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**Reauthorizing Discipline for
the Disabled Student:
Will Congress create a better balance in
the Individuals with Disabilities Education Act (IDEA)?**

Lauren Zykorie*

I. Education for All

“I want to be in the real classroom . . . I am very bright and I want to go to school . . . I am different, but so are many people in the United States of America. Being different is hard when your difference is a disability.”¹

In the past, the disabled student faced educational challenges. In 1970, before the enactment of the Individuals with Disabilities Education Act,² only one in five students with disabilities received an education from American public schools.³ Despite the lack of cost-effectiveness in “consigning disabled children to ‘terminal’ care in an institution,” stereotypes regarding disabled schoolchildren persistently prevented educating disabled students in public schools.⁴ Thus, in enacting the Education for All Handicapped Children Act of 1975 (EHA), later renamed the Individuals with Disabilities Education Act (IDEA),⁵ Congress mandated an end to the long history of segregation, discrimination, and exclusion of children with disabilities

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¹ National Council on Disability, *Individuals with Disabilities Education Act Reauthorization: Where Do We Really Stand?*, pt.1, comments from 6 year old student, prepared by Alison (July 5, 2002), available at http://www.ncd.gov/newsroom/publications/synthesis_07-05-02.html#part1 (on file with author) [hereinafter *Where Do We Really Stand?*]

² 20 U.S.C. §§ 1400-1491 (1999) (originally enacted as the Education for the Handicapped Act, Pub. L. No. 94-142, 89 Stat. 773 (1975)).

³ National Council on Disability, *Back to School on Civil Rights*, pt.1 (Jan. 25, 2000), available at http://www.ncd.gov/newsroom/publications/backtoschool_1.html (on file with author) [hereinafter *Back to School on Civil Rights*].

⁴ *Id.*

⁵ 20 U.S.C. §§ 1400-1491 (1999) (originally enacted as the Education for the Handicapped Act, Pub. L. No. 94-142, 89 Stat. 773 (1975)).

in education.⁶ In advocating for the passage of the IDEA, Senator Hubert H. Humphrey (D-MN) argued “too often we keep children whom we regard as ‘different’ or a ‘disturbing influence’ out of our schools.”⁷ Indeed, “special education and disabled children were often considered uneducable, disruptive, and their presence disturbing to children and adults in the school community.”⁸ Congress intended the IDEA to be the vehicle for challenging these justifications for excluding students with disabilities.

To ensure that schools fully incorporate students with disabilities into their educational system, the IDEA requires that all children with disabilities have access to free and appropriate public education that meets their educational needs in the least restrictive environment.⁹ Although the landmark legislation provided disabled students with an opportunity for a regular education, the law as initially enacted did not address the notion that special education and disabled children were disruptive and disturbing to the mainstream educational community.¹⁰ The law also failed to address how a school could respond to a disruptive, disturbing disabled student.¹¹ Three years after its implementation, the first court case decided under the IDEA concerned disciplining a disabled student.¹²

School discipline of a disabled student has been controversial since the inception of the IDEA. Educators, parents, courts, legislators, and society in general have been pushed into a battle of balancing “the special needs of some students with broader educational goals for the

⁶ *Back to School on Civil Rights*, *supra* note 3.

⁷ *Id.*

⁸ *Id.*

⁹ 20 U.S.C. § 1412.

¹⁰ See Erica Bell, Note, *Disciplinary Exclusion of Handicapped Students: An Examination of the Limitations Imposed by the Education for All Handicapped Children Act of 1975*, 51 *FORDHAM L. REV.* 168 (1982); Philip T.K. Daniel, *Discipline and the IDEA Reauthorization: The Need to Resolve Inconsistencies*, 142 *ED. LAW REP.* 591 (2000); Renae Waterman Groeschel, Comment, *Discipline and the Disabled Student: The IDEA Reauthorization Responds*, 1998 *WIS. L. REV.* 1085 (1998); Allan G. Osborne, Jr., *Discipline of Special-Education Students under the Individuals with Disabilities Education Act*, 29 *FORDHAM URB. L. J.* 513 (2001);

¹¹ Osborne, *supra* note 10, at 515; Groeschel, *supra* note 10, at 1086-88.

entire student population.”¹³ Specifically, it is a complex and difficult challenge to balance the IDEA’s mandate of educating disabled students in public schools, often in regular classrooms, with a school’s need to protect all its students from harm and disruption while promoting a learning environment.

Initially, Congress was silent on the subject of disciplining the disabled in the IDEA.¹⁴ However, many of its original provisions had discipline implications because a disabled student would be denied an education if he were disciplined by suspensions or expulsions.¹⁵ After much litigation,¹⁶ Congress reauthorized and amended the IDEA in 1997, specifically addressing the issue of discipline.¹⁷ While maintaining the IDEA’s core principle of providing disabled students with a free and appropriate education, the 1997 IDEA enables school officials, *inter*

¹² See *Stuart v. Nappi*, 443 F. Supp 1235 (D. Conn. 1978); see also Osborne, *supra* note 10, at 517.

¹³ Margaret Graham Tebo, *Seeking the Right Equation*, 88 A.B.A. J. 48 (Sept. 2002).

¹⁴ See Daniel, *supra* note 10, at 591; see also Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 WASH. L. REV. 1, 8 (2000); Kurt M. Graham, Note, *An Idea on How to Amend the Individuals with Disabilities Education Act in Order to Promote Students and Promote Equality*, 45 WAYNE L. REV. 1599, 1606 (1999); Groeschel, *supra* note 10, at 1092; Kelly S. Thompson, Note, *Limits on the Ability To Discipline Disabled School Children: Do the 1997 Amendments to the IDEA Go Far Enough?*, 32 IND. L. REV. 565, 567, 569 (1999).

¹⁵ Osborne, *supra* note 10, at 515.

¹⁶ Most notably, the Fourth Circuit’s 1997 decision *Virginia Department of Education v. Riley*, 86 F.3d 1377 (4th Cir. 1996) regarding providing educational services to disciplined disabled students catalyzed the reform of the IDEA. The Fourth Circuit held that school districts were not required to provide educational services to disabled students who were disciplined for behavior not related to their disability. *Id.* The IDEA only required states to provide disabled students with access to a free appropriate public education and that right of access could be forfeited by conduct antithetical to the right itself. *Id.* See also *Bd. of Educ., Oak Park River Forest High Sch. Dist. v. Illinois State Bd. of Educ.*, 79 F.3d 654 (7th Cir. 1996); *Light v. Parkway C-2 Sch. Dist.*, 41 F.3d 1223 (8th Cir. 1994); *Hacienda La Puente Unified Sch. Dist. of Los Angeles v. Honig*, 976 F.2d 487 (9th Cir. 1992); *Steldt v. Sch. Bd. of Riverdale Sch. Dist.*, 885 F. Supp. 1192 (W.D. Wis. 1995); *M.P. v. Governing Bd. of the Grossmont Union High Sch. Dist.*, 858 F. Supp. 1044 (S.D. Cal. 1994).

¹⁷ Theresa J. Bryant, *The Death Knell for School Expulsion: The 1997 Amendments to The Individuals With Disabilities Education Act*, 47 AM. U. L. REV. 487, 503-26 (1998); Daniel, *supra* note 10, at 591-93; John Dayton, *Special Education Discipline Law*, 163 ED. LAW REP. 1, 20 (May 2002); Melisa C. George, *A New IDEA: The Individuals with Disabilities Education Act after the 1997 Amendments*, 23 LAW & PSYCHOL. REV. 91, 94, 118-24 (1999); Groeschel, *supra* note 10, at 1096-1100; Terry Jean Seligmann, *Not As Simple As ABC: Disciplining Children With Disabilities Under the 1997 IDEA Amendments*, 42 ARIZ. L. REV. 77, 91-122 (2000); Thompson, *supra* note 14, at 574-77.

alia, to suspend a disabled student who violates school rules for up to ten days without providing alternate educational services.¹⁸

However, according to Philip T.K. Daniel, author of *Discipline and the IDEA Reauthorization: The Need to Resolve Inconsistencies*,

Despite Congress' attempts at clarification, several issues regarding the discipline of students with disabilities are left unresolved because of complicated and indeterminate statutory provisions, implementing regulations that are overly complex, and at times arguably in direct conflict with the statutory language, and a notable absence of any authoritative case law.¹⁹

Furthermore, although Congress attempted to provide a more "balanced approach to the [discipline] controversy" in the 1997 IDEA Reauthorization by providing school authorities with greater flexibility in disciplining students, many educational professionals argue that the provisions do not extend far enough, while parents maintain that the greater freedom given to schools to discipline the disabled is a mere pretext for exclusion.²⁰

The IDEA is up for reauthorization this year (2002-2003).²¹ Consequently, the issue of disciplining the disabled will be debated and discussed. As in previous reauthorizations, Congress will search for a more equitable balance between the rights of disabled students to be educated with the interest of schools in maintaining a positive learning environment.²²

¹⁸ Graham, *supra* note 14, at 1606-07. See also Bryant, *supra* note 17, at 503-06; Daniel, *supra* note 10, at 594-97; Dayton, *supra* note 17, at 23-27; Groeschel, *supra* note 10, at 1101; Seligmann, *supra* note 17, at 91-94; Thompson, *supra* note 14, at 575-76.

¹⁹ Daniel, *supra* note 10, at 593.

²⁰ See Groeschel, *supra* note 10, at 1099; Joetta L. Sack, *Schools Grapple With Reality of Ambitious Law*, EDUCATION WEEK ON THE WEB (Dec. 6, 2000), at <http://www.edweek.org/ew/ewstory.cfm?slug=14idea.h20>. See generally Clint Bolick, *A Bad IDEA Is Disabling Public Schools*, EDUCATION WEEK (Sept. 5, 2001), available at http://www.edweek.org/ew/ew_printstory.cfm?slug=01bolick.h21; Kathleen Koch, *Controversy Builds Over Disciplining Disabled Students*, CNN.COM (June 11, 1996), at <http://www.cnn.com/US/9606/11/discipline/>.

²¹ IDEA Practices, at <http://www.ideapractices.org/> (last visited Dec. 16, 2002) (on file with author). See also Office of Special Education and Rehabilitative Services, Department of Education, *Reauthorization of the Individuals with Disabilities Education Act, Notice and Request for Public Comment*, 67 FR 1411 (Jan. 2002); American Association of School Administrators, *School Administrators Offer Tempered Enthusiasm For Anticipated Release of Special Education Commission Report* (July 9, 2002), available at <http://www.aasa.org/newsroom/2002/july/7-09-02.htm>.

²² See discussion *infra* Part IV.

Moreover, reformers hope the new law will be less complex and clarify some of the inconsistencies resulting from the 1997 IDEA's discipline provisions.²³ With parents and educators often on polar sides of the IDEA discipline debate,²⁴ Congress must strike a compromise with the new IDEA. However, this compromise cannot come at the expense of educating all children in non-disruptive classrooms in American public schools.

Part II of this paper explores the general history and background of the IDEA and concludes with a brief description of what may be expected during the upcoming IDEA Reauthorization process. Part III analyzes the discipline provisions of the IDEA and discusses the case law leading to the 1997 IDEA amendments. Part IV provides a framework for understanding these amendments and evaluates some of the problems with current disciplinary provisions. In search of a solution, Part V analyzes the current controversial discipline issues and offers recommendations for reforming the IDEA discipline provisions during the impending reauthorization. Part VI explores the progress made thus far in reauthorizing the IDEA. Since this paper was written, some progress forward has taken place; part VI chronicles these most recent developments. Finally, the conclusion suggests some implications for the future of educating disabled children if the IDEA reauthorization fails to create an appropriate balance between disciplining the disabled and providing a free and appropriate education to all students in classrooms free from violence and disruptions.

II. Protecting the Disabled Student

*Providing educational services [for disabled students] will ensure against persons needlessly being forced into institutional settings.*²⁵

²³ See discussion *infra* Part V.C.

²⁴ See discussion *infra* Part V.

²⁵ Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 1975 U.S.C.A.N. (89 Stat. 773) (codified at 20 U.S.C. §§ 1400-1487 (1977)), available at <http://www.theteachersguide.com/20USC1400MyOverview.html> (last visited Dec. 16, 2002) (on file with author).

Chief Justice Earl Warren noted the importance of education for all children in *Brown v. Board of Education* when he stated, “[Education] is a principal instrument for awakening the child to cultural values, in preparing him for later . . . training, and in helping him to adjust normally to his environment. . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”²⁶ Although specifically referring to African-Americans, Chief Justice Warren’s *Brown* decision, along with other civil and social rights cases set the stage for federal action in education. The “movement to ensure the civil rights of African Americans” and the federal anti-poverty programs of the 1960s brought social justice and equity issues to the forefront.²⁷ Consequently, the 1964 Civil Rights Act opened the door to civil rights for many minority groups;²⁸ the Elementary and Secondary Education Act of 1965 provided education opportunities for the disadvantaged;²⁹ and in 1973, Congress passed Section 504 of the Rehabilitation Act, the first major civil rights law for persons with disabilities.³⁰ Finally, in 1975 Congress enacted the Education for All Handicapped Children Act, later known as the IDEA, to provide new educational rights and protections for disabled children.³¹

In enacting the IDEA, Congress described the high social and economic costs that society pays for failing to provide disabled children with an appropriate education. *Id.*

²⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

²⁷ Center on Education Policy and the American Youth Policy Forum, *Twenty-Five Years of Educating Children with Disabilities: The Good News and the Work Ahead* (Jan. 2000), available at <http://www.cep-dc.org/specialeducation/25yearseducatingchildren.pdf> (on file with author) [hereinafter *Twenty-Five Years of Educating*].

²⁸ Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 1964 U.S.C.C.A.N. (§ Stat. 241), 42 U.S.C. § 2000(e) (West 2002).

²⁹ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-750, 1966 U.S.C.C.A.N. (80 Stat. 1191, 1204) (codified in part as amended in scattered sections of 20 U.S.C. and partially repealed by Pub. L. No. 91-230, 1970 U.S.C.C.A.N. (84 Stat. 121, 173)).

³⁰ Rehabilitation Act of 1973, Pub. L. No. 93-112, 1973 U.S.C.C.A.N. (87 Stat. 355), as amended, codified in relevant part for educational institutions at 29 U.S.C. § 794 (1998).

³¹ Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 1975 U.S.C.C.A.N. (89 Stat. 773) (codified at 20 U.S.C. §§ 1400-1487 (1977)). Three laws form the nondiscrimination framework for children with disabilities in public schools: Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1973), the Individuals

Prior to this legislation, in the 1960s and early 1970s, some educational programs were offered for disabled children primarily through Head Start and other federal early childhood programs.³² Yet, the majority of disabled students were denied the opportunity of an education. Many states even had laws excluding certain students, including those who were blind, deaf, or labeled ‘emotionally disturbed’ or ‘mentally retarded,’ from education.³³ Children with disabilities were institutionalized and warehoused and, if they were provided any education at all, it was often inferior, segregated, and inappropriate for their special needs.³⁴ However, following the lead of the Supreme Court’s mandate to racially desegregate schools and the general societal push for civil rights and equality for all, advocates for individuals with disabilities championed desegregation for disabled children.³⁵

A. *Pre-IDEA Case Law*

*There were many ways my school could have helped me but they didn’t, saying if they did things for me... other people would want such things.*³⁶

A few major court cases in the early 1970’s prompted Congress to enact the IDEA. Most notably, *Pennsylvania Association for Retarded Citizens (PARC) v. Pennsylvania*³⁷ and *Mills v. Board of Education for the District of Columbia*³⁸ affirmed the constitutional civil rights principles of equal protection and due process for disabled children in education. In *Pennsylvania Association for Retarded Citizens v. Pennsylvania*, thirteen mentally disabled

with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 (1997), and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 (1990). If a student does not meet the criteria for the IDEA, he may qualify for education services under either § 504 of the Rehabilitation Act or the ADA. All of these acts prohibit schools from discriminating against disabled students. The focus of this article however is with the IDEA because it has the most significant impact on discipline issues in public schools. Nevertheless, knowledge of these three federal acts along with state laws, federal and state regulations, and judicial decisions remains essential to an understanding of special education law.

³² *Twenty-Five Years of Educating*, *supra* note 27.

³³ *Back to School on Civil Rights*, *supra* note 3, at Introduction.

³⁴ *Id.*; see also *Twenty-Five Years of Educating*, *supra* note 27.

³⁵ Dayton, *supra* note 17, at 18.

³⁶ *Where Do We Really Stand?*, *supra* note 1, at pt. 2, §1, excerpt from Adam, student, from public testimony.

³⁷ *Pennsylvania Ass’n for Retarded Citizens (PARC) v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1971).

children argued for the unconstitutionality of several state statutes excluding retarded children from education.³⁹ Specifically, the plaintiffs claimed that (1) “these statutes offend due process because they lack any provision for notice and a hearing before a retarded person is either excluded from a public education or a change is made in his educational assignment within the public system;”⁴⁰ (2) the statutes violate equal protection because the premise of the statutes, which necessarily assume that certain retarded children are uneducable and untrainable, lack a rational basis in fact;⁴¹ and (3) “that because the Constitution and laws of Pennsylvania guarantee an education to all children, [the statutes] violate due process in that they arbitrarily and capriciously deny that given right to retarded children.”⁴² Although the parties settled with a consent decree, thus preventing the court from ruling on the constitutionality of the statutes at issue, the decree ultimately allowed disabled students to obtain an appropriate public education with due process protections against exclusion.⁴³

A few months later in *Mills v. Board of Education for the District of Columbia*, a group of seven disabled children challenged their exclusion from public schools without due process hearings or a review of their educational status.⁴⁴ These plaintiffs sought to compel the District of Columbia School Board to provide them with immediate and adequate education and educational facilities in the public schools or alternative placement at public costs.⁴⁵ In the

³⁸ *Mills v. Bd. of Educ. of Dist. of Columbia*, 348 F. Supp. 866 (D.C. 1972).

³⁹ *PARC*, 343 F. Supp. at 281.

⁴⁰ *Id.* at 283.

⁴¹ *Id.*

⁴² *Id.*

⁴³ The Consent Decree approved of in *PARC* provides “that no child who is mentally retarded or thought to be mentally retarded can be assigned initially (or re-assigned) to either a regular or special educational status, or excluded from a public education without a prior recorded hearing before a special hearing officer.” *Id.* at 284-85. Essentially, because the Commonwealth of Pennsylvania had undertaken “to provide a free public education for all of its children between the ages of six and twenty-one years. . . it is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity.” *Id.* at 285.

⁴⁴ *Mills v. Bd. of Educ. of Dist. of Columbia*, 348 F. Supp. 866 (D.C. Cir. 1972).

