

NOT AS SIMPLE AS ABC: DISCIPLINING CHILDREN WITH DISABILITIES UNDER THE 1997 IDEA AMENDMENTS

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Andrea, a seventh grader, becomes frustrated during her English class and throws her book across the room.

Ben, a fifth grader, for the eighth time in the semester misbehaves in the lunchroom, this time by tipping over his classmate Rachel's milk carton.

Carl, a high school junior, assaults a classmate in the hallway. When he is searched after the tussle, he is found to have a sheathed hunting knife with a three inch blade in his pocket.

If Andrea, Ben, and Carl have disabilities, will this affect the way that school authorities impose discipline on these students? Should it?

Every day students and schools across the country face similar questions. Now a new statutory and regulatory scheme answers them. A 1997 set of amendments to the Individuals with Disabilities Education Act¹ ("IDEA") was followed in March of 1999 by a complex set of final regulations, issued by the Department of Education ("DOE").² This analysis provides a critical look at the

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1. Individuals with Disabilities Education Act Amendments of 1997, 20 U.S.C. § 1400 (Supp. III 1997). *See also* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37.

2. Assistance to States for the Education of Children with Disabilities, 34 C.F.R. pt. 300 (1999). *See also* Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12,405 (March 12, 1999) (codified at 34 C.F.R. pts. 300, 303).

resulting regulatory scheme and how well it settles the storm of controversy that has swirled around disciplinary issues since the 1975 enactment of landmark legislation providing for the appropriate education of children with disabilities.³

Over the past twenty years, disciplinary issues have produced judicial decisions, legislative alterations, and administrative determinations and interpretations. Among the issues addressed were when suspensions trigger the IDEA's procedural protections, what educational setting must be provided to children during disputes over disciplinary actions (known as "stay put" provisions), the relevance of the relationship between the child's disability and the disciplined behavior, and the extent to which school districts are obligated to provide special educational services to students under long-term suspension or expulsion.⁴ School administrators complained that the IDEA, as interpreted, left them hamstrung in their ability to deal with dangerous and disruptive students.⁵ The 1997 IDEA amendments⁶ followed extensive negotiation and discussion regarding the process for disciplining disabled students.⁷ The final bill, which

3. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. § 1400 (Supp. III 1997)).

4. Part II of this Article reviews the most significant of these developments. Commentary accompanied each of these developments. See, e.g., David L. Dagley et al., Commentary, *The Relationship Test in the Discipline of Disabled Students*, 88 Educ. L. Rep. 13 (1994); Stewart R. Hakola, *Suspension, Expulsion, and Discipline of Handicapped Students*, 68 MICH. B.J. 1088 (1989); Gail Sorenson, Commentary, *Update on Legal Issues in Special Education Discipline*, 81 Educ. L. Rep. 399 (1993); Gail Paulus Sorenson, Commentary, *Special Education Discipline in the 1990s*, 62 Educ. L. Rep. 387 (1990); Gail Paulus Sorenson, Commentary, *The Many Faces of the EHA's "Stay-Put" Provision*, 62 Educ. L. Rep. 833 (1990); Caryn Gelbman, Note, *Suspensions and Expulsions Under the Education for All Handicapped Children Act: Victory for Handicapped Children or Defeat for School Officials?*, 36 WASH. U. J. URB. & CONTEMP. L. 137 (1989); Gail Jensen, Comment and Note, *Disciplining Students with Disabilities: Problems Under the Individuals with Disabilities Education Act*, 1996 BYU EDUC. & L.J. 34; Dominick F. Mills, Note and Comment, *Beyond Weapons: The Case for Including a Dangerousness Exception to the "Stay Put" Provision of the Individuals with Disabilities Education Act (IDEA)*, 17 J. JUV. L. 94 (1996); Omyra M. Ramsingh, Comment, *Disciplining Children with Disabilities Under the Individuals with Disabilities Education Act*, 12 J. CONTEMP. HEALTH L. & POL'Y 155 (1995); Rebecca K. Cate, Development in the Law, *The Handicapped in the Classroom: The Supreme Court Adopts a Standard for the Protection of Rights in Honig v. Doe*, 24 WILLAMETTE L. REV. 1141 (1988).

5. See, e.g., Renae Waterman Groeschel, Comment, *Discipline and the Disabled Student: The IDEA Reauthorization Responds*, 1998 WIS. L. REV. 1085, 1096-98 (1998); Pete Idstein, *Swimming Against the Mainstream*, 75 PHI DELTA KAPPAN 336 (1993).

6. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, codified at 20 U.S.C. § 1400 (Supp. III 1997) [change format per FN1]. The sections of the amendments which directly relate to discipline appear at sections 1412(a)(1) (requiring educational services for children suspended or expelled) and 1415(k) (stating provisions for alternative placements and other disciplinary actions).

7. An attempt to reauthorize the IDEA during the previous congressional session, an election year, foundered on differences over discipline and litigation. See 143 CONG. REC. E972-01 (daily ed. May 13, 1997) (speech of Rep. Martinez); 143 CONG. REC.

reauthorized the IDEA and amended many parts of the statute beyond those governing discipline, represented a compromise that was supported both by national groups of school administrators and teachers and by groups representing parents and children with disabilities.⁸ Yet the new statutory disciplinary provisions were still criticized as inadequate.⁹ The Department of Education's proposed regulations, originally published in October 1997, received over 6000 comments, many regarding the discipline provisions.¹⁰ The final regulations, which were accompanied by extensive commentary,¹¹ govern all future disciplinary actions involving children with disabilities.¹²

S4354-02 (daily ed. May 13, 1997) (statement of Sen. Thomas). Congress then worked through a bicameral, bipartisan task force appointed by the majority leader to attempt to agree on the disputed issues and present legislation reflecting a consensus. *See* 143 CONG. REC. S4359 (daily ed. May 13, 1997) (statement of Sen. Coats); 143 CONG. REC. S4354-02 (daily ed. May 13, 1997) (statement of Sen. Thomas). For debate on the adequacy of the discipline provisions, *see* 143 CONG. REC. S4354-02, S4355-75 (daily ed. May 13, 1997).

8. The lengthy list of organizations supporting the final passage of the amendments included the American Association of School Administrators, the National Association of Elementary School Principals, the American Federation of Teachers, the National Education Association, the Learning Disabilities Association, the National Association of Developmental Disabilities Councils, and twenty-five other education, mental health, and disability organizations. *See* 143 CONG. REC. S4295-96 (daily ed. May 12, 1997) (statement of Sen. Jeffords).

9. For some less-than-sanguine analyses of the provisions of the 1997 IDEA Amendments on student discipline, *see* Theresa J. Bryant, *The Death Knell for School Expulsion: The 1997 IDEA Amendments to the Individuals with Disabilities Education Act*, 47 AM. U. L. REV. 487 (1998); Joseph R. McKinney, *Disciplining Children With(out) Disabilities: Schools Behind the Eight Ball*, 130 EDUC. L. REP. 365 (1999); 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 (1999).

10. *See* Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12,406, 12,406 (1999).

11. The Department of Education's ("DOE") summary of changes from the proposed to the final regulations, and its analysis of comments received on the proposed regulations both devote substantial discussion to the proposed disciplinary regulations. *See* Major Changes in Regulations, Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12,407, 12,413-16 (1999) [hereinafter *Summary*]; Attachment I: Analysis of Comments and Changes, Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12,537, 12,617-32 (1999) [hereinafter *Analysis*].

The extent of explanatory material that accompanied the final regulations, but which is not part of the regulatory text or the Appendix that is published in the C.F.R., is particularly interesting given the DOE's decision to eliminate "Notes" in the final regulations. It did so because of suggestions that the Notes went beyond clarification and yet had questionable legal status. The DOE acknowledged that it does not "regulate by notes," but that it did incorporate into the Analysis of Comments and Changes information which it viewed as providing "clarifying information or useful guidance." *Analysis, supra*, at 64 Fed. Reg. 12,537.

The new version of the IDEA as implemented through these regulations, while not perfect, allows school districts sufficient authority and alternatives to deal adequately with most misconduct by students with disabilities. The final scheme is a product of political compromise. As such, it will completely satisfy neither student advocates nor school officials. And it has some significant blemishes and imperfections. Its underlying values, though, are the right ones—a commitment to education for even the most troubled and troublesome students with disabilities, and a recognition of the need for safe schools where all children can learn.

The new scheme recognizes the need of school administrators to deal with student misconduct. It provides for swift action to remove children who commit the most serious kinds of offenses, those involving weapons or illegal drugs, or posing a danger to others. It also takes an enlightened approach to the roots of disciplinary problems by mandating that schools attend to causes of and provide remedies for behavioral problems of disabled students. School administrators are not powerless, nor are disabled students' rights ignored. As the discussion of the cases of Andrea, Ben, and Carl shows, school authorities can act effectively and fairly to discipline students under the present scheme.

The scheme's impact on school operations should be assessed realistically, not from a dramatically drawn, worst-case perspective. Long-term suspension and expulsion, the measures most heavily regulated by the IDEA, are

One additional feature of the 1997 IDEA is a prohibition on the DOE's establishing any rules required for "compliance with, and eligibility under, the IDEA" via policy letters or statements without following the rulemaking provisions of the Administrative Procedure Act ("APA"). 20 U.S.C. § 1406(c) (Supp. III 1997) (citing Administrative Procedure Act, 5 U.S.C. § 553 (1994)). *See also* Morton v. Ruiz, 415 U.S. 199, 235 (1974) (stating that eligibility requirements must go through APA rulemaking process). To the extent, then, that material such as that in the Analysis might be found to be such a "rule," it would not be valid under this section. Note also, however, that the APA exempts interpretative rules or general statements of policy from the rulemaking requirements applicable to legislative rules. *See* 5 U.S.C. §§ 551(H)(4) (defining "rule"), 553(b)(3)(A) (1994) (exempting interpretive rules).

12. The regulations went into effect on May 11, 1999. Statutory requirements and requirements under the pre-existing regulations were expected to be followed for the 1998-99 school year. Compliance with the remaining regulations was required when the state received Fiscal Year 1999 funding or on October 1, 1999, whichever was earlier. Applications for grant of Fiscal Year 1999 funds had to comply with the regulations. *See* Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12,406, 12,406-07 (March 12, 1999).

The IDEA amendments explicitly bar the DOE from taking any regulatory action that "would procedurally or substantively lessen the protections provided to children with disabilities" as embodied in prior regulations in effect on July 20, 1983, unless that action reflects the "clear and unequivocal intent of Congress." 20 U.S.C. § 1406(b) (Supp. III 1997). This provision appears designed to avoid subsequent shifts in administrative philosophy which might be spurred by changes in political control of the executive branch or by lobbying of interest groups.

viewed by many educators and school systems as measures of last resort, reserved for the most serious conduct. Most misconduct is handled by other means: office referrals, detention, in-school suspension, time-outs, withdrawal of privileges, etc. Many school systems have developed alternative programs that help reduce the need for exclusion of children from school via suspension or expulsion. Much attention, in short, has been focused on a small part of the student population and the disciplinary process, both for non-disabled and disabled students. This has tended to cause a loss of perspective in evaluating the IDEA's overall impact on school discipline.

The new provisions are less satisfactory in helping educators deal with disruptive conduct that seriously affects the school's functioning and the learning of others, but falls short of posing a danger to school children. Those faced with implementing and enforcing the scheme need practical solutions to the problems that the new scheme has not resolved well. Where problems remain, the Author identifies interpretations and strategies for administering the IDEA and reviewing claims under it. The statutory and administrative scheme will lead to fewer objectionable results, and will better fulfill its mission, if administrative and judicial authorities remain sensitive to the needs of all students for a safe environment for learning when considering challenges to school disciplinary decisions.

This Article begins in Part I with an overview of the IDEA and the individualized educational planning process it creates. Part II offers a synopsis of how issues regarding student discipline arose and were resolved before the 1997 IDEA Amendments. A detailed examination of the current regulatory scheme for disciplining children with disabilities follows in Part III. It identifies and discusses questions left unresolved by the new legislative and regulatory scheme, and suggests appropriate resolutions. Readers who seek a synthesized, step-by-step, guide to the process of disciplining a child under the statute and regulations can find this in Part IV.A of the Article.¹³ Finally, Part IV.B returns to the cases of Andrea, Ben, and Carl, and considers how the IDEA would apply to their situations.

I. THE IDEA'S ENTITLEMENTS TO PROCEDURAL PROTECTION AND APPROPRIATE EDUCATION¹⁴

Congress enacted the first comprehensive federal legislation regarding children with disabilities in 1975, both to provide access to the educational process for children who were then excluded from the educational system and to provide

13. Part IV is footnoted with internal references to the sections of this Article that explain the particular step in greater detail. It can thus serve as an alternative point of entry for the reader who wants to first obtain an overview of the disciplinary process school districts now must use.

14. For the benefit of the reader, this overview includes extensive footnotes which take account of some of the newer decisions and developments in areas of the IDEA's operation which are unrelated to discipline.

appropriate education for those who were failing in their educational programs because of undetected disabilities.¹⁵ Before Congress acted, the practice of excluding hard-to-handle disabled students had already generated two significant court decisions in the area of disability rights.¹⁶

Reflecting Congress' expressed concerns with exclusion, misdiagnosis, and inappropriate education of disabled children, the IDEA set up a comprehensive scheme for identifying and evaluating children with disabilities and planning for appropriate, individualized special education and related services.¹⁷ At the center of this system is the individual educational plan ("IEP") process. The process brings together school personnel and parents who, as a team, evaluate the child's needs, identify the services to be provided, and specify the setting or placement in which the child will receive services.¹⁸ The IDEA

15. See 20 U.S.C. § 1400(c)(2)(C), (D) (Supp. III 1997). The Findings and Purposes section of the Education for All Handicapped Children Act of 1975 ("EHA") included the following findings, now part of a historical section of the findings in the 1997 IDEA amendments:

1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers;
there were many children with disabilities throughout the United States participating in regular school programs whose disabilities prevented such children from having a successful educational experience because their disabilities were undetected.

Individuals with Disabilities Education Act, 20 U.S.C. § 1400(c)(2)(C), (D) (Supp. III 1997). See also Education for All Handicapped Children Act of 1975 ("EHA"), Pub. L. No. 94-142, 89 Stat. 773 (codified as amended in scattered sections of 20 U.S.C.). Congress changed the name of the Education for All Handicapped Children Act ("EHA") to the IDEA in 1990. See Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1141 (codified as amended in scattered sections of 20 U.S.C.).

16. See *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257, 1257 (E.D. Pa. 1971), *further proceedings at* 343 F. Supp. 279 (E.D. Pa. 1972).

17. The IDEA operates as a funding statute; it provides federal funds to assist state and local school authorities in educating children with disabilities. States receiving funds under the IDEA must satisfy the IDEA's conditions, of which a primary condition is the provision of a "free appropriate public education" ("FAPE") to children with disabilities. See *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 889 (1984). See also *Bradley v. Arkansas Dep't of Educ.*, 189 F.3d 745, 752 (8th Cir. 1999) (upholding IDEA's conditioning of funding on waiver of states' Eleventh Amendment immunity as valid under spending clause), *reh'g granted, vacated in part sub nom. Jim C. v. Arkansas Dep't of Educ.*, 197 F.3d 958 (8th Cir. 1999).

18. The IEP team creates a plan (the "IEP") which describes how the child's disability affects his involvement and progress in the general curriculum, states "measurable annual goals," including benchmarks or short-term objectives related to meeting the child's needs, states what special educational and other related services, program modifications, or supports for school personnel will be provided to help the child meet the goals and participate with other children, explains the degree to which the child will not participate in the regular classroom, and provides for a system of reporting to

emphasizes process and prescribes what the Supreme Court described as “a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree.”¹⁹

One of the hallmarks of the IDEA is the availability of a fair administrative hearing process to resolve disputes over a child’s assessment, educational plan, or placement.²⁰ The first stage in the process is collaborative, through meetings of the IEP team. Parents and school personnel are statutory members.²¹ Under the IDEA amendments, when a child may be placed in the regular classroom, the regular classroom teacher participates in the IEP team also, particularly in the planning of behavioral strategies and interventions.²² Most decisions regarding children with disabilities are made by the IEP team and never

parents on the child’s progress. *See* 20 U.S.C. § 1414(d) (Supp. III 1997); 34 C.F.R. § 300.347 (1999).

19. *Honig v. Doe*, 484 U.S. 305, 308 (1988).

