United States Senate

Republican Policy Committee

Jon Kyl, Chairman

July 22, 2003

Disabled Children May Be Left Behind if IDEA Law Becomes an Entitlement

Executive Summary

- The reauthorization this year of the Individuals with Disabilities Education Act (IDEA) presents an opportunity to address the flaws in the special education system which have been pointed out by teachers, parents, and administrators.
- The President's principles for reform address these flaws: the need for increased accountability; the burdensome procedural requirements; the misidentification of children as disabled; and the insufficient role of parents in helping determine their disabled child's educational needs.
- If Congress fails to reform the system, the consequences will be costly – more endangered students, more teachers driven from the field, and more precious resources pulled out of the classroom and into litigation expenses and administrative requirements.
- On June 25, a bipartisan bill (S. 1248) to reauthorize IDEA was unanimously reported by the Senate Committee on Health, Education, Labor, and Pensions. The Gregg-Kennedy bill would not accomplish all of the President's principles, but it makes a meaningful start.
- The most significant threat to implementing the President's principles is an effort to convert the law into a protected entitlement program, which the bill as reported would not do.
- Senator Kennedy has indicated he will offer an amendment to make IDEA a mandatory program when the reauthorization bill comes before the full Senate.
- Were that amendment to pass, it would become immensely more difficult for Congress to make improvements to the law. Special education is an evolving field, and so the opportunity to make critical reforms should not be denied for future years.
- Republicans have initiated a 282-percent spending increase over the past seven years to respond to the pressing needs of the states. Republicans should continue to pursue the goal of improving educational outcomes for children with disabilities, and resist efforts that would make it more difficult to address the critical and evolving problems facing the special education community.

Introduction

The right of disabled children to equal educational opportunities is rooted not in the law but in the United States Constitution.[1] The special education law – now known as the Individuals with Disabilities Education Act (IDEA) – was enacted in 1975 to assist states in meeting their Constitutional obligation.[2] States that follow federal rules and offer all children, regardless of disability, a free appropriate public education (FAPE) receive federal financial assistance. Through the reauthorization process, the law has been revised several times, most recently in 1997. In 2002, 6.5 million disabled children were served through IDEA.[3]

Authorization Versus Entitlement

Reforms to IDEA have been implemented during past reauthorizations, but many problems persist. Even the best efforts in 2003 may well fall short of satisfying the disabled student community. In part, this is due to the competing interests in the debate, and in part due to the fact that the science of defining disabilities is an evolving one, affecting both who is served and how they should be served.

Thus, it is critical that even as Congress continues to increase the funding levels for IDEA – as it has over the past seven years – it also must be permitted to improve the system for the benefit of disabled children by addressing the evolving science, any unintended consequences of the law's mandates, and the growing costs. It can do this best through the legislative reauthorization process. Congress largely will be denied this opportunity if Democrats succeed in putting this imperfect program on auto-pilot.

The President's Principles

Though the law has opened doors for disabled children overall, IDEA's complicated regulatory system detracts from its success. Specific problems with the system were studied by the President's Commission on Special Education, a 20-member Commission organized in 2001 to recommend IDEA reforms. The Commission based its findings on the reports of more than 100 special education experts, practitioners, parents, and disabled individuals themselves. After receiving the Commission's report, the President issued a list of principles directed at the reauthorization process. The principles are:

---

[1] *PARC v. State of Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972). See "The Individuals with Disabilities Education Act: Congressional Intent", CRS report number 95-669, for summary.

[2] P.L. 94-142, originally called the Education for All Handicapped Children Act, was renamed IDEA during its 1990 reauthorization in P.L. 101-476.

[3] President's Commission on Excellence in Special Education, *A New Era: Revitalizing Special Education for Children and their Families*, 2002.

- First, improve accountability by aligning IDEA with the principles of the No Child Left Behind Act. The President seeks to decrease emphasis on compliance with procedure and increase emphasis on results.

- Second, simplify the law's burdensome due-process requirements, which create inordinate amounts of paperwork for teachers, limit the ability of schools to discipline disabled children who exhibit violent or inappropriate behavior, and intensify adversity between parents and schools.

- Third, reduce misidentification of students, which has fueled growing IDEA costs. Schools are faced with a growing and changing population of special-education beneficiaries, some of which is based on outdated identification practices. The questions of how disabled children are identified, and what schools must provide, should be examined with this legislation.

- Fourth, increase the role of parents in determining the most appropriate setting for their disabled child's education. Oftentimes, this may be a private or charter school.