⁴⁵ *Id.* at 868.

beginning of its opinion, the U.S. District Court notes the significant problems involved in the case including “(1) the failure of the District of Columbia to provide publicly supported education and training to plaintiffs and other ‘exceptional’ children, members of their class, and (2) the excluding, suspending, expelling, reassigning and transferring of ‘exceptional’ children from regular public school classes without affording them due process of law.”⁴⁶ Stressing the importance of education for all, the court declared that “Congress has decreed a system of publicly supported education for the children of the District of Columbia [and the Board] has the responsibility of administering that system in accordance with law and of providing such publicly supported education to all of the children of the District [of Columbia], including these ‘exceptional’ children.”⁴⁷ Furthermore, the court held that the disabled students could not be denied due process or equal protection, stating: “[n]ot only are plaintiffs and their class denied the publicly supported education to which they are entitled, many are suspended or expelled from regular schooling or specialized instruction or reassigned without any prior hearing and are given no periodic review thereafter.”⁴⁸ Ultimately, “the court required that the [local] school system follow many of the same guidelines and procedures later adopted by Congress in the IDEA.”⁴⁹

Although the Supreme Court did not address the issues of *Pennsylvania Association for Retarded Citizens v. Pennsylvania* and *Mills v. Board of Education for the District of Columbia* prior to the enactment of the IDEA, Congress recognized that the problems these cases demonstrated required a national solution.⁵⁰ Therefore, in 1975, three years after these decisions,

⁴⁶ *Id.*

⁴⁷ *Id.* at 870-71.

⁴⁸ *Id.* at 875.

⁴⁹ Thompson, *supra* note 14, at 567.

⁵⁰ In addition to promulgating the IDEA, other statutes affect and protect disabled students. *See supra* note 31.

Congress passed the Education for All Handicapped Children Act.⁵¹ Later renamed the IDEA,⁵² the Act guaranteed all disabled children the right to a free and appropriate public education in the least restrictive environment possible.⁵³

B. The Primary Legal Concepts of the IDEA

*Everyone can agree with the objective stated in the title of this [Education for All Handicapped Children Act] bill -- educating all handicapped children in our Nation. The key question is whether the bill will really accomplish that objective.*⁵⁴

The IDEA is a complex statute, divided into 4 parts:⁵⁵ Part A, the General Provisions section; Part B, Grants to States Program (including preschool grants); Part C, Infants and Toddlers program; and Part D, Support Programs.⁵⁶

The purposes of the IDEA include: 1) ensuring that every disabled child has available to them a FAPE emphasizing special education and related services ‘designed to meet their unique needs and prepare them for employment and independent living’; 2) protecting the rights of disabled children and the rights of their parents; 3) assisting state, local, and federal educational agencies with providing education to all disabled children; 4) ensuring ‘that educators and parents have the necessary tools to improve educational results for children with disabilities’; and 5) assessing and ensuring ‘the effectiveness of, efforts to educate children with disabilities.’⁵⁷

Part B of the IDEA provides financial assistance to states and local education agencies for educating disabled students. Specifically, in order to receive funding, a state must demonstrate that it has policies and procedures in effect that ensure that it meets a list of conditions, including free and appropriate education, the least restrictive environment possible, procedural safeguards,

⁵¹ 20 U.S.C. §§1400-1491 (1999) (originally enacted as the Education for the Handicapped Act (EHA), Pub. L. No. 94-142, 89 Stat. 773 (1975)).

⁵² Although the EHA did not become the IDEA until 1990, for purposes of this paper, I will refer to the federal statute as the IDEA. See Groeschel, *supra* note 10, at 1090.

⁵³ 20 U.S.C. §§ 1401-1413. See also *Back to School on Civil Rights*, *supra* note 3, at pt. 1, §D.

⁵⁴ President Gerald R. Ford’s Statement on Signing the Education for All Handicapped Children Act of 1975 (Dec. 2, 1975), available at <http://www.ford.utexas.edu/library/speeches/750707.htm> (on file with author).

⁵⁵ As authorized by the 1997 Amendments, IDEA is divided into four major parts. See Department of Education, Office of Special Education and Rehabilitative Services, *Notices, Reauthorization of the Individuals With Disabilities Education Act*, 67 FR 1411-01, 2002 WL 23076 (Jan. 10, 2002).

⁵⁶ *Back to School on Civil Rights*, *supra* note 3, at pt. 1, §B.

⁵⁷ George, *supra* note 17, at 94-95.

and evaluations.⁵⁸ Part D, Support Programs, emphasizes research and reform by providing grants to “assist State educational agencies, in reforming and improving their systems for providing educational, early intervention, and transitional services, including their systems for professional development, technical assistance, and dissemination of knowledge about best practices, to improve results for children with disabilities.”⁵⁹

In order for a disabled student to qualify under the IDEA as disabled, there are several requirements for both the school and the student. First, the school must participate in a Child Find program that identifies, locates, and evaluates children who may be in need of special education.⁶⁰ Second, the disabled student must also have a disability as defined in the IDEA. The IDEA’s definition of disability includes mental retardation, hearing impairment, speech or language impairments, visual impairments, orthopedic impairments, emotional disturbance, learning disability, and a variety of health impairments.⁶¹ Third, the disabled student must need special assistance in order to benefit from education.⁶² Thus, there must be evidence that the disabled child’s disability adversely affects his educational performance.

Once a student qualifies under the IDEA as disabled, the IDEA requires that schools provide the disabled student the fundamental educational rights of a free and appropriate public education (FAPE) and an education specially designed to meet the disabled child’s unique

⁵⁸ Prior to the 1997 amendments to IDEA, in order to qualify for federal funds under the IDEA, a state was required to meet certain eligibility requirements and submit a state plan to the Office of Special Education Programs as well as comply with periodic resubmission requirements. Under the 1997 IDEA, the State must demonstrate that it has in effect a list of policies and procedures. The revised regulation also provides for the submission of modifications under specified circumstances. 20 U.S.C. §1412; 34 C.F.R. §§ 612 (a), (b), (c).

⁵⁹ 20 U.S.C. § 1412

⁶⁰ 20 U.S.C. § 1412 (a)(3)(A), (B), 34 C.F.R. § 300.125.

⁶¹ George, *supra* note 17, at 95.

⁶² Consortium for Citizens with Disabilities, *Principles for the Individuals with Disabilities Education Act (IDEA)*, available at <http://www.c-c-d.org/2001IDEAPrinciples.htm> (last visited Sep. 29, 2002) (on file with author) [hereinafter CCD Principles].

needs.⁶³ Appropriateness is an elusive but significant concept in the IDEA because the law does not equate appropriate education with maximum education. The Act imposes no obligation on schools beyond the requirement that disabled children receive some form of specialized education.⁶⁴ Thus, a school can provide a disabled student with a FAPE without an optimum education.⁶⁵ All schools must have a FAPE policy.⁶⁶ "In order to meet the FAPE requirements for all disabled children, school personnel must identify the child with a disability, evaluate the child, design an individualized educational program (IEP) for the child, and place the child in an educational program in the least restrictive environment' (LRE) possible."⁶⁷

The LRE requirement attempts to ensure that to the "maximum extent possible and appropriate, the education and related services [of a disabled student are] provided in a setting that allows [a] disabled child to be educated with children who do not have disabilities."⁶⁸ This is commonly referred to as mainstreaming. Although the IDEA prefers mainstreaming, this term has caused much confusion among educators and parents alike.⁶⁹ Essentially, the IDEA recognizes that an alternative placement may be necessary for a specific child, but its preference is towards educating disabled children in the same educational setting as nondisabled students: "A child with disabilities will not be removed from a regular classroom unless he cannot achieve satisfactorily even with the use of supplemental aides and services."⁷⁰

Furthermore, to implement the FAPE policy and to provide an education to the disabled in the LRE, schools must evaluate "the child for special services and work with the parents to

⁶³ Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982).

⁶⁴ *Id.* at 195.

⁶⁵ *Id.* at 203. ("Insofar as a State is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.")

⁶⁶ 20 U.S.C. §1401(8); §1412(a)(1)(A)

⁶⁷ George, *supra* note 17, at 96; *see also* Dupre, *supra* note 14, at 8.

⁶⁸ Thompson, *supra* note 14, at 569.

⁶⁹ LAWRENCE M. SIEGEL, THE COMPLETE IEP GUIDE 1/3, 2/5, 11/13 (2nd ed. 2002).

develop an Individual Education Plan for that child.”⁷¹ The Individual Education Plan is a written description of a disabled child’s educational program. Specifically, the Plan must address “several elements, including statement of the child’s current performance, long and short-term goals and objectives, services the school district will provide to the child, the extent to which the child will participate in activities with nondisabled students, and the projected date the child will begin the special education program.”⁷²

The IDEA also provides procedural due process rights to disabled children and parents.⁷³ For example, when a parent of a disabled student has a disagreement about an assessment or placement, the school must provide a due process hearing to the parent with specific procedural safeguards such as the right to present evidence and the right to advice from special educational professionals.⁷⁴ When a due process hearing occurs, a disabled child is entitled to remain (“stay-put”) in his current placement until an agreement is reached.⁷⁵

C. *Legislative History of the IDEA*

*Thanks to the IDEA, we have made great strides during the past 25 years in helping students with disabilities. This law has ensured access to public education for millions of children with disabilities, who were not previously welcome in our public schools. Yet, despite the progress we have made, there are still significant achievement gaps between children with disabilities and their peers.*⁷⁶

⁷⁰ 34 C.F.R. § 300.550 (2002); *see also* 20 U.S.C. § 1412(a)(5) (2003); SIEGEL, *supra* note 69, at 2/3 - 2/16.

⁷¹ George, *supra* note 17, at 96; *see also* Dupre, *supra* note 14, at 8.

⁷² SIEGAL, *supra* note 69, at 2/9 to 2/12; Groeschel, *supra* note 10, at 1091.

⁷³ For a general discussion of the due process protections of the IDEA including case law and school compliance, *see* Elizabeth A. Bunch, *School Discipline Under the Individuals With Disabilities Education Act: How the Stay-Put Provision Limits Schools in Providing A Safe Learning Environment*, 27 J. L. & EDUC. 315 (1998); Joseph R. McKinney, *Disciplining Children With(Out) Disabilities: Schools Behind the Eight Ball*, 130 ED. LAW REP. 365 (1999); Trent D. Nelson, Note, *Congressional Attention Needed For the Stay-Put Provision of the Individuals With Disabilities Education Act*, 1997 B.Y.U. EDUC. & L. J. 49 (1997).

⁷⁴ SIEGAL, *supra* note 69, at 2/3- 2/14; *see also* Groeschel, *supra* note 10, at 1091-92.

⁷⁵ 20 U.S.C. § 1415(j) (2003); 34 C.F.R. § 300.514 (2002). The stay-put provision not only provides procedural protections for disabled students but it also recognizes the educational value in not removing a child from its current placement. For comments by parents, school administrators, and the public regarding the due process protections provided by the IDEA, *see Where Do We Really Stand?*, *supra* note 1.

⁷⁶ Testimony of Secretary Rod Paige before the House Committee on Education and the Workforce (Oct. 4, 2001), *available at* <http://www.ed.gov/Speeches/10-2001/011004.html> (on file with author).

Since 1975 and the passage of the Education for All Handicapped Children Act (EHA), now the IDEA, more than six million disabled children now have the opportunity to attend public school.⁷⁷ Although Congress amended the IDEA several times since its enactment,⁷⁸ many of the key provisions remained the same until 1997. In 1986, Congress promulgated the Handicapped Children's Protection Act that included an attorney fee provision in the IDEA, thus equating the civil rights aspect of the IDEA with other civil rights legislation.⁷⁹ Further, Congress added another amendment to the IDEA in the 1980s that established an early intervention program for infants, toddlers, and their families.⁸⁰ In 1990, Congress again amended the law, although substantive changes were limited.⁸¹ Nevertheless, one of these changes altered the statutory name of the EHA to the name society now associates with disability and education—the Individuals with Disabilities in Education Act.⁸² During the 1980s and 1990s, numerous cases challenged the IDEA's inclusion policy and, particularly, how the IDEA's mainstreaming policy affected school violence and the learning environment of classrooms.⁸³ Both issues stirred much debate and controversy; many parents, educators, and legislators believed a school's ability to discipline a disruptive child directly conflicted with the IDEA's preference that disabled students

⁷⁷ National Association of Secondary School Principals, *Individuals with Disabilities Education Act (IDEA)*, available at http://www.principals.org/publicaffairs/idea_info.htm (last visited Sept. 28, 2002) (on file with author); see also CCD Principles, *supra* note 62.

⁷⁸ *Back to School on Civil Rights*, *supra* note 3, at pt. 1, §D.

⁷⁹ In 1986, in response to *Smith v. Robinson*, 468 U.S. 992 (1984), Congress enacted the Handicapped Children's Protection Act (HCPA) which, *inter alia*, added an attorney fee provision to IDEA. See Handicapped Children's Protection Act, Pub. L. No. 99-372, 796 Stat. 1986.

⁸⁰ *Back to School on Civil Rights*, *supra* note 3, at pt. 1, §D.

⁸¹ Among the changes were the addition of separate categories for autism and traumatic brain injury and the addition of transition services to the IEP requirements for children over 16 who are preparing to leave school because of graduation or age. *Id.*; see also 20 U.S.C. § 1401(3)(A) (2003).

⁸² Dayton, *supra* note 17, at 20.

⁸³ See e.g., Bd. of Educ., Sacramento City Unified Sch. Dist. v. Holland, 14 F.3d 1398 (9th Cir. 1994), *cert. denied*, 512 U.S. 1207 (1994); Oberti v. Bd. of Educ., 995 F.2d 1204 (3rd Cir. 1993); Green v. Rome City Sch. Dist., 950 F.2d 688 (11th Cir. 1991); Daniel R. R. v. State Bd of Educ., El Paso Indep. Sch. Dist., 874 F.2d 1036 (5th Cir. 1989).

be educated in regular classrooms with their nondisabled peers.⁸⁴ Since the enactment of laws regarding education of the disabled student, educators and parents have pushed Congress to focus on the issue of discipline. Proposals were diverse and often extreme; while some parents of disabled children vigorously opposed any measures that would exclude their children from regular classrooms, some parents of nondisabled children argued that inclusion of disruptive disabled children decreased their children's educational opportunities.⁸⁵

Despite minor changes to the IDEA during the 1990s,⁸⁶ Congress did not address the issue of discipline fully until 1997 when Congress reauthorized the IDEA. The 1997 Reauthorization “. . . launched the second generation of statutory development. For the first time since 1975, significant changes were made to the law while retaining its basic protections. The 1997 additions were intended to clarify, strengthen, and provide guidance on implementation of the law based on two decades of experience.”⁸⁷ The law that emerged in 1997 was “for the most part, strengthened and revitalized,”⁸⁸ and “for the first time, the 1997 IDEA established and clarified how school disciplinary rules and the obligation to provide a FAPE to disabled children corresponded with each other.”⁸⁹ The 1997 IDEA also emphasized testing, inclusion, results, funding, assessment, accountability, clearer standards and definitions within the law, parent

⁸⁴ *Back to School on Civil Rights*, *supra* note 3, at pt. 1, §D, E.

⁸⁵ See Koch, *supra* note 20; June Kronholz, *Educators Say Proposed Law Boosting Ability to Punish Disabled Kids Doesn't Go Far Enough*, WALL ST. J., May 14, 1997; National Center for Policy Analysis, *Problems Disciplining Disabled Students*, available at <http://www.ncpa.org/pi/edu/may97f.html> (last visited Dec. 1, 2002) (on file with author). See generally Daniel, *supra* note 10; Dayton, *supra* note 17; Seligmann, *supra* note 17.

⁸⁶ For example, in 1994 the Jeffords Amendment carved out an exception to the *Honig* holding and the IDEA. When a disabled student possessed a firearm, the Jeffords Amendment permitted school officials to alter a disabled student's placement and educational setting for up to 45 days. Roslyn Zisie Roth, *Disciplining Special Education Students*, 114 P.L.I. 927, 955-60 (2000).

⁸⁷ *Back to School on Civil Rights*, *supra* note 3, at pt. 1, §E.

⁸⁸ *Id.*

⁸⁹ U.S. Department of Education, Office of Special Education Programs, *IDEA Practices, Discipline Q & As*, available at http://www.ideapractices.org/law/addl_material/discipline.php (last visited Nov. 14, 2002) (on file with author).

training, technology development, and paperwork reduction.⁹⁰ The U.S. Department of Education issued regulations for the 1997 IDEA amendments in 1999.⁹¹

Although the IDEA in general and the 1997 IDEA amendments in particular made great strides towards equality for disabled students in schools, problems inevitably remain that warrant attention. Indeed, “states and districts continue to struggle with competing pressures and complex issues.”⁹² Only a few years after the Department of Education issued its regulations concerning the 1997 IDEA, the IDEA is up for reauthorization again in 2002/2003. Many of the same issues prompting the 1997 amendments will certainly be addressed in the hearings and committees leading up to the new IDEA. Most people agree that the IDEA is a good law; however, even more people, especially parents with disabled students and school administrators, agree that there is room for improvement, especially on the basics of IDEA and education for the disabled.⁹³

D. Reauthorization

*Every time that Congress has reauthorized or amended IDEA during the last 27 years, it has strengthened and extended IDEA's substantive and procedural provisions. In doing so, it has reaffirmed the original statement of purpose. In 2002, the 107th Congress has every reason to follow this unbroken precedent.*⁹⁴

Many provisions of the IDEA expired on September 30, 2002,⁹⁵ and require reauthorization. Approximately every five years, the IDEA is updated and reviewed.⁹⁶ The last

⁹⁰ Center on Education Policy, *A Timely IDEA: Rethinking Federal Education Programs for Children with Disabilities*, available at <http://www.cep-dc.org/specialeducation/timelyidea2002.pdf> (last visited Sept. 30, 2002) (on file with author).

⁹¹ *Id.*; Dayton, *supra* note 17, at 20.

⁹² *Twenty-Five Years of Educating*, *supra* note 27.

⁹³ Martin Gould, *Individuals with Disabilities Education Act Reauthorization* (July 23, 2002), at www.ncd.gov/newsroom/testimony/gould_07-23-02.html.

⁹⁴ Written Remarks of Martin Gould, Senior Research Specialist, National Council on Disability, to the OSEP Task Force of the President's Commission on Excellence in Special Education (April 26, 2002), at http://www.ncd.gov/newsroom/testimony/gould_04-26-02.html.

⁹⁵ Part C & D expired on Sept. 30, 2000. See Reauthorization of the Individuals with Disabilities Education Act, 67 F.R. 1411 (Dep't of Educ., Jan. 10, 2002).

