Washington Law Review

Volume 75 | Number 1

1-1-2000

# A Study in Double Standards, Discipline, and the Disabled Student

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# A STUDY IN DOUBLE STANDARDS, DISCIPLINE, AND THE DISABLED STUDENT

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*Abstract:* School violence and other school discipline issues erode trust and confidence in our public schools and inhibit students from obtaining the education necessary to participate meaningfully in our nation's democratic and political institutions. This Article examines an issue of school law that appears almost insoluble—what one judge has called the "exquisitely difficult" issue of school discipline and the disabled student. The issue is governed by the Individuals with Disabilities Education Act (IDEA, enacted in 1975), which imposes significant constraints on school authorities who wish to discipline disruptive or violent disabled students. School officials have stated that IDEA left them powerless to protect teachers, staff, and other students from disabled students with severe behavior disorders. In part to address some of these concerns, Congress amended IDEA in 1997. Indeed, school discipline was the "top concern" and the "most contentious issue" Congress faced in the amendment process. When the Department of Education issued Proposed Regulations in October 1997, the passion that permeates this issue erupted once more. The Department received over 6000 comments and was called before Congress in April 1998 to explain the uproar. The Department promised to issue Final Regulations by May 30, 1998, but the regulations were not promulgated until March 1999. This Article addresses this complex issue at contextual, theoretical, and remedial levels. It first places in historical context the current controversy over the recent amendments regarding school discipline. This examination reveals the political spirit that infuses this issue—a spirit that resonates with the current debate over racial affirmative action. After analyzing the effect of the new discipline amendments, the Article explores how some theories used primarily in criminal law relate to the school discipline issues that IDEA raises. Finally, the Article suggests how these troubling issues can be resolved by the community, the judiciary, and Congress.



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## I. INTRODUCTION

Policymakers at both local and national levels are searching for ways to improve America's public schools. One presidential candidate has stated that he would ensure that disruptive students are removed from the classroom so they no longer would hinder the education of other students.[1] The statement seems on its face to be a noncontroversial proposal for a politician to make.[2] This proposal, however, is steeped in controversy. Moreover, it may be frustrated by at least one federal statute and its new amendments that, ironically, were intended to help schools deal with disciplinary problems.[3]

This Article examines the "exquisitely difficult" issue of school discipline and the disabled student.[4] Disabled students are certainly not the only students who cause discipline problems in school. But they are the only students who have constraints placed on the management of their behavior by a complex and controversial federal statute.[5] The issue is far from being resolved and, in fact, was further complicated by amendments in 1997 to the federal statute that addresses disabled students and education—the Individuals with Disabilities Education

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1. *See Bush Calls on Educators to Set Limits, Eject the Violent*, San Diego Union-Trib., Nov. 3, 1999, at 4. Not long after his inauguration, Georgia Governor Roy Barnes unveiled a bill that would allow teachers to remove unruly students from the classroom. *See* James Saltzer, *Bill Would Allow Teachers to Eject Rowdy Students*, Athens Daily News/Athens Banner-Herald, Feb. 6, 1999, at 1A.

2. *See* Anne P. Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 Geo. Wash. L. Rev. 49, 51 (1996) (describing how Charlotte, North Carolina, school system "determined that improper behavior like shouting out in class, hitting others in class, walking around room while lesson is taught and disrupting others will no longer be tolerated").

3. *See* Tamara Henry, *Special Ed. Law Faulted; Educators: Control of Pupils an Issue*, USA Today, Apr. 14, 1997, at 1D (citing poll of 1350 elementary school principals, where 78% stated that federal law limits their freedom to discipline).

4. Doe v. Maher, 793 F.2d 1470, 1496 (9th Cir. 1986).

5. Of course, the management of student behavior is protected by the U.S. Constitution. *See* Dupre, *supra* note 2, at 54–59. This protection, however, is afforded to all students. As will be explained in greater detail below, the Individuals with Disabilities Education Act (IDEA) protects only disabled students. Moreover, it does not allow school officials to change unilaterally the educational placement of a disabled student, even if the child exhibits severe behavioral problems.

Act[6]—"one of the nation's most debated and emotionally charged education laws."[7]

The polemic surrounding school discipline and the disabled student has evolved over several years and embodies a tangled and often perplexing tale. There is no one entity to blame entirely for the problems that surround this thorny issue. Congress had a legitimate concern when it enacted the Individuals with Disabilities Education Act (IDEA) in 1975 to ensure that disabled children receive access to a free appropriate public education.[8] Yet despite making some needed changes to the statute since then, Congress has been unwilling to change some of the provisions that have proved most problematic.

This reluctance is likely due to the increased political power of advocates for the disabled, who have taken on the civil rights mantle in their fight for the rights of disabled persons in schools and the workplace.[9] While many concerns over the treatment of the disabled have been warranted, these advocates can be unyielding in their demands, and they sometimes fail to recognize that the rights of the disabled student cannot impede the rights of other students to obtain an education. One commentator has observed, "The political terror of attacking this program is more acute than any other education area I've seen in my life. No congressman wants his office surrounded by screaming parents and their kids in wheelchairs."[10]

Educators have been frustrated by the time-consuming requirements of IDEA and claim that they are unable to maintain safe and effective classrooms because of the statute's restrictions.[11] Yet it was the

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6. The Individuals with Disabilities Education Act is codified at 20 U.S.C. §§ 1400–1487 (Supp. III 1997). When it was enacted in 1975, the statute was called the Education for All Handicapped Children Act, but the name was changed in 1990. *See* Pub. L. 101-476, § 901(a)(1), 104 Stat. 1141 (1990). This Article refers to the Act throughout as IDEA.

7. Joetta Sack, *Delay of Rules Leaves Schools in Doubt on IDEA*, Educ. Wk., Mar. 10, 1999, at 1.

8. *See infra* note 12.

9. *See* Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against "Inclusion,"* 72 Wash. L. Rev. 775, 829 (1997) (noting that movement to achieve rights for disabled has often been compared to civil rights movement for racial equality); Rochelle L. Stanfield, *Tales out of School*, 27 Nat'l J. 2102, 2102 (1995) (noting that politicians have been "terrified of [organizations representing the disabled]—that they'll trot out people in wheelchairs . . . . It's very easy for a member to feel virtuous by voting for their issues.") (quoting lobbyist for education association).

10. Kay Hymowitz, *Special Ed: Kids Go In, But They Don't Come Out*, Manhattan Inst. City J., Summer 1996, at 27 (quoting Chester Finn of Hudson Institute).

11. *See, e.g., infra* notes 192–96 and accompanying text.

recalcitrance of some schools that refused to treat disabled students with dignity that was the impetus for the passage of IDEA in the first place.[12]

Judges have, in some cases, been dismayed to learn that the statute compelled them to prohibit schools from removing a violent disabled student from a school or classroom.[13] In other cases, however, where it would have been possible to defer to the judgment of educators and enhance order in the school, courts have refused to do so.[14] The inevitable collision between IDEA's disciplinary restrictions and the recent decision by the U.S. Supreme Court that allows students who are sexually harassed by another student to obtain monetary damages from the school district promises to add yet another dimension to this complex issue.[15]

Students with disabilities account for twelve percent of public school enrollment.[16] According to one estimate, children with crippling disabilities account for only 1.2% of children in special education.[17] Nearly seventy percent of those students who have been diagnosed as disabled suffer from emotional problems, mental retardation, or other learning disabilities.[18] The number of disabled students has risen markedly in recent years "as the definition of disabled has widened to include areas like hyperactivity and chronic fatigue syndrome."[19] Many of these students never exhibit behavioral problems. But those who do can wreak havoc in the school environment, and school officials contend that IDEA has hindered their ability to deal with these students.

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12. Congress found that before the enactment of the Education for All Handicapped Children Act in 1975, the special education needs of children with disabilities were not being fully met, that more than one-half of the children with disabilities in the United States did not receive appropriate educational services, and that 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system. *See* 20 U.S.C. § 1400(c)(2)(A)–(C) (Supp. III 1997).

13. *See infra* notes 163–64 and accompanying text.

14. *See* Anne Proffitt Dupre, *Disability, Deference and the Integrity of the Academic Enterprise*, 32 Ga. L. Rev. 393, 426–43 (1998).

15. *See infra* notes 318–20 and accompanying text (describing tension between IDEA and *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661 (1999)).

16. *See* Editorial, *Special Ed. Rebels*, Wall St. J., Sept. 8, 1998, at A28 (citing U.S. Commission on Civil Rights report). This figure is up from eight percent in 1976. *See id.*

17. *See* June Kronholz, *Educators Say Proposed Law Boosting Ability to Punish Disabled Kids Doesn't Go Far Enough*, Wall St. J., May 14, 1997, at A24.

18. *See* Stanfield, *supra* note 9, at 2103.

19. Peter Applebome, *Push for School Safety Led to New Rules on Discipline*, N.Y. Times, May 14, 1997, at 8.

Part II of this Article by explains the relevant provisions of the Individuals with Disabilities Education Act, which Congress first passed in 1975 and which has become the largest unfunded mandate relating to education.[20] Rather than merely discussing the new 1997 discipline amendments, the Article allows the reader to view the new amendments in context by presenting, in Part III, a comprehensive study of how the statute has been interpreted by courts. Part III examines the problems IDEA has presented relating to school discipline and explains how Congress has dealt with those problems leading up to the 1997 amendments. Part IV then sets forth a detailed explanation and analysis of the 1997 amendments to IDEA, which have "upset settled expectations in important ways."[21] In addition, Part IV spells out how the Department of Education has interpreted the statute in final regulations that were promulgated amidst a furor that entailed spirited hearings before Congress.

IDEA has been called an "extraordinary example of a good idea having gone awry."[22] The 1997 IDEA amendments were supposed to fix some of the problems that the statute has caused regarding school discipline. Part V of this Article explains how the new IDEA amendments will affect discipline problems and how IDEA may undermine the very mission of public schools. First, in Section A, the Article details how the new amendments fail in their attempt to address the issue of school discipline. Next, in Section B, the Article explores some of the fundamental issues of education policy that are being dismantled by IDEA. Finally, Part VI contends that the underlying reason for the problems with IDEA is that when addressing issues involving this statute, Congress has failed to use what Professor Marci Hamilton has called the "attorneyship" model of representation. Part VI further suggests how Congress, the courts, and the community could begin to solve this important issue.

Before beginning this examination, the reader may wish to keep in mind one possible effect of the school discipline issue that may not be evident at first. As discussed in greater detail below, one issue that

20. *See* Hymowitz, *supra* note 10, at 27.

21. Dixie S. Huefner, *The Individuals with Disabilities Education Act Amendments of 1997*, 122 Educ. L. Rep. 1103, 1103 (1998).

22. *See Examining the Effect of Federal Policy on the Ability of School Systems to Discipline Students with Disabilities: Hearings Before the Subcomm. on Disability Policy of the Comm. on Labor and Human Resources*, 104th Cong. 71 (1995) [hereinafter *Federal Disability Policy Hearings*] (statement of Marcia Reback, President, Rhode Island Federation of Teachers).

underlies the problem of school discipline is that of school choice.[23] Is the deterioration of school discipline and the decreased support for public schools that inevitably follows merely an insidious means to increase the clamor for school choice and public financial support for sectarian schools? Even if increased support for school choice is not the intent behind the IDEA discipline amendments, it may very well end up being the result.

## II. THE LEGALIZATION OF DISABILITY IN SCHOOLS

In *Goss v. Lopez*,[24] the U.S. Supreme Court in 1975 determined by a five-to-four vote that all students in public schools possessed procedural due process rights that afforded them "some kind of notice" and "some kind of hearing" before schools had the power to suspend them.[25] The Court explained that for suspensions of ten days or less, students must receive oral or written notice of the charges against them, an explanation of the evidence the school officials possessed, and an opportunity to present their side of the story to the school official suspending them.[26] Longer suspensions may require more procedures, but schools could immediately remove students whose presence posed a continuing danger or an ongoing threat.[27]

IDEA was also enacted in 1975,[28] the same year that *Goss* was decided. The legislative history of IDEA indicates that a "primary motive" for its enactment was "the fact that children with disabilities often failed to receive any education."[29] IDEA set forth both substantive and procedural rights for disabled students, making it a mixture of a grant and a civil rights statute.[30] These substantive rights and procedural protections are described in greater detail below.[31]

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23. *See infra* notes 470–87 and accompanying text.

24. 419 U.S. 565 (1975).

25. *Id.* at 579.

26. *See id.* at 581.

27. *See id.* at 582–83. Notice and hearing should follow as soon as practicable. *See id.*

28. *See* Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400–1487 (Supp. III 1997)).

29. *Federal Disability Policy Hearings*, *supra* note 22, at 53 (statement of Nancy L. Jones, Legislative Attorney, Congressional Research Service).

30. *See id.*

31. *See* 20 U.S.C. § 1412 (1994). This brief synopsis generally sets forth the constraints placed on school officials by the statute as enacted in 1975 and court interpretations thereof. Although the

### *A. Free Appropriate Public Education*

The most significant provision of IDEA is the substantive requirement that to qualify for federal financial assistance,[32] states must have a policy that "assures all children with disabilities the right to a *free appropriate public education.*"[33] To implement this policy, schools must develop an "individualized educational program" (IEP)[34] for each disabled child. The IEP must contain "specially designed instruction to meet the unique needs of children with disabilities."[35]

The IEP team consists of the child's parents, at least one regular education teacher, at least one special education teacher, a person employed by the school who is qualified to provide or supervise the specially designed instruction, a person who can interpret the instructional implications of evaluation, and—at the discretion of the school or parent—other persons who have knowledge or expertise, and,

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protections described remain intact after the 1997 amendments to IDEA, the effect of some of these provisions may be altered because of new provisions added to the statute in the 1997 amendments. *See infra* notes 233–94 and accompanying text.

32. *See* Editorial, *Schools for Disabled Children*, Wash. Post, July 10, 1996, at A16 (stating that IDEA is "second-largest source of federal aid to elementary schools").

33. 20 U.S.C. § 1412(1) (emphasis added).

34. 20 U.S.C. § 1401(a)(20) (1994). The IEP is defined as a written statement developed annually for each child with a disability. *See* 20 U.S.C. § 1401(a)(20). The requirements for the IEP are specific and result in a detailed and lengthy document that must include:

> (A) a statement of the present levels of educational performance of such child,
>
> (B) a statement of annual goals, including short-term instructional objectives,
>
> (C) a statement of the specific instructional services to be provided to such child, and the extent to which such child will be able to participate in regular education programs,
>
> (D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency reponsibilities [sic] or linkages (or both) before the student leaves the school setting,
>
> (E) the projected date for initiation and anticipated duration of such services, and
>
> (F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.
>
> In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives.

20 U.S.C. § 1401(a)(20) (footnote omitted).

35. 20 U.S.C. § 1401(a)(20). IDEA regulations require an annual review of the IEP to reconsider and revise it, if appropriate. *See* 34 C.F.R. § 300.343 (1998) (describing logistical requirements for IEP meetings).

if appropriate, the child.[36] The "free appropriate public education" to which the disabled child is entitled includes (1) "special education,"[37] which is defined as "specially designed instruction, at no cost to parents . . . to meet the unique needs of a child with a disability";[38] and (2) "related services,"[39] which include an array of developmental, corrective, and other support services "as may be required to assist a child with a disability to benefit from special education."[40]

### *B. Inclusion*

Although IDEA (before the 1997 amendments) did not specifically address discipline of the disabled, it contained the so-called "stay-put" provision that has been at the heart of the controversy surrounding the discipline issue.[41] To comprehend fully the effect of the stay-put provision, however, it is first necessary to understand how one other provision of IDEA, in particular, appears to contribute to many of the problems that school officials have described.[42] Under this provision of IDEA, sometimes called "the least restrictive environment," disabled students should be educated with nondisabled students to the maximum extent appropriate.[43]

IDEA requires the state to provide procedures ensuring that children with disabilities are educated "to the maximum extent appropriate" with

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36. *See* 34 C.F.R. § 300.344 (1998).

37. 20 U.S.C. § 1401(a)(18) (1994), *amended by* 20 U.S.C. § 1401(8) (Supp. III 1997).

38. 20 U.S.C. § 1401(a)(16) (1994).

39. 20 U.S.C. § 1401(a)(17) (1994).

40. 20 U.S.C. § 1401(a)(17). The services that a public school would be required to provide a disabled child include "speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only." 20 U.S.C. § 1401(a)(17); *see, e.g.*, Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 172–73 (3d Cir. 1988) (precluding summary judgment on issue whether school must provide 14-year-old suffering from effects of encephalopathy—who had mental and physical capacities of toddler—with services of licensed physical therapist).

41. *See Federal Disability Policy Hearings*, *supra* note 22, at 56 (statement of Nancy L. Jones).

42. *See* Lynn Schnaiberg, *Disciplining Special-Education Students: A Conundrum*, Educ. Wk., Nov. 30, 1994, at 1 (noting that discipline problems are "wrapped up" in movement toward full inclusion of students with disabilities into regular classrooms in neighborhood schools); *see also* Stanfield, *supra* note 9, at 2103 (quoting Assistant Director of Educational Issue Department of American Federation of Teachers as stating that inclusion has exacerbated discipline problems).

43. 34 C.F.R. § 300.550 (1998).

children who are not disabled.[44] A disabled child should be removed from the regular classroom "only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[45] The statute fails to provide guidance on how to achieve the correct balance between its requirement that the disabled child receive an "appropriate public education"[46] and its requirement that the disabled child be educated "to the maximum extent appropriate" with nondisabled children.[47] Thus, the educators who comprise the disabled child's IEP team in "cooperation" with the child's parents must use their best professional judgment to strike this balance.[48]

The notion of least restrictive environment has evolved from "mainstreaming" to full inclusion. Many inclusion advocates now propose that *all* students with disabilities should be placed in regular education classes.[49] As one commentator explains:

> The concept of full inclusion goes far beyond mainstreaming. In mainstreaming, as interpreted by federal courts, the degree to which students with disabilities are integrated into the regular classroom varies according to the severity of a child's disability and the difficulty of providing him or her with specialized services necessary for an appropriate education. A student's IEP could, for example, include special education classes for part of the day and regular classes for the remainder of the day. Full inclusion, on the other hand, calls for the placement of all students with disabilities into general education classrooms, irrespective of the particular

44. 20 U.S.C. § 1412(5)(B) (1994).

45. 20 U.S.C. § 1412(5)(B).

46. 20 U.S.C. § 1412(1) (1994).

47. 20 U.S.C. § 1412(5)(B).

48. *See* Board of Educ. v. Rowley, 458 U.S. 176, 209 (1982). In this case, the parents of a deaf eight-year-old, Amy, who was placed in a regular kindergarten class, insisted that she be provided a sign-language interpreter in all of her academic classes in the first grade. An interpreter who had been assigned to Amy for two weeks during the kindergarten year and the school district both agreed that Amy did not need the services of an interpreter at that time. Rather, she was provided with a hearing aid which amplified words spoken into a wireless receiver. *See id.* at 184–85.

49. *See generally* Dupre, *supra* note 9 (providing more detailed discussion of inclusion movement).

disability and, at times, irrespective of the student's needs or the impact on the learning environment.[50]

Parents who wish for their disabled child to be included in the regular classroom may file an action in federal court under IDEA.[51] The U.S. Supreme Court has not yet ruled on inclusion, but the lower federal courts have offered a confusing array of opinions on the issue.[52] Despite the fact that IDEA does not require full inclusion, many courts have tacitly accepted the premises of the full-inclusion movement.[53] Thus, "[a]rmed with a string of court decisions, [inclusion advocates] have made significant progress toward their goal of including all children with disabilities in the regular classroom."[54]

### *C. IDEA's Stay-Put Provision*

The upshot of the full-inclusion movement is that more students with severe behavioral problems are being placed in regular classrooms. But once a student is placed, it can be difficult to change that placement, even in the face of severe behavioral problems, if the parents disagree with the school's proposal.[55] Included in the procedural protections that are part of any change in placement is the controversial "stay-put" provision. This provision states that unless the parents agree to the

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50. Omyra M. Ramsingh, *Disciplining Children with Disabilities Under the Individuals with Disabilities Education Act*, 12 J. Contemp. Health L. & Pol'y 155, 176 (1995) (footnotes omitted).

51. *See, e.g.*, Sacramento City Unified Sch. Dist. Bd. of Educ. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994).

52. *See* Dupre, *supra* note 9, at 794–806 (analyzing opinions from various circuits).

53. *See id.*; Frank J. Macchiarola et al., *The Judicial System & Equality in Schools*, 23 Fordham Urb. L.J., 567, 598 (1996) ("Since 1989, a series of decisions in lower federal courts have [sic] demonstrated the judiciary's willingness to promote the cause of inclusion in the education of students with disabilities.").

54. *Inclusion Can Mean Exclusion to Deaf Students*, Inclusive Educ. Programs, Dec. 1995, at 1; *see also* Martha M. McCarthy, *Inclusion of Children with Disabilities: Is It Required?*, 95 Educ. L. Rep. 823, 826 (1995) (noting "judicial shift toward inclusion"). As a result of recent court opinions, some school districts in California feel the proper course of action is full inclusion: "[P]lace all handicapped children in regular education classes, regardless of their mental, physical or emotional disabilities." Theresa Bryant, *Drowning in the Mainstream: Integration of Children with Disabilities After* Oberti v. Clementon School District, 22 Ohio N.U. L. Rev. 83, 116 (1995) (citing Sarah Lubman, *More Schools Embrace "Full Inclusion" of the Disabled*, Wall St. J., Apr. 13, 1994, at B1).

55. *See* Editorial, *Schools for Disabled Children*, Wash. Post, July 10, 1996, at A16 (stating that "as a legal matter" IDEA has meant that "a parent could insist on keeping a child in [a mainstream classroom] no matter what the wider effects on the class").

proposed change, the student is allowed to remain in the current placement pending a final court decision regarding the change.[56]

Put simply, the stay-put provision constrains the actions of educators whenever there is a dispute about any "change in placement." A change in placement can occur with certain disciplinary actions—for example, an expulsion or suspension for more than ten days.[57] But a change in placement also can occur even if the school wishes to continue educational services in a more restrictive environment—if, for instance, a school wishes to move a student with a severe behavioral problem from a regular classroom to a special education classroom.[58]

Any proposed change in placement (including any change for disciplinary reasons) triggers significant procedural requirements, including detailed notice to parents and a meeting of the IEP team (including parents) to determine if the bad conduct is related to the disability and if the current placement is appropriate.[59] Parents must be informed of their right to an impartial hearing and then to judicial review if they disagree with a new placement decision.[60] Parents can challenge a placement decision at several levels—administrative hearings, court proceedings in district or state courts, and appeals. The statute's fee-shifting provision allows "reasonable attorneys' fees" to a parent or guardian (but not to the school) who is a "prevailing party."[61]

Thus, if a student exhibits severe behavioral problems (like toilet accidents, temper tantrums, crawling and hiding under furniture, or hitting and spitting on other children),[62] and a parent disagrees with the school that the student will be better off in a more restrictive school

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56. *See* 20 U.S.C. § 1415(e)(3)(A) (1994). The provision provides in part: "[D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child." As explained below, schools may go to court to seek an injunction dissolving the stay-put provision if they have sufficient evidence that the disabled student is "truly dangerous." Honig v. Doe, 484 U.S. 305, 326 (1988); *see infra* notes 121–23 and accompanying text.

57. *See* 34 C.F.R. § 300.519 (1999). The 1999 regulations attempt to clarify when a change in placement occurs. *See infra* notes 236–37 and accompanying text.

58. *See, e.g.*, Oberti v. Board of Educ., 995 F.2d 1204, 1207 (3d Cir. 1993).

59. *See* 20 U.S.C. § 1415(b) (1994).

60. *See* 20 U.S.C. § 1415(b)(2).

61. 20 U.S.C. § 1415(e)(4)(B) (1994). Courts have recently been showing more willingness to allow money damage claims for violations of IDEA, including at least one court that stated that punitive damages were available against individual school officials for violations of IDEA. *See* Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215, 220 (N.D.N.Y. 1993).

62. *See Oberti*, 995 F.2d at 1208 (describing behavior of severely disabled student).

setting (a self-contained special education classroom, for instance), the parents may challenge the decision in time- and resource-consuming administrative and court proceedings. According to the pre-amendment statute, during the time that these proceedings occur, the disabled student could not be moved from the regular classroom unless the parent agreed, with the following narrow exception: if school officials believed that the student was truly dangerous and had sufficient evidence that the disabled student was likely to injure others, the school could go to court to obtain permission to remove the student.[63] As explained below, changes in the new amendments allow school authorities to request a hearing officer to order the removal of a violent student who is considered sufficiently dangerous. This exception does not allow schools to remove a disabled student who is severely disruptive but not considered by a court to be sufficiently violent.

The timeline involved in a typical scenario may unfold as follows: After a child is placed in a regular classroom and then poses a severe discipline problem, the school will work to increase supports and interventions, sometimes for months.[64] If these interventions do not resolve the problem, the school will reconvene the IEP committee, which may recommend that the student be moved to a more restrictive educational environment—sometimes for part of a school day, sometimes for the entire school day. Then, if the parent still opposes a change in placement, months will likely be spent on legal preparation and expert testimony, as well as the time involved before a hearing officer, district court, and appeals court.[65] Unless the school can convince a court to grant an injunction—which some courts have been reluctant to do despite evidence of violent behavior[66]—the student will stay put in the regular classroom during that time.

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63. *See* Honig v. Doe, 484 U.S. 305, 326 (1988); *infra* notes 121–23 and accompanying text.

64. *See, e.g.*, Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 999–1000 (1997), *cert. denied*, 522 U.S. 1046 (1998) (describing interventions attempted throughout entire school year before IEP team proposed to remove autistic student from regular classroom and place him in class specifically structured for autistic children).

65. *See Honig*, 484 U.S. at 322 (noting that judicial and administrative review process is "ponderous" and pointing out that this case it was addressing took seven years to reach Court); *Hartmann*, 118 F.3d 996 (demonstrating length of review process: request for placement made in May 1994; Court of Appeals decision rendered in July 1997); *see also* 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, 498 (1998) (pointing out that invoking stay-put provision may delay expulsion for months or years).

66. *See infra* notes 145–60 and accompanying text.

Some schools are well aware of the tragic consequences of improperly placing a violent disabled student. For example, one disabled student with a history of problems was sent from a special education center to a regular high school.[67] Within two days after he arrived at his new school, he severely beat, raped, and murdered a fifteen-year-old girl in the girls' restroom.[68]

As with any controversial issue, the complicated problems surrounding discipline and the disabled student under IDEA developed over time. The 1997 IDEA amendments were not enacted in a vacuum. To understand the context that surrounded the enactment of the 1997 amendments, it is helpful to examine how schools and courts have addressed some of the discipline issues that have arisen under IDEA since its enactment in 1975.

