Reauthorizing Discipline for the Disabled Student: Will Congress Create a Better Balance in the Individuals With Disabilities Education Act (IDEA)?

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I. EDUCATION FOR ALL

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

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

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[†] J.D., The University of Texas School of Law, 2003; B.A., Wellesley College, 2000. Many thanks to Professor Norma Cantu for her guidance, knowledge, assistance, and encouragement. I would also like to thank my family and Richard Villa for their continued support in all my endeavors.

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

[2] 20 U.S.C. §§ 1400-1491 (1999) (originally enacted as the Education for the Handicapped Act, Pub.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

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

[4] *Id.*

[5] 20 U.S.C. §§ 1400-1491 (1999) (originally enacted as the Education for the Handicapped Act, Pub.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

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

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

School discipline of a disabled student has been controversial since the inception of the IDEA. Educators, parents, courts, legislators, and society in general have been pushed into a battle of balancing "the special needs of some students with broader educational goals for the entire student population."[13] Specifically, it is a complex and difficult

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[6] *Back to School on Civil Rights*, *supra* note 3.
[7] *Id.*
[8] *Id.*
[9] 20 U.S.C. § 1412.
[10] *See* Erica Bell, Note, *Disciplinary Exclusion of Handicapped Students: An Examination of the Limitations Imposed by the Education for All Handicapped Children Act of 1975*, 51 FORDHAM L. REV. 168 (1982); Philip T.K. Daniel, *Discipline and the IDEA Reauthorization: The Need to Resolve Inconsistencies*, 142 ED. LAW REP. 591 (2000); Renae W. Groeschel, Comment, *Discipline and the Disabled Student: The IDEA Reauthorization Responds,* 1998 WIS. L. REV. 1085 (1998); Allan G. Osborne, Jr., *Discipline of Special-Education Students Under the Individuals with Disabilities Education Act*, 29 FORDHAM URB. L.J. 513 (2001).
[11] Osborne, *supra* note 10, at 515; Groeschel, *supra* note 10, at 1086-88.
[12] *See* Stuart v. Nappi, 443 F. Supp 1235 (D. Conn. 1978); *see also* Osborne, *supra* note 10, at 517.
[13] Margaret G. Tebo, *Seeking the Right Equation*, 88 A.B.A. J. 48 (Sept. 2002).

challenge to balance the IDEA's mandate of educating disabled students in public schools, often in regular classrooms, with a school's need to protect all its students from harm and disruption while promoting a learning environment.

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

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

[15] Osborne, *supra* note 10, at 515.

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

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

rules for up to ten days without providing alternate educational services.[18]

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

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

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

The IDEA is up for reauthorization this year (2002-2003).[21] Consequently, the issue of disciplining the disabled will be debated and discussed. As in previous reauthorizations, Congress will search for a

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

[19] Daniel, *supra* note 10, at 593.

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

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

more equitable balance between the rights of disabled students to be educated with the interest of schools in maintaining a positive learning environment.[22] Moreover, reformers hope the new law will be less complex and clarify some of the inconsistencies resulting from the 1997 IDEA's discipline provisions.[23] With parents and educators often on polar sides of the IDEA discipline debate,[24] Congress must strike a compromise with the new IDEA. However, this compromise cannot come at the expense of educating all children in non-disruptive classrooms in American public schools.

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

II. PROTECTING THE DISABLED STUDENT

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

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[22] *See* Discussion *infra* Part IV.
[23] *See* Discussion *infra* Part V.C.
[24] *See* Discussion *infra* Part V.
[25] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 1975 U.S.C.C.A.N. (89 Stat. 773) (codified at 20 U.S.C. §§ 1400-1487 (1977), http://www.theteachersguide.com/20USC1400MyOverview.html (last visited Dec. 16, 2002) (on file with author). In enacting the IDEA, Congress described the high social and economic costs that society pays for failing to provide disabled children with an appropriate education. *Id.*

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

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

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

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

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

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

[31] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 1975 U.S.C.C.A.N. (89 Stat. 773) (codified at 20 U.S.C. §§ 1400-1487 (1977)). Three laws form the nondiscrimination framework for children with disabilities in public schools: Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1973), the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 (1997), and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 (1990). If a student does not meet the criteria for the IDEA, he may qualify for education services under either § 504 of the Rehabilitation Act or the ADA. All of these acts prohibit schools from discriminating

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

A. Pre-IDEA Case Law

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

A few major court cases in the early 1970's prompted Congress to enact the IDEA. Most notably, *Pennsylvania Association for Retarded Citizens (PARC) v. Pennsylvania*[37] and *Mills v. Board of Education for the District of Columbia*[38] affirmed the constitutional civil rights principles of equal protection and due process for disabled children in education. In *Pennsylvania Association for Retarded Citizens v. Pennsylvania,* thirteen mentally disabled children argued for the unconstitutionality of several state statutes excluding retarded children from education.[39] Specifically, the plaintiffs claimed that (1) "these

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against disabled students. The focus of this article, however, is on IDEA because it most significantly impacts discipline issues in public schools. Nevertheless, knowledge of these three federal acts along with state laws, federal and state regulations, and judicial decisions remain essential to understanding special education law.

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

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

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

[35] Dayton, *supra* note 17, at 18.

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

[37] Pa. Ass'n for Retarded Citizens (PARC) v. Pa., 343 F. Supp. 279 (E.D. Pa. 1971).

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

[39] *PARC*, 343 F. Supp. at 281.

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

A few months later in *Mills v. Board of Education for the District of Columbia,* a group of seven disabled children challenged their exclusion from public schools without due process hearings or a review of their educational status.[44] These plaintiffs sought to compel the District of Columbia School Board to provide them with immediate and adequate education and educational facilities in the public schools or alternative placement at public costs.[45] In the beginning of its opinion, the U.S. District Court notes the significant problems involved in the case including "(1) the failure of the District of Columbia to provide publicly supported education and training to plaintiffs and other 'exceptional' children, members of their class, and (2) the excluding, suspending, expelling, reassigning and transferring of 'exceptional' children from regular public school classes without affording them due

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[40] *Id.* at 283.
[41] *Id.*
[42] *Id.*
[43] The Consent Decree approved of in *PARC* provides "that no child who is mentally retarded or thought to be mentally retarded can be assigned initially (or re-assigned) to either a regular or special educational status, or excluded from a public education without a prior recorded hearing before a special hearing officer." *Id.* at 284-85. Essentially, because the Commonwealth of Pennsylvania had undertaken "to provide a free public education for all of its children between the ages of six and twenty-one years . . . it is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity*." Id.* at 285.
[44] Mills, 348 F. Supp. at [ ].
[45] *Id.* at 868.

process of law."[46] Stressing the importance of education for all, the court declared that "Congress has decreed a system of publicly supported education for the children of the District of Columbia [and the Board] has the responsibility of administering that system in accordance with law and of providing such publicly supported education to all of the children of the District [of Columbia], including these 'exceptional' children."[47] Furthermore, the court held that the disabled students could not be denied due process or equal protection, stating: "[n]ot only are plaintiffs and their class denied the publicly supported education to which they are entitled, many are suspended or expelled from regular schooling or specialized instruction or reassigned without any prior hearing and are given no periodic review thereafter."[48] Ultimately, "the court required that the [local] school system follow many of the same guidelines and procedures later adopted by Congress in the IDEA."[49]

Although the Supreme Court did not address the issues of *Pennsylvania Association for Retarded Citizens v. Pennsylvania* and *Mills v. Board of Education for the District of Columbia* prior to the enactment of the IDEA, Congress recognized that the problems these cases demonstrated required a national solution.[50] Therefore, in 1975, three years after these decisions, Congress passed the Education for All Handicapped Children Act.[51] Later renamed the IDEA,[52] the Act guaranteed all disabled children the right to a free and appropriate public education in the least restrictive environment possible.[53]

B. The Primary Legal Concepts of IDEA

> *Everyone can agree with the objective stated in the title of this [Education for All Handicapped Children Act] bill -- educating all handicapped children in our Nation. The key*

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[46] *Id.*
[47] *Id.* at 870-71.
[48] *Id.* at 875.
[49] Thompson, *supra* note 14, at 567.
[50] In addition to promulgating the IDEA, other statutes affect and protect disabled students. *See supra* note 31.
[51] 20 U.S.C. §§1400-1491 (1999) (originally enacted as the Education for the Handicapped Act (EHA), Pub. L. No. 94-142, 89 Stat. 773 (1975)).
[52] Although the EHA did not become the IDEA until 1990, for purposes of this paper, I will refer to the federal statute as the IDEA. *See* Groeschel, *supra* note 10, at 1090.
[53] 20 U.S.C. §§ 1401-1413. *See also Back to School on Civil Rights*, *supra* note 3, at pt. 1, §D.

> *question is whether the bill will really accomplish that objective.*[54]

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

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

Part B of the IDEA provides financial assistance to states and local education agencies for educating disabled students. Specifically, in order to receive funding, a state must demonstrate that it has policies and procedures in effect that ensure that it meets a list of conditions, including free and appropriate education, the least restrictive environment possible, procedural safeguards, and evaluations.[58] Part D, Support Programs, emphasizes research and reform by providing grants to "assist State educational agencies, in reforming and improving their systems for providing educational, early intervention, and transitional

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

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

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

[57] George, *supra* note 17, at 94-95.