20. *See, e.g., Board of Educ. v. Rowley*, 458 U.S. 176, 205–06 (1982) (“Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard.” (citation omitted)).

21. *See* 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.344. The members of the IEP team include the parents of the child, a regular education teacher if the child may participate in a regular classroom, a special education teacher or provider, a knowledgeable and supervisory representative of the school district, and, at the parent or school district’s discretion, other persons with knowledge or special expertise regarding the child. If the IEP meeting addresses transition services for the child, then the student is also invited to attend. *See* 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.344.

The reference to other persons with knowledge, a provision new with the IDEA amendments, allows a parent to bring an outside expert who has evaluated the child, or an advocate familiar with the child, to the IEP meeting. The Department of Education “strongly discourage[s]” bringing attorneys to IEP meetings, viewing this as tending to detract from the non-adversary climate the IEP process hopes to promote. 34 C.F.R. pt. 300, app. A at 112 (1999) (“Even if the attorney possessed knowledge or special expertise regarding the child, an attorney’s presence would have the potential for creating an adversarial atmosphere that would not necessarily be in the best interests of the child.”). The provision and the regulatory commentary do make it clear, however, that the party inviting the participation of another person, i.e., here the parent, not the school district, decides both what person to bring and whether that person has the requisite knowledge. *See Summary, supra* note 11, 64 Fed. Reg. at 12,409 (1999). This should eliminate disputes over whether parents can bring a friend, neighbor, PTA member, or special education advocate into the IEP meeting.

22. *See* 20 U.S.C. §§ 1414(d)(1)(B) (including regular education teacher as member), 1414(d)(3)(C) (establishing participation of regular education teacher in determining positive behavioral strategies and interventions); 34 C.F.R. §§ 300.344, .346(d).

go any further in the administrative process.²³ If a parent is dissatisfied with an IEP team's determination concerning a child's identification, evaluation, or educational placement, the parent can initiate the administrative hearing process.²⁴

Although many states have had mediation programs in place for some time,²⁵ the IDEA amendments now require states to offer parents the option of mediation of disputes on a voluntary, confidential basis.²⁶ If mediation is unsuccessful, or if parents decline to use it, a due process hearing before an impartial administrative hearing officer takes place.²⁷ Some states allow a further administrative review of the hearing officer's decision.²⁸ After a final agency decision, an aggrieved party can obtain review of the agency decision in the United States district court.²⁹

23. According to the Department of Education's cost-benefit analysis of the IDEA regulations, the expected rate is one complaint for every 1000 children served, or about 6000 requests for due process hearings for the six million children served in a year. *See* Attachment 2: Summary of Potential Benefits and Costs, Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12,656, 12,658 (1999) [hereinafter *Cost-Benefit Summary*]. The DOE suggests that the complaint rate may decrease under the IDEA amendments because of expected "higher parental satisfaction." *Id.*

This suggestion may be a bit disingenuous; other aspects of the amendments may well remove the incentive or foreclose the ability of parents to bring some claims and thereby decrease the number of complaints. One such provision requires a parent to give advance notice of the intention to remove a child from public school and to place the child in a private school for special educational purposes, on penalty of denial of reimbursement of those costs in a later dispute. *See* 20 U.S.C. § 1412(a)(10)(C) (Supp. III 1997); 34 C.F.R. § 300.403(d). Another provision requires parents to notify the school district of the nature of the problem and a proposed resolution when seeking a due process hearing. *See* 20 U.S.C. § 1415(b)(7) (Supp. III 1997); 34 C.F.R. § 300.507(c)(2). And changes in both the stay put provisions for children in certain disciplinary settings and the availability of educational services during disciplinary removals from school, discussed more fully in Part III, may reduce disputes over such sanctions.

24. *See* 20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.507.

25. Before the IDEA amendments, thirty-nine states had mediation systems in effect, which were, on the average, holding mediations in sixty percent of the cases in which hearings were requested. *See Cost-Benefit Summary, supra* note 23, 64 Fed. Reg. at 12,658.

26. *See* 20 U.S.C. § 1415(e); 34 C.F.R. § 300.506.

27. *See* 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.508, .509.

28. *See* 20 U.S.C. § 1415(g); 34 C.F.R. § 300.510. States are evenly split; about half have a single administrative hearing, half a two-tiered procedure. *See* 143 CONG. REC. S4354-02, S4358 (daily ed. May 13, 1997) (statement of Sen. Jeffords).

29. *See* 20 U.S.C. § 1415(i); 34 C.F.R. § 300.512. States which have laws giving children rights to special educational services may have their own administrative rules, and statutory review process, available as a matter of state law. *See, e.g.,* MASS. GEN. LAWS ch. 71B § 3 (Supp. 1998). In some instances, where state law confers a greater right on the child, such claims will be pursued along with IDEA review. For example, under Massachusetts law, a child's IEP must provide for the "maximum possible development of the child." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 987 (1st Cir. 1990). *Accord*

The district court receives the record of the administrative hearing, and may hear additional evidence.³⁰ According due weight to the administrative decision,³¹ the district court bases its decision on the “preponderance of the evidence” and may grant such relief as it determines appropriate.³²

Ross v. Framingham Sch. Comm., 44 F. Supp. 2d 104, 117 (D. Mass. 1999). See also Mass. Gen. Laws ch. 71B § 2 (stating that regulations should require description of special needs to assure maximum potential development of child). Compare this with the Supreme Court’s characterization of the IDEA as granting a “basic floor of opportunity” and requiring only that the IEP provide “educational benefit.” Board of Educ. v. Rowley, 458 U.S. 176, 200, 203 (1982). The IDEA amendments emphasize high expectations and set a standard for IEPs as enabling “progress in the general curriculum” when appropriate. 20 U.S.C. §§ 1400(c)(5)(A), 1414(d)(1)(A) (Supp. III 1997) (IEP requirements). See also Tara L. Eyer, Commentary, *Greater Expectations: How the 1997 IDEA Amendments Raise the Floor of Opportunity for Children with Disabilities*, 126 Educ. L. Rep. 1, 14–16 (1998); Julie F. Mead, Commentary, *Expressions of Congressional Intent: Examining the 1997 Amendments to the IDEA*, 127 Educ. L. Rep. 511, 516 (1998).

30. See 20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.512. Most courts have restrictively interpreted the circumstances under which they will hear additional evidence. See, e.g., E.S. v. Independent Sch. Dist. No. 196, 135 F.3d 566, 569 (8th Cir. 1998) (stating that party seeking to introduce additional evidence must have a solid justification for doing so); Springer v. Fairfax County Sch. Bd., 134 F.3d 659, 667 (4th Cir. 1998) (finding that “additional” means supplemental and that exclusion of testimony by those who did or could have testified at administrative hearing is generally an appropriate limit); Monticello Sch. Dist. No. 25 v. George L., 102 F.3d 895, 901 (7th Cir. 1996); Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1472–73 (9th Cir. 1993); Town of Burlington v. Department of Educ., 736 F.2d 773, 790 (1st Cir. 1984), *aff’d*, 471 U.S. 359 (1985).

31. See *Rowley*, 458 U.S. at 206 (reading the requirement that the court receive the administrative record as carrying with it an “implied requirement” that due weight be given the administrative proceedings). For an extensive discussion of how courts resolve giving due weight to the hearing officer’s and review panel’s decisions respectively, in states which have a two tier administrative process, see *O’Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233*, 144 F.3d 692, 698–99 (10th Cir. 1998).

32. 20 U.S.C. § 1415(i). The relief a court can grant is broadly equitable in nature. It includes ordering reimbursement to parents who have incurred tuition costs by placing children into private school when provided with an inadequate educational plan by the school district. See *School Comm. v. Department of Educ.*, 471 U.S. 359, 369 (1985). The private school need not be one approved by the state. See *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 14 (1993). Compensatory educational services may also be appropriately ordered. See, e.g., *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 249 (3d Cir. 1999) (finding right to compensatory education once school district knows or should have known its IEP has failed); *Peter v. Wedl*, 155 F.3d 992, 1001 (8th Cir. 1998), *on remand sub. nom. Westendorp v. Independent Sch. Dist. No. 273*, 35 F. Supp. 2d 1134, 1134 (D. Minn. 1998) (ordering on remand six years of compensatory paraprofessional services); *Charlie F. v. Board of Educ.*, 98 F.3d 989, 992 (7th Cir. 1996) (stating that school district may be obliged to provide services in kind to compensate for consequences of educational shortfalls).

Most courts passing on the question have decided that the IDEA was not intended to confer a right to money damages for violations. See *Sellers ex rel. Sellers v. School Bd.*, 141 F.3d 524, 527–28 (4th Cir. 1998) (citing cases); *Heidemann v. Rother*, 84 F.3d 1021,

The court may award costs³³ and attorneys' fees to the prevailing party³⁴ covering the administrative hearing and the court action, but not, under normal circumstances, for an attorney's participation in the IEP team process.³⁵ If the merits of the claim were resolved at the administrative level, then the parent can file a separate action for attorneys' fees.³⁶

1033 (8th Cir. 1996); Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 980 F.2d 382, 386-87 (6th Cir. 1992); Hall v. Knott County Bd. of Educ., 941 F.2d 402, 407 (6th Cir. 1991); Manecke v. School Bd., 762 F.2d 912, 915 n.2 (11th Cir. 1985). Others, noting that rights under 42 U.S.C. § 1983 are specifically reserved by the IDEA, have held to the contrary. See W.B. v. Matula, 67 F.3d 484, 495 (3d Cir. 1995); Quackenbush v. Johnson City Sch. Dist., 716 F.2d 141, 148 (2d Cir. 1983); Padilla *ex rel.* Padilla v. School Dist. No. 1, 35 F. Supp. 2d 1260, 1266-69 (D. Colo. 1999).

33. Costs have generally been held to include expert witness fees in IDEA cases. See, e.g., B.K. v. Toms River Bd. of Educ., 998 F. Supp. 462, 473 (D.N.J. 1998); S.D. v. Manville Bd. of Educ., 989 F. Supp. 649, 654 (D.N.J. 1998); Bailey v. District of Columbia, 839 F. Supp. 888, 892 (D.D.C. 1993). This reading, which is counter to the general rule denying such expenses as "costs," see 4 JAMES A. RAPP, EDUCATIONAL LAW § 10.03, at 10-632 (1998), is based on clear legislative history stating that costs include "reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case...as well as traditional costs incurred." Joint Explanatory Statement of the Committee of Conference, H.R. CONF. REP. NO. 99-687 (1986), reprinted in 1986 U.S.C.C.A.N. 1807, 1808. But see Eirschele *ex rel.* Eirschele v. Craven County Bd. of Educ., 7 F. Supp. 2d 655, 657-60 (E.D.N.C. 1998) (reviewing cases and legislative history but applying a Scalia-based "plain language" approach to deny expert fees as part of costs).

34. Courts considering IDEA attorneys' fees claims typically apply the standards used to decide claims under the Civil Rights Attorney's Fees Act, 42 U.S.C. § 1988 (1994 & Supp. IV 1998). For these standards, see, for example, *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992) (stating that a party must show both materiality and causation to be prevailing party), *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 782 (1989) (finding that prevailing party is one who succeeds on any significant claim affording some of the relief sought), *New Hampshire v. Adams*, 159 F.3d 680, 685 (1st Cir. 1998) (finding that under "catalyst" theory, causation can also be shown alternatively by demonstrating that action served as a "catalyst" for defendant to meet plaintiff's claims, even without judicial involvement in result), and *Warner v. Independent School District No. 625*, 134 F.3d 1333, 1336-37 (8th Cir. 1998) (applying standards, including catalyst theory, to deny attorneys' fees under IDEA). The legislative history to the 1997 amendments reiterates Congress' intent to have the terms "prevailing party" and "reasonable" be construed in accordance with the Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). See S. REP. NO. 105-17, at 26 (1997).

35. 20 U.S.C. § 1415(i)(3)(D). The IDEA also prohibits the award of fees if the parent refuses a timely made written settlement offer at the administrative or judicial level and later fails to obtain more favorable relief than that offered. See *id.* The court can also reduce fees if the parent unreasonably protracted the controversy's resolution, or if the parent's attorney failed to give the school district information about the grounds of the claim or the relief being sought in the due process hearing. See *id.* § 1415(i)(3)(F).

36. See, e.g., *Johnson v. Bismark Pub. Sch. Dist.*, 949 F.2d 1000, 1003 (8th Cir. 1991); *Moore v. District of Columbia*, 907 F.2d 165, 166 (D.C. Cir. 1990) (citing cases). The IDEA does not contain its own statute of limitations; courts therefore typically borrow

The IDEA contains a stay put provision regarding placement of the child during the resolution of disputes through the administrative and judicial proceedings.³⁷ Before the 1997 IDEA amendments, that provision simply provided that a child had to remain in the child's "then current educational placement."³⁸ The first issue to reach the Supreme Court regarding the discipline of children with disabilities pertained to the application of this provision.³⁹

II. DISCIPLINARY ISSUES UNDER THE PRE-AMENDMENT IDEA

A. Suspension or Expulsion as a Change in Placement

In *Honig v. Doe*,⁴⁰ the Supreme Court considered the case of two children with severe emotional difficulties who were expelled for acting out in school. The children attacked their expulsions, arguing that they constituted changes in their educational placements, which could not be accomplished without compliance with the full IEP process. Invoking the stay put provisions of the IDEA, they sought injunctive relief allowing them to return to their classrooms during the pendency of the administrative hearing processes.⁴¹ The Supreme Court read the IDEA as requiring that the IEP process be followed in cases of disciplinary removal of students for more than ten days⁴² for behavior related to their

the most suitable state statute. See *Zipperer v. School Bd.*, 111 F.3d 847, 850 (11th Cir. 1997); *Powers v. Indiana Dep't of Educ.*, 61 F.3d 552, 555 (7th Cir. 1995). Courts differ on what statute of limitations to apply to an action brought only to obtain attorneys' fees, as opposed to one seeking review of the administrative decision. Some courts apply the short statute of limitations applicable under a state administrative procedure act to both judicial review and attorneys' fees petitions; others view the attorneys' fee petition as entitled to a longer filing time, and apply either a longer borrowed statute or a "reasonable time." Compare *Birmingham ex rel. Birmingham v. Omaha Sch. Dist.*, 17 F. Supp. 2d 859, 859 (W.D. Ark. 1998) (applying state's 30-day statute of limitations to IDEA claims for judicial review and attorneys' fees), with *B.K. v. Toms River Bd. of Educ.*, 998 F. Supp. 462 (D.N.J. 1998) (applying "reasonable time" of two years after administrative decision to attorneys' fees claim). The latter view seems ill-advised. A school district might abide by an administrative decision if it can calculate that no further financial exposure accompanies its failure to appeal. If the court allows fee petitions to be filed years after the administrative decision is made, school districts may feel compelled to continue litigating, appealing hearing officer decisions in order to defeat a later claim for fees. This seems contrary to the purpose of the IDEA—to implement an adequate educational plan for a child as expeditiously as possible. See, e.g., *School Comm. v. Department of Educ.*, 471 U.S. 359, 372 (1985) (discussing the need to avoid denying a free and appropriate education during the pendency of the review and appeal process).

37. 20 U.S.C. § 1415(j) (Supp. III 1997).

38. 20 U.S.C. § 1415 (e)(3)(A) (1994) (current version at 20 U.S.C. § 1415(j) (Supp. III 1997)).

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

40. *Id.* at 305.

41. See *id.* at 308–15.

42. The Supreme Court accepted, as a valid construction of the IDEA, the Department of Education's policy letter, which stated that a suspension of up to 10 school days was not a "change in placement." *Honig*, 484 U.S. at 326 n.8. This construction, in

disabilities. These procedures included convening an IEP meeting and, notably, application of the stay put provisions during the pendency of any administrative or judicial review. The *Honig* Court did, however, read the IDEA as conferring power on the district courts to issue a temporary order enjoining dangerous children from attending school in appropriate cases.⁴³

The *Honig* decision led to the problematic result that a child removed from the classroom could be returned there indefinitely during a potentially protracted period of dispute resolution if the parent invoked the hearing process. Not surprisingly, school officials protested that this hindered their ability to effectively keep discipline in schools, given that an estimated twelve percent of students in public schools receive some kind of special educational services.⁴⁴ Such dissatisfaction, and the perception that this reading of the IDEA created a double standard for discipline, spurred many of the changes made in the 1997 IDEA amendments.