## III. THE PRE-AMENDMENT BACKDROP: DISCIPLINE ISSUES UNDER IDEA

IDEA did not expressly address the authority of school officials to discipline disabled students.[69] This lacuna caused confusion and uncertainty for educators who were uncertain as to their rights and responsibilities. The issue of school discipline and the disabled student has thus become a matter of "great controversy and confusion"[70] as courts have "struggl[ed] under the weight of litigation involving [disabled] students."[71] Courts have been pushed into the fray in the attempt to balance the disabled student's right to a free appropriate public education with the public school's duty to maintain order so that all students can obtain an education.[72]

Although the many procedural protections in the statute were chiefly designed to guard against the reclassification of disabled students for educational reasons, these protections were also regarded as creating

67. *See* Bill McClellan, *Trial Opening Shows That Enlightenment May Have Dark Side*, St. Louis Post-Dispatch, Feb. 13, 1998, at D1.

68. *See id.*

69. *See* Mark G. Yudof et al., *Educational Policy and the Law* 734 (1992).

70. Mitchell L. Yell, Honig v. Doe: *The Suspension and Expulsion of Handicapped Students*, 56 Exceptional Children 60, 69 (1989).

71. Larry Bartlett, *Disciplining Handicapped Students: Legal Issues in Light of* Honig v. Doe, 55 Exceptional Children 357, 364 (1989).

72. *See* Yell, *supra* note 70, at 60.

procedural rights when the disabled student was disciplined.[73] As explained above, the so-called stay-put provision most directly affected discipline, as it prohibited schools from removing disabled students from the educational placement set forth in the IEP without parental consent.[74] In essence, the provision on its face seemed to give parents the right to keep the student in the educational setting even though the student would otherwise be subject to school disciplinary measures.[75]

### *A. Discipline Issues After the Enactment of IDEA*

#### *1. Suspension and Expulsion*

One of the traditional school disciplinary actions is "expulsion," defined here as a long-term removal from school. A school "suspension" may consist of removal from school for an indefinite time (until the case can be considered by the school board, for example) or a temporary suspension, which is constitutionally permissible under *Goss v. Lopez*, as long as some kind of notice and hearing is provided.[76] IDEA has had a major impact on the suspension and/or expulsion of disabled students. Even if a school provides educational services to the disabled student while he or she is suspended, those who oppose expelling or suspending disabled students maintain that the disabled child's social development is hindered, as homebound tutoring provided by the school does not allow the student to interact with other students.[77] Moreover, some commen-

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73. *See* Yudof et al., *supra* note 69, at 734 (citing Comment, *The Legal Limits of School Discipline for Children with Handicaps*, 69 Or. L. Rev. 117 (1990)).

74. *See* 20 U.S.C. § 1415(e)(3)(A) (1994).

75. When a student was suspended for 35 days for misconduct that included physical attacks on a teacher and other students, the parents had him evaluated by a private psychologist who maintained that the boy had a learning disability. The parents wanted the boy returned to school pending evaluation by the school. When the school refused, the parents brought suit. *See* Doe v. Rockingham County Sch. Bd., 658 F. Supp. 403, 409 (W.D. Va. 1987). The school argued that the boy should "stay put" in his current placement—suspension—until the dispute was resolved, but the court found that "leaving a handicapped child under disciplinary suspension during the pendency of administrative proceedings violated both the language and the intent of the 'stay put'" rule. *Id.*

76. *See supra* notes 24–27 and accompanying text; *see also* John R. Paddock Jr., Comment, *The Rights of Handicapped Students in Disciplinary Proceedings by Public School Authorities*, 53 U. Colo. L. Rev. 367, 377, 385–86 (1981).

77. *See* Lamont X. v. Quisenberry, 606 F. Supp. 809, 814 (S.D. Ohio 1984) (finding that homebound program is "change in placement," giving rise to IDEA procedural protections); Stuart v. Nappi, 443 F. Supp. 1235, 1240 (D. Conn. 1979).

tators claim that suspension or expulsion stigmatizes students, thwarts intellectual development, and may cause psychological damage.[78]

School officials, on the other hand, contend that a double standard for student behavior disserves disabled children, as it leads them to believe that their inappropriate behavior is excused because of their disability, and they obtain a false impression of society's expectations.[79] In the wake of the enactment of IDEA, school officials argued that a comment to the regulations promulgated under the statute at least permitted the expulsion or suspension of dangerous students.[80] The comment allowed schools to use their "normal procedures"—which would include suspensions and expulsions—to deal with "children who are endangering themselves or others."[81] Schools also defended other disciplinary actions in court, including in-school suspensions in a three-by-five-foot "timeout" room,[82] paddling, isolated seating in the classroom and cafeteria, refusing to allow the student to participate in a class field trip, and having a student put tape on his mouth to remind himself to be quiet.[83]

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78. *See* Sanford F. Remz, Note, *Legal Remedies for the Misclassification or Wrongful Placement of Educationally Handicapped Children*, 14 Colum. J.L. & Soc. Probs. 389, 425–26 (1979).

79. *See* Caryn Gelbman, *Suspensions and Expulsions Under the Education for All Handicapped Children Act: Victory for Handicapped Children or Defeat for School Officials?*, 36 Wash. U. J. Urb. & Contemp. L. 137, 156 (1989).

80. *See, e.g.*, Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328, 1336 (W.D.N.Y. 1979) (arguing that comment allowed schools to discipline students that are dangerous); *Stuart*, 443 F. Supp. at 1242 (same).

81. 34 C.F.R. § 300.513 cmt. (1998). The comment stated:

> Section 300.513 [the regulation regarding the disabled student's status during administrative or judicial proceedings] does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

34 C.F.R. § 300.513 cmt. (1998).

82. Hayes v. Unified Sch. Dist. Number 377, 669 F. Supp. 1519, 1524 (D. Kan. 1987), *rev'd*, 877 F.2d 809, 813 (10th Cir. 1989) (concluding that in-school suspension for up to five days is not change in placement).

83. *See* Cole v. Greenfield-Cent. Community Schs., 657 F. Supp. 56, 62 (S.D. Ind. 1986). The court stated that the teacher had a duty to provide an adequate educational experience to all students in the classroom, not only the mainstreamed disabled student. *See id.* The desirability of mainstreaming allowed such actions. *See id.* The taping incidents were not extreme under the circumstances. *See id.*

The U.S. Supreme Court has stated that paddling does not violate the Eighth Amendment prohibition against cruel and unusual punishment or the Fourteenth Amendment requirements for procedural due process. *See* Ingraham v. Wright, 430 U.S. 651, 671–72 (1977).

Courts struggled to balance the statutory mandate that a disabled student must be afforded a free appropriate public education with the school's interest in maintaining a safe and productive learning environment. Courts generally agreed that an expulsion constituted a change in placement under the statute, which triggered IDEA's parental procedural protections.[84] Thus, under IDEA's stay-put provision, students must remain in their current placement—they could not be expelled or even moved to a more restrictive classroom setting—until all parent complaints had been resolved through the administrative hearings and then the courts.[85] Because state laws differed regarding how many days constituted expulsion, inconsistent rules developed regarding how many days constituted a change in placement for IDEA purposes.[86]

Some courts implied a dangerousness exception into the stay-put provision of the statute. For example, in a case involving a disabled student who brought a razor blade to school and threatened to injure or kill another student, the Eleventh Circuit allowed the school to move the disabled student to an alternative school while review proceedings (the due process hearings and subsequent appeals allowed by the statute) went forward.[87]

### 2. *Misconduct Related to Disability*

Although the statute does not require the school to determine whether the student's misconduct was related to the disability, courts agreed that a disabled student should not be expelled for conduct that was related to the disability.[88] Schools sought to limit the "relationship" test (that is, whether the student's behavior is related to the disability) to cases where the student was classified as "seriously emotionally disturbed."[89] In other words, school officials argued that disabled students who were not

84. *See* Doe v. Maher, 793 F.2d 1470, 1482 (9th Cir. 1986); Kaelin v. Grubbs, 682 F.2d 595, 601 (6th Cir. 1982); *Stuart*, 443 F. Supp. at 1242–43.

85. *See Stuart*, 443 F. Supp. at 1242–43.

86. *Compare Maher*, 793 F.2d at 1484 (concluding that 30-day suspension does not constitute change in placement), *with Stuart*, 443 F. Supp. at 1242 (concluding that 10-day suspension constitutes change in placement).

87. *See* Victoria L. v. District Sch. Bd., 741 F.2d 369, 371 (11th Cir. 1984); *see also Stuart*, 443 F. Supp. at 1242 (holding that school authorities can deal with emergencies by suspending disabled students, but implying that this is limited to 10-day, short-term suspension).

88. *See* Bartlett, *supra* note 71, at 360; *see also, e.g.*, *Maher*, 793 F.2d at 1483–84.

89. S-1 v. Turlington, 635 F.2d 342, 346 (5th Cir. 1981).

seriously emotionally disturbed should be able to demonstrate proper behavior.[90] Courts have not generally been receptive to this argument, noting that the statute's procedural protections apply to all disabled students.[91]

Determining whether bad conduct was related to a disability proved to be a thorny issue. It was nonetheless a necessary determination, as some jurisdictions concluded that a disabled student could be expelled if the behavior was not a manifestation of the student's disability.[92] The IEP team makes the initial decision whether the conduct is related to the disability, but parents may appeal the decision to a hearing officer and to the courts.[93] Some courts of appeal reasoned that related behavior meant any behavior that is attributable to the disability or that is in some way a result or manifestation of the disability.[94] Thus, one court decided that a student with a learning disability who was a go-between in a drug deal was exhibiting behavior that was related to his disability, because his disability caused him to have low self-esteem which, in turn, caused him to be susceptible to peer pressure.[95] Other courts have stated that conduct that bears only an attenuated relationship to the disability—like misbehavior to get attention due to low self-esteem—is not sufficiently related to the disability.[96] Moreover, before the 1997 amendments changed the landscape, some courts held that educational services could be terminated for students who were expelled due to conduct that was not related to their disability.[97]

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90. *See id.*

91. *See id.*

92. *See Maher*, 793 F.2d at 1482; Doe v. Koger, 480 F. Supp. 225, 229 (N.D. Ind. 1979). *But cf.* Kaelin v. Grubbs, 682 F.2d 595, 602 (6th Cir. 1982) (concluding that expulsion cannot end educational services); *Turlington*, 635 F.2d at 350 (same).

93. *See* School Bd. v. Malone, 762 F.2d 1210, 1217–18 (4th Cir. 1985).

94. *See id.* at 1216–17.

95. *See id.* In *School Board v. Malone*, 662 F. Supp. 978, 980 (E.D. Va. 1984), *aff'd*, 762 F.2d 1210 (4th Cir. 1985), the court disagreed with an IEP committee that found no causal connection between the student's disability and his drug dealing. The court decided that the student's disability caused low self-esteem, which caused him to be susceptible to peer pressure, and that the learning disability prevented the student from understanding the long-term consequences of his actions. In *Maher*, 793 F.2d at 1480, the court noted that the misconduct of an emotionally handicapped student will not always be related to the disabling condition. *See also Turlington*, 635 F.2d at 346 (rejecting school's argument that conduct of disabled students who could tell right from wrong was not related to disability).

96. *See Maher*, 793 F.2d at 1482.

97. *See* Doe v. Board of Educ., 115 F.3d 1273, 1277 (7th Cir. 1997) (stating originally that school district is not required to provide continued educational services to expelled students, but amending

### *B. The Supreme Court and Discipline*

The enactment of IDEA significantly changed the traditional notion that schools enjoyed great discretion in dealing with serious student misbehavior. "For the first time, the nation's courts, including the U.S. Supreme Court [began] telling school officials that their discretion in dealing with serious student misconduct may be greatly limited."[98] In 1988—thirteen years after IDEA was enacted—the U.S. Supreme Court addressed the issue of expelling disabled students and determined that school officials could not unilaterally expel even a dangerous disabled student from school.[99] In *Honig v. Doe*,[100] the Court addressed whether the San Francisco Unified School District could expel two emotionally disturbed children indefinitely for disruptive and violent behavior.[101] One of the students, a seventeen-year-old, assaulted another student—choking the other student with sufficient force to leave abrasions on the child's neck—and kicked out a school window while being escorted to the principal's office afterwards.[102] The school commenced expulsion proceedings (which included a hearing) and suspended the student until the proceedings could be completed.[103]

The other student[104] had been identified as an emotionally disturbed child, whose IEP stated that he was "easily distracted, impulsive, and

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opinion after new IDEA amendments, limiting opinion to cases before amendments); Virginia Dep't of Educ. v. Riley, 23 F.3d 80, 82 (4th Cir. 1994). *But see Turlington*, 635 F.2d at 348 (stating that expulsion could not result in complete termination of educational services, but failing to illuminate what services could be eliminated); Magyar v. Tucson Unified Sch. Dist., 25 IDELR 608, 609 (D. Ariz. 1997) (finding that school was required to provide educational services to student with emotional disability who was suspended for bringing knife to school); Metropolitan Sch. Dist. v. Davila, 770 F. Supp. 1331, 1339 (S.D. Ind. 1991), *rev'd*, 969 F.2d 485 (7th Cir. 1991) (concluding that all students with disabilities, even if expelled because of conduct unrelated to their disabilities, must continue to receive educational services).

98. Bartlett, *supra* note 71, at 357.

99. *See* Dori Meinert, *Schools' Power to Expel Limited: High Court Ruling Protects Emotionally Troubled Pupils*, San Diego Union-Trib., Jan. 21, 1988, at A1 (stating that the *Honig* opinion "sharply limited public school officials' power to suspend or expel emotionally disturbed pupils for disruptive or dangerous behavior").

100. 484 U.S. 305 (1988).

101. *See id.* at 308.

102. *See id.* at 313.

103. *See id.*

104. The school had placed the student in a learning center for emotionally disturbed children. His grandparents wished him to be in the regular public school setting, and the school acquiesced. The student began to misbehave almost immediately after being placed in a regular classroom setting,

anxious."[105] His evaluative records showed that he was "unable 'to control verbal or physical outburst[s]' and exhibited a '[s]evere disturbance in relationships with peers and adults.'"[106] The student's chronically disruptive behavior—including stealing, extorting money from fellow students, and making sexual comments to female classmates—led to a five-day suspension and a recommendation by the Student Placement Committee to suspend the student indefinitely pending a final disposition in the matter.[107] Attorneys for both students protested that these actions violated IDEA.[108]

At the time, a suspension in excess of ten days or an expulsion was considered a "change in the placement" of the disabled child.[109] Thus, according to the statute, the parents had the right to notice, an opportunity to present complaints concerning the school's decision, and an opportunity for a due process hearing respecting any complaints.[110] If the parents were unsatisfied after the hearing, they could obtain further administrative review.[111] If still unsatisfied, the parents could file a civil action in a state or federal court and could appeal the result of that action.[112]

Because these numerous hearings and court proceedings often take a long time to run their course,[113] the school must determine how to deal with the child during this time. As explained above, IDEA states that pending the completion of any review proceedings, the disabled child

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and school officials met with his grandparents twice to convince them to allow the school to place the child in a half-day program. *See id.* at 314–15.

105. *Id.*

106. *Id.* at 314 (quoting school evaluative records).

107. *See id.* at 315.

108. IDEA was called the Education of the Handicapped Act at this time. *See supra* note 6 and accompanying text.

109. *Honig*, 484 U.S. at 325 n.8. The Court observed that the statute did not define "change in placement" and that neither the structure of the statute nor its legislative history provided any guidance regarding how that phrase applied to fixed suspensions. *See id.* at 323. The Department of Education's Office of Civil Rights had taken the position that a suspension of up to 10 days did not amount to a change in placement. *See id.* The Court deferred to this construction, noting that it comported with the purposes of the statute: "Congress sought to prevent schools from permanently and unilaterally excluding disabled children by means of indefinite suspensions and expulsions; the power to impose fixed suspensions of short duration does not carry the potential for total exclusion that Congress found so objectionable." *Id.*

110. *See* 20 U.S.C. § 1415(b)(1)–(2) (1994); *see also Honig*, 484 U.S. at 311–12.

111. *See* 20 U.S.C. § 1415(c) (1994).

112. *See* 20 U.S.C. § 1415(e)(2) (1994).

113. *See Honig*, 484 U.S. at 323.

"shall remain in [his or her] then current educational placement" unless the parents agree to the change.[114] The educators claimed and, some courts had agreed,[115] that the residual authority of school officials to exclude dangerous students meant that the school could keep violent or dangerous students from the classroom until the review process was complete.

The Supreme Court stated that the statute had no exception for dangerous students and that such students could be removed only with permission of the parents or with the approval of a court.[116] "We think it clear, however, that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school."[117] Congress thereby denied school officials "their former right to 'self-help,' and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts."[118]

The Supreme Court maintained that educators were not "hamstrung," but could make use of study carrels, timeouts, detention, or the restriction of privileges.[119] If a student poses an "immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 schooldays."[120] If the parent of a "truly dangerous child" persists in refusing to permit any change in placement, educators can turn to the courts. Although the statute requires that the school must exhaust time-consuming administrative proceedings,[121] the Court stated that the school might be able to bypass this administrative review in some cases if the school could meet its burden of showing that administrative review would be futile or inadequate.[122] If the school could meet this burden, it then had the additional burden of demonstrating that keeping the student in the classroom was "substantially likely to result in injury either to

114. 20 U.S.C. §1415(e)(3)(A) (1994).

115. *See supra* note 87 and accompanying text.

116. *See Honig*, 484 U.S. at 323–24.

117. *Id.* at 323.

118. *Id.* at 323–24.

119. *See id.* at 325.

120. *Id.* In its discussion of these alternative disciplinary measures, the Court did not exempt students whose conduct was related to their disability, implying that "relationship" in this context made no difference.

121. *See* 20 U.S.C. § 1415(e)(2) (1994), *cited in Honig*, 484 U.S. at 326.

122. *See Honig*, 484 U.S. at 326–27.

himself or herself, or to others."[123] If the school could demonstrate this level of potential violence, the court might enjoin the student from attending school.

The upshot of the opinion was that there was no dangerousness or emergency exception to IDEA's stay-put provision. A school could not unilaterally decide to expel for more than ten days a dangerous or disruptive student who posed a threat to the safety of others. If the parents steadfastly refused to agree to a change in placement in the IEP for a dangerous student, the school must seek an injunction in court, where the school bore a heavy burden to overcome the presumption that the student remain in his or her current placement.

The opinion was inconsistent in the way it treated congressional silence.[124] After all, the Court stated that because Congress was silent as to the dangerous disabled student, there was no dangerousness exception in the statute. Yet the Court determined that schools possessed another remedy that also was nowhere to be seen in the statute—the opportunity to circumvent the requirement of exhaustion of administrative remedies. The Court was criticized for "essentially grant[ing] schools [an] implied dangerousness exception" by allowing courts to remove disabled students from school through an injunction.[125] In addition, the Court was criticized for allowing schools easier access to the courts (through a circumvention of the administrative proceedings), because "[t]he judiciary's expertise on the essentials of a handicapped child's educational program is minimal, if existent at all."[126] Further, commentators pointed out the Court created a new liability issue for schools: school officials may be forced to keep a disabled child in a classroom pending a hearing because a parent refuses to give consent for suspension, but schools are still responsible for the welfare of all the students in attendance and may be liable if the disabled child harms another child.[127]

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123. *Id.* at 328.

124. *See* Christopher L. Baxter, Comment, *Right to a Free and Appropriate Education: The Education for All the Handicapped Act Does Not Contain an Implicit "Dangerousness Exception,"* 20 Rutgers L.J. 561, 573–74 (1989).

125. *Id.* at 575.

126. *Id.* at 576 (reasoning that professionals on the student's IEP committee are more experienced in dealing with disabled children in education than is the judiciary, which is the "most inexperienced panel available"); *see also* Dupre, *supra* note 14, at 450.

127. *See* Baxter, *supra* note 124, at 577–78.

### C. *In the Aftermath of the* Honig *Decision*

The reaction of educators to the *Honig* decision was measured at first. The press deemed the decision a defeat for educators, who had argued "that they should be able to act quickly and unilaterally when they believe that a [disabled] student poses a danger to others."[128] The California school superintendent, Bill Honig, in whose name the case was brought, stated that he "could live with the decision."[129] Superintendent Honig considered the Supreme Court opinion "another example of how courts get involved with the day-to-day operations of schools to the detriment of schools,"[130] but he reasoned, "At least it gives us some clarity about what districts can and can't do."[131] He claimed—wrongly as it turned out—that because of the *Honig* opinion, "if there is even a hint of a discipline problem, the kid will be put in a special education class from the start and will not be allowed to attend regular classes."[132] In reality, schools have been hamstrung in their efforts to place disabled disruptive students in special education classes. The advocates of the full-inclusion movement and the courts that have tacitly accepted the premises of this movement have "made significant progress toward their goal of including all students with disabilities in the regular classroom," including disabled students with severe behavioral problems.[133]

*Honig*'s effect on school discipline became clearer as it was applied by lower courts. Professor Michael Heise has observed, "It's pretty clear that, by gaming the legal rules, parents can effectively hamstring school officials under IDEA."[134] Educators began to claim that IDEA's stay-put provision as interpreted by *Honig* "can make it impossible to protect teachers and other students if a disabled student turns dangerous."[135]

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128. David G. Savage, *Expelling Violent Handicapped Students Curbed*, L.A. Times, Jan. 21, 1988, at 1.

129. *Id.*

130. Meinert, *supra* note 99, at A1.

131. Savage, *supra* note 128, at 1.

132. William Carlsen, *Schools Lose Ruling on Disturbed Students*, S.F. Chron., Jan. 21, 1988, at A1.

133. *Inclusion Can Mean Exclusion to Deaf Students*, *supra* note 54, at 1.

134. Stuart Anderson, *Why Schools Don't Dare to Discipline the Disabled*, Wkly. Standard, Feb. 19, 1996, at 29, 31 (stating that this premise has led to double standard that "defies common sense and leaves children, particularly other special education students, to face dangerous peers who are above the law").

135. Don J. DeBenedictis, *Schools See Disabled Protection as Threat to Safety*, Nat'l L.J., June 27, 1994, at A9.

Others have lauded the statute and the *Honig* decision, stating that "[l]imiting school officials' disciplinary authority will result in less discrimination against the handicapped."[136] Advocates for the disabled claim that "[t]he stay-put provision is necessary because all too often schools make judgments solely on the basis of a child's superficial behavior, rather than by trying to figure out what's causing the behavior."[137] Disability advocates maintain that expelling a disabled student is an "insidious attempt to undercut the very purpose of [IDEA]."[138]

Many questions remained open after *Honig*. Despite the Court's assurances that educators were not "hamstrung"—that they still could employ normal disciplinary procedures[139]—it remained unclear what normal disciplinary procedures may entail and when parents could challenge them successfully as a change in placement.[140] After all, long-term suspension or expulsion for violent students had been normal disciplinary procedure in San Francisco before the Court's decision in *Honig*. The *Honig* opinion did not include in its list of disciplinary options the possibility of a change to a more restrictive environment—a special education classroom or an alternative school setting[141]—and the Office of Civil Rights stated that suspensions that total more than ten days in one school year constitute a change in placement (meaning that IDEA procedural safeguards are thereby triggered).[142] One court stated, "The touchstone . . . has to be whether the decision is likely to affect in

136. Gelbman, *supra* note 79, at 165.

137. DeBenedictis, *supra* note 135, at A9 (quoting Steven Novick, Executive Director of the Oklahoma Disability Law Center).

138. Savage, *supra* note 128, at 1 (quoting Sheila Brogna, attorney for Legal Services for Children of San Francisco, who argued *Honig*). Toby Rubin, another attorney in the case, stated, "This will prevent the schools from simply saying, 'You're out, go home,' when there is a problem with handicapped children, instead of addressing the problem directly." Carlsen, *supra* note 132, at A1.

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

140. *See generally* Doe v. Maher, 793 F.2d 1470, 1484 (9th Cir. 1986) (determining that changes in program that do not amount to change in placement are appropriate disciplinary measures); Gail P. Sorenson, *Special Education Discipline in the 1990s*, 62 Educ. L. Rep. 387, 396 (1990) ("Despite the Supreme Court's explicit approval in *Honig* of 'normal' in-school disciplinary measures including time-outs, study carrels, and the restriction of privileges, it is not difficult to imagine circumstances that would violate [IDEA's] provisions.").

141. *See Honig*, 484 U.S. at 325 (study carrels, timeouts, detention, restriction of privileges and temporary suspension up to ten days).

142. *See* Bartlett, *supra* note 71, at 362–63 (citing 1985 Department of Education letter from Thomas to Nail). See also *infra* notes 236–37 and accompanying text for a discussion of the 1999 regulations on this issue.

some significant way the child's learning experience."[143] Even this interpretation was not particularly helpful, however, as what is significant for one disabled child may not be significant for another. Notably, the *Honig* opinion did not mention corporal punishment, although the Supreme Court has held that corporal punishment is not unconstitutional.[144]

Although the *Honig* Court stated that schools could ask courts to suspend a disabled student who was "truly dangerous," the Court did not explain what the school had to prove to show that a student was "truly dangerous."[145] Educators described cases where they were forced to seek court approval before removing severely disruptive, disabled students from class, "even though one student allegedly injured a classmate and two staff members, and another allegedly threatened to injure or kill several people at his school."[146] One case sounded eerily like the harbinger of school killings that have erupted across the nation in recent years. A ninth-grade disabled boy stated that Charles Manson was his hero "because he had people killed." The student advocated smashing an administrator's head, vandalizing her car, and assaulting a school official's wife.[147] The parents refused the school's proposal to transfer the student to a special program that educators stated would better suit his needs.[148] The school was powerless to act until it obtained court approval to remove the child. The school in this case was able to convince the court that the student should be barred temporarily from the school campus.[149] But another court turned down the plea of a school that attempted to move a disruptive disabled student from a regular classroom to a special education setting in lieu of suspension or expulsion. The

143. DeLeon v. Susquehanna Community Sch. Dist., 747 F.2d 149, 153 (3d Cir. 1984).

144. *See* Ingraham v. Wright, 430 U.S. 651, 671, 682 (1977).

145. Yell, *supra* note 70, at 67; *see also* Edward J. Sarzynski, *Disciplining a Handicapped Student*, 46 Educ. L. Rep. 17, 24 (1988) (arguing that in stating that dangerous disabled students are not immune from discipline, Court "may actually have immunized a greater number of [disabled] students from the disciplinary process").