⁹⁶ *Id.*

reauthorization was in 1997. Although “by the end of 2002, Congress [was] scheduled to approve the continued expenditure and use of federal funds to carry out activities included under certain components or parts of the IDEA statute,”⁹⁷ many advocates correctly believed that the controversial reauthorization would not happen in 2002.⁹⁸ One behavioral health advocate noted that “reauthorization will definitely happen—but its absolutely not going to be done in 2002.”⁹⁹ Congress began discussions and conducting hearings concerning the reauthorization of IDEA in the spring of 2002 and the new bill to reauthorize the law was due for release shortly after the completion of a report from the President’s Commission on Excellence in Special Education. However, both the Senate and the House are still studying these recommendations as they prepare their legislation. Elizabeth Wenk, press secretary to Representative Michael Castle, who chairs the House Education Reform Subcommittee commented: “I don’t think anybody thinks this is going to be done before we adjourn (scheduled for Oct. 4)... I think we’ll get in a lame-duck session after the election when reauthorization may be discussed.”¹⁰⁰ Many attribute the slower pace for IDEA reauthorization to the Commission’s report addressing the controversial issue of private school vouchers, the November elections, the focus on homeland security and budget bills, and the fact that lawmakers are generally reluctant to address contentious issues.¹⁰¹

Only two of the four parts of the IDEA require reauthorization —Part C, which authorizes an early intervention program for infants and toddlers with disabilities, and Part D, which authorizes several discretionary programs to support national activities. However, the

⁹⁷ *CEC Identifies Five Issues for Consideration in Next Year’s IDEA Reauthorization*, CEC TODAY, Vol. 8, No. 6 (Jan. 2002), at www.cec.sped.org/pp/ideadiscussionpaper2001.pdf [hereinafter *CEC, Five Issues*].

⁹⁸ *Election Year Dynamics Could Derail IDEA Reauthorization*, MENTAL HEALTH WEEKLY (Jan. 28, 2002), available at http://www.findarticles.com/cf/_m0BSC/4_12?82551709/print.jhtml.

⁹⁹ *Id.*

¹⁰⁰ *Specifics of IDEA Timetable for Reauthorization, Legislation Unclear*, SPECIAL EDUCATOR (Sept. 25, 2002).

¹⁰¹ National Association of Secondary School Principal, *Federal Relations Report, Slower Pace for IDEA Reauthorization Predicted* (July 16, 2002), available at <http://www.principals.org/publicaffairs/frr/071902frr.html> (on file with author); *Election-Year Dynamics*, *supra* note 98; *Specifics of IDEA Timetable*, *supra* note 100.

reauthorization process for these Parts provides an opportunity to examine and make changes to Part B as Congress did in 1997. And Part B will likely be scrutinized and analyzed just as much as the Parts needing reauthorization because the true “heart of the IDEA controversy lies” in Part B.¹⁰² Included in Part B are the controversial issues such as evaluations, IEP’s, eligibility, and procedural safeguards including discipline and due process. Some educators believe these issues will certainly be addressed in the IDEA reauthorization process, especially in light of the attention they received during the debates on the reauthorization of the Elementary and Secondary Education Act (No Child Left Behind Act).¹⁰³

Since this article has been written, there has been much activity in Congress concerning the reauthorization of the IDEA.¹⁰⁴ For example, in February 2003, Secretary of Education Paige released a “Principles for Reauthorizing IDEA” describing the guiding principles in the reauthorization of the IDEA and foreshadowing what issues will be highlighted in the actual reauthorization.¹⁰⁵ Most importantly, however, on April 30, 2003, the House of Representatives voted to approve H.R. 1350, the Republican bill to reauthorize the IDEA.¹⁰⁶ Then in May 2003, it was predicted that the Senate would reauthorize the IDEA before the Memorial Day recess, but senate staff members confirmed that a bill to reauthorize the IDEA would probably not be introduced until June.¹⁰⁷ On June 13, 2003 the Senate Committee on Health, Education, Labor, and Pensions introduced a proposed IDEA reauthorization bill, S. 1248, which was marked up

¹⁰² See *supra* note 98.

¹⁰³ National Council of Disabilities, *IDEA Reauthorization—A NCD Working Paper* (Feb. 7, 2002), at http://www.ncd.gov/newsroom/reauthorizations/idea/idea_workingpaper.html.

¹⁰⁴ See generally Wrightslaw, *IDEA Reauthorization 2003* (Aug. 28, 2003), at <http://www.wrightslaw.com/news/idea2002.htm>.

¹⁰⁵ Wrightslaw, *Paige Releases Principles for Reauthorizing IDEA* (Feb. 15, 2003), at <http://www.wrightslaw.com/news/2003/idea.paige.reauth.principles.htm>.

¹⁰⁶ Wrightslaw, *IDEA Update & Game Plan* (May 7, 2003), at <http://www.wrightslaw.com/news/2003/idea.update.plan.0507.htm>. The full text of H.R. 1350 can be found on the Library of Congress website available at <http://thomas.loc.gov/>.

and passed by the Senate Committee on June 25, 2003.¹⁰⁸ Debate and a vote by the full Senate will now be scheduled. During the debate, amendments will be offered on the bill. As of August 1, 2003, no new action has been taken in the Senate since the markup of S. 1248 on June 25, 2003. Due to numerous other legislative obligations as well as the August recess, the full Senate vote and any other IDEA action will probably not occur until September 2003, at the earliest.¹⁰⁹ Following the passage of the Senate bill, the House and Senate bills go to conference, out of which one bill will emerge.¹¹⁰

III. A Discipline Standard Emerges

*[B]urdensome federal regulations are impeding the educational progress of some children with special needs.*¹¹¹

Almost all parents, teachers and educators agree that maintaining discipline and safety in America's public schools is of primary importance. Unfortunately, there is little agreement on how to discipline the disabled student. This section attempts to provide a backdrop to discipline reform in the upcoming reauthorization of IDEA by exploring the history and various statutory discipline requirements of the IDEA and related case law.

A. *Goss v. Lopez*

Prior to the enactment of the IDEA, courts were already dealing with issues of discipline in public schools. In *Goss v. Lopez*, the Supreme Court overturned a statute permitting

¹⁰⁷ NICHCY, *The Latest Scoop on IDEA Reauthorization!* (Aug. 29, 2003), at <http://www.nichcy.org/reauth/scoop.html>.

¹⁰⁸ *Id.* S.1248 is available online at http://www.senate.gov/~labor/bills/013_bill.html. The bill summary as well as the press release and a partial list of supporting organizations can be found at <http://www.gregg.senate.gov/press/HELP/helppress062503.pdf>.

¹⁰⁹ National Association of School Psychologists, *NASP Legislative Update* (July 25, 2003), at <http://www.nasponline.org/advocacy/legisup072503.html>.

¹¹⁰ See generally bridges4kids, *IDEA Reauthorization Update: Articles and Resources* (Aug. 29, 2003), at <http://www.bridges4kids.org/IDEA.html>.

¹¹¹ Press Release, Committee on Education and the Workforce, GOP Education Leaders Highlight New Report, Call for IDEA Reforms to Ensure Student Results (Aug. 13, 2002), at <http://edworkforce.house.gov/press/press107/idea81302.htm>.

discretionary suspensions of public nondisabled students without a hearing or notice.¹¹² The Court declared that a "student's legitimate entitlement to a public education [is] a property interest which is protected by the Due Process Clause and . . . may not be taken away for misconduct without adherence to the minimum procedure required by that clause."¹¹³ The Court further "articulated that the degree of procedural protection required before a student may be excluded from school . . . corresponds to the length of the exclusion."¹¹⁴ Notice and an opportunity to respond must be provided to a student who is suspended for ten days or less. Although the Court held that students faced with suspension or expulsion are guaranteed minimum due process and procedural protections, the Court nevertheless recognized that a "modicum of discipline and order is essential if the educational function is to be performed."¹¹⁵ Thus, students who pose a danger or an ongoing threat of disrupting the academic process can be removed from school immediately and the required notice and a hearing must follow as soon as possible.¹¹⁶ The Court did not articulate what procedural protections a student must receive if the school suspends the student for more than ten days.¹¹⁷

B. Enactment of the IDEA

In 1975, the same year as *Goss*, Congress passed the IDEA.¹¹⁸ However, the IDEA contained no specific provision pertained to disciplining a disabled student. Although the 'stay-put' provision had implications for excluding children due to discipline problems, it primarily

¹¹² *Goss v. Lopez*, 419 U.S. 565, 584 (1975).

¹¹³ *Id.* at 574.

¹¹⁴ Omyra M. Ramsingh, Comment, *Disciplining Children with Disabilities Under the Individuals with Disabilities Education Act*, 12 J. CONTEMP. HEALTH L. & POL'Y 155, 165 (1995).

¹¹⁵ *Goss*, 419 U.S. at 580.

¹¹⁶ However, in *Goss v. Lopez* the court held that there was an exception to the finding of a denial of due process when the student presented a continuous danger to people, property, or the educational process. *Goss*, 419 U.S. at 582.

¹¹⁷ *Id.* at 584. See also *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978).

¹¹⁸ 20 U.S.C. §§ 1400-1491 (1999) (originally enacted as the Education for the Handicapped Act, Pub. L. No. 94-142, 89 Stat. 773 (1975)).

emphasized the IDEA's mainstreaming preference, particularly during due process procedures: "[U]nless the State of local educational agency and the parents otherwise agree, the child shall remain in the then current educational placement of such child . . . until all such proceedings have been completed."¹¹⁹ Nevertheless, the stay-put provision, from the inception of the IDEA, caused concern among educators and parents about the ability of schools to maintain a safe learning environment in the classroom. For example, if a school administrator wants to suspend or expel a disabled child for his/her excessive classroom disturbances and the parent does not consent, the stay-put provision requires that, until the due process hearing concludes, the child must remain in his present placement (generally the mainstream educational setting).¹²⁰

C. *Stuart v. Nappi and its Progeny*

In *Stuart v. Nappi*, the District Court for the District of Connecticut considered the legality of discipline in the context of the IDEA.¹²¹ In *Stuart*, the plaintiff, a high school student with serious academic and emotional difficulties due to numerous learning disabilities, received a ten-day disciplinary suspension due to her involvement in a school-wide disturbance. At a disciplinary hearing, the superintendent recommended that the plaintiff receive an expulsion for the remainder of the school year.¹²² Although cognizant of the school district's need to have flexibility in its disciplinary determinations, the District Court of Connecticut held that the expulsion violated the stay-put provision of the IDEA.¹²³ Termination of educational services resulting from an expulsion is a change of educational placement that invokes the procedural protections of the IDEA. Therefore, to discipline a disabled student, a school must follow the

¹¹⁹ 20 U.S.C. §1415(j); 34 C.F.R. §300.514 (a). See generally SIEGEL, *supra* note 69, at 12/8 (describing how to resolve IEP disputes through due process and the consequence of the stay-put IDEA provision).

¹²⁰ Thompson, *supra* note 14, at 569-70; see also Christopher P. Borreca & David B. Hodgins, *Education of Public School Students with Disabilities*, 34 HOUS. LAW. 12, 16 (1997).

¹²¹ 443 F. Supp. 1235 (D. Conn. 1978). *Stuart*, the first court case decided under the IDEA, illustrates that discipline in the IDEA has been a problematic concept from the very beginning. Osborne, *supra* note 10, at 516.

¹²² *Stuart*, 443 F. Supp. at 1235, 1236.

IDEA's procedural mandates; when necessary, a school can suspend a disabled student for less than ten days or follow the IDEA procedures to change the student's educational placement and remove the student from the mainstream educational setting for a longer period.¹²⁴

In addition to reiterating *Stuart's* holding that an expulsion is a change in placement requiring the IDEA's procedural protections, the cases that followed *Stuart* expanded its concept to a determination of whether the disability of the disabled student caused the student's disruptive behavior and thus his discipline.¹²⁵ In *Doe v. Koger*, for example, the court concluded that schools could not expel disabled students whose disability causes their disruptive conduct.¹²⁶ This manifestation of the disability concept provides that when a disabled student becomes subject to disciplinary exclusion, the school must determine whether the child's disability caused the disturbance. If it is determined that the misbehavior resulted from the student's disability, the school may place the student in a more restrictive and suitable school setting (change of placement) as long as the disabled student is afforded the procedural protections of the IDEA, including its stay-put provision.¹²⁷ Although approving of the manifestation of the disability determination, the Fifth Circuit Court of Appeals in *S-I v. Turlington* concluded that if the manifestation decision determined that there was no relationship between the disability and the disruptive behavior, the school could expel the student only in accordance with the IDEA procedures.¹²⁸ The *S-I* Court also concluded that during an expulsion, a disabled student cannot be denied education services; nevertheless, "expulsion is still a proper disciplinary tool under the

¹²³ *Id.* at 1238.

¹²⁴ *Id.* See also Osborne, *supra* note 10, at 517; Bell, *supra* note 10, at 179-183; Ramsingh, *supra* note 114, at 166-67. For a discussion of a dangerousness exclusion exception, see *Stuart*, 443 F. Supp. at 1242; *Jackson v. Franklin County Sch. Bd.* 765 F.2d 535 (5th Cir. 1985); *Victoria v. District Sch. Bd.* 741 F.2d 369, 371 (11th Cir. 1984).

¹²⁵ Bell, *supra* note 10, at 182-86; Osborne, *supra* note 10, at 516-20; Ramsingh, *supra* note 114, at 164-70. This expansion was partly due to the United States Department of Education proposing new regulations under the IDEA in 1982. Bell, *supra* note 10, at 182 n.92.

¹²⁶ *Doe v. Kroger*, 480 F. Supp. 223 (N.D. Ind. 1979).

¹²⁷ See Bell, *supra* note 10, at 182-84; Osborne, *supra* note 10, at 517-19.

[IDEA] when proper procedures are utilized and under proper circumstances.”¹²⁹ However, without discussion, the court summarily concluded that it could not “authorize the complete cessation of educational services during an expulsion period.”¹³⁰

D. *Honig v. Doe*

Stuart and its progeny set the stage for the Supreme Court’s decision in *Honig v. Doe*, which holds that a suspension of more than ten days is equivalent to a change in placement that triggers the procedural protections of the IDEA.¹³¹ *Honig* interpreted the IDEA’s due process protections and stay-put provision as restricting school officials from unilaterally excluding disabled children from the classroom for dangerous or disruptive conduct resulting from their disability while a hearing or review proceeding occurred.¹³² The Court noted that “Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school.”¹³³ Based on the language of the IDEA, the Court strongly refused to permit a dangerousness exception as some previous courts had allowed.¹³⁴ Similar to pre-*Honig* cases, the *Honig* Court held that a proposed removal of more than ten days (an expulsion) constituted a change of placement triggering the requirement that a due process hearing occur and a determination be made whether the “disabled student’s misconduct was caused by his or her disability or was the result of an inappropriate placement. If the answer to

¹²⁸ 635 F.2d 342 (5th Cir. 1981), cert. denied 454 U.S. 1030 (1981).

¹²⁹ *Id.* at 348.

¹³⁰ *Id.*; see also *Kaelin v. Grubbs*, 682 F. 2d 595, 602 (6th Cir. 1982). This issue was later reviewed, and the opposite conclusion was reached, by the 9th, 4th, and 7th Circuits in *Virg. Dep’t of Educ. v. Riley*, 106 F.3d 559 (4th Cir. 1997), *Doe v. Bd. of Educ. of Oak Park*, 115 F.3d 1273, 1234 (7th Cir. 1997) and *Doe v. Maher*, 793 F.2d 1470, 1471 (9th Cir. 1986).

¹³¹ *Honig v. Doe*, 484 U.S. 305 (1988).

¹³² *Id.* at 323, 326-29.

¹³³ *Id.* at 323-24.

¹³⁴ *Id.* at 325.

either inquiry is yes,¹³⁵ expulsion is not possible, and the district is obligated to provide an appropriate public education, taking the misbehavior into account.”¹³⁶ However, schools did not have all of their flexibility usurped. School administrators could still suspend disabled students for up to ten days without violating the IDEA. Anything beyond ten days constituted a change of placement requiring adherence to the steps outlined in the IDEA. Similarly, school officials could submit to the courts in search of an order to enjoin the student and thus bypass the administrative review. Finally, schools could impose other sanctions such as detention, or the restriction of privileges as disciplinary measures.¹³⁷

E. Unresolved Issues and Complications Post-Honig¹³⁸

Honig resulted in numerous complaints and uncertainty about other related disciplinary standards as applied to a disabled student. First, a separate disciplinary standard for disabled students was established and approved of in *Honig* with a dual system of disciplinary procedures, disabled students are given a different set of disciplinary rules and are not subject to the same consequence for their misconduct as nondisabled students.¹³⁹ Second, many parents of nondisabled students complained that their children’s education was jeopardized. While the stay-put provision is operative, the disabled student remains in school; thus faculty and other classmates, absent a court order, may be placed in danger by a dangerous disabled student.

¹³⁵ If the misbehavior is not caused by the disability or an inappropriate placement, an expulsion may occur. However, educational programming must not cease during the course of the expulsion. *See* S-1 v. Turlington, 635 F.2d 342, X (5th Cir. 1981); *but see* Virg. Dep’t of Educ. v. Riley, 106 F.3d 559 (4th Cir. 1997). During the pendency of the appeal, the student must remain in his or her current placement, unless the parties agree otherwise. This “stay-put” provision applies even if the student is dangerous to himself or others. An exception now exists in the IDEA for the disabled student who brings a firearm to school. A school may place such a student in an interim alternative setting for not more than 45 days. Robert Silverstein, *A User’s Guide to the 1999 IDEA Regulations*, DiscoverIDEA CD 2000, available at <http://specialed.principals.org/discidea/topdocs/practices/userguide.htm> (last visited Dec. 15, 2002) (on file with author).

¹³⁶ Borreca & Hodgins, *supra* note 120, at 16.

¹³⁷ *Honig*, 484 U.S. at 325-26.

¹³⁸ Many of the unresolved issues following *Honig* were addressed in 1997 IDEA and the corresponding 1999 IDEA Regulations. *See* discussion *infra* Part IV.

¹³⁹ Ramsingh, *supra* note 114, at 172; Graham, *supra* note 14, at 1605-06.

Similarly, the educational setting is disturbed because the teacher has to devote additional time to an extremely disruptive child at the expense of other children. Third, although *Honig* addressed disciplining a disabled student, particularly the stay-put provision as it related to a dangerous disabled student (dangerous to oneself or to others), it failed to address many other aspects of disciplining under the IDEA. For example, *Honig* did not address the options a school can take, such as expulsion, when it is determined that the disabled student's conduct does not result from a manifestation of a disability. "Nor did the Court articulate the necessary strength of the relationship between the misbehavior and the disability. Furthermore, the Court did not discuss whether services must be provided to a disabled student if there is a proper expulsion (e.g., after following IDEA procedures or by a court)."¹⁴⁰ In addition, the Court's decision does not state whether the ten day suspension, which constitutes a change in placement, applies to ten consecutive days, or whether it applies to a total of ten school days in a given period of time such as a school year.¹⁴¹ Finally, the issue of when schools could consult the juvenile courts to deal with disciplining disabled children was not answered.¹⁴² The numerous questions left unresolved in *Honig* were further complicated by post-*Honig* Courts, which held that the IDEA applies to students who were not classified under IDEA before the misbehavior occurred.¹⁴³ In 1994, to the relief of many parents and educators, Congress passed the Improving American's School Act which established one clear exception to the stay-put provision of the IDEA: when a disabled

¹⁴⁰ Nelson, *supra* note 73, at 53. The 1999 Regulations to the 1997 IDEA specify that the obligation to provide FAPE applies to individuals with disabilities who have been suspended or expelled. 34 C.F.R. 300.524 (a).

¹⁴¹ The 1999 Regulations to the 1997 IDEA clarify this issue. See discussion *infra* Part IV.

¹⁴² See Nelson, *supra* note 73, at 64.