Funding Should Not Be the Focus of the Debate

Congressional commitment to IDEA funding is strong under the current Republican leadership – but it cannot be our only focus. By fighting to assure the safety of children, reduce the burden on special education teachers, increase cooperation between schools and families, keep costs reasonable for school districts, and assure services are properly provided to those who need them, Republicans can demonstrate that their commitment to special education extends beyond increased funding alone. The principal goal of IDEA is to improve educational outcomes for disabled children. Money alone will not achieve that goal.

The Gregg-Kennedy bill does not convert IDEA spending from discretionary to mandatory, but as noted earlier, an amendment to do so is expected during the floor debate. The House on April 30 passed (251-171) its IDEA reauthorization, H.R. 1350, retaining IDEA as a discretionary-spending program, and doubling the funding level in just seven years.

The remainder of this paper details the President's principles for addressing the critical problems facing special education today – shortcomings which would not improve if IDEA becomes an entitlement program.

Principle 1: Improve Accountability

The President's first principle is to align IDEA with the landmark No Child Left Behind Act (NCLB), which puts educational results first and makes schools accountable to students and parents. Under NCLB, all students are assessed every year to make sure they are learning. Each state is developing standards against which students will be measured; special education students will require alternate standards and assessment methods.

The Gregg-Kennedy bill would clarify methods to measure special education students' progress and allow alternate assessments to be incorporated into the No Child Left Behind Act accountability systems. The bill would fund efforts to determine accurate alternate assessment methods which states could align with state content standards.

The ability to measure students' progress within the context of a state's general education standards will offer parents a meaningful picture of their child's development – yet, it is just the kind of reform that could be discouraged if IDEA is converted into an entitlement program. Efforts to create or strengthen accountability systems frequently face opposition from entrenched education groups. Yet during reauthorization, parents, teachers, administrators, and state and federal policymakers must come together, hear each other's concerns, and forge a compromise. Making IDEA an entitlement program would take away that rare opportunity for modest reform, jeopardizing the quality of special education.

Principle 2: Simplify Burdensome Procedural Provisions

In an effort to ensure every disabled child is treated fairly, IDEA provides elaborate procedural safeguards. Compliance with these burdensome provisions presents three of the law's most serious problems: restrictive discipline procedures, which can put other children and teachers at risk; excessive paperwork requirements, which affect teachers' time in the classroom; and an adversarial framework, which contributes to animosity and high legal costs.

Discipline Restrictions Put Children and Teachers at Risk

Under IDEA, schools are strictly limited in their ability to deal with disabled children who exhibit violent or inappropriate behavior. This can place teachers and other children in the classroom at risk, disrupt the learning process, and put the school at risk for lawsuits.

Special education students are subject to a federally prescribed disciplinary regime. When such a student commits an infraction, he may be suspended for up to 10 days. He may be removed from the classroom and placed in an interim setting for up to 45 days only in cases involving weapons, drugs, or clear indications that the child is likely to injure himself or others. Education services must not cease during a 45-day removal. After 45 days, the student is often returned to the original educational setting. On the other hand, all states have policies requiring the one-year expulsion of non-disabled students who bring weapons to school.[4]

If a student's parents allege due-process violations, the law requires the student to "stay put," meaning that he must remain in the current educational setting until all proceedings, including appeals, have been completed. Two attorneys who worked with a disabled student describe how the procedural protection can be exploited:

[4]As required for federal funding under the Gun-Free Schools Act, Public Law No. 103-382.

> "The IDEA's 'stay-put' provision is subject to serious abuse. . . . College basketball long ago implemented the 40-second clock to put some reasonable limits on versions of 'stall ball.' There is no comparable mechanism in IDEA. Running out the clock is a strategy that is alive and well in special education due process proceedings."[5]

The law is so broadly written that it permits even students who are in – or who have not begun – the initial stages of disability determination to claim exemption from a school's disciplinary process. Once a student is subject to a disciplinary action, he then can allege that he is disabled, and he may be eligible to receive the same protections under certain circumstances.

The President requested that the disciplinary provisions be simplified to improve school safety while preserving protections for disabled students. The Senate bill, S. 1248, would simplify the disciplinary procedure schools must follow. It also would repeal the "stay-put" provision and, instead, require a school to conduct an expedited hearing within 20 school days of the date the hearing was requested. However, it would retain the 45-day out-of-classroom limitation, and require schools, before issuing punishment, to determine whether the disciplinary violation was a result of the student's disability.

The House bill, H.R. 1350, takes a bigger step towards meeting the President's principle. It would allow students who violate school rules to be kept out of the classroom for longer than the initial 45-day period (with continuing educational services), and would allow students with disabilities to be penalized in the same manner as non-disabled students for the same violations.