146. Jay Mathews, *California Uses Courts to Oust Students; Principals Powerless to Expel the Unruly from Special-Ed Classes*, Wash. Post, June 3, 1989, at A5. The article describes two cases in California. In the first, school administrators at a school for the blind wished to suspend a 21-year-old blind and deaf woman (IDEA applies to disabled students from ages 3 to 21) who had struck two staff members and a classmate. The school had documented 30 separate declarations from people who witnessed her violent behavior.

147. *See id.*

148. *See id.*

149. *See id.*

court reportedly determined that conduct like hitting students, kicking staff members, upturning a desk, and putting the teacher on stress-related leave did not show that the student was dangerous enough under the statute to be removed.[150]

The Eighth Circuit set forth two requirements a school must meet before it could change the placement of a disabled student.[151] The student in the case had hit, kicked, slapped, and bitten other students, as well as thrown pencils and other objects in classmates' eyes—committing eleven to nineteen aggressive acts a week, thirty of which required the attention of the school nurse.[152] The parents had argued that the standard for removal should require the school to show, in addition to the above, that the student was "truly dangerous" and that the student actually intended to cause harm.[153] Instead, the court stated that the school must prove that (1) it is "substantially likely" that maintaining the disabled student in the current placement would result in injury to the student or other, and (2) the school district had done all that it reasonably could to reduce the risk that the disabled student would cause injury.[154] To demonstrate that it had done all it could to reduce the risk of further misconduct, a school must show that it has attempted numerous interventions, some of which may be costly.[155] For example, one school reported the techniques it attempted to improve the behavior of a twelve-year-old disabled boy who repeatedly attacked his teacher, aide, and therapist, both sexually and physically.[156] Those methods included "explaining proper behavior to the boy; providing a two-to-one pupil-teacher ratio for field trips; providing a teacher to work individually with

150. *See* DeBenedictis, *supra* note 135, at A9 (describing case); *see also Student with Razor Should Stay Put District Court Rules*, Special Educator, Mar. 28, 1997, at 1, 8 (reporting that court dissolved temporary restraining order to bar disabled student's attendance at school and transfer her to alternative placement after student cut classmate with razor).

151. *See* Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223, 1228 (8th Cir. 1994).

152. *See id.* at 1225, 1229.

153. *Id.* at 1228.

154. *Id.*

155. In *School District v. Stephan M.*, 25 IDELR 506, 508 (E.D. Pa. 1997), the court questioned why the school had not instituted measures to search a student who had cut another with razor blade to avoid future problems. The court pointed out that the school had not detailed a security employee, obtained an electronic detecting device, or had a female administrator or professional employee conduct searches, and that the school had not offered an explanation why it had not done so. *See id.*

156. *See* Anne Lindberg, *District Sues to Move Autistic Boy*, St. Petersburg Times, Mar. 13, 1997, at 8 (describing teacher who threatened to quit unless school system removed disabled student who grabbed her legs, buttocks, and genitals, hit her, kicked her, and choked her).

him during group speech therapy; isolating him from other pupils when necessary; and assigning him a personal assistant."[157]

Courts have continued to set a high bar before granting relief from IDEA's stay-put provisions, ruling that significant acts of violence were insufficient to allow a school to expel a student or remove him to another setting.[158] Indeed, one commentator could find only one case where an appellate court held that a school could remove a disabled student because the *Honig* standard[159] for dangerousness had been met.[160]

As school violence increased, school officials were "caught between the converging currents of a 'zero tolerance' policy for guns and other contraband and a 'zero reject' policy for students with disabilities."[161] One judge noted, "[T]he statute may be misused so that school children can be exposed to the dangers inherent in the bringing of a firearm to school while the student responsible for bringing the gun escapes the consequences of the action."[162] Forced to tell a school that it could neither expel a disabled student who brought a handgun to school nor move the student to another school until he was evaluated,[163] Judge Judith N. Keep deplored the situation as one "that can cause parents, if

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157. *Id.*

158. *See* Aaron D. Rachelson, *Expelling Students Who Claim to Be Disabled: Escaping the Individuals with Disabilities Education Act's "Stay-Put" Provision*, 2 Mich. L. & Pol'y Rev. 127, 149–50 (1997).

159. Maintaining the student in the current placement was substantially likely to result in injury to the student or others. *See* Honig v. Doe, 484 U.S. 305, 328 (1988).

160. *See* Rachelson, *supra* note 158, at 149–50 (citing Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223 (8th Cir. 1994)). The court reviewed evidence that for two years a 13-year-old disabled student committed 11 to 19 aggressive acts per week that included biting, hitting and kicking her teachers, poking others in the eye, throwing objects, and turning over furniture. *See* Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223, 1225 (8th Cir. 1994). The attention of the school nurse was required for some 30 incidents. *See id.*

161. Perry A. Zirkel, *Disabling Discipline?*, Phi Delta Kappan, Mar. 1995, at 568, 569. The school district's counsel for the appeal stated that the case had "serious and significant implications for schools with regard to crimes on campus." *Id.* He pointed out that the decision "effectively creates an immunity for disability not only from school discipline but also from the state criminal process." *Id.* (quoting Charles Weatherly, who was discussing the district court decision, later affirmed on appeal); *see also* Mary George, *Armed Kids in Special Ed., Aided by Law, Expulsion Prohibited If Disability at Fault*, Denver Post, Dec. 12, 1996, at A-1 (describing case in Boulder, Colorado, where four students passed around gun at school but only one was expelled because others were protected by IDEA).

162. M.P. v. Governing Bd. of Grossmont Union High Sch. Dist., 858 F. Supp. 1044, 1048 (S.D. Cal. 1994).

163. See *infra* notes 243–50 and accompanying text for a discussion of how Congress attempted to amend IDEA to deal with the problem of guns in schools.

they have any money whatsoever, to remove their children from a public school."[164]

Congress passed the Gun-Free Schools Act in 1994,[165] which mandated that all school districts must have a policy that students who bring a firearm to school will be expelled for at least one year.[166] IDEA, on the other hand, required that a disabled student "stay put" (in school and perhaps even in the regular classroom if the student has been "included") during ongoing disputes about placement, with limited exceptions.[167] Although the Gun-Free Schools Act provided that it should be interpreted in a manner consistent with IDEA,[168] the tension between the two statutes was obvious. Later in 1994, Congress enacted the Jeffords Amendment to the Improving America's School Act of 1994, which attempted to reconcile the conflicting requirements for schools by allowing for an interim alternative educational placement for up to forty-five days.[169] This provision specifically limited the application of IDEA's stay-put provision while the due process proceedings took place, but only for students who brought a "firearm" (not a knife or other weapon) to school.[170] If the parents continued to object to any change in placement and the due process proceedings lasted more than forty-five days, the student would remain in the interim placement if the school desired.[171]

After the *Honig* decision, some courts determined that IDEA protections were applicable even to students who had not yet been determined as having a disability. One court noted its concern that schools could circumvent IDEA's restrictions by refusing to identify students as disabled. The court stated that the "broad language" used by the U.S. Supreme Court in *Honig* left "the unmistakable impression that all disabled students, whether or not possessing 'previously identified

164. DeBenedictis, *supra* note 135, at A9 (quoting Judge Judith N. Keep of the Southern District of California).

165. Pub. L. No. 103-382, 108 Stat. 3907 (1994).

166. *See* 20 U.S.C. §§ 8921–8923 (1994).

167. The exceptions were for suspensions of less than 10 days, for misconduct that is unrelated to the disability (in some jurisdictions), and in cases where the school goes to court to get permission through an injunction to expel a "truly dangerous" student. *See* Honig v. Doe, 484 U.S. 305, 326 (1988); *see also* Zirkel, *supra* note 161, at 569 (describing exceptions).

168. *See* 20 U.S.C. § 8921(c).

169. *See* 20 U.S.C. § 1415(e)(3)(B) (1994).

170. 20 U.S.C. § 1415(e)(3)(B)(iv) ("[F]or the purpose of this section, the term 'weapon' means a firearm as such term is defined in section 921 of title 18.").

171. *See* 20 U.S.C. § 1415(e)(3)(B)(iii).

exceptional needs,' are entitled to the procedural protections afforded under the IDEA."[172] Other courts pointed out, however, that a student who was not disabled could use the IDEA protections for his or her own benefit,[173] to "forestall any attempts at routine discipline" and "disrupt[] the educational goals of an already over-burdened and of times classified as a chaotic public school system."[174]

The upshot is that disabled status, or even claiming disabled status, could result in at least two significant disciplinary benefits.[175] Because of the stay-put provision, the discipline action would be delayed while the administrative and court procedures take place.[176] Moreover, the possible disciplinary sanction would be less severe, because a disabled student (or a student in the process of being evaluated) could not be expelled.[177]

In some jurisdictions, however, the benefits were even more striking. At least one court interpreted IDEA as prohibiting schools from filing juvenile court petitions for criminal acts perpetrated by disabled students.[178] Because filing a petition in the juvenile court was deemed a change in placement, the school was prohibited from doing so until all the time-consuming and expensive IDEA procedural requirements for a change in placement were completed.[179] These procedural requirements involve holding an IEP meeting to discuss and analyze any placement change, and may include parental challenges before a hearing officer, district court, and appellate courts and, of course, include the stay-put

172. Hacienda La Puente Sch. Dist. v. Honig, 976 F.2d 487, 494 (9th Cir. 1992); *see also* Richard v. City of Medford, 924 F. Supp. 320, 322 (D. Mass. 1996) (agreeing with Ninth Circuit in *Hacienda* that student's "status was fixed at the time that a special needs evaluation should have been done").

173. *See* M.P. v. Governing Bd. of Grossmont Union High Sch. Dist., 858 F. Supp. 1044, 1047 (S.D. Cal. 1994). The student was a senior in high school facing expulsion for bringing a firearm onto school grounds and then enlisting the help of another student to hide the gun. Because IDEA's hearing process takes several months to complete, even if the student is ultimately found to be not disabled, "by invoking IDEA the [student] will achieve the goal of graduating with his class." *Id.* at 1049; *see also* Ramsingh, *supra* note 50, at 172–75 (pointing out how students can avoid discipline by asking to be identified as disabled and invoking stay-put provision).

174. Rodiriecus L. v. Waukegan Sch. Dist., 90 F.3d 249, 253–54 (7th Cir. 1996) (stating that student must show that school knew or should have known of disability).

175. *See* Bryant, *supra* note 65, at 498.

176. *See id.*

177. *See id.* (noting that student cannot be expelled for conduct related to disability, and "perhaps even for conduct not related to the disability").

178. *See* Morgan v. Chris L., 21 IDELR 783 (E.D. Tenn. 1994).

179. *See id.*

provision.[180] In *Morgan v. Chris L.*,[181] the Eastern District Court of Tennessee stated that the filing of a petition in Juvenile Court (for vandalism of school property) was an initiation of a change in placement similar to a disciplinary action that would expel or suspend a student for more than ten days.[182] The Sixth Circuit affirmed.[183] The court ordered the school to withdraw the petition to the juvenile court, stating that the filing of the petition by the school was a violation of IDEA and that the juvenile court had also failed to follow IDEA procedures.[184]

School officials claimed that the court had allowed schools to become a "lawless zone" for disabled students, pointing out that if a disabled student committed a crime on the street, he could certainly be charged.[185] The counsel for the disabled student pointed out that nothing precluded a private victim—a teacher or another student—from initiating juvenile court proceedings.[186]

## IV. THE NEW IDEA AMENDMENTS AND REGULATIONS

Discipline was both the "top concern"[187] and the "most contentious issue"[188] when Congress sought to reauthorize the Individuals with Disabilities Education Act—a process that began in 1995 and culminated in the IDEA amendments of 1997.[189] As Congress considered any changes it would make to IDEA during reauthorization, it became apparent in the committee hearings that discipline was a significant issue. The committee hearings described below give some sense of the

180. *See supra* Part II.A. Under *Honig*, if a school official believes the disabled student is "truly dangerous," the school may go to court to ask for an injunction that removes the student from school. Honig v. Doe, 484 U.S. 305, 326 (1988).

181. 21 IDELR 783 (E.D. Tenn. 1994).

182. *See id.*

183. *See* Morgan v. Chris L., 106 F.3d 401 (6th Cir. 1997) (unpublished table decision).

184. The court also chastised the school for procedural mistakes, including failing to identify the student's disability in a timely fashion and failing to notify parents fully about the purpose of a multidisciplinary hearing. *See id.*

185. Zirkel, *supra* note 161, at 569.

186. *See id.*

187. Robert Greene, *Revised Law on Disabled Students Hard to Follow*, Athens Daily News/Athens Banner-Herald, July 5, 1998, at 5C.

188. *How to Get Regular Education Peers off Your Back and on Your Side*, Special Educator, Aug. 4, 1995, at 10.

189. *See* Joetta L. Sack, *Delay of Rules Leaves Schools in Doubt on IDEA*, Educ. Wk., Mar. 10, 1999, at 1.

problems addressed and the passion with which each side views the issue. Although some of the testimony before Congress amounts to anecdotes about the consequences of restrictions on discipline and rhetoric about discrimination by school officials absent IDEA, it bears careful study because it reveals the strong lines that have been drawn on each side of this complicated issue.[190]

The issue of school discipline and the disabled student involves balancing the school's need for discipline and the disabled student's need for an education.[191] Congress faced the question whether the statute as written maintained an appropriate balance. Teachers and school administrators contended it did not. "Almost every school district has a story about the problems of disciplining children with disabilities—the wild kindergartner who disrupts classes for everyone else but cannot legally be removed from class, or the gang of youngsters caught selling drugs in which all are expelled except the one diagnosed with a disability."[192] Teachers claimed they were increasingly frustrated when school districts were unable or reluctant to act in the face of severe behavioral problems and instead meted out light punishments of two or three days suspension for violent acts against teachers.[193] Because the inclusion movement has resulted in more and more students with significant emotional and behavioral problems being moved from residential settings and special education classrooms into the regular general education classrooms, teachers in the regular classrooms are now "confronted with situations and behaviors which are totally outside their experience and preparation."[194] Teachers recounted incidents of assault and battery including incidents in which a teacher's arm was broken by a disabled student and a teacher repeatedly suffered blows, several of which left open wounds and one of which required a visit to an

190. As one commentator stated, "Overhaul of [IDEA] . . . is tailor-made for policy decision by anecdote. The facts and figures are sparse and conflicting; the horror stories are stark and vivid. And the interests groups are well organized, disciplined and loaded with heart-tuggers or spine-chillers, depending on their legislative goal." Stanfield, *supra* note 9, at 2102.

191. *See Federal Disability Policy Hearings*, *supra* note 22, at 56 (statement of Nancy L. Jones).

192. Applebome, *supra* note 19, at 8. For example, in Hope, Arkansas, three high school students—one with learning disabilities—robbed a pawnshop, beat the owner, and brought stolen guns to a school basketball game. All three were arrested, but only two could be expelled. The school district was required to send a tutor to jail for the next year to educate the disabled student. *See* Kronholz, *supra* note 17, at A24.

193. *See Federal Disability Policy Hearings*, *supra* note 22, at 70 (statement of Marcia Reback).

194. *Id.* at 69.

emergency room.[195] In testimony before a Senate committee, one teacher revealed that a new syndrome has emerged, "battered-teacher syndrome," where teachers have come to believe that "being pummeled, bitten, spit at, pushed, and assaulted in a myriad of other ways is an expected part of the job."[196]

School officials claimed that being required to go to court every time a student with disabilities exhibited dangerous or seriously disruptive behavior at school was an unsatisfactory method for dealing with discipline problems.[197] Even if the balance struck by Congress was appropriate in 1975 when IDEA was first passed, society had changed significantly since that time, and the school environment was dramatically different. Advocates for school officials pointed out that the schools of the 1990s are increasingly confronted with serious misconduct, including rape, murder, and physical and sexual assault, as well as drug use and the destruction of property.[198] In addition, the full-inclusion movement has exacerbated the problem because more and more disabled students with severe behavioral problems have been placed in regular classes. To effect a change to a more restrictive environment—for example, a special education class—because of discipline problems may involve lawyers and courts if the parents object.[199] And because many courts have tacitly accepted the premises of the full-inclusion movement,[200] parents believe that challenges are likely to succeed and therefore may be more willing to object to a change in placement to a more restrictive environment. Using the courts is expensive for schools and parents alike, and the adversarial nature of a court proceeding makes it highly unlikely that the school and parents will later be able to cooperate to develop a program for the disabled student.[201] In addition, the educators in the schools believed that they

195. *See id.* at 70–71.

196. *Id.*

197. *See id.* at 90 (statement of Charles L. Weatherly).

198. *See id.* at 88. In short, significant changes have affected the educational environment since IDEA was passed. *See* Rachelson, *supra* note 158, at 134. Census Bureau statistics indicate that juvenile arrests for aggravated assault and murder have each increased 100% from 1975 to 1995. *See id.* (citing Bureau of the Census, Pub. No. 323, *Statistical Abstract of the United States 1995*, at 206). Weapons possession charges increased almost 200% in that time. *See id.*

199. *See Federal Disability Policy Hearings*, *supra* note 22, at 90 (statement of Charles L. Weatherly).

200. *See* Dupre, *supra* note 9, at 775.

201. *See Federal Disability Policy Hearings*, *supra* note 22, at 90–91 (statement of Charles L. Weatherly).

were in a better position than judges in courtrooms to determine if a serious problem existed in the school environment.[202]

Finally, Congress expanded the definition of disability from that first set forth in 1975. In 1983 Congress replaced the term "seriously emotionally disturbed" with the broader term "behaviorally disordered."[203] Again, in 1990, Congress expanded the definition to include traumatic brain condition, autistic condition, and attention deficit disorder.[204] Moreover, the number of students diagnosed with learning disabilities has increased dramatically in the past twenty years.[205]

Advocates for the disabled pointed out that IDEA was passed in 1975 "to address the national failure to provide disabled children educational opportunity that had been long considered the right of every other American child."[206] One advocate maintained that no changes were needed to the existing law because schools frequently try to exclude disabled students under the guise of "serious behavioral" concerns and violence.[207] The same advocate claimed, somewhat inconsistently, that there were few reported cases where schools had gone to court to remove a violent disabled student from school, contending that this showed that there were few cases where schools could demonstrate sufficient danger or where parents would not consent to a change in placement.[208] Creating an exception for disruptive behavior was also rejected, as "school personnel should continue to work with parents to develop alternative

202. *See id.* at 91.

203. H.R. Rep. No. 98-410, at 92 (1983), *reprinted in* 1983 U.S.C.C.A.N. 2088, 2131.

204. *See* H.R. Rep. No. 101-544, at 4–6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1723, 1726–28. Controversy continues to surround the diagnosis of Attention Deficit Disorder. *See* Rachelson, *supra* note 158, at 137–39.

205. *See* Anne P. Dupre, *Kelman and Lester's Jumping the Queue: An Inquiry into the Legal Treatment of Students with Learning Disabilities*, 49 J. Legal Educ. 302 (1999) (book review); Joetta Sack, *Report Charts Rise in Spec. Ed. Enrollment*, Educ. Wk., Mar. 17, 1999, at 40. The category of disability that includes attention deficit/hyperactivity disorder saw a 20.5% increase from 1995–96 to 1996–97. *See id.*

206. *Federal Disability Policy Hearings*, *supra* note 22, at 97 (statement of Kathleen Boundy, Co-Director, Center for Law and Education).

207. *Id.*

208. *See id.* at 100; *see also supra* text accompanying note 192. *But see* Kronholz, *supra* note 17, at A24 (describing teachers' union study that stated that 4712 criminal incidents were committed against teachers in New York City in one year (assaults, sex offenses, robberies) and that half were committed by special education students).

strategies."[209] Moreover, even children who were not yet identified as disabled should be able to seek the protection of IDEA.[210] In an oft-used expression, advocates claimed that changing the IDEA protections would "turn back the clock" to a time when school officials could deny disabled students a full and appropriate education.[211]

Senator Tom Harkin (D-Iowa), considered the Senate's strongest disability advocate, balked at proposals by school representatives that would allow school officials to remove students based on what educators considered dangerous behavior.[212] Senator Harkin contended that "dangerous" behavior could not be defined objectively in a manner that would not discriminate against disabled students.[213] He stated that "history is replete with examples of schools using discipline as an excuse" to exclude students with disabilities who had behavior problems.[214] Thus, he also claimed that change would "turn the clock back 20 years."[215] Other senators, like Senator Slade Gorton (R-Wash.), supported a ninety-day interim placement for students who brought weapons to school, physically or sexually assaulted school staff or other students, possessed or distributed illegal drugs, or who were seriously disruptive.[216]

The Department of Education weighed in with its own proposal. The Department made only two suggestions: (1) expand the Jeffords Amendment to include weapons other than firearms and (2) authorize hearing officers to issue the so-called "*Honig* injunctions" to allow removal of dangerous students after the allowable ten-day suspension.[217] Education

209. *Federal Disability Policy Hearings*, *supra* note 22, at 101 (statement of Kathleen Boundy). Disability advocates claim that designating students as disabled or disruptive was used in the past to expel students with disabilities. *See* Stanfield, *supra* note 9, at 2103.

210. *See Federal Disability Policy Hearings*, *supra* note 22, at 101–02 (statement of Kathleen Boundy).

211. *Id.* at 101.

212. *See Are You Ready for This?: Major Changes Loom in IDEA Reauthorization*, Special Educator, Aug. 4, 1995, at 11.

213. *Id.* at 12.

214. *Id.*

215. *Id.* Some might argue that there were some things about the public schools of 20 years ago that would be good to recreate. There is also an analogy here to the racial affirmative action debate: that affirmative action is needed because without it we will return to the "bad old days." Senator Harkin increased the rhetoric of the debate by stressing, "'I'll stand on the Senate floor for a long, long time' to oppose changes that will 'undo IDEA.'" *Id.*

216. *See id.*

217. *Id.* at 10–11.

Secretary Richard Riley acknowledged that the proposals would not be entirely satisfactory to either school officials or the disabled community.[218]

Breaking a two-year deadlock, the House and Senate finally passed the new amendments, and President Clinton signed the Individuals with Disabilities Education Act Amendments of 1997 into law on June 4, 1997.[219] The bill was passed in an unusual manner with sponsors working to move it quickly so that advocates for schools and the disabled would be unable to mobilize against parts of the bill that they opposed.[220] Some senators decided that this process should be a model for how controversial bills should be handled.[221]

The amendments to IDEA are "numerous and substantive," representing a "significant change" to some aspects of federal special education law.[222] For example, the new amendments added a section to the provision setting forth the statute's purpose. The stated purpose of IDEA is no longer merely to ensure that disabled students have access to a free appropriate education,[223] but to "*prepare them for employment and independent living.*"[224] Although the amendments were supposed to make it clearer how disabled students may be disciplined under federal law, teachers and school administrators were more uncertain than ever how to respond to discipline problems that involve a disabled student.[225] More than a year after the new amendments were passed, the regulations implementing the law had yet to be issued. Although the process of

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218. *See id.* at 11.

219. The House passed the bill by a 420–3 vote; the Senate vote was 98–1. *See IDEA Bill Passes Senate, Cleared for Clinton's Signature*, Congress Daily, May 14, 1997. A Senate amendment that would have given school officials more authority to discipline was defeated 51–48. *See id.*

220. *See id.*

221. *See id.* Surely, the opposite argument also has some force.

222. Huefner, *supra* note 21, at 1103; *see also* Bryant, *supra* note 65, at 491 (calling changes "substantial" and "sweeping"). Although the amendments deal with eligibility, evaluation, IEPs, private placements, discipline, funding, attorneys fees, and alternative dispute resolution, this Article focuses only on the discipline provisions.

223. The statute previously stated, "It is the purpose of this chapter to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs . . . ." 20 U.S.C. § 1400(c) (1994).

224. 20 U.S.C. § 1400(d)(1)(A) (Supp. III 1997) (emphasis added).

225. *See, e.g.*, Greene, *supra* note 187, at 5C; Sack, *supra* note 189, at 23 (quoting school superintendent as stating that discipline amendments are "an inherent problem that creates confusion, frustrations, and anger").

issuing regulations rarely ignites the same passions as the passage of a law, IDEA proved an exception, highlighting the struggle between schools and disability-rights advocates.[226] The Proposed Regulations issued by the Department of Education in October 1997 caused an uproar. "As soon as they went public, people went ballistic."[227] After the ninety-day comment period, the Department had received more than 4500 written comments, many of them concerning the proposed regulations on discipline, and more than fifty letters were from members of Congress.[228] Congress even held hearings in April 1998, where some members chastised the Department for exceeding the letter and spirit of the law and overregulating IDEA.[229] Members also were displeased that the Department did not consult with Congress as it wrote the proposed regulations.[230]

It was not until almost one year after the April 1998 hearings—nearly two years after the amendments were passed—that the Department of Education unveiled the final regulations for the amended IDEA.[231] Many educators and lawmakers saw the delay as another sign of "unresponsiveness to the day-to-day needs of schools."[232]

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226. *See* Sack, *supra* note 189, at 23.

227. Clare Kittredge, *For Special Ed Advocates, Rumor Is a Call to Arms*, Boston Globe (New Hampshire Wkly.), Apr. 26, 1998, at 1 (quoting Mark Joyce, Executive Director of the New Hampshire School Administrators' Association). Mr. Joyce stated, "We've been calling legislators saying they [the proposed regulations issued by the Department of Education] went far beyond the law. They are just too burdensome and intrusive to the operation of schools." *Id.*

228. *See Examining the Dept. of Education's Development of Regulations Necessary to Implement the IDEA Amendments of 1997 (Public Law 105-17): Joint Hearing Before the Senate Comm. on Labor and Human Resources and the House Comm. on Educ. and the Workforce*, 105th Cong. 76 (Apr. 22, 1998) [hereinafter *Hearing on Proposed Regulations*] (statement of Judith E. Heumann, Assistant Secretary for Special Education and Rehabilitative Services). See *infra* note 232 where Secretary of Education Richard Riley states that the Department of Education received 6000 comments on the proposed rules.

229. *See Hearing on Proposed Regulations*, *supra* note 228, at 3 (statement of Honorable William F. Goodling, Chairman of Committee on Education and the Workforce).

230. *See id.* at 15 (statement of Honorable Frank Riggs, Chairman of Subcommittee on Early Childhood, Youth, and Families).

231. *See* 34 C.F.R. pts. 300, 303 (1999).