B. Misconduct Related to a Child's Disability

The behavior for which the children in the *Honig* case were being disciplined was concededly related to their disabilities.⁴⁵ In an earlier decision, the Fifth Circuit required schools to determine the relationship between misconduct and a child's disability before deciding to expel a child with a disability.⁴⁶ The implied reasoning there was that expelling a child for conduct that his disability made him unable to control or understand would equate to a change in placement.⁴⁷ In contrast, if the misconduct was not related to the child's disability, the IDEA should not, in theory, shield the child from facing the same consequences a non-disabled classmate would face for the same conduct.⁴⁸ This

turn, derived from the Court's view that due process protections of property and liberty interests were triggered by a suspension of 10 school days or more. *See Goss v. Lopez*, 419 U.S. 565, 574-76 (1975).

43. *See Honig*, 484 U.S. at 327.

44. *See Cost-Benefit Summary*, *supra* note 23, 64 Fed. Reg. at 12,660 (estimating 47 million children enrolled in public elementary and secondary schools in 1998-99 and using National Center for Education Statistics estimate of twelve percent, or 6 million, children with disabilities nationwide).

45. Both children were emotionally disturbed, and described as having difficulty controlling impulses. One, a student in a school for developmentally disabled children, had responded to taunting by choking a classmate. He kicked out a school window on the way to the principal's office afterward. The other had been in a program for emotionally disturbed children, but at the behest of his grandparents was placed into a half-day program at the public school. While there, he engaged in a pattern of disruptive behavior including stealing, extorting money from other students, and making sexual comments to female classmates. *See Honig*, 484 U.S. at 312-15. Both were being expelled "indefinitely for violent and disruptive conduct related to their disabilities." *Id.* at 312.

46. *See S-1 v. Turlington*, 635 F.2d 342, 350 (5th Cir. 1981).

47. *See id.* at 346-48.

48. An example of this might be a learning disabled student who steals computer equipment. Although the implication of *Turlington* and *Honig* was that discipline could

determination of relatedness, termed a "manifestation determination review," is now incorporated into the legislative provisions of IDEA.⁴⁹

C. Provision of Special Educational Services During Suspension or Expulsion

Before the 1997 IDEA amendments, courts divided over whether the IDEA obliged school districts to provide special educational services to suspended or expelled children with disabilities. The Department of Education interpreted the IDEA to require the continuation of educational services to children with disabilities during periods of suspension or expulsion, even where the misconduct was determined to be unrelated to the child's disability.⁵⁰ Several circuit courts agreed.⁵¹ The Fourth and Seventh Circuit courts, however, held that once the determination had been made that the misconduct was unconnected to the child's disability, a school district could suspend educational services for disciplinary reasons to the same extent that it did for non-disabled children.⁵² These courts reasoned that if the conduct warranting the suspension or expulsion was unrelated to the child's disability, no services need be provided, just as none were provided to non-disabled children subject to such sanctions.⁵³

Other legislative developments affecting student discipline included the Gun Free Schools Act, which requires schools to expel students who bring a gun to school.⁵⁴ IDEA amendments passed in response to this legislation authorized school districts to immediately remove to an alternative setting a disabled student who carries a gun to school.⁵⁵ This removal could last up to forty-five days.⁵⁶

D. Requests for Evaluation After a Disciplinary Action

Another problem surfaced involving disciplinary actions taken against children who were not receiving special educational services. In some of these cases a parent either contended the child was disabled or requested that the child

proceed if the conduct was unrelated to the disability, few cases squarely upheld an expulsion on this ground. Most cases arose in contexts that triggered an order for a relatedness determination, or found a basis for the behavior in the child's disability. *See* Dagley, *supra* note 4, at 18-26.

49. 20 U.S.C. § 1415(k)(4) (Supp. III 1997).

50. *See Cost-Benefit Summary, supra* note 23, 64 Fed. Reg. at 12,659. *See also* Bryant, *supra* note 9, at 496 n.57 (identifying policy letters containing this interpretation).

51. *See Turlington*, 635 F.2d at 348 ("We cannot...authorize the complete cessation of educational services during an expulsion period."); *Kaelin v. Grubbs*, 682 F.2d 595, 602 (6th Cir. 1982) ("[E]ven during the expulsion period there may not be a complete cessation of educational services.").

52. *See Doe v. Board of Educ.*, 115 F.3d 1273, 1279 (7th Cir.), *cert. denied*, 118 S. Ct. 564 (1997); *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 561 (4th Cir. 1997).

53. *See Doe*, 115 F.3d at 1279; *Riley*, 106 F.3d at 561.

54. *See* 20 U.S.C. § 8921 (1994).

55. *See* 20 U.S.C. § 1415(e)(3)(B)(i) (1994). The 1994 amendment is generally referred to as the Jeffords Amendment.

56. *See id.*

be evaluated for determination of a disability.⁵⁷ Were these students protected, as were those already identified with disabilities, from changes in placement for disciplinary reasons made without IEP process compliance? Could a parent contesting the child's eligibility for services forestall disciplinary sanctions by seeking enforcement of the stay put provisions of the IDEA?

In *Hacienda v. Honig*,⁵⁸ the Ninth Circuit made it clear that a parent had a right to request an evaluation of a child even after disciplinary action and to invoke the due process provisions under the IDEA to contest an adverse determination.⁵⁹ Following the decision in *Hacienda*, other decisions applied the stay put provisions to such requests. For example, a court ordered a high school senior who had brought a gun to school, and who had never previously been identified by school officials or his parents as having a need for special education, placed back into regular classes.⁶⁰ Then the Seventh Circuit, in *Rodiricus L. v. Waukegan School District No. 60*,⁶¹ limited the problem by adopting the approach taken in an Office of Special Education Programs ("OSEP") memorandum.⁶² Under this reading of the IDEA, unless the school district knew or should have known that a child might be disabled, the "then current educational placement" of the child during the pendency of the newly requested evaluation and due process proceedings would be the disciplinary placement.⁶³

All of these decisions and administrative interpretations were before Congress as it crafted the 1997 amendments to the IDEA.

III. STUDENT DISCIPLINE UNDER THE IDEA AMENDMENTS AND THE FINAL REGULATIONS

The 1997 IDEA amendments reauthorized and amended the IDEA in a number of respects beyond those touching on discipline.⁶⁴ One important new

57. See McKinney, *supra* note 9, at 367-70 (discussing and citing such cases).

58. 976 F.2d 487 (9th Cir. 1992).

59. See *id.* at 492-93.

60. See *M.P. v. Governing Bd.*, 858 F. Supp. 1044, 1050-51 (S.D. Cal. 1994). See also *Deborah V. v. Leonard*, No. Civ. A. 93-11984-Z, 1993 WL 393055, at *2 (D. Mass. Sept. 24, 1993) (ordering school system to provide services to boy who, after expulsion for stabbing another student, claimed to have attention deficit disorder, but noting that services could be at-home schooling).

61. 90 F.3d 249 (7th Cir. 1996).

62. See *id.* at 254 (citing OSEP Mem. No. 95-16 (1995)).

63. See *id.* at 252 (citing 20 U.S.C. § 1415(e)(3)(A) (1994) (current version at 20 U.S.C. § 1415(j) (Supp. III 1997))).

64. The amendments purportedly attempt to reduce the amount of paperwork required to comply with the Act, see 20 U.S.C. § 1400(c)(5)(G) (Supp. III 1997), although some new assessment and reporting requirements make it questionable that they have done so. See, e.g., 20 U.S.C. § 1412(a)(17)(B) (Supp. III 1997). They also emphasize district-wide assessments of student learning. See *id.* They hold public charter schools to the standards of the IDEA. See 20 U.S.C. § 1413(a)(5) (Supp. III 1997). They tighten the circumstances under which parents who act unilaterally by placing children into private

concept is application of the standard of progress and involvement in the "general curriculum" to help define an appropriate education under the law.⁶⁵ Much of the congressional debate and public attention, however, focused on the disciplinary provisions of the amendments.⁶⁶

While many of the amendments codified prior judicial or administrative rulings regarding disciplinary issues, others broadened the powers of school authorities and administrative hearing officers to deal with serious and dangerous misconduct. The amendments altered the stay put provisions to reduce the likelihood that a child disciplined for these reasons would be returned to the classroom in the event of a dispute and to prevent the assertion of a belated claim of disability from triggering a right to return to a prior placement. The amendments address behavioral problems associated with a child's disabilities through IEP provisions that identify steps and strategies to deal with those behaviors. The amendments also require continuation of disabled children's education, even when they must be removed from school.

Just as provisions regarding discipline provided much of the impetus for and legislative attention to the 1997 IDEA amendments, so too there was significant attention to, and comment upon, the disciplinary portions of the proposed regulations published by the Department of Education to implement the amended IDEA.⁶⁷ Sections of the final regulations attempt to resolve ambiguities or questions that commenters raised after the statute was enacted. This section discusses the current IDEA statutory and regulatory scheme for discipline of children with disabilities, the issues it resolves, and new issues it raises.

schools can receive tuition reimbursement from school systems. See U.S.C. § 1412(a)(10)(C). And they eliminate individual rights to special education services of children voluntarily enrolled in private schools. See *id.* For summaries and analysis of other aspects of the amendments, see generally Eyer, *supra* note 29, Dixie Snow Huefner, *The Individuals with Disabilities Education Act Amendments of 1997*, 122 Educ. L. Rep. 1103 (1998), Joseph R. McKinney, *Charter Schools' Legal Responsibilities Toward Children with Disabilities*, 126 Educ. L. Rep. 565 (1998), and Mead, *supra* note 29.

65. Children's IEPs should now focus on providing the child with access to the general curriculum and with the services needed to help children progress in that curriculum. See, e.g., 20 U.S.C. §§ 1400 (stating that purpose of 1997 IDEA is ensuring access to the general curriculum to the maximum extent possible), 1414(d)(1)(A)(ii)(I) (Supp. III 1997) (establishing IEP requirement that goals meet needs to enable child to "be involved in and progress in the general curriculum"). The Department of Education explains the general curriculum by saying that for each school system, there is a "common core of subjects and curriculum areas...that applies to all children within each general age grouping," to which access must be provided. *Analysis, supra* note 11, 64 Fed. Reg. at 12,545. See also Eyer, *supra* note 29, at 16-19; Mead, *supra* note 29, at 516.

The standard also is implicated in the amendment mandating provision of educational services to children with disabilities who are being disciplined. See *infra* Part III.B.3.

66. See sources cited *supra* note 7.

67. See *Summary, supra* note 11, 64 Fed. Reg. at 12,413-16; *Analysis, supra* note 11, 64 Fed. Reg. at 12,617-32. See also, generally, Groeschel, *supra* note 5.

A. Removal from School for Disciplinary Reasons

The major focus of the disciplinary provisions of the IDEA is on actions that change a child's placement or remove the child from school. Measures such as withholding of privileges, detention, and in-school suspension can generally be used for children with disabilities to the same extent as for non-disabled children.⁶⁸ The provisions of a particular child's IEP may constrain the choice of a disciplinary response. Some children will have specific consideration in their IEPs of appropriate sanctions for misbehavior.⁶⁹ For example, a child's IEP might state that withdrawal of privileges or time-outs be used for misconduct in lieu of corporal punishment. A disciplinary measure that violated the IEP's particular approach to behavioral interventions and strategies for the child thus would not be appropriate.⁷⁰ Since most school systems use long-term suspension and expulsion sparingly and only for serious offenses, the IDEA is not triggered in the vast majority of day-to-day disciplinary actions.⁷¹

The amended IDEA continues the prior authority of school officials to act unilaterally by giving short suspensions from school of up to ten days. It expands the ability officials had to remove students to another setting for bringing a weapon to school so that it also covers drug offenses. In addition, it creates an

68. See *Summary, supra* note 11, 64 Fed. Reg. at 12,415-16; *Analysis, supra* note 11, 64 Fed. Reg. at 12,619.

69. Behavioral strategies, including positive behavioral interventions, strategies, and supports, must be considered whenever a child's behavior impedes the child's learning or that of others. See 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i) (1999).

70. See *Summary, supra* note 11, 64 Fed. Reg. at 12,415-16.

71. A report on student exclusions in Massachusetts Public Schools shows that 27% of all student exclusions (defined as removal of a student from school permanently, indefinitely, or for more than ten consecutive school days) in 1996-97 involved a weapon, 22% involved possession of an illegal substance, and 21% were for assaults on school staff or students. See Massachusetts Dep't of Educ., *Student Exclusions in Massachusetts Public Schools 1996-97* (visited June 2, 1999) <<http://www.doe.mass.edu/doedata/exclu98rpt.html>>. Over one-half of all school districts, or over 200 districts, reported no student exclusions; exclusion rates varied among the districts which did exclude students, with most (132) reporting between one and nine exclusions, and 24 reporting 10 or more. See *id.*

National statistics indicate that schools use expulsion, transfer to alternative schools or programs, and out of school suspensions lasting five or more days for the same types of offenses. Twenty-seven percent of schools reported weapon or firearm infractions, 27% reported alcohol, drugs, or tobacco infractions, and 39% reported physical attacks or fights. See National Center for Educational Statistics and Bureau of Justice Statistics, *Indicators of School Crime and Safety*, Table A6 (1998) (visited June 3, 1999) <<http://nces.ed.gov/pubs98/safety/ta6a6.html>>.

To take a microcosmic snapshot, during the 1998-99 school year in a school system of approximately 7800 students, only one student was expelled and one was suspended from school for more than ten days. In comparison, the same school system reported 1076 in-school disciplinary actions, such as detention and in-school suspension. Interview with Ron Jared, Assistant Superintendent, Fayetteville, Arkansas Public Schools, in Fayetteville, Ark. (June 1, 1999).

administrative route, as an alternative to seeking court intervention, for obtaining authorization to place those students whose conduct raises a risk of injury to themselves or others into another setting.

1. *The Ten Day Rule*

Under the *Honig* decision, a suspension of less than ten days generally was not considered a change in placement that required an IEP process or carried with it due process rights for parents.⁷² The regulations codify this view.⁷³ The regulations also provide further interpretation on the measurement of ten days. Repeated short suspensions of less than ten days are not cumulated.⁷⁴ Thus, a student could be suspended for two days in October, for five days in December, and for four days in June, without the action constituting a change in placement.⁷⁵ There is an exception to this non-cumulating rule. If short suspensions are found because of their length, frequency, and total duration, to be part of a pattern, they are viewed as a change in placement.⁷⁶ These interpretations pre-date the IDEA amendments,⁷⁷ but are now in formal regulatory form.⁷⁸

School systems have been working under this interpretation for some time now. Shorter suspensions may have increased over long-term suspensions as a result, both for non-disabled and disabled students.⁷⁹

2. *Weapons and Drugs*

The IDEA amendments expanded the power of school officials to place children in alternative educational settings. Previously, the Jeffords Amendment allowed alternative placement if a student brought a firearm to school.⁸⁰ The IDEA

72. See *Honig v. Doe*, 484 U.S. 305, 326 n.8 (1988).

73. See 34 C.F.R. §§ 300.519(a), .520(b), (c) (1999).

74. See 34 C.F.R. § 300.520(a)(1)(i). However, once the child has been out of school for more than ten days in a school year, even as a result of short suspensions, the school system must provide the child with educational services. See 34 C.F.R. § 300.121(d)(2); discussion *infra* Part III.B.3.

75. See 34 C.F.R. § 300.520(a)(1)(i); *Summary, supra* note 11, 64 Fed. Reg. at 12,415.

76. See 34 C.F.R. § 300.519(b).

77. The regulation "reflects the DOE's longstanding definition of what constitutes a 'change of placement' in the disciplinary context." *Summary, supra* note 11, 64 Fed. Reg. at 12,413.

78. See 20 U.S.C. § 1406(c) (Supp. III 1997) (requiring all rules establishing requirements under the IDEA to go through the formal rulemaking process).

79. For example, in one mid-sized school system during the 1998-99 school year, of a total of 273 suspensions, 212 were for less than ten days, 55 were for ten days, and 1 was for more than ten days. The system uses short suspensions for less serious infractions; a ten day suspension is the initial measure of choice in more serious instances. Interview with Lee Haight, Assistant Director of Special Services, and Ron Jared, Assistant Superintendent, Fayetteville, Arkansas Public Schools, in Fayetteville, Ark. (June 1, 1999).

