Congress was beginning to respond to the court trends. In examining the issue, Congress found that more than half of the nation's eight million disabled children were not receiving appropriate education and that more than one million children were excluded from public schools altogether. Many other disabled children were simply warehoused in institutions or were neglectfully shepherded through the system until they dropped out.

In response to these findings, Congress passed the Education of All Handicapped Children Act (P.L. 94-142). Through this legislation, Congress attempted to guarantee a free and appropriate education in the least restrictive environment to all children with disabilities and to provide Federal funding to assist states and localities in meeting this goal. Four main reasons were advanced for the law's enactment: 1) an increased awareness of the needs of children with disabilities, 2) judicial decisions that found constitutional requirements for the education of children with disabilities, 3) the inability of states and localities to fund education for children with disabilities, and 4) the belief that educating children with disabilities would result in their becoming more productive members of society and thus lessening taxpayers' burden to support nonproductive persons.

The emphasis on life-long success was expanded upon in a 1975 Senate Report:

The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such

persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens.\footnote{S.Rep. No. 168, 94th Cong., 1st Sess. 9 (1975). reprinted in 1975 U.S.C.C.A.N. 1425, 1433.}

This policy objective of creating productive citizens was echoed in *Polk v. Central SusquehannaIntermediate Unit 16*, in which the court wrote:

The EHA's sponsors stressed the importance of teaching skills that would foster personal independence for two reasons. First, they advocated dignity for handicapped children. Second, they stressed the long-term financial savings of early education and assistance for handicapped children. A chief selling point of the Act was that although it is penny dear, it is pound wise -- the expensive individualized assistance early in life, geared toward teaching basic life skills and self-sufficiency, eventually redounds to the benefit of the public fisc as these children grow to become productive citizens.\footnote{853 F.2d 171, 181-82 (3rd Cir.) (1988).}

In 1986 the Act was amended to significantly expand the discretionary programs, including the preschool incentive program, which provided educational programs for three- to five-year-old children with disabilities. These amendments also provided federal grants to states for development and implementation of statewide systems to provide early intervention services for infants and toddlers with disabilities and their families.

In 1990, Congress renamed the Act the Individuals with Disabilities Education Act (IDEA) and noted that it was permanently authorizing Part B of the Act, the state-formula grant program, to signal the federal government's commitment to assisting the States and enforcing the principle of equal educational opportunity for individuals.

The EHA 1990 amendments also broadened the definition of a child with a disability to include children with autism, children who had suffered a traumatic brain injury, and children with attention deficit disorder. Additionally, the 1990 amendments responded to the U.S. Supreme Court's decision in *Delmnuth v. MuSh*, 491 U.S. 223 (1989), which had denied parents reimbursement for tuition paid by parents to a private program, when the child had been denied a free appropriate public education. The conference added a new section to clarify that states are not immune under the 11th Amendment from suit in federal court for violations of the Act.

In 1991, IDEA was amended to reflect two major goals: 1) the provision of "seamless" services during the transition from early intervention programs to preschool programs for the disabled and 2) the expansion of the definition of "children with disabilities" to include children experiencing developmental
delays. The amendment also emphasized the training of individuals as educators in the disability field and increased the authorization for parent training centers.

The federal role in establishing the framework and providing financial assistance to states to address the educational needs of children with disabilities has been of paramount importance. In school year 1994, more than six million students from birth to age 21 received special education services supported by the IDEA. Access to appropriate special education and related services has resulted in an increase in the productivity and employability of young adults with disabilities, as well as a reduction in the number of students with severe disabilities who are placed inappropriately in institutions away from their homes.

Importance of Disciplinary Procedural Safeguards

The IDEA provides special placement protections and "change of placement" provisions for students with disabilities. It favors, insofar as possible, the inclusion of students with disabilities in as many school activities as possible by mandating that students with disabilities be placed in the "least restrictive environment" based on the child's individualized education program.

Concerns have been raised that these provisions conflict with school administrators' power to suspend or expel a student for disorderly behavior and with other students' educational experiences. In fact, the legislative history of IDEA shows that the discipline concerns were at the very heart of this law and that these concerns have been considered and resolved through the mechanisms the law provides to adjust students' placements.

Under current law, if a child in special education is dangerous to himself or others, and the child's behavior is shown to be a manifestation of the child's disability, the child may be removed (suspended) for up to 10 days. The U.S. Supreme Court has held that a suspension or expulsion longer than 10 days constitutes a change of placement for the child, which requires the consent of the child's parents. If the parents object, they may pursue a due process hearing to contest the expulsion or suspension.