232. Sack, *supra* note 189, at 1. Education Department officials claim the additional time was necessary to review the unprecedented number of comments that were received regarding the proposed rules. *See id.* at 23. At a House hearing on February 11, 1999, Secretary of Education Richard Riley noted that federal officials traveled to different parts of the country to get advice to deal with 6000 comments on the proposed rules. *See id.*

The next section sets forth the new amendments and regulations. The section immediately following critically evaluates whether the amendments will be effective in achieving their asserted purpose.

### *A. Restrictions on Discipline*

The statute allows school officials unilaterally to remove disabled students from the classroom in only a limited number of situations and for only a limited time. In essence, the school may suspend a disabled student using only the *Goss v. Lopez* protections (available to all students) for up to ten days. The new statutory language raises a significant issue, however, regarding whether schools must provide educational services to students during these short-term suspensions. The school may also remove a student to an "appropriate interim alternative educational setting" for up to forty-five days for more serious behavior. As discussed below, the circumstances under which a student can be removed to an interim alternative educational setting are also limited and subject to IDEA procedural protections.

#### *1. Ten-Day Suspension*

The *Honig* decision is reflected in the statute, allowing school officials to suspend disabled students for up to ten days.[233] Recall that the *Honig* Court had concluded that suspensions for less than ten days were not a change in placement,[234] leading to a Department of Education policy that educational services are not required for such short-term suspensions.[235] The new statutory language indicates that a suspension for less than ten days is a change in placement.[236] Despite the statutory language, however, the new IDEA regulations state that a change of placement occurs only when the student is removed for more than ten consecutive school

233. *See* 20 U.S.C. § 1415(k)(1)(A)(i) (Supp. III 1997).

234. *See* Honig v. Doe, 484 U.S. 305, 325–26 (1988) (basing its conclusion on Department of Education determination that suspensions of less than 10 days were not change in placement).

235. *See* OSEP Letter of Aug. 1, 1996, 25 IDELR 513 (1996) (stating that school districts are not required to provide educational services for suspensions of less than 10 days).

236. *See id.* Section 1415(k)(1)(A)(i) states: "School personnel under this section may order a *change in the placement* of a child with a disability—to an appropriate alternative interim educational setting, another setting, *or suspension*, for not more than 10 school days." (emphasis added).

days or when the student is subject to a series of removals that "constitute a pattern."[237]

Moreover, another new provision in the 1997 amendments provides that a free appropriate public education must be "available to *all* children with disabilities . . . *including* [*students*] *who have been suspended or expelled from school.*"[238] This is an important change for schools in those jurisdictions where courts had determined that schools could cease services for students who are suspended or expelled for conduct unrelated to their disability.[239] Again, despite statutory language that seems clear, the regulations state that schools do not need to provide educational services during the first ten-day suspension in a school year. An attorney for a disabled student who is not provided educational services for the initial ten-day suspension would surely argue that this regulation is invalid, because it conflicts with the plain language of the statute.

The school is also permitted to place the disabled student in an interim alternative educational setting for the ten days, thus avoiding the services-during-suspension issue. But the school can do so only "to the extent such alternatives would be applied to [students] without disabilities."[240] A school that attempts to place a disabled student with a behavior disorder in a more restrictive special education classroom for forty-five days to better meet his or her needs may be unable to do so if this particular strategy is not used with nondisabled students.

The statute does not address serial suspensions. The regulations state that a series of suspensions or removals which aggregate more than ten school days in a year does not constitute a change in placement triggering additional procedures unless this constitutes a "pattern" because of factors such as "the length of each removal, the total amount

237. 34 C.F.R. § 300.519 (1999).

238. 20 U.S.C. § 1412(a)(1)(A) (Supp. III 1997) (emphasis added).

239. *See, e.g.*, Department of Educ. v. Riley, 106 F.3d 559, 561 (4th Cir. 1997) (stating that plain language of IDEA does not condition receipt of funding on providing services to disabled students expelled for serious misconduct unrelated to their disabilities); *supra* note 97 and accompanying text (describing other cases). One court, realizing that it had decided that expelled students need not receive educational services without considering the new amendments, amended its opinion, stating that this rule applied only to cases initiated before the 1997 amendments were enacted. *See* Doe v. Board of Educ., 115 F.3d 1273, 1283 (7th Cir. 1997). The court acknowledged, however, that in the future, school districts must provide educational services to disabled students. *See id.*

240. 20 U.S.C. § 1415(k)(1)(A)(i).

of time the child is removed, and the proximity of the removals to one another."[241]

### 2. *Alternative Placement*

If school authorities wish to remove a disabled student from the classroom for over ten days, the student must be placed in an "interim alternative educational setting."[242] This removal to an alternative educational setting can occur only under the limited circumstances that are described below.

#### a. *Weapons and Drugs*

Keeping, at least in part, some of the features of the Gun-Free Schools Act and the 1994 Jeffords Amendment,[243] the 1997 amendments allow schools to discipline disabled students who bring a weapon to school. The 1997 Amendments expand the covered behavior beyond "guns" to "weapons" and include some drug offenses, but Senator Gorton's proposal that would have included assault on school personnel was not enacted. The statute allows school officials to move a disabled student to an "appropriate interim alternative educational setting" for not more than forty-five days, but only if the student (1) carries a weapon to school or a school function or (2) possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function.[244]

The statute nowhere defines what kind of interim alternative setting would be "appropriate." What is clear, however, is that the setting must be *educational.* The regulations set forth more explicit requirements for the interim setting: the interim setting must (1) allow the disabled student to continue to progress in the general curriculum, (2) allow the child to continue to receive the services and modifications that were set out in the

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241. 34 C.F.R. § 300.519(b).

242. 20 U.S.C. § 1415(k)(1)(A)(i). For any misconduct, the school must first determine if the behavior causing the removal was a manifestation of the student's disability. *See infra* notes 267–75 and accompanying text.

243. *See supra* notes 166–71 and accompanying text.

244. 20 U.S.C. § 1415(k)(1)(A)(ii) (Supp. III 1997). IDEA expanded the coverage of the Jeffords Amendment of 1994 beyond "gun or other firearm" to "dangerous weapon," which is defined as a "weapon, device, instrument, material, or substance, animate or inanimate, that is used for or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2½ inches in length." 18 U.S.C. § 930(g)(2) (1994) (incorporated by reference).

student's IEP, and (3) include any additional services and modifications that have been designed to prevent the misconduct from recurring.[245]

The 1997 amendments add a new obligation for school districts. After taking any of the disciplinary actions described above (appropriate interim educational setting for ten days or forty-five days, suspension for ten days), the student's IEP team must meet within ten days to develop a behavioral intervention plan or review a plan that is already in place and modify it to address the behavior.[246] Although this statutory requirement plainly applies whenever a disabled student is suspended for ten days or less,[247] the regulations create an exception for such short-term suspensions, an interpretation that seems to have no basis in the statute and that is likely to be challenged in court.[248]

The effect of the new IDEA amendments is simple: If two students—one disabled and one nondisabled—are found with a gun at school, Congress has mandated that they be treated differently. The nondisabled student would be expelled for one year with no requirement that the student receive any educational services under the requirements of the Gun-Free Schools Act.[249] But the disabled student would be entitled to IDEA procedural protections. The student may be placed in an alternative interim educational placement for a maximum of forty-five days, where the student must continue to receive the benefit of special education services, access to the general curriculum, and a behavior intervention plan designed to reduce the student's behavior disorder. Schools may try to deal with this double standard by avoiding long suspensions of any student,[250] which in turn may contribute to a general decline in order.

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245. *See* 34 C.F.R. § 300.522 (1999). The IDEA regulations state that the interim alternative setting must be determined by the IEP team. *See* 34 C.F.R. § 300.522. Because of the requirements set forth in the regulations, home schooling may not be an appropriate interim setting.

246. *See* 20 U.S.C. § 1415(k)(1)(B)(i)–(ii) (Supp. III 1997).

247. The statute states, "Either before or not later than 10 days *after taking a disciplinary action described in subparagraph (A)*," the IEP team must conduct an assessment or review. 20 U.S.C. § 1415(k)(1)(B)(i)–(ii) (emphasis added). Subparagraph A, as described above, provides in part that school personnel may unilaterally suspend a disabled student for not more than 10 days. *See* 20 U.S.C. § 1415(k)(1)(A)(i).

248. *See* 34 C.F.R. § 300.520(b)(1)(i)–(ii) (1999).

249. *See* 20 U.S.C. § 8921(b)(1) (1994) ("[E]ach state receiving Federal funds under this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to a school.").

250. *See* Laura Mansnerus, *Spare the Rod, and Then What?*, N.Y. Times, Mar. 8, 1998, § 14, at 1.

*b. Violent Students*

If the conduct of a violent disabled student is not covered by the weapons and drug provision, school officials must request a hearing officer for permission to remove a violent disabled student for up to forty-five days to an appropriate interim alternative educational setting.[251] The statute makes no provision to allow school officials to remove a severely disruptive student who is not violent. The use of a hearing officer, however, is a change from the pre-amendment requirement set forth in *Honig* that schools must petition a court when seeking to remove a dangerous student from his or her placement.

In addition, the 1997 amendments add a new "substantial evidence" requirement.[252] The school must demonstrate by "substantial evidence"[253] that the disabled student is "substantially likely" to injure himself or others.[254] The statute defines "substantial evidence" as "beyond a preponderance of the evidence."[255]

The hearing officer must also consider the appropriateness of the student's current placement and whether the school has made reasonable efforts to minimize the risk of harm in the student's current placement, including the use of supplementary aids and services. If the current placement is deemed to be "inappropriate" or the school has not made reasonable efforts to minimize the risk of harm, it appears—at least from the legislative history—that the hearing officer must deny the school's request to move the student to an alternative setting.[256] What efforts will be deemed reasonable under the statute is left for further elucidation by courts.

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251. *See* 20 U.S.C. § 1415(k)(2) (Supp. III 1997).

252. *Honig* required that the school show that it was "substantially likely" that injury would result. Honig v. Doe, 484 U.S. 305, 328 (1988). The new amendments added the requirement that the school show by "substantial evidence" that it is "substantially likely" that injury will result. 20 U.S.C. § 1415(k)(2)(A).

253. 20 U.S.C. § 1415(k)(10)(C) (Supp. III 1997).

254. 20 U.S.C. § 1415(k)(2)(A).

255. 20 U.S.C. § 1415(k)(10)(C).

256. The Senate Report from the Committee on Labor and Human Resources states that in such a case, "the appropriate response by an impartial hearing officer is to deny the school district's request to move the child to an alternative setting," as the problems "can be addressed in the current placement." S. Rep. No. 105-17, at 29 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 107. Of course, cases may arise where placement may be deemed inappropriate because of curricular needs. Even with changes to make the placement "appropriate" for curricular matters, however, violent behavior simply may be more difficult to subdue, even *with* reasonable efforts to reduce the risk of harm.

Finally, the statute sets forth "additional requirements" for the alternative setting.[257] The hearing officer must determine whether the alternative setting would enable the student to continue to participate in the general curriculum and to receive services and modifications set out in the IEP, and whether the services and modifications set out in the IEP will address the behavioral problem so that it does not recur.[258] This provision will require the school to present evidence at the hearing regarding how this can and will be accomplished in the alternative setting.

Thus, a parent may challenge any change in placement to an alternative setting on a number of grounds. First, the parent can contend that the school did not present "substantial evidence" that the violent child is "substantially likely" to injure himself or others. Next, the parent can contend that the school did not provide enough supplementary aids and services to minimize the risk that the disabled student's behavior will cause harm. Finally, the parent can contend that the school has not demonstrated that the interim alternative education placement meets all the requirements set forth in the statute and its regulations.

If the school can demonstrate all of the above, the hearing officer may order a change in placement for a violent disabled student to an interim alternative setting for up to forty-five days. The Analysis of Comments and Changes to the regulations states that the statute does not limit the number of times the procedure may be invoked if the school desires an extension during an appeal regarding the interim placement itself or while a due process hearing proceeds regarding a more permanent change of placement.[259] The parent may file an action in district court if the parent disagrees with the hearing officer's determination.[260]

*c. Staying Put in the Alternative Placement*

If a parent challenges the interim alternative educational placement for a weapons or drug violation or for violent conduct, a complex "stay-put" provision kicks in while the appeal proceeds. The new amendments change the stay-put provision that was in place (for students with guns)

257. 20 U.S.C. § 1415(k)(3)(B) (Supp. III 1997). These requirements apply to placement in an alternative setting under the weapons and drugs provision and under the violent student provision.

258. *See* 20 U.S.C. § 1415(k)(3)(B)(i)-(ii).

259. *See* 34 C.F.R. pts. 300 and 303, Attachment 1, Analysis of Comments and Changes, 64 Fed. Reg. 12,628 (1999).

260. *See* 20 U.S.C. § 1415(k)(6)(A)(i) (Supp. III 1997).

after the Gun-Free Schools Act. Previously, at least for bringing a gun to school, the student remained in the alternative placement even if the appeals process took more than forty-five days.[261] According to the 1997 amendments, if a parent challenges the alternative placement for either the weapons or drug offenses or for violent conduct, the student will remain in the alternative placement until the appeals process is completed or until the forty-five days are up, *whichever comes first.*[262] If the school wants to keep the student in the alternative placement beyond the forty-five days until the appeals process is complete, the school must request an expedited hearing.[263] The statute restricts the school to only one argument at this hearing: the school must show that putting the student back in the original placement would be dangerous.[264] To keep the student in the alternative setting, the school must meet the same burden that the statute set forth to remove violent students to the alternative placement—substantial evidence that the student is substantially likely to injure himself or others.[265] In addition, as in the initial placement decision, the school must show that it considered the appropriateness of the student's current placement (the placement before the alternative setting); made reasonable efforts to reduce the risk of harm in that placement (including use of supplementary aids and services); and determined whether the alternative setting would enable the student to continue to participate in the general curriculum and to receive services and modifications set out in the IEP.[266]

### *B. The Manifestation Determination*

Misbehavior that is a manifestation of a student's disability is to be treated differently from misbehavior that is unrelated to the disability. This distinction follows the pattern set by pre-amendment court opinions.[267] The new amendments add a section addressing how to tell if the bad conduct is a manifestation of the student's disability and what a school is allowed to do if it is not.

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261. *See* OSEP Memorandum 95-16, 22 IDELR 531 (OSEP Apr. 26, 1995).

262. *See* 20 U.S.C. § 1415(k)(7)(A) (Supp. III 1997).

263. *See* 20 U.S.C. § 1415(k)(7)(C)(i) (Supp. III 1997).

264. *See* 20 U.S.C. § 1415(k)(7)(C)(i).

265. *See* 20 U.S.C. § 1415(k)(7)(C)(ii) (referring to § 1415(k)(2)).

266. *See* 20 U.S.C. § 1415(k)(2) (Supp. III 1997).

267. *See supra* notes 88–97 and accompanying text.

The statute provides that after every decision to take any disciplinary action allowed by the statute, or for any change of placement for more than ten days for any other misbehavior, the IEP team must meet within ten days.[268] The statute sets forth the steps the IEP team must take in chronological order. The team must first consider evaluation and diagnostic results, including any relevant information provided by the parents, observations of the student, and the child's current IEP and placement. The team must next determine "in relationship to the behavior subject to the disciplinary action," whether the IEP and placement were appropriate and whether special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the IEP and placement. The IEP team must consider "all relevant information," including "evaluation and diagnostic results" or "other relevant information supplied by the parents," observations of the student, and the student's IEP placement.[269]

The statute for the first time sets forth a standard for determining if a disabled student's misconduct was a manifestation of the student's disability. To make this determination, the IEP team, after completing the steps outlined above, must decide whether the student's disability "impair[ed]" the student's "ability . . . to understand the impact and consequences of the behavior" *and* whether "the disability impair[ed]" the student's "ability . . . to control the behavior."[270] The statute gives no clue as to how to weigh the above factors but merely states that if, after review, the IEP team decides that the behavior was not a manifestation of the disability, the student may be disciplined in the same way as a student without disabilities.[271] As noted above,[272] another provision in the new amendments requires that a free appropriate education must be "available to all children with disabilities . . . including [students] who have been suspended or expelled from school."[273] Thus, even if a student can be removed from the classroom because the conduct is deemed unrelated to the disability, education services must still be provided to the student.

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268. *See* 20 U.S.C. § 1415(k)(4)(A)(ii) (Supp. III 1997). See *supra* notes 233–58 and accompanying text for a discussion of disciplinary action allowed by IDEA.

269. 20 U.S.C. § 1415(k)(4)(C) (Supp. III 1997); 34 C.F.R. § 300.523 (1999).

270. 20 U.S.C. § 1415(k)(4)(C)(ii).

271. *See* 20 U.S.C. § 1415(k)(5)(A) (Supp. III 1997).

272. *See supra* note 238 and accompanying text.

273. 20 U.S.C. § 1412(a)(1)(A) (Supp. III 1997).

Again, despite the plain statutory language that requires a manifestation determination review each time a school authority contemplates a disciplinary action including a suspension or removal for less than ten days, the regulations do not require a manifestation review for suspensions or removal for less than ten days when these actions do not constitute an improper pattern.[274] The Department of Education may be correct that manifestation review for these short-term suspensions would have little utility and would be burdensome.[275] Nonetheless, Congress called for such a review, making this issue ripe for litigation.

### *1. Challenging and Staying Put During the Manifestation Determination*

The statute specifically allows parents to request an expedited hearing if they disagree with the manifestation determination (or *any* decision regarding placement). At that hearing the school has the burden of demonstrating that the behavior was not a manifestation of the disability.[276] If the parent challenges the determination that the conduct was not a manifestation of the disability, the statute then tracks the complex scheme for placement during any hearing and court proceedings that was described above in the section regarding parent challenges to the interim alternative educational placement.[277] That is, the student will remain in the interim alternative educational setting up to the forty-five-day limit, unless the parents and the school agree otherwise.[278] If the challenge goes beyond forty-five days, the student is returned to the original placement—the placement prior to the removal to the alternative setting. As noted above, as the full-inclusion movement continues to gain momentum, the original setting is likely to be the regular general education classroom. The school can challenge the return of the student only by requesting yet another expedited hearing and by showing by substantial evidence that the student is dangerous—that placement is "substantially likely to result in injury to the child or to others."

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274. *See* 34 C.F.R. § 300.523.

275. *See* 34 C.F.R. pts. 300 and 303, Attachment 1, Analysis of Comments and Changes, 64 Fed. Reg. 12,624 (1999).

276. *See* 20 U.S.C. § 1415(k)(6)(B)(i) (Supp. III 1997).

277. *See supra* notes 262–66 and accompanying text.

278. *See supra* note 262 and accompanying text.

### C. *Protecting Students Who Are Not Yet Eligible for Special Education*

Even if a student has not yet been deemed eligible for special education, the student may be treated as if he or she were disabled with regard to school discipline. If a student violates a school's code of conduct—including carrying a gun to school—the student may claim that he or she cannot be disciplined as would a nondisabled student. The student can claim all of the protections for disabled students described above if the school "had knowledge" that the student had a disability before the behavior occurred. According to the statute, the school shall be deemed to have knowledge (1) if the parent expressed concern in writing[279] or has requested evaluation of the child, (2) if the behavior or performance of the child demonstrates that the child needs special education services, or (3) if the teacher *or other school personnel* expressed concern about the child to the director of special education or to *other school personnel*.[280]

### D. *Reporting*

A state, if it chooses, may now require a local school to include information in the student's records about disciplinary action taken against the disabled student.[281] These records may be transmitted in the same way that such information is transmitted for nondisabled students.

The statute now makes clear that a school may report crimes committed by a disabled student, and that reporting a crime is not an event protected by IDEA.[282] Law enforcement authorities may apply the criminal law to crimes committed by a disabled student[283] and are apparently allowed to change the educational placement of the student if

279. There is an exception for a parent who is illiterate or has a disability that prevents such expression. It is not clear if both parents must be illiterate, what kind of disability would qualify as preventing a parent from expressing concern, and whether the parent needs to have been identified as disabled before making this claim. *See* Bryant, *supra* note 65, at 536.

280. *See* 20 U.S.C. § 1415(k)(8)(B) (Supp. III 1997). The regulations narrow the statutory language in part (3) by adding the modifier "other personnel in accordance with the agency's established child find or special education referral system." 34 C.F.R. § 300.527(b)(4) (1999).

281. *See* 20 U.S.C. § 1413(j) (Supp. III 1997).

282. *See* 20 U.S.C. § 1415(k)(9)(A) (Supp. III 1997).

283. *See* 20 U.S.C. § 1415(k)(9)(A). The school must send copies of the disciplinary records and special education records for consideration by the appropriate authorities, *see* 20 U.S.C. § 1415(k)(9)(B) (Supp. III 1997), but only in a manner that is consistent with the Family Educational Rights and Privacy Act. *See* 34 C.F.R. § 300.529(b)(2) (1999).

incarceration is necessary. The statute is silent as to whether the disciplinary protections remain in effect for the disabled student after the crime is reported but while the law enforcement or judicial authorities investigate and decide whether to assert jurisdiction or whether to take the student into custody.

States must provide a free appropriate public education until a student reaches his or her twenty-first birthday; this includes those from eighteen to twenty-one who are in an adult correctional facility, if they were identified as disabled before incarceration in the facility and have an IEP.[284] A student who had been identified as disabled and had received services under an IEP must be afforded a free appropriate education and related services while in prison, until age twenty-one, even if the student had dropped out of school before incarceration.[285]

A number of provisions that had been requested by teachers were not enacted. One proposal requested a ninety-day trial period for a change in placement to see if a particular classroom environment was appropriate for the disabled student.[286] The classroom teacher would need to agree before the placement could continue, but numerous interventions and supports to help the student would be used during that time. Another proposed revision would have given the principal of a school unilateral power to act to remove a student if a student were considered dangerous.[287] This particular proposal also dealt with disruptive students. If a disabled student significantly and persistently disrupted a class, the multidisciplinary IEP team would be empowered to change the student's placement without the parent's permission.[288] Despite the proposal to address disruptive students in the amendments on discipline, disruptive students are not covered in IDEA at all.

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284. *See* 20 U.S.C. § 1412(a)(1)(B)(ii) (Supp. III 1997). State law may require that these students need not be provided with a free appropriate public education if they had not been identified as disabled and did not have an IEP in the last educational placement before incarceration. *See* 34 C.F.R. § 300.122(a)(2)(i)(A)–(B) (1999). A school may discontinue services for disabled students who graduate from high school with a regular high school diploma, but this graduation is a change in placement that triggers IDEA's notice provision. *See* 34 C.F.R. § 300.122(a)(3) (1999).

285. *See* 34 C.F.R. § 300.122(a)(2)(ii)(A) (1999).

286. *See Federal Disability Policy Hearings*, *supra* note 22, at 72 (statement of Marcia Reback) (describing recommendations by American Federation of Teachers).

287. *See id.*

288. *See id.*; *see also IDEA Bill Passes Senate, Cleared for Clinton's Signature*, Cong. Daily, May 14, 1997 (describing how amendment proposed by Senator Slade Gorton to give state and local government more authority to discipline was defeated 51–48).

Some educators were temperate in their criticism of the new law when it was first enacted, stating that the amendments were better than the existing law.[289] Nonetheless, they pointed out that although the law would handle "the most egregious cases," the "gray areas that affect most teachers in most classrooms are still out there."[290] Others were more vehement in their criticism. After learning that a former special education student could not be suspended for more than forty-five days after he was sent home from school under the influence of marijuana and he threatened to kill an assistant principal, one school board wrote a scathing letter to state and federal leaders blasting the new discipline procedures.[291] Other teachers and principals claimed that the weapons provision failed to address the major problem of special education students who bite teachers and who hit teachers or each other with fists.[292]

Less than a year after the 1997 IDEA amendments were enacted, Senators Judd Gregg and Slade Gorton considered introducing the IDEA Flexibility Amendment, which would have allowed schools more flexibility in disciplining disabled students.[293] Claiming that this change would allow "kids with disabilities and their families to be discriminated against because of their disability," advocates for the disabled "bombarded" Senator Gregg's office with e-mail and telephone calls, and he chose not the introduce the amendment.[294]

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289. *See* David Hess & Elsa C. Arnett, *Disabled Student Conduct Targeted*, Denver Post, May 14, 1997, at A1 (giving reaction of Bruce Hunter, chief lobbyist for the American Association of School Administrators, to House passage of bill and expected immediate passage by Senate).

290. *Id.*

291. *See* Ryan Underwood, *Discipline Constraints Under Fire*, Tennessean, Mar. 13, 1998, at 1W. A nondisabled student would have been suspended for one calendar year under the district's zero-tolerance rules. *See id.*

292. *See* Kronholz, *supra* note 17, at A24 (describing concern of school principal who had recently ordered hepatitis shot for teacher who was bitten by special education student).

293. *See* Kittredge, *supra* note 227, at 1. In addition, the Georgia School Boards Association has lobbied Georgia congressmen to change the law, at least as regards the protections afforded disabled students whose misconduct is not caused by the disability. *See* Doug Cumming, *Special Ed. Law Unfair, Critics Say*, Atlanta J. & Const., Apr. 27, 1998, at C1; *see also Critics Calling Special Education Law Unfair*, Fla. Times-Union, Apr. 28, 1998, at B1.

294. Kittredge, *supra* note 227, at 1; *see also* Anderson, *supra* note 134, at 32 (quoting Michael Horowitz, former general counsel at Office of Management and Budget as stating, "Any time we tried to change [special education policy] we would be overwhelmed.").

## V. FROM THE FRYING PAN INTO THE FIRE?

The precise impact of the new amendments, like the impact of IDEA after it was originally passed in 1975,[295] will be revealed only as schools implement the new provisions and the post-amendment cases start to wind their way through the courts. But the amendments raise some interesting questions about the dilemma of school discipline and the disabled. This section examines some of these issues.

### *A. Double Standards and Discipline*

#### *1. The Disruptive Student*

Disruptive students affect the learning of other students and can demand a disproportionate amount of teacher time and energy.[296] Indeed, the effect on teachers and other students can be "overwhelmingly negative."[297] Yet the new IDEA amendments make no provision for schools attempting to deal with disruptive students. Although disruptive disabled students can inhibit the learning process in both special education classrooms and regular education classrooms, the problem is

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295. *See* Dupre, *supra* note 9, at 776 n.2 (quoting one educator in 1975 as stating that IDEA would "change the American public school system more drastically than the 1954 Supreme Court ruling on desegregation").

296. *See* Henry, *supra* note 3, at 1D (citing poll of 1320 elementary school principals where 82% said disciplining disruptive or dangerous disabled students requires too much time); *cf.* Cole v. Greenfield-Cent. Community Schs., 657 F. Supp. 56, 62 (S.D. Ind. 1986) (stating that teacher had duty to provide adequate educational experience to all students in classroom, not only to mainstreamed disabled student).

