



RECOMMENDATIONS FOR CHANGE PUBLIC LAW 108-446

INDIVIDUALS WITH DISABILITIES EDUCATION
IMPROVEMENT ACT OF 2004 (IDEA 2004)

JULY 2017

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Overview

The Council of Administrators of Special Education (CASE) is an international professional education organization affiliated with the Council for Exceptional Children (CEC) whose members are dedicated to the enhancement of the worth, dignity, potential, and uniqueness of each individual in society. CASE represents special education administrators in local school districts, the individuals charged with responsibility for implementation and financial oversight of special education programs for children and youth with disabilities in schools across the country.

CASE is dedicated to being highly involved and engaged throughout the reauthorization process of IDEA. We believe it is important to be prepared to provide recommendations when Congress begins this critical body of work. The recommendations that follow are in support of and in addition to the overarching CEC IDEA reauthorization recommendations presently being developed. CASE has fully reviewed the CEC recommendations and offers these more specific recommendations as administrators of special education working with the statute and regulations on a regular basis.

It is our goal that all students with disabilities have access to high-quality first instruction in the classroom with their peers who are nondisabled and have access to a Multi-Tiered System of Supports (MTSS) through the general education system. We recognize the critical need for due process rights for parents and students under IDEA, the necessity of compliance with the special education laws and regulations to ensure adequate IEP development, and the necessity of progress monitoring of student growth to ensure academic progress for students.

CASE members have been involved in the development of these recommendations through meetings and surveys and all stakeholder results and comments have been taken into account. The CASE Policy and Legislative Committee, in coordination with our CASE Executive Council and the CASE Board of Directors, has spent nearly two years carefully considering recommendations, rationales for those recommendations, and statutory language that would operationalize these recommendations.

CASE offers the following recommendations for consideration.

Recommendation #1: Full Funding of IDEA

CASE recommends Congress maintain the current authorized IDEA funding formula and that appropriation of funds for the Act matches the intention in the statute. Specifically, CASE recommends Congress appropriate funds for the full formula (40% of excess costs X the number of participating students), as authorized.

RATIONALE: When the Education for the Handicapped Act was signed in 1975, Congress recognized the costs to serve children with disabilities would be higher than the costs to serve students without disabilities. Congress authorized a funding level of 40% of the average per-pupil expenditure multiplied by the number of students with disabilities. As the costs to serve children with disabilities have skyrocketed due to increases in students with more severe disabilities like autism, states' need for this support is more critical than ever. Providing federal funding at the level promised is essential for the following reasons:

- IDEA is a federal statute associated with many procedural regulations. The volume of regulations at the federal level dictates a level of investment that will adequately support local school districts' abilities to address the needs of students with mild to profound disabilities.
- Federal funding ensures a level of equity across the nation with regard to investment in special education.
- The American Recovery and Reinvestment Act of 2009 provided a level of funding that was at 31% of the calculated excess costs. This level of support resulted in a tremendous benefit to students with disabilities and addressed the federal support needed for high-quality IDEA implementation.
- CASE supports a phase-in of increased funding over a 4-year period with a goal of full funding by 2021.

Recommendation #2: Opposition to Public Subsidy of Private Education

CASE opposes all publicly funded subsidies of private education such as private school voucher programs (including tax credits, taxpayer savings grants/scholarships, and portability) for all students, including students with disabilities, as these subsidies are contrary to the best interests of students and their families, the public school system, local communities, and taxpayers.