Whenever a placement is being contested, the child must remain in his/her "present educational placement": that is, the child must "stay put" in his/her current educational setting until the proceedings are resolved. In response to educators' frustrations with not being able to expel violent students with disabilities, the "stay put" provision of IDEA was amended in October 1994 to conform to recently enacted gun-free schools legislation. Specifically, a student in special education who is found to have a gun in his possession on school grounds no longer has the protection of the "stay put" provision. Rather, such children can be placed in an interim alternative educational setting for up to 45 days.
The “stay put” provision originally was intended to respond to several landmark court decisions, including Mills v. Board of Education. As noted previously, the Mills case involved students with disabilities in the District of Columbia who had been denied access to public schools. The court expressed concern that schools were utilizing disciplinary procedures as a mask for avoiding the duties and difficulties of educating children with disabilities.

To address concerns that disciplinary procedures may be used to circumvent schools’ obligations under IDEA, the proposed policy supports existing safeguards in IDEA that prevent schools from resolving disciplinary problems of students with disabilities by suspension or expulsion. Any proposed disciplinary provisions should maintain the principle that schools cannot resolve disciplinary problems of students with disabilities simply by suspension or expulsion.6

Courts also have held that IDEA prohibits the use of disciplinary actions to avoid educating disabled students. In Honig v. Doe, 484 U.S. 305 (1988), the Supreme Court held that IDEA prohibits school officials’ unilateral exclusion of any child covered by the statute for more than 10 days. However, the Court commented that IDEA does not leave the schools “powerless” to deal with discipline problems and noted IDEA’s placement procedures. See also, Lamont X. v. Quisenberry, 606 F.Supp. 809 (S.D. Ohio 1984) (noting that even if student’s removal from the classroom was appropriate at the time of the incident, continued exclusion was inappropriate). It is important that IDEA continue to provide a careful balance between students’ interests in a free appropriate education and their rights to due process and schools’ interests in maintaining a safe learning environment.

This recommendation serves to reinforce IDEA’s guarantee that all students with disabilities will receive a free appropriate public education.9 The legislative history of IDEA emphasized that “the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity.” Educational opportunity is essential to equal opportunity, and that right too often has been denied students with disabilities.

Recently, in fact, federal government and the courts have continued to underscore that all students with disabilities, including students who have been suspended or expelled, have the right to a free appropriate education. In 1993, for example, the Department of Education issued a policy letter discussing the “stay put” provision and suspension of students with disabilities. The department

620 U.S.C. § 1415 (e)(3). See, e.g., 34 C.F.R. §§ 300.343, 300.44 and 300.533 (mandated procedures include convening of IEP team with full consideration of the child’s needs, evaluation data, current program and placement options).


clarified that "all children with disabilities, including those who have been suspended or expelled, must be provided a free appropriate education, and educational services may not cease for such students." The Court of Appeals for the Seventh Circuit has upheld the requirement that even an expelled student must be provided a free appropriate public education and that educational services cannot be cut off. Metropolitan School District of Wayne Township v. Davila, 969 F.2d 485 (7th Cir. 1991). See also S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981)("expulsion is still a proper disciplinary tool ... when proper procedures are utilized ... but we cannot authorize complete cessation of educational services during an expulsion period.").

The current procedural safeguards in IDEA have enabled children and parents to work cooperatively with local schools and states to assist children with disabilities in reaching their educational potential. The safeguards have helped clarify and resolve issues that prevented children from receiving a free appropriate public education. Such provisions have stood the test of time. Any exceptions to the current procedural safeguards of IDEA must be carefully and narrowly drafted to preserve every child's right to a free and appropriate education.

Usefulness of Mediation in IDEA Cases

The IDEA is an essential component of the federal government's commitment to the civil rights of persons with disabilities. Like other civil rights statutes, IDEA provides legal recourse for parents of children with disabilities when school districts refuse to comply with the law. Under current law, parents are entitled to a due process hearing to challenge the identification, evaluation, and educational placement of their child.

The proposed policy encourages expanding the act's due process guarantees to include a right to pursue a claim through mediation. If properly implemented, mediation can be a cost-effective form of alternative dispute resolution. However, proper implementation requires that the mediation process include adequate safeguards to protect the constitutional rights of students with disabilities to a free appropriate education.