297. Clyde K. v. Puyallup Sch. Dist. Number 3, 35 F.3d 1396, 1401 (9th Cir. 1994). In *Clyde K.*, school officials had to go to court to change the placement of a 15-year-old boy with Attention Deficit Hyperactivity Disorder and Tourette Syndrome whose severe behavioral problem included name-calling and profanity in the classroom, kicking furniture, directing sexually explicit remarks to female students, and numerous assaults. *See id.* The parents had refused to agree with the court's recommendation that the student be removed from the regular classroom and placed in a more restrictive self-contained educational program that was off-campus and that dealt specifically with students with severe behavioral problems. *See id.* The parents requested a due process hearing and district court review, and appealed to the Ninth Circuit after the hearing office and the district court agreed with the school that the appropriate placement for this student was the special program recommended by the school. *See id.* The Ninth Circuit agreed that the off-campus program recommended by the school was the least restrictive environment where the student could be educated satisfactorily, as required by IDEA. *See id.* at 1402. The school was required to litigate this matter three times—using considerable economic and human resources—over two years. *See id.* at 1402 n.10. On March 27, 1992, the parents requested a due process hearing; on March 23, 1993, the parents appealed to the district court; the Ninth Circuit decision was rendered in 1994. The fee for the school attorney alone exceeded $100,000. *See id.*

especially difficult for regular classroom teachers, who have no special training in dealing with severe disabilities and who have a larger number of students with varying academic abilities to teach and keep on task.[298] Although school districts may hire a one-to-one teacher's aide for the disabled student, these para-professionals are not even trained teachers and may not have the skills to manage severe discipline problems.[299] The inclusion movement exacerbates the problem,[300] as parents can fight successfully to have a student with severe behavioral problems in a regular classroom or in a regular school.[301]

The failure to focus attention on disruptive students appears to stem from the notion that safety issues are serious problems, while learning issues are not. Indeed, some advocates for the disabled insist that discipline for safety reasons and discipline for learning are separate issues because they claim disruption hurts no one.[302] According to a leading disability advocate, students "who [have] Tourette syndrome might be disruptive in the classroom because of their behavior, but they're not hurting anybody."[303] To be sure, not all disruptive students *physically* injure others. But it is absurd to suggest that students remain unharmed when others interfere with their academic progress. "Disruptive behavior is as injurious to the educational program of [children] as dangerous behavior is to their safety."[304] Learning is lost each time a teacher stops a lesson to quell a disturbance. Although this effect is perhaps the most obvious, the aftermath of disruption causes even more loss of learning. Additional learning time is lost as the teacher attempts to get the other students back on task after each disruption. In addition, the teacher has less capacity to give other students individual attention, because she or he must always keep an eye on the disruptive student.

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298. *See* Stanfield, *supra* note 9, at 2103 ("Most [regular classroom] teachers have neither the training themselves nor the experienced aides and specialists to help them cope.").

299. *See* Hymowitz, *supra* note 10, at 27 (describing problems with paraprofessionals).

300. *See* Editorial, *Behavioral Disorders*, St. Louis Post-Dispatch, Feb. 1, 1995, at 6B.

301. *See* Oberti v. Board of Educ., 995 F.2d 1204, 1208 (3d Cir. 1993). The child's behavior included repeated toileting accidents, temper tantrums, crawling and hiding under furniture, and touching, hitting, and spitting on other children, the teacher, and the teacher's aide. *See id.*

302. *See* Kittredge, *supra* note 227, at 1.

303. *Id.* (quoting Jan Carlton, President of New Hampshire Learning Disabilities Association, who stated that people get confused between "discipline and safety").

304. Stanfield, *supra* note 9, at 2104 (quoting Assistant Director of the Educational Issues Department of American Federation of Teachers).

More subtle effects creep in over time. A teacher who is constantly dealing with disruption may be discouraged from trying a certain kind of lesson for fear it may set off a response in the disruptive student. Dealing with frequent disruption also is likely to lead to physical exhaustion, and the teacher may simply have less energy and enthusiasm for the day-to-day activities in the classroom. Other students may model the disruptive behavior when they learn that this behavior has no severe consequences, thus compounding the problem.[305] The harm from disruption does not affect only nondisabled students. Nondisruptive *disabled* students who must sit in a class with disruptive students also suffer when discipline problems occur. Moreover, when a disabled student is disruptive, it must certainly affect the academic benefit that the disabled student would obtain from being in the regular classroom.[306]

In response to critics who point out that the education of nondisruptive students suffers if disruptive students cannot be removed to an alternative setting, advocates for the disabled simply respond that "federal law insists that provision be made for disabled students."[307] The suggestion that "[n]obody seems to care very much about the other kids in the classroom"[308] appears to have some merit. Where disabled students have advocates in congressional halls and in courtrooms who focus solely on the needs of the disabled student, "[n]ondisabled kids stand without advocates."[309]

### 2. *The Violent Student*

Although the IDEA amendments fail to acknowledge the problems presented by the disruptive student, they do attempt to address school

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305. *See* Dupre, *supra* note 9, at 826–29 (describing research regarding modeling). When teachers see student misbehavior and fail to stop it, students perceive that the teacher is intimidated and this encourages additional student misbehavior that might not otherwise occur. *See* Jackson Toby, *Getting Serious About School Discipline*, Pub. Interest, Sept. 22, 1998, at 71 (noting how minor student infractions contribute to sense of intimidation among teachers and encourage students to challenge other, more sacred, rules).

306. *See* Clyde K. v. Puyallup Sch. Dist. Number 3, 35 F.3d 1396, 1402 (9th Cir. 1994).

307. Mathews, *supra* note 146, at A5 (quoting Dale Mentink, attorney for Protection & Advocacy, Inc., who represented disabled student who hit two staff members and classmate).

308. *Inclusion: What to Do with the Disruptive Child*, Am. Pol. Network Daily Rep. Card, Sept. 14, 1994, at 5 (quoting Peter Idstein, former elementary school principal).

309. *Id.* Even though school officials take the needs of the nondisabled student into account, they must consider the needs of all students and must also take into account the mandates of the federal law that focuses solely on the rights of the disabled child.

discipline and the violent student. But the amendments fall short of offering sufficient protection for nonviolent students and school staff. Put simply, the statute requires that absent parental agreement, schools must meet an exceedingly high standard before moving a violent student from a classroom to an alternative placement.[310] Indeed, it is hard to think of another instance where adults with direct responsibility for children are prohibited by law from protecting those children unless a hearing officer determines there is *substantial evidence* that it is *substantially likely* that the children will be injured. "Substantial" evidence, though it falls somewhat below the reasonable doubt standard, is not an easy standard to meet. In fact, the statute defines "substantial" evidence as "beyond a mere preponderance," or beyond fifty percent.[311] Given that definition of "substantial evidence," it would appear that "substantially likely" means that the school must show that there is a more than fifty-percent likelihood that injury will occur before a violent student can be placed in an alternative setting.[312] Yet school districts may be liable in a negligence action for injuries inflicted by a violent student.[313] Moreover, the amendments make no provision for a sliding scale of proof for severe injury. For instance, if it were only thirty percent likely that injury would occur, but the injury would be serious, the likelihood of injury would not appear to rise to the "substantially likely" threshold.[314]

In addition, the statute does not delineate what type of injury will count in the alternative placement determination. Courts should avoid any invitation to rule that injury occurs for IDEA purposes "only when blood is drawn or the emergency room visited."[315] Injury from a punch or

310. *See* 20 U.S.C. § 1415(k) (Supp. III 1997).

311. 20 U.S.C. § 1415(k)(10).

312. *See* Bryant, *supra* note 65, at 515 (explaining that statute could be interpreted this way).

313. *See, e.g.*, Garufi v. School Bd., 613 So. 2d 1341, 1343 (Fla. Ct. App. 1993) (holding there was genuine issue of fact as to whether school district breached duty to person injured on school grounds by failing to protect her from student with extensive disciplinary history).

314. Although one pre-amendment opinion stated that even a five-percent likelihood of material personal injury or an appreciable danger of serious personal injury makes injury "substantially likely," *see* Clinton County R-III Sch. Dist. v. C.J.K., 896 F. Supp. 948, 950 (W.D. Mo. 1995), the new statutory language would appear to preclude such an interpretation today. One can only wonder how much this Missouri court's opinion, published in August 1995, was influenced by the well-publicized murder of Christine Smetzer in early 1995. *See, e.g.*, Diana Aitchison, *A Student's Murder Sparks Bitter Debate; Mainstreaming of Special Needs Students Under Fire in St. Louis*, Kansas City Star, Feb. 26, 1995, at B1; *see also infra* notes 384–89 and accompanying text (describing facts of Christine Smetzer's death).

315. Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223, 1230 (8th Cir. 1994) (rejecting this standard).

a push may be just as damaging to school discipline and learning as injuries from a bite or a puncture from a pencil.

Physical injury is not the only kind of injury that can be inflicted on other students and staff. Verbal insults, intimidation, sexual abuse, and threats have been deemed to constitute injury in the employment context.[316] Words of intimidation, threat, or abuse can have a devastating effect on the emotional well-being of a child who is the recipient of a verbal assault. In particular, other disabled students may be the object of insults because of their disability. The IDEA amendments fail to clarify if verbal assault is included in the statutory requirement of "injury."

Ironically, yet another federal statute has led the Supreme Court to assert that remarks by students that do not rise to the level of physical injury can deprive a child of educational benefits.[317] At least when such conduct is in the form of sexual harassment, schools officials now have an obligation under Title IX to take action to stop the abuse or face a damages action.[318] Thus, Title IX and IDEA together place schools in an impossibly difficult situation. School officials who attempt to comply with Title IX by removing an abusive disabled student to an alternative setting will run up against the disciplinary restrictions of IDEA. A "student's demand for a harassment-free classroom will conflict with the alleged harasser's claim to a mainstream placement under [IDEA]."[319] Moreover, IDEA—as Justice Kennedy recognized—"places strict limits on the ability of schools to take disciplinary actions against students with behavior disorder disabilities, even if the disability was not diagnosed prior to the incident triggering discipline."[320]

Sexual abuse by disabled students is not limited merely to abuse of other students. Teachers, aides, and school therapists are also victims of sexual or physical abuse[321] or improper sexual touching.[322] Indeed, some educators and commentators agree that the only way to ensure that

316. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

317. *See* Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661 (1999).

318. The plaintiff in *Davis* asked for $500,000 in damages. *See id.* at 1689 (Kennedy, J., dissenting); *see also* George F. Will, *Six-Year-Old Harassers?*, Newsweek, June 7, 1999, at 88.

319. *Davis*, 119 S. Ct. at 1690 (Kennedy, J., dissenting).

320. *Id.* at 1682 (Kennedy, J., dissenting); *see also* Will, *supra* note 318, at 88.

321. *See* Lindberg, *supra* note 156, at 8 (describing sexual and physical assaults on teachers and staff, some that left bruising).

322. *See id.* (describing numerous instances where disabled student grabbed genitals and buttocks of teacher, aide, and occupational therapist).

students and staff are protected when a violent student is thrust back into the classroom may be to hire security guards.[323]

Even if the likelihood-of-injury standard is met, the school must also demonstrate that it made reasonable efforts to minimize the risk of harm from the disabled student. The determination of what kinds of efforts are "reasonable" to minimize the risk of harm from a violent student is left open, a clear invitation for litigation. The wording of the statute may cut two ways. It provides that the hearing officer must consider whether the school "*has made* reasonable efforts,"[324] a search into past decisionmaking. One commentator has pointed out that this factor is likely to convince courts to determine that because the behavior continued, past efforts inevitably have not been reasonable, and the school would then be forced to deal with a dangerous student outside the alternative placement.[325]

This interpretation seems unduly strict, as the statute's requirement of "reasonable" efforts could also be interpreted to mean that inquiry into these efforts (by a hearing officer or a judge) must consider the child's previous behavior patterns and the information that was available at the time the misconduct occurred. For example, if the conduct initiating the discipline had not been exhibited previously, the school's failure to address the behavior might be reasonable. But if the conduct initiating the discipline had been exhibited previously, parents could challenge any intervention the school attempted as not being a reasonable attempt to minimize the risk of harm to others, a challenge that will take considerable time and resources to defend, even if the school ultimately prevails.

If the school has not made reasonable efforts to intervene with problematic behavior that it was aware of, the statute requires that the school be "punished" by having to deal immediately with a dangerous student outside the alternative setting. This may include dealing with a dangerous student in the regular education classroom or otherwise in the school setting.[326] This "punishment," however, sweeps too broadly, for it

323. *See* Bryant, *supra* note 65, at 520 (stating that few behavior plans other than security guards would have immediate and guaranteed results); *id.* at 520 n.190 (quoting principal who reported that school system had to resort to "hiring 'muscle' or 'protection' simply to protect our staff and other students"); *see also* Rachelson, *supra* note 158, at 128.

324. 20 U.S.C. § 1415(k)(2)(E) (Supp. III 1997) (emphasis added).

325. *See* Bryant, *supra* note 65, at 519.

326. *See id.* at 520.

is not only the educators (who presumably had the power at least to make efforts to minimize the risk of harm) who will be punished. The other students—who are now exposed to a student who is dangerous and disruptive—are also "punished," as the school and the other students attempt to deal with this student in the classroom without loss of learning time or injury.

The dangerous student, however, learns that school officials are powerless to stop his or her violent behavior. By the time a school has gathered and documented all the evidence needed and finally enters the administrative proceedings required by IDEA, the student has many opportunities to perpetrate further violence and disruption.[327] Litigation is "simply too slow and too costly to deal adequately with the rapidly changing needs of children."[328] Perhaps not surprisingly, disabled students reportedly brag to other students and teachers that they cannot be expelled.[329]

Consider the case where a middle-school-aged student committed from eleven to nineteen aggressive acts per week over a two-year period; at least thirty of these acts required treatment by the school nurse. The school attempted many behavior interventions to minimize the risk of harm to others, including hiring a *second* full-time teacher and a full-time aide, hiring a behavior consultant recommended by the parents, providing special training for the staff in behavior management and crisis intervention, and providing support staff so the student could participate in after-school activities. None of the interventions or supports worked, but school officials tried for two years while students and staff endured an abusive and disruptive environment. Finally, school officials were confident that they had met all the requirements to request a placement change to a more restrictive classroom. When the parents objected to the determination by the hearing officer, the school then defended its proposal in district court and appellate court before it could finally rest the case and place the student in a more restrictive educational environment.[330]

The new amendments do little to change this pattern or to instill confidence in educators that they can and should act swiftly and

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327. *See* Rachelson, *supra* note 158, at 128.

328. Clyde K. v. Puyallup Sch. Dist. Number 3, 34 F.3d 1395, 1400 n.5 (9th Cir. 1994).

329. *See* Anderson, *supra* note 134, at 31 (referring to deposition filed in case involving student who had brought .357 Magnum to school).

330. *See* Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223, 1231 (8th Cir. 1994).

purposefully when faced with violent student behavior. Some behaviors simply cannot be managed in the regular classroom. Yet other students are nonetheless required by law to attend school and to deal with a severely disturbed child. There is no adequate remedy for the murdered Christine Smetzer or for any student who is injured or deprived of educational opportunity because a disruptive or violent disabled student is allowed to remain in a classroom setting.

### 3. *Curing the Behavior Problem*

Even if the school is able to meet the burden required to move a violent student to an interim alternative setting, developing the alternative setting required by the statute is a long and arduous process in and of itself that may take up to sixty to ninety days to complete.[331] The process may also be expensive as schools will have the burden of producing expert testimony to meet these standards.[332] The school must ensure that the alternative setting will enable the student to continue to participate in the general curriculum and to receive the services set out in the IEP. Although the purpose behind this provision—to ensure that the disabled student's education can continue during the time in the alternative placement—is legitimate, the burden of creating the alternative program should not weigh so heavily on economic resources or on teacher time that it interferes with the education of other students.

In addition, the statute requires that the IEP set forth modifications that will address the behavioral problem so that it does not reoccur.[333] Another provision requires schools to develop a behavioral intervention plan, or modify an existing plan to address the behavior ten days after taking any disciplinary action allowed by the statute.[334] Teachers certainly should (and usually do) attempt different intervention strategies to address the serious behavior problems of disabled students.[335]

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331. *See Hearings on the Individuals with Disabilities Education Act: Hearings Before Subcomm. on Early Childhood, Youth, and Families of the Comm. on Econ. and Educ. Opportunities*, 104th Cong. 387 (1995) (statement of William Boucher, Jr., Superintendent of Public Instruction, Commonwealth of Virginia) (stating that according to experience in his state, developing alternative placement often takes 60 to 90 days).

332. *See Federal Disability Policy Hearings*, *supra* note 22, at 90 (statement of Charles L. Weatherly).

333. *See* 20 U.S.C. § 1415(k)(1)(B)(i)–(ii) (Supp. III 1997).

334. *See* 20 U.S.C. § 1415(k)(1)(B)(i)–(ii).

335. An example of interventions attempted to improve the behavior problems of one disabled student included "explaining proper behavior to the boy; providing a 2–1 pupil-teacher ratio for field

Sometimes a different intervention strategy will help some students change some behavioral patterns. But the premise underlying these statutory provisions seems to be that all severe behavioral problems could be solved if only the school would set forth the correct program.[336] "Like a team of doctors, experts are supposed to 'diagnose' a child's malady and then recommend the proper course of treatment."[337]

Even if educators were able to evaluate a disabled student's precise problems accurately—a doubtful proposition—serious behavioral problems simply may not be curable by the modification plans that can be used in the public schools.[338] Indeed, even trained psychiatrists and psychologists are unable to determine how best to correct antisocial behavior. Recall that the full-inclusion movement has resulted in more and more severely disturbed disabled children being placed in regular classrooms for all or part of the day.[339] The classroom teachers—even with help from teacher's aides, guidance counselors, and school psychologists—simply may not be equipped to remedy the serious problems exhibited by certain disabled students. "Realistically, there are a limited number of ways to individualize teaching."[340]

In addition, a disabled child who is included in a general education school (or a special education classroom) is there for only a few hours a day Monday through Friday. Even assuming that the educational plan sets forth behavioral interventions that could help alleviate some behavior problems if delivered consistently, the disabled student still must go to a home every afternoon and every weekend that may not

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trips; providing a teacher to work individually with him during group speech therapy; isolating him from other pupils when necessary; and assigning him a personal assistant." Lindberg, *supra* note 156, at 8.

336. *See* Mathews, *supra* note 146, at A5 (quoting attorney for student who hit two staff members and classmate as stating that behavior would not have occurred if student had received individual attention school should have given her); *see also* Clyde K. v. Puyallup Sch. Dist. Number 3, 35 F.3d 1396, 1400–01 (9th Cir. 1994) (involving parents claiming that personal aide would solve severe behavioral problems in regular classroom, which included name-calling and profanity in classroom, kicking furniture, directing sexually explicit remarks to female students, and numerous assaults); Oberti v. Board of Educ., 995 F.2d 1204, 1208 (3d Cir. 1993) (noting that parents requested aide but aide placed with child did little to resolve behavior problems).

337. Hymowitz, *supra* note 10, at 27; *see also* Rachelson, *supra* note 158, at 139 (noting possibility of misdiagnosing students as suffering from Attention Deficit Disorder).

338. *See Federal Disability Policy Hearings*, *supra* note 22, at 73 (statement of Marcia Reback); Hymowitz, *supra* note 10, at 27.

339. *See, e.g.*, *Oberti*, 995 F.2d at 1208 (listing toileting accidents, temper tantrums, crawling and hiding under furniture, hitting, and spitting on other children).

340. Hymowitz, *supra* note 10, at 27.

always reinforce these behavioral interventions. After all, parents and babysitters are not bound to follow an IEP.[341] Sadly, some parents will simply not take the time or have the energy to follow through with the behavior interventions. This may be due to unwillingness or inability—either from lack of capacity or because time is taken up with other children, stressful jobs, or even personal problems that may include alcohol or drug abuse.[342]

At some point, people in the United States must come to terms with the fact that our nation's public schools simply do not have the resources to solve every societal problem. We have confused our belief that *education* can itself solve many social problems with the notion that the public school as an institution can solve these problems. But the school is merely a means—a conduit, if you will—to give students access to education. When the public school institution cannot solve a severe and intractable problem, the public must accept this limitation. Instead, the focus should be on how best to deal with the problems in the learning environment while continuing to educate students—to propel them forward in academic competency.[343]

*4. Relating the Disability to the Misconduct*

The standard for determining if a student's misconduct is a manifestation of his or her disability—whether the disability impaired the student's ability to understand consequences and control behavior—is problematic. First, an IEP team may lack sufficient expertise in psychiatry to determine the relationship between disability and understanding of consequences and the relationship between disability and behavior control. The regulation states that the review must be conducted by the IEP team and also by "other qualified personnel."[344] "Other qualified personnel" may include "individuals who are knowledgeable about how a child's disability can impact on behavior or

341. *See id.* (describing chaotic home life of many students who are defined as learning disabled).

342. *See id.* (describing how unemployed, unmarried mother of 12-year-old disabled boy with three younger children has no time to check on her son).

343. *See* Dupre, *supra* note 9, at 842 (describing classroom as community of learning where students perform in group that is propelled forward in academic competency). After all, other institutions—church, family, legislatures—have not been able to solve many societal problems. This does not mean that schools or society should give up on these problems, but that the public should recognize the limitations of institutions and be willing to work within those limitations.

344. 34 C.F.R. § 300.523(b) (1999).

on understanding the impact and consequences of behavior," as well as other persons "knowledgeable about" the student's disability.[345] This may include the student's treating physician and other experts the parents may provide. Underlying the addition of these persons to the review team is the recognition that this review is a time-consuming, complex, multifaceted inquiry.

Even if the IEP team and "other qualified personnel" could determine that a student's misconduct was a manifestation of the disability because he could not understand its consequences and could not control his behavior, the statute misses some important points. It does not explain what degree of impairment is necessary before the statute's provisions apply. It requires the school to prove a negative—that the misconduct was *not* a manifestation of the disability. Moreover one of the very *purposes* of discipline is to teach students what the consequences are for misconduct and to teach them to control their behavior in the future. Indeed many, if not most, *nondisabled* children fail to understand the consequences of their behavior or are unable to control it on occasion. Swift and consistent discipline teaches them what the societal consequences are.

The problem with the standard in the statute is that it 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. If school officials are hesitant to discipline this student or feel compelled to invoke time-consuming procedures before they feel confident they are able to do so, the student instead learns that he can get away with misconduct and may never learn to understand its consequences or to control it.

The statute appears to allow a disabled student to claim that low self-esteem caused by the disability impaired his or her understanding or control.[346] This would mean that the disabled student could always invoke the protections of IDEA for any misconduct—drug dealing, violent acts, sexual harassment—and that the disabled student would likely be disciplined differently from a nondisabled student, especially in

345. 34 C.F.R. pts. 300 and 303, Attachment 1, Analysis of Comments and Changes, 64 Fed. Reg. 12,625 (1999).

346. In *School Board v. Malone*, the court disagreed with an IEP committee that found no causal connection between the student's disability and his drug dealing. *See* 662 F. Supp. 978, 980 (E.D. Va. 1984), *aff'd*, 762 F.2d 1210 (4th Cir. 1985). The court decided that the student's disability caused low self-esteem, which caused him to be susceptible to peer pressure, and that the learning disability prevented the student from understanding the long-term consequences of his actions. *See id.*

schools with zero-tolerance rules.[347] This provision may simply result in most students with disabilities being immune from regular education disciplinary action.[348]

Researchers have suggested that reviewing a student's behavior systematically, starting with the academic and disciplinary record, is one way to address the manifestation issue.[349] One researcher contends that steady academic progress for several years followed by little academic growth and behavior problems suggest a connection between the behavior and the disability, as does a pattern of behavior indicating lack of judgment and deficient social skills over time.[350] Serious acts of misbehavior that are not typical for the child and that do not follow a change in placement suggest that no relationship exists.[351]

Although determining the connection between the behavior and the disability is problematic in and of itself, the review team cannot even reach that point unless it has first assessed the IEP. The statute requires that the review team determine if the IEP and placement were appropriate *before* it makes the manifestation determination.[352] The determination whether—in relationship to the misbehavior—the IEP and placement were appropriate is fraught with possible problems. First, it seems to put the cart before the horse. If the behavior is unrelated to the disability, the IEP and behavior intervention strategies are irrelevant.[353] Second, the statute does not require that the hearing officer or court determine if a different placement or IEP would make a difference in the behavior, that is, whether the misconduct would be substantially less likely to occur in another placement.

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347. *See* Yell, *supra* note 70, at 66 (noting that good lawyer could probably convince court that misbehavior is always related to disability); *see also* Doe v. Maher, 793 F.2d 1470, 1481–82 (9th Cir. 1986) (noting that misconduct of emotionally handicapped student will always be related to disabling condition).

348. *See* Bryant, *supra* note 65, at 529 (contending that this provision will have "enormous impact"); Mary E. Broadhurst, Comment, *The Legal Limits of School Discipline for Children with Handicaps*, 69 Or. L. Rev. 117, 131–32 (1990) (stating that expelling students for behavior that comes from low self-image created by disability contravenes original purpose of IDEA, which was to rectify situation where students with disabilities were excluded from school because of their behavior).

349. *See* Yell, *supra* note 70, at 67 (citing research).

350. *See id.*

351. *See id.*

352. *See* 20 U.S.C. § 1415(k)(4) (Supp. III 1997).

353. *See* Bryant, *supra* note 65, at 528.

Considerable school and teacher time and resources may be spent on this procedure—time and resources that could be spent teaching children.[354] Moreover, because a determination that conduct is not a manifestation of the disability may result in harsher discipline, it is "highly likely [to] be challenged,"[355] and the statute provides that parents may request an expedited hearing to do so.[356] The statute states that the school has the burden of demonstrating that the behavior was not a manifestation of the disability, but the statute does not supply the standard of proof that must be offered.[357] After going through the administrative procedures, either the parent or the school may bring a civil action in a state or federal court.[358] Not only will the litigation prove costly, both economically and in terms of time and energy of the educators involved, but a loss on this issue (or any other litigated under the statute) opens the door to the school district's being sued for attorneys' fees.[359] Although the courts have stressed that a group of professionals makes this difficult decision, "courts have often overturned decisions [of these] specialized teams" in the past.[360]

IDEA's new manifestation provisions go beyond even a double standard and set up triple standards of discipline.[361] One commentator

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354. *See* Doe v. Maher, 793 F.2d 1470, 1482–83 (9th Cir. 1986) (acknowledging how difficult this manifestation determination is, but stating that states accepting federal funds must also accept burden that Congress set up to go with them). The statute clearly mandates this time- and resource-consuming manifestation determination by numerous trained persons every time a school wishes to impose even a short-term suspension, as well as any suspension for more than 10 days, although the regulations do not require the review for suspensions of less than 10 days that do not constitute a pattern. *See supra* notes 274–75 and accompanying text.