Teachers and principals should be allowed to control the safety and educational atmosphere of their schools. If IDEA became a permanent entitlement program, the straitjacket of federal disciplinary rules would remain on teachers and principals indefinitely.

Paperwork Takes Teachers Out of the Classroom

Special education teachers face paperwork burdens so onerous that they spend more time on paperwork than on grading, communicating with parents, sharing with colleagues, supervising assistants, and attending teacher meetings combined.[6]

---

[5]Kevin J. Lanigan et al., "Nasty, Brutish...and Often Not Very Short: The Attorney Perspective on Due Process," in C.E. Finn, Jr., A.J. Rotherham, & C.R. Hokanson, Jr. (Eds.), *Rethinking Special Education for a New Century*, Washington, DC: Thomas B. Fordham Foundation and Progressive Policy Institute, May 2001, p. 226.

[6]Elaine Carlson et al., *Study of Personnel Needs in Special Education (SPENSE)*, Westat for the Department of Education, March 24, 2003, A7-8. http://www.spense.org. Data from 1999-2000.

Teachers are used as compliance officers for school districts struggling to comply with more than 814 federal monitoring requirements. The President's Commission noted that few are "related to student performance."[7] Special education teachers spend three times as much time on paperwork as the average teacher.[8]

The Council for Exceptional Children, a special education teachers group, conducted a survey on its members' unique burden. They found that their additional paperwork duties include documentation related to collaborative team meetings, medical assistance billing records, due process documentation, and reports and evaluations of students referred to but not placed in special education. Remember, these are classroom teachers, not lawyers or administrators.

The Individual Education Program (IEP), the federally required contractual document negotiated annually for each disabled child, largely contributes to the paperwork burden. A recent survey shows 83 percent of the teachers reporting they spend "from one-half to one-and-a-half days per week in IEP-related meetings."[9] IEPs contain detailed information about the child's current status, goals, and the services which will be provided. Typically, the IEP is between 8 and 16 pages in length and is drafted during hours of negotiations in meetings with teachers, administrators, lawyers, and parents.[10]

Reducing the paperwork burden must include the IEP process. S. 1248 would maintain the annual IEP requirement for children under age 18, but it does relieves paperwork and time commitments for teachers in a number of other ways. The Senate bill would allow: amendments to the IEP rather than complete redrafts; more flexibility in allowing teachers to be excused from IEP meetings when their attendance is unnecessary; and consolidation of IEP and reevaluation meetings. Most significantly, both the Senate and House bills would eliminate the requirements that IEPs must include benchmarks and short-term objectives, which contribute greatly to the paperwork burden on educators and parents, and often bear no relationship to a child's development.

The House-passed reauthorization bill arguably comes closer to the President's goals by giving parents the option of renewing IEPs every three years or annually, as they prefer.[11] H.R. 1350 also would allow: amendments to the IEP rather than complete redrafts; changes through written exchange

---

[7]President's Commission on Excellence in Special Education, p. 12.

[8]Carlson et al., p. 1.

[9]Council for Exceptional Children (CEC), *IDEA Reauthorization Recommendations*, 2002, http://www.cec.sped.org/gov/IDEA_reauth_4-2002.pdf.

[10]CEC, p. 18.

[11]This approach was recommended by the CEC as part of a pilot program, CEC p. 23.

rather than face-to-face meetings; and flexibility in the makeup of the IEP drafting group. Like the Senate bill, H.R. 1350 would eliminate benchmarks and short-term objectives, but for a limited group of students and only after a phase-in period. Importantly, the House bill would waive paperwork requirements for up to four years for 10 states in a pilot program.

Elaborate Due Process Structure Leads to Litigation, and Fear of Litigation

Much of the paperwork burden is not actually required by the federal law, but by states and localities in an effort to fend off lawsuits. As the Council on Exceptional Children pointed out, "Too often the focus of IEP development seems to be on compliance with the rules and regulations that govern special education services in order to avoid procedural complaints."[12] Until this problem is remedied, states have little choice but to continue to protect themselves against costly litigation by doing onerous paperwork aimed only at proving they complied with the law.

The law's elaborate procedural safeguards include a negotiated IEP, numerous formal notices of educational action (and non-action), mediation of disputes, a due process hearing, and a right to appeal in state or federal court. When parents prevail, they can be awarded reasonable attorneys fees.[13] Schools are never entitled to attorneys fees. Unfortunately, this structure also allows for abuse by ensuring that either party can prolong resolution of disputes for years.