RATIONALE: Public education is essential to provide equitable opportunities and positive educational outcomes for all students, including students with disabilities, in the least restrictive environment. CASE opposes public subsidy of private education for the following reasons:

- Students with disabilities do not have equal access to private schools. Mission-based entrance policies which describe students who “match” a private school’s mission are often discriminatory against students with disabilities. There is evidence of discriminatory practice within this context based on race, disability, and socioeconomic status. Any organization receiving public funding must offer equal access to its programs.
- Private schools significantly lack accountability. As such, the measures so critical to considering school success are missing from private education. Standardized assessment, student achievement targets, funding oversight, reporting requirements regarding discipline, oversight on least restrictive environment, transition outcomes, discipline, disproportionality, maintenance of effort, evaluation timelines, special education teacher certification requirements, incidents of restraint and seclusion and other essential oversight required of the public school systems are necessary to ensure equitable access for students with disabilities.
- Students with disabilities and their families are not guaranteed basic due process rights afforded under the Individuals with Disabilities Education Act (IDEA) when they choose private schools. If parents

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make a unilateral decision to enroll their child in a private school, the right to an individualized education program (IEP), special education and related services, mediation, dispute resolution and other due process rights are not available. Therefore, participation in the educational program is limited for students with disabilities in private schools.

- Subsidizing private schools with public funds does irreparable harm to public schools. Access to equitable public opportunities and positive educational outcomes is based on a strong state and federal investment in public education. Use of public dollars to pay for private education decreases the funding available to ensure a strong public school system which is essential to quality educational opportunities for students with disabilities. A parallel system of education publicly funded in the private sector is unsustainable for taxpayers and harmful to students with disabilities.

For these reasons, CASE calls upon Congress and the U.S. Department of Education to oppose any statutory or administrative change that promotes public subsidy to private education, such as vouchers, scholarships, voucher-like programs and/or tax credits.

Recommendation #3: Revise Independent Educational Evaluation Request Requirements

CASE recommends reasonable parameters in determining when a parent should have access to an Independent Educational Evaluation (IEE) at the cost of the school district.

RATIONALE: The IDEA statute includes the term 'independent educational evaluation,' but does not provide specific guidance to parents or the public agency. Federal regulations require the public agency to file a due process complaint to show its evaluation is appropriate, or ensure that an IEE is provided at public expense. The requirement that a due process hearing is the only process the public agency may use to establish the appropriateness of the evaluation conducted by school experts creates a financial burden and an adversarial relationship with parents. The appropriateness of the evaluation should be determined through a collaborative review process at the local level involving parents and the public agency. The recommendation for statutory language would provide clarification and establish reasonable parameters around requests for IEEs.

CASE recommends provisions for IEEs be clarified as follows: Provide an opportunity for the parents of a child with a disability to examine all records relating to the child and participate in meetings regarding the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education (FAPE), and to obtain an IEE as described below:

- The parents of a child with a disability have the right to obtain an independent educational evaluation of the child at public expense.
- IEEs should be limited to areas of evaluation that are a component of a special education eligibility determination.
- A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency and informs the public agency in writing of the specific reason(s) for disagreeing with the public agency's evaluation.
- Prior to obtaining an IEE, the parent, in collaboration with the public agency, must consider the administration of additional assessments conducted by the public agency.
- A resolution session must be held to enable the public agency an opportunity to demonstrate the appropriateness of the evaluation.
- If, through the resolution session, it is determined an IEE should be obtained, the public agency will provide a list of qualified examiners to conduct an evaluation who are not employees of the public agency responsible for the child's education or employed by a private service agency the child may attend.
- The public agency must provide to parents the criteria and cost limitations that apply to IEEs.
- A parent is entitled to only one IEE, which could include multiple components at public expense, each time the public agency conducts an evaluation with which the parent disagrees.

Recommendation #4: Redefine Serious Bodily Injury

CASE supports redefining the term serious bodily injury at a level of harm less severe than under the present definition.

RATIONALE: School districts have a legal and moral responsibility to ensure children and staff are safe from serious injury while at school or school functions. The current statute uses the definition of serious bodily injury from § 1365(h)(3) of Title 18, United States Code, which is a threshold too high for any educational setting. Local school districts must respond to concerns about student behavior in a proactive and preventive manner. School districts are required to address behavior that impedes the child's learning or that of others, and requires the IEP team consider the use of possible behavioral interventions, supports, and strategies to address that behavior. This proposed change would be consistent with expanded provisions in the IEP designed to prevent the likelihood of serious bodily injury.