Because mediation is an informal method of dispute resolution, it lacks the traditional procedural protections of litigation. Mediation must be structured to ensure that the process is fair and just to both parties. Mediation should be voluntary and non-binding and should not preclude parents' option to proceed to the due process hearing guaranteed in IDEA.

In addition, basic due process safeguards, such as notice and access to information, should be required for mediation. For example, parents should receive relevant information about the mediation

process, their option to a due process hearing, their rights under IDEA, and state and local education agencies' responsibilities under IDEA.

Parents also should be given the opportunity to be represented by counsel or legal advocates at the mediation and to recover attorney's fees associated with mediation. This position conforms with current case law. In *E.M. v. Milville Board of Education*, 849 F.Supp. 312 (D.N.J. 1994), the district court held that mediation is an "action or proceeding" within the meaning of IDEA even if parents never sought an administrative hearing and that awarding attorney's fees to parents who prevail at mediation is entirely consistent with existing authority. See also, *Masotti v. Turpin Unified School District*, 926 F.Supp. 221 (C.D.Cal. 1992) (district court held that when a hearing is requested, resolution of a special education complaint through mediation cannot preclude recovery of attorney's fees even if a hearing was never held); *No. 2 v. Milbee*, 940 F.2d 1280 (1991) (prevailing party may recover when settlement is reached even if an administrative hearing is never held); K.A.L v. Salem Bd of Educ., 1994 U.S. Dist. Lexis 8897 (D.N.J. 1994) (attorney's fees awarded properly covers all time parent's attorney spent preparing for and participating in mediation).

Mediation also has been shown to be an effective mechanism for conciliation with a reduced likelihood of animosity as a by-product of the dispute resolution system currently in place. Finally, avoiding litigation also reduces costs—an additional benefit for school systems and parents.

Mediation must not be used to deny parents access to the full range of procedural safeguards guaranteed under IDEA. But it could be added as an additional optional safeguard available to expedite the dispute resolution process in a cost-effective, efficient, and friendly manner.

**Need for Attorney's Fees Provisions**

The attorney's fees provisions in IDEA were the result of an amendment to the act by the Handicapped Children's Protection Act of 1986 (P.L. 99-372). As amended, IDEA provides for the award of reasonable attorney's fees and costs to parents or guardians who prevail in IDEA disputes, administrative due process hearings, mediation sessions, and court proceedings. The award of fees must be based on rates prevailing in the community in which the action or proceeding arose. No bonus or multiplier may be used in calculating the fees.

The award of fees is subject to a number of significant conditions designed to encourage voluntary settlements. Fees may not be awarded for services performed after a written settlement offer is made to the child's parents or guardian if three conditions are met: 1) the settlement offer was made more than 10 days before the start of a due process hearing or trial, 2) the offer is not accepted within 10 days, and 3) the relief finally obtained is not more favorable than the settlement offer unless the parent was substantially justified in rejecting the offer.
Prior to this amendment, school districts, in many cases, routinely delayed settlements until immediately prior to hearings or trials. There was no incentive to settle early in the process. As a result, legal representatives of parents would have to invest limited, unrecoverable resources in witnesses and document preparation, expert evaluation fees, and record duplication.

However, with the addition of the fee-shifting provisions, early settlements became much more abundant. Because a parent is eligible for attorney's fees through a pre-hearing settlement, as well as when the parent prevails in an administrative or judicial proceeding, it is in everyone's interest to settle as soon as possible. School authorities no longer can adopt the strategy of settling on the eve of a hearing or trial because doing so increases their fee potential. Rather, the prospect of having to pay attorney's fees encourages schools to be realistic about settling early in the process before parents begin to incur substantial attorney's fees.

Furthermore, because IDEA provides for reimbursement, the ability of attorneys to engage in successful advocacy has increased, thus deterring schools from committing the same wrong in the future. The prospect of having to pay a fee award if a parent prevails on any issue is a primary incentive for voluntary compliance with IDEA. The end result is that the fee system created by IDEA is an inducement to school districts to spend their scarce resources on educational services rather than on litigation expenses generated by opposing legitimate parental claims.