The 1997 reauthorization sought to improve the dispute resolution process by requiring that schools offer mediation as an option to parents before a formal due process hearing. Although schools report that mediation is far less costly, schools are prohibited from entering into voluntary binding arbitration. Due process proceedings and litigation are always an option. Schools face high risk because they pay for their own attorneys' fees and sometimes those of the other party. The cost of litigation in both time and money remains so substantial that the fear of litigation is what most hinders relief.[14]

This pits parents against schools in a battle for school resources, and the costs are considerable. A recent study based on 1999-2000 data found that the cost of a mediation or due process case typically

---

[12]CEC, p. 18.

[13]H.R. 1350 would amend IDEA to give the power to determine hourly rates for attorneys fees in IDEA suits to a state's governor, or other appropriate official. The governor would report these rates to the public annually. No court could add a bonus or multiplier to such attorneys fees. S. 1248 has no similar provision.

[14]Jay G. Chambers, Jennifer J. Harr and Amynah Dhanani, "What are We Spending on Procedural Safeguards in Special Education, 1999-2000?" Center for Special Education Finance, May 2003. http://www.seep.org/DOCS/04.PDF.

ranged from $8,160 to $12,200, while the average cost of a litigated case was $94,600.[15] This study concluded that $146.5 million was spent in the 1999-2000 school year on due process, mediation, and litigation activities – but the study recognized that this estimate is likely lower than actual costs because it does not include attorneys fees awarded, costs related to the first level of complaint to the local school district, or the costs of teachers' and administrators' time when they are required to appear in court and mediation sessions.

The President requested that alternative dispute resolution through both mediation and voluntary binding arbitration be encouraged. S. 1248 attempts to streamline the procedural safeguards, and requires that a parent must sit down with a school district and give school officials an opportunity to resolve their complaint before resorting to a due process hearing. While S. 1248 encourages alternative dispute resolution, it does not provide for voluntary binding arbitration. The House bill would require states to establish a voluntary dispute resolution system. In cases where a due process hearing does occur, to different degrees both bills would restrict the hearing officers to looking at how well the school is meeting the child's educational needs, and not procedural fumbles and missteps. Both bills would establish statutes of limitations for lawsuits. H.R. 1350 creates a one-year statute of limitation and S. 1248 adopts a two-year statute of limitations, which could be extended or shortened by state law.

Principle 3: Improve Means to Identify Disabled Children

The cost of special education has skyrocketed since IDEA's enactment. The average cost of educating a disabled child has grown from $3,577 in 1977-1978 to $12,474 in 1999-2000. This is almost twice as much as it costs to educate a non-disabled student.[16] In the 1999-2000 school year, states spent $78 billion to educate disabled children – amounting to 21.7 percent of total state education spending.[17] The cost of the maximum authorized federal share of IDEA (40 percent of the average per-pupil expenditure (APPE), multiplied by the number of disabled students) has grown significantly from $3.4 million in 1981 to $18.2 billion in 2002.

Over-identification of Disabled Students Adds to Cost Burden

Contributing to this growth is the increase in the number of students identified as disabled. That number has grown from 8.5 percent of the student population in 1977-1978 to 13 percent in 1999-

[15]Chambers at al., p. 5.

[16]Chambers, Harr and Dhanani, p. 6.

[17]Jay G. Chambers, Thomas B. Parrish and Jennifer J. Harr, What are We Spending on Special Education Services in the United States, 1999-2000?, Center for Special Education Finance, March 2002. http://www.seep.org/Docs/AdvRpt1.PDF

2000,[18] and much of that growth is attributable to one class of disabled: Attention Deficit Hyperactivity Disorder (ADHD). In 10 years, the number identified in this category has jumped by 319 percent.[19] Another classification, Specific Learning Disability (SLD), has increased by 36 percent in the same time frame.

While some of the growth in both of these categories is attributed to an increase in premature births and to a greater understanding and awareness of learning disabilities, there is concern that some also may be due to over-identification. As the President's Commission on Special Education explained, "The lack of consistently applied diagnostic criteria for specific learning disorders makes it possible to diagnose almost any low- or under-achieving child as SLD depending on resources and other local considerations."[20] The Commission also found flaws with the way ADHD students are qualified, concluding, "It is widely believed that many children who are identified through this process are not adequately evaluated."[21]

Both S. 1248 and H.R. 1350 would improve identification of disabled children in the categories which have experienced such rapid growth and encourage cost-effective early identification of disabled children. In many cases early intervention can be a key to overcoming a disability.[22] In both bills, up to 15 percent of a state or local school district's total grant could be utilized for "pre-referral services" to identify students who, with additional services, could succeed on the general education track.