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

services, including their systems for professional development, technical assistance, and dissemination of knowledge about best practices, to improve results for children with disabilities."[59]

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

Once a student qualifies under the IDEA as disabled, the IDEA requires that schools provide the disabled student the fundamental educational rights of a free and appropriate public education (FAPE) and an education specially designed to meet the disabled child's unique needs.[63] Appropriateness is an elusive but significant concept in the IDEA because the law does not equate appropriate education with maximum education. The Act imposes no obligation on schools beyond the requirement that disabled children receive some form of specialized education.[64] Thus, a school can provide a disabled student with a FAPE without an optimum education.[65] All schools must have a FAPE policy.[66] "In order to meet the FAPE requirements for all disabled children, school personnel must identify the child with a disability, evaluate the child, design an individualized educational program (IEP) for the child,

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[59] 20 U.S.C. § 1412

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

[61] George, *supra* note 17, at 95.

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

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

[64] *Id*. at 195.

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

[66] 20 U.S.C. §1401(8); §1412(a)(1)(A).

and place the child in an educational program in the least restrictive environment' (LRE) possible."[67]

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

Furthermore, to implement the FAPE policy and to provide an education to the disabled in the LRE, schools must evaluate "the child for special services and work with the parents to develop an Individual Education Plan for that child."[71] The Individual Education Plan is a written description of a disabled child's educational program. Specifically, the Plan must address "several elements, including statement of the child's current performance, long and short-term goals and objectives, services the school district will provide to the child, the extent to which the child will participate in activities with non-disabled students, and the projected date the child will begin the special education program."[72]

The IDEA also provides procedural due process rights to disabled children and parents.[73] For example, when a parent of a disabled student

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[67] George, *supra* note 17, at 96; *see also* Dupre, *supra* note 14, at 8.
[68] Thompson, *supra* note 14, at 569.
[69] LAWRENCE M. SIEGEL, THE COMPLETE IEP GUIDE 1/3, 2/5, 11/13 (2d ed. 2002).
[70] 34 C.F.R. § 300.550 (2002); *see also* 20 U.S.C. §1412(a)(5) (2003); SIEGEL, *supra* note 69, at 2/3 - 2/16.
[71] George, *supra* note 17, at 96; *see also* Dupre, *supra* note 14, at 8.
[72] SIEGAL, *supra* note 69, at 2/9-2/12; Groeschel, *supra* note 10, at 1091.
[73] For a general discussion of the due process protections of the IDEA including case law and school compliance, *see* Elizabeth A. Bunch, *School Discipline Under the Individuals with Disabilities Education Act: How the Stay-Put Provision Limits Schools in Providing a Safe Learning Environment*, 27 J.L. & EDUC. 315 (1998); Joseph R. McKinney, *Disciplining Children With(Out) Disabilities: Schools Behind the Eight Ball*, 130 ED. LAW REP. 365 (1999); Trent D. Nelson, Note, *Congressional Attention Needed For the Stay-Put Provision of the Individuals With Disabilities Education Act,* 1997 BYU EDUC. & L.J. 49 (1997).

has a disagreement about an assessment or placement, the school must provide a due process hearing to the parent with specific procedural safeguards such as the right to present evidence and the right to advice from special educational professionals.[74] When a due process hearing occurs, a disabled child is entitled to remain ("stay-put") in his current placement until an agreement is reached. [75]

C. Legislative History of IDEA

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

Since 1975 and the passage of the Education for All Handicapped Children Act (EHA), now the IDEA, more than six million disabled children now have the opportunity to attend public school.[77] Although Congress amended the IDEA several times since its enactment,[78] many of the key provisions remained the same until 1997. In 1986, Congress promulgated the Handicapped Children's Protection Act that included an attorney fee provision in the IDEA, thus equating the civil rights aspect of the IDEA with other civil rights legislation.[79] Further, Congress

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

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

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

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

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

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

added another amendment to the IDEA in the 1980s that established an early intervention program for infants, toddlers, and their families.[80] In 1990, Congress again amended the law, although substantive changes were limited.[81] Nevertheless, one of these changes altered the statutory name of the EHA to the name society now associates with disability and education—the Individuals with Disabilities in Education Act.[82] During the 1980s and 1990s, numerous cases challenged the IDEA's inclusion policy and, particularly, how the IDEA's mainstreaming policy affected school violence and the learning environment of classrooms.[83] Both issues stirred much debate and controversy; many parents, educators, and legislators believed a school's ability to discipline a disruptive child directly conflicted with the IDEA's preference that disabled students be educated in regular classrooms with their non-disabled peers.[84] Since the enactment of laws regarding education of the disabled student, educators and parents have pushed Congress to focus on the issue of discipline. Proposals were diverse and often extreme; while some parents of disabled children vigorously opposed any measures that would exclude their children from regular classrooms, some parents of non-disabled children argued that inclusion of disruptive disabled children decreased their children's educational opportunities.[85]

Despite minor changes to the IDEA during the 1990s,[86] Congress did not address the issue of discipline fully until 1997 when Congress

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

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

[82] Dayton, *supra* note 17, at 20.

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

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

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

[86] For example, in 1994 the Jeffords Amendment carved out an exception to the *Honig* holding and the IDEA. When a disabled student possessed a firearm, the Jeffords Amendment permitted school officials to alter a disabled student's placement and

reauthorized the IDEA. The 1997 Reauthorization ". . . launched the second generation of statutory development. For the first time since 1975, significant changes were made to the law while retaining its basic protections. The 1997 additions were intended to clarify, strengthen, and provide guidance on implementation of the law based on two decades of experience."[87] The law that emerged in 1997 was "for the most part, strengthened and revitalized,"[88] and "for the first time, the 1997 IDEA established and clarified how school disciplinary rules and the obligation to provide a FAPE to disabled children corresponded with each other." [89] The 1997 IDEA also emphasized testing, inclusion, results, funding, assessment, accountability, clearer standards and definitions within the law, parent training, technology development, and paperwork reduction.[90] The U.S. Department of Education issued regulations for the 1997 IDEA amendments in 1999.[91]

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

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educational setting for up to 45 days. Roslyn Zisie Roth, *Disciplining Special Education Students*, 114 P.L.I. 927, 955-60 (2000).

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

[88] *Id.*

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

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

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

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

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

D. Reauthorization

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

Many provisions of the IDEA expired on September 30, 2002,[95] and require reauthorization. Approximately every five years, the IDEA is updated and reviewed.[96] The last reauthorization was in 1997. Although "by the end of 2002, Congress [was] scheduled to approve the continued expenditure and use of federal funds to carry out activities included under certain components or parts of the IDEA statute,"[97] many advocates correctly believed that the controversial reauthorization would not happen in 2002.[98] One behavioral health advocate noted that "reauthorization will definitely happen—but its absolutely not going to be done in 2002."[99] Congress began discussions and conducting hearings concerning the reauthorization of IDEA in the spring of 2002 and the new bill to reauthorize the law was due for release shortly after the completion of a report from the President's Commission on Excellence in Special Education. However, both the Senate and the House are still studying these recommendations as they prepare their legislation. Elizabeth Wenk, press secretary to Representative Michael Castle, who chairs the House Education Reform Subcommittee commented: "I don't think anybody thinks this is going to be done before we adjourn (scheduled for Oct. 4) . . . I think we'll get in a lame-duck

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

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

[96] *Id.*

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

[98] *Election Year Dynamics Could Derail IDEA Reauthorization*, MENTAL HEALTH WEEKLY (Jan. 28, 2002), *available at* http://www.findarticles.com/cf_/m0BSC/4_12?82551709/print.jhtml.

[99] *Id.*

session after the election when reauthorization may be discussed."[100] Many attribute the slower pace for IDEA reauthorization to the Commission's report addressing the controversial issue of private school vouchers, the November elections, the focus on homeland security and budget bills, and the fact that lawmakers are generally reluctant to address contentious issues.[101]

Only two of the four parts of the IDEA require reauthorization — Part C, which authorizes an early intervention program for infants and toddlers with disabilities, and Part D, which authorizes several discretionary programs to support national activities. However, the reauthorization process for these Parts provides an opportunity to examine and make changes to Part B as Congress did in 1997. And Part B will likely be scrutinized and analyzed just as much as the Parts needing reauthorization because the true "heart of the IDEA controversy lies" in Part B.[102] Included in Part B are the controversial issues such as evaluations, IEP's, eligibility, and procedural safeguards including discipline and due process. Some educators believe these issues will certainly be addressed in the IDEA reauthorization process, especially in light of the attention they received during the debates on the reauthorization of the Elementary and Secondary Education Act (No Child Left Behind Act).[103]

Since this article has been written, there has been much activity in Congress concerning the reauthorization of the IDEA.[104] For example, in February 2003, Secretary of Education Paige released a "Principles for Reauthorizing IDEA" describing the guiding principles in the reauthorization of the IDEA and foreshadowing what issues will be highlighted in the actual reauthorization.[105] Most importantly, however, on April 30, 2003, the House of Representatives voted to approve H.R.

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

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

[102] *See supra* note 98.