¹⁴³ Courts have also held that IDEA applies to students not yet identified as disabled who misbehave. "IDEA requires schools to actively search for students that qualify. Students who are not classified still merit the procedural and substantive protection of IDEA. However, some students invoke the protection of IDEA to sidestep punishment." Nelson, *supra* note 73, at 61. See *Hacienda La Puente Sch. Dist. v. Honig*, 976 F.2d 487 (9th Cir. 1992); *M.P. v. Grossmont Union High Sch. Dist.*, 858 F.Supp. 1044 (S.D. Cal. 1994). *But cf. Rodiricus v. Waukegan Sch. Dist.*, 90 F.3d 249 (7th Cir. 1996) (stay-put provision of IDEA applies to a student that has not

student brings a weapon to school, defined only as a firearm, the student may be placed in an alternative interim placement while the ultimate decision of placement is decided, even if the discipline or placement decision is contested.¹⁴⁴ Nevertheless, it became clear after *Honig* that “no balance had been struck between providing the least restrictive educational setting for children with disabilities and protecting the rights of others attending or working in the school systems to a safe and peaceful environment.”¹⁴⁵

IV. The 1997 IDEA Reauthorization Responds

*“Despite dramatic improvement over the years, too many disabled children are still being left behind academically.”*¹⁴⁶

In 1997, Congress finally responded to the concerns of educators and parents regarding the IDEA and in particular its discipline provisions. Making schools safer for all children was one of the main purposes of the revisions of the IDEA; “‘ensuring the schools are safe and conducive to learning’ was one of the many ways Congress could improve the quality of education for disabled children.”¹⁴⁷ Both the Senate and the House, by overwhelming majorities, approved the proposed amendments. When President Clinton signed the 1997 IDEA legislation into law in June 1997, he recognized that the new law “[gave] school officials the tools they need[ed] to ensure that the Nation’s schools are safe and conducive to learning for all children, while scrupulously protecting the rights of children with disabilities.”¹⁴⁸ The 1997 IDEA implemented far-reaching changes by including, for the first time, specific provisions for disciplining disabled students. “Some of these provisions simply codified existing case law;

previously been diagnosed only if the student reasonably should have been diagnosed). IDEA requires schools to identify, locate and evaluate all students with disabilities. *See* 20 U.S.C. 1412 (3)(a).

¹⁴⁴ Nelson, *supra* note 73, at 51.

¹⁴⁵ Thompson, *supra* note 14, at 573.

¹⁴⁶ Statement of Education Reform Subcommittee Chairman Michael Castle (R-DE), House Education Committee Begins Efforts to Strengthen Individuals with Disabilities Education Act (IDEA), *available at* <http://edworkforce.house.gov/press/press107/castleidea41802.htm> (last visited Nov. 23, 2002) (on file with author).

¹⁴⁷ Thompson, *supra* note 14, at 574.

others, however, clarified previously gray areas, and settled disagreements that had split the courts.”¹⁴⁹ Nevertheless, the IDEA still has not achieved an appropriate balance of rights—educators must continue to grapple with maintaining a safe conductive learning environment for all students while submitting to the protections afforded to the disabled student regarding discipline. In order to understand the problems with the 1997 IDEA provisions, this section provides a thumbnail sketch of the relevant 1997 IDEA disciplinary provisions followed by a discussion of case law and resulting problems with the law.

A. *The Amendments and Regulations*¹⁵⁰

1. **Short-term Removals**

The 1997 IDEA permits school officials the authority to suspend a disabled student for “not more than 10 school days” as long as a similar discipline sanction would be applied to nondisabled students.¹⁵¹ As long as the removal does not constitute a change in placement, short periods of removals, even over the parent’s objections, are authorized. Although the amendments are silent as to whether the limit “for not more than 10 school days” is a cumulative or consecutive limit, the regulations place a limit on multiple suspensions. The regulations note that a “change in placement occurs when a child is removed for more than ten school days or when a child is subjected to a series of removal[s] that constitute a pattern because they cumulate to more than 10 school days in a school year.”¹⁵²

¹⁴⁸ *Id.* at 575.

¹⁴⁹ Osborne, *supra* note 10, at 529. For example, IDEA 97 declares that students with disabilities who have been expelled are still entitled to a FAPE. This issue had divided the courts. *Compare* Honig v. Doe, 484 U.S. 305 (1988) and *S-1 v. Turlington*, 635 F.2d, 342(1981) with *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986), and *Virg. v. Riley*, 106 F.3d 559 (4th Cir. 1997), and *Doe v. Bd. of Educ. of Oak Park*, 115 F.3d 1273 (7th Cir. 1997).

¹⁵⁰ See *infra* Part VII & Appendix for a brief overview for disciplining the disabled.

¹⁵¹ 20 U.S.C. § 1415(k).

¹⁵² 34 C.F.R. § 300.519. In making this pattern assessment, several factors are considered including length of removal, the total amount of time the child is removed, and the proximity of the removals to one another. *Id.*

More specifically, the 1997 IDEA and regulations provide that if a school removes a disabled student for up to 10 school days in a school year, services do not have to be provided if services are not provided to a nondisabled student similarly removed.¹⁵³ However, during subsequent removals that do not constitute a change in placement, educational services must be provided to the disabled student to the extent necessary to enable the child to appropriately progress in the general curriculum and towards the goals set out in the child's Individual Educational Program (IEP).¹⁵⁴ Functional behavioral assessments and behavioral intervention plans are required when the school first removes the disabled student for more than 10 school days in a school year and whenever the student is subjected to a disciplinary change of placement.¹⁵⁵ In other subsequent removals, the functional behavioral assessment and behavioral intervention plan must be reviewed.¹⁵⁶ Manifestation determinations and the IEP team meetings to make these determinations are only required when a child is subjected to a disciplinary change of placement.¹⁵⁷ If it is determined that the behavior of the disabled student is not a manifestation of the child's disability, then the child can be disciplined in the same manner as nondisabled children, except that appropriate educational services must be provided.

2. Long Term Removals

If a disabled student requires discipline that would result in a removal from the current educational placement for more than 10 days,¹⁵⁸ schools must follow special procedures. School personnel must notify the parents of the long-term removal decision and provide a copy of the

¹⁵³ Silverstein, *supra* note 135.

¹⁵⁴ *Id.* See also 34 C.F.R. § 300.121(d). See generally The Exceptional Children's Assistance Center, ECAC Newsletter, *Final IDEA Regulations Change Discipline Procedures* (Spring 1999), available at <http://www.ecac-parentcenter.org/newsletters/spring99/procedures.html>. [hereinafter *ECAC, Final IDEA Regulations*]; Disability Rights Education and Defense Fund, *Individuals with Disabilities Education Act Amendments of 1997 and IDEA Regulations of 1999, Summary of Changes* (May 1999), available at <http://www.dredf.org/idea10.html>.

¹⁵⁵ 20 U.S.C. § 1415(k)(1); 34 C.F.R. § 300.520; Silverstein, *supra* note 135.

¹⁵⁶ 20 U.S.C. § 1415(k)(1); 34 C.F.R. § 300.520

¹⁵⁷ 20 U.S.C. § 1415(k)(4); 34 C.F.R. § 300.520

IDEA procedural safeguards to the parent.¹⁵⁹ The stay-put provision of the IDEA prevents removal of the disabled student until resolution of due process procedures.¹⁶⁰ Within 10 days of the decision, the IEP and other qualified personnel must meet and perform a manifestation determination review.¹⁶¹ If the misbehavior constitutes a manifestation of the disability, no discipline may be assessed to the disabled student.¹⁶² If the IEP identifies deficiencies in the IEP, placement, or implementation of the program set out in the IEP, then the IEP team must discuss and immediately resolve these issues.¹⁶³ On the other hand, if the misbehavior was not a manifestation of the disability, then regular disciplinary actions may be taken. Cessation of services, however, is not permitted and the disabled student must continue to receive services equivalent to a free and appropriate public education.¹⁶⁴

3. Drug and Weapon Violations and the Dangerous Disabled Student

The 1997 IDEA permits different disciplinary actions and procedures for drug and weapon violations and for disabled students considered dangerous either to themselves or to others. This provision “expands the authority previously granted to school officials by the Gun Free Schools Act of 1994 to exclude students from mainstream public schools for drug [and weapon] violations.”¹⁶⁵ The 1997 IDEA and Regulations define a weapon as “the meaning given the term ‘dangerous weapon,’” and define an illegal drug as a “controlled substance” not

¹⁵⁸ 20 U.S.C. § 1415(k)(1); 34 C.F.R. § 300.519

¹⁵⁹ 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503

¹⁶⁰ 20 U.S.C. § 1415(k)(7); 34 C.F.R. § 300.526

¹⁶¹ 20 U.S.C. § 1415(k)(4); 34 C.F.R. § 300.523

¹⁶² 20 U.S.C. § 1415(k)(5); 34 C.F.R. § 300.524.

¹⁶³ 20 U.S.C. § 1514(k)(4)(C)(i); 34 C.F.R. § 300.523(f).

¹⁶⁴ 20 U.S.C. § 1415(k)(5)(A); 34 C.F.R. § 524.

¹⁶⁵ Osborne, *supra* note 10, at 535. See 20 U.S.C. § 8921 (2001) (repealed by Act Jan. 8, 2002, P.L. 107-110, Title X, § 1011(5)(C), 115 Stat. 1986 (effective on enactment, with certain exceptions, as provided by § of such Act, which appears at 20 U.S.C. § 6301 note); see also Gun-Free Schools Act, 20 USCS § 7151 (2002).

proscribed by a health-care professional.¹⁶⁶ For a drug or weapon violation, school authorities can unilaterally remove a disabled student from the child's regular placement to an interim alternative educational placement for up to 45 days at a time.¹⁶⁷ An IEP team must convene to determine the extent to which services must be provided to a disabled student in an interim alternative educational setting.¹⁶⁸ School officials may also seek to place a disabled student they consider is "likely to injure [one's] self or others in the child's regular placement" in a permanent alternative educational setting by requesting an impartial hearing officer to impose such a sanction or by obtaining a court order.¹⁶⁹ Law enforcement officials can also be informed of violations and crimes committed by disabled students.¹⁷⁰

4. Other Aspects of the Law

The stay-put provision of the IDEA applies to all actions contemplated by school officials. Thus, a disabled child is entitled to stay in his or her current placement pending resolution of parental appeals, due process, and court action except for cases involving weapons or drugs.¹⁷¹ Several sections of the 1997 IDEA require that school officials conduct a functional behavioral assessment and implement a behavior intervention plan if one is not already in place. Generally, changes in placement can never occur without a manifestation determination, functional behavioral assessment, and implementation of a behavior intervention plan.¹⁷² The 1997 IDEA regulations encourage and recommend that the IEP team review the circumstances

¹⁶⁶ 20 U.S.C. § 1415(k)(10); 24 C.F.R. § 300.520(d). Controlled substance is defined further as a "drug or other substance identified under schedules I, II, III, IV, or V in §202(c) of the Controlled Substances Act (21 U.S.C. §812(c))" and for the definition of weapon, reference is made to the definition of dangerous weapon "under paragraph (2) of the first subsection (g) of § 930 of title 18, United States Code." 20 U.S.C. § 1415(k)(10); 24 C.F.R. § 300.520(d).

¹⁶⁷ 20 U.S.C. § 1415(k)(1)(A)(ii); 34 C.F.R. § 300.520(b).

¹⁶⁸ 20 U.S.C. § 1415(k)(3)(B); 34 C.F.R. § 300.522.

¹⁶⁹ 20 U.S.C. §§ 1415(k)(2),(k)(9); 34 C.F.R. §§ 300.521, .529.

¹⁷⁰ 20 U.S.C. § 1415(k)(9); 34 C.F.R. § 300.529.

¹⁷¹ Silverstein, *supra* note 135. *See also* 20 U.S.C. § 1415(k)(7); 34 C.F.R. § 300.526.

surrounding the behavior even if a change of placement does not occur.¹⁷³ To prevent discipline problems in the first place, the 1997 IDEA addresses the utilization of “positive behavioral interventions, strategies, and supports.”¹⁷⁴ In the development of an IEP for a disabled student, the IEP team “shall in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.”¹⁷⁵ Neither the 1997 IDEA nor its Regulations define positive behavioral systems.¹⁷⁶

The 1997 IDEA also protects children not yet eligible for special education.¹⁷⁷ A regular education student who has engaged in behavior warranting suspension or expulsion may invoke the IDEA and claim he/she should be treated as a disabled student and be provided all of the procedural protections afforded to a disabled student. However, the student must demonstrate that the school had knowledge “that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.”¹⁷⁸ The 1997 IDEA establishes four ways in which a school can have knowledge that a student may have a disability: parental concerns addressed to school, behavioral indications, parental requests for disability determinations, or if a school official has expressed concern regarding the child’s behavior.¹⁷⁹

Overall, “the process for disciplining disabled students, as interpreted by the [1997 IDEA] and the final IDEA regulation, is complex.”¹⁸⁰ However, numerous commentators and

¹⁷² 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. §§ 300.520(b), .523.

¹⁷³ Groeschel, *supra* note 10, at 1119.

¹⁷⁴ 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346.

¹⁷⁵ 20 U.S.C. § 1414(d)(3)(B)(i).

¹⁷⁶ For possible interpretations of PBS and its use and effective in schools, see H. Rutherford Turnbull, III, et al., *IDEA, Positive Behavioral Supports, and School Safety*, 30 J.L. & EDUC. 445 (July 2001).

¹⁷⁷ 24 U.S.C. § 615(k)(8); 34 C.F.R. § 300.527.

¹⁷⁸ 24 U.S.C. § 615(k)(8); 34 C.F.R. § 300.527(a).

¹⁷⁹ 24 U.S.C. § 615(k)(8)(B)(iiv); 34 C.F.R. § 300.527(b)(1).

¹⁸⁰ Janet L. Horton, *Discipline Under IDEA*, SCHOOL ADMINISTRATOR (Oct. 1999), available at www.aasa.org/publications/sa/1999_10/horton.htm (on file with author).

advocacy groups, including the Office of Special Education, have attempted to clarify the issue by providing simplified guidelines, diagrams, and timelines for parents and administrators dealing with disciplining the disabled.¹⁸¹ Although the 1997 IDEA and corresponding regulations provide the framework for disciplining the disabled, several issues remain controversial as the proper balance has yet to be achieved.

B. The Balance Problem with the 1997 IDEA

Although for the most part the 1997 IDEA was a success, advocates on both sides were not completely satisfied. Particularly regarding discipline, both parents and educators claimed that Congress still did not realize an appropriate balance of maintaining a safe and orderly classroom with providing disabled students the right to be educated along with their nondisabled peers. That is, “despite the best intentions of the [IDEA], its implementation gradually has created a bureaucracy of separatism, where mandates have been imposed without adequate regard for the balance of resources... [or] the balance of special education with all other education services provided by the public schools.”¹⁸² The 1997 IDEA clearly represented a compromise of the extremes. However, in reaching a compromise, Congress may have compromised the rights of non-disruptive students and nondisabled students in general.

¹⁸¹ Numerous advocacy organizations have attempted to clarify the 1999 Regulations to 1997 IDEA. See ECAC, *Final IDEA Regulations*, *supra* note 152; Learning Disabilities Online: LD In-Depth: A Primer on IDEA 1997 and its Regulations, available at www.ldonline.org/ld_indepth/special_education/cec_idea_primer.html; The Families and Advocates Partnership for Education, available at <http://www.fape.org/> (last visited Nov. 20, 2002) (on file with author); Labor Relations Press, *New Idea, Making Sense of the New IDEA Regulations* (Spring and Fall 1999); available at <http://www.lrpconferences.com/newidea.html>; Wrightslaw, *The Individuals with Disabilities Education Act of 1997*, available at http://www.wrightslaw.com/law/code_regs/20USC1400MyOverview.html (last visited Dec. 2, 2002) (on file with author); Office of Special Education, available at <http://www.ed.gov/offices/OSERS/Policy/IDEA/> (last visited Nov. 12, 2002) (on file with author). See also Seligmann, *supra* note 17, at 122-28 (providing a checklist, detailed questionnaire, and action plan for discipline under the IDEA).

¹⁸² Statement of John L. Bukey, Legal Counsel, California School Boards Association, Reauthorization of the Individuals with Disabilities Education Act: Hearing on H.R. 5 Before the House Educ. and Workforce Comm., Early Childhood, Youth and Families Subcomm., 105th Cong. 98 (1997).

One of the major critiques of the 1997 IDEA is the amount of flexibility given to school officials. Although the amendments address school discipline and the violent disabled student, they “fall short of offering sufficient protection for nonviolent students and school staff ... [and] schools must meet an exceedingly high standard before moving a violent student from a classroom to an alternative placement.”¹⁸³ Violence in schools is simply too big of a problem to allow exceptions.¹⁸⁴ Furthermore, the 1997 IDEA neglects to address the problems of the disruptive disabled student. Although a disabled student may not be violent or dangerous, “disruptive behavior is as injurious to the educational program of [children] as dangerous behavior is to their safety.”¹⁸⁵ Many disruptions and other problems are not excluded from the stay-put rule, and many other behavioral problems exist for schools besides weapons and drugs. For example, a disabled student can throw a temper-tantrum in school or their Tourette’s syndrome may create classroom disruptions. Both instances would require a teacher to stop her lesson-plan to quell a disturbance, thus halting learning for all students. Schools, however, are not completely without recourse; schools administrators can obtain relief from the courts or a hearing officer in order to discipline disabled students not involved with drugs or weapons but who are nevertheless substantially disruptive to the educational process. But such relief is difficult to obtain as school officials must demonstrate that “they have done all they could to mitigate the danger or chance of disruption and that there is no less restrictive alternative.”¹⁸⁶ On the other hand, disability advocates claim that permitting sanctions for disruptive behavior would exclude a large number of disabled children from a normal education.¹⁸⁷ Advocates want an IDEA that prevents school officials from finding and claiming any disciplinary reason to expel or

¹⁸³ Dupre, *supra* note 14, at 52.

¹⁸⁴ Thompson, *supra* note 14, at 583.

¹⁸⁵ Dupre, *supra* note 14, at 50 (citation omitted).

¹⁸⁶ Osborne, *supra* note 10, at 537.

remove a disruptive child.¹⁸⁸ Advocates and parents believe they have already made concessions and fear that further conceding “could be the beginning of a slippery slope, ending with the ability of school officials to expel disabled students just to be rid of them.”¹⁸⁹ They recognize that schools must have the ability to discipline students, but argue that long-term removals are used too frequently rather than positive behavioral strategies. Testifying before the U.S. Senate Health, Education, Labor and Pensions Committee Hearing on the IDEA, Marisa Brown, a parent of a disabled student, noted the negative consequence associated with the overuse of suspensions, especially in the absence of more effective strategies: “For my child, suspension was used so often, that it actually began to reinforce the very behavior that the teachers were trying to extinguish. Suspension became a way for [my child] to escape a situation... and he quickly learned how to ensure swift suspensions, and ones that would last more than one day!”¹⁹⁰ Overall, disability advocates, parents of disabled children, and the disability community as a whole remain concerned that the 1997 IDEA and its regulations “have weakened the rights of these students to a free appropriate public education.”¹⁹¹

Many educators also argue that the IDEA, as currently applied, allows disabled children to receive different, possibly preferential, treatment over nondisabled students.¹⁹² The 1997 IDEA did not solve the dual standard system of discipline,¹⁹³ and school officials want a single

¹⁸⁷ Thompson, *supra* note 14, at 577-78.