Recent Court Ruling Fuel Skyrocketing Costs - Now Include Medical Services

In *Cedar Rapids Community School District v. Garret F*, 526 U.S. 66 (1999) the Supreme Court opened the door to huge additional cost burdens on states.[23] IDEA requires states to provide both a free appropriate public education and *related services*, such as transportation. The Court found that the related services requirement obligates states to pay for whatever *medical services* (that are not required to be administered by a doctor) are required to keep a child in school. In the case before the high court, the school was ordered to pay for a full-time nurse for a child who required a ventilator that required constant monitoring. Clearly, the presence of a medically needy child can impose very high and unexpected costs on a school district's special education program.

---

[18] Chambers, Parrish and Harr, p. 7.

[19] President's Commission on Excellence in Special Education p.2 4.

[20] President's Commission on Excellence in Special Education p. 25.

[21] President's Commission on Excellence in Special Education p. 24.

[22] President's Commission on Excellence in Special Education p. 22.

[23] Cedar Rapids Community School District v. Garret F., 526 U.S. 66 (1999).

Both S. 1248 and H.R. 1350 would amend IDEA to allow some funds to be reserved in risk pools which could be drawn upon for high-cost cases.[24] The Senate bill, S. 1248, would require states to set aside 2 percent of their Part B IDEA grant (after adjusting for administrative costs) for the sole purpose of assisting local districts in covering the costs of high-need students. The bill would grandfather states which already have some form of cost-sharing risk pool in place, allowing them to use the 2 percent for their current structure. Any unused funds would eventually go out to the local districts as part of their regular grant. In contrast, the House bill clarifies that states may voluntarily apply funds to this purpose, although current law does not prohibit them from doing so.

Rather than let IDEA's deficiencies and court rulings fuel the growing costs of special education, Congress should reform the program so that all disabled children can be well served. The alarming spike in learning disabilities which are difficult to accurately diagnose is in large part a result of natural scientific developments, which no doubt will continue to unfold. Because Congress has established criteria for defining eligible disabilities, it has an important role to play in this arena. As conditions become scientifically accepted and accurate methods of diagnosing conditions change, the law must be modified so that special education resources are used wisely.

With regard to the *Cedar Rapids* ruling, it can be reasonably anticipated that as medical science advances, even more disabled individuals will be able to participate in all-day school. A risk pool as provided in this year's bill might not be sufficient to fund these needs, and a different approach may become necessary. If IDEA funding becomes mandatory, it will be very difficult to revise the statute in a way that reduces its costs. Legislators must establish that delicate balance between meeting the needs of children and retaining the ability of a school to function both administratively and fiscally.

Principle 4: Increasing the Role of Parental Choice

The President's fourth principle for reform is to increase the role of parents in determining the best environment for their disabled child's education. Current law requires local education agencies (LEAs) to identify all disabled children regardless of whether they are enrolled in private, parochial, or public school. It also allows a substantial degree of private school involvement for districts willing to allow it. For example, the LEA may pay to place the student in private school if the members of the student's individual education plan team agree to it, but that is not often the case.

[24] In the 107th Congress, legislation was considered which would allow Medicaid to cover disabled children who would not otherwise meet a state income threshold for Medicaid eligibility - S. 321 and H.R. 600.

The state of Florida has established a traditional voucher program for special education students, which has proved very popular. Participation in Florida's McKay Scholarship Program has grown every year, reaching 8,000 disabled children in the 2002-2003 school year,[25] and the reviews from parents are very positive. Among the areas parents rated highly were smaller class sizes, and their assessments that their children were much less likely to be "bothered" by other students based on their disability or to be physically assaulted.[26]

As the survey results show, most participating parents believe their child is receiving a more appropriate education in a private school. However, the $54 million McKay program is not funded by IDEA – it is entirely funded by the state of Florida. The President's Commission recommended that IDEA funds should "follow students to schools their families choose."[27]

There are other possibilities to encourage parental choice. Some states offer tax credits for donations to scholarship programs. In Arizona, individual taxpayers receive a dollar-for-dollar tax credit for donations to nonprofit groups that offer private school scholarships to students. The program was initiated in 1997, and in its first four years it collected $56 million, enough to provide new opportunities to 36,000 school children.[28] Other possibilities states may want to experiment with include a partial choice program, such as offering disabled students in failing school districts vouchers for supplemental tutoring services.

Mandatory Spending Threatens to Leave Disabled Students Behind

In many cases, IDEA's deficiencies are fueling its costs. Some of these are apparent to lawmakers now and could be addressed in this reauthorization; many more will be the possible unintended consequences of this reauthorization or trends too nascent to approach this year. Others, such as the new identification situations described above, may be addressed in this reauthorization but the scientific field in which the law operates may change enough to subvert Congressional intent.