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

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

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

1350, the Republican bill to reauthorize the IDEA.[106] Then in May 2003, it was predicted that the Senate would reauthorize the IDEA before the Memorial Day recess, but senate staff members confirmed that a bill to reauthorize the IDEA would probably not be introduced until June.[107] On June 13, 2003 the Senate Committee on Health, Education, Labor, and Pensions introduced a proposed IDEA reauthorization bill, S. 1248, which was marked up and passed by the Senate Committee on June 25, 2003. [108] Debate and a vote by the full Senate will now be scheduled. During the debate, amendments will be offered on the bill. As of August 1, 2003, no new action has been taken in the Senate since the markup of S. 1248 on June 25, 2003. Due to numerous other legislative obligations as well as the August recess, the full Senate vote and any other IDEA action will probably not occur until September 2003, at the earliest.[109] Following the passage of the Senate bill, the House and Senate bills go to conference, out of which one bill will emerge.[110]

III. A DISCIPLINE STANDARD EMERGES

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

Almost all parents, teachers and educators agree that maintaining discipline and safety in America's public schools is of primary importance. Unfortunately, there is little agreement on how to discipline

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

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

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

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

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

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

the disabled student. This section attempts to provide a backdrop to discipline reform in the upcoming reauthorization of IDEA by exploring the history and various statutory discipline requirements of the IDEA and related case law.

A. Goss v. Lopez

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

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[112] Goss v. Lopez, 419 U.S. 565, 584 (1975).
[113] *Id.* at 574.
[114] Omyra M. Ramsingh, Comment, *Disciplining Children with Disabilities Under the Individuals with Disabilities Education Act*, 12 J. CONTEMP. HEALTH L. & POL'Y 155, 165 (1995).
[115] *Goss,* 419 U.S. at 580.
[116] However, in *Goss v. Lopez* the court held that there was an exception to the finding of a denial of due process when the student presented a continuous danger to people, property, or the educational process. *Goss*, 419 U.S. at 582.
[117] *Id.* at 584. *See also* Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978).

B. Enactment of IDEA

In 1975, the same year as *Goss*, Congress passed the IDEA.[118] However, the IDEA contained no specific provision pertained to disciplining a disabled student. Although the 'stay-put' provision had implications for excluding children due to discipline problems, it primarily emphasized the IDEA's mainstreaming preference, particularly during due process procedures: "[U]nless the State of local educational agency and the parents otherwise agree, the child shall remain in the then current educational placement of such child . . . until all such proceedings have been completed."[119] Nevertheless, the stay-put provision, from the inception of the IDEA, caused concern among educators and parents about the ability of schools to maintain a safe learning environment in the classroom. For example, if a school administrator wants to suspend or expel a disabled child for his/her excessive classroom disturbances and the parent does not consent, the stay-put provision requires that, until the due process hearing concludes, the child must remain in his present placement (generally the mainstream educational setting).[120]

C. Stuart v. Nappi *and its Progeny*

In *Stuart v. Nappi*, the District Court for the District of Connecticut considered the legality of discipline in the context of the IDEA.[121] In *Stuart,* the plaintiff, a high school student with serious academic and emotional difficulties due to numerous learning disabilities, received a ten-day disciplinary suspension due to her involvement in a school-wide disturbance. At a disciplinary hearing, the superintendent recommended that the plaintiff receive an expulsion for

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

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

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

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

the remainder of the school year. [122] Although cognizant of the school district's need to have flexibility in its disciplinary determinations, the District Court of Connecticut held that the expulsion violated the stay-put provision of the IDEA.[123] Termination of educational services resulting from an expulsion is a change of educational placement that invokes the procedural protections of the IDEA. Therefore, to discipline a disabled student, a school must follow the IDEA's procedural mandates; when necessary, a school can suspend a disabled student for less than ten days or follow the IDEA procedures to change the student's educational placement and remove the student from the mainstream educational setting for a longer period.[124]

In addition to reiterating *Stuart's* holding that an expulsion is a change in placement requiring the IDEA's procedural protections, the cases that followed *Stuart* expanded its concept to a determination of whether the disability of the disabled student caused the student's disruptive behavior and thus his discipline.[125] In *Doe v. Koger*, for example, the court concluded that schools could not expel disabled students whose disability causes their disruptive conduct.[126] This manifestation of the disability concept provides that when a disabled student becomes subject to disciplinary exclusion, the school must determine whether the child's disability caused the disturbance. If it is determined that the misbehavior resulted from the student's disability, the school may place the student in a more restrictive and suitable school setting (change of placement) as long as the disabled student is afforded the procedural protections of the IDEA, including its stay-put provision.[127] Although approving of the manifestation of the disability determination, the Fifth Circuit Court of Appeals in *S-1 v. Turlington* concluded that if the manifestation decision determined that there was no relationship between the disability and the disruptive behavior, the

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[122] *Stuart,* 443 F. Supp. at 1235, 1236.
[123] *Id.* at 1238.
[124] *Id. See also* Osborne, *supra* note 10, at 517; Bell, *supra* note 10, at 179-83; Ramsingh, *supra* note 114, at 166-67. For a discussion of a dangerousness exclusion exception, see *Stuart*, 443 F. Supp. at 1242; Jackson v. Franklin County Sch. Bd. 765 F.2d 535 (5th Cir. 1985); Victoria v. Dist. Sch. Bd., 741 F.2d 369, 371 (11th Cir. 1984).
[125] Bell, *supra* note 10, at 182-86; Osborne, *supra* note 10, at 516-20; Ramsingh, *supra* note 114, at 164-70. This expansion was partly due to the United States Department of Education proposing new regulations under the IDEA in 1982. Bell, *supra* note 10, at 182 n. 92.
[126] Doe v. Kroger, 480 F. Supp. 223 (N.D. Ind. 1979).
[127] *See* Bell, *supra* note 10, at 182-84; Osborne, *supra* note 10, at 517-19.

school could expel the student only in accordance with the IDEA procedures.[128] The *S-1* Court also concluded that during an expulsion, a disabled student cannot be denied education services; nevertheless, "expulsion is still a proper disciplinary tool under the [IDEA] when proper procedures are utilized and under proper circumstances."[129] However, without discussion, the court summarily concluded that it could not "authorize the complete cessation of educational services during an expulsion period."[130]

D. Honig v. Doe

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

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[128] S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981), *cert. denied* 454 U.S. 1030 (1981).
[129] *Id*. at 348.
[130] *Id; see also* Kaelin v. Grubbs, 682 F. 2d 595, 602 (6th Cir. 1982). This issue was later reviewed, and the opposite conclusion was reached, by the 9th, 4th, and 7th Circuits in Va. Dep't of Educ. v. Riley, 106 F.3d 559 (4th Cir. 1997), Doe v. Bd. of Educ. of Oak Park, 115 F.3d 1273, 1234 (7th Cir. 1997) and Doe v. Maher, 793 F.2d 1470, 1471 (9th Cir. 1986).
[131] Honig v. Doe, 484 U.S. 305 (1988).
[132] *Id.* at 323, 326-29.
[133] *Id*. at 323-24.
[134] *Id*. at 325.

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

E. Unresolved Issues and Complications Post-Honig[138]

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

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

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

[137] *Honig*, 484 U.S. at 325-26.

[138] Many of the unresolved issues following *Honig* were addressed in the 19997 IDEA and the corresponding 1999 IDEA Regulations. *See* Discussion, *infra* Part IV.

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

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

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

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

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

[143] Courts have also held that IDEA applies to students not yet identified as disabled who misbehave. "IDEA requires schools to actively search for students that qualify. Students who are not classified still merit the procedural and substantive protection of IDEA. However, some students invoke the protection of IDEA to sidestep punishment." Nelson, *supra* note 73, at 61. *See* Hacienda La Puente Sch. Dist. v. Honig, 976 F.2d 487 (9th Cir. 1992); M.P. v. Grossmont Union High Sch. Dist., 858 F.Supp. 1044 (S.D. Cal. 1994). *But cf.* Rodiriecus v. Waukegan Sch. Dist., 90 F.3d 249 (7th Cir. 1996) (stay-put provision of IDEA applies to a student that has not previously been diagnosed only if the student reasonably should have been diagnosed). IDEA requires schools to identify, locate and evaluate all students with disabilities. *See* 20 U.S.C. 1412 (3)(a).

or placement decision is contested.[144] Nevertheless, it became clear after *Honig* that "no balance had been struck between providing the least restrictive educational setting for children with disabilities and protecting the rights of others attending or working in the school systems to a safe and peaceful environment."[145]

IV. THE 1997 IDEA REAUTHORIZATION RESPONDS

> *"Despite dramatic improvement over the years, too many disabled children are still being left behind academically."*[146]

In 1997, Congress finally responded to the concerns of educators and parents regarding the IDEA and in particular its discipline provisions. Making schools safer for all children was one of the main purposes of the revisions of the IDEA; "'ensuring the schools are safe and conductive to learning' was one of the many ways Congress could improve the quality of education for disabled children."[147] Both the Senate and the House, by overwhelming majorities, approved the proposed amendments. When President Clinton signed the 1997 IDEA legislation into law in June 1997, he recognized that the new law "[gave] school officials the tools they need[ed] to ensure that the Nation's schools are safe and conductive to learning for all children, while scrupulously protecting the rights of children with disabilities."[148] The 1997 IDEA implemented far-reaching changes by including, for the first time, specific provisions for disciplining disabled students. "Some of these provisions simply codified existing case law; others, however, clarified previously gray areas, and settled disagreements that had split the courts."[149] Nevertheless, the IDEA still has not achieved an

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[144] Nelson, *supra* note 73, at 51.
[145] Thompson, *supra* note 14, at 573.
[146] Statement of Education Reform Subcommittee Chairman Michael Castle (R-DE), House Education Committee Begins Efforts to Strengthen Individuals with Disabilities Education Act (IDEA), http://edworkforce.house.gov/press/press107/castleidea41802.htm (last visited Nov. 23, 2002) (on file with author).
[147] Thompson, *supra* note 14, at 574.
[148] *Id.* at 575.
[149] Osborne, *supra* note 10, at 529. For example, IDEA 97 declares that students with disabilities who have been expelled are still entitled to a FAPE. This issue had divided the courts. *Compare* Honig v. Doe, 484 U.S. 305 (1988) *and* S-1 v. Turlington, 635 F.2d 342 (1981) *with* Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986), *and* Va. v. Riley,

appropriate balance of rights— educators must continue to grapple with maintaining a safe conductive learning environment for all students while submitting to the protections afforded to the disabled student regarding discipline. In order to understand the problems with the 1997 IDEA provisions, this section provides a thumbnail sketch of the relevant 1997 IDEA disciplinary provisions followed by a discussion of case law and resulting problems with the law.