¹⁸⁸ *Id.* at 582

¹⁸⁹ *Id.*

¹⁹⁰ *Individuals with Disabilities Act Oversight: Hearing Before the Senate Comm. on Health, Education, Labor and Pensions*, 2002 S. Hrg. 107-672 (June 6, 2002)(statement of Marisa Brown, parent).

¹⁹¹ ECAC, *Final IDEA Regulations*, *supra* note 154.

¹⁹² See Graham, *supra* note 14, at 1621.

¹⁹³ Theoretically, the IDEA creates “a double standard by requiring alternative educational services only for disabled students.” Seligmann, *supra* note 17, at 114. Although the term ‘double standard’ assumes equally placed people, an unlikely assumption for disabled and nondisabled students, this is the term used by advocates, critics, and commentators of the IDEA. See also Graham, *supra* note 14, at 1621; Dupre, *supra* note 14, at 49; Del Stover, *Schools Grapple With Special Ed Discipline Limits*, SCHOOL BOARD NEWS (Mar. 2002), available at <http://www.nsba.org/sbn/02-mar/030502-2.htm>; InFocus, *Will Congress Have a Better IDEA* (April 2002), available at <http://www.healthinschools.org/focus/2002/no2.htm>; Bolick, *supra* note 20; Lynda Van Kuren, *IDEA: A Law To*

system of discipline.¹⁹⁴ Many school officials “express frustration that they cannot punish students with disabilities according to the same standard governing other students. They believe those constraints send a negative message to students, parents, and the community.”¹⁹⁵ For educators, the dual discipline standard has simply become “a constant irritant.”¹⁹⁶ Such a system also affects nondisabled students because schools are not required to provide educational services to nondisabled children under long-term suspension or expulsion.¹⁹⁷ There is a perceived double standard for student conduct, concerns about fairness, and the belief that students in special education can “get away with acting up,” whereas other students might be suspended, expelled, or be subject to other disciplinary action for a similar offense.¹⁹⁸ On the other hand, in light of the zero-tolerance disciplinary policies many schools have adopted, the 1997 IDEA provides the necessary protections for educating disabled students.¹⁹⁹

Similarly, the major premise of the IDEA is to treat disabled students equally—by providing disabled and nondisabled students equal opportunity to public education. However,

Be Proud Of, ENABLEDONLINE.COM (Mar.-April 2002), available at <http://www.enabledonline.com/BackIssues/Mar.-April2002/editorial2.html>; National Association of School Psychologists, *NASP Recommendations on IDEA Reauthorization* (Feb. 22, 2002), available at http://www.nasponline.org/advocacy/NASP_IDEA.html (on file with author)[hereinafter *NASP Recommendations*]; *CEC, Five Issues*, *supra* note 97.

¹⁹⁴ Thompson, *supra* note 14, at 579.

¹⁹⁵ Sack, *supra* note 20.

¹⁹⁶ *Id.*

¹⁹⁷ However, “similar arguments to those reflected in the IDEA’s provisions for continued educational services to children with disabilities can be made for maintaining a connection through education with nondisabled youth who misbehave in school.” Seligmann, *supra* note 17, at 114-15. Indeed many states have already implemented such policies for nondisabled students. For example, California and Texas statutes have provisions providing educational services to at least some nondisabled students suspended or expelled. See CAL. EDUC. CODE. §48916.1 (West 2003); TEX. EDUC. CODE. ANN. §37.011 (West 2003).

¹⁹⁸ Seligmann, *supra* note 17, at 114-15.

¹⁹⁹ *School Discipline and The Special Education Student: A Report from the General Accounting Office of the United States Looks at the Impact of IDEA on Student Discipline*, SPECIAL EDUCATION (Nov. 12, 2002), available at <http://speialed.about.com/library/weekly/aa052801a.htm> (on file with author). See also United States General Accounting Office, Report to the Committees on Appropriations, U.S. Senate and House of Representatives, *Student Discipline: Individuals with Disabilities Education Act* (Jan. 2002), available at <http://www.gao.gov/new.items/d01210.pdf> (on file with author). The concept of zero-tolerance is in “sharp conflict with the special education laws, which require a detailed, highly individualized inquiry before a disabled student is

the disciplinary policies of the IDEA allow and even mandate unequal treatment of the disabled. Rather than teaching children that adversity is not an excuse for disruptive and/or dangerous behavior, “making disciplinary concessions for children with disabilities may be sending a message [to them] that no one expects them to live up to the same standards as their peers.”²⁰⁰ Perhaps all students should be provided alternative educational opportunities when suspended or expelled.²⁰¹ Removing any child is likely to backfire—when the student does return to school, his behavior will not have changed. Those students who are expelled are the ones who most need educational support and social skills instruction.²⁰² Congress has even endorsed this objective of “encouraging and promoting programs designed to keep in school juvenile delinquents expelled or suspended for disciplinary reasons.”²⁰³

Another problem with the 1997 IDEA is its implementation. Trying to execute any disciplinary procedure against a disabled student requires going through a “legal maze that frustrates the ability to discipline at all.”²⁰⁴ Essentially, all school decisions are subject to review as parents may appeal disciplinary determinations, changes in placement settings, or disability determinations—all of this results in lengthy legal conflicts when it is just easier for schools to quit and allow disruptive or dangerous conduct to continue.²⁰⁵ Many administrators argue that getting disabled students removed simply takes too much time and requires too many

subject to significant discipline.” Asperger Syndrome Education Network, *Zero-tolerance and Special Education*, (Oct. 13, 2002), available at <http://www.aspennj.org/tolerance.html> (on file with author).

²⁰⁰ Thompson, *supra* note 14, at 583. See discussion *infra* Part V(E).

²⁰¹ See *supra* note 163 (some states do provide alternative educational opportunities to nondisabled students who have been expelled or suspended).

²⁰² Lisa Graham Keegan, *Education Leaders Council, Access, Achievement, and Accountability Matter Most*, ENABLED ONLINE (Nov. 1, 2002), available at <http://www.enabledonline.com/editorials6.html> (on file with author).

²⁰³ Thompson, *supra* note 14, at 584-85 (quoting S. REP. NO. 105-108 (1997)).

²⁰⁴ *Id.* at 580.

²⁰⁵ *Id.* at 581.

administrative burdens.²⁰⁶ Although mediation is encouraged by the IDEA, it has not been significantly implemented as a model for preventing conflict between parents and school authorities regarding disciplining the disabled.²⁰⁷

Also, many of the required procedures of the 1997 IDEA are complex, problematic, and place a heavy burden on school administrators.²⁰⁸ For example, the Act's required manifestation determination procedures "go beyond even a double standard and set up triple standards of discipline . . . [B]ecause of all the problems surrounding the manifestation determination, 'it may be advisable to consider that a child's misbehavior is always related to his or her handicapping condition.'"²⁰⁹ The 1997 IDEA can make a disciplinary exception out of children with a myriad of disabilities even though many arguably "have little to do with a child's ability to obey school rules or to behave himself or herself the same as other children."²¹⁰ For example, one "commentator suggests, the reasoning is as follows: 'If a kid is a bully, that must mean he has an emotional problem; if he has an emotional problem, it qualifies him as disabled; if he's disabled, he cannot be punished or even be removed from a classroom without a huge federal civil rights hassle.'"²¹¹

Furthermore, misconduct that is a manifestation of a student's disability receives different treatment than misbehavior unrelated to the disability. Yet there are problems in making this manifestation determination. The IEP team and other "qualified personnel" make this manifestation determination considering "all relevant information" including "evaluation and diagnostic results," parental supplied information, "observations of the child" and whether "the

²⁰⁶ Sack, *supra* note 20.

²⁰⁷ 20 U.S.C. § 1415(e); 34 CFR § 300.506

²⁰⁸ The weight of this burden can generally be attributable to and a factor of school size, training, teacher shortages, etc.

²⁰⁹ Dupre, *supra* note 14, at 61-62.

²¹⁰ Thompson, *supra* note 14, at 584.

²¹¹ *Id.*

child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement."²¹² The regulations define qualified personnel to include the student's treating physician and other experts the parents provide.²¹³ However, the IEP team, even with experts, "may lack sufficient expertise in psychiatry to determine the relationship between disability and understanding of consequences and the relationship between disability and behavior control" essential to the manifestation determination.²¹⁴ The manifestation determination provision of the IDEA also "misses some important points." For example, it fails to explain what "degree of impairment is necessary before the statute's provisions apply" and "does not make any allowance for the disabled student who may not currently be able to understand or control behavior, but could be trained to do so with swift and consistent discipline."²¹⁵ Although any parental challenge to the determination places the burden on the school to justify itself and its determination and often results in lengthy litigation, costly both in time and energy that could be better spent on educating the disabled student, such parental appeals are necessary to prevent the weakening of the protections for disabled students and to prevent abuses of the stay-put provisions of the IDEA.²¹⁶

The amendments to the IDEA also created additional responsibilities for the schools and its staff. Schools now have an affirmative duty to review and modify a disabled student's IEP when the student's behavior results in a disciplinary change of placement. Similarly, schools must also bear the burden of keeping a watchful eye on those students whose behavior may indicate the need for special education. Although every state must have in effect policies and

²¹² 20 U.S.C. §§ 1415(k)(4)(C)(i)(I)-(III), (ii)(1).

²¹³ Dupre, *supra* note 14, at 59.

²¹⁴ *Id.* at 58.

²¹⁵ *Id.* at 59.

procedures to ensure all children are identified, located, and evaluated for disabilities, the IDEA provides protections for children not yet eligible for special education and related services.²¹⁷

The 1997 IDEA “presume[s] that if school personnel express concern to other school employees about a child’s behavior or performance, then the school has already failed to properly evaluate the child as in need of special education.”²¹⁸ Such a practice allows children without disabilities “to prevent routine discipline by simply requesting a disability evaluation . . . [and] in some cases [the] IDEA is manipulated by students who do not even have a disability. The student neither has any history of requesting special education services nor any credible basis for claiming a disability.”²¹⁹ Yet even these students can claim shelter from discipline under the Act’s provisions.

The toll on teachers created by the IDEA’s disciplinary provisions also negatively affects the learning environment and contributes to the problems associated with disciplining the disabled. “Classroom teachers must spend an appreciable amount of time dealing with the meetings and paperwork that IDEA’s mandates spawn.”²²⁰ The burdensome demands placed on teachers often leads to a drain in resources. While teachers participate in IEP and discipline related meetings, hearings or court proceedings, substitute teachers have to be provided and other students are deprived of their teacher’s time, energy, and passion for teaching. Shortages of qualified special education teachers along with a high burnout rate of those already in the special education field further contributes to the problems associated with disciplining the disabled.²²¹

All teachers are affected by the IDEA; “it’s not just the special education teachers who are

²¹⁶ Thompson, *supra* note 14, at 582; Nelson, *supra* note 73, at 61.

²¹⁷ 20 U.S.C. § 1415(k)(8), 34 C.F.R. § 300.527.

²¹⁸ McKinney, *supra* note 73, at 371.

²¹⁹ *Id.*

²²⁰ Dupre, *supra* note 14, at 73.

²²¹ Joetta L. Sack, *All Classes of Special Education Teachers in Demand Throughout Nation*, EDUCATION WEEK, (Mar. 24, 1999), available at <http://www.edweek.org/ew/vol-18/28speced.h18>.

shouldering the law's burdens. General education teachers are also responsible for implementing the law, keeping track of paperwork, and attending IEP team meetings."²²² Yet, teachers "are being asked to do things they have not necessarily been trained to do."²²³

V. Reform and the 2003 Reauthorization

*Our challenge today is to address discipline issues with special students while protecting the hard won civil rights of school children with disabilities.*²²⁴

*"The IDEA has yet to fulfill its promise. The doors are open, but the system still denies too many students the opportunity to reach high academic standards. That is why the IDEA needs reform."*²²⁵

Numerous advocacy, educational, medical, disability, parent, and school organizations have submitted to Congress their suggestions for reforming the discipline provisions of the 1997 IDEA. Despite the variety of suggestions, a main theme of all the reform movements is that change is necessary.²²⁶ Disciplining the disabled has been one of the most controversial aspects of the IDEA since its inception. "It is a difficult issue because it counters the ever-present duty of school administrators to maintain order, discipline, and a safe educational environment balanced against the rights students with disabilities have to a free [and] appropriate education in the least restrictive environment [possible]."²²⁷ Revision and renewal of the IDEA is currently underway. Although the IDEA's discipline requirements do not have to be reauthorized, the current discipline provisions have caused much debate and need to be addressed. It may be difficult to assess the consequences of the 1997 IDEA Amendments because the Regulations

²²² Sack, *supra* note 20, at 4.

²²³ *Id.*

²²⁴ Statement of Senator Edward M. Kennedy, Committee on Health, Education, Labor and Pensions, The Implementation of the Individuals with Disabilities Education Act (IDEA) (June 6, 2002), *available at* <http://www.ed.gov/print/news/speeches/2001/10/011004.html>.

²²⁵ Statement of Education Secretary Rod Paige before the House Education Committee (Oct. 4, 2001), *available at* <http://edworkforce.house.gov/issues/107th/education/idea/041802special.pdf>

²²⁶ In addition to discipline, numerous other IDEA issues must be addressed in the reauthorization debate including funding, paperwork reduction, identification and assessment, teacher shortages and training, parental empowerment, testing, enforcement, and accountability.

were not promulgated until 1999 and research is still underway concerning the effects of the 1997 IDEA.²²⁸ Nevertheless, there are some general issues relating to disciplining the disabled that must be recognized and addressed before Congress releases a new IDEA. Congress and the Department of Education must continue to work together and with parents and educators alike to answer the most pressing questions and resolve some of the problems confronting school districts left unanswered and unresolved by the 1997 IDEA regarding disciplining the disabled.

A. *Cessation of Services*

Most advocacy groups strongly oppose cessation of services.²²⁹ Courts have agreed that schools cannot deny educational services to students with disabilities.²³⁰ The current IDEA does not allow cessation of services except for short-term disciplinary sanctions. Rather, the IDEA provides for alternative educational placements and continuation of IEP supports when disabled students are disciplined. This principle of ‘no cessation’ without exception must be preserved in the upcoming IDEA reauthorization.

²²⁷ Osborne, *supra* note 10, at 537.

²²⁸ The U.S. Department of Education's Office of Special Education Programs (OSEP) is conducting a national assessment to examine how the changes in the 1997 IDEA amendments are affecting states, districts, and schools, as well as infants, toddlers, children and youth with disabilities and their families. *See* Council for Exceptional Children, *CEC Policy Update* (Nov. 15, 2002), available at <http://www.cec.sped.org/pp/legupd111502.html#2>.

²²⁹ *See* National Association of School Psychologists, National Mental Health and Education Center, *IDEA Reauthorization: Challenging Behavior and Students with Disabilities*, available at http://www.naspcenter.org/factsheets/idea_fs.html (last visited Dec. 16, 2002) (on file with author) [hereinafter *Challenging Behavior*]; The Families and Advocates Partnership for Education, available at <http://www.fape.org/> (last visited Nov. 20, 2002) (on file with author); CCD Principles, *supra* note 62; U.S. Commission on Civil Rights, *Recommendations for the Reauthorization of the Individuals with Disabilities Education Act* (May 2002), available at <http://www.usccr.gov/pubs/idea/recs.htm>; The Disability Rights Education and Defense Fund, *The Disability Rights Education and Defense Fund, Inc., Launches IDEA Rapid Response Network* (April 2002), available at <http://64.143.22.161/rrn/rapid.html>; American Association of School Administrators, *American Association of School Administrators IDEA Reauthorization Position* (June 2002), available at <http://www.cesa7.k12.wi.us/sped/issues-2002IDEA/aasaonidea.htm>; Council of Administrators of Special Education, *CASE 2002 IDEA Re-authorization Recommendations* (Aug. 2002), available at <http://www.cesa7.k12.wi.us/sped/issues-2002IDEA/case.htm>; Parent Advocacy Coalition for Educational Rights, *Position Paper on Discipline Issues Relating to the Reauthorization of IDEA* (Dec. 2002), available at <http://www.pacer.org/lesislation/position.htm>.

²³⁰ *Honig v. Doe*, 484 U.S. 305, 323-25 (1988); *Kaelin v. Grubbs*, 682 F.2d 595, 599-602 (6th Cir. 1982); *S-1 v. Turlington*, 635 F.2d 342, 348 (5th Cir. 1981).

During the 2001 reauthorization of the Elementary and Secondary Education Act (No Child Left Behind Act) signed into law in January 2002, advocates of ‘no cessation’ achieved a great victory when several discipline amendments failed to be incorporated in the final Act. The amendments offered by Senator Sessions and Representative Norwood, though slightly different, essentially would have enabled schools to cease educational services for disabled students when the manifestation determination revealed that misbehavior was not related to the disability.²³¹ Allowing schools to cease providing disciplined disabled students with educational services contradicts the intentions of the IDEA which include educating disabled students and bringing them into mainstream educational settings.²³²

Cessation of services has serious negative consequences for all students, especially disabled students. In fact, “no evidence shows cessation of educational services through suspension and expulsion makes a positive contribution to school safety or in any way improves student behavior.”²³³ The National Association of School Psychiatrists argues that “ceasing educational and other services for students as a means of disciplining them does not improve school safety or effectively address the behavior.”²³⁴ Many fear cessation of services could have a negative backlash when these students do return to school; when such services are denied, any type of supervision and instruction disappears and “students are more likely to become involved in illegal activities” ultimately leading to an increase in delinquency and a corresponding decrease in school and community safety.²³⁵ Similarly, other data demonstrates that when

²³¹ *IDEA Advocates Wage Battle Against Discipline Amendments*, MENTAL HEALTH WEEKLY (July 2, 2001), available at http://www.findarticles.com/cf_0/m0BSC/26_11/76938095/p1/article.jhtml?term=IDEA+++discipline (on file with author).

²³² *Id.*

²³³ *Rethinking School Discipline: Keeping Schools Safe Through Instruction, Not Exclusion: Hearing Before the Subcomm. on Educ. Reform Comm. on Educ. and the Workforce, 107th Cong. (2002)* (testimony of Dr. Russell Skiba) available at <http://www.tash.org/govaffairs/skiba.htm>.

²³⁴ *NASP Recommendations*, *supra* note 193.