Perhaps more important, attorney's fees are an integral resource for parents of children with disabilities because they help ensure a "level playing field." School personnel are repeat players to the process and have had extended involvement with the legal requirements of IDEA. Furthermore, school personnel have easy access to legal representation and enjoy an abundance of in-house experts (e.g., school psychologists, educational diagnosticians, therapists) to serve as no-cost expert witnesses at hearings. For parents, on the other hand, there are very few private attorneys who have expertise in the provision of special education to children with disabilities, and many parents lack the resources to acquire their services. Without legal representation, parents, who often are unaware of their own rights in the process, may be at an unfair disadvantage in the proceedings. The fee provisions of IDEA ensure that effective legal representation is available to low and moderate income parents by assisting the parents in paying for the costs of counsel. The fee provisions also increase incentives for lawyers to become specialized in the field of special education through the guarantee of payment should the parent prevail.

Retention of existing IDEA fee provisions is necessary to ensure that parents of children with disabilities have equal access to effective legal representation. Furthermore, prevailing parents should be able to continue to receive attorney's fees for services rendered at all stages of the dispute resolution process, including pre-hearing or pre-trial settlements. If mediation is an option, fees for the services also should be authorized.
Conclusion

The IDEA expresses the clear intent of Congress that children with mental, physical, or emotional disabilities, should receive free appropriate public education. The act also includes administrative and judicial remedies to protect the educational rights of children with disabilities and the rights of their parents or guardians to informed decision making and participation in the provision of appropriate free education for their children. Such rights and protections must be maintained in the 1996 reauthorization of IDEA.

Attorneys, judges, and state and local bar associations can and should help protect the rights of children with disabilities by increasing the availability of legal services, sponsoring and participating in educational programs on the rights of children with disabilities to special education services, and supporting efforts to include mediation as an option in the dispute resolution process and to maintain provisions for attorney fee awards to permit all affected children and their parents or guardians access to the judicial process.

Respectfully submitted,

Abby R. Rubenfeld, Chair
Section of Individual Rights
and Responsibilities

Richard S. Brown, Chair
Commission on Mental and
and Physical Disability Law

February 1996
1. Summary of Recommendation:

The recommendation supports federal legislation, such as the Individuals with Disabilities Education Act, that guarantees children with mental and physical disabilities a free appropriate public education in the least restrictive environment. It opposes efforts to eliminate, weaken, or circumvent such legislation. It also encourages lawyers, judges, and state and local bar associations to make legal services available to help ensure that children with disabilities are not deprived of a free appropriate public education in the least restrictive environment, and supports attorney’s fees provisions in federal legislation that help ensure legal assistance for children with disabilities who seek to obtain or continue free appropriate public education.

2. Approval by Submitting Entity:

The Individual Rights Section Council approved this proposed policy in principle at the Section’s Oct. 20-21, 1995, meeting in Nashville, Tenn. The Section’s Executive Committee approved the final submission by telephone poll on Nov. 20, 1995.

The Chair of the Commission on Mental and Physical Disability Law approved the final submission by telephone on Nov. 20, 1995.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

In August 1983, the House of Delegates adopted policy to encourage efforts to help improve the handling of cases involving children with learning disabilities. The adoption of this recommendation would amplify the existing policy as it applies to the education rights of children with disabilities.
5. What urgency exists which requires action at this meeting of the House?

The Individuals with Disabilities Education Act (IDEA) is up for reauthorization. Although current indications are that it will be reauthorized, it also will be subject to amendments that would reduce or eliminate important legal protections now incorporated into the act. Hearings are likely to be scheduled early in the next Congressional session. Adoption of the proposed resolution in February will enable the ABA to speak definitively on an issue with considerable implications for the civil rights of children with disabilities.

6. Status of Legislation. (If applicable.)

Reauthorizing legislation is being drafted. Although no bills have been introduced as of this date, they will be introduced early in the new year.

7. Cost to the Association. (Both direct and indirect costs.)

Adoption of the recommendation would result only in minor, indirect costs of Governmental Affairs and Section staff time devoted to policy dissemination and implementation as part of staff members' overall substantive responsibilities.

8. Disclosure of Interest. (If applicable.) N/A

9. Referrals.

Referrals of this report are being made in accordance with Rule 45.7(b). In addition, the Section is distributing a memorandum outlining the substance of the report with recommendation to the following ABA entities that may have a specific interest in the subject matter:

Sections, Divisions, and Forums

Administrative Law and Regulatory Practice
Criminal Justice
Dispute Resolution
Family Law
General Practice
Government and Public Sector Lawyers
Law Student
Litigation
State and Local Government Law
10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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12. Contact Person Regarding Amendments to This Recommendation. (Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax and ABA/net number of the person to contact below.)

No proposed amendments known at this time.