A. The Amendments and Regulations[150]

1. Short-Term Removals

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

More specifically, the 1997 IDEA and regulations provide that if a school removes a disabled student for up to 10 school days in a school year, services do not have to be provided if services are not provided to a non-disabled student similarly removed.[153] However, during subsequent removals that do not constitute a change in placement, educational services must be provided to the disabled student to the extent necessary to enable the child to appropriately progress in the general curriculum and towards the goals set out in the child's Individual Educational

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106 F.3d 559 (4th Cir. 1997), *and* Doe v. Bd. of Educ. of Oak Park, 115 F.3d 1273 (7th Cir. 1997).

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

[151] 20 U.S.C. § 1415(k).

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

[153] Silverstein, *supra* note 135.

Program (IEP).[154] Functional behavioral assessments and behavioral intervention plans are required when the school first removes the disabled student for more than 10 school days in a school year and whenever the student is subjected to a disciplinary change of placement.[155] In other subsequent removals, the functional behavioral assessment and behavioral intervention plan must be reviewed.[156] Manifestation determinations and the IEP team meetings to make these determinations are only required when a child is subjected to a disciplinary change of placement.[157] If it is determined that the behavior of the disabled student is not a manifestation of the child's disability, then the child can be disciplined in the same manner as non-disabled children, except that appropriate educational services must be provided.

2. Long-Term Removals

If a disabled student requires discipline that would result in a removal from the current educational placement for more than 10 days,[158] schools must follow special procedures. School personnel must notify the parents of the long-term removal decision and provide a copy of the IDEA procedural safeguards to the parent.[159] The stay-put provision of the IDEA prevents removal of the disabled student until resolution of due process procedures.[160] Within 10 days of the decision, the IEP and other qualified personnel must meet and perform a manifestation determination review.[161] If the misbehavior constitutes a manifestation of the disability, no discipline may be assessed to the disabled student.[162] If the IEP identifies deficiencies in the IEP, placement, or implementation of the program set out in the IEP, then the

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

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

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

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

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

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

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

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

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

IEP team must discuss and immediately resolve these issues.[163] On the other hand, if the misbehavior was not a manifestation of the disability, then regular disciplinary actions may be taken. Cessation of services, however, is not permitted and the disabled student must continue to receive services equivalent to a free and appropriate public education.[164]

3. Drug and Weapon Violations and the Dangerous Disabled Student

The 1997 IDEA permits different disciplinary actions and procedures for drug and weapon violations and for disabled students considered dangerous either to themselves or to others. This provision "expands the authority previously granted to school officials by the Gun Free Schools Act of 1994 to exclude students from mainstream public schools for drug [and weapon] violations."[165] The 1997 IDEA and Regulations define a weapon as "the meaning given the term 'dangerous weapon,'" and define an illegal drug as a "controlled substance" not proscribed by a health-care professional.[166] For a drug or weapon violation, school authorities can unilaterally remove a disabled student from the child's regular placement to an interim alternative educational placement for up to 45 days at a time.[167] An IEP team must convene to determine the extent to which services must be provided to a disabled student in an interim alternative educational setting.[168] School officials may also seek to place a disabled student they consider is "likely to injure [one's] self or others in the child's regular placement" in a permanent alternative educational setting by requesting an impartial hearing officer to impose such a sanction or by obtaining a court

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[163] 20 U.S.C. § 1514(k)(4)(C)(i); 34 C.F.R. § 300.523(f).
[164] 20 U.S.C. § 1415(k)(5)(A); 34 C.F.R. § 524.
[165] Osborne, *supra* note 10, at 535. *See* 20 U.S.C. § 8921 (2001) (repealed by Act Jan. 8, 2002, Pub. L. 107-110, Title X, §1011(5)(C), 115 Stat. 1986 (effective on enactment, with certain exceptions, as provided by § of such Act, which appears at 20 U.S.C. § 6301 note); *see also* Gun-Free Schools Act, 20 U.S.C.S. § 7151 (2002).
[166] 20 U.S.C. § 1415(k)(10); 24 C.F.R. § 300.520(d). Controlled substance is defined further as a "drug or other substance identified under schedules I, II, III, IV, or V in §202(c) of the Controlled Substances Act (21 U.S.C. §812(c))" and for the definition of weapon, reference is made to the definition of dangerous weapon "under paragraph (2) of the first subsection (g) of § 930 of title 18, United States Code." 20 U.S.C. § 1415(k)(10); 24 C.F.R. § 300.520(d).
[167] 20 U.S.C. § 1415(k)(1)(A)(ii); 34 C.F.R. § 300.520(b).
[168] 20 U.S.C. § 1415(k)(3)(B); 34 C.F.R. § 300.522.

order.[169] Law enforcement officials can also be informed of violations and crimes committed by disabled students.[170]

4. Other Aspects of the Law

The stay-put provision of the IDEA applies to all actions contemplated by school officials. Thus, a disabled child is entitled to stay in his or her current placement pending resolution of parental appeals, due process, and court action except for cases involving weapons or drugs.[171] Several sections of the 1997 IDEA require that school officials conduct a functional behavioral assessment and implement a behavior intervention plan if one is not already in place. Generally, changes in placement can never occur without a manifestation determination, functional behavioral assessment, and implementation of a behavior intervention plan.[172] The 1997 IDEA regulations encourage and recommend that the IEP team review the circumstances surrounding the behavior even if a change of placement does not occur.[173] To prevent discipline problems in the first place, the 1997 IDEA addresses the utilization of "positive behavioral interventions, strategies, and supports."[174] In the development of an IEP for a disabled student, the IEP team "shall in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior."[175] Neither the1997 IDEA nor its Regulations define positive behavioral systems.[176]

The 1997 IDEA also protects children not yet eligible for special education.[177] A regular education student who has engaged in behavior warranting suspension or expulsion may invoke the IDEA and claim he/she should be treated as a disabled student and be provided all of the procedural protections afforded to a disabled student. However, the

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[169] 20 U.S.C. §§ 1415(k)(2), (k)(9); 34 C.F.R. §§ 300.521, 300.529.
[170] 20 U.S.C. § 1415(k)(9); 34 C.F.R. § 300.529.
[171] Silverstein, *supra* note 135. *See also* 20 U.S.C. § 1415(k)(7); 34 C.F.R. § 300.526.
[172] 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. §§ 300.520(b),.523.
[173] Groeschel, *supra* note 10, at 1119.
[174] 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346.
[175] 20 U.S.C. § 1414(d)(3)(B)(i).
[176] For possible interpretations of PBS and its use and effect in schools, see H. Rutherford Turnbull, III, et al., *IDEA, Positive Behavioral Supports and School Safety*, 30 J.L. & EDUC. 445 (July 2001).
[177] 24 U.S.C. § 615(k)(8); 34 C.F.R. § 300.527.

student must demonstrate that the school had knowledge "that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred."[178] The 1997 IDEA establishes four ways in which a school can have knowledge that a student may have a disability: parental concerns addressed to school, behavioral indications, parental requests for disability determinations, or if a school official has expressed concern regarding the child's behavior.[179]

Overall, "the process for disciplining disabled students, as interpreted by the [1997 IDEA] and the final IDEA regulation, is complex."[180] However, numerous commentators and advocacy groups, including the Office of Special Education, have attempted to clarify the issue by providing simplified guidelines, diagrams, and timelines for parents and administrators dealing with disciplining the disabled.[181] Although the 1997 IDEA and corresponding regulations provide the framework for disciplining the disabled, several issues remain controversial as the proper balance has yet to be achieved.

B. The Balance Problem with the 1997 IDEA

Although for the most part the 1997 IDEA was a success, advocates on both sides were not completely satisfied. Particularly regarding discipline, both parents and educators claimed that Congress still did not realize an appropriate balance of maintaining a safe and orderly classroom with providing disabled students the right to be educated along with their non-disabled peers. That is, "despite the best

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[178] 24 U.S.C. § 615(k)(8); 34 C.F.R. § 300.527(a).
[179] 24 U.S.C. § 615(k)(8)(B)(iiv); 34 C.F.R. § 300.527(b)(1).
[180] Janet L. Horton, *Discipline Under IDEA*, SCHOOL ADMINISTRATOR (Oct. 1999), *available at* www.aasa.org/publications/sa/1999_10/horton.htm (on file with author).
[181] Numerous advocacy organizations have attempted to clarify the 1999 Regulations to 1997 IDEA. *See ECAC, Final IDEA Regulations*, *supra* note 152; Learning Disabilities Online: LD In-Depth: *A Primer on IDEA 1997 and its Regulations,* www.ldonline.org/ld_indepth/special_education/cec_idea_primer.html; The Families and Advocates Partnership for Education, http://www.fape.org/ (last visited Nov. 20, 2002) (on file with author); Labor Relations Press, *New Idea, Making Sense of the New IDEA Regulations* (Spring and Fall 1999); http://www.lrpconferences.com/newidea.html; Wrightslaw, *The Individuals with Disabilities Education Act of 1997,* http://www.wrightslaw.com/law/code_regs/20USC1400MyOverview.html (last visited Dec. 2, 2002) (on file with author); Office of Special Education, *available at* http://www.ed.gov/offices/OSERS/Policy/IDEA/ (last visited Nov. 12, 2002) (on file with author). *See also* Seligmann, *supra* note 17, at 122-28 (providing a checklist, detailed questionnaire, and action plan for discipline under the IDEA).

intentions of the [IDEA], its implementation gradually has created a bureaucracy of separatism, where mandates have been imposed without adequate regard for the balance of resources… [or] the balance of special education with all other education services provided by the public schools."[182] The 1997 IDEA clearly represented a compromise of the extremes. However, in reaching a compromise, Congress may have compromised the rights of non-disruptive students and non-disabled students in general.