²³⁵ *See id.*

educational services are suspended, students fall further behind and often dropout of school. Students who dropout of school “are three and a half times as likely as high school graduates to be arrested. Drop-out rates are higher among students with disabilities, and nearly one-third of these special education students cite discipline issues as the reason for dropping out.”²³⁶

The National Council on Disability suggests that the new IDEA must parallel that of the No Child Left Behind Act. In order to prevent *any* child from being left behind, no child should be denied needed educational services. The Council maintains that “children should never be considered to have forfeited their rights to services... [it] is not something to which a child . . . can waive.”²³⁷ Some advocacy groups argue that no child, regardless of disability, should be denied educational services.²³⁸ Testifying before the Subcommittee on Education Reform, Dr. Russell Skiba stated that “it is possible to develop sound disciplinary procedures for both general and special education that do not require cessation of services for students with disabilities.”²³⁹ Parents of disabled students argue for no cessation of services in any situation. Instead, “students who are removed from their educational setting should be placed in settings where they have access to appropriate mental health and behavioral support services provided by qualified professionals with specialized training and expertise.”²⁴⁰ Parents of special education students are adamant that schools should not punish students for their disability and oppose any measures

²³⁶ *Challenging Behavior*, *supra* note 229.

²³⁷ *National Disability Policy: A Progress Report*, Nat'l Council on Disability, July 26, 2002. *available at* http://www.ncd.gov/newsroom/publications/progressreport_07-26-02.html. (on file with author).

²³⁸ See discussion *infra* Part V.D. For example, the Council for Exceptional Children (CEC) supports the current IDEA discipline policy but opposes cessation of educational services and supports for any student. “No child should be denied appropriate educational services. As such, CEC recommends establishing a single discipline standard for all students who are suspended or expelled from school.” *CEC Five Issues*, *supra* note 97. See also *Challenging Behavior*, *supra* note 229; National Association of Secondary School Principals, *Reauthorization of the Individuals with Disabilities Education Act (IDEA)*, *available at* http://www.principals.org/publicaffairs/fact_idea.htm.

²³⁹ *Rethinking School Discipline: Keeping Schools Safe Through Instruction, Not Exclusion: Hearing Before the Subcomm. on Educ. Reform Comm. on Educ. and the Workforce, 107th Cong. (2002)* (testimony of Dr. Russell Skiba), *available at* <http://www.tash.org/govaffairs/skiba.htm>.

²⁴⁰ *Where Do We Really Stand?*, *supra* note 1, at pt. 2, §3, Barbara Raimondo, response to NCD Request for Comment.

that would give schools more flexibility and authority to remove ‘disruptive students,’ fearing segregation will result.²⁴¹ The Education Leaders Council’s attempts to rebuff assertions from special education advocates that allowing teachers more flexibility in disciplining disabled students will “lead to multitudes of disabled youngsters being banished from classrooms and schools.”²⁴² While not directly advocating cessation of services, the Education Leaders Council argues that the stay-put provision and the manifestation determination “often have the unintended effect of tying the hands of educators who are trying to create orderly learning environments in their classrooms.”²⁴³ The Council, however, does not offer any alternatives as to a child’s placement and receiving of services while schools conduct due process protections such as the manifestation determination.²⁴⁴

Withholding education is simply not a suitable punishment for violations of the student discipline code. By enacting the IDEA, Congress sought to make public education available to the disabled student. Congress was aware of the stereotypes regarding disabled students; despite the notion that disabled students could be disruptive, Congress nevertheless determined that disabled students should be educated in public schools. Cessation of services contradicts this ideal. Such a proposal not only has implications for disabled children in general, but in particular, for minority-disabled children who are more susceptible to misidentification and discipline. Data shows that “African American children are identified at one and a half to four times the rate of white children in the disability categories of mental retardation and emotional disturbance... [and] once identified, most minority students are significantly more likely to be

²⁴¹ *Where Do We Really Stand?*, *supra* note 1, at pt. 2, §3, Kathleen Boundy, testimony before hearing on “Idea: Behavioral Supports in School, Committee on Health, Education, Labor and Pensions.

²⁴² Education Leaders Council, *ELC, Empower American, and Fordham Foundation Letter to the President’s Commission on Excellence in Special Education* (Feb. 20, 2002), available at <http://www.educationleaders.org/issues/020222branstad.htm> (on file with author).

²⁴³ *Id.*

²⁴⁴ *Id.*

removed from the general education program and be educated in a more restrictive environment.”²⁴⁵ Evidence also demonstrates that schools discipline minority students at substantially higher rates. Data released by the Department of Education for the 1999-2000 academic year indicates that “Hispanic, American Indian, and African American students with disabilities were substantially more likely than white students to be suspended, removed by school personnel, or removed by a hearing officer, and were more likely to be given both short- and long-term suspension.”²⁴⁶ Often children who are members of racial or ethnic minority groups are “treated with harsh exclusionary discipline instead of appropriate special education and related services... for behavior that is part of [a] disability though inappropriately labeled as misconduct.”²⁴⁷ Furthermore, “given the data reflecting racial disparity in the use of exclusionary discipline, and the hard effects of exclusion, we have reason to be concerned, especially for those students and parents who are unrepresented and lack access to legal and other expertise to challenge findings of ‘no manifestation.’”²⁴⁸ In a study of New York City schools, of the 50,000 suspensions in 2001, half of the long-term suspensions were of disabled students and approximately 70% of those suspensions were African American students.²⁴⁹ Focusing on the “disproportionate impact on minorities” student cessation should not even be considered; “[t]here’s nothing worse than having at-risk students out of school for months

²⁴⁵ The Civil Rights Project, Harvard University, *Racial Inequity in Special Education*, available at http://www.civilrightsproject.harvard.edu/research/specialed/IDEA_paper02.php (last visited Dec. 15, 2002) (on file with author) [hereinafter The Civil Rights Project].

²⁴⁶ U.S. Commission on Civil Rights, *Recommendations for the Reauthorization of the Individuals with Disabilities Education Act* (May 2002), available at <http://www.usccr.gov/pubs/idea/recs.htm> [hereinafter USCCR, *Recommendations*]; see also The Civil Rights Project, *supra* note 245.

²⁴⁷ *Where Do We Really Stand?*, *supra* note 1, at pt.2, §3, Kathleen Boundy, testimony before Senate Health, Education, Labor and Pensions Committee Hearing.

²⁴⁸ *Id.*

²⁴⁹ *Where Do We Really Stand?*, *supra* note 1, at pt.2, §3, Elysa Hyman, public comment from the hearing before the President's Commission on Excellence in Special Education, "Assessment and Identification Task Force," Brooklyn, NY, April 16, 2002.

unsupervised.”²⁵⁰ Consequently, in addition to the general concerns regarding racial inequality in schools, cessation of services for any disabled student signals a return to the segregation the IDEA was established to cease.

B. Positive Behavioral Services²⁵¹

Increasing services should also be emphasized during the IDEA reauthorization. The focus should not be so much on how to discipline, but how to prevent discipline problems. “Research indicated that positive behavior support is effective for one-half to two-thirds of the cases and that success rates nearly double when interventions are based on functional behavioral assessments.”²⁵² Similarly, studies show that “schools that employ system wide interventions for problem behavior prevention report reduction [had] office discipline referrals of 20-60% resulting in increased academic engaged time and improved academic performance for all students.”²⁵³ Schools, parents, and teachers need to provide positive behavioral supports and other effective behavioral interventions to prevent behavior problems. “[S]ocial skills instruction and violence prevention strategies are effective in promoting positive behavior in students and schools. Strategies that effectively maintain appropriate social behavior will make schools safer. Safer schools are more effective learning environments.”²⁵⁴

The 1997 IDEA requires the IEP team to conduct a functional behavioral assessment and behavioral intervention plan and review the disabled student’s IEP after a disciplinary violation. The IEP team should conduct these assessments and plans before any disciplinary infraction

²⁵⁰ *Id.*

²⁵¹ For a thorough and complete discussion of Positive Behavioral Supports see generally, Turnbull, *supra* note 176. (analyzing the relationship between positive behavioral strategies and the IDEA).

²⁵² Association of University Centers on Disability, *Principles of the Association of University Centers on Disability for the Reauthorization of IDEA* (Dec. 11, 2001), at http://www.aucd.org/legislative_affairs/aucd_principles.htm.

²⁵³ *Challenging Behavior*, *supra* note 229.

²⁵⁴ *Id.*

takes place.²⁵⁵ Whenever a disabled student has a behavior problem that interferes with learning, though not rising to the level of a discipline violation, positive behavioral supports and interventions should be implemented. One parent of a disabled student commented that “behavior problems arise when the program is inappropriate.”²⁵⁶ Services should be behavioral support not behavioral discipline because appropriate services often can treat behavior that is attributed to a disability.

Schools must realize that they not only should teach academic skills, but also appropriate social behaviors and skills. Parents as well must work with schools in developing positive behavior methods as “parental involvement is critical to providing *appropriate* education to children with and without disabilities.”²⁵⁷ Thus, the Support Programs provided under the IDEA must be expanded. Effective research-based instruction should be used whenever possible.²⁵⁸ Schools must provide reading initiatives to all students, including children with disabilities. Such programs, accompanied by intensive, long-term, individualized, research-based instruction for children assist in identifying and providing positive services to disabled students early on in the child’s education.²⁵⁹ Similarly, the Council for Exceptional Children recommends that there should be “comprehensive family-centered approaches to address the needs of students who demonstrate challenging behaviors in school, including positive behavioral supports, as an effective strategy to reduce later discipline referrals.”²⁶⁰ Training is essential for all educational personnel. Teachers must receive training on how to recognize and respond appropriately to

²⁵⁵ Protection and Advocacy System, *Working P & A Draft on IDEA Reauthorization General Distribution Document* (Nov. 16, 2002), at <http://www.cesa7.k12.wi.us/sped/issues-2002IDEA/napas.htm>; *NASP Recommendations*, *supra* note 193.

²⁵⁶ *Where Do We Really Stand?*, *supra* note 1, at §3, Laura Gardner, NCD Request for Public Comment, May 19, 2002.

²⁵⁷ CCD Principles, *supra* note 62.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

problematic behavior in disabled students, and staff must possess the skills to implement management strategies and positive behavior intervention strategies.²⁶¹ Studies have found that “the presence of qualified personnel is critical to achieving positive student outcomes. High dropout rates among students with disabilities are correlated to shortages of qualified personnel. Ensuring qualified personnel is a critical component of educational accountability.”²⁶² All educators (teachers, staff, administrators) must be knowledgeable about student disabilities and be trained to be able to address specific challenges to student learning and to respond to individualized discipline problems. “Pre-service education at institutions of higher learning and on-going research-based in-service education for practicing professionals must include the development of cultural awareness and competence and effective collaboration as part of an interdisciplinary team.”²⁶³ The U.S. Commission on Civil Rights recommends discipline policies that are “proactive, research-based, and schoolwide, and promote positive behavioral support . . . classroom management, and the use of behavioral assessments.”²⁶⁴ The Commission calls on the Office of Special Education to provide guidance to states and school districts regarding positive behavior strategies as uniform discipline guidelines are developed.²⁶⁵

C. Complexity of the IDEA and its Regulations

The language of the discipline provisions in the 1997 IDEA is cumbersome and difficult to follow. It is no wonder that they are not being implemented or enforced properly. In a 2000 study, *Back to School on Civil Rights*, the National Council on Disability found that “every state was out of compliance with [the] IDEA requirements to some degree. . . federal efforts to

²⁶⁰ Jacquelyn Alexander, *CEC's President Testifies on IDEA Reauthorization*, 8 CEC TODAY 6, at 4 (Feb/Mar. 2002).

²⁶¹ *NASP Recommendations*, *supra* note 193.

²⁶² CCD Principles, *supra* note 62.

²⁶³ Association of University Centers on Disability, *Principles of the Association of University Centers on Disability for the Reauthorization of IDEA* (Dec. 11, 2001), at http://www.aucd.org/legislative_affairs/aucd_principles.htm.

²⁶⁴ USCCR, *Recommendations*, *supra* note 246.

enforce the law over several administrations have been inconsistent, ineffective, and lacking any real teeth.”²⁶⁶ Similarly, according to a study conducted by the U.S. Commission on Civil Rights, although attempts to follow the IDEA discipline rules have resulted in some improvements, one major complaint of the 1997 IDEA provisions “is that they are too complicated and confusing, and therefore should be reviewed, clarified, and simplified for better implementation.”²⁶⁷ Many of the 1997 IDEA provisions do not set clear guidelines for school officials but rather principles to follow. “Campus administrators are expected to follow a maze of [procedural] regulations” and then make substantive decisions based on principles. This maze of regulations has numerous decision points, all potential vehicles for litigation. This inequitable system creates opportunities for exploitation of the system. Further, it assumes that all individuals are capable of understanding and applying these legal complexities.”²⁶⁸ Parents agree that much of the over-identification of disabled students needing discipline stems from the IDEA’s complexity. Gene Lenz, the Senior Director of the Texas Education Association of the Division of Special Education, testified before the President’s Commission on Excellence in Special Education, stating the following:

[T]he discipline section of [the] IDEA, both in the statute and the regulation, requires massive simplification, with priority clarification to the differentiation between behavioral concerns requiring instructional interventions versus disciplinary action. We have to make a clear distinction between those kids that need behavior intervention as an instructional issue versus a discipline issue.²⁶⁹

²⁶⁵ *Id.*

²⁶⁶ *Back to School on Civil Rights*, *supra* note 3.

²⁶⁷ *Where Do We Really Stand?*, *supra* note 1, at §3, U.S. Commission on Civil Rights, Report from Hearing on Reauthorization of IDEA, Washington, D.C. (May, 2002).

²⁶⁸ *Id.* at §3, Dr. Sally Arthur, State and Local Level Special Education Programs that Work and Federal Barriers to Innovation (May 8, 2002).

²⁶⁹ *Where Do We Really Stand?*, *supra* note 1, at §3, Gene Lenz, The President's Commission on Excellence in Special Education (Feb. 26, 2002).

Rather than focusing on manifestation determinations, the major emphasis should be on identifying and providing the appropriate programs and supports and the IDEA should stress the importance of these concepts.

D. Dual Systems of Discipline

Although most educators and parents alike agree with the principals of no cessation of services, increased behavioral support programs, and simplifying the process of discipline students, the dual discipline system established by the 1997 IDEA is extremely controversial.²⁷⁰ The right of any student or teacher is the right to study and teach in a safe atmosphere conducive to learning. To be fair to both disabled and nondisabled children, the IDEA should create a single discipline standard. Principals strongly argue for a single discipline system. The National Association of Secondary School Principals favors “equitable discipline policies for all students . . . the dual system of discipline must be eliminated, helping officials to keep schools safe and enforce district behavior policies.”²⁷¹ In addition to easing the burden for school administrators by having only one system, principals argue that the IDEA students are “acutely aware that the school’s standard conduct guidelines and consequences do not apply to them. They know that they can’t be punished. This double standard is not fair or good for anyone, including special education students.”²⁷² Furthermore, allowing any disabled student to disrupt the education of

²⁷⁰ However, there may not be any basis in this debate. Following the 1997 IDEA, “there was a perception of a double standard for student discipline for students with disabilities.” United States General Accounting Office, Report to the Committees on Appropriations, *supra* note 199. Consequently, Congress directed the General Accounting Office to conduct a study to determine how the 1997 IDEA affected the “ability of schools to maintain a safe environment conducive to learning.” *Id.* The study found that students with disabilities are receiving the same punishments as general education students for violent acts they commit in schools, principals attributed the effects of serious misconduct to incidents involving disabled and nondisabled students alike, and IDEA plays a minor role in affecting school’s ability to properly discipline students. *Id.* However, approximately “27% of school principals reported that a separate discipline policy for special education students is unfair to the regular student population.” *Id.*

²⁷¹ National Association of Secondary School Principals, *Individuals with Disabilities Act (IDEA): Resources and Reform* (July 2002), at http://www.nassp.org/advocacy/idea_res_reform.cfm.

²⁷² Gerald N. Tirozzi & Vincent L. Ferrandino, *Here We Go Again, Principals’ Perspective*, at www.naesp.org/misc/edweek_article_3-06-02.htm (last visited Aug. 28, 2003). See also National Association of

many children is “not only bad for educational achievement, but it also signals a double standard that teaches children a bad moral lesson.”²⁷³ As a remedy for this problem, the principle of "universal design" could be applied. In other words, the new IDEA could create a system of school discipline that incorporates the principle that education should continue for all students, disabled and nondisabled alike, who are expelled or suspended, though possibly in a different site than regular schooling.²⁷⁴ The Council for Exceptional Children supports this view; along with its opposition to cessation of educational services and supports for any student, the Council recommends a single discipline standard resembling that of the IDEA by providing continued alternative educational services for all students, disabled and nondisabled, who receive suspensions or expulsions as disciplinary sanctions.²⁷⁵

Some parents, on the other hand, support the dual system of discipline. One parent of a disabled student commented that “changing to uniform discipline policies will not improve functioning in a student with a disability. All it serves to do is relieve the teachers from having to try.”²⁷⁶ Parents also dispute the contention of principals that administering a different system of discipline is difficult, by citing a new General Accounting Office Report (GAO) on student

Secondary School Principals, *Initial Comments Related to the Reauthorization of the Individuals with Disabilities Education Act* (Dec. 10, 2001) (“Principals have tremendous difficulties in administering discipline policies that require certain students be discipline differently than others.”), at http://www.nassp.org/advocacy/osep_idea_priorities.cfm.

²⁷³ ELC, Empower America, and Fordham Foundation Letter to the President's Commission on Excellence in Special Education, letter presented from Lisa Graham Keegan, Education Leaders Council; William J. Bennett, Empower America; Chester E. Finn, Jr., Thomas B. Fordham Foundation to Terry Branstad, Chairman of the Commission, before its Feb. 25 meeting in Houston, at <http://www.educationleaders.org/elc/issues/020222branstad.html> (last visited Aug. 28, 2003).

²⁷⁴ *Will Congress Have A Better IDEA?*, INFOCUS (April 12, 2002), at <http://www.healthinschools.org/focus/2002/no2.htm> (on file with author). For a more thorough discussion of universal design, see Center on Education Policy, *A Timely IDEA: Rethinking Federal Education Programs for Children with Disabilities*, at <http://www.cep-dc.org/specialeducation/timelyidea2002.pdf> (last visited Sept. 30, 2002) (on file with author).

²⁷⁵ *CEC, Five Issues*, *supra* note 97. The National Association of School Psychologists also supports this view that the no cessation of services should not be viewed as a double standard for students with disabilities, but rather as a standard that “should be held for all students.” *Challenging Behavior*, *supra* note 229.