The "Full-Funding Obligation" Debate

The charge that the federal government has not kept its so-called obligation to "fully fund" special education comes from the way Congress developed the funding formula. IDEA authorizes the federal government to pay no more than 40 percent of the average per pupil expenditure (APPE) multiplied by the number of disabled children for purposes of Part B of IDEA. APPE is a measure of how much it

---

[25]Richard N. Apling, Nancy L. Jones and David P. Smole, Individuals with Disabilities Education Act: Possible Voucher Issues, April 8, 2003, RL31489.

[26]Greene, p. 22-24.

[27]President's Commission on Excellence in Special Education p. 38.

[28]Dan Lips, "The Arizona Scholarship Tax Credit: A Model for Federal Reform," Arizona Issue Analysis 173, July 31, 2002.

costs to educate a child generally, not exclusively disabled children, and the rather arbitrary formula simply assumes the costs of educating a disabled child to be twice the cost of a non-disabled child.[29] For FY04, an appropriation of $21 billion would be required to "fully fund" Part B of IDEA, i.e., provide 40 percent of the estimated costs based on this calculation. The federal government covered about 17.6 percent of the APPE in FY03 and the President's request for FY04 would fund over 18 percent of APPE.

For Congress to fund a program below its authorized maximum is not uncommon, particularly when a program is riddled with problems serious enough to endanger its efficacy. If IDEA were fully funded today, states would still be faced with escalating special education costs. So rather than just focusing on "fully funding" the program, Congress should take steps to assure that states are not left stranded by spiraling costs they are mandated to cover.

H.R. 1350 would authorize appropriations that would allow Congress to meet 40 percent of APPE in seven years, with annual increases of over $2 billion. In fact, both the Senate Budget Resolution and Chairman Gregg's comprehensive education bill, S. 4, propose significant IDEA funding increases to achieve full-funding, or 40-percent-of-APPE, in 2009. In contrast, the existing mandatory spending proposal, S. 939, does not reach that level until 2011. As the evidence shows, it unquestionably is Republicans who have shown the strongest commitment to increasing IDEA funding.

Mandatory Versus "Full Funding"

The Republican spending plan[30] would "fully fund" IDEA by 2009. In comparison, legislation seeking mandatory funding offered by Senate Democrats, S. 939, does not reach full funding until 2011, or even later. This is because S. 939 seeks to make all funding above the FY03 level mandatory, while leaving the rest discretionary. Mandatory funding is not subject to the congressional appropriations process or budget rules, as is discretionary funding. If funding increases are made mandatory entitlements for FY04 appropriations, then the already budgeted increase of $2.2 billion in Function 500 for IDEA will be open to other spending possibilities within the function. Generally, any challenge of this "freed-up" discretionary spending – even if it is, for example, wasteful or redundant – would not be subject to a 60-vote budget point of order.

Mandatory funding under S. 939 is no guarantee of "full funding." In fact, it may be just the opposite because only half of the money is "guaranteed," while the current base level (roughly half of the full-funding amount) would remain discretionary. Even though proponents of mandatory funding promise

---

[29] Recent research has shown it is actually a little less, 1.9 times as costly. Chambers, Parrish and Harr, p. 8.