355. Allan G. Osborne, *Making the Manifestation Determination When Disciplining a Special Education Student*, 119 Educ. L. Rep. 323, 324 (1997).

356. "Expedited" is not defined in the statute.

357. *See* 20 U.S.C. § 1415(k)(6)(B)(i) (Supp. III 1997).

358. *See* 20 U.S.C. § 1415(i)(2)(A) (Supp. III 1997).

359. *See* 20 U.S.C. § 1415(i)(3)(B) (Supp. III 1997).

360. Yell, *supra* note 70, at 67.

361. *See* Kronholz, *supra* note 17, at A24. This triple standard occurs because of the IDEA provision that requires schools to provide educational services for all expelled or suspended disabled students—even those whose misconduct was not related to the disability. *See* 20 U.S.C. § 1412 (Supp. III 1997). Consider the case in Missouri where four students used methamphetamines at school. The two general education students were suspended for one year. The third student was learning disabled, but his disability was deemed *not* linked to his misconduct. He received a one-year suspension but was given a home tutor. The fourth student's disability was deemed linked to his misconduct. He received a 10-day suspension and then returned to school. *See* Kronholz, *supra* note 17, at A24.

has suggested that because 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."[362] Given all the difficulties in making the manifestation determination, the ease with which it can be challenged, and the practical problems that will occur in educating the disabled student whose conduct is not related to the disability during a period of expulsion or suspension, school districts will have every incentive to determine that the misconduct is a manifestation of the disability most of the time.[363]

Although this may be easier for schools in the long run and it may be welcomed by parents of some disabled students who misbehave but will receive less harsh punishment, it may do more harm than good—both to the disabled student whose behavior is at issue and to all disabled persons generally. Ironically, this provision may result in a stigma against the disabled that many advocates for the disabled fight so hard to overcome. The upshot of this provision and its practical consequences may simply be that the disabled will be viewed as consistently having no understanding or control over their behavior, surely a prejudice that many in the disabled community have worked for years to dissipate.

*5. Treating Students as if They Are Disabled*

This provision was put in place to ensure that students who may have disabilities do not get ignored, while attempting to prevent students from manufacturing a disability to avoid punishment. A student who misbehaves can be treated as if he is disabled for disciplinary purposes if the school "had knowledge" of the disability.[364] The statute does not explain whether the student is to be treated as disabled while the school and the parents litigate the issue of whether the school "had knowledge."

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Some educators maintain, "When the disability is not the cause of the misbehavior, the miscreant should not be entitled to federally imposed special treatment which has the effect of teaching the student that he or she is 'above the law.'" Cumming, *supra* note 293, at 1C (quoting Georgia School Boards Association Vice-President Gary Ashley).

362. Yell, *supra* note 70, at 67.

363. *See* Dixie S. Huefner, *Another View of the Suspension and Expulsion Cases*, 57 Exceptional Children 360, 364 (1991) (agreeing that schools may wish to avoid practical difficulties of determining whether misconduct is related to disability).

364. 20 U.S.C. § 1415(k)(8)(B) (Supp. III 1997).

Moreover, the broad definition of knowledge "errs on the side of overprotection."[365] This provision would come into play if a parent were to contend that *any* school employee expressed concern about the behavior of a student to *any other* school employee.[366] Expressing concern about a student's behavior is a common occurrence among administrators, teachers, aides, and even cafeteria workers and bus drivers. Indeed, a conversation of this nature is a likely occurrence among educators dealing with a student that the school is attempting to discipline. Surely, not every student whose misbehavior results in a conversation with a co-worker is disabled. According to the statutory language, however, if such a conversation takes place, the school is deemed to have knowledge that the student had a disability and the extensive disciplinary protections of IDEA are set in motion. The regulations attempt to narrow this broad statutory language. The regulations quote the statutory language but add a modifier—"other personnel *in accordance with [the school's] established child find or special education referral system.*"[367] Despite its apparent virtue, there is nothing in the statute to support this limitation.

Even if no conversation between school personnel takes place, the statutory language gives students and parents yet another tool to claim disability disciplinary protections for each and every misbehavior. According to the statute, each time the student misbehaves, the parents or student need only claim that the misconduct itself shows the student needs special services.[368] Indeed, one commentator has stated that a strong argument exists that repeated behavioral incidents that result in expulsion are sufficient to qualify the student as disabled under the Act,[369] and some Justices of the U.S. Supreme Court agree.[370] Even if a

365. Huefner, *supra* note 21, at 1110; *see also* Vicky M. Pitasky, *The Year in Review: IDEA Reauthorization Takes Spotlight*, Cal. Special Educ. Alert 3 (Feb. 1998) (pointing out that critics of provision claim that knowledge standard will be easy to prove and will not guard against sham claims it was supposed to weed out).

366. *See supra* note 280 and accompanying text.

367. 34 C.F.R. § 300.527(b)(4) (1999).

368. *See supra* note 280 and accompanying text.

369. *See* Bryant, *supra* note 65, at 492. This seems analogous to the contention in criminal law that if the accused commits a murder that is heinous enough, that is sufficient to show that he is insane and thus should receive any protection available under an insanity defense. Jeffrey Dahmer, in perhaps one of the most publicized forays into this arena, was unsuccessful in his claim that he was insane. *See Insanity Defense by Dahmer Fails*, N.Y. Times, Feb. 16, 1992, at 24.

370. *See* Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1682 (1999) (Kennedy J., dissenting) (joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas).

school ultimately prevails on such a claim, the student nonetheless obtains a benefit, and the provision gives troubling incentives to nondisabled students who wish to abuse the system.[371] Anytime a student or parent makes either of the above contentions, the district must provide the student with the disciplinary protections provided in the statute until it determines through evaluation and testing (which often is time-consuming) whether the student has a disability.[372] In the meantime, students will be protected for all kinds of bad conduct.

This provision also gives educators troubling incentives. Some educators may curtail their discussion of problem students to avoid the first prong of the knowledge element. Or educators may feel obligated to overevaluate students for any perceived problem. Teachers and other school officials may be inclined not to discipline students at all to avoid the complicated, resource-draining procedures.[373]

### 6. *The Loss of Suspension and Expulsion as Disciplinary Tools*

Certainly one upshot of the new IDEA amendments may be that suspension and expulsion will no longer be a viable disciplinary tool for

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> If . . . the behavior that constitutes actionable peer sexual harassment so deviates from the normal teasing and jostling of adolescence that it puts schools on clear notice of potential liability, then a student who engages in such harassment may have at least a colorable claim of severe emotional disturbance within the meaning of IDEA.

*Id.*

371. Before the 1997 amendments, case law in the Ninth Circuit applied IDEA to students who had not yet been determined to have disabilities. *See* Hacienda La Puente Sch. Dist. v. Honig, 976 F.2d 487, 492 (9th Cir. 1992). But a district court, obligated to follow the court of appeals, noted:

> [T]he plaintiff has benefitted greatly from his invoking of the statute. The plaintiff is a senior who was facing expulsion and thus would not have graduated with his class. Because IDEA's hearing process will take several months to complete, even if the student is ultimately found to be not disabled, by invoking IDEA the plaintiff will achieve the goal of graduating with his class and avoiding expulsion.

M.P. v. Governing Bd. of Grossmont Union High Sch. Dist., 858 F. Supp. 1044, 1048 (S.D. Cal. 1994).

372. *See* 20 U.S.C. § 1415(k)(8)(A) (Supp. III 1997); *cf.* Laura F. Rothstein, *Higher Education and Disabilities: Trends and Developments*, 27 Stetson L. Rev. 119, 125 (1997) (noting that area of increasing concern in higher education is re-admission of students who did not discover learning disability until after academic failure, but pointing out that higher education programs "are required to accommodate only known disabilities").

373. *See New Law Confuses Schools*, Orlando Sentinel, July 5, 1998, at A6 (describing how parents, teachers, and school officials spent hours preparing seven-page document on how to meet disabled student's special needs after he was suspended for five days for sexual harassment).

any student.[374] Except for one suspension of less than ten days, schools must provide educational services to any disabled student, regardless of whether the misconduct was a manifestation of the disability.[375] The requirements regarding the interim alternative educational setting for a disabled student who is sufficiently violent or who violates the drug-and-weapon provision involve considerable time and resources. Moreover, the perceived unfairness of providing educational services to disabled students who are suspended or placed in an alternative setting, while providing no such services to nondisabled students for identical conduct, may simply make this disciplinary device untenable in many circumstances.

Some argue that the loss of suspension and expulsion is a good development.[376] In fact, suspension may not be a particularly enlightened disciplinary tool. Students are out of school, often unsupervised, where they have the time and opportunity to get into more trouble. Nonetheless, because suspension is certainly viewed as undesirable by parents and students—as evidenced by the challenges that occur when schools attempt to suspend a student—it may still serve as a deterrent to bad behavior.

Despite the ongoing arguments about the efficacy of suspension, it is ironic that traditional disciplinary tools are being curtailed by federal law at the same time the clamor for school order and "zero tolerance" is increasing.[377] Although expulsion may not always be in the best interest of the expelled student, it may be in the best interests of the students remaining in school.[378] When a student is merely placed in a study carrel

374. *See* Bryant, *supra* note 65, at 492 (claiming that "the new law renders it politically and practically difficult to continue the dual system of school discipline" and thus will end expulsion as disciplinary tool for all students). At least in some school districts, school expulsion was already rare even before the new IDEA amendments because it was seen as interfering with the student's right to attend public schools. *See* Mansnerus, *supra* note 250, § 14, at 1.

375. *See* 34 C.F.R. §§ 300.121(d)(2)(i)(B), 300.520 (1999).

376. *See* Bryant, *supra* note 65, at 549–55. *But see* Goss v. Lopez, 419 U.S. 565, 580 (1975) ("Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device.").

377. Zirkel, *supra* note 161, at 569 (pointing out how schools are caught between "zero tolerance" policy regarding guns and "zero reject" policy for disabled students); Perry A. Zirkel, *Supporting Suspenders*, Phi Delta Kappan, Nov. 1999, at 257 (contending that "new school law" trend exists where courts are curtailing students' constitutional rights and supporting public school officials who are attempting to deal with perceived threats to societal security, but pointing out that statutory countertrend exists in terms of rights of students with disabilities).

378. *See* Rachelson, *supra* note 158, at 148.

or timeout room or in detention, students, teachers, and staff are still in danger before and after school and while the student is in common areas like school corridors and restrooms.[379] Even timeout rooms are being attacked, however, as an inappropriate disciplinary tool.[380]

The loss of long-term suspension or expulsion for some disabled students or even as a disciplinary tool in general might not be such a great loss if schools had other alternatives for placement that would avoid disrupting the education of other students. Some counties in Georgia are trying "boot camps" so that troubled students are not merely out on the streets, but are working and—it is hoped—learning, perhaps even learning to control their improper behavior.[381] Vermont has started a program for disruptive disabled students called "Success School," a separate school with low teacher-student ratio and numerous teachers' aides, to educate students who, if left in a regular classroom, "can intimidate teachers and cause so much disruption that other students cannot learn."[382] Of course all such programs raise resource-allocation issues.[383] Moreover, for a disabled student, moving to a boot camp or the Success School would be considered a change in placement that must be afforded all the procedural protections of IDEA. Parental permission would be needed or the school may need to go to court to effect this kind of change. A placement in an alternative school (and even in-house suspension or study carrels) that lasts over a certain period or that is used repeatedly may also be deemed a change in placement for a disabled student if the student has an IEP that states that he or she is to be

379. *See id.* at 149. Recall the case of Christine Smetzer. *See supra* notes 67–68 and accompanying text; *infra* notes 386–90 and accompanying text.

380. *See, e.g.*, Jordana Hart, *School Closes 'Timeout' Room*, Boston Globe, Oct. 31, 1998, at B1 (describing how "outraged parents" succeeded in having timeout room closed and sought ouster of principal who used it to calm down uncontrollable students).

381. *See* Michael Weiss, *Forget Suspension; In Newton Troublemakers Go to Boot Camp*, Atlanta J. & Const., Mar. 23, 1995, at R1. The New York City Board of Education has also voted to establish three middle schools and three high schools to educate 300 of the city's most violent students. *See* Somini Sengupta, *School Board Is to Create Schools for Violent Students*, N.Y. Times, Mar. 6, 1997, at B2; *see also* Steve Bickerstaff et al., *Preserving the Opportunity for Education: Texas' Alternative Education Programs for Disruptive Youth*, 26 J.L. & Educ. 1 (1997). *But see* Editorial, *Inappropriate Penalty for Students*, Atlanta J. & Const., Oct. 15, 1995, at C6 (criticizing boot camps).

382. Joetta L. Sack, *Disruptive Spec. Ed. Students Get Own School*, Educ. Wk., Apr. 16, 1997, at 1.

383. For example, it costs the Vermont school district roughly $11,000 to educate a disabled student at the Success School, compared with the $3824 it spends per student in regular classes. *See id.* The establishment of the so-called Second Opportunity Schools in New York City is estimated to cost $7.2 million. *See* Sengupta, *supra* note 381, at B2.

educated in a regular classroom. Thus, a disabled student who disrupts a classroom may challenge any disciplinary act that removes the student from a regular classroom. In essence, the nondisabled students are deemed part of the disabled student's education plan, and separation from them, even if the disabled student is impeding their education, may violate IDEA.

### *7. Reporting Misconduct*

#### *a. To School Officials*

The murder of fifteen-year-old Christine Smetzer in a school restroom in St. Louis was the impetus behind the new provision that allows a transferring school to tell the new school about a disabled student's discipline problems.[384] The convicted murderer was a special education student who had been diagnosed with a behavior disorder and who had a history of discipline problems.[385] This student had attended a school that served only disabled students—the "most supervised, controlled environment for behavior-disordered students."[386] He was subsequently transferred to Christine's school (supposedly as part of a mainstreaming or inclusion effort and an IEP plan that called for his transfer from one high school to another) where he would attend fewer special education classes. The new school was not informed of the student's problems.[387] Two days after the transfer, Christine was murdered, her head flushed in the toilet, and her beaten and half-clothed body wedged between the toilet and the wall.[388]

As a result of this tragedy, Missouri Senator John Ashcroft pushed for this provision that now enables school officials to be informed about students with a history of disciplinary problems.[389] Of course, what schools are able to do once they are informed may be another matter.

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384. *See* David L. Greene, *New Law for Tracking Disciplinary Records of Disabled Students*, St. Louis Post-Dispatch, June 5, 1997, at 8A.

385. *See* Aitchison, *supra* note 314, at B1; Virginia B. Hick et al., *Behavior-Disordered Students Pose Dilemma*, St. Louis Post-Dispatch, Jan. 29, 1995, at 1D.

386. Hick et al., *supra* note 385, at 1D.

387. *See* Tim O'Neil & Virginia B. Hick, *Principal: "We Didn't Know Anything About This Kid,"* St. Louis Post-Dispatch, Feb. 24, 1995, at 13A.

388. *See id.*

389. *See* Editorial, *Bright Idea for Students with Disabilities*, St. Louis Post-Dispatch, June 8, 1997, at 2B; *see also* Hick et al., *supra* note 385, at 1D.

Subjecting students to surveillance or an escort when they pass between classes or go to the restroom—apparently one measure that might have helped with this particular student—may be problematic (putting aside the economic cost of such an undertaking). If inclusion and mainstreaming are supposed to avoid stigmatizing a disabled student, parents may object to their child's being treated differently without more proof that the student would harm others.

Some states have passed statutes that require the state courts to notify school systems when students have been convicted on felony charges. For example, the Georgia General Assembly recently passed a statute that requires the superior court to notify the school superintendent within thirty days of a felony conviction of any student who is at least seventeen years of age.[390] Another recently enacted statute requires the court to provide such notice for any student between thirteen and seventeen who is convicted or adjudicated delinquent for murder, voluntary manslaughter, rape, aggravated sodomy, aggravated child molestation, sexual battery, and armed robbery committed with a firearm.[391] Information received by the court "or from any other source" that a transferring student has been convicted of a felony must be shared with "all teachers to whom the student is assigned."[392] These provisions at least make teachers aware of past problems with their students, nondisabled and disabled alike, and may enable them to structure the classroom environment to avoid future misconduct.

*b. To Parents*

Both IDEA and the Family Educational Rights and Privacy Act (FERPA)[393] protect disabled and nondisabled students from disclosure of their educational records to unauthorized third parties.[394] FERPA defines

390. *See* Ga. Code Ann. § 15-6-36(b) (1998).

391. *See* Ga. Code Ann. § 15-11-5(b)(2)(A)(i)–(vii) (1998); *see also* Conn. Gen. Stat. Ann. § 10-233h (West 1996) (providing for notification for felony or class A misdemeanor); Fla. Stat. Ann. § 985.207 (West 1997) (providing for immediate notification to school district for violation of law that would be felony if committed by adult or that involves crime of violence).

392. Ga. Code Ann. § 20-2-671 (1998).

393. 20 U.S.C. § 1232g (1994).

394. *See* 20 U.S.C. § 1417(c) (Supp. III 1997) ("The Secretary shall take appropriate action . . . to assure the protection of the confidentiality of any personally identifiable data, information, and records collected . . . pursuant to the provisions of this subchapter."); *see also* 20 U.S.C. § 1232g(b)(1) ("No funds shall be made available . . . to any educational agency or institution which

"educational records" to include both special education records and disciplinary records.[395] The new IDEA amendments allow no exception for informing the parents of children who will be exposed to violent students in classrooms and in other areas at school. Yet the states' compulsory education laws force all children to attend school, and federal disability law may cause a severely disturbed student to be in a regular classroom (or physical education class or music class) seated near other students whose parents may be completely unaware that their children may be exposed to danger. To be sure, children may be exposed to danger from nondisabled students as well as disabled students. It may be easier, however, for school officials to deter repeated violent behavior from a nondisabled student. Recall that a violent *disabled* student can be removed from a classroom (for not more than forty-five days) only if the school can convince a hearing officer (and a judge, if the parent continues to litigate) with *substantial* evidence that the disabled student is *substantially* likely to result in injury to others, a heavy burden to meet. Parents might wish at least to have the option of removing their own child from a classroom (or a school) if they determine that they do not wish their child to be in a situation where it is even *somewhat* likely that their child will be injured.

Under the laws known as "Megan's Laws," law enforcement officers *are* required to notify communities about certain convicted sex offenders.[396] Of course, these laws involve only persons who have been convicted of special offenses. The purpose of the law is to warn the parents of children who *may* come in contact with a convicted sex offender to avoid the potential for repeated violence.[397] Violent students in the classroom (both nondisabled and disabled) may not provide the same risk of harm as a convicted sex offender.[398] Yet a child is usually not *forced* to come into contact with a convicted adult sex offender in the same way a student may be compelled to be near a violent disabled

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has a policy or practice of permitting the release of education records . . . without the written consent of [students'] parents."). Privacy may also be protected under state law or the federal Constitution.

395. 20 U.S.C. § 1232g(a)(4)(B).

396. Stephen McAllister, *Megan's Laws: Wise Public Policy or Ill-Considered Public Folly?*, 7 Kan. J.L. Pub. Pol'y 1 (1998) (describing laws).

397. *See* Robert J. Martin, *Pursuing Public Protection Through Mandatory Community Notification of Convicted Sex Offenders: The Trials and Tribulations of Megan's Law*, 6 B.U. Pub. Int. L.J. 29 (1996).

398. *But see supra* notes 384–88 and accompanying text (describing rape and murder of Christine Smetzer at school by fellow student).

student. With regard to the school scenario, nonviolent students may be compelled to attend the same school as a severely violent student, directed to the same classroom, or even told by a teacher to sit next to that student.

*c. To Law Enforcement*

The IDEA amendments may prove the impetus for a change in school discipline regarding violent crime in school. The amendments clarify that schools may report crimes committed by disabled students to law enforcement without triggering all the IDEA protections. To avoid time- and resource-consuming hearings and court battles, schools may simply report a criminal act like assault to juvenile authorities. In essence, schools may use the referral to the juvenile authorities as a disciplinary tool because the more traditional disciplinary tools have become so cumbersome under IDEA.[399]

The report rate for juvenile violent crimes in schools currently is purported to be significantly less than that of juvenile street crime.[400] This may be due to the perception that the juvenile justice system is an ineffective deterrent or punishment that fails to rehabilitate violent offenders or because school officials wish to deal with the problem "in-house" for political reasons. An increase in reported violent crime may give the impression that school administrators have lost control of the school.[401] Teachers, who traditionally have acted *in loco parentis* (in the place of the parent) may have the same reluctance of a parent to report a student to the police because of concerns about stigma or because it may harm the child emotionally. Or teachers may not wish to deal with yet one more layer of bureaucracy and paperwork.

Failing to report violent crime in school is problematic for many reasons. It reinforces the bad conduct for the student perpetrator as well as for other student observers, who see that nothing really serious

399. This would violate Section 504 of the Rehabilitation Act of 1973 if only disabled students were referred to law enforcement authorities. *See* 34 C.F.R. pts. 300 and 303, Attachment 1, Analysis of Comments and Changes, 64 Fed. Reg. 12,631 (1999).

400. *See* Barbara A. Murray & Mary A. Myers, *Conduct Disorders and the Special-Education Trap*, Educ. Dig., Apr. 1998, at 48, 53 (stating that only nine percent of juvenile violent crime in school is reported to criminal justice authorities, while 37% of similar juvenile street crime is reported).

401. *See* Mansnerus, *supra* note 250, § 14, at 1 (quoting official of American Federation of Teachers as stating that perception that school has discipline problems is "bad public relations for the school").

happened as a consequence of that behavior. Moreover, allowing the behavior to go unchecked fails to communicate the expectations of society either to the perpetrator or to the other students and contributes to an unstable learning environment for all.[402] On the other hand, sending a student to law enforcement authorities may exacerbate the problem, as the student may now view himself or herself (and believe that others view him or her) as unworthy, and the student may continue the bad conduct in a self-fulfilling prophecy. In addition, if schools report a student, and the juvenile justice system fails to punish the student effectively, the student may be emboldened to perpetrate even more serious crimes. Other students may also get the message that the school is powerless to stop their bad behavior and disciplinary problems may actually increase.

The perception that schools are at least attempting to address violent crime seriously may be worth the difficulties, however. In the wake of staggering increases in violent crime by juveniles, many states have reconstituted their juvenile justice system.[403] Tragically, we have learned from places like Pearl, Mississippi; Paducah, Kentucky; Springfield, Oregon; and Littleton, Colorado, that the schoolhouse is no longer a safe haven for children.[404] The public school institution simply is not equipped to deal with the violence that spews forth every day from the streets into the schools. Schools cannot educate students while punishing or rehabilitating criminals.

Teachers and school officials have a statutory duty to report some criminal acts; all fifty states have enacted laws that require certain professionals, including teachers and school officials, to report child

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402. *See* Murray & Myers, *supra* note 400, at 53.

403. *See* Richard Lacayo, *Teen Crime*, Time, July 21, 1997, at 28 (explaining that "in the past five years . . . every state except Hawaii has decided to allow some kids to be tried in adult criminal court").

404. My reference to the spate of mass killings that has captured the concern of the nation is to show how easily violence can ignite at school. The boy killers in Paducah and Littleton were not identified as disabled. *But see* James Prichard, *Teen Pleads Guilty But Mentally Ill in School Shootings*, Athens Daily News/Athens Banner-Herald, Oct. 6, 1998, at 7A (explaining that Michael Adam Carneal, accused of opening fire on prayer circle at Paducah, Kentucky, high school, pleaded guilty but mentally ill). Under the new provisions of IDEA entitled "Protections for Children Not Yet Eligible for Special Education," there would be strong arguments that these violent students could have been protected by IDEA discipline procedures. *See supra* notes 279–80 and accompanying text.

abuse to authorities.[405] Since 1994, Georgia law has required schools to notify local law enforcement if they have reasonable cause to believe that a student has committed certain crimes on school campus or at a school function, including weapons violations, sexual offenses, and drug-related activity.[406] Teachers and school officials are immune from civil liability for good faith reports, but willful failure to report is a misdemeanor.[407] School systems have discretion whether to report other conduct that may be criminal, but that does not fall within the list of enumerated offenses.[408]

These provisions at least make a start toward dividing up the functions between teachers—whose experience and expertise lie in the transfer of knowledge to students—and law enforcement officers—whose experience and expertise lie in maintaining order. At least with regard to the specific offenses that must be reported, the provisions help to alleviate some of the political pressure that school officials may feel when deciding whether to report criminal acts of students.

Now that the IDEA amendments have cleared up the controversy surrounding criminal acts in school by disabled students, school boards or state legislatures could enact policies that require (or at least encourage) educators to report violent criminal acts by students (both nondisabled and disabled) to local law enforcement authorities.[409] "If an offense is serious enough to warrant an arrest if committed on the street, it is serious enough to warrant an arrest if committed at school."[410] A fight that occurs in the school corridor may be an assault and battery on the streets, as may be biting of teachers, throwing chairs, and hitting and spitting at students, all of which have been reported conduct of disabled students in school.[411] Any reporting policy should ensure that reporting is

405. *See* Jill D. Moore, *Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process*, 73 N.C. L. Rev. 2063, 2068–69 (1995).

406. *See* Ga. Code Ann. § 20-2-1184 (1998); *see also, e.g.*, La. Rev. Stat. Ann. § 95.2(F)(2)(a) (West 1998) (requiring school official to notify law enforcement if weapon is confiscated from student).

407. *See* Ga. Code Ann. § 20-2-1184(c)–(d).

408. *See* Ga. Code Ann. § 20-2-756(a) (1998).

409. *See* Murray & Myers, *supra* note 400, at 53.

410. *Id.*

411. *See* DeBenedictis, *supra* note 135, at A9 (describing incidents of biting teacher, hitting students, kicking staff members); Oberti v. Board of Educ., 995 F.2d 1204, 1208 (3d Cir. 1993) (listing toileting accidents, temper tantrums, crawling and hiding under furniture, hitting, and spitting on other children).

evenhanded—based on the act committed—not based on racial or social status and certainly not on disability. But the decision whether to prosecute would be made by law enforcement officials—based on experience and practice—not the school teacher, who has neither expertise nor experience in criminal justice.