²⁷⁶ *Where Do We Really Stand?*, *supra* note 1, §3.

discipline that found that the IDEA discipline policies do not hinder school officials. The GAO study acknowledges that “a significant majority of school administrators believe the [discipline provisions of the IDEA are] effectively working and [do] not create a ‘problem’ for implementation.”²⁷⁷ Furthermore, parents believe that a unified system of discipline could result in pre-IDEA conditions with disabled students being segregated and excluded from education.²⁷⁸ If the IDEA is expanded to permit increased removal of “so-called disruptive students” from the regular classroom to alternative education programs or other settings “there is little doubt but that resegregation without accountability for teaching and learning will be the outcome.”²⁷⁹

Another controversial issue related to the dual system of school discipline is the IDEA’s extension of protection to students not formally identified as disabled. In amending the IDEA in 1997, Congress extended this protection because of indications of school incompetence and failure to identify some students as disabled, school oversight, or “mere subtlety of the disability.”²⁸⁰ “The existence of a dual disciplinary system for disabled and nondisabled students, where the school is limited to expensive and legally-involved options for disabled students, may exacerbate the failure to identify problems by tempting schools to avoid identification of students who have behavior problems.”²⁸¹ In addition, identifying student with real disabilities versus the typical misbehaved student can be challenging for school administrators. Nevertheless, the liability associated with identifying disabled students in the “gray area” may provide incentives to schools to “research the misbehavior [of a student] and

²⁷⁷ *Id.* To view the full Report, see United States General Accounting Office, Report to the Committees on Appropriations, U.S. Senate and House of Representatives, Student Discipline: Individuals with Disabilities Education Act (Jan. 2002), available at <http://www.gao.gov/new.items/d01210.pdf> (on file with author).

²⁷⁸ *Id.* at Pt. 2, §3 Discipline, Kathleen Boundy, testimony before hearing on IDEA: Behavioral Supports in School, Committee on Health, Education, Labor and Pensions, April 25, 2002.

²⁷⁹ *Id.*

²⁸⁰ Bryant, *supra* note 17, at 542.

²⁸¹ *Id.* at 543.

determine if there is a disability at its root.”²⁸² Finally, abuse of this IDEA provision is easy and eventually every student possibly could be labeled disabled. The only benefit of this possible over-identification and over-classification of students as disabled is that the dual system of discipline would be eliminated.

E. Alternatives to the IDEA Discipline Provisions

The IDEA provision governing placing students in an alternative educational setting should be consulted as a last resort for educators.²⁸³ Schools should first consider alternative methods of dealing with the misbehavior of disabled students. School officials may utilize a variety of behavior and individualized conflict management strategies to promote appropriate behavior of disabled children. The *Honig* Court noted that “[s]uch procedures may include the use of study carrels, timeouts, detention, or the restriction of privileges.”²⁸⁴ Discipline methods that are less harsh than the options provided in the IDEA such as taking away privileges, or mandating time-outs may prove to be a useful way to discipline and teach acceptable behavior.²⁸⁵ Generally, these disciplinary measures do not constitute change of placements and thus they do not involve the IDEA. Additionally, positive conduct should be rewarded just as much as disruptions and violations should result in discipline. Positive reinforcement encourages the disabled student to repeat positive behavior. Furthermore, schools must invest in innovative classroom and non-classroom approaches that will help to minimize the need to use disciplinary measures. Counseling, peer mediation, anger management, teaching social skills, teamwork, and problem solving skills will help all students develop self-control, improve student achievement,

²⁸² *Id.*

²⁸³ Council for Exceptional Children, *IDEA Reauthorization Recommendations*, April 2002, at www.cesa7.k12.wi.us/sped/issues-2002IDEA/IDEA_reauth_4-2002.pdf. See also The Council for Children with Behavioral Disorders, *Talking Points on IDEA Reauthorization*, at <http://www.ccbd.net/advocacy/story.cfm?contentID=9> (last visited Nov. 15, 2002) (on file with author).

²⁸⁴ *Honig v. Doe*, 484 U.S. 305, 325 (1988).

²⁸⁵ Beth Bader, *IDEA: Dealing with Student Disruption*, 82 AMERICAN TEACHER 19 (Mar. 1998).

and facilitate positive school climates essential for learning and for decreasing classroom disturbances.

Many school administrators, backed by parents of nondisabled students, argue for the zero-tolerance approach. Parents of disabled children strongly oppose zero-tolerance policies for any infraction because despite the original focus on zero-tolerance policies on truly dangerous student behavior, schools have expanded these policies to include behavior and infractions that pose safety concerns, and even less serious acts of misconduct such as noncompliance or disrespect.²⁸⁶ Zero-tolerance policies also profoundly impact disabled students and particularly minority disabled students; “[a]lthough the Individuals with Disabilities Act provides protections for children with disabilities . . . ‘ in many circumstances, school officials are ignoring the law, and parents and students are unaware of their rights or unable to enforce them.’”²⁸⁷ Furthermore, in addition to the lack of evidence that this approach alters a student’s behavior, the exclusionary approaches “have documented negative collateral effects including school dropout, increased rates of disruption, and the fact that minorities are likely to be disproportionately affected by such policies.”²⁸⁸ Zero-tolerance approaches alienate students from the classroom while failing to address underlying problems and failing to teach to correct the problem as do positive behavioral systems. By their nature, zero-tolerance policies do not provide guidance and thus they do not solve any discipline problem. Indeed, they may even exacerbate the problem by advocating an adversarial, confrontational attitude.

²⁸⁶ *Special Report: “Zero-tolerance Policies,”* THE SPECIAL ED ADVOCATE NEWSLETTER (July 6, 2000), at http://www.wrightslaw.com/advoc/nwltr/2000/nl_00_0706.htm (on file with author)[hereinafter *Zero-tolerance Policies*]; Asperger Syndrome Education Network, *Zero-tolerance and Special Education*, at <http://www.aspenj.org/tolerance.html> (last visited Oct. 13, 2002) (on file with author).

²⁸⁷ *Zero-tolerance Policies*, *supra* note 286.

²⁸⁸ Council for Children with Behavioral Disorders, *School Discipline Policies for Students with Significantly Disruptive Behavior* (June 13, 2002), at <http://www.ccbd.net/content/pdfs/CCBDdisciplinefinal.pdf> (on file with author)[hereinafter *Council for Children with Behavioral Disorders*].

In contrast to employing the ever increasing zero-tolerance approach to discipline, some schools are “finding that it is possible to have achievement, safety and a low number of disciplinary referrals” without resorting to zero-tolerance.²⁸⁹ Some of the elements these schools employ to curb discipline problems from all students include “positive approaches to discipline, opportunities for teachers and students to bond, training for teacher’s classroom management techniques, clearly understood codes of conduct, and discipline focused on prevention of problems.”²⁹⁰

Furthermore, the Council for Children with Behavioral Disorders recommends that the discipline process must

- (a) incorporate empirically validated practices; (b) limit the amount of time students are removed from learning environments; (c) emphasize an instructional approach; (d) focus on increasing appropriate behavior, as opposed to simply decreasing or punishing problem behavior; and (e) build policies and procedures within the school to support appropriate behavior in *all* students.²⁹¹

Schools should take advantage of alternatives to the IDEA’s discipline measures such as positive reinforcement schemes and/or disciplinary sanctions not rising to the level of the IDEA’s coverage. These alternatives not only address the problem but they also teach to avoid the problem. Thus, schools can “both avoid the cost of individualized educational services and reach students who may be heading for [serious] trouble before” a behavior or conduct violation occurs.²⁹²

²⁸⁹ The Advancement Project & the Civil Rights Project, *Opportunities Suspended, The Devastating Consequences of Zero-tolerance and School Discipline Policies* (June 2002), at http://www.civilrightsproject.harvard.edu/research/discipline/exec_summary.pdf.

²⁹⁰ *Id.*

²⁹¹ Council for Children with Behavioral Disorders, *supra* note 288, at 3.

²⁹² Seligmann, *supra* note 17, at 113.

VI. Reauthorization Progress Thus Far

As of August 1, 2003 no new action has been taken regarding the reauthorization of the IDEA. Nevertheless both the House bill (HR 1350) and the Senate bill (S1248), which have been issued, will foreshadow the ultimate reauthorization law. The House bill makes dramatic changes to the discipline provisions while the Senate bill maintains many of the current IDEA provisions without addressing many of the clearly identified problems with the 1997 IDEA provisions.

House bill 1350 radically reverses many of the carefully developed discipline protection provisions of the IDEA97 provisions.²⁹³ Most significantly, HR 1350 would allow a disabled student to be disciplined without a determination of whether the discipline infraction was a part of the disabled student's disability. Ultimately, the bill removes the manifestation determination requirement of current IDEA law. The new measure also places the onus on parents to initiate the investigation process to determine if a disciplinary incident resulted from a disability.²⁹⁴ Furthermore, in addition to the parent having the burden to investigate the manifestation determination, the expedited hearing option has been removed. The bill would also allow schools to suspend students with disabilities for up to 45 days not only for the most serious infractions, as current law allows, but also for any discipline violation.²⁹⁵ During this time, the student remains in the alternative setting rather than in the current stay put placement as is required under current law regardless of the infraction. Yet, the requirements of the alternative educational setting are less stringent than under the current IDEA. For example, the school

²⁹³ Consortium for Citizens with Disabilities, *House Bill Jeopardizes the Future of Children with Disabilities, Promotes Litigation—National Disability Coalition Opposes HR 1350*, at <http://www.lucasmrdd.com/1350concerns.pdf> [hereinafter *House Bill Jeopardizes Children with Disabilities*].

²⁹⁴ Lisa Goldstein, *Discipline Split at Heart of IDEA Overhaul Debate*, EDUCATION WEEK (June 18, 2003), at <http://www.edweek.org/ew/ewstory.cfm?slug=41discipline.h22>.

²⁹⁵ *Id.* Although suspensions are available for all infractions under HR 1350, suspended students would still be guaranteed educational services after 10 days out of school. *Id.*

district need only ensure that the student is able to progress toward meeting his IEP goals rather than requiring, as current law does, that the student continue to receive those services described in his IEP enabling the child to meet the goals set out in the IEP.²⁹⁶ Another potential problem of HR 1350 is its “removal of the requirements for functional behavioral assessment, development of behavior intervention plans and review of the appropriateness of the current IEP and placement.”²⁹⁷ Most special education advocacy organizations have overwhelmingly opposed the legislation.²⁹⁸ For instance, according to the advocacy organization Kids Together, Inc., HR 1350 “allows students to be removed from classrooms without attempts to meet their needs based on their disability It takes accountability away from the schools, instead of requiring schools to take action to help and support children, it would allow them to remove them.”²⁹⁹ The Council for Exceptional Children also notes that the “discipline provisions in the House bill strip away all protections for students with disabilities.”³⁰⁰

The Senate bill S1248 significantly improves on the House bill, but nevertheless retains some controversial issues such as the disciplining the disabled student. First, unlike the House bill which shifts the burden to parents to initiate investigations into whether the discipline infraction resulted from a disability, the Senate Bill maintains the manifestation determination requirement for schools to examine the role of students’ disabilities in their behavior.³⁰¹ Senator Edward Kennedy (D-Mass.) commented that “this bill provides [protection] by requiring schools to determine whether a child’s behavior is the result of the disability, or the lack of other

²⁹⁶ Association of University Centers on Disabilities, *Summary of Major Changes Proposed in the House IDEA Reauthorization Bill (HR 1350) Regarding Discipline and Due Process Protections* (April 7, 2003), at http://www.aucd.org/legislative_affairs/hr1350_due_process.htm.

²⁹⁷ *House Bill Jeopardizes Children with Disabilities*, *supra* note 293.

²⁹⁸ See Kids together, Inc., *Howe Passes HR 1350, A Bad IDEA*, available at http://www.kidstogether.org/reauthorization_of_idea.htm (last visited Oct. 13, 2003).

²⁹⁹ *Id.*

³⁰⁰ Goldstein, *supra* note 294.

³⁰¹ *Id.*

supports that should have been provided.”³⁰² However, most significantly, S1248 eliminates the stay put provision during the pendency of an appeal of a manifestation determination and allows disabled student to be suspended up to 10 days without consideration of the student’s disability.³⁰³ The National Association of School Psychologists notes that although the Senate bill removes the stay put provision, “it retains current law ensuring that children have certain due process protections in disciplinary action if their infraction was a manifestation of the child’s disability”³⁰⁴ Another issue of the Senate bill is that, like the House bill, it eliminates the current law’s requirement that schools conduct a functional behavioral assessment when removing a student.³⁰⁵ Yet, according to a new report by the Bazelon Center for Mental Health Law, functional behavioral assessments and positive behavioral interventions and supports when properly used “decrease the need for harsh disciplinary actions.”³⁰⁶ Finally, like the House bill, the Senate bill does not specifically require that the modifications and services described in the student’s IEP are continued when a student is placed in an alternative educational setting as is required by current law.³⁰⁷ Overall, many organizations approve of the Senate bill, especially as compared with the House bill. For example, the director of the National Association of State Directors of Special Education, Nancy Reder, commented that “we like what [the Senate] did with discipline compared to the House bill. We think it represents a fair compromise with the

³⁰² Rick Hodges, *The Latest IDEA: Compromising on Discipline and Disability*, ADDITUDE MAGAZINE, available at http://www.additudemag.com/additude.asp?DEPT_NO=101&SUB_NO=109 (on file with author) (last visited Aug. 5, 2003).

³⁰³ *Id.* See also *Our Children Left Behind, What Should We Talk About?*, at <http://www.ourchildrenleftbehind.com/pages/1/index.htm> (Aug. 5, 2003).

³⁰⁴ National Association of School Psychologists, *Senate Committee Passes IDEA Bill* (June 27, 2003), available at <http://www.nasponline.org/advocacy>.

³⁰⁵ National Association of Social Workers, *IDEA Reauthorization Bill Introduced in Senate S. 1248* (June 18, 2003), available at <http://www.socialworkers.org/advocacy/updates/061803.asp>.

³⁰⁶ National Association of School Psychologists, *Senate Committee Passes IDEA Bill* (June 27, 2003), available at <http://www.nasponline.org/advocacy>.

³⁰⁷ *Id.*

disability community that didn't want any changes and our members.”³⁰⁸ Although some special education organizations want other discipline issues to be addressed, possibly what committee chairman Judd Gregg (R-N.H.) notes may ring true: “The Senate bill offers a solution . . . by providing protections for children with disabilities while simplifying the rules that school districts can use in discipline cases.”³⁰⁹

The House bill, HR 1350 has already been voted on and approved by the House of Representatives. The Senate bill, S1248, on the other hand, although passed on June 25, 2003, has yet to be debated and voted on by the Senate. The Senate will pass some version of S1248. Afterwards, Congress will take both the House and the Senate bill and a Conference Committee will make the two bills into one. Thus, the end result on what discipline provisions will be voted on and accepted as law remains to be seen.

VI. The Implications for All

The controversy surrounding disciplining the disabled has “evolved over several years and embodies a tangled and often perplexing tale.”³¹⁰ The current IDEA provides a framework for disciplining disabled students, an enormous accomplishment achieved in 1997. Yet, the IDEA still has not figured out the formula of how to balance the special needs of disabled students with the broader educational goals for all students. The compromise of the IDEA and its original “tight requirements . . . were [once] necessary for a recognition that schools must provide all children with an appropriate education. The education of disabled students now has improved.”³¹¹ Discipline problems with disabled students are no greater than discipline

³⁰⁸ Diana Jean Schemo, *Senate Panel Approves Bill for Students with Disabilities*, N. Y. TIMES (June 15, 1990).

³⁰⁹ Rick Hodges, *supra* note 302.

³¹⁰ Dupre, *supra* note 14, at 4.

³¹¹ Nelson, *supra* note 73, at 68.

problems with regular students.³¹² Schools are better educated on and trained with working with disabled students.³¹³ Overall, “[i]n the field of disability education, rights of disabled students are now more well-known, and the rights are more consistently protected.”³¹⁴ By recognizing the overall progress of society regarding conceptions and treatment of the disabled, as well as of schools and students, the IDEA should become more flexible. This added control and flexibility will ensure that our public education system fulfills its responsibility “for educating all students, including students with disabilities. Only when special education & general education work together can we be confident that no child will be left behind.”³¹⁵

Changes in the IDEA may not be enough. The way in which the various interests of disabled students and the general school community are balanced should also be refined. As it stands now, the interests that are weighed are those of the state and school districts, against those of the individual disabled student and his/her parents challenging the placement. The interests that are left out of this balancing act are the interests of all students, most notably the disabled students who are not disruptive. Greater weight needs to be given to this silent majority of students who are attempting to gain an education in the chaotic, sometimes dangerous, environment of the classroom.³¹⁶

Congress may not address the problems with the IDEA discipline provisions in the upcoming reauthorization. The regulations for the 1997 IDEA were enacted in 1999 and the effectiveness and extent to which these discipline provisions work is not fully determined. Furthermore, hesitance to change may result from the possibility that there may be no correct

³¹² United States General Accounting Office, Report to the Committees on Appropriations, U.S. Senate and House of Representatives, *Student Discipline: Individuals with Disabilities Education Act* (Jan. 2002), available at <http://www.gao.gov/new.items/d01210.pdf> (on file with author).

³¹³ Nelson, *supra* note 73, at 67-68.

³¹⁴ *Id.* at 68.

³¹⁵ CCD Principles, *supra* note 62.

³¹⁶ Bunch, *supra* note 73, at 320.

equation or formula to produce a balance between disabled students and the rights of other students. Although discipline likely will be discussed in congressional hearings, committees, and organizations established for the reauthorization of the IDEA, the forecast for change is dim. Nevertheless, regardless of what specific issues are codified as amendments to the IDEA in the upcoming IDEA reauthorization, “Congress must focus on ways to strengthen the IDEA and build on the successes that have been achieved thus far.”³¹⁷

VII. Appendix 1

Disciplining the Disabled Student

Brief Overview

10 school days or less in a school year

- no services required
- no special procedures
- not considered a change of placement

Subsequent short-term removals

- removals after a child has been removed from his current placement by school authorities for 10 school days in the same school year
- services required on the 11th school day in the school year and thereafter if necessary to enable child to appropriately progress
- convene IEP meeting to develop or review functional behavioral assessment plan
- review or develop behavioral intervention plan

Long-term suspension/expulsion

- in excess of 10 consecutive school days or suspension in excess of 10 school days cumulatively in a school year where a pattern of suspension is created
- change in placement
- IEP team meeting to look at functional behavioral assessment, behavior intervention plan, and manifestation determination
 - if conduct is found to be related to disability, then a long-term suspension or expulsion cannot be implemented
 - if conduct if found unrelated to disability, then a long-term suspension or expulsion can be implemented and the IEP team must determine alternative

³¹⁷ USCCR, *Recommendations, supra nte* 246.

educational setting and determine services which will enable the child to continue to receive a FAPE and continued access to general education curriculum

- parental notification with procedural safeguards

Placement for drug/weapons

- subsequent removals to interim alternative educational settings for up to 45 days by school authorities for weapons or drug offenses
- immediate notification to parent with procedural safeguards
- review or development of functional behavioral assessment and behavioral intervention plan
- manifestation determination although decision will not affect decision of whether student receives the 45 calendar placement
- IEP determines where the alternative educational setting will be, and what services will enable the child to continue to receive a FAPE with continued progress in the general education curriculum

Removals by Hearing Officer

- when behavior substantially likely to result in injury to self or others
- permissible based on determination that maintaining current placement of child is substantially likely to result in injury to the child or to others if the child remains in the current placement (whether or not the offenses are a manifestation of the child's disability)
- officer must determine that the interim alternative educational setting proposed enables the child to continue to progress in the general curriculum and receives services that will enable the child to meet the goals of the child's IEP
- alternative educational setting must include services to address the child's behavior

Court Order

- school officials may seek a court order to remove a disabled child from school or to change a child's placement if they believe that maintaining the child in the current educational placement is substantially likely to result in injury to the child or to others

Stay-put Provisions Pending Resolution of Due Process

- except for cases involving weapons, drugs, injury to self and/or others, the stay-put provision applies to all actions contemplated by school officials including findings in manifestation determination reviews.