80. See 20 U.S.C. § 1415(e)(3)(B)(i) (1995).

now authorizes school authorities to remove and place in an alternative educational setting, for a period of up to forty-five days, a child who brings a weapon to school or to a school function, or who knowingly possesses, uses, sells, or solicits drugs while at school or a school function.⁸¹ The decision as to the alternative setting is made by the IEP team and must be one which allows the child to continue to "progress in the general curriculum" and includes services in the child's IEP and any behavioral services or modifications determined through a separate review.⁸² The Department of Education has indicated that it interprets the regulations to mean that school authorities may unilaterally remove a child immediately for up to ten days and then place the child in the forty-five day alternative setting that the IEP team prescribes.⁸³

Detractors of the revised provisions have suggested that the period of removal is too short and that it should cover other offenses, such as possessing alcohol.⁸⁴ Others have criticized the provision for failing to empower school officials to deal with other kinds of disruptive, but not illegal or dangerous, behavior.⁸⁵ The provision works together, however, with other parts of the IDEA that provide routes for dealing with these other kinds of behaviors. Other criminal offenses can be addressed by referral to law enforcement or by removal for

81. See 20 U.S.C. § 1415(k)(1); 34 C.F.R. § 300.520(a)(2)(i), (ii) (1999). A 1999 amendment clarifies that this alternative educational setting provision applies both to possessing and carrying a weapon to school, on school premises, or at a school function. See Education Flexibility Partnership Act of 1999, Pub. L. No. 106-25 § 6 (April 29, 1999) (to be codified at 20 U.S.C. § 1415(k)(1)(A)(ii)(I)). The IDEA defines a weapon using a reference to the definition of dangerous weapon in 18 U.S.C. § 930(g)(2) (1994). See 20 U.S.C. § 1415(k)(10)(D). That definition includes "a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2½ inches in length." 18 U.S.C. § 930(g)(2).

82. 34 C.F.R. § 300.522(b).

83. See *Analysis, supra* note 11, 64 Fed. Reg. at 12,620.

84. See 143 CONG. REC. S4354-02, S4366 (daily ed. May 13, 1997) (statement of Sen. Byrd); 143 CONG. REC. at 4367 (daily ed. May 13, 1997) (statement of Sen. Smith).

85. See Bryant, *supra* note 9, at 520-23. The amendments initially proposed, but not enacted, in the previous congressional session contained a complicated section allowing removal of a child to an alternative educational setting for "ongoing serious disruptive behavior that significantly impairs the education of the child or the education of other children and the ability of the teacher of the child to teach." S. REP. NO. 104-275, at 163-64 (1996). The provision was hedged with prior consultation requirements and definitional clauses excluding determinations based on stereotypes, lack of understanding of the disability's effects, disruptions caused by the services a child received, or behavior not addressed by the child's IEP. See *id.* Congress did not retain the provision in the final amendments. One legislator who supported the passage of the final amendments referred to the earlier language, saying, "[m]ost of us assume this was a well-intended effort, yet nonetheless it would have resulted in a situation where any of a wide-range of nonthreatening but, to some, unpleasant behaviors, could have been grounds for suspension or expulsion." 143 CONG. REC. E951-01 (daily ed. May 13, 1997) (statement of Rep. Miller).

dangerousness. The disruptive child's placement can be altered through the IEP process.⁸⁶

3. Likelihood of Injury

The amendments codify the pronouncement in *Honig*⁸⁷ that school authorities may obtain relief to exclude a dangerous child from the classroom. They create an administrative process, with defined standards, for obtaining this relief from a state hearing officer.⁸⁸ The IDEA authorizes hearing officers to order a change in placement for up to forty-five days upon a finding that the school district has "demonstrated by substantial evidence that maintaining the current placement of the child is substantially likely to result in injury to the child or to others."⁸⁹ The hearing officer must also consider both the appropriateness of the child's current placement and whether the school district has made "reasonable efforts" to minimize the risk of harm in the child's current placement.⁹⁰ The hearing officer determines whether the alternative placement meets the IDEA requirements. The alternative placement is limited to forty-five days. The district can request an expedited hearing and obtain a forty-five day order from the hearing officer under the same standards, repeating this process as necessary, during the pendency of a dispute over a child's continued placement.⁹¹

In the face of comments seeking both narrow and broad definitions of the standard for likelihood of injury, the DOE declined to further define the term, noting that hearing officers would need to use their judgment based on the evidence in the individual case.⁹² Some commenters had sought to define "injury" as not including a minor injury; others urged regulators not to require a showing of "imminent threat to the safety or health" of the child or others.⁹³

The leading pre-amendment case to address the nature of the risk of "injury" warranting removal of a child from a current placement took a broad,

86. For further discussion about dealing with disruptive conduct, see *infra* text accompanying notes 233-238.

87. See *Honig v. Doe*, 484 U.S. 305, 327 (1988).

88. See 20 U.S.C. § 1415(k)(2) (Supp. III 1997); 34 C.F.R. § 300.521 (1999).

89. 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.521(a).

90. 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.521(b), (c). The "reasonable efforts" requirement derives from the decision in *Light v. Parkway C-2 School District*, 41 F.3d 1223, 1228 (8th Cir. 1994), discussed further *infra*. Reasonable efforts does not mean steps that would be futile, in light of the student's particular disability, see *Walton Cent. Sch. Dist. v. Kirk*, 28 Indiv. with Disabilities Educ. L. Rep. 597, 599 (N.D.N.Y. May 21, 1998), nor does it require exhaustion of "all heroic or possible methods." *Horry County Sch. Dist. v. P.F.*, 29 Indiv. with Disabilities Educ. L. Rep. 354, 363 (D.S.C. Oct. 20, 1998). See also *infra* text accompanying notes 99-100.

91. See 20 U.S.C. § 1415(k)(7)(C); 34 C.F.R. § 300.526(c). See also *infra* Part III.C (discussing stay put provisions).

92. See *Analysis*, *supra* note 11, 64 Fed. Reg. at 12,621.

93. See *id.*

rather than a narrow, point of view.⁹⁴ The child in *Light v. Parkway C-2 School District*, a thirteen year old girl with multiple disabilities, had been placed in a self-contained middle school classroom with five other disabled children, but went to regular classes for certain courses, such as physical education, art, and computer lab. She had logged an average of fifteen incidents a week of "aggressive and disruptive" behavior such as biting, hitting, kicking, poking, throwing objects, and turning over furniture.⁹⁵ The court noted the negative effect of her behavior on the other five children in her program. The court rejected parental arguments that the child's conduct was merely a nuisance which had not harmed anyone to the point of requiring medical attention:

[W]e emphatically reject the contention that an "injury" is inflicted only when blood is drawn or the emergency room visited. Bruises, bite marks, and poked eyes all constitute "injuries" in the context of this analysis. More broadly, we reject the proposition that a child must first inflict serious harm before that child can be deemed substantially likely to cause injury.⁹⁶

The court also found that the school had taken reasonable steps to minimize the child's propensity to cause injury, including training and preparing her teaching staff.⁹⁷

Of the handful of reported cases where the risk of injury is considered, many have offered a long history of aggressive behavior.⁹⁸ The better documented that history is, the easier it appears to be for the court, or now the hearing officer, to approve a change in the placement. An unfortunate side effect of such amply

94. See *Light*, 41 F.3d at 1228.

95. See *id.* at 1225.

96. *Id.* at 1230. *Accord* *School Bd. v. J.M.*, 957 F. Supp. 1252, 1258 (M.D. Fla. 1997) (stating that lack of serious injury to date is not the yardstick, hitting staff hard enough to leave marks was injury, as was touching of teacher's breasts, bottom, and crotch areas); *Walton Cent. Sch. Dist. v. Kirk*, 28 *Indiv. with Disabilities Educ. L. Rep.* 597, 599 (N.D.N.Y. May 21, 1998) (finding that triggering incident in which student punched and kicked principal was followed by credible threats to shoot classmates and that "actual occurrence of serious injury is not the benchmark").

97. See *Light*, 41 F.3d at 1230.

98. See, e.g., *Texas City Indep. Sch. Dist. v. Jorstad*, 752 F. Supp. 231, 234-37 (S.D. Tex. 1990) (discussing student involved in thirty physical assaults on teachers, staff, aides, and students, and incidents such as trying to jump out of school windows, darting into a roadway, and destroying school property); *Horry County Sch. Dist. v. P.F.*, 29 *Indiv. with Disabilities Educ. L. Rep.* 354, 364-66 (S.C. Oct. 20, 1998) (finding that long history of self-injurious behavior and harm to others, including head-banging and breaking aide's nose, warranted order approving interim alternative residential placement); *Community Consol. Sch. Dist. 15, 30 Indiv. with Disabilities Educ. L. Rep.* 448, 449 (Ill. Educ. Agency Mar. 27, 1999) (discussing similar behavior, presenting evidence in tables of frequency data for each type of behavior and victim).

documented situations may have been a tendency by some reviewing authorities to conclude that evidence of conduct short of such a history does not justify relief.⁹⁹

Likewise, records of the cases in which school districts have successfully obtained court or agency approval to alter a child's placement based upon the risk of harm are replete with meetings, plans, strategies, and other interventions to try to address the child's harmful behaviors.¹⁰⁰ Some of the cases denying relief in what appear to be situations that posed a legitimate risk of harm, in contrast, appear to rest on the decisionmaker's doubts that the school district tried other measures before seeking the change in placement.¹⁰¹

Since the IDEA amendments, a child with a disability who is "expelled" continues to receive IEP services in an alternative setting.¹⁰² At least one hearing panel, noting that under the amendment a child will not be expelled in the

99. See, e.g., *Phoenixville Area Sch. Dist. v. Marquis B.*, No. 97-0840, 1997 WL 67793, at *2 (E.D. Pa. Feb. 18, 1997) (finding that three assaults on classmates and principal plus verbal abuse did not "rise to the level" of substantial likelihood of causing injury in the "immediate" future). When the same child enrolled in a different school district two years later, after having been in several other residential and alternative settings, including a juvenile court placement, the state agency appeals panel rejected the district's request for an interim alternative school placement as less justified than that in the prior litigation because it sought relief based on physical conduct occurring two years in the past. See *Pottstown Sch. Dist.*, 30 *Indiv. with Disabilities Educ. L. Rep.* 651, 652 (Pa. Educ. Agency June 3, 1999). See also *Cabot Sch. Dist.*, 27 *Indiv. with Disabilities Educ. L. Rep.* 304, 306-07 (Ark. Educ. Agency Dec. 9, 1997). The behavior included throwing spit balls and refusing to follow directions, followed by mouthing off obscenely at teachers. The court found that this did not evidence injury comparable to that in other cases and the school district was free to remove student from class or send him home for such disruption and behavior, but not to change his placement. See *id.*

100. See, e.g., *J.M.*, 957 F. Supp. at 1254 (noting the log kept of incidents and of numerous efforts to accommodate student). One administrative decision contains a veritable curriculum of strategies:

[B]ehavior management strategies implemented by [the school included] verbal reprimands, verbal and physical redirection, removal of reinforcers, physical restraint when necessary, and timeout. JG has been placed in closer proximity to the teacher, has been given more breaks, has been redirected from the activity when becoming frustrated, has been permitted to change activities, and has been given adapted or modified materials. [Teachers] have tried sensory integration, instruction in alternative modes, alternative reinforcers, picture cues of expected behaviors, peer modeling, and the implementation of a behavior management plan.

Community Consol. Sch. Dist., 30 *Indiv. with Disabilities Educ. L. Rep.* at 451. All these measures failed to decrease or control the student's behavior.

101. See, e.g., *School Dist. v. Stephan M.*, No. 97-1154, 1997 WL 89113, at *1 (E.D. Pa. Feb. 27, 1997) (addressing a child who cut student with a razor, allegedly in response to sexual assault; noting that there was no showing of measures to mitigate danger); *Marquis B.*, 1997 WL 67793, at *1 (noting the lack of elaboration on what preventative or ameliorative measures had been attempted).

102. See 20 U.S.C. § 1412(a)(1) (Supp. III 1997). See also *infra* Part III.B.3.

traditional sense of being deprived of educational services, has suggested that the injury standard under the amendments may not be identical to that called for in *Honig*¹⁰³ to support expulsion, reasoning that expulsion is "a far more serious matter than a change in the location of an educational program."¹⁰⁴ The definitions of the terms "substantial likelihood" and "injury" are likely to develop further as new cases arise.¹⁰⁵

The IDEA amendments have introduced a new and problematic definition of the standard of "substantial evidence" as it is to be used by the hearing officer in determining whether to approve an alternative setting. It is statutorily defined as "beyond a preponderance of the evidence."¹⁰⁶ This definition is inconsistent with that commonly given to the term substantial evidence in court proceedings, either in the administrative law arena or in the trial court fact finding process. When reviewing a decision of an administrative agency, the federal Administrative Procedure Act typically calls for a standard of substantial evidence on review of the whole record.¹⁰⁷ This standard has generally been interpreted as something *less* than the weight of the evidence, but instead "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹⁰⁸ Courts reviewing a jury verdict also use the "substantial evidence" standard to mean evidence sufficient to submit a case to the jury—again, a determination that does not involve weighing one side's evidence against the other.¹⁰⁹ Instead, it asks whether, viewing the evidence and all reasonable inferences in the light most

103. *Honig v. Doe*, 484 U.S. 305, 328 (1988).

104. *Scranton Sch. Dist.*, 29 *Indiv. with Disabilities Educ. L. Rep.* 133, 134 (Pa. Educ. Agency June 22, 1998).

105. In an interesting twist, a Washington appellate court suggested that a school district can be held to have known that a student with a history of outbursts requiring physical restraint would injure its employees, thereby entitling the employees to sue the district for intentional injury and avoid the Industrial Insurance Act's bar, under the theory that the district willfully disregarded this knowledge. *See Stenger v. Stanwood Sch. Dist.*, 977 P.2d 660, 668 (Wash. Ct. App. 1999). The court rejected the district's suggestion that the IDEA gave it no choice but to maintain the child's placement, saying that the law acknowledged that a regular classroom would not always be the appropriate placement for a disabled student, "particularly if the child is violent and has a negative, disruptive effect on his or her class." *Id.* at 667.

106. 20 U.S.C. § 1415(k)(10)(C) (Supp. III 1997); 34 C.F.R. § 300.521(e) (1999); *Analysis, supra* note 11, 64 *Fed. Reg.* at 12,621. This statutory definition was added in committee by an amendment to the bill which was proposed by Senator Jeffords. The only explanation in the committee report sheds no light on the intended operation of this standard or the reason for including it, merely referring to the definition as requiring "something more than a preponderance of the evidence." S. REP. NO. 105-17, at 4 (1997).

107. *See* 5 U.S.C. § 706 (1994).

108. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Avondale Indus. Inc. v. Director, Office of Workers' Compensation Programs*, 977 F.2d 186, 189 (5th Cir. 1992). *See also* BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 10.9 (3d ed. 1991).

109. *See Gibraltar Sav. v. L.D. Brinkman Corp.*, 860 F.2d 1275, 1297 (5th Cir. 1988) (stating that substantial evidence is something less than the weight of the evidence); SCHWARTZ, *supra* note 108, § 10.11.

favorable to the verdict, a rational fact finder could come to the same conclusion.¹¹⁰

The preponderance of the evidence standard, which is the common burden of proof in a civil case, means proving that "something is more likely so than not so."¹¹¹ The statutory use of the term "substantial evidence" to mean *more* than a preponderance standard thus creates a different, and undefined, quantum of proof.¹¹² Particularly where such a difficult proposition as predicting future injury is involved, this places an unfortunate and probably unrealistic burden on school districts, for whom the safety of school children must be a high priority. Hearing officers and reviewing courts need to interpret and apply this standard in a way that appropriately balances safety concerns against the temporary removal of the child.¹¹³ In doing so, they should give deference to school officials' assessment of safety conditions within their schools and to their more extended experience with the child in question.

Other questions have surfaced regarding the process of obtaining an order for a change in placement. The DOE has expressed the view that the statutory reference to evidence suggests that both sides would be given an opportunity to submit evidence to the hearing officer, rather than allowing an *ex parte* procedure, or one based on school district evidence alone.¹¹⁴ This interpretation is consistent with the IDEA's concern with parental notice and participation in all aspects of the child's evaluation and educational planning. On the other hand, in urgent and extreme circumstances, it could be argued that a hearing officer could make a short-term determination based on evidence provided by the school district only. The officer could then schedule the matter for a full hearing after giving notice to

110. See *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1337-38 (8th Cir. 1997); *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1013-14 (9th Cir. 1985); 19 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 206.02[1] (3d ed. 1997).