### *8. The Toll on Teachers*

Classroom teachers must spend an appreciable amount of time dealing with the meetings and paperwork that IDEA's mandates spawn.[412] For example, the regular education teacher must be on the initial IEP team for all disabled students who participate in the regular education environment, as well as for reviews and revisions thereof.[413] This will entail a great deal of time, both to participate in the process and to prepare for the meetings.[414] For example, teachers must document behavior and learning problems, any interventions or curriculum modifications attempted, as well as the student's reaction to any change in strategy. Schools must provide substitute teachers to allow the classroom teacher to participate in meetings. In addition to the drain on resources, other students are being deprived of their teacher's time and energy. If the parents challenge the IEP and the school does not capitulate to parental demands, teachers must spend more time preparing to defend the IEP proposal before a hearing officer (or a court, if the parent persists). If discipline problems occur, the teacher may need to prepare for and participate in a manifestation hearing and a hearing to remove the student from the classroom. If the parents disagree with the hearing officer's determination, the teacher's time and input will be necessary in any court proceeding if the school decides to remain steadfast in its recommendation. In the meantime, the teacher must document that the other provisions of the IEP are being complied with. In addition, the teacher must institute and implement interventions to ensure that the behavior does not reoccur and further document the

412. *See* Greene, *supra* note 187, at 5C (describing how parents, teachers, and school officials spent hours preparing document on how child's special needs should be met and describing how teachers nationwide face "hours of paperwork and confusion about discipline").

413. *See* 20 U.S.C. § 1414(d)(1)(B)(ii) (Supp. III 1997).

414. *See First Things First: Review of the Federal Government's Commitment to Funding Special Education: Hearings Before the Comm. on Educ. and the Workforce*, 105th Cong. 26 (1998) [hereinafter *First Things First Hearings*] (statement of Eric J. Smith, Superintendent, Charlotte-Mecklenburg Schools, Charlotte, N.C.).

results of these interventions. To be an effective participant in these numerous IEP meetings, hearings, and court proceedings, the regular education teacher will need to be trained in the intricacies of special education law. "The time demands and training requirements will be considerable"[415] and burdensome.[416]

The very complexity of the process involved may prove to be a disincentive to effective discipline for the disabled student.[417] Put simply, the time and effort it takes to discipline a disabled student may be enough of a disincentive for some teachers simply to ignore misbehavior.[418] This may prove harmful to the disabled student in the long run—as he or she never learns the consequences of failing to follow the rules of society—as well as to the nondisabled students, who must continue to deal with the behavior problems in the classroom.[419] Even if a teacher decides to attempt to discipline a disabled student, the stay-put provision may cause the student to remain in the classroom for months or even years while a hearing officer, district court, and appellate court decide whether a school's proposed change to a more restrictive educational setting is appropriate.

Not surprisingly, teachers who must constantly deal with disruptive and violent students with no relief become frustrated at their inability to teach, may exhibit stress-related disorders, and start to lose motivation and enthusiasm for teaching.[420] A teacher who must obtain a hepatitis shot after being bitten by a student (or who hears of a colleague having to do so) will likely be affected emotionally as well as physically.[421]

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415. Huefner, *supra* note 21, at 1113.

416. *But see* Doe v. Maher, 793 F.2d 1470, 1481–83 (8th Cir. 1996) (acknowledging how difficult manifestation decision is, but pointing out that states that accept federal funds must also accept burden that Congress set up to go with them).

417. *See Federal Disability Policy Hearings*, *supra* note 22, at 70 (statement of Marcia Reback).

418. The complex procedures that schools must follow have created a disincentive to remove dangerous students. School officials may instead decide to leave dangerous students in the classroom rather than go through the difficult process of removing them. *See* Nancy L. Jones, *Violence in Schools and the Individuals with Disabilities Education Act*, 41 Fed. Bar News & J. 630, 632 (1994) (citing spokesperson for American Federation of Teachers who testified before House Subcommittee on Select Education and Civil Rights).

419. *See Federal Disability Policy Hearings*, *supra* note 22, at 70 (statement of Marcia Reback).

420. *See* Lindberg, *supra* note 156, at 8 (describing teacher who threatened to quit unless school system removed disabled student who grabbed her legs, buttocks, and genitals, hit her, kicked her, and choked her); Schnaiberg, *supra* note 42, at 1 (describing teacher and classroom aide who both took medical leaves because of severe stress from dealing with disabled boy who hit and bit teacher, threw desks and chairs, hit classmate, and kicked staff members).

421. *See* Kronholz, *supra* note 17, at A24.

Teacher frustration, battered-teacher syndrome, and teacher burnout are not problems to be taken lightly. A teacher under stress simply may not have the energy to set forth a creative-writing lesson, or she or he may feel that it is futile to do so as it will only be disrupted.

Not only do the teacher's time, energy, and stress issues affect the education of the students for one year in a particular classroom, but it may have other long-term effects. Teachers who return after stress-disability leave—or who experience an extremely stressful year even without such a leave—are likely to feel discouraged, and some of their enthusiasm for future teaching will surely be dampened. Other teachers who see this happening to friends and colleagues may also become jaded or depressed. Teachers that take stress-disability leaves because of unabated discipline problems will take their toll on economic resources, as the school system must hire another teacher to take the stressed-out teacher's place. Insurance rates may be affected. To get away from the stress, experienced teachers will retire as soon as they are able. This too has economic consequences, as the state or school district with a retirement plan will pay the retired teacher as well as the teacher that takes his or her place. Moreover, students may be deprived of the expertise and knowledge that greater experience in the classroom often brings to the job. As teachers increasingly are viewed as employed in dangerous and stressful jobs over which they have little or no control, it will be even more difficult to attract bright and talented college students to the profession.

### *9. Parental Power*

Even with the new dispute-resolution mechanism,[422] IDEA still promotes litigation and adversarial relations between schools and parents that "tends to poison relationships, destroying channels for constructive dialogue."[423] Indeed there are very few disincentives for parents to pursue a challenge.[424]

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422. *See* 20 U.S.C. § 1415(e) (Supp. III 1997) (requiring educational agencies receiving assistance to make available mediation process whenever hearing is requested).

423. Clyde K. v. Puyallup Sch. Dist. Number 3, 35 F.3d 1396, 1400 n.5 (9th Cir. 1994); *see also* Steven S. Goldberg, *Discipline, Disability and Disruptive Students:* Honig v. Doe, 44 Educ. L. Rep. 495, 500 (stating that developing research shows that adversarial model created by Congress is not well received either by school officials or parents that law was intended to include).

424. *See* Bryant, *supra* note 65, at 547.

The Supreme Court has stated that "historically it has [been] recognized that natural bonds of affection lead parents to act in the best interests of their children."[425] But the Court has also noted the state's interest in children's becoming "self-reliant and self-sufficient participants in society" so they can function "effectively and intelligently in our open political system [and] preserve freedom and independence."[426] And the Supreme Court has recognized that "experience and reality" may refute the notion that parents always act in their child's best interest.[427] Indeed, statistics regarding reported child abuse and child neglect by parents show that a significant number of parents fail to meet even the basic elements of being a responsible parent.[428]

Of course, most parents do not abuse or neglect their children. Yet even those parents who intend to act in their disabled child's best interests may nonetheless be influenced by forces that conflict with the actual best interest of the child. Parents of a disabled child may have a difficult time admitting that their child is different and needs special help. Moreover, parents dealing with a child's disability often suffer from emotional stress that may hinder their ability to make decisions that prompt the best interest of their children.[429] Parents may be frustrated at their inability to control their child or his or her destiny. In addition, parents may also be dealing with financial stress that may in part be caused by the expenses involved in raising and treating a disabled child.

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425. Parham v. J.R., 442 U.S. 584, 602 (1979).

426. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

427. *Parham*, 442 U.S. at 602.

428. *See, e.g.*, Lesa Bethea, *Primary Prevention of Child Abuse*, Am. Fam. Physician, Mar. 15, 1999, at 1577 (reporting that most child abuse occurs in the home); Bruce Frankel, *Report: Child Abuse Estimates Low; Federal Data Understate Problem, Gallup Group Says*, USA Today, Dec. 7, 1995, at 3A (reporting that survey of parents concludes that there are far more cases of physical and sexual abuse of children than federal reports indicate).

429. *See, e.g.*, Theresa Glennon & Robert G. Schwartz, *Foreward: Looking Back, Looking Ahead: The Evolution of Children's Rights*, 68 Temp. L. Rev. 1557, 1557 (1995) (noting how some parents are "too stressed and too drained to provide the nurturing, structure, and security that protect children") (quoting National Comm'n on Children, *Beyond Rhetoric: A New American Agenda for Children and Families* 3–4 (1991) (footnote omitted)); Barbara M. Altman et al., *The Case of Disability in the Family: Impact on Health Care Utilization and Expenditures for Nondisabled Members*, Milbank Q., Mar. 22, 1999, *available in* 1999 WL 17269170 (citing studies that document financial problems and stress, including disruption of family routines, demands on caregivers' time, reduced social and leisure activities, and out-of-pocket expenses for disabled family member).

Thus, even the most caring parent may be dealing with underlying issues that cloud his or her judgment regarding the child.[430] The problem with giving the parent of a disabled child so much power over school decisionmaking is two-fold. First, parents have no political and little fiscal accountability, yet their wishes can have a major impact on how a classroom functions and on school budget issues. Consider the demands of the parent of a boy with severe behavioral problems in the following case. The parent reportedly offered to settle the case he instituted with the school board if his demands were met: he wanted his son in the regular classroom; he wanted the school to hire his son's babysitter as a classroom aide; he wanted the babysitter, rather than the teacher, to have authority to decide whether his son would participate in a particular classroom activity; he wanted the school to buy his son two computers, one for home and one for school; he wanted unlimited class visitations for himself, but wanted other parents banned from the classroom.[431] The school refused to settle, but estimated that its legal costs (not to mention the cost in other resources) would be at least $150,000.[432]

Second, the parent of a disabled child is interested in the welfare of his or her child, not that of the many other students in the community of learning. Professor Stephen Gilles, in describing what he calls "liberal parentalism," states that parental control over a child's education is "presumed superior" because "the fallible human agents through whom government must act are less likely to do what is good for other people's children than fallible individual parents are to do what is good for their own."[433] But even if a particular request is in the best interest of one particular child, it may *not* be in the best interest of other students and *their* parents, who do not have a voice in the matter.[434] To skew the power relationship so that a threat from a parent can affect the learning

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430. In disallowing attorneys' fees to attorney parents who represent their children in IDEA cases, the Fourth Circuit recognized that parents involved with an IDEA claim may be "irrationally emotional." Erickson v. Board of Educ., 162 F.3d 289, 292 (4th Cir. 1998).

431. *See* Anderson, *supra* note 134, at 30.

432. *See id.* In my own county in Georgia, parents sued the school district because it refused to pay the tuition for a private school placement for their autistic son in Japan. *See* Drew P. v. Clarke County Sch. Dist., 877 F.2d 927, 929 (11th Cir. 1989). The parents were awarded $42,637, representing tuition, school fees, and uniform fees for his placement in residential facilities in Tokyo and later in Boston. *See id.*

433. Stephen G. Gilles, *Liberal Parentalism and Children's Educational Rights*, 26 Cap. U. L. Rev. 9, 19 (1999).

434. Except to the extent that school officials can represent the interests of these parents and students.

environment of many other students is deeply troubling. To quote Justice Douglas, "It is the future of the student, not the future of the parents," that is of primary importance.[435]

### *B. Broken Windows in the Schoolhouse*

James Q. Wilson and George L. Kelling published a trenchant essay entitled *Broken Windows* in 1982.[436] Although the essay dealt with police and neighborhood safety, it resonates powerfully with the issues surrounding the discipline provisions of IDEA. The essence of the essay is that "disorder and crime are usually inextricably linked, in a kind of developmental sequence."[437] The "broken windows" are a symbol of disorder. According to social psychologists and police, "if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken."[438] This is not because there are larger populations of window breakers in some areas, but because the unrepaired broken window is a signal that no one cares.[439] Just as untended property becomes fair game—even for people who generally would not plunder the property of others—"untended" behavior "leads to the breakdown of community controls."[440]

Professor Dan Kahan builds upon the notion of broken windows and criminality, arguing that criminal law scholars have underestimated the impact of social norms upon the incidence of crime.[441] When people believe that others are committing crime and getting away with it (or

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435. Wisconsin v. Yoder, 406 U.S. 205, 245 (1972) (Douglas, J., dissenting); *see* James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 Cal. L. Rev. 1371, 1374 (1994) (arguing that "children's rights, rather than parents' rights, [should] be the legal basis for protecting the interests of children").

436. *See* James Q. Wilson & George L. Kelling, *Broken Windows*, Atlantic Monthly, Mar. 1982, at 29.

437. *Id.* at 31.

438. *Id.*; *see also generally* Wesley G. Skogan, *Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods* (1990) (supplying empirical support for "broken window" theory). *But see* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 Mich. L. Rev. 291, 295, 309–31 (1998) (claiming that Skogan's data do not support claim that reducing disorder deters more serious crime).

439. *See* Wilson & Kelling, *supra* note 436, at 31.

440. *Id.*

441. *See* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349 (1997). *But see* Harcourt, *supra* note 438, at 300 (claiming Kahan's "sociology" is "not adequately theorized").

gaining enhanced status in the relevant community), the crime rate will be higher.[442] Moreover, public order offenses—like prostitution, petty drug dealing, and public drunkenness—lead to "the breakdown of community controls" because they signal that people in that community either do not value or do not expect order.[443]

The broken windows idea can readily be applied to the problem of disruptive or violent disabled children in the public schools. The problem with the IDEA amendments is the *message* that is sent—both to the community of learning in the public schools and to the larger community. Indeed, the IDEA amendments send a clear message: to rid yourself of the normal rules of conduct (indeed, to obtain a special, more lenient set of rules) you need to find some ground upon which to assert some kind of special status—in particular, some basis upon which to claim that you are not responsible for your own conduct. This message is a strong counterweight to the argument that aggressive disability statutes like IDEA are necessary to alter public perceptions of disabled persons. To the extent that the IDEA discipline amendments alter public perceptions, the alteration is not all to the good.

The amendments also signal a lack of trust in teachers and other school authorities to discipline disruptive or violent students fairly. The erosion of trust in public school officials deprives them of much-needed confidence to make important judgments about how to maintain order.

When order and discipline deteriorate, those who can afford to leave the public school community do so. The following section illustrates how the disorder perpetrated by IDEA could lead to degeneration of the public school system, much as broken windows in a neighborhood can lead to its decay.[444]

### *1. Perceptions and Models*

Perceptions of fairness and consistency are important for discipline, particularly for children. The double standards in the IDEA disciplinary provisions cannot help but affect the perception that nondisabled students will have of their disabled classmates. Many advocates for the disabled

442. *See* Harcourt, *supra* note 438, at 350.

443. *Id.* at 369 (quoting James Q. Wilson & George L. Kelling, *Broken Windows*, Atlantic Monthly, Mar. 1982, at 31).

444. *See* Toby, *supra* note 305, at 71 (noting how minor student infractions contribute to sense of intimidation among teachers and encourage students to challenge other, more sacred, rules).

are concerned that disabled students become stigmatized when they attend special education classes outside the regular classroom, because they will be perceived by other students and teachers as different.[445] Advocates of full inclusion have used the stigma argument to argue that disabled students should not be viewed differently from nondisabled students and should be placed in a regular classroom.[446] A number of courts have accepted this premise and have required schools to place students with severe behavior problems in the regular classroom.[447] If stigma is indeed an important consideration, it is likely that the double standard for discipline exacerbates it. The double standard sends a signal to others that the disabled student is different and cannot be treated like a "normal" child. In addition, it is hard to see how a student who hits a teacher, assaults other classmates, and continually disrupts class will not be stigmatized by others as undesirable to be around. One additional danger is that the double standard for discipline and the perceived inability to keep disabled students from disrupting a class or from injuring others may result in a backlash against disabled students.[448] Boycotts, pickets, and letter-writing campaigns by parents of nondisabled students complaining about the rights of disabled students have reportedly increased.[449]

Thus, the double standard for discipline has a debilitating effect on the very student it is allegedly supposed to help. Disabled students receive a signal that they will be excused for aberrant behavior because of their disability.[450] "Undisciplined, not held accountable for their acts, the students will fail to learn community values and expectations."[451] This

445. *See* Dupre, *supra* note 49, at 817.

446. *See id.* at 793.

447. *See, e.g.*, Oberti v. Board of Educ., 995 F.2d 1204, 1207 (3d Cir. 1993).

448. *See Federal Disability Policy Hearings*, *supra* note 22, at 93 (statement of Charles L. Weatherly) (describing backlash in community from parents); Schnaiberg, *supra* note 42, at 14 (stating that many observers say that if discipline issue is not dealt with it could endanger protections afforded disabled students by "stoking a backlash against special education").

449. *See Federal Disability Policy Hearings*, *supra* note 22, at 93 (statement of Charles L. Weatherly); *see also* Schnaiberg, *supra* note 42, at 14 (noting that parents picketed school and pulled children out when court said injuries caused by six-year-old disabled boy were not serious enough to warrant removal).

450. *See* Mary George, *Armed Kids in Special Ed. Aided by Law, Expulsion Prohibited If Disability at Fault*, Denver Post, Dec. 12, 1996, at A-1 (describing case in Boulder, Colorado, where four students passed around gun at school, and only one was expelled because others were protected by IDEA).

451. Anderson, *supra* note 134, at 32.

flies in the face of the asserted purpose of the statute—to "prepare [all children with disabilities] for employment and independent living."[452] In addition, the double standard sets disabled students apart from the larger community. This separation may promote "an anti-community 'badge of honor' (misbehaving without consequences)" that schools should be fighting to eliminate.[453]

In short, the discipline double standard can have an insidious harmful effect on both the disabled student who violates school rules and the other students who observe how institutions like the school deal with aberrant behavior. Both the student who misbehaves and the student who watches the misbehavior are being taught a very important lesson. Each student sees that there is absolution of personal responsibility for certain children for certain behavior.

It also cannot help but affect other students as they watch their teacher or their aide being ignored, shouted at, or—in some cases—hit or bitten.[454] They see that the important adults in their lives, their teachers, are hesitant to act and, in some cases, powerless to stop the misconduct, a frightening realization for some children who trust that adults can protect them from harm.[455]

It is possible, however, that the discipline double standard could be used to teach nondisabled students that they should be tolerant of problems that disabled students have and should learn to understand why disabled students will be treated differently. While a good argument in theory, it would require other students to incorporate a certain world view—one that is rich in complexity and often hard even for some adults

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452. 20 U.S.C. § 1400(d)(1)(A) (Supp. III 1997).

453. Anderson, *supra* note 134, at 32. The author is quoting officials of the Commonwealth of Virginia who contested a Department of Education decision that Virginia must continue alternative special education for expelled special education students, even those who had sold drugs or assaulted other students. Virginia challenged the decision in court as regards students whose misconduct was not related to the disability. Although the Fourth Circuit held that schools need not provide educational services to disabled students who were expelled or suspended long-term due to misconduct that was unrelated to the disability, *see* Virginia Dep't of Educ. v. Riley, 23 F.3d 80, 86–87 (4th Cir. 1997), the new IDEA amendments ensured that the victory was short-lived. *See supra* note 239 and accompanying text.

454. *See* Schnaiberg, *supra* note 42, at 14 (reporting on mother who described child as being afraid to go to class with violent six-year-old who bit and hit teacher and threw desks and chairs); *see also* Lindberg, *supra* note 156, at 8 (describing how staff at one school were in "daily fear of having their persons violated" by 12-year-old disabled student).

455. As one educator put it, "We're going to have a whole generation of kids who don't have appropriate controls in their life." Kittredge, *supra* note 227, at 1 (quoting Peggy McAllister, Executive Director of New Hampshire Association of School Principals).

to grasp. Children may be able to grasp the fundamental idea of such a value system, given enough time and resources to educate them in this view. What is most important, however, is that this social benefit works only if the education of the nondisabled student is not being harmed by violence, disruptions, or distractions. It is true that schools are perhaps the first exposure many children have to the notion of civil liberties.[456] But another important function of public schools is to serve as a working model of social order.[457] Indeed, schools may be the most important model of social order that young people observe before they become adults with the concomitant rights and responsibilities of citizenship.

Another argument for keeping the misbehaving disabled student in the classroom, rather than in an alternative placement, is that the disabled student will eventually model behavior after nondisabled students. Some researchers, however, dispute that good behavior is contagious. Researchers like Professor James Kauffman maintain that many disabled students simply do not have the "subskills they need to benefit from modeling."[458] They often "do not retain what they observe, do not know when to produce the behavior and are not motivated to do so."[459] And if modeling does indeed occur, it may not necessarily work the way it is intended. If students do mimic what they see, the nondisabled students may begin to model their behavior after the disabled student with the behavior disorder.[460]

### 2. *Erosion of Confidence*

Perhaps the most significant effect of the new disciplinary amendments is that they signal the continued erosion of confidence in school authority. Teachers and school officials need to be able to maintain control over the entire student population. Instead, at a time when violent juvenile crime—including violence at school—seems to be at epidemic

456. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 385–86 (1985) (Steven, J., dissenting).

457. *See* Bethel Sch. Dist. Number 403 v. Fraser, 478 U.S. 675, 683 (1986).

458. *What to Do with the Disruptive Child*, Am. Pol. Network Daily Rep. Card, Sept. 14, 1994, at 5.

459. *Id.*; *see* Dupre, *supra* note 49, at 826–29 (explaining research regarding modeling); *see also* Clyde K. v. Puyallup Sch. Dist. Number 3, 35 F.3d 1396, 1401 (9th Cir. 1994). The court pointed to the findings of doctors of a student with severe behavioral problems that the student was socially isolated in the regular classroom, had few friends, and suffered under a great deal of stress from the teasing inflicted on him by other students. Having seen how cruel children can be to nondisabled children, this finding does not seem surprising to me.

460. *See* Lindberg, *supra* note 156, at 8 (reporting that classmates mimicked disabled student who grabbed teacher's genitals and hit and choked teacher).

proportions, schools making decisions about discipline can never be certain about rendering out swift and sure punishment.[461]

It is difficult to make predictions about behavior. Forecasts can be even more difficult when dealing with a disturbed disabled student, whose behavior may be unusually erratic and impulsive. Yet courts reviewing discipline decisions under IDEA often second-guess school officials seeking to remove a violent or disruptive student to an alternative placement. Consider the case where a court denied a request to remove a student who brought a weapon to school because school officials did not adequately explain why they did not simply search that student regularly for weapons before seeking to move the student to an alternative placement.[462] Or consider the case where a court refused to grant a school injunctive relief for a sixth-grade disabled student who assaulted classmates, punched classmates in the face causing bruising, and shoved the school principal. The court explained that the student's behavior up to that point neither resulted in physical damage to property nor required the injured persons to seek medical attention.[463] Teachers and school principals receive the message that they must not act swiftly to resolve a problem. Instead of addressing serious discipline problems with confidence, they must wait until a child or an adult is seriously injured before asking a court to remove a troubled student from the classroom.[464] Moreover, the possibility of protracted litigation and payment of parents' attorneys fees deter school boards and administrations from trying to discipline disabled students.[465] "It is just a lot

461. "'Every time a kid was even literally put out in the hall, put in in-school suspension, anything, they had to do these seven pages' of paperwork" because of the new law. Greene, *supra* note 187, at 5C (quoting Beverly Columbo, teacher interviewed at National Education Association's annual convention); *see also* Editorial, *Violent Students*, S.F. Chron., Jan. 22, 1988, at A26 (noting that when violence occurs, teachers need to be able to make "quick, realistic decisions" to assure that safety of all children is of "paramount consideration").

462. *See Student with Razor Should Stay Put, District Court Rules*, Special Educator, Mar. 28, 1997, at 1; *see also* Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223, 1228 (8th Cir. 1994) (stating that school district must show that it had done "all that it reasonably can to reduce the risk that [a] child will cause injury").

463. *See* Phoenixville Area Sch. Dist. v. Marquis B., 25 IDELR 452, 453 (E.D. Pa. 1997); *District Could Not Prevent Student's Return Where Behavior Was Not Sufficiently Dangerous*, Special Educator, Mar. 28, 1997, at 14.

464. *See Federal Disability Policy Hearings*, *supra* note 22, at 70 (statement of Marcia Reback).

465. *See* Stanfield, *supra* note 9, at 2103.

easier to give in to the parents" than to spend months, perhaps years, and considerable human and economic resources litigating the issue.[466]

The public, seemingly unaware of the double standards under which school must operate, continues to demand safe and orderly schools. In addition, courts continue to emphasize that schools have a "special obligation to ensure that students entrusted to their care are kept out of harm's way"[467] and stress the "traditional authority and responsibility of the local school board to ensure a safe school environment."[468] When schools are unable to ensure a safe or productive learning environment, parents wish to remove their children from public schools. At some level, IDEA's discipline constraints may be fueling a new direction in school reform.

### *3. School Choice*

A subtle but extremely significant issue underlies any issue relating to school discipline. Indeed, this issue pierces the integrity, and perhaps even the continued existence, of the public school institution. The issue is, of course, school choice and its effect on the school as an agent of social integration.

One of the great strengths of the public school institution is its ability to encourage social integration. Indeed, this nation may have no other institution with the same potential of integrating rich and poor on a daily basis and inculcating our commitment to representative democracy while children are young and before they become set in their views. Learning to deal with, and perhaps even be friends with, children of a different economic, racial, or religious background can be an enriching experience for children.[469] It helps children become more sensitive to others, and they may gain a new perspective on the economic, political, and social issues that they will face (and vote on) as adults.[470] Indeed, one of the strengths of the inclusion movement is that nondisabled students may learn to better understand disability issues. I have argued elsewhere that

466. Interview with Mark Proffitt, Principal of Lawrence School in Middleton, Conn., in Worcester, Mass. (Oct. 6, 1998).

467. Clyde K. v. Puyallup Sch. Dist. Number 3, 35 F.3d 1396, 1401 (9th Cir. 1994).

468. S-1 v. Turlington, 635 F.2d 342, 348 n.9 (5th Cir. 1981).

469. One of my law students, who said she was very poor as a child, once told me that going to school with upper-middle-class children inspired her to work hard at school so that she could change her life to be more like theirs.