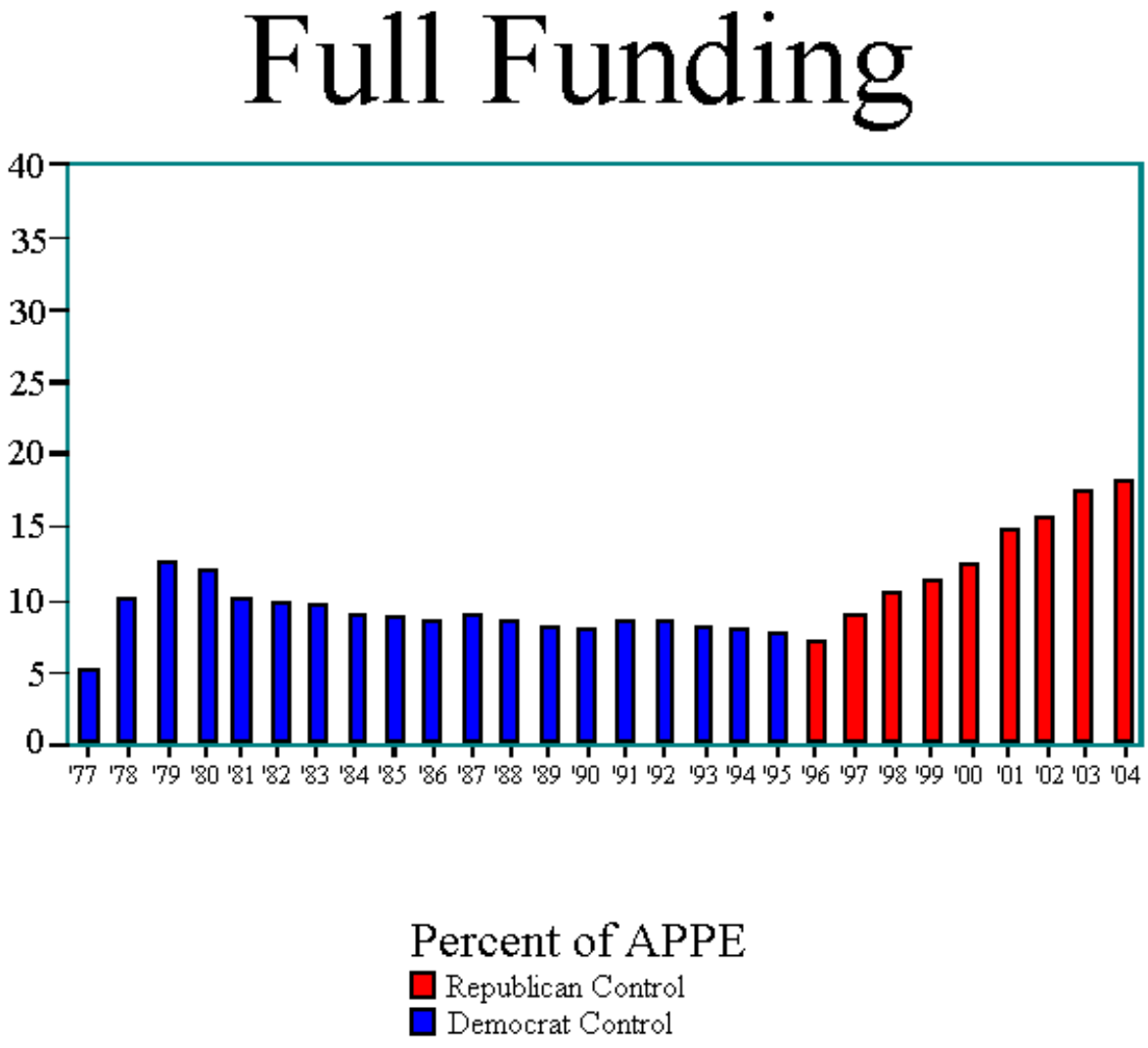
[30] Based on the Budget Resolution's projection of funding levels and H.R. 1350. Senator Gregg has expressed support for the spending levels authorized in H.R. 1350, although in his bipartisan bill the levels were left open to be settled on the floor.

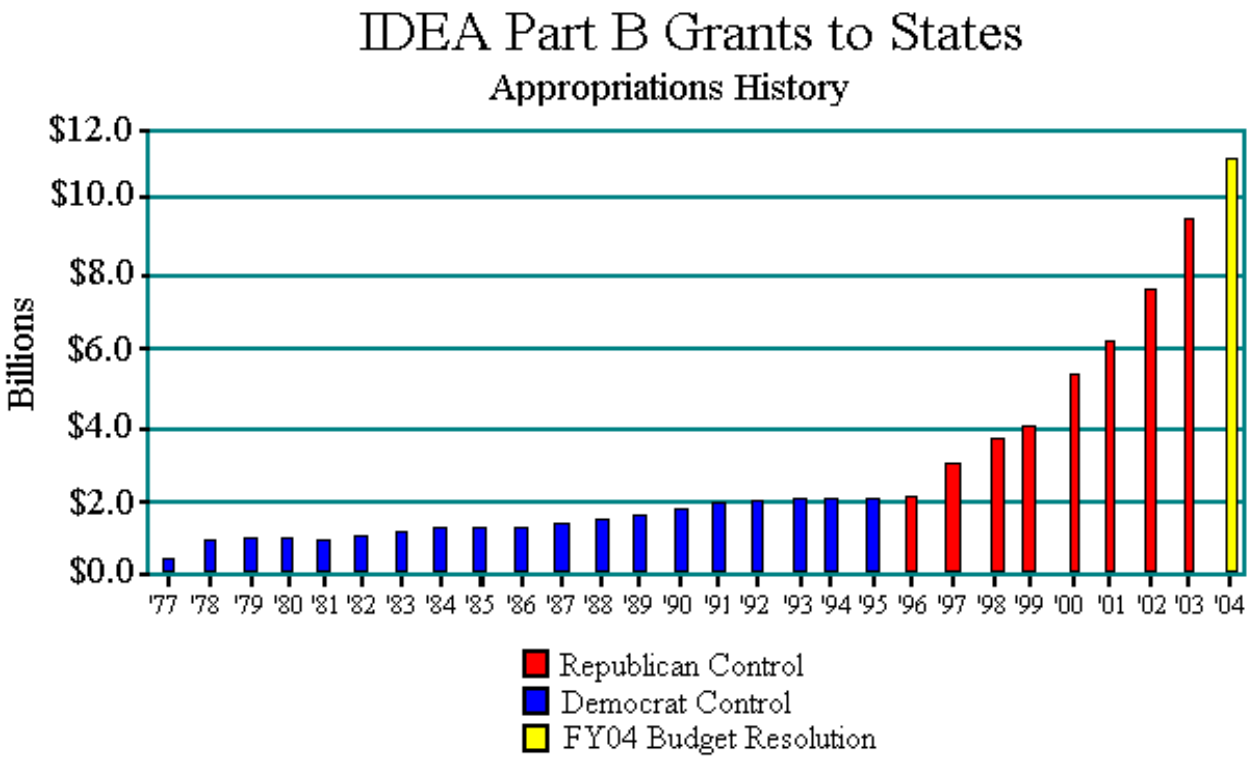
their approach gets to "full funding," under their plan, only new money is mandatory. As a result, the discretionary base funding could be reduced by an equivalent amount of the new mandatory funding each year and the net effect would be to level fund the program.