111. 3 EDWARD J. DEVITT ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 72.01 (1987). The IDEA already uses the preponderance of the evidence standard on judicial review of agency hearing decisions. See 20 U.S.C. § 1415(i)(2)(B).

112. That confusion is engendered by this standard is already confirmed. See *Scranton Sch. Dist., 29 Indiv. with Disabilities Educ. L. Rep.* 133, 134 (Pa. Educ. Agency June 22, 1998) (chastising the hearing officer as misconstruing the standard). The panel then states that the preponderance of the evidence standard is "just enough evidence to tip the scale in one direction; it is the lowest standard that can be demanded." Turning to substantial evidence, it cites the *Consolidated Edison* language quoted above, terming this as "more than a preponderance." *Id.* at 134 & n.6.

113. Courts are well-experienced in balancing harms and considering the public interest in making judgments about the grant of temporary injunctive relief, and have used such analyses in reviewing school district motions. See, e.g., *Texas City Indep. Sch. Dist. v. Jorstad*, 752 F. Supp. 231, 238 (S.D. Tex. 1990). Cf. *Honig v. Doe*, 484 U.S. 305, 328 (1988) (recognizing interest of the state and school officials in a safe learning environment for all students). Agency hearing officials have been given this role under the IDEA; they should be free to consider these interests as well.

114. See *Analysis, supra* note 11, 64 Fed. Reg. at 12,621.

the parent, much as a district court judge has the power to do under the Federal Rules of Civil Procedure when a party seeks a temporary restraining order.¹¹⁵ As noted above, the DOE has interpreted the statute to authorize an initial ten day removal without a hearing officer's order, which can be followed by a forty-five day alternative placement.¹¹⁶ If this interpretation is upheld, the need for an ex parte hearing before a state hearing officer would be minimized, as school districts could seek a hearing date within the ten day period after removal of the child. If it is not, some provision for immediate relief must be substituted, in the nature of a temporary restraining order.

Also unsettled is the relationship between administrative procedure and the availability of court intervention. School districts arguably also can seek temporary relief under the IDEA from the United States district court. *Honig* interpreted the court's jurisdiction under the pre-amendment IDEA as including the authority to hear requests for injunctive relief based on a showing of danger to the child or others.¹¹⁷ In the ordinary course, parties are required to exhaust administrative remedies under the IDEA before bringing an action in the district court.¹¹⁸ In *Honig*, the Supreme Court suggested that exhaustion of the agency hearing process under the IDEA would not be required in the type of exigent circumstances related to a claim of likely injury to the child or others.¹¹⁹ It is not clear whether, now that the statute provides for the grant of a remedy by the state hearing officer upon a showing of dangerousness, the courts still will apply the exception to exhaustion or whether school officials will have to exhaust their administrative remedy before seeking court intervention.¹²⁰ The DOE apparently interprets the IDEA as allowing resort to the district court.¹²¹ Thus far, the only reported decision to consider the question opined that no exhaustion of remedy before the hearing officer would be required, although it did so in a case that was moot by the time the court ruled.¹²² The most efficient course until this question is settled is to seek relief from the hearing officer. If such relief is denied, the school district could seek temporary injunctive relief from the district court.

B. School District Obligations Upon Taking Disciplinary Action

The IDEA amendments charge school authorities with a number of responsibilities when they decide to discipline a child with a disability using one

115. See FED. R. CIV. P. 65(b).

116. See *Analysis*, *supra* note 11, 64 Fed. Reg. at 12,620.

117. See *Honig*, 484 U.S. at 327-28. See also 20 U.S.C. § 1415(i) (Supp. III 1997).

118. See 20 U.S.C. § 1415(i)(2); *Smith v. Robinson*, 468 U.S. 992, 1009 (1984).

119. *Honig*, 484 U.S. at 327.

120. See *Mead*, *supra* note 29, at 526.

121. The DOE comments, "Public agencies continue to have the right to seek injunctive relief from a court when they believe they have the need to do so." *Analysis*, *supra* note 11, 64 Fed. Reg. at 12,621.

122. See *Gadsden City Bd. of Educ. v. B.P.*, 3 F. Supp. 2d 1299, 1304 (N.D. Ala. 1998).

of the steps that are serious enough to represent a change in placement. First, they must examine the connection between the child's misconduct and the child's disability. Second, they must review or create a plan for the future to try to improve the child's conduct. Third, they must continue to provide educational services while the child is out of school.

1. Manifestation Determination Review

Whenever school authorities make a decision to take a disciplinary action putting a child into an alternative setting because of a weapon or drug offense or because of the child's dangerousness, or to take an action that represents a change in placement, such as a suspension of more than ten days, the IEP team must conduct a manifestation determination review within ten days of that decision.¹²³ School officials must notify parents of the decision on the date it is made and tell them about the procedural safeguards available through a notice that meets specific regulatory requirements.¹²⁴ The contents of a "procedural safeguards" notice are comprehensive. They include information about the opportunity to present complaints, the stay put provisions, procedures for children subject to placement in alternative education settings, and due process hearings and appeals.¹²⁵

In conducting a manifestation determination, the IEP team considers "all relevant information."¹²⁶ This specifically includes evaluations and diagnostic results, parent-supplied evaluations and material, "observations of the child," and the child's IEP and placement.¹²⁷ The statutory and regulatory standard for determining that a child's behavior is not related to his disability is high. It is adopted in part from the Ninth Circuit's decision in *Doe v. Maher*,¹²⁸ the case heard as *Honig v. Doe*¹²⁹ when it reached the Supreme Court. In *Doe v. Maher*, the court stated that behavior would not be viewed as related to a child's disability unless the disability "significantly impairs the child's behavioral controls."¹³⁰ The IDEA states this in the negative—a child's behavior *cannot* be found *unrelated* to his disability unless the IEP team determines that the disability did not impair: (1) the child's ability to understand the impact and consequences of his behavior;

123. See 20 U.S.C. § 1415(k)(4); 34 C.F.R. § 300.523 (1999).

124. See 20 U.S.C. § 1415(k)(4)(a)(i); 34 C.F.R. § 300.523(a)(1).

125. See 20 U.S.C. § 1415(d)(2); 34 C.F.R. § 300.504. The regulations call for this kind of comprehensive notice to be given at certain specified points in the IEP process, including when a child is initially referred for evaluation, when the parent is notified of an IEP meeting, when a child is reevaluated, and whenever the parent requests a due process hearing. See *id.*

126. 20 U.S.C. § 1415(k)(4)(C); 34 C.F.R. § 300.523(c).

127. 20 U.S.C. § 1415(k)(4)(C); 34 C.F.R. § 300.523(c).

128. 793 F.2d 1470 (9th Cir. 1986), *aff'd sub nom.* *Honig v. Doe*, 484 U.S. 305 (1988).

129. 484 U.S. 305 (1988).

130. *Maher*, 793 F.3d at 1480 n.8.

and (2) his ability to control the behavior.¹³¹ The IDEA adds a third requirement: the child's IEP and placement must have been appropriate, and implemented, in relationship to the behavior subject to the disciplinary action.¹³²

If the IEP team concludes that the behavior is not related to the child's disability, then the IDEA authorizes school districts to impose the same discipline they would for a non-disabled child.¹³³ The IDEA now unambiguously requires, however, that some services continue to be provided to children with disabilities even when they are out of school for disciplinary reasons.¹³⁴

Some commentators have paraded horror stories reported by school authorities, suggesting that theories interpreting misconduct as tied to feelings of poor self esteem or frustration deriving from a student's disability will make it impossible to ever successfully make and defend a non-related determination.¹³⁵ A reasonable application of these standards, however, need not lead to absurd or inequitable results.

For example, courts have recognized, and for the most part sensibly applied, the definition of eligibility in the IDEA for the disability of "serious emotional disturbance" as not including children who present behavior problems without other characteristics.¹³⁶ A recent and illustrative case applying these provisions is *Springer v. Fairfax County School Board*.¹³⁷ In *Springer*, the Fourth Circuit rejected such a disability claim made on behalf of a child who had a history of behavioral problems in his teenage years, including arrests for possessing burglary tools and tampering with automobiles, staying out all night, using drugs and alcohol, breaking school rules, cutting school, and fighting.¹³⁸ The court noted that courts and special education authorities had "routinely declined...to equate conduct disorders or social maladjustment with serious emotional disturbance."¹³⁹ The court continued with a reality check:

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

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

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

134. See *infra* Part III.B.3 for a discussion of the nature of these services.

135. See Bryant, *supra* note 9, at 525-28; Thompson, *supra* note 9, at 572-82. One case often cited as an example is *School Board v. Malone*, 762 F.2d 1210, 1218 (4th Cir. 1985), where the court upheld as "not clearly erroneous" the hearing officer and district court's determinations that a student's participation as an unpaid intermediary in several drug transactions was related to his learning disability. The disability caused him problems in understanding oral and written communication and, given his "borderline intelligence," was found to make him unable to "comprehend...the consequences of his action." *Id.* at 1212, 1216. This case represents what some commentators have referred to as an "attenuated relationship" test. Dagley, *supra* note 4, at 22-23.

136. IDEA regulations specifically provide that a child is not emotionally disturbed simply because he is "socially maladjusted." 34 C.F.R. § 300.7(c)(4)(ii).

137. 134 F.3d 659 (4th Cir. 1998).

138. See *id.* at 661.

139. *Id.* at 664 (citations omitted).

Teenagers, for instance, can be a wild and unruly bunch. Adolescence is, almost by definition, a time of social maladjustment for many people.... Any definition that equated simple bad behavior with serious emotional disturbance would exponentially enlarge the burden IDEA places on state and local educational authorities.¹⁴⁰

This comment, which undoubtedly resonates with parents of teenagers, teachers, and with all former teenagers, should also guide agency and judicial review of manifestation determinations.

Indeed, the Seventh Circuit's decision in *Doe v. Board of Education*,¹⁴¹ another recent case involving a manifestation determination review, bears out this view. *Doe* involved a child receiving special education for learning disabilities who was expelled for bringing a pipe and marijuana to a school dance. The school authorities conducted a manifestation determination and reached the conclusion that the child's misbehavior did not relate to his learning disability.¹⁴² The parents had sought to have an evaluation of the child for Attention Deficit Hyperactivity Disorder ("ADHD") and wanted the relatedness determination delayed until that evaluation was completed, which the school district refused to do.¹⁴³ The Seventh Circuit ruled that the parents had not been prejudiced by the procedure used and went on to note that even if the child had Attention Deficit Disorder ("ADD") or ADHD, the evidence at the hearings was that he had control of his conduct and knew the rules.¹⁴⁴ The court rejected an argument of relatedness which was based on testimony by the parents' witnesses that the child's learning disability resulted in "low self-esteem," leading to his "conscious misbehavior to gain attention or win approval from his peers."¹⁴⁵ The court cited the analysis used by the Ninth Circuit in *Doe v. Maher* approvingly, agreeing that "such attenuated conduct cannot trigger the protections of the IDEA."¹⁴⁶ The operative language of the current IDEA would support the same conclusion in cases such as this.¹⁴⁷

140. *Id.*

141. *Doe v. Board of Educ.*, 115 F.3d 1273, 1281 (7th Cir.), *cert. denied*, 118 S. Ct. 564 (1997). The case was decided before the 1997 IDEA amendments. As part of this decision the court held that no educational services were required to be provided to a child expelled for reasons unrelated to his disability. After passage of the 1997 IDEA amendments, the court issued an addendum to the opinion acknowledging that this part of its opinion would no longer be the result in future cases. *See id.* at 1279, 1283.

142. *See id.* at 1275.

143. *See id.* at 1281.

144. *See id.* at 1282.

145. *Id.*

146. *Id.* (citing *Doe v. Maher*, 793 F.2d 1470, 1480 n.8 (9th Cir. 1986)).

147. See also the explanation given by Senator Frist during the floor debate on the IDEA of the purpose and need for a manifestation determination process. *See* 143 CONG. REC. S4354-02, S4364 (daily ed. May 13, 1997) (statement of Sen. Frist). He proffered the examples of a child with Tourette's Syndrome which had caused him to blurt out irrelevant comments, and of a developmentally disabled child who was taken advantage of by other students and prevailed upon to accept a gun he was told was a toy. *See id.* Both of these examples fall directly within the relatedness definition in *Doe v. Maher*. The child

There is thus reason to believe that courts are aware of and sensitive to the need to support school authorities in maintaining a learning environment that is safe and not disruptive, even while protecting the rights of disabled students.¹⁴⁸ The legislative history of the IDEA amendments and the DOE's regulatory commentary¹⁴⁹ also recognize that students with disabilities are not, simply by virtue of their disabilities, automatically exempt from conduct expectations.

2. Behavioral Assessment and Intervention Plans

Hand-in-hand with the need for discipline is the need to help the child with behavioral problems. The IDEA now provides for this. If a child's behavior "impedes his or her learning or that of others," the IEP team, meeting to assess the child's needs and prepare an appropriate plan, is to consider "strategies, including positive behavioral interventions, strategies, and supports to address that behavior."¹⁵⁰ If the child may be educated in a regular classroom, the regular

with Tourette's Syndrome cannot control his behavior because of his disability. The developmentally disabled child's disability significantly impairs his ability to understand the impact and consequences of his behavior in order to control it. Neither represents an attenuated connection between the disability and the conduct.

148. An unusually frank decision addressing such concerns is the First Circuit's opinion in *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141 (1st Cir. 1998), a case arising under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12182 (1994). The IDEA applies to state and local educational agencies receiving funding, but not to private schools like the defendant in *Bercovitch*. *Bercovitch* is also significant as an ADA case because it enforces, under the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1994), an anticipatory waiver of the judicial forum and an arbitration clause. *See Bercovitch*, 133 F.3d at 151.

Bercovitch reversed a preliminary injunction which had ordered a private school in Puerto Rico to suspend its code of conduct with respect to the behavior of an ADHD student who repeatedly made abusive comments to teachers. *See id.* at 146. The student was only diagnosed with ADHD when his parents sought an evaluation following his suspension from the school for misconduct. The parents then sought, and received, a preliminary injunction readmitting the child to school, where his misconduct continued. Dealing with this child's behavior was consuming thirty percent of the administration's time. *See id.* The First Circuit vacated the preliminary injunction based on a finding that plaintiff was unlikely to succeed on the merits. Suspension of the code of conduct, which would require the school to "tolerate disruptive and disrespectful conduct when that behavior impaired the educational experience of the other students and significantly taxed the resources of the faculty and administration," would not be a "reasonable accommodation." *Id.* at 152. The court also questioned whether the child was "disabled" in the "life activity" of learning, within the meaning of the ADA, in that he continued to excel academically, and whether he was "otherwise qualified" if he could not conform his conduct to reasonable disciplinary requirements, but it did not rest its decision on these grounds. *Id.* at 154-55.

The ADA has different statutory standards from IDEA; nevertheless, the court's recognition of the effect of this child's conduct on the school and other students may reflect wider judicial receptivity to the school system's interests.

149. *See Summary, supra* note 11, 64 Fed. Reg. at 12,415-16 (1999).

150. 20 U.S.C. § 1414(d)(3)(B)(i) (Supp. III 1997); 34 C.F.R. § 300.346(a)(2)(i) (1999).

classroom teacher participates in determining appropriate behavioral interventions and strategies for that child.¹⁵¹ This provision recognizes the significant impact that a child with behavioral problems can have on the teacher and students in a regular classroom and guarantees that this perspective is represented in the IEP meeting when the appropriateness of regular classroom placement is assessed.

The IDEA does not require that a child be mainstreamed, or placed into the regular classroom, if that child's behavior is so disruptive as to make that placement inappropriate.¹⁵² The converse, however, is also true—if the child can appropriately function in the regular classroom with services, then this placement is the least restrictive placement.¹⁵³ The importance of making this assessment *before* a placement decision is especially significant because if later experience suggests that the student cannot function appropriately, the due process and stay put provisions of the IDEA make it harder to move the student over the parent's objection.