CASE recommends revising the IDEA definition of serious bodily injury as provided below:

"Serious bodily injury" means a significant physical injury that: (a) requires the attention of a healthcare professional and absence from school (e.g., broken bones, unconsciousness, need for stitches, or where an ambulance must be called to care for any person); (b) causes an absence from school or work for multiple days pursuant to doctor's orders; (c) requires an overnight stay in a hospital; or, (d) is a compensable injury under the applicable workers' compensation statute."



Recommendation #5: Expand Maintenance of Effort (MOE) Exceptions

CASE recommends adding additional exceptions to the MOE requirements for Local Educational Agencies (LEA) from one year to the next.

RATIONALE: The original purpose of the MOE provision was to ensure students do not lose access to services due to cuts in funding. The limited exceptions permitted in order to verify services have not been cut are overly simplistic and do not take into account systemic changes in education regarding early intervention, the impact of federal grant (e.g., Title I) supports and services, and implementation of a Multi Tiered System of Supports (MTSS). For these reasons, the following additional exceptions should be added:

- Improved efficiencies that do not result in a reduction in special education services.
- A reduction of expenditures for employment-related benefits provided to special education personnel (e.g., pay, retirement contributions, sick leave, health and life insurance), provided that such reduction of expenditures is made for all instructional personnel, and these reductions do not result in a reduction in special education services.
- LEA reduction of expenditures may be related to:
 - Re-enrollment of students upon exiting an LEA-contracted placement due to availability of an appropriate program in the LEA,
 - Development of specialized programming within the LEA for which the LEA previously contracted with another agency, or
 - Reduction in assistive technology costs due to price reduction of technology based on market price.

CASE believes that all students with disabilities must have access to high-quality first instruction in the classroom with their peers who are nondisabled and have access to a Multi-Tiered System of Supports (MTSS) through the general education system.

CASE recommends the state educational agency (SEA) be allowed to grant waivers to an LEA, as follows:

- Waivers for exceptional or uncontrollable circumstances: The SEA may waive the requirements of maintenance of effort for an LEA, for one fiscal year at a time, if:
 - The SEA determines the LEA has not reduced the level of expenditures for the education of children with disabilities for that fiscal year disproportionate to other expenditures; and
 - The SEA determines that granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the LEA; or
 - The LEA provides clear and convincing evidence to the SEA that all children with disabilities have FAPE available to them, and the SEA concurs with the evidence provided by the LEA.

CASE recommends monitoring requirements regarding significant disproportionality be revised to ensure accountability and provide local flexibility with early intervening funds.

CASE recommends the removal, under Section 613(f), of the provision requiring an LEA to reserve the maximum amount of funds to provide comprehensive coordinated early intervening services to children in the LEA, particularly children in those groups that were significantly overidentified.

Recommendation #6: Ensure Access to Facilitated IEP Team Meeting Services

CASE recommends IEP facilitation services be a required component of services offered by the SEA as part of the IDEA conflict resolution process.

RATIONALE: IDEA makes clear the collaborative teaming necessary for development of high-quality IEPs. Disagreements between parents and schools are inevitable, given the standard set by FAPE. Parents/guardians may request additional services above and beyond what might be required under special education. Any and all local supports for teams to work through challenges at the IEP team level are beneficial. IEP facilitation has been shown to improve the outcomes for IEP teams and decrease the need for due process hearings.

CASE proposes SEAs be required to implement IEP facilitation with well-trained facilitators to support teams where conflict is occurring. While teams should not be required to use IEP team facilitators, the service should be available and at no cost to either party based on a request showing facilitation would enhance the outcomes, given the challenges experienced by the team.

Topic #7: Notification to School Districts Prior to Filing Due Process

CASE recommends parents be required to make school districts aware of formal disagreements prior to allowing parents to file a due process complaint under the IDEA.