VIII. Appendix 2

The Individuals With Disabilities Education Act

Key Provisions Relating to Discipline

20 U.S.C. §§1414-1415

§ 1414. Evaluations, eligibility determinations, individualized education programs, and educational placements

(a) Evaluations and reevaluations.

(1) Initial evaluations.

(A) In general. A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation, in accordance with this paragraph and subsection (b), before the initial provision of special education and related services to a child with a disability under this part [20 USCS §§ 1411 et seq.].

(B) Procedures. Such initial evaluation shall consist of procedures--

(i) to determine whether a child is a child with a disability (as defined in section 602(3) [20 USCS § 1401(3)]); and

(ii) to determine the educational needs of such child.

(C) Parental consent.

(i) In general. The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in section 602(3)(A) or 602(3)(B) [20 USCS § 1401(3)(A) or (B)] shall obtain an informed consent from the parent of such child before the evaluation is conducted. Parental consent for evaluation shall not be construed as consent for

placement for receipt of special education and related services.

(ii) Refusal. If the parents of such child refuse consent for the evaluation, the agency may continue to pursue an evaluation by utilizing the mediation and due process procedures under section 615 [20 USCS § 1415], except to the extent inconsistent with State law relating to parental consent.

(2) *Reevaluations.* A local educational agency shall ensure that a reevaluation of each child with a disability is conducted--

(A) if conditions warrant a reevaluation or if the child's parent or teacher requests a reevaluation, but at least once every 3 years; and

(B) in accordance with subsections (b) and (c).

(b) Evaluation procedures.

(1) *Notice.* The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 615 [20 USCS § 1415(b)(3), (4), and (c)], that describes any evaluation procedures such agency proposes to conduct.

(2) *Conduct of evaluation.* In conducting the evaluation, the local educational agency shall--

(A) use a variety of assessment tools and strategies to gather relevant functional and developmental information, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general curriculum or, for preschool children, to participate in appropriate activities;

(B) not use any single procedure as the sole criterion for determining whether a child is a

child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) Additional requirements. Each local educational agency shall ensure that--

(A) tests and other evaluation materials used to assess a child under this section--

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis; and

(ii) are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so; and

(B) any standardized tests that are given to the child--

(i) have been validated for the specific purpose for which they are used;

(ii) are administered by trained and knowledgeable personnel; and

(iii) are administered in accordance with any instructions provided by the producer of such tests;

(C) the child is assessed in all areas of suspected disability; and

(D) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

(4) Determination of eligibility. Upon completion of administration of tests and other evaluation materials--

(A) the determination of whether the child is a child with a disability as defined in section 602(3) [20 USCS § 1401(3)] shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and

(B) a copy of the evaluation report and the documentation of determination of eligibility will

be given to the parent.

(5) Special rule for eligibility determination. In making a determination of eligibility under paragraph (4)(A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is lack of instruction in reading or math or limited English proficiency.

(c) Additional requirements for evaluation and reevaluations.

(1) Review of existing evaluation data. As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team described in subsection (d)(1)(B) and other qualified professionals, as appropriate, shall--

(A) review existing evaluation data on the child, including evaluations and information provided by the parents of the child, current classroom-based assessments and observations, and teacher and related services providers observation; and

(B) on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine--

(i) whether the child has a particular category of disability, as described in section 602(3) [20 USCS § 1401(3)], or, in case of a reevaluation of a child, whether the child continues to have such a disability;

(ii) the present levels of performance and educational needs of the child;

(iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized

education program of the child and to participate, as appropriate, in the general curriculum.

(2) Source of data. The local educational agency shall administer such tests and other evaluation materials as may be needed to produce the data identified by the IEP Team under paragraph (1)(B).

(3) Parental consent. Each local educational agency shall obtain informed parental consent, in accordance with subsection (a)(1)(C), prior to conducting any reevaluation of a child with a disability, except that such informed parent consent need not be obtained if the local educational agency can demonstrate that it had taken reasonable measures to obtain such consent and the child's parent has failed to respond.

(4) Requirements if additional data are not needed. If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, the local educational agency--

(A) shall notify the child's parents of--

(i) that determination and the reasons for it; and

(ii) the right of such parents to request an assessment to determine whether the child continues to be a child with a disability; and

(B) shall not be required to conduct such an assessment unless requested to by the child's parents.

(5) Evaluations before change in eligibility. A local educational agency shall evaluate a child with a disability in accordance with this section before determining that the child is no longer a child with a disability.

(d) Individualized education programs.

(1) Definitions. As used in this title [20 USCS §§ 1400 et seq.]:

(A) Individualized education program. The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes--

(i) a statement of the child's present levels of educational performance, including--

(I) how the child's disability affects the child's involvement and progress in the general curriculum; or

(II) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(ii) a statement of measurable annual goals, including benchmarks or short-term objectives, related to--

(I) meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and

(II) meeting each of the child's other educational needs that result from the child's disability;

(iii) a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child--

(I) to advance appropriately toward attaining the annual goals;

(II) to be involved and progress in the general curriculum in accordance with clause (i) and to participate in extracurricular and other nonacademic activities; and

(III) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this paragraph;

(iv) an explanation of the extent, if any, to which the child will not participate with

nondisabled children in the regular class and in the activities described in clause (iii);

(v) (I) a statement of any individual modifications in the administration of State or districtwide assessments of student achievement that are needed in order for the child to participate in such assessment; and

(II) if the IEP Team determines that the child will not participate in a particular State or district wide assessment of student achievement (or part of such an assessment), a statement of--

(aa) why that assessment is not appropriate for the child; and

(bb) how the child will be assessed;

(vi) the projected date for the beginning of the services and modifications described in clause (iii), and the anticipated frequency, location, and duration of those services and modifications;

(vii) (I) beginning at age 14, and updated annually, a statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's courses of study (such as participation in advanced-placement courses or a vocational education program);

(II) beginning at age 16 (or younger, if determined appropriate by the IEP Team), a statement of needed transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages; and

(III) beginning at least one year before the child reaches the age of majority under State law, a statement that the child has been informed of his or her rights under this title [20 USCS §§ 1400 et seq.], if any, that will transfer to the child on reaching the age of majority under section 615(m) [20 USCS § 1415(m)]; and

(viii) a statement of--

(I) how the child's progress toward the annual goals described in clause (ii) will be measured; and

(II) how the child's parents will be regularly informed (by such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of--

(aa) their child's progress toward the annual goals described in clause (ii); and

(bb) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

(B) Individualized education program team. The term "individualized education program team" or "IEP Team" means a group of individuals composed of--

(i) the parents of a child with a disability;

(ii) at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) at least one special education teacher, or where appropriate, at least one special education provider of such child;

(iv) a representative of the local educational agency who--

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

(2) Requirement that program be in effect.

(A) In general. At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in its jurisdiction, an individualized education program, as defined in paragraph (1)(A).

(B) Program for child aged 3 through 5. In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State educational agency, a 2 year-old child with a disability who will turn age 3 during the school year), an individualized family service plan that contains the material described in section 636, and that is developed in accordance with this section, may serve as the IEP of the child if using that plan as the IEP is--

(i) consistent with State policy; and

(ii) agreed to by the agency and the child's parents.

(3) Development of IEP.

(A) In general. In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider--

(i) the strengths of the child and the concerns of the parents for enhancing the education of their child; and

(ii) the results of the initial evaluation or most recent evaluation of the child.

(B) Consideration of special factors. The IEP Team shall--

(i) in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;

(ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP;

(iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) consider whether the child requires assistive technology devices and services.

(C) Requirement with respect to regular education teacher. The regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and strategies and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(iii).

(4) Review and revision of IEP.

(A) In general. The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team--

(i) reviews the child's IEP periodically, but not less than annually to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address--

(I) any lack of expected progress toward the annual goals and in the general curriculum, where appropriate;

(II) the results of any reevaluation conducted under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);

(IV) the child's anticipated needs; or

(V) other matters.

(B) Requirement with respect to regular education teacher. The regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the review and revision of the IEP of the child.

(5) Failure to meet transition objectives. If a participating Oagency, other than the local educational agency, fails to provide the transition services described in the IEP in accordance with paragraph (1)(A)(vii), the local educational agency shall reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in that program.

(6) Children with disabilities in adult prisons.

(A) In general. The following requirements do not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(i) The requirements contained in section 612(a)(17) [20 USCS § 1412(a)(17)] and paragraph (1)(A)(v) of this subsection (relating to participation of children with disabilities in general assessments).

(ii) The requirements of sub clauses (I) and (II) of paragraph (1)(A)(vii) of this subsection

(relating to transition planning and transition services), do not apply with respect to such children whose eligibility under this part [20 USCS §§ 1411 et seq.] will end, because of their age, before they will be released from prison.

(B) Additional requirement. If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of sections 612(a)(5)(A) and 614(d)(1)(A) [20 USCS §§ 1412(a)(5)(A), 1414(d)(1)(A)] if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(e) Construction. Nothing in this section shall be construed to require the IEP Team to include information under one component of a child's IEP that is already contained under another component of such IEP.

(f) Educational placements. Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

§ 1415. Procedural safeguards

(a) Establishment of procedures. Any State educational agency, State agency, or local educational agency that receives assistance under this part [20 USCS §§ 1411 et seq.] shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) Types of procedures. The procedures required by this section shall include--

(1) an opportunity for the parents of a child with a disability to examine all records relating to

such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(2) procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents;

(3) written prior notice to the parents of the child whenever such agency--

(A) proposes to initiate or change; or

(B) refuses to initiate or change;

the identification, evaluation, or educational placement of the child, in accordance with subsection (c), or the provision of a free appropriate public education to the child;

(4) procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so;

(5) an opportunity for mediation in accordance with subsection (e);

(6) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

(7) procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential)--

(A) to the State educational agency or local educational agency, as the case may be, in the complaint filed under paragraph (6); and

(B) that shall include--

(i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;

(ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(iii) a proposed resolution of the problem to the extent known and available to the parents at the time; and

(8) procedures that require the State educational agency to develop a model form to assist parents in filing a complaint in accordance with paragraph (7).

(c) Content of prior written notice. The notice required by subsection (b)(3) shall include--

(1) a description of the action proposed or refused by the agency;

(2) an explanation of why the agency proposes or refuses to take the action;

(3) a description of any other options that the agency considered and the reasons why those options were rejected;

(4) a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

(5) a description of any other factors that are relevant to the agency's proposal or refusal;

(6) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part [20 USCS §§ 1411 et seq.] and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

(7) sources for parents to contact to obtain assistance in understanding the provisions of this part [20 USCS §§ 1411 et seq.].

(d) Procedural safeguards notice.

(1) In general. A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum--

(A) upon initial referral for evaluation;

(B) upon each notification of an individualized education program meeting and upon reevaluation of the child; and

(C) upon registration of a complaint under subsection (b)(6).

(2) Contents. The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so, and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to--

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) opportunity to present complaints;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) mediation;

(J) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(K) State-level appeals (if applicable in that State);

(L) civil actions; and

(M) attorneys' fees.

(e) Mediation.

(1) In general. Any State educational agency or local educational agency that receives assistance under this part [20 USCS §§ 1411 et seq.] shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) to resolve such disputes through a mediation process which, at a minimum, shall be available whenever a hearing is requested under subsection (f) or (k).

(2) Requirements. Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process--

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this part [20 USCS §§ 1411 et seq.]; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) A local educational agency or a State agency may establish procedures to require parents who choose not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with--

(i) a parent training and information center or community parent resource center in the State established under section 682 or 683 [20 USCS § 1482 or 1483]; or

(ii) an appropriate alternative dispute resolution entity;

to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

(G) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

(f) Impartial due process hearing.

(1) In general. Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(2) Disclosure of evaluations and recommendations.

(A) In general. At least 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date and

recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(B) Failure to disclose. A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitation on conduct of hearing. A hearing conducted pursuant to paragraph (1) may not be conducted by an employee of the State educational agency or the local educational agency involved in the education or care of the child.

(g) Appeal. If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency. Such agency shall conduct an impartial review of such decision. The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards. Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded--

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the

requirements of section 617(c) [20 USCS § 1417(c)] (relating to the confidentiality of data, information, and records) and shall also be transmitted to the advisory panel established pursuant to section 612(a)(21) [20 USCS § 1412(a)(21)].

(i) Administrative procedures.

(1) In general.

(A) Decision made in hearing. A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2) of this subsection.

(B) Decision made at appeal. A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Right to bring civil action.

(A) In general. Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(B) Additional requirements. In any action brought under this paragraph, the court--

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees.

(A) In general. The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees. In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

(C) Determination of amount of attorneys' fees. Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services.

(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if--

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) that is conducted prior to the filing of a complaint under subsection (b)(6) or (k) of this section.

(E) Exception to prohibition on attorneys' fees and related costs. Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees. Except as provided in subparagraph (G), whenever the court finds that--

(i) the parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with subsection (b)(7);

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees. The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement. Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-

current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

(k) Placement in alternative educational setting.

(1) Authority of school personnel.

(A) School personnel under this section may order a change in the placement of a child with a disability--

(i) to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities); and

(ii) to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days if--

(I) the child carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or a local educational agency; or

(II) the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local educational agency.

(B) Either before or not later than 10 days after taking a disciplinary action described in subparagraph (A)--

(i) if the local educational agency did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted in the suspension described in subparagraph (A), the agency shall convene an IEP meeting to develop an assessment plan to address that behavior; or

(ii) if the child already has a behavioral intervention plan, the IEP Team shall review the plan and modify it, as necessary, to address the behavior.

(2) Authority of hearing officer. A hearing officer under this section may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer--

(A) determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others;

(B) considers the appropriateness of the child's current placement;

(C) considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and

(D) determines that the interim alternative educational setting meets the requirements of paragraph (3)(B).

(3) Determination of setting.

(A) In general. The alternative educational setting described in paragraph (1)(A)(ii) shall be determined by the IEP Team.

(B) Additional requirements. Any interim alternative educational setting in which a child is placed under paragraph (1) or (2) shall--

(i) be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and

(ii) include services and modifications designed to address the behavior described in

paragraph (1) or paragraph (2) so that it does not recur.

(4) Manifestation determination review.

(A) In general. If a disciplinary action is contemplated as described in paragraph (1) or paragraph (2) for a behavior of a child with a disability described in either of those paragraphs, or if a disciplinary action involving a change of placement for more than 10 days is contemplated for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the local educational agency that applies to all children--

(i) not later than the date on which the decision to take that action is made, the parents shall be notified of that decision and of all procedural safeguards accorded under this section; and

(ii) immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review shall be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.

(B) Individuals to carry out review. A review described in subparagraph (A) shall be conducted by the IEP Team and other qualified personnel.

(C) Conduct of review. In carrying out a review described in subparagraph (A), the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team--

(i) first considers, in terms of the behavior subject to disciplinary action, all relevant information, including--

(I) evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;

(II) observations of the child; and

(III) the child's IEP and placement; and

(ii) then determines that--

(I) in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(II) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

(5) Determination that behavior was not manifestation of disability.

(A) In general. If the result of the review described in paragraph (4) is a determination, consistent with paragraph (4)(C), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in section 612(a)(1) [20 USCS § 1412(a)(1)].

(B) Additional requirement. If the public agency initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

(6) Parent appeal.

(A) In general.

(i) If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may

request a hearing.

(ii) The State or local educational agency shall arrange for an expedited hearing in any case described in this subsection when requested by a parent.

(B) Review of decision.

(i) In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of such child's disability consistent with the requirements of paragraph (4)(C).

(ii) In reviewing a decision under paragraph (1)(A)(ii) to place the child in an interim alternative educational setting, the hearing officer shall apply the standards set out in paragraph (2).

(7) Placement during appeals.

(A) In general. When a parent requests a hearing regarding a disciplinary action described in paragraph (1)(A)(ii) or paragraph (2) to challenge the interim alternative educational setting or the manifestation determination, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(A)(ii) or paragraph (2), whichever occurs first, unless the parent and the State or local educational agency agree otherwise.

(B) Current placement. If a child is placed in an interim alternative educational setting pursuant to paragraph (1)(A)(ii) or paragraph (2) and school personnel propose to change the child's placement after expiration of the interim alternative placement, during the pendency of any proceeding to challenge the proposed change in placement, the child shall remain in the current placement (the child's placement prior to the interim alternative educational setting),

except as provided in subparagraph (C).

(C) Expedited hearing.

(i) If school personnel maintain that it is dangerous for the child to be in the current placement (placement prior to removal to the interim alternative education setting) during the pendency of the due process proceedings, the local educational agency may request an expedited hearing.

(ii) In determining whether the child may be placed in the alternative educational setting or in another appropriate placement ordered by the hearing officer, the hearing officer shall apply the standards set out in paragraph (2).

(8) Protections for children not yet eligible for special education and related services.

(A) In general. A child who has not been determined to be eligible for special education and related services under this part [20 USCS §§ 1411 et seq.] and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in paragraph (1), may assert any of the protections provided for in this part [20 USCS §§ 1411 et seq.] if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge. A local educational agency shall be deemed to have knowledge that a child is a child with a disability if--

(i) the parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to personnel of the appropriate educational agency that the child is in need of special education and related services;

(ii) the behavior or performance of the child demonstrates the need for such services;

(iii) the parent of the child has requested an evaluation of the child pursuant to section 614 [20 USCS § 1414]; or

(iv) the teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency.

(C) Conditions that apply if no basis of knowledge.

(i) In general. If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B)) prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations. If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under paragraph (1) or (2), the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with the provisions of this part [20 USCS §§ 1411 et seq.], except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(9) Referral to and action by law enforcement and judicial authorities.

(A) Nothing in this part [20 USCS §§ 1411 et seq.] shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to

prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

(10) Definitions. For purposes of this subsection, the following definitions apply:

(A) Controlled substance. The term "controlled substance" means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(B) Illegal drug. The term "illegal drug"--

(i) means a controlled substance; but

(ii) does not include such a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(C) Substantial evidence. The term "substantial evidence" means beyond a preponderance of the evidence.

(D) Weapon. The term "weapon" has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

(l) Rule of construction. Nothing in this title [20 USCS §§ 1400 et seq.] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973 [29 USCS §§ 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that

before the filing of a civil action under such laws seeking relief that is also available under this part [20 USCS §§ 1411 et seq.], the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this part [20 USCS §§ 1411 et seq.].

(m) Transfer of parental rights at age of majority.

(1) In general. A State that receives amounts from a grant under this part [20 USCS §§ 1411 et seq.] may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)-

(A) the public agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this part [20 USCS §§ 1411 et seq.] transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this part [20 USCS §§ 1411 et seq.] transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule. If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this part [20 USCS §§ 1411 et seq.].