When significant disciplinary action becomes necessary for a child with disabilities, the need to focus on behavioral intervention is heightened. The IDEA reflects this need. If the child did not have a behavioral plan before, the IEP team must convene within ten days and develop an assessment plan.¹⁵⁴ This will be followed by an IEP meeting to create, and then implement, a behavioral plan.¹⁵⁵

151. See 20 U.S.C. §1414(d)(3)(C); 34 C.F.R. § 300.346(d)(1). The IDEA amendments make it clear that the child's regular education teacher is a member of the IEP team whenever regular education is considered for the child. See 20 U.S.C. § 1414(d)(1)(B)(ii); 34 C.F.R. § 300.344(a)(2). The teacher is also entitled to help determine what supplementary aids and services, program modifications, or supports for school personnel will be provided for the child. See 20 U.S.C. § 1414(d)(3)(C); 34 C.F.R. § 300.346(d)(2). This last provision suggests an intent to support regular classroom teachers who are being asked to teach children with disabilities by providing them directly with supports they will need to teach that child.

152. The DOE's Office of Special Education Programs summarized this in a set of questions and answers which appears as Appendix A to the Regulations. "If the child's behavior in the regular classroom, even with the provision of appropriate behavioral supports, strategies or interventions, would significantly impair the learning of others, that placement would not meet his or her needs and would not be appropriate for that child." 34 C.F.R. pt. 300 app. A at 112 (1999).

153. See *id.*

154. 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.520(b)(1). This obligation is triggered by either removal for more than ten days, removal that is a change in placement (i.e., a pattern of short suspensions, *see supra* text accompanying note 76), or an alternative placement under the provisions for action based on weapon and drug offenses. See 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.520(a)(2)(i)-(ii).

A critic could argue the sense of requiring such a process for students who have already committed criminal behavior such as weapon or drug offenses, or violent sexual assault.

155. See 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.520(b)(1)(i).

The meeting to develop an assessment plan can occur at the same time as the manifestation determination review.¹⁵⁶

If the child's IEP contains a behavioral plan, the team must meet within the ten days to review and modify the plan or its implementation, as necessary.¹⁵⁷ If the child is later disciplined for a short suspension of less than ten days, IEP team members will review the plan again, but need only hold a meeting if a member of the team believes that modifications are needed.¹⁵⁸ This last, regulatory, interpretation can avoid repetitive IEP meetings when an appropriate behavioral plan exists.¹⁵⁹

These provisions coexist with the general IDEA provisions regarding review and modification of a child's IEP and, in particular, a change in the child's placement. Using the general IDEA provisions, when a school's experience with a child suggests that the placement originally proposed in the IEP and implemented for the child is no longer appropriate, the team can meet and modify that placement.¹⁶⁰

Because the IEP meeting process guarantees parental participation and carries with it due process rights, including the right to maintain a child in his IEP-designated placement, or "then current educational placement," pending appeals,¹⁶¹ critics have suggested that the amended IDEA leaves schools powerless to remove disruptive children from the classroom.¹⁶² In many instances when a placement is not working for the child because of continued behavioral issues, however, the parents and the school district may well agree that a change is in order. Thus, the assumption that school districts always will be unable to alter the placement of a disruptive child is an overbroad and unduly pessimistic one. While there will be parents who contest a change, surely far more will be as concerned about a child's behavior as the school is, and agree with the school's recommended change in placement. The stay put provisions requiring maintenance of behaviorally difficult children in their IEP-determined placement pending resolution of a dispute are invoked only when the parent of the child disagrees with the proposed change of placement and seeks a due process hearing.¹⁶³ When there is agreement to make a

156. See 34 C.F.R. § 300.523(e).

157. See 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.520(b)(1).

158. See 34 C.F.R. § 300.520(c).

159. Because only one team member, including a parent, is enough to require an IEP meeting however, it is possible for a meeting to be required when all the other members of the team believe it to be unnecessary.

160. See *supra* text accompanying notes 20–36.

161. 20 U.S.C. § 1415(j). See *infra* Part III.C for a discussion of special stay put provisions for children in temporary disciplinary placements.

162. See, e.g., Bryant, *supra* note 9, at 520–24.

163. Only one parent in one thousand files a complaint under the IDEA for any reason. See *Cost-Benefit Summary*, *supra* note 23, 64 Fed. Reg. at 12,658.

change in placement, this can be accomplished relatively swiftly through the usual IEP process.¹⁶⁴

The IDEA's designation of the IEP process as the vehicle for changing placements or services for children whose behaviors are related to their disabilities represents the endorsement of an enlightened, collaborative approach toward educating and helping these children. It was not intended to approve or perpetuate disruption of the educational process for others.¹⁶⁵ Because of the operation of the stay put provisions, though, it has this potential, although only in those cases where a disruptive child's parents choose to contest a proposed change in placement.¹⁶⁶ To minimize such disputes, thorough consideration of behavioral issues during the regular assessment and IEP planning stage will be especially important to ensure that the team selects appropriate placement and supportive services.

3. Educational Services After Disciplinary Action

a. The IDEA's Requirements

The issue which divided the circuits after *Honig*¹⁶⁷ is now legislatively settled. Educational services must be provided to children with disabilities who are suspended or expelled from school. The IDEA amendments require a state receiving funding under the IDEA to make available a free appropriate public education to all children with disabilities between the ages of three and twenty-one

164. The Department of Education stressed this in summarizing the disciplinary aspects of the IDEA regulations:

Limitations [on a child's removal from a current placement] only come into play when schools are not able to work out an appropriate placement with the parents of a child who has violated a school code of conduct.

....

...[T]he discipline provisions of the IDEA allow responsible and appropriate changes in placement of children with disabilities when their parents do not object.

Summary, supra note 11, 64 Fed. Reg. at 12,413-14.

165. See 143 CONG. REC. S4354-02, S4362 (daily ed. May 13, 1997) (statement of Sen. Harkin):

What do we want at the end of the day? At the end of the day, we want a safe classroom with an environment that is conducive to learning for all students.... What we want to do is teach children behavior that will lead to that safe, quiet classroom...to use discipline as a tool to learn and not just as a punishment....

Id.

166. See *infra* Part III.C for possible approaches to dealing with what is hopefully an infrequent situation, although a troublesome one when it does occur.

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

residing in the state, "including children with disabilities who have been suspended or expelled from school."¹⁶⁸

What of school actions removing children from school for less than ten days? The *Honig* court endorsed the Department of Education's determination not to treat such removals as a change in placement requiring compliance with the IDEA.¹⁶⁹ Although the IDEA language does not distinguish between suspensions of less than ten days and longer suspensions or expulsions, the amendments specifically authorize school officials to act unilaterally in suspending a child for disciplinary reasons for up to ten days.¹⁷⁰

The DOE's regulatory interpretation excludes children subject to less than ten day removals from the general requirement to furnish educational services to suspended children.¹⁷¹ This reading is consistent with the history of the IDEA's implementation under *Honig*¹⁷² and allows school districts the flexibility needed for immediate responses to misconduct.¹⁷³

Under DOE regulations, a school district must provide educational services, even during a short suspension, once a child has been removed for more than ten days cumulatively in a school year.¹⁷⁴ The IDEA's statutory provisions do not draw a distinction based on cumulative time out of school in a given year. But this regulatory provision, like the provision deeming a pattern of short suspensions

168. 20 U.S.C. § 1412(a)(1)(A) (Supp. III 1997).

169. See *Honig*, 484 U.S. at 326 n.8.

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

171. See 34 C.F.R. § 300.121(d)(1). In discussing the rationale for this interpretation, the DOE stated:

The Act, however, should not be read to always require the provision of services when a child is to be removed from school for just a few days. School officials need some reasonable degree of flexibility when dealing with children with disabilities who violate school conduct rules, and interrupting a child's participation in education for up to 10 school days over the course of a school year, when necessary and appropriate to the circumstances, does not impose an unreasonable limitation on a child with disabilities right to FAPE.

Analysis, *supra* note 11, 64 Fed. Reg. at 12,554.

172. See *Analysis*, *supra* note 11, 64 Fed. Reg. at 12,618 (referring to DOE's "longstanding position that children with disabilities could be removed from their current educational placement for not more than 10 consecutive school days without educational services").

173. For the argument that the DOE's interpretation may not be valid given the language of the statute, and a review characterizing the legislative history as ambiguous on this question, see Bryant, *supra* note 9, at 504–09. Other commentators read the legislative history as more supportive of the DOE's interpretation. See Groeschel, *supra* note 5, at 1102–06. For now, the final regulation's provisions are explicit and will stand until a judicial challenge. The clear obligation under both statute and regulation to provide services after ten days makes the mounting of litigation over such a short-term cessation of service less likely.

174. 34 C.F.R. § 300.121(d)(2). For a history of this provision, see Mead, *supra* note 29, at 525.

to be a change in placement,¹⁷⁵ prevents circumvention of the IDEA's articulated purposes by the use of repeated short exclusions from school. The Department of Education also noted the issue of parity between children on long-term suspensions and those who are missing school because of repeated short removals:

[A]t some point repeated exclusions of a child with disabilities from the educational process will have a deleterious effect on the child's ability to succeed in school and to become a contributing member of society. The law ensures that even children with disabilities who are engaged in what objectively can be identified as dangerous acts, such as carrying a weapon to school, must receive appropriate services.

Therefore, it is reasonable that children with disabilities who have been repeatedly suspended for more minor violations of school codes not suffer greater consequences...than children who have committed the most significant offenses.¹⁷⁶

The fact that services must be provided after the child's tenth day out of school in a year does not mean services must be delivered *on* the eleventh day.¹⁷⁷

Who decides upon the educational services to be provided to a disciplined child depends upon the nature of the disciplinary action. If the child is under a brief suspension of less than ten days, but has missed more than ten days cumulatively in the school year, school personnel and the special education teacher consult and decide on what services are needed.¹⁷⁸ The services required are those "necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP...."¹⁷⁹ This language allows for a determination that some services that would have been provided under a child's IEP had the child been in school may not be necessary during a brief suspension. Services probably will differ from those needed when a child faces a longer term alternative placement or suspension. "[A] one or two day removal of a child who is performing at grade level may not need the same kind and amount of service to meet this standard as a child who is out of his or her regular placement for 45 days...."¹⁸⁰ Placing with school

175. See 34 C.F.R. § 300.519(b); *supra* text accompanying note 76.

176. *Analysis, supra* note 11, 64 Fed. Reg. at 12,554 (citation omitted).

177. The frequency and type of services will vary both with the child's individual needs and with the standard of services applicable. See *Summary, supra* note 11, 64 Fed. Reg. at 12,414. For example, a student might normally receive thirty minutes of occupational therapy on Wednesdays. On Thursday she receives a suspension of two days which pushes her total suspension time over ten school days. This student would presumably not need to be rescheduled for services before her usual time the following Wednesday.

178. See 34 C.F.R. § 300.121(d)(3)(i).

179. *Id.*

180. *Analysis, supra* note 11, 64 Fed. Reg. at 12,554.

personnel the ability to decide on services in these situations honors the need for swift decisions.¹⁸¹

The standard for services to a child who is suspended or removed for misconduct unrelated to the child's disability is the same. The determination of services, however, is made by the IEP team, presumably at the same time that it meets within the first ten days to make the manifestation determination review and to look at the status of the child's behavioral assessment and plan.¹⁸²

There well may be future litigation over what services and access to the regular educational program must be given to children who are excluded for misconduct that is unrelated to their disabilities. Courts should hesitate before ordering school districts to provide these children with access to school-based activities, or with extraordinary levels of service, and give particular attention to how non-disabled students who are removed from school are treated within the school district.¹⁸³ The proposed service plan should be reviewed to see if the educational services provided would, if appropriately utilized by the child, allow progress in the curriculum and provide any special support required by the child's disability to enable progress. For example, if an expelled child has a learning disability that makes reading difficult and if the curriculum is being provided at home via written materials, some way of continuing to provide support in reading will be needed. On the other hand, if the disability is a hearing impairment, no special educational services may be needed to accompany the home-based written curriculum.

For children placed into a forty-five day alternative educational setting because of a weapon or drug offense, the IEP team determines the alternative setting and selects a setting that will "enable the child to continue to participate in the general curriculum, although in another setting" and to receive IEP-described services.¹⁸⁴ The proposed regulatory language tracking this statutory provision prompted questions to the DOE whether schools would have to provide such things as honors courses, electives, or other non-core curriculum.¹⁸⁵ Other questions related to extracurricular activities and sports, or classes like chemistry, shop, or physical education.¹⁸⁶ The DOE altered its proposed regulation, which referred to *participation*, to adopt a standard of services enabling "*progress* in the general curriculum" in order to clarify that not all aspects of the child's usual educational program need be replicated. Examples might be courses taught via laboratory techniques or with specialized equipment such as chemistry or auto

181. See *id.* at 12,622.

182. See 34 C.F.R. §§ 300.121(d)(3)(ii), .524.

183. If the local school system as a matter of policy refuses to provide services to suspended or expelled students, then the IDEA places this obligation on the state educational agency. See 20 U.S.C. § 1413(h)(1) (Supp. III 1997).

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

185. See *Analysis, supra* note 11, 64 Fed. Reg. at 12,622-23.

186. See *id.*

mechanics.¹⁸⁷ The DOE did note, however, that different instructional techniques and “program modules” could allow a student to progress, even in curriculum usually taught in hands-on settings, while in an alternative setting.¹⁸⁸ The DOE declined to more specifically define the general curriculum in terms of honors classes, electives, etc., saying that the determination of general curriculum was for state and local school authorities and might vary.¹⁸⁹ The change in the regulation and the interpretive guidance in the analysis of comments may give some greater level of comfort to school authorities about the shape of alternative program offerings.

A child who is removed from classes because of an offense involving a weapon or drugs logically should not have to be allowed to participate in after-school activities or sports during the period of exclusion. Such an alternative setting would generally not be “appropriate,” assuming that appropriateness allows for consideration of the health and safety needs of other children as well as the child being placed.¹⁹⁰

For children who are placed into an alternative educational setting by order of a hearing officer based on their dangerousness to themselves or others,¹⁹¹ the hearing officer has the authority to order the child’s placement into an “appropriate interim alternative educational setting” for a period of up to forty-five days.¹⁹² Although the hearing officer determines the setting, school personnel in consultation with the child’s special education teacher will propose a setting for the hearing officer to assess.¹⁹³ The regulations obligate the school district to provide services to the child to the same extent as for an IEP-determined placement for a weapon or drug offense.¹⁹⁴

In most cases, school officials have a ten day period in which to determine the alternative setting and service plan. The DOE reads the regulations to allow officials to take the temporary unilateral action of removal for up to ten days and then take action to remove the child for a longer period under one of the provisions authorizing such a change.¹⁹⁵ Thus, for example, if a child is being

187. See 34 C.F.R. § 300.522(b)(1); *Analysis, supra* note 11, 64 Fed. Reg. at 12,622–23.

188. *Analysis, supra* note 11, 64 Fed. Reg. at 12,622–23.

189. See *id.* at 12,622.

190. See, e.g., 34 C.F.R. § 300.520(a)(2) (requiring change to an “appropriate interim alternative educational setting”); 34 C.F.R. pt. 300, app. A at 115 (1999) (stating that placement in which child’s behavior impairs the learning of others is not “appropriate”).

191. See *supra* Part III.A.3.

192. 20 U.S.C. § 1415(k)(2) (Supp. III 1997); 34 C.F.R. § 300.521.

193. See 34 C.F.R. § 300.521(d).

194. See 34 C.F.R. § 300.121(d)(2)(ii). The regulation imposes on states the obligation to provide services to children in hearing officer-ordered interim placements “consistent with § 300.522,” which contains the standard for services in interim alternative placements for either a weapon or drug offense, or a hearing officer-determined placement.

195. See *Analysis, supra* note 11, 64 Fed. Reg. at 12,620. During this ten day or less period, either no services will be required (if the child has not already been out of

removed for a weapon or drug offense, school officials can suspend the child for ten days and then convene the IEP team to decide upon a forty-five day alternative setting and service plan.

The overall regulatory approach thus takes a middle ground in assigning the responsibility for determination of settings and services for disciplined children. For most brief removals from school, no services need be provided. For a short suspension or when an alternative placement for dangerousness is in order, school personnel, with input from the special education teacher, can determine services quickly without a formal IEP process. In the case of removal for dangerousness, the proposed setting must be presented to a hearing officer for expedited action. When the child is removed for weapon or drug offenses, or is suspended or excluded for misconduct unrelated to the disability, the IEP team determines the setting and service plan. For children whose disability-related behavior warrants a review of their plan and placement, the general IEP process governs the child's change of placement and service plan.

b. Impact on School Systems

School systems must plan, in light of the IDEA mandates, for the manner in which educational services will be delivered to students whose conduct requires their removal from school. These decisions undoubtedly will have an economic impact upon school districts, although how great an impact is harder to predict.