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

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[182] *Reauthorization of the Individuals with Disabilities Education Act: Hearing before the H. Educ. And Workforce Comm'n*, 105th Cong. 98 (1997) (statement of John L. Burkey, Legal Counsel for the Cal. Sch. Bd.'s Assoc.).
[183] Dupre, *supra* note 14, at 52.
[184] Thompson, *supra* note 14, at 583.
[185] Dupre, *supra* note 14, at 50 (citation omitted).
[186] Osborne, *supra* note 10, at 537.

permitting sanctions for disruptive behavior would exclude a large number of disabled children from a normal education.[187] Advocates want an IDEA that prevents school officials from finding and claiming any disciplinary reason to expel or remove a disruptive child.[188] Advocates and parents believe they have already made concessions and fear that further conceding "could be the beginning of a slippery slope, ending with the ability of school officials to expel disabled students just to be rid of them."[189] They recognize that schools must have the ability to discipline students, but argue that long-term removals are used too frequently rather than positive behavioral strategies. Testifying before the U.S. Senate Health, Education, Labor and Pensions Committee Hearing on the IDEA, Marisa Brown, a parent of a disabled student, noted the negative consequence associated with the overuse of suspensions, especially in the absence of more effective strategies: "For my child, suspension was used so often, that it actually began to reinforce the very behavior that the teachers were trying to extinguish. Suspension became a way for [my child] to escape a situation... and he quickly learned how to ensure swift suspensions, and ones that would last more than one day!"[190] Overall, disability advocates, parents of disabled children, and the disability community as a whole remain concerned that the 1997 IDEA and its regulations "have weakened the rights of these students to a free appropriate public education."[191]

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

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[187] Thompson, *supra* note 14, at 577-78.
[188] *Id*. at 582
[189] *Id.*
[190] *Individuals with Disabilities Act Oversight: Hearing Before the Senate Comm'n on Health, Educ., Labor and Pensions*, 2002 S. Hrg. 107-672 (June 6, 2002) (statement of Marisa Brown, parent).
[191] *ECAC, Final IDEA Regulations*, *supra* note 154.
[192] *See* Graham, *supra* note 14, at 1621.
[193] Theoretically, the IDEA creates "a double standard by requiring alternative educational services only for disabled students." Seligmann, *supra* note 17, at 114. Although the term 'double standard' assumes equally placed people, an unlikely assumption for disabled and non-disabled students, this is the term used by advocates, critics, and commentators of the IDEA. *See also* Graham, *supra* note 14, at 1621; Dupre, *supra* note 14, at 49; Del Stover, *Schools Grapple with Special Ed Discipline Limits*, SCHOOL BOARD NEWS (Mar. 2002), http://www.nsba.org/sbn/02-mar/030502-2.htm; InFocus, *Will Congress Have a Better IDEA* (April 2002),

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

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http://www.healthinschools.org/focus/2002/no2.htm; Bolick, *supra* note 20; Lynda Van Kuren, *IDEA: A Law To Be Proud Of*, ENABLEDONLINE.COM (Mar.-April 2002), http://www.enabledonline.com/BackIssues/Mar.-April2002/editorial2.html; National Association of School Psychologists, *NASP Recommendations on IDEA Reauthorization* (Feb. 22, 2002), http://www.nasponline.org/advocacy/NASP_IDEA.html (on file with author)[hereinafter *NASP Recommendations*]; *CEC, Five Issues*, *supra* note 97.

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

[195] Sack, *supra* note 20.

[196] *Id.*

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

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

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

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

Another problem with the 1997 IDEA is its implementation. Trying to execute any disciplinary procedure against a disabled student requires going through a "legal maze that frustrates the ability to discipline at all."[204] Essentially, all school decisions are subject to review as parents may appeal disciplinary determinations, changes in placement settings, or disability determinations—all of this is results in lengthy legal conflicts when it is just easier for schools to quit and allow disruptive or dangerous conduct to continue.[205] Many administrators argue that getting disabled students removed simply takes too much time and requires too many administrative burdens.[206] Although mediation is encouraged by the IDEA, it has not been significantly implemented as a model for preventing conflict between parents and school authorities regarding disciplining the disabled.[207]

Syndrome Education Network, *Zero-tolerance and Special Education*, (Oct. 13, 2002), http://www.aspennj.org/tolerance.html (on file with author).

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

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

[202] Lisa G. Keegan, *Education Leaders Council, Access, Achievement, and Accountability Matter Most*, ENABLEDONLINE (Nov. 1, 2002), http://www.enabledonline.com/editorials6.html (on file with author).

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

[204] *Id*. at 580.

[205] *Id*. at 581.

[206] Sack, *supra* note 20.

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

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

Furthermore, misconduct that is a manifestation of a student's disability receives different treatment than misbehavior unrelated to the disability. Yet there are problems in making this manifestation determination. The IEP team and other "qualified personnel" make this manifestation determination considering "all relevant information" including "evaluation and diagnostic results," parental supplied information, "observations of the child" and whether "the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement."[212] The regulations define qualified personnel to include the student's treating physician and other experts the parents provide.[213] However, the IEP team, even with experts, "may lack sufficient expertise in psychiatry to determine the relationship between disability and understanding of consequences and the relationship between disability and behavior control" essential to the manifestation determination.[214] The manifestation determination provision of the IDEA also "misses some

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[208] The weight of this burden can generally be attributable to, and a factor of, school size, training, teacher shortages, etc.
[209] Dupre, *supra* note 14, at 61-62.
[210] Thompson, *supra* note 14, at 584.
[211] *Id.*
[212] 20 U.S.C. §§ 1415(k)(4)(C)(i)(I)-(III), (ii)(1).
[213] Dupre, *supra* note 14, at 59.
[214] *Id.* at 58.

important points." For example, it fails to explain what "degree of impairment is necessary before the statute's provisions apply" and "does not make any allowance for the disabled student who may not currently be able to understand or control behavior, but could be trained to do so with swift and consistent discipline."[215] Although any parental challenge to the determination places the burden on the school to justify itself and its determination and often results in lengthy litigation, costly both in time and energy that could be better spent on educating the disabled student, such parental appeals are necessary to prevent the weakening of the protections for disabled students and to prevent abuses of the stay-put provisions of the IDEA.[216]

The amendments to the IDEA also created additional responsibilities for the schools and its staff. Schools now have an affirmative duty to review and modify a disabled student's IEP when the student's behavior results in a disciplinary change of placement. Similarly, schools must also bear the burden of keeping a watchful eye on those students whose behavior may indicate the need for special education. Although every state must have in effect policies and procedures to ensure all children are identified, located, and evaluated for disabilities, the IDEA provides protections for children not yet eligible for special education and related services.[217] The 1997 IDEA "presume[s] that if school personnel express concern to other school employees about a child's behavior or performance, then the school has already failed to properly evaluate the child as in need of special education."[218] Such a practice allows children without disabilities "to prevent routine discipline by simply requesting a disability evaluation . . . [and] in some cases [the] IDEA is manipulated by students who do not even have a disability. The student neither has any history of requesting special education services nor any credible basis for claiming a disability."[219] Yet even these students can claim shelter from discipline under the Act's provisions.

The toll on teachers created by the IDEA's disciplinary provisions also negatively affects the learning environment and contributes to the problems associated with disciplining the disabled. "Classroom teachers must spend an appreciable amount of time dealing

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[215] *Id.* at 59.
[216] Thompson, *supra* note 14, at 582; Nelson, *supra* note 73, at 61.
[217] 20 U.S.C. § 1415(k)(8), 34 C.F.R. § 300.527.
[218] McKinney, *supra* note 73, at 371.
[219] *Id*.

with the meetings and paperwork that IDEA's mandates spawn."[220] The burdensome demands placed on teachers often leads to a drain in resources. While teachers participate in IEP and discipline related meetings, hearings or court proceedings, substitute teachers have to be provided and other students are deprived of their teacher's time, energy, and passion for teaching. Shortages of qualified special education teachers along with a high burnout rate of those already in the special education field further contributes to the problems associated with disciplining the disabled.[221] All teachers are affected by the IDEA; "it's not just the special education teachers who are shouldering the law's burdens. General education teachers are also responsible for implementing the law, keeping track of paperwork, and attending IEP team meetings."[222] Yet, teachers "are being asked to do things they have not necessarily been trained to do."[223]

V. REFORM AND THE 2003 REAUTHORIZATION

> *Our challenge today is to address discipline issues with special students while protecting the hard won civil rights of school children with disabilities.*[224]
>
> *"The IDEA has yet to fulfill its promise. The doors are open, but the system still denies too many students the opportunity to reach high academic standards. That is why the IDEA needs reform."*[225]