Republicans Have Dramatically Increased IDEA Funding

The most dramatic increases in Part B IDEA grants to states funding have all occurred under Republican control of Congress and/or the White House. The FY03 Appropriations bill increased Part B funding by $1.3 billion, or 18 percent, over last year, from a program level of $7.5 billion in FY02 to $8.9 billion. In his budget for FY04, President Bush requested another $1 billion increase over the level he requested in FY03. The Republican Congress has already increased funding for Part B of IDEA by 282 percent since 1996.

In comparison, during Democrat control of Congress in the 1980s, IDEA spending was one of the few appropriations that did not grow. In fact, in many of those years the federal government covered less of the states' APPE for disabled children than it had the year before. (see chart)





The Blank Check Problem

The growth in the number of disabled children under IDEA has prompted concern that the law encourages states to identify students as disabled even if they may not actually qualify as such.[31] States are faced with skyrocketing costs of special education and a cap on the amount the federal government will cover, and, to a large degree, they have federal mandates to blame for driving up the costs of special education.

In 1997, reforms were adopted to address this concern. The amount of the IDEA grant to states, which is calculated based on the number of disabled children, was capped at the 1999 level of $4.9 billion. All additional funding, which was $5.1 billion for FY03, is now distributed through another formula: 85 percent of the additional funding is distributed based on the total number of school-aged children in the state and 15 percent is distributed based on the state's share of children living in poor families. Almost half of the current grant is still distributed based on the number of disabled a state identified as of 1999.

H.R. 1350 would attempt to address the problem by placing a cap on the number of children upon which the grant will be based as equal to 13.5 percent of the state's school-age population. However, because most states' relevant number of identified children is significantly lower than 13.5

[31]Marie Gryphon and David Salisbury, *Escaping IDEA: Freeing Parents, Teachers and Students through Deregulation and Choice*, CATO, July 10, 2002.

percent, under H.R. 1350 these states will still have a significant incentive to over-identify as Congress reaches the full-funding year and provides states the maximum authorized grants. In contrast, S. 1248 immediately addresses the issue of over-identification by locking in place each state's percentage for the 2002-03 school year – a number that cannot be manipulated. Moving forward, S. 1248 calculates each state's maximum grant based on what it would have received as a maximum grant for 2002-03 and updates this figure based on the census and poverty calculations in the permanent formula thereby taking away any fiscal incentive to over-identify in future years.

Conclusion

The primary goal of IDEA must be to improve educational outcomes for individuals with disabilities. Through the reauthorization process, Congress has a chance to address the shortcomings identified by the President and his Commission on Special Education and adopt creative solutions to better educate disabled children. Converting IDEA into an entitlement program would stymie such efforts. Meanwhile, Republicans remain committed to adequately funding special education, and are putting authorized appropriations on track to meet "full funding" by 2009.

The difficulties schools face in administering IDEA are not new. Many of IDEA's flaws, such as cumbersome paperwork requirements, are due not to direct federal mandate but to states' desire to avert lawsuits. If funding levels were to become guaranteed, states would have far less incentive to make improvements.

Issues with the disciplinary provisions, the paperwork burden, procedural excesses, and over-identification have been tackled by Congresses before in efforts that have yielded less than satisfactory results. There is more work to be done with IDEA, and Congress should not convert it into an entitlement, virtually sealing the program off from review. Doing so would lock disabled children into a flawed educational system. It would also relegate more and more of the continually increasing financial burden of special education to the states.