The Department of Education's analysis of the benefits and costs of the IDEA amendments on discipline points out that only two circuit courts of appeal disagreed with the DOE's interpretation of the pre-amendment IDEA requiring services to all suspended or expelled students with disabilities.¹⁹⁶ School systems in most states, therefore, have already determined how they will provide alternative educational services to those students and have some sense of the cost of such services. The DOE acknowledged that the cost of providing alternative services likely would be more than the average daily cost of serving children with disabilities due to the loss of economies of scale in serving children in alternative settings.¹⁹⁷

The Department of Education estimated that six million children with disabilities would be served in the public school system in the 1998-99 school year, around twelve percent of the total public elementary and secondary school

school for more than ten days in the year), or such limited services as the school personnel and special education teacher decide are necessary for that period of time will be required. *See id.*

196. *See Cost-Benefit Summary, supra* note 23, 64 Fed. Reg. at 12,659. These were the Fourth and Seventh Circuits. *See Doe v. Board of Educ.*, 115 F.3d 1273, 1279 (7th Cir.), *cert. denied*, 118 S. Ct. 564 (1997); *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 561 (4th Cir. 1997).

197. *See Cost-Benefit Summary, supra* note 23, 64 Fed. Reg. at 12,658-59. The cost of serving a child with disabilities was estimated at \$75 per day. *See id.*

population of forty-seven million children.¹⁹⁸ Of that six million, 300,000 would be suspended for at least one day, but probably no more than 45,000 for more than ten days in a school year.¹⁹⁹ Out of that 45,000, the group facing a long consecutive suspension requiring the most services is far smaller. An estimated 15,000 children nationwide were expected to be suspended at least once for more than ten consecutive days.²⁰⁰

Many school systems have created alternative programs that may reduce or largely eliminate the need to use long-term suspension or expulsions for significant numbers of students.²⁰¹ Others have adopted different approaches and strategies to discipline that have proved successful.²⁰² To the extent that a school district can offer students an alternative educational setting in lieu of, rather than as a consequence of, suspension or expulsion, the district can both avoid the cost of individualized educational services and reach students who may be heading for trouble before they are in trouble.

198. These figures were based on extrapolated data from the Office of Civil Rights as of 1992, and from a few selected states. See *Cost-Benefit Summary*, *supra* note 23, 64 Fed. Reg. at 12,660–61.

199. See *id.*

200. See *id.*

201. For descriptions of Model Programs identified as either demonstrating or promising to reduce violent behavior in schools, see United States Departments of Education and Justice, *Annual Report on School Safety* ch. 3 (1998) (visited June 3, 1999) <<http://www.ed.gov/pubs/AnnSchoolRept98/>>.

As an illustration, one school system runs an alternative school for secondary students, the Uptown School, serving fifty to sixty students who have difficulty with the structure of high school. Within the high school building is a full day program known as the Academy for students seen as at risk for dropping out due to academic adjustment to the high school, and “School Within a School,” a program for students whose ability is not reflected by their achievement, offering more independent and creative opportunities to those students. During the 1998–99 school year the system piloted a “re-entry” school for children on the verge of exclusion for disciplinary reasons, offering a nine week, half-day curriculum to help them make better decisions and resolve anger peacefully. Interview with Lee Haight, Director of Special Programs, Ron Jared, Assistant Superintendent of Schools, and Deborah Wilson, Director of Special Education, Fayetteville, Arkansas Public Schools, in Fayetteville, Ark. (June 1, 1999).

202. During the congressional debate on IDEA, Senator Harkin cited as an example changes made by a new principal at a middle school in Sioux City, South Dakota. See 143 CONG. REC. S4354-02, S4362 (daily ed. May 13, 1997) (statement of Sen. Harkin). In the year before the principal arrived, there were 692 suspensions, 220 of children with disabilities, an absenteeism rate of 25%, and 267 referrals to juvenile authorities. The new principal shifted the philosophy of discipline from one of punishment to one that used discipline as a teaching tool, and involved children and their parents in the process. A year later, the number of suspensions dropped to 156, none of students with disabilities, the attendance rate climbed to 98.5%, and only three juvenile court referrals were made. See *id.* See also *Summary*, *supra* note 11, 64 Fed. Reg. at 12,415.

c. Educational Policy and Double Standards

Faced with the choice of excluding children with disabilities from the educational system for misbehavior or of maintaining an educational presence in their lives, Congress has spoken. The decision to continue educating our disabled and troubled youth rests on sound policy reasons.²⁰³ Children who drop out of the educational system face bleak futures.²⁰⁴ Children who misbehave in school today may become adult offenders tomorrow.²⁰⁵ Society not only loses the contributions of educated citizens, it pays socially and economically, through the costs of its law enforcement apparatus, its prison system, and through injuries suffered by victims of crime, for the consequences of these lost students.²⁰⁶ Placed in this perspective, the cost of continuing educational services can be justified in both human and monetary terms.

The IDEA in theory creates a "double standard" by requiring alternative educational services only for disabled students. School systems are not generally prohibited, however, from providing educational services to non-disabled children under long-term suspension or expulsion, and many states have already chosen to support the development of alternative education programs.²⁰⁷ Similar arguments

203. "Research tells us that suspension and expulsion are ineffective in changing the behavior of students in special education. When students with disabilities are suspended or expelled and their education is disrupted, they are likely to fall farther behind, become more frustrated, and drop out of school altogether." 143 CONG. REC. S4311-02, S4319 (daily ed. May 12, 1997) (statement of Sen. Kennedy).

204. Dropouts are three times more likely to be unemployed than high school graduates. Nearly half of the heads of households on welfare did not finish high school. *See* 143 CONG. REC. S4311-02, S4319 (daily ed. May 12, 1997) (statement of Sen. Kennedy). *See also* NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION, DROPOUT RATES IN THE UNITED STATES 1 (1999) (dropouts more likely to be unemployed and on public assistance than high school graduates).

About 60% of the 1996-97 dropouts were in the labor force (those employed or looking for work). Of those, 25% were unemployed. In contrast, 81% of 1997 high school graduates were in the labor force, of whom only 17% were unemployed. *See* NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION, DIGEST OF EDUCATION STATISTICS 428 (1998 ed.).

205. Half of the prison population did not finish high school. *See* 143 CONG. REC. S4311-02, S4319 (daily ed. May 12, 1997) (statement of Sen. Kennedy). Dropouts comprise a disproportionate percentage of the nation's prison and death row inmates. *See* NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION, DROPOUT RATES IN THE UNITED STATES 1 (1999).

206. Senator Harkin estimated the savings from reduced institutionalization of children and youth with disabilities since the enactment of the IDEA's predecessor legislation in 1974 as \$5.46 billion per year, not including the costs saved in welfare, social services, and other costs for those who now live independently, work, and pay taxes. *See* 143 CONG. REC. S4295-03, S4309 (daily ed. May 12, 1997) (statement of Sen. Harkin).

207. Jurisdictions which require provision of educational services to at least some suspended or expelled children include California, Colorado, the District of Columbia, Louisiana, Minnesota, Missouri, Nebraska, Texas, Virginia, and West Virginia. *See* W. VA. CONST. art. XII, § 1, construed in *Cathe A. v. Dodding County Bd. of Educ.*, 490 S.E.2d

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.²⁰⁸

Some "economies of scale" could be recaptured by a policy decision to continue serving *all* students educationally during times of disciplinary removal from the regular classroom. Such alternative programs are in place in many school systems.²⁰⁹ So long as such programs do not become a method for the permanent exclusion of children with disabilities, they offer routes for a school system to fulfill its IDEA obligations without excessive cost.²¹⁰

4. Referral to Law Enforcement Authorities

The IDEA amendments make it clear that school authorities may report a crime committed by a child with a disability to appropriate authorities, who are free to act in accordance with their duties under federal and state law.²¹¹ The statute directs the referring agency to ensure that copies of the child's special education and disciplinary records are sent to the authorities to whom the report is being made.²¹² The provision is qualified by the implementing regulation permitting transmission of records "only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act."²¹³ The DOE

340 (W. Va. 1997); CAL. EDUC. CODE § 48915 (West Supp. 2000); COLO. REV. STAT. ANN. § 22-33-203 (West Supp. 1998); D.C. CODE ANN. § 31-453 (1998); LA. REV. STAT. ANN. § 17:416.2 (West Supp. 1997); MINN. STAT. ANN. §§ 121A.41-46 (West Supp. 1999); NEB. REV. STAT. § 79-266 (1996); TEX. EDUC. CODE ANN. § 37.011 (West 1997); VA. CODE ANN. §§ 22.1-209.1:2, 209.1:6 (Michie 1997 & Supp. 1999).

208. See *supra* notes 204-205 and accompanying text. See also Bryant, *supra* note 9, at 551-55 nn.348-77 for more data on the relationship of suspensions and expulsions to drop-out rates, and of drop-out rates to adverse social consequences.

209. See *supra* notes 205-207 and accompanying text. In Massachusetts, the percentage of excluded students receiving alternative education increased to 62.9% in the year 1996-97. See Massachusetts Dep't of Educ., *Student Exclusions in Massachusetts Public Schools 1996-97* tbl. 1 (visited June 2, 1999) <<http://www.doe.mass.edu/doedata/exclu98rpt.html>>.

210. At least one commentator has argued that school systems will find maintaining a double standard of providing services to some, but not all, suspended and expelled children unworkable, and that they should eliminate suspension and expulsion in favor of such alternative settings for disciplined children with and without disabilities. See Bryant, *supra* note 9, at 553-55.

211. See 20 U.S.C. § 1415(k)(9) (Supp. III 1997). This provision came in direct response to a decision by the Sixth Circuit holding that the filing by a school district of a juvenile court petition against a disabled student was a change in placement requiring an IEP process. *Morgan v. Chris L.*, 25 *Indiv. with Disabilities Educ. L. Rep.* 227, 230 (6th Cir. Jan. 21, 1997).

212. See 20 U.S.C. § 1415(k)(9).

213. 34 C.F.R. § 300.529(b)(2) (1999). See also 20 U.S.C. § 1232g (1994) ("FERPA"). The DOE reads the statute as overriding prior restrictions imposed under the IDEA on such transmission, but not as superseding FERPA's provisions. See *Analysis, supra* note 11, 64 *Fed. Reg.* at 12,631-32.

explains the qualification as required to avoid an arguable violation of the equal protection rights of children with disabilities "to be protected against certain involuntary disclosures to authorities of their confidential educational records to the same extent as their nondisabled peers."²¹⁴

Even while in juvenile facilities or adult prisons, children with disabilities are entitled, with certain exceptions, to educational services under IDEA.²¹⁵ To this extent, depending upon state law and the location of the facility, school district obligations to these children may continue.

C. Resolution of Disputes and the Stay Put Provisions

A parent who is unable to resolve a dispute with local school authorities over a disciplinary decision has the right to file a complaint seeking a due process hearing, just as the parent can challenge any significant determination regarding placement or services for a child with disabilities.²¹⁶ Filing a complaint triggers an array of rights and a hearing process culminating in the right to appeal to the United States district court.²¹⁷

The amended due process provisions make a number of significant modifications to the scheme. First, the current scheme places additional obligations upon parents and their attorneys who invoke the due process procedures. Parents must give written notice to school authorities factually stating the particular problem and proposing a resolution.²¹⁸ At least five business days before the hearing, parents and school districts must exchange any evaluations and

214. *Analysis, supra* note 11, 64 Fed. Reg. at 12,631. FERPA allows disclosure of such records without consent, *inter alia*, in compliance with certain federal grand jury or other law enforcement subpoenas, in emergencies where the information is necessary to protect the health or safety of the student or others, and under state juvenile statutes that properly address sharing and nondisclosure of records. *See id.* (discussing FERPA provisions and regulations); 20 U.S.C. § 1232g; 34 C.F.R. § 99.31–.38 (1999).

215. *See* 20 U.S.C. §§ 1412(a)(1) (Supp. III 1997) (exempting from IDEA right to educational services 18–21 year olds in adult prisons who were not previously identified as having a disability or on an IEP), 1414(d)(6) (Supp. III 1997) (allowing modification of IEP requirements for bona fide security or compelling penological interest).

216. The general due process provisions of the IDEA require that parents of a child have an "opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). With particular reference to discipline, the IDEA gives a parent a right to a hearing upon request "if the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement." 20 U.S.C. § 1415(k)(6). *See also* 34 C.F.R. §§ 300.507 (general due process hearings), .525 (disciplinary actions).

217. *See* 20 U.S.C. § 1415(l)(2); 34 C.F.R. § 300.512. *See supra* text accompanying notes 20–36 for an overview of the dispute resolution scheme.

218. *See* 20 U.S.C. § 1415(b)(7); 34 C.F.R. § 300.507(c). The school district is responsible for developing a model form for parents to use in supplying this required information. *See* 20 U.S.C. § 1415(b)(7); 34 C.F.R. § 300.507(c).

recommendations they intend to use at the hearing, or face exclusion of the evidence upon the other's objection.²¹⁹ Second, the scheme provides for expedited hearings on any placement decision related to misconduct at the request of a parent.²²⁰ An expedited hearing must result in a hearing decision within forty-five days of the receipt of the request.²²¹

Third, the stay put provisions have been modified. The IDEA's generally applicable stay put provision requires that unless the parents agree with the school authorities (or the state agency at the hearing level) to a different placement, the child "shall remain in the then-current...placement" during the pendency of "any proceedings pursuant to this section."²²² Under the amendments, a parent's request for a due process hearing does not trigger the return to a previous placement of a child who is determined to be dangerous to himself or others, or who has violated the weapon or drugs provisions.²²³ The child "must remain in the interim alternative educational placement" until either the hearing officer's decision or the expiration of forty-five days, whichever is sooner.²²⁴ If the hearing decision has not been rendered at the end of the forty-five day period, the previous placement becomes the child's stay put placement unless the school district takes further action.

219. See 20 U.S.C. § 1415(f); 34 C.F.R. § 300.508(b). This pre-hearing discovery provision parallels similar disclosure requirements relating to experts' reports in civil litigation. See FED. R. CIV. P. 26.

220. See 20 U.S.C. § 1415(k)(6)(ii); 34 C.F.R. § 300.525(a)(2).

221. See 34 C.F.R. § 300.528. This is a short timeline for an administrative agency to schedule a hearing, hold it, and issue a decision. Typically, such requirements for agency hearings and decisions are met in most, but not all, cases. In some number of cases, the complexity of the matter, or the availability of witnesses, experts, parties or attorneys delays the process.

Delays from exceeding the time limits for decisions, or other procedural flaws which do not deprive the student of educational opportunity or foreclose the parent's opportunity to participate in the IEP formulation process, are not grounds for invalidation of the decision. See *Heather S. v. Wisconsin*, 125 F.3d 1045, 1059 (7th Cir. 1997) (finding that decision exceeded time limits but did not deprive student of FAPE); *Amann v. Stow Sch. Sys.*, 982 F.2d 644, 653 (1st Cir. 1992) (stating that untimely decision caused no remediable harm); *W.G. v. Board of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994-95 (1st Cir. 1990).

222. 20 U.S.C. § 1415(j). *Accord* 34 C.F.R. § 300.514. The regulations clarify that once the state agency has made a determination of an appropriate placement, if the parents agree with that determination, that placement becomes the "then-current placement" which the school authorities must implement pending further review. 34 C.F.R. § 300.514(c). This had been an issue in some court proceedings, although most courts gave the provision the regulatory interpretation that gave the agency decision effect and provided the child with the presumptively appropriate educational placement as soon as possible. See, e.g., *School Comm. v. Department of Educ.*, 471 U.S. 359, 371 (1985); *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 84 (3d Cir. 1996); *Clovis Unified Sch. Dist. v. Office of Admin. Hearings*, 903 F.2d 635, 641 (9th Cir. 1990); *Analysis, supra* note 11, 64 Fed. Reg. at 12,615 (citing cases).

223. 20 U.S.C. § 1415(k)(7); 34 C.F.R. § 300.526(a).

224. 20 U.S.C. § 1415(k)(7); 34 C.F.R. § 300.526(a).