RATIONALE: Directors of special education, special educators, classroom teachers, school principals and other critical members of student teams are highly dedicated professionals who work tirelessly to address student needs and provide high-quality instruction and intervention. It is often the case that a parent will file for due process without previous notice of dissatisfaction and without clearly articulating their concerns about the program.

CASE recommends parents be required to clearly articulate their concerns, providing the school district a chance to address those concerns. This notification will ensure school districts and parents have the opportunity to address differences locally prior to costly litigation.

School districts manage a variety of complaints on many topics and have policies and procedures in place to address the need for due process for students and families. Concerns regarding IEPs, evaluations, discipline, and other decisions regulated under IDEA should be subject to a review by the school district with an opportunity to resolve those differences.

Topic #8: Revised Requirements Regarding Functional Behavior Assessments

- A. CASE recommends Functional Behavior Assessments (FBA) not be subject to IEEs.
- B. CASE recommends the requirements be revised for FBAs and Behavior Intervention Plans (BIP) under the IDEA discipline provisions.

RATIONALE: Functional Behavior Assessments (FBAs) provide an important basis for specific behavior planning and programming in special education. Best practice for this process involves the use of team interviews in conjunction with student observations to create hypotheses about the function of behaviors that support the design of a behavior plan. The BIP should be designed to replace those behaviors with pro-social and successful behaviors.

FBAs should not be required if a recent one exists, i.e., completed within 90 days of a disciplinary event that triggered the development of an FBA for a behavior substantially similar to the current behavior. The repeated requirement to complete FBAs is unduly burdensome on IEP teams and students where students must undergo FBAs on a regular basis as part of ongoing educational programming. As long as teams are completing FBAs on a regular basis, repeating them at the occurrence of a single event is duplicative and unnecessary.

Given the ongoing process of behavior planning and development of FBAs, it is also unreasonable to create a right to an IEE based on a single FBA. Congress should give careful consideration to ensuring statutory requirements are reasonable and match the intent of the FBA process and behavior planning.

Recommendation #9: Determine a Consistent Burden of Proof Across States

CASE recommends creating a burden of proof consistent across all 50 states.

RATIONALE: In 2005, in *Schaffer v. Weast*, the United States Supreme Court addressed the question of the burden of proof in special education due process hearings, holding that when a child's IEP is challenged, the party seeking relief bears the burden. However, the Court did not require states to amend their laws if they place the burden of proof on districts, nor prohibit states from passing legislation that places the burden on districts. As a result, half a dozen states place the burden of proof on the district regardless of whether the parent is challenging the IEP. IDEA should clarify the burden of proof standard for all 50 states based on this legal standard as follows: The burden of proof to determine the provision of FAPE should be on the party seeking relief.

Recommendation #10: Change in Terminology Specific to Emotional Disturbance

CASE recommends the term Emotional Disturbance be changed to Emotional and Behavioral Disability.

RATIONALE: The term 'Emotional Disturbance' is a pejorative label that causes stress for parents, teachers and, most importantly, for students. The term "disturbance" has a highly negative connotation and creates implicit bias associated with students labeled as such. The term should be changed to more precisely describe the disability category and avoid unnecessary negative association with an already challenging and highly charged disability.



As the costs to serve children with disabilities has skyrocketed due to increases in students with more severe disabilities like autism, support to implement the law is even more critically needed by states.



A Division Of The Council For Exceptional Children



ABOUT CASE

The Council of Administrators of Special Education, Inc. (CASE) is an international professional educational organization which is affiliated with the Council for Exceptional Children (CEC), whose members are dedicated to the enhancement of the worth, dignity, potential, and uniqueness of each individual in society. CASE is especially dedicated to the improvement of services for students with disabilities and is therefore organized to promote professional leadership, to provide opportunity for the study of challenges common to its members, and to communicate through discussion and publications information to develop improved services for exceptional children. Membership is open to current members of the CEC who administer/coordinate programs for exceptional children, are former administrators of special education, or are college/university faculty whose major responsibility is the professional preparation of administrators of special education. CASE was constituted in 1952 and has approximately 5000 members throughout the United States, Canada, and various other countries.