470. This is a two-way street. More affluent children may also learn about poverty.

this is indeed a commendable goal that works in many situations.[471] If the disabled student impedes the education of other students, however, the cost is too great.[472]

In some areas in this country, however, the public school no longer acts as an agent of social integration.[473] Many parents, including President Clinton and public school teachers themselves, have taken Judge Keep's advice and placed their children in private schools, which do not have the same constraints placed on them as public schools regarding issues like discipline.[474] Students, both black and white, who are committed to learning often transfer out of troubled public institutions to private or parochial schools, or they find a friend or relative to live with in the catchment area of a better school.[475] Although there are numerous individual reasons for these decisions, school discipline is often cited as one of the significant problems associated with public schools.[476] Thus, in many urban areas, the public schools have become the enclaves of poor racial minorities and the disabled (who may demand and obtain appropriate educational services under IDEA). These schools no longer even remotely resemble an institution of social integration.[477]

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471. *See* Dupre, *supra* note 9, at 821–22 (stating that disabled students who do not disrupt learning in regular classroom should certainly be included and may teach other students about tolerance).

472. Moreover, it is difficult to see how a disabled student with severe behavioral problems who continually disrupts the learning process and assaults other children will engender positive feelings about the disabled.

473. *See* David D. Boaz, *Five Myths About School Choice*, Educ. Wk., Jan. 27, 1993, at 12 (noting that in Manhattan, public schools are nearly 90% black or Hispanic and private schools are more than 80% white).

474. *See* DeBenedictis, *supra* note 135, at A9. See *supra* note 164 and accompanying text where federal judge stated that situation raised by IDEA discipline restraints was one "that can cause parents, if they have any money whatsoever, to remove their children from public school."

475. *See* Toby, *supra* note 305, at 71.

476. *See* Dupre, *supra* note 2, at 50 n.2 (discussing polls that cite "lack of discipline" as biggest problem faced by public schools); Peter Applebome, *Milwaukee Is Forcing the Debate on Vouchers for Church Schools*, N.Y. Times, Sept. 1, 1995, at A1 (quoting parent as stating, "I don't think there's enough discipline [in the public schools], and I want religion in the school."); Schnaiberg, *supra* note 42, at 1 (describing how parents removed children from public school when court said that injuries caused by violent six-year-old were not severe enough to warrant his removal when he hit and bit teacher, hit classmates, and threw desks and chairs).

477. Professor Suzanna Sherry maintains that the nation's citizens need an education that prepares them to "exercise both the rights and the responsibilities of citizenship." Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. Chi. L. Rev. 131, 132 (1995). She

Some argue that the school choice movement, if successful, would ensure that more school districts are brought to this level.[478] They argue that vouchers or tax credits will help only the middle class.[479] A voucher or tax credit may be of little value to a poor family with little income. For example, a seventh-grade student would need $7,521 in tuition plus over $500 in bus fees to attend Athens Academy, a well-regarded private school in my town of Athens, Georgia.[480]

It is also not clear from most school choice plans the extent to which private schools would be required to accept racial minorities,[481] disabled students (particularly those with severe behavioral disorders), or—in the case of sectarian schools—students of a different religion or no religion. If private schools can limit the number of disturbed disabled students or low-achieving nondisabled students, these students may be left behind in the public schools. In addition, when private schools limit student admission, they do not function as agents of social integration, and they help to weaken the one public institution that does by "skimming off" the better-behaved, higher-achieving, wealthier students.[482] Of course, private schools can currently function in this manner, but they do not benefit from additional taxpayer funds to do so.

Because many of the private schools subsidized from tax dollars are sectarian, First Amendment Establishment Clause issues permeate the voucher/tax credit issue. Although one court upheld a school-choice plan against an Establishment Clause challenge,[483] some scholars believe that

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maintains that voucher plans help to serve that goal by improving education quality and by reviving individual responsibility. *See id.* at 200–01.

478. *See* Jeanne Allen, Heritage Found. Reps., *Nine Phoney Assertions About School Choice* (1991) (quoting Wisconsin school official who stated that school choice hurts common schools established for common societal good); *see also* Michael Olivas, *Information Access Inequities in Voucher Plans*, 10 J.L. & Educ. 441 (1981).

479. *See* Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 Tenn. L. Rev. 359, 362 (1997) (claiming that private school tuition vouchers are "fundamentally incompatible with the goal of providing an education for citizenship").

480. *See* Athens Academy Tuition Information 1998–99 (on file with author).

481. Recall that many private "academies" in the South were started to avoid the effect of *Brown v. Board of Education*. *See* Michael Heise, *School Choice, Education Policy and Legal Theory: Uncomfortable Yet Inevitable Intersections*, Chi. Pol'y Rev., Spring 1997, at 79, 86–87 (noting scholars who contend school choice policies would exacerbate racial and class imbalances in schools).

482. Bill Honig, *School Vouchers: Dangerous Claptrap*, N.Y. Times, June 29, 1990, at A25.

483. *See* Jackson v. Benson, 578 N.W.2d 602, 611–20 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998); Joan Biskupic, *Wisconsin Wins School Vouchers Case*, Wash. Post, June 11, 1998, at A-1

school-choice plans intrude too deeply into the division between church and state.[484]

To be sure, it is possible that the market theorists are correct—that competition will only strengthen public schools, and they will emerge a stronger institution that will be an even more viable force for social integration.[485] Or there may be an unspoken, insidious motivation—to dismantle public schools as an institution by those who are opposed to this mission.[486]

Unraveling the possible effects of and the motivations behind the school choice movement is beyond the scope of this Article. Yet the school-choice issue lurks behind the discipline issue. Every parent who moves his or her child to private school (or wishes to do so) because of perceived discipline problems in the public school will have an incentive to join the school-choice bandwagon. If it is not the intent of those who would restrain school discipline for the disabled to increase support for school choice, it may nonetheless be the result.

## VI. SOLVING THE DISCIPLINE DILEMMA

### *A. Using the Attorneyship Model of Representation*

The problems with school discipline and the disabled student are likely to continue. A clear and definitive correction lies with Congress. Congress, however, has been unwilling to act without more of a public outcry. "Few lawmakers want to court accusations that they have an animus against disabled children."[487] One reason Congress has such difficulty coming to terms with discipline and the disabled is Congress'

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(reporting decision in *Jackson* that using taxpayer-funded vouchers violates neither state nor federal Constitution).

484. *See* Heise, *supra* note 481, at 86 (explaining likelihood that publicly funded school choice programs that include religious schools will generate challenges under Establishment Clause, but noting that excluding religious schools may raise Free Exercise issue). Any limitation on religious schools would severely curtail the school choice issue, as approximately 78% of the nation's private elementary and secondary schools are religiously affiliated. *See id.*

485. *But see* Mary Jane Guy, *The American Common Schools: Institutions at Risk*, 21 J.L. & Educ. 569, 575 (1992) (arguing that instead of shifting to market-driven system of education, policy makers should take care of "one best system" already in operation).

486. *See* O'Brien, *supra* note 479, at 362–63 (asserting that "voucher movement, in the context of its history and assumptions, demonstrably coincides with the white conservative pursuit of dominance and privilege").

487. Anderson, *supra* note 134, at 32.

failure to use the attorneyship model of representation. Professor Marci Hamilton makes a persuasive argument that the attorneyship model best describes the role of the representative in a liberal republican democracy.[488] According to Professor Hamilton, "A representative under the attorneyship model is entrusted with delegated responsibility to act in the best interests of her present and future client-constituents while fulfilling an obligation of continual communication."[489] Like a class-action attorney, the legislator is delegated the power to make independent judgments by weighing the desires and needs of both present and future clients.[490] The basis for the delegation is the impossibility of running the government "by plebiscite."[491] The representative and the client-constituents are bound together in an "overarching mutual political commitment" to each other.[492] Indeed, the representative acts as the "trustee" for the larger enterprise and, because of that responsibility, may be forced to ignore the voices of some individuals.[493] Like an attorney, a legislator's abdication of the responsibility of exercising independent judgment—by refusing to vote, giving narrow interest groups the ultimate decision, or engaging in pretextual decisionmaking—is a serious offense.[494] Perhaps most important, the communication element of the attorneyship model gives the people the ability to judge how their representatives exercise their delegated powers and to detect any abuse thereof.[495]

The client-constituents who are most affected by IDEA are not limited to disabled students, but include nondisabled students, educators, and taxpayers. Indeed, all citizens are affected to some degree by the ability (or lack thereof) to transfer knowledge in the community of learning that is the public school. To the extent that Congress has allowed one

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488. *See* Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. Rev. 477, 527 (1994); *see also* Dupre, *supra* note 2, at 102 (proposing attorneyship model to refine definition of nature of school power).

489. Hamilton, *supra* note 488, at 523.

490. *See id.* at 534.

491. *Id.* at 533–34.

492. *Id.* at 535 (footnote omitted).

493. *Id.* at 536.

494. *See id.* at 538.

495. *See id.* at 540–41; *cf.* Ingraham v. Wright, 430 U.S. 651, 670 (1977) (reasoning that "openness of the public school and its supervision by the community afford significant safeguards against" abuse).

segment of its client-constituents to interfere with the learning process, Congress has failed to act as a trustee for the larger academic enterprise. Instead, Congress has given narrow interest groups the ultimate decision, to the detriment of others in the constituent class. This is precisely the abdication of responsibility that Professor Hamilton describes so cogently.[496]

One way to force Congress to use the attorneyship model is to remind Congress that it has more than one client-constituent to represent. The concerns of educators alone have not been enough to effectuate concerted change. The impetus for change apparently must come from a more formidable group than educators who, after all, may be viewed as acting in part from frustration at the loss of power.

Despite the restrictions placed on them by IDEA, educators must steadfastly work hard at the difficult task of propelling students forward in academic competency. In their continuing efforts to maintain a safe and orderly learning environment, however, educators must enlist the help of other institutions—the courts, the press, and the general community—to aid in this mission.[497] If there is indeed a serious problem with the way the federal law deals with discipline and disabled students, parents, taxpayers, and the general community should be made fully aware of the issue. After all, educators are not the only affected persons when the public schools deteriorate.

Congress may have given one answer to the vexing issues surrounding disciplining the disabled in the text of the 1997 IDEA amendments. Congress added a new purpose to IDEA: "[T]o prepare all children with disabilities for employment and independent living."[498] The purpose of

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496. *See* Hamilton, *supra* note 488, at 538.

497. *See* Toby, *supra* note 305, at 73 (noting that when school is isolated from local community, "if a large enough proportion of students misbehaved, teachers and principals would have difficulty maintaining order").

498. 20 U.S.C. § 1401(d)(1) (Supp. III 1997). Despite this laudable purpose, it is doubtful that all children with disabilities will ever be prepared for "employment and independent living." For example, the child in *Timothy W. v. Rochester, N.H., Sch. Dist.*, 875 F.2d 954 (1st Cir. 1989), suffered from spastic quadriplegia, cerebral palsy, seizure disorder, and cortical blindness. *See id.* at 956. The school district proposed to offer no education because it claimed the child could not benefit from one. *See id.* One physician noted that the boy responded to sounds and recommended physical therapy and stimulation; another physician stated that the child had no educational potential. *See id.* The court determined that IDEA was intended to ensure that all children with disabilities receive a free appropriate education regardless of the severity of the disability. *See id.* at 960. The First Circuit remanded the case for the development of an appropriate individual education plan and for a determination of damages. *See id.* at 973. Nonetheless, self-sufficiency is an important goal for many

school discipline is to keep an ordered environment in the community of learning so that students can obtain an appropriate education. If students, disabled and nondisabled alike, "are to learn their roles and responsibilities in school and society"—if they are to be prepared for employment and independent living—"they must understand the purposes of rules and the consequences of not adhering to those rules."[499] It is in obtaining a "serious education"[500] and what each student does with his or her life based on that education that helps to make a better society. To the extent that IDEA spells out that every child—disabled or nondisabled—should have access to education, it is a laudable statute. But to the extent it allows one group of students to impede the access of other students to education, it is flawed.[501]

Courts interpreting IDEA provisions should use the stated purpose of the Act as a guiding principle when they deal with difficult disciplinary issues. Using this purpose as a framework, courts can and should interpret IDEA provisions wherever possible to allow educators to maintain a safe and orderly school environment. For example, if a student is continually disruptive after the school has tried various interventions, courts could agree that the IEP is not effective and allow the school to change the student's placement.[502]

School officials should certainly continue to work at resolving placement and discipline issues in a nonadversarial manner. But if discipline problems are indeed impeding learning and a parent refuses a reasonable placement change proposal, the school should not capitulate from fear of litigation. Rather, it should marshal its evidence and its resources and stand firm. The economic loss and the immeasurable loss to the community of learning—when multiplied over the many cases where schools capitulate to unreasonable and unnecessary parental demands because of the desire to avoid a lawsuit—may be much greater

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disabled students. *See* Robert C. Hannon, *Returning to the True Goal of the Individuals with Disabilities Education Act: Self-Sufficiency*, 50 Vand. L. Rev. 715 (1997).

499. Yell, *supra* note 70, at 69.

500. Dupre, *supra* note 2, at 97.

501. *See generally* Mark Kelman & Gillian Lester, *Jumping the Queue: An Inquiry into the Legal Treatment of Students with Learning Disabilities* 145, 154, 156 (1997) (criticizing IDEA for allowing resources to be skewed toward students with learning disabilities to detriment of troubled learners who are not disabled).

502. *Cf.* Oberti v. Board of Educ., 995 F.2d 1204, 1207 (3d Cir. 1993) (refusing to allow change in placement for child whose behavior included toileting accidents, temper tantrums, crawling and hiding under furniture, touching, hitting, and spitting on other children, teacher, and teacher's aide).

than the cost of litigation. Parents and other advocates for the disabled must understand that the needs of the disturbed disabled student with severe behavioral problems cannot impede the learning of other students. Surely, the parents of nondisruptive and nonviolent disabled students want their children to be educated in a safe and effective manner. Even special education teachers contend that students with severe behavioral disorders can destroy the learning environment in a special education class, harming the education of other disabled students.[503] Disability advocates should come to terms with the idea that a small number of disturbed disabled students should not hold others students—disabled and nondisabled alike—hostage to their outbursts.

Of the many issues that affect the fabric of a community, the integrity of its public schools must rank at or near the top. To the extent that privacy laws allow, parents and the community should be made aware of discipline issues and the school's attempts—both successful and unsuccessful—to resolve them.[504] If it is necessary to litigate to maintain an effective school environment, educators should not hesitate to do so and should make sure that the press and taxpayers are aware of all issues that are considered public record. Particularly in the case of disruption and distraction, parents may not realize the amount of learning that is lost each day and more subtly over time as tired and burned-out teachers lose enthusiasm and motivation. Still others may believe that any attempt at change would be futile, or they may simply have more pressing problems in their lives. But many parents, including the parents of nondisruptive disabled students, would probably be astonished to learn the extent to which federal law restricts disciplinary action against disabled students

503. *See* Phyllis B. Librach, *Two Boys Double Trouble in School; Their Cases Exemplify What Educators Face*, St. Louis Post-Dispatch, Feb. 19, 1995, at 1A. One teacher of learning-disabled students stated that she was unprepared to teach students with severe behavioral problems who constantly disrupted her class and impeded the learning of other disabled students in the class. *See id.* She kept a log of the disruptive behavior of one eight-year-old. One entry read: "Called the teacher names. Crawled around on all fours making noises like a dog. Refused to stay seated. Walked around room. Refused to sit down when told. Sat in trash can and rocked back and forth until it fell over with him in it. Had girl down on floor, lying on top of her with both of his hands on her throat choking her." *Id.*

504. A detailed examination of relevant privacy laws is beyond the scope of this Article, but the anonymity of students who cause discipline problems is a significant issue. Both IDEA and the Family Educational Rights and Privacy Act protect the confidentiality of student records—including student disciplinary records—as well as "personally identifiable" information. *See supra* note 394 and accompanying text.

and the amount of economic and human resources that must be expended to effectuate any change in placement.[505]

If courts make a decision that is harmful to school discipline—either because judges feel compelled to do so because of clear statutory language or because judges refuse to defer to the professional judgment of educators—school officials should ensure that the press and public are aware of the decision and its consequences. To this end, the press has an important part to play in aiding the mission of the public schools.[506] The community needs to have safe and orderly public schools, period. If educators are unable to maintain orderly classrooms for all students, the public should be aware of the problem and its causes.[507] This task may be difficult, as school officials may be "skittish" and less than forthcoming about discipline issues.[508] School officials who feel under siege because of school choice and charter-school initiatives may be wary about publicizing problems.[509] But full community awareness of significant issues regarding public schools may be the only way to ensure that

505. A district court judge who did not allow a school to remove a disabled student stated, "I understand that the parents of the other children at El Capitan high school will be shocked to think that classmates of their children could bring a gun to school and then escape suspension or expulsion by claiming a heretofore undetected disability." M.P. v. Governing Bd. of Grossmont Union High Sch. Dist., 858 F. Supp. 1044, 1048 (S.D. Cal. 1994). One county in Georgia set off "an emotional storm" when it revealed that two seventh graders with a gun and ammo clip at school, who were expelled under a county zero-tolerance policy, were also protected by federal disability law. Doug Cumming, *Cobb Expulsions Set Political Fireworks*, Atlanta J. & Const., Feb. 8, 1999, at B1. "The fallout crackled over talk radio for hours," with most listeners advocating permanent expulsion. *Id.* Using the community of learning constituents as a potent political force may not always yield results. *See* Kelman & Lester, *supra* note 501, at 159 (stating that "squeezing the nondisabled student" has not "increased political pressure to obtain sufficient funding rather than simply further compromising inadequate educational systems"). When problems occur, some parents who have the means simply will remove their child from the school. These are likely to be the parents who care about education but who will be likely to put the problems of the public schools out of their minds once their child is no longer affected.

506. *See, e.g.*, Les Simpson, *Your Newspaper Is a Community Resource*, Athens Daily News/Athens Banner-Herald, July 2, 1998, at 27 (explaining how newspapers can expose problems and help make better community).

507. State open-records acts and "sunshine" statutes may aid the press in obtaining certain information from schools that might otherwise be protected by federal or state privacy laws. *See generally* Ralph D. Mawdsley, *Litigation Involving FERPA*, 110 Educ. L. Rep. 897, 912–14 (1996); Perry A. Zirkel, *Caught in the Collision: A Disabled Child's Right to Confidentiality and the News Media's Right to "Sunshine,"* 117 Educ. L. Rep. 429 (1997).

508. *See* Mansnerus, *supra* note 250, § 14, at 1 (quoting official of American Federation of Teachers who pointed out reluctance of school administrators to "rock the boat" and noted that discipline problems are "bad public relations for the school").

509. Worried about losing tenure or about bringing negative attention to the school, teachers are also guarded. *See id.*

Congress reverts to the attorneyship model of representation.[510] Recall the role the press played in altering Congress' path during the Vietnam War.[511] The effectiveness of our public schools is no less important than our nation's security. After all, it is the public, our democratic society, that ultimately will lose if our nation's young people do not obtain an education that enables them to participate knowledgeably in the economic and political process as adults.

The aftermath of the murder of Christine Smetzer is one example of how community awareness made a difference to Congress.[512] In the wake of the press reports of her death, parents and concerned citizens met with school officials, who explained the restraints placed on them by federal and state law on disciplining students with behavior disorders and the constraints on informing school administrators and teachers about past problems.[513] The citizens were urged to write to Senator John Ashcroft who, as explained above, was instrumental in getting the reporting provision of the 1997 amendments enacted.[514] Thus, after a brutal murder and its accompanying press coverage, Congress donned its attorneyship role and instituted a change demanded by its constituent-clients.

### *B. Of Wrongs and Remedies*

Even if members of Congress eventually determine they must, in the role of "attorney legislator," exercise independent judgment on the issue of school discipline and the disabled, they still must come to terms with the fundamental core of IDEA. The issue is one of trust.[515] The premise that drives any debate about IDEA's substance, implementation, or enforcement is that—without strong federal intervention—all public schools will attempt to exclude disabled students.[516] This is based on the

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510. *See* Sack, *supra* note 189, at 1. Representative Michael Castle and other members of Congress have stated that IDEA is becoming a "top complaint" for educators in their home districts. *Id.* "We're starting to hear enough about it that we're becoming increasingly concerned." *Id.*

511. Recall also the significant effect of press coverage after the beating of Rodney King.

512. See *supra* notes 386–90 and accompanying text for a description of the details surrounding her death.

513. *See* William C. Lhotta, *Law on Disorders Under Review*, St. Louis Post-Dispatch, Feb. 19, 1995, at 4D.

514. *See supra* note 389 and accompanying text.

515. *See* Rachelson, *supra* note 158, at 157 (noting Congress' distrust of educational authorities).

516. *See supra* notes 206–11 and accompanying text; *see also* Anderson, *supra* note 134, at 29 (stating that this premise has led to double standard that "defies common sense and leaves children, particularly other special education students, to face dangerous peers who are above the law").

past bad actions of some school districts against completely different students before IDEA was enacted in 1975. Advocates for the disabled thus define their own context as a revolution against evil—in this case discrimination by educators. These advocates argue that only IDEA's restrictions can sustain the dignity of disability, so they measure every situation by IDEA and its effect on this perceived evil. In addition, this argument sets up a blameworthy target for legislation.

The argument may have rhetorical effect on the floor of Congress,[517] but closer analysis reveals its flaws. The IDEA discipline provisions produce a significant conflict between two important and legitimate rights: the right to obtain a serious education in an orderly and safe environment versus the protection of disabled students from the arbitrary discipline and warehousing of the past. Yet if lack of trust and the concomitant restrictions exist because of past discrimination, the remedy for that discrimination is only necessary for those schools that would continue to discriminate. Put another way, assuming without doubt that lifting some disciplinary restrictions would "turn back the clock" to the pre-1975 era when disabled students were excluded from access to education, enshrines these provisions forever. There is no way to *know* that this would happen, but the threat keeps us from ever finding out. Congress could regain its proper role by fashioning a "remedy" for the wrong perpetrated by this past discrimination and by ensuring that this remedy better serves all of the class represented. The final section of this Article is intended merely to begin this inquiry.

A possible solution may be found by viewing the IDEA restrictions as being similar to a court-ordered racial-desegregation plan. When courts determined that school districts intentionally segregated students by race and failed to remedy this past discrimination, courts placed those school districts under court-ordered desegregation plans.[518] But in *Board of Education v. Dowell*[519] and other cases, the Supreme Court has determined that these school districts need not be bound by these court-ordered plans indefinitely.[520] The Court recognized that the personnel of school boards change over time and that courts should take into consideration the good faith of the school board in complying with the

517. *See supra* notes 213–15 and accompanying text.

518. *See* Board of Educ. v. Dowell, 498 U.S. 237, 241 (1991).

519. 498 U.S. 237.

520. *See id.* at 247–48.

decree.[521] Specifically, in dissolving a desegregation decree, courts must address whether the school board "complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination [have] been eliminated to the extent practicable."[522] Courts must look at student assignments, "faculty, staff, transportation, extracurricular activities and facilities."[523] The Court refused to condemn a school board that once had intentionally discriminated to "judicial tutelage for the indefinite future."[524]

Congress, however, has allowed rhetoric about past discrimination by some school boards to continue to bind all school boards without any assessment whether the school board had (1) discriminated in the past or (2) would discriminate in the future absent the IDEA disciplinary restrictions. Congress could fashion some *Dowell*-like scheme to allow schools to discipline disabled students when the school district can show that it has complied in good faith with the mandates of IDEA and any vestiges of past discrimination have been eliminated to the extent practicable.[525] This would give school districts incentive to ensure that such a program existed, and Congress could fund the statute as it was originally intended to ensure that school districts had the resources to do so.[526] A mechanism to allow parents to reinstate the disciplinary constraints upon a showing of improper practice by the school board should also be included.

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521. *See id.* at 249.

522. *Id.* at 249–50.

523. *Id.* at 250 (quoting Green v. New Kent County Sch. Bd., 391 U.S. 430, 435 (1968)).

524. *Id.* at 249.

525. This showing could be made through requests to the Department of Education. School districts already must show that IDEA programs exist to obtain federal funds. *See* 20 U.S.C. § 1412(a) (Supp. III 1997).

526. When Congress passed IDEA in 1975, it promised to pay 40% of the incremental costs of special education; this goal has never been realized. *See* Kelman & Lester, *supra* note 501, at 44; *see also First Things First Hearing*, *supra* note 414, at 65 (statement of Eric J. Smith). Mr. Smith stated that federal funds comprised only 14% of the special education budget in his district (Charlotte-Mecklenburg, N.C.). *See id.* He set forth the example of one disabled kindergarten child who has been included in the regular classroom, but who needed the following supports: a one-to-one personal assistant; occupational therapy; physical therapy; speech and language therapy; augmentative communication devices and services; assistive technology; special education instruction; special transportation; and special evaluations. *See id.* at 66–67. According to this school superintendent, the cost of these supports and services to maintain this student in the regular classroom exceeded $40,000 a year. *See id.* at 69. The school district received $539 in federal funds and, to make up the difference, funds initially identified to support other regular education programs must be shifted to cover special education costs. *See id.* at 67.

Congress should consider seriously the suggestion by the Pioneer Institute in Boston that Congress dismantle the adversarial court proceedings fostered by IDEA in favor of a "simpler appeals process before a committee of parents, educators, and administrators for those parents who believe the school system is failing to serve their children properly."[527] A more refined and nuanced statutory scheme would ensure that the remedy envisioned by the passage of IDEA in 1975 would more closely fit any wrongs committed in the twenty-first century.

## VII. CONCLUSION

The issue of school discipline, for the disabled and nondisabled alike, goes to the very heart of the community of learning in the public schools.[528] To be sure, disabled students are not the only students with discipline problems. But disabled students "are the only students who have serious restrictions placed on the management of their behavior and on the ability of the [school] to move them to another placement."[529] Disabled students certainly should have access to public education and should be protected from arbitrary or capricious action. But the discipline problems in public schools must be addressed immediately so that public school educators can focus on the academic mission of the public schools—the transfer of knowledge to our Nation's young people. For if the public school institution is incapable of maintaining a safe and orderly educational environment and thus unable to impart a serious education to its students, it will continue to lose the support of parents, students, and community. The real tragedy will be that the nation will lose one of its best engines for social integration. A cynic would say that is precisely what some people have in mind.

527. Hymowitz, *supra* note 10, at 217. Professors Kelman and Lester have suggested ways to deal with skewed resource allocation for students who have been diagnosed with a learning disability. *See* Kelman & Lester, *supra* note 501, at 158–59 (suggesting that districts be allowed to withdraw services when services prove inefficacious over a substantial period of time and proposing that districts with lower per-pupil spending levels should be allowed to temper IEP to account for district poverty).

528. *See* Bartlett, *supra* note 71, at 366 (stating that school discipline "has important implications that reach beyond what is best for the individual student").

529. *Federal Disability Policy Hearings*, *supra* note 22, at 73 (statement of Marcia Reback).