Numerous advocacy, educational, medical, disability, parent, and school organizations have submitted to Congress their suggestions for reforming the discipline provisions of the 1997 IDEA. Despite the

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[220] Dupre, *supra* note 14, at 73.
[221] Joetta L. Sack, *All Classes of Special Education Teachers in Demand Throughout Nation*, EDUCATION WEEK, (Mar. 24, 1999), *available at* http://www.edweek.org/ew/vol-18/28speced.h18.
[222] Sack, *supra* note 20, at 4.
[223] *Id.*
[224] Statement of Senator Edward M. Kennedy, Committee on Health, Education, Labor and Pensions, The Implementation of the Individuals with Disabilities Education Act (IDEA) (June 6, 2002), http://www.ed.gov/print/news/speeches/2001/10/011004.html.
[225] Statement of Education Secretary Rod Paige before the House Education Committee (Oct. 4, 2001), http://edworkforce.house.gov/issues/107th/education/idea/041802specialed.pdf

variety of suggestions, a main theme of all the reform movements is that change is necessary.[226] Disciplining the disabled has been one of the most controversial aspects of the IDEA since its inception. "It is a difficult issue because it counters the ever-present duty of school administrators to maintain order, discipline, and a safe educational environment balanced against the rights students with disabilities have to a free [and] appropriate education in the least restrictive environment [possible]."[227] Revision and renewal of the IDEA is currently underway. Although the IDEA's discipline requirements do not have to be reauthorized, the current discipline provisions have caused much debate and need to be addressed. It may be difficult to assess the consequences of the 1997 IDEA Amendments because the Regulations were not promulgated until 1999 and research is still underway concerning the effects of the 1997 IDEA.[228] Nevertheless, there are some general issues relating to disciplining the disabled that must be recognized and addressed before Congress releases a new IDEA. Congress and the Department of Education must continue to work together and with parents and educators alike to answer the most pressing questions and resolve some of the problems confronting school districts left unanswered and unresolved by the 1997 IDEA regarding disciplining the disabled.

A. Cessation of Services

Most advocacy groups strongly oppose cessation of services.[229] Courts have agreed that schools cannot deny educational services to

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

[227] Osborne, *supra* note 10, at 537.

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

[229] *See* National Association of School Psychologists, National Mental Health and Education Center, *IDEA Reauthorization: Challenging Behavior and Students with Disabilities,* http://www.naspcenter.org/factsheets/idea_fs.html (last visited Dec. 16, 2002) (on file with author) [hereinafter *Challenging Behavior*]; The Families and Advocates Partnership for Education, http://www.fape.org/ (last visited Nov. 20, 2002)

students with disabilities.[230] The current IDEA does not allow cessation of services except for short-term disciplinary sanctions. Rather, the IDEA provides for alternative educational placements and continuation of IEP supports when disabled students are disciplined. This principle of 'no cessation' without exception must be preserved in the upcoming IDEA reauthorization.

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

Cessation of services has serious negative consequences for all students, especially disabled students. In fact, "no evidence shows cessation of educational services through suspension and expulsion makes a positive contribution to school safety or in any way improves student behavior."[233] The National Association of School Psychiatrists

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(on file with author); CCD Principles, *supra* note 62; U.S. Commission on Civil Rights, *Recommendations for the Reauthorization of the Individuals with Disabilities Education Act* (May 2002), http://www.usccr.gov/pubs/idea/recs.htm; The Disability Rights Education and Defense Fund, *The Disability Rights Education and Defense Fund, Inc., Launches IDEA Rapid Response Network* (April 2002), http://64.143.22.161/rrn/rapid.html; American Association of School Administrators, *American Association of School Administrators IDEA Reauthorization Position* (June 2002), http://www.cesa7.k12.wi.us/sped/issues-2002IDEA/aasaonidea.htm; Council of Administrators of Special Education, *CASE 2002 IDEA Re-authorization Recommendations* (Aug. 2002), http://www.cesa7.k12.wi.us/sped/issues-2002IDEA/case.htm; Parent Advocacy Coalition for Educational Rights, *Position Paper on Discipline Issues Relating to the Reauthorization of IDEA* (Dec. 2002), http://www.pacer.org/lesislation/position.htm.

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

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

[232] *Id.*

[233] *Rethinking School Discipline: Keeping Schools Safe Through Instruction, Not Exclusion: Hearing Before the Subcomm. on Educ. Reform Comm. on Educ. and the*

argues that "ceasing educational and other services for students as a means of disciplining them does not improve school safety or effectively address the behavior."[234] Many fear cessation of services could have a negative backlash when these students do return to school; when such services are denied, any type of supervision and instruction disappears and "students are more likely to become involved in illegal activities" ultimately leading to an increase in delinquency and a corresponding decrease in school and community safety.[235] Similarly, other data demonstrates that when educational services are suspended, students fall further behind and often dropout of school. Students who dropout of school "are three and a half times as likely as high school graduates to be arrested. Drop-out rates are higher among students with disabilities, and nearly one-third of these special education students cite discipline issues as the reason for dropping out."[236]

The National Council on Disability suggests that the new IDEA must parallel that of the No Child Left Behind Act. In order to prevent *any* child from being left behind, no child should be denied needed educational services. The Council maintains that "children should never be considered to have forfeited their rights to services . . . [it] is not something to which a child . . . can waive."[237] Some advocacy groups argue that no child, regardless of disability, should be denied educational services.[238] Testifying before the Subcommittee on Education Reform, Dr. Russell Skiba stated that "it is possible to develop sound disciplinary procedures for both general and special education that do not require cessation of services for students with disabilities."[239] Parents of

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Workforce, 107th Cong. (2002) (testimony of Dr. Russell Skiba), *available at* http://www.tash.org/govaffairs/skiba.htm.

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

[235] *See Id*.

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

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

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

[239] *Rethinking School Discipline: Keeping Schools Safe Through Instruction, Not Exclusion: Hearing Before the Subcomm. on Educ. Reform Comm. on Educ. and the*

disabled students argue for no cessation of services in any situation. Instead, "students who are removed from their educational setting should be placed in settings where they have access to appropriate mental health and behavioral support services provided by qualified professionals with specialized training and expertise."[240] Parents of special education students are adamant that schools should not punish students for their disability and oppose any measures that would give schools more flexibility and authority to remove 'disruptive students,' fearing segregation will result.[241] The Education Leaders Council's attempts to rebuff assertions from special education advocates that allowing teachers more flexibility in disciplining disabled students will "lead to multitudes of disabled youngsters being banished from classrooms and schools."[242] While not directly advocating cessation of services, the Education Leaders Council argues that the stay-put provision and the manifestation determination "often have the unintended effect of tying the hands of educators who are trying to create orderly leaning environments in their classrooms."[243] The Council, however, does not offer any alternatives as to a child's placement and receiving of services while schools conduct due process protections such as the manifestation determination.[244]

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

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Workforce, 107th Cong. (2002) (testimony of Dr. Russell Skiba), http://www.tash.org/govaffairs/skiba.htm.

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

[241] *Id.*, Kathleen Boundy, testimony before hearing on "Idea: Behavioral Supports in School, Committee on Health, Education, Labor and Pensions.

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

[243] *Id.*

[244] *Id.*

of white children in the disability categories of mental retardation and emotional disturbance . . . [and] once identified, most minority students are significantly more likely to be removed from the general education program and be educated in a more restrictive environment."[245] Evidence also demonstrates that schools discipline minority students at substantially higher rates. Data released by the Department of Education for the 1999-2000 academic year indicates that "Hispanic, American Indian, and African American students with disabilities were substantially more likely than white students to be suspended, removed by school personnel, or removed by a hearing officer, and were more likely to be given both short- and long-term suspension."[246] Often children who are members of racial or ethnic minority groups are "treated with harsh exclusionary discipline instead of appropriate special education and related services... for behavior that is part of [a] disability though inappropriately labeled as misconduct."[247] Furthermore, "given the data reflecting racial disparity in the use of exclusionary discipline, and the hard effects of exclusion, we have reason to be concerned, especially for those students and parents who are unrepresented and lack access to legal and other expertise to challenge findings of 'no manifestation.'"[248] In a study of New York City schools, of the 50,000 suspensions in 2001, half of the long-term suspensions were of disabled students and approximately 70% of those suspensions were African American students.[249] Focusing on the "disproportionate impact on minorities" student cessation should not even be considered; "[t]here's nothing worse than having at-risk students out of school for months unsupervised."[250] Consequently, in addition to the general concerns regarding racial inequality in schools, cessation of services for any

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

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

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

[248] *Id.*

[249] *Id.*, Elysa Hyman, public comment from the hearing before the President's Commission on Excellence in Special Education, "Assessment and Identification Task Force," Brooklyn, NY, April 16, 2002.

[250] *Id.*

disabled student signals a return to the segregation the IDEA was established to cease.

B. Positive Behavioral Services[251]

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

The 1997 IDEA requires the IEP team to conduct a functional behavioral assessment and behavioral intervention plan and review the disabled student's IEP after a disciplinary violation. The IEP team should conduct these assessments and plans before any disciplinary infraction takes place.[255] Whenever a disabled student has a behavior problem that interferes with learning, though not rising to the level of a discipline violation, positive behavioral supports and interventions should be implemented. One parent of a disabled student commented

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

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

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

[254] *Id.*

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

that "behavior problems arise when the program is inappropriate."[256] Services should be behavioral support not behavioral discipline because appropriate services often can treat behavior that is attributed to a disability.

Schools must realize that they not only should teach academic skills, but also appropriate social behaviors and skills. Parents as well must work with schools in developing positive behavior methods as "parental involvement is critical to providing *appropriate* education to children with and without disabilities."[257] Thus, the Support Programs provided under the IDEA must be expanded. Effective research-based instruction should be used whenever possible.[258] Schools must provide reading initiatives to all students, including children with disabilities. Such programs, accompanied by intensive, long-term, individualized, research-based instruction for children assist in identifying and providing positive services to disabled students early on in the child's education.[259] Similarly, the Council for Exceptional Children recommends that there should be "comprehensive family-centered approaches to address the needs of students who demonstrate challenging behaviors in school, including positive behavioral supports, as an effective strategy to reduce later discipline referrals."[260] Training is essential for all educational personnel. Teachers must receive training on how to recognize and respond appropriately to problematic behavior in disabled students, and staff must possess the skills to implement management strategies and positive behavior intervention strategies.[261] Studies have found that "the presence of qualified personnel is critical to achieving positive student outcomes. High dropout rates among students with disabilities are correlated to shortages of qualified personnel. Ensuring qualified personnel is a critical component of educational accountability."[262] All educators (teachers, staff, administrators) must be knowledgeable about student disabilities and be trained to be able to address specific challenges to student learning and to respond to individualized discipline problems. "Pre-service education at institutions of higher learning and

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[256] *Where Do We Really Stand?, supra* note 1, at §3, Laura Gardner, NCD Request for Public Comment, May 19, 2002.
[257] CCD Principles, *supra* note 62.
[258] *Id.*
[259] *Id.*
[260] Jacquelyn Alexander, *CEC's President Testifies on IDEA Reauthorization*, 8 CEC TODAY 6, at 4 (Feb/Mar. 2002).
[261] *NASP Recommendations*, *supra* note 193.
[262] CCD Principles, *supra* note 62.

on-going research-based in-service education for practicing professionals must include the development of cultural awareness and competence and effective collaboration as part of an interdisciplinary team."[263] The U.S. Commission on Civil Rights recommends discipline policies that are "proactive, research-based, and schoolwide, and promote positive behavioral support . . . classroom management, and the use of behavioral assessments."[264] The Commission calls on the Office of Special Education to provide guidance to states and school districts regarding positive behavior strategies as uniform discipline guidelines are developed.[265]

C. Complexity of IDEA and its Regulations

The language of the discipline provisions in the 1997 IDEA is cumbersome and difficult to follow. It is no wonder that they are not being implemented or enforced properly. In a 2000 study, *Back to School on Civil Rights*, the National Council on Disability found that "every state was out of compliance with [the] IDEA requirements to some degree . . . federal efforts to enforce the law over several administrations have been inconsistent, ineffective, and lacking any real teeth."[266] Similarly, according to a study conducted by the U.S. Commission on Civil Rights, although attempts to follow the IDEA discipline rules have resulted in some improvements, one major complaint of the 1997 IDEA provisions "is that they are too complicated and confusing, and therefore should be reviewed, clarified, and simplified for better implementation."[267] Many of the 1997 IDEA provisions do not set clear guidelines for school officials but rather principles to follow. "Campus administrators are expected to follow a maze of [procedural] regulations" and then make substantive decisions based on principles. This maze of regulations has numerous decision points, all potential vehicles for litigation. This inequitable system creates opportunities for exploitation of the system. Further, it assumes that all individuals are capable of understanding and applying these legal

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[263] Association of University Centers on Disability, *Principles of the Association of University Centers on Disability for the Reauthorization of IDEA* (Dec. 11, 2001), http://www.aucd.org/legislative_affairs/aucd_principles.htm.
[264] USCCR, *Recommendations, supra* note 246.
[265] *Id.*
[266] *Back to School on Civil Rights*, *supra* note 3.
[267] *Where Do We Really Stand?, supra* note 1, at §3, U.S. Commission on Civil Rights, Report from Hearing on Reauthorization of IDEA, Washington, D.C. (May, 2002).

complexities." [268] Parents agree that much of the over-identification of disabled students needing discipline stems from the IDEA's complexity. Gene Lenz, the Senior Director of the Texas Education Association of the Division of Special Education, testified before the President's Commission on Excellence in Special Education, stating the following:

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

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

D. Dual Systems of Discipline

Although most educators and parents alike agree with the principals of no cessation of services, increased behavioral support programs, and simplifying the process of discipline students, the dual discipline system established by the 1997 IDEA is extremely controversial.[270] The right of any student or teacher is the right to study

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

[269] *Id.*, Gene Lenz, The President's Commission on Excellence in Special Education (Feb. 26, 2002).

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

and teach in a safe atmosphere conducive to learning. To be fair to both disabled and non-disabled children, the IDEA should create a single discipline standard. Principals strongly argue for a single discipline system. The National Association of Secondary School Principals favors "equitable discipline policies for all students . . . the dual system of discipline must be eliminated, helping officials to keep schools safe and enforce district behavior policies."[271] In addition to easing the burden for school administrators by having only one system, principals argue that the IDEA students are "acutely aware that the school's standard conduct guidelines and consequences do not apply to them. They know that they can't be punished. This double standard is not fair or good for anyone, including special education students."[272] Furthermore, allowing any disabled student to disrupt the education of many children is "not only bad for educational achievement, but it also signals a double standard that teaches children a bad moral lesson."[273] As a remedy for this problem, the principle of "universal design" could be applied. In other words, the new IDEA could create a system of school discipline that incorporates the principle that education should continue for all students, disabled and non-disabled alike, who are expelled or suspended, though possibly in a different site than regular schooling.[274]

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a separate discipline policy for special education students is unfair to the regular student population." *Id.*

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

[272] Gerald N. Tirozzi & Vincent L. Ferrandino*, Here We Go Again, Principals' Perspective,* http://www.naesp.org/misc/edweek_article_3-06-02.htm (last visited Aug. 28, 2003). *See also* National Association of Secondary School Principals, *Initial Comments Related to the Reauthorization of the Individuals with Disabilities Education Act* (Dec. 10, 2001) ("Principals have tremendous difficulties in administrating discipline policies that require certain students be disciplined differently than others"), http://www.nassp.org/advocacy/osep_idea_priorities.cfm.

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

[274] *Will Congress Have A Better IDEA*?, INFOCUS (April 12, 2002), http://www.healthinschools.org/focus/2002/no2.htm (on file with author). For a more thorough discussion of universal design, *see* Center on Education Policy, *A Timely IDEA: Rethinking Federal Education Programs for Children with Disabilities, at*

The Council for Exceptional Children supports this view; along with its opposition to cessation of educational services and supports for any student, the Council recommends a single discipline standard resembling that of the IDEA by providing continued alternative educational services for all students, disabled and non-disabled, who receive suspensions or expulsions as disciplinary sanctions.[275]

Some parents, on the other hand, support the dual system of discipline. One parent of a disabled student commented that "changing to uniform discipline policies will not improve functioning in a student with a disability. All it serves to do is relieve the teachers from having to try."[276] Parents also dispute the contention of principals that administering a different system of discipline is difficult, by citing a new General Accounting Office Report (GAO) on student discipline that found that the IDEA discipline policies do not hinder school officials. The GAO study acknowledges that "a significant majority of school administrators believe the [discipline provisions of the IDEA are] effectively working and [do] not create a 'problem' for implementation.[277] Furthermore, parents believe that a unified system of discipline could result in pre-IDEA conditions with disabled students being segregated and excluded from education.[278] If the IDEA is expanded to permit increased removal of "so-called disruptive students" from the regular classroom to alternative education programs or other settings "there is little doubt but that resegregation without accountability for teaching and learning will be the outcome."[279]

Another controversial issue related to the dual system of school discipline is the IDEA's extension of protection to students not formally identified as disabled. In amending the IDEA in 1997, Congress extended this protection because of indications of school incompetence

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http://www.cep-dc.org/specialeducation/timelyidea2002.pdf (last visited Sept. 30, 2002) (on file with author).

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

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

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

[278] *Id.* at Pt. 2, §3 IDEA: Behavioral Supports in School: Hearing Before the Comm'n on Health Educ., Labor and Pensions (need actual cite), April 25, 2002 (testimony of Kathleen Boundy).

[279] *Id*.

and failure to identify some students as disabled, school oversight, or "mere subtlety of the disability."[280] "The existence of a dual disciplinary system for disabled and non-disabled students, where the school is limited to expensive and legally-involved options for disabled students, may exacerbate the failure to identify problems by tempting schools to avoid identification of students who have behavior problems."[281] In addition, identifying student with real disabilities versus the typical misbehaved student can be challenging for school administrators. Nevertheless, the liability associated with identifying disabled students in the "gray area" may provide incentives to schools to "research the misbehavior [of a student] and determine if there is a disability at its root."[282] Finally, abuse of this IDEA provision is easy and eventually every student possibly could be labeled disabled. The only benefit of this possible over-identification and over-classification of students as disabled is that the dual system of discipline would be eliminated.

E. Alternatives to IDEA's Discipline Provisions

The IDEA provision governing placing students in an alternative educational setting should be consulted as a last resort for educators.[283] Schools should first consider alternative methods of dealing with the misbehavior of disabled students. School officials may utilize a variety of behavior and individualized conflict management strategies to promote appropriate behavior of disabled children. The *Honig* Court noted that "[s]uch procedures may include the use of study carrels, timeouts, detention, or the restriction of privileges."[284] Discipline methods that are less harsh than the options provided in the IDEA such as taking away privileges, or mandating time-outs may prove to be a useful way to discipline and teach acceptable behavior.[285] Generally,

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[280] Bryant, *supra* note 17, at 542.
[281] *Id.* at 543.
[282] *Id.*
[283] Council for Exceptional Children, *IDEA Reauthorization Recommendations*, April 2002, http://www.cesa7.k12.wi.us/sped/issues-2002IDEA/IDEA_reauth_4-2002.pdf. *See also* The Council for Children with Behavioral Disorders, *Talking Points on IDEA Reauthorization*, http://www.ccbd.net/advocacy/story.cfm?contentID=9 (last visited Nov. 15, 2002) (on file with author).
[284] Honig v. Doe, 484 U.S. 305, 325 (1988).
[285] Beth Bader, *IDEA: Dealing with Student Disruption*, 82 AM. TEACHER 19 (Mar. 1998).

these disciplinary measures do not constitute change of placements and thus they do not involve the IDEA. Additionally, positive conduct should be rewarded just as much as disruptions and violations should result in discipline. Positive reinforcement encourages the disabled student to repeat positive behavior. Furthermore, schools must invest in innovative classroom and non-classroom approaches that will help to minimize the need to use disciplinary measures. Counseling, peer mediation, anger management, teaching social skills, teamwork, and problem solving skills will help all students develop self-control, improve student achievement, and facilitate positive school climates essential for learning and for decreasing classroom disturbances.

Many school administrators, backed by parents of non-disabled students, argue for the zero-tolerance approach. Parents of disabled children strongly oppose zero-tolerance policies for any infraction because despite the original focus on zero-tolerance policies on truly dangerous student behavior, schools have expanded these policies to include behavior and infractions that pose safety concerns, and even less serious acts of misconduct such as noncompliance or disrespect.[286] Zero-tolerance policies also profoundly impact disabled students and particularly minority disabled students; "[a]lthough the Individuals with Disabilities Act provides protections for children with disabilities . . . ' in many circumstances, school officials are ignoring the law, and parents and students are unaware of their rights or unable to enforce them.'"[287] Furthermore, in addition to the lack of evidence that this approach alters a student's behavior, the exclusionary approaches "have documented negative collateral effects including school dropout, increased rates of disruption, and the fact that minorities are likely to be disproportionately affected by such policies."[288] Zero-tolerance approaches alienate students from the classroom while failing to address underlying problems and failing to teach to correct the problem as do positive

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

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

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

behavioral systems. By their nature, zero-tolerance policies do not provide guidance and thus they do not solve any discipline problem. Indeed, they may even exacerbate the problem by advocating an adversarial, confrontational attitude.

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

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

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

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

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

[290] *Id.*

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

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

VI. REAUTHORIZATION PROGRESS THUS FAR

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

House bill 1350 radically reverses many of the carefully developed discipline protection provisions of the IDEA97 provisions.[293] Most significantly, HR 1350 would allow a disabled student to be disciplined without a determination of whether the discipline infraction was a part of the disabled student's disability. Ultimately, the bill removes the manifestation determination requirement of current IDEA law. The new measure also places the onus on parents to initiate the investigation process to determine if a disciplinary incident resulted from a disability.[294] Furthermore, in addition to the parent having the burden to investigate the manifestation determination, the expedited hearing option has been removed. The bill would also allow schools to suspend students with disabilities for up to 45 days not only for the most serious infractions, as current law allows, but also for any discipline violation.[295] During this time, the student remains in the alternative setting rather than in the current stay put placement as is required under current law regardless of the infraction. Yet, the requirements of the alternative educational setting are less stringent than under the current IDEA. For example, the school district need only ensure that the student is able to progress toward meeting his IEP goals rather than requiring, as current law does, that the student continue to receive those services described in his IEP enabling the child to meet the goals set out in the IEP.[296]

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

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

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

[296] Association of University Centers on Disabilities, *Summary of Major Changes Proposed in the House IDEA Reauthorization Bill (HR 1350) Regarding Discipline and*

Another potential problem of HR 1350 is its "removal of the requirements for functional behavioral assessment, development of behavior intervention plans and review of the appropriateness of the current IEP and placement."[297] Most special education advocacy organizations have overwhelmingly opposed the legislation.[298] For instance, according to the advocacy organization Kids Together, Inc., HR 1350 "allows students to be removed from classrooms without attempts to meet their needs based on their disability . . . .. It takes accountability away from the schools, instead of requiring schools to take action to help and support children, it would allow them to remove them."[299] The Council for Exceptional Children also notes that the "discipline provisions in the House bill strip away all protections for students with disabilities."[300]

The Senate bill S1248 significantly improves on the House bill, but nevertheless retains some controversial issues such as the disciplining the disabled student. First, unlike the House bill which shifts the burden to parents to initiate investigations into whether the discipline infraction resulted from a disability, the Senate Bill maintains the manifestation determination requirement for schools to examine the role of students' disabilities in their behavior.[301] Senator Edward Kennedy (D-Mass.) commented that "this bill provides [protection] by requiring schools to determine whether a child's behavior is the result of the disability, or the lack of other supports that should have been provided."[302] However, most significantly, S1248 eliminates the stay put provision during the pendency of an appeal of a manifestation determination and allows disabled student to be suspended up to 10 days without consideration of the student's disability.[303] The National Association of School Psychologists notes that although the Senate bill removes the stay put provision, "it retains current law ensuring that

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Due Process Protections (April 7, 2003), http://www.aucd.org/legislative_affairs /hr1350_due_process.htm.

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

[298] *See* Kids Together, Inc., *House Passes HR 1350, A Bad IDEA,* http://www.kidstogether.org/reauthorization_of_idea.htm (last visited Oct. 13, 2003).

[299] *Id.*

[300] Goldstein, *supra* note 294.

[301] *Id.*

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

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

children have certain due process protections in disciplinary action if their infraction was a manifestation of the child's disability . . .. "[304] Another issue of the Senate bill is that, like the House bill, it eliminates the current law's requirement that schools conduct a functional behavioral assessment when removing a student.[305] Yet, according to a new report by the Bazelon Center for Mental Health Law, functional behavioral assessments and positive behavioral interventions and supports when properly used "decrease the need for harsh disciplinary actions."[306] Finally, like the House bill, the Senate bill does not specifically require that the modifications and services described in the student's IEP are continued when a student is placed in an alternative educational setting as is required by current law.[307] Overall, many organizations approve of the Senate bill, especially as compared with the House bill. For example, the director of the National Association of State Directors of Special Education, Nancy Reder, commented that "we like what [the Senate] did with discipline compared to the House bill. We think it represents a fair compromise with the disability community that didn't want any changes and our members."[308] Although some special education organizations want other discipline issues to be addressed, possibly what committee chairman Judd Gregg (R-N.H.) notes may ring true: "The Senate bill offers a solution … by providing protections for children with disabilities while simplifying the rules that school districts can use in discipline cases."[309]

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

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

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

[306] *See Senate Committee Passes IDEA Bill, supra* note 304.

[307] *Id.*

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

[309] Rick Hodges, *supra* note 302.

VI. THE IMPLICATIONS FOR ALL

The controversy surrounding disciplining the disabled has "evolved over several years and embodies a tangled and often perplexing tale." [310] The current IDEA provides a framework for disciplining disabled students, an enormous accomplishment achieved in 1997. Yet, the IDEA still has not figured out the formula of how to balance the special needs of disabled students with the broader educational goals for all students. The compromise of the IDEA and its original "tight requirements . . . were [once] necessary for a recognition that schools must provide all children with an appropriate education. The education of disabled students now has improved."[311] Discipline problems with disabled students are no greater than discipline problems with regular students.[312] Schools are better educated on and trained with working with disabled students. [313] Overall, "[i]n the field of disability education, rights of disabled students are now more well-known, and the rights are more consistently protected."[314] By recognizing the overall progress of society regarding conceptions and treatment of the disabled, as well as of schools and students, the IDEA should become more flexible. This added control and flexibility will ensure that our public education system fulfills its responsibility "for educating all students, including students with disabilities. Only when special education & general education work together can we be confident that no child will be left behind."[315]

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

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[310] Dupre, *supra* note 14, at 4.
[311] Nelson, *supra* note 73, at 68.
[312] United States General Accounting Office, Report to the Committees on Appropriations, U.S. Senate and House of Representatives, *Student Discipline: Individuals with Disabilities Education Act* (Jan. 2002), http://www.gao.gov/new.items/d01210.pdf (on file with author).
[313] Nelson, *supra* note 73, at 67-68.
[314] *Id.* at 68.
[315] CCD Principles, *supra* note 62.

students who are attempting to gain an education in the chaotic, sometimes dangerous, environment of the classroom.[316]

Congress may not address the problems with the IDEA discipline provisions in the upcoming reauthorization. The regulations for the 1997 IDEA were enacted in 1999 and the effectiveness and extent to which these discipline provisions work is not fully determined. Furthermore, hesitance to change may result from the possibility that there may be no correct equation or formula to produce a balance between disabled students and the rights of other students. Although discipline likely will be discussed in congressional hearings, committees, and organizations established for the reauthorization of the IDEA, the forecast for change is dim. Nevertheless, regardless of what specific issues are codified as amendments to the IDEA in the upcoming IDEA reauthorization, "Congress must focus on ways to strengthen the IDEA and build on the successes that have been achieved thus far."[317]

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[316] Bunch, *supra* note 73, at 320.
[317] USCCR, *Recommendations, supra* note 246.