Last, a school district can request an expedited hearing if school personnel think that it is dangerous to maintain the child in the stay put placement. The district must meet the standards for an alternative placement based on dangerousness²²⁵ and can obtain a forty-five day order authorizing a different placement.²²⁶ The order may be repeated during the pendency of the due process proceedings for additional forty-five day periods.²²⁷

For all other disputes, including those challenging a determination that misconduct was unrelated to a child's disability, the general stay put provision applies, i.e., the child must be maintained in the placement prior to the disciplinary removal, unless the parents agree otherwise.²²⁸

The new statutory scheme's narrow exceptions to the stay put provisions fall short in protecting the rights of other children whose educational environment is affected by misbehavior severe enough to warrant removal of a child from school.²²⁹ First, the stay put provision allows the return to school of a child expelled for misconduct which the IEP team determines the child could understand and control and for which non-disabled children are removed.²³⁰ Not only does this affect others in the school, it undermines the disciplinary sanction's purpose of letting a child know that his conduct carries consequences. Second, a parent's request for a hearing can return a child to the classroom who cannot otherwise control his or her behavior and who may be highly disruptive, but not "dangerous."²³¹ This child's "then-current placement" appears not to be beneficial for the child or others in the class. Continuing this child in a placement which most of the IEP team concludes has become inappropriate is of dubious educational benefit.

225. See *supra* Part III.A.3.

226. See 20 U.S.C. § 1415(k)(7)(C); 34 C.F.R. § 300.526(c). In addition to the showing of likelihood of injury, the hearing officer must consider the appropriateness of the child's current placement, whether the school district has "made reasonable efforts to minimize...risk," 20 U.S.C. § 1415(k)(2)(C), within that placement through supplementary aids and services, and must find the interim alternative placement to be one that allows the child to continue to receive services under the IEP and to "participate in the general curriculum, although in another setting," 20 U.S.C. § 1415(k)(3)(B)(i). This last phrase has been interpreted by the regulations not to require full access to all parts of a school's program. See 34 C.F.R. §§ 300.521, .522. See also 20 U.S.C. § 1415(k)(2), (3); *supra* Part III.B.3.

227. See 34 C.F.R. § 300.526(c)(4).

228. See 20 U.S.C. § 1415(k)(7); 34 C.F.R. §§ 200.514, .524(c) (challenges to manifestation determinations).

229. These other children may include both children without disabilities in a regular classroom in which the child is currently placed, and other children with disabilities placed in the regular classroom or in more specialized placements, such as the program for developmentally disabled children which one of the plaintiffs in *Honig* had been attending. See *Honig v. Doe*, 484 U.S. 305, 312 (1988). See also sources cited *supra* note 85 for legislative history of the IDEA amendments regarding the determination not to allow unilateral changes for disruptive conduct.

230. See 20 U.S.C. § 1415(k)(7); 34 C.F.R. §§ 200.514, .524(c).

231. See 20 U.S.C. § 1415(j).

The DOE's commentary responds to such concerns by stressing the limited application of these provisions to situations where parents and school districts do not agree on where the child should be placed pending the resolution of disputes.²³² Certainly one would hope and expect that most parents, confronted with serious misbehavior, or with a placement that was not working for the child, would cooperate with school personnel in seeking an alternative setting in which the child could learn. Some recourse, however, should exist for school authorities if there is no agreement.

One step requiring no alteration in the statutory scheme would make an expedited hearing available at the request of a school district when the district believes the child will be disruptive to others' ability to learn if returned to the stay put placement.²³³ If the hearing officer determines that the child's prior placement is not "appropriate" because of the child's inability to function in that setting, a new placement can be ordered.²³⁴ Or, if the hearing officer agrees that the child's misconduct is unrelated to the child's disability, the decision will validate the removal.²³⁵

Another alternative arguably not foreclosed by either *Honig*²³⁶ or the present statutory scheme is resort to the judicial system. Under the general equitable power recognized in *Honig*,²³⁷ school authorities could request interim equitable relief on the grounds that the child's conduct is seriously disruptive of others' education. Although *Honig* spoke in terms of danger to the child or others, it did not foreclose the presentation of other grounds justifying equitable relief. *Honig* instead took pains to stress that its approach of reserving power in the judiciary would not leave school districts powerless.²³⁸ Opening such routes for

232. See *Summary, supra* note 11, 64 Fed. Reg. at 12,414-15; *Analysis, supra* note 11, 64 Fed. Reg. at 12,627.

233. Although the statutory scheme does not require an expedited hearing for this reason, it nowhere prohibits the state agency from granting one.

234. See *Parent v. Osceola County Sch. Bd.*, 59 F. Supp. 2d 1243, 1249 (M.D. Fla. 1999) (finding that alternative school was least restrictive environment because student's inability to control his behavior made it impossible for him to obtain comparable educational benefits at high school).

235. Such a determination would be subject to judicial review and the invocation of the stay put provisions during a civil action. Given the direction to judicial authorities to give due weight to state and local judgments on educational matters, and the general climate of concern for school safety and discipline, a parent would need strong evidence to successfully challenge such a decision judicially. Parents who pursue appeals strictly to defer disciplinary action could face sanctions for pursuing such a claim frivolously. See *FED. R. CIV. P.* 11, 65. At a minimum, the unsuccessful appealing party would be denied attorneys' fees.

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

237. *Id.* at 327.

238. Indeed, the Court read the provisions of the statute, which restrained school officials from acting, as not operating to limit the equitable powers of the district courts, in appropriate cases, to enjoin attendance in school by a dangerous child. See *Honig*, 484 U.S. at 327. The same argument could be applied to a seriously disruptive child.

relief avoids torturing the meaning of the statutory term "injury" in the definition of dangerousness, yet would not leave school authorities without any ability to remove a disruptive child during the course of administrative and judicial review.

D. Unidentified Students

The IDEA now statutorily incorporates the standards set out in the *Rodiriecus L.*²³⁹ decision and holds school districts to compliance with IDEA disciplinary procedures only when the district knew or should have known that the child has a disability.²⁴⁰ If a parent requests an evaluation after a disciplinary action is taken, the school district must conduct it expeditiously.²⁴¹ If the evaluation shows a disability, then the IDEA's other provisions relating to discipline kick in. But during the time for evaluation and any ensuing dispute resolution process, the stay put placement is that determined by school authorities.²⁴² This change to the stay put definitions avoids abuse of the dispute resolution process by parents in situations where the facts suggest a belated or suspect claim of disability is being made in response to the disciplinary action.

A school district is deemed to know of a disability if: (1) the parent had expressed concern in writing to school personnel about whether the child was disabled;²⁴³ (2) the child's behavior or performance demonstrates the need for services;²⁴⁴ (3) there is a pending request for evaluation;²⁴⁵ or (4) a teacher or

At least one court entertained the idea that upon a proper showing, a school district could seek injunctive relief based upon the claim that a student's presence would cause the educational program of the school to be disrupted and undermine the ability of the staff to maintain order and discipline. *See School Dist. v. Stephan M.*, Civ. No. 97-1154, 1997 WL 89113, at *3 (E.D. Pa. Feb. 27, 1997). Part of such a showing would be that the district had pursued ameliorative measures. *See id.* But *see Clinton County R-III Sch. Dist. v. C.J.K.*, 896 F. Supp. 948, 948 (W.D. Mo. 1995) (reading *Honig* to mean that "no matter how disruptive or offensive the behavior of the child may be, and regardless of the effect of misbehavior on the school staff and the student body, there can be no change in placement until completion of administrative review, absent the substantial likelihood of injury"). This latter reading is not compelled by *Honig's* holding.

Congress did not resolve how to treat disruption; it lacked a consensus that would allow it to comfortably proceed. *See supra* note 85 and accompanying text. So no negative inference should be drawn from its failure to legislatively address this issue.

239. *Rodiriecus L. v. Waukegan Sch. Dist.* No. 60, 90 F.3d 249 (7th Cir. 1996). *See also supra* text accompanying notes 61-63. The standards were themselves based on a non-regulatory administrative memorandum. The present standards are published in regulatory form. *See* 34 C.F.R. § 300.527 (1999).

240. *See* 20 U.S.C. § 1415(k)(8) (Supp. III 1997); 34 C.F.R. § 300.527.

241. *See* 20 U.S.C. § 1415(k)(8)(C)(ii); 34 C.F.R. § 300.527(d)(2)(i).

242. *See* 20 U.S.C. § 1415(k)(8); 34 C.F.R. § 300.527.

243. *See* 20 U.S.C. § 1415(k)(8)(B)(i); 34 C.F.R. § 300.527(b)(1). This requirement of a writing is dispensed with if the parent is illiterate, or himself has a disability preventing his compliance with this provision. *See* 20 U.S.C. § 1415(k)(8)(B)(i); 34 C.F.R. § 300.527(b)(1).

244. *See* 20 U.S.C. § 1415(k)(8)(B)(ii); 34 C.F.R. § 300.527(b)(2).

245. *See* 20 U.S.C. § 1415(k)(8)(B)(iii); 34 C.F.R. § 300.527(b)(3).

school official has “expressed concern about the behavior...of the child” to other school personnel.²⁴⁶ The tests of a previous writing or a request for evaluation are relatively objective and bright-line in application. A prior writing or evaluation request which resulted in a determination not to evaluate or a determination of no disability does not trigger constructive knowledge.²⁴⁷ The other standards for imputing constructive knowledge of a child’s disability are not particularly precise.

The provision that a school district is on notice of a possible disability if “the behavior or performance of the child demonstrates the need for such services”²⁴⁸ generated much comment upon enactment and when circulated as a proposed regulation.²⁴⁹ In response, the DOE adopted a final regulation which refers back to the specific definition of a disability, and thus to both the categorical descriptions of a variety of named disabilities, from autism to visual impairment, and to the requirement that these disabilities create a need for special educational services.²⁵⁰ In doing so, the DOE commented:

[T]he behavior or performance of the child sufficient to meet this standard should be tied to characteristics associated with one of the disability categories identified in the definition of child with a disability in order to remove unnecessary uncertainty about the type, severity, or degree of behavior or performance intended.²⁵¹

This standard still leaves open the potential for arguing school district knowledge in a broad range of situations. After the fact, it is far easier to look at a child’s history as presenting warnings or signals of a disability. Hearing officers and courts need to avoid the temptation to engage in twenty-twenty hindsight when considering claims based on this provision.²⁵²

246. See 20 U.S.C. § 1415(k)(8)(B)(iv); 34 C.F.R. § 300.527(b)(4).

247. See 34 C.F.R. § 300.527(c). This gloss is a regulatory interpretation which seems to make eminent sense.

248. 20 U.S.C. § 1415(k)(8)(B)(ii).

249. For a detailed analysis of this aspect of the IDEA, see McKinney, *supra* note 9. See also Bryant, *supra* note 9, at 535–38; Mead, *supra* note 29, at 526. For comments on the proposed regulation, see *Analysis*, *supra* note 11, 64 Fed. Reg. at 12,628–29; Groeschel, *supra* note 5, at 1127–31.

250. See 34 C.F.R. §§ 300.527(b)(2), .7.

251. *Analysis*, *supra* note 11, 64 Fed. Reg. at 12,628. Participating states must commit to identifying, locating, and evaluating all children with disabilities residing in the state, including those attending private schools. This responsibility is referred to as “child find.” See 20 U.S.C. § 1412(a)(3) (Supp. III 1997). The DOE stressed that limiting the standard to documented, observed performance or behavior in the child’s *record* could be inconsistent with child find obligations. See *Analysis*, *supra* note 11, 64 Fed. Reg. at 12,628.

252. The few cases implicating this aspect of the IDEA suggest they will not do so. See *Rodiricus L. v. Waukegan Sch. Dist. No. 60*, 90 F.3d 249, 253–55 (7th Cir. 1996) (finding that history of robbery and other disruptive behavior did not give school district notice of a disability); *Doe v. Board of Educ.*, 149 F.3d 1182, No. 96-4008, 1998 WL 344061, at *5–7 (6th Cir. May 27, 1998) (unpublished table decision) (finding no IDEA

The last situation in which notice will be found is when the child's teacher or other local school personnel have "expressed concern about the behavior or performance of the child" to the special education director or "other personnel of the agency."²⁵³ Read literally, this statutory language could be satisfied by a passing discussion in the lunch room between two teachers. The adopted regulation narrows this to a more rational interpretation—the expression of concern must be made officially to someone with child find or special education referral responsibilities.²⁵⁴

The final regulations, then, address the constructive knowledge provisions in helpful ways. Although the statutory definitions are not without potential for broad application, the agency's final regulations better accomplish Congress' purposes—preventing circumvention of discipline through recently manufactured claims of disability, but requiring evaluation and action in bona fide cases of a disability.

IV. MAKING DISCIPLINARY DECISIONS—THE ABCS

Although the IDEA and the regulations implementing it are complex, and now reflect twenty years of judicial decisions, administrative interpretations, and statutory developments, the disciplinary provisions in any particular case can be summarized into a series of questions and consequences. After offering such a summary, the discussion returns to review the cases of Andrea, Ben, and Carl.

*A. An Action Plan for Discipline Under the IDEA*²⁵⁵

*Step 1. Is This a "Child with a Disability"?*²⁵⁶

If yes, continue to Step 2.

If no, does the school have prior knowledge of a disability?

The school may have prior knowledge from a parent's written concern, the student's behavior or performance, a request for an evaluation, or school

violation by expulsion of child who brought toy gun to school where behavioral problems had begun recently after child's mother was in serious accident).

253. 20 U.S.C. § 1415(k)(8)(B)(iv).

254. See 34 C.F.R. § 300.527(b)(4). See also *Analysis, supra* note 11, 64 Fed. Reg. at 12,629 ("Public agencies should not be held to have a basis for knowledge that a child was a child with a disability merely because the child's teacher had expressed concern about the child's behavior or performance that was unrelated to whether the child had a disability.").

255. The authority for each of the following steps has been discussed and cited above. Footnotes in this Part refer the reader to the section(s) of the Article containing a fuller discussion of the particular provision.

256. A "child with a disability" means a child who has been evaluated as having one of a list of specified disabilities which cause the child to need special education and related services. See 20 U.S.C. § 1401(3)(A), (B) (Supp. III 1997); 34 C.F.R. § 300.7 (1999).

personnel's expressions of concern.²⁵⁷ However, if the child has been evaluated as not having a disability, or a decision was made not to evaluate, these facts are not viewed as creating prior knowledge.

If no, is the parent requesting an evaluation? If so, conduct an expedited evaluation, with the child remaining in school-authority determined placement.²⁵⁸ If the evaluation shows a child with a disability, continue to Step 2.

Step 2. Is Removal the Appropriate Disciplinary Action?

Steps such as study carrels, time outs, privilege restrictions, and in-school suspensions may be used, if not contrary to the child's IEP.²⁵⁹

Step 3. Is the Disciplinary Action a Removal of Less than Ten Days?

If the action is a removal of less than ten days, and the child has not been removed from school for more than ten days cumulatively in the school year, school authorities may remove the child without providing services.²⁶⁰

If the removal is for less than ten days, but the student will have been removed from school for a cumulative total of ten school days in the year, school authorities and the special education teacher decide on the services to be provided during the removal.²⁶¹ In addition, the IEP team should prepare a behavioral plan (Step 6).²⁶²

If the removal is less than ten days, but the child was previously removed for more than ten days and has a behavioral plan, IEP team members should review it (no meeting required).²⁶³

A removal of less than ten days is not considered a change in placement unless it is part of a pattern of suspensions which cumulatively exceed ten days in a school year and amount to a change in placement.²⁶⁴

If the action is removal for more than ten days, it is considered a change in placement.²⁶⁵

Step 4. Is the Conduct a Weapon or Drug Offense?

If so, school authorities may place the child in an interim alternative placement, determined by the IEP team, for up to forty-five days.²⁶⁶ School

257. See *supra* Part III.D, notes 239–254 and accompanying text.

258. See *supra* Part III.D, notes 239–254 and accompanying text.

259. See *supra* Part III.A, notes 68–71 and accompanying text.

260. See *supra* Part III.A.1.; notes 72–79 *supra* Part III.B.3, notes 169–173 and accompanying text.

261. See *supra* Part III.B.3, notes 169–181 and accompanying text.

262. See *supra* Part III.B.2, notes 150–159 and accompanying text.

263. See *supra* notes 157–158 and accompanying text.

264. See *supra* Part III.A.1.

265. See *supra* Part III.A.1.

266. See *supra* Part III.A.2, notes 80–86 and accompanying text.

authorities may immediately remove the child for less than ten days, followed by an IEP-determined alternative placement.²⁶⁷

Step 5. Is the Child Dangerous to Himself or Others in His Current Placement?

If school authorities can demonstrate that it is substantially likely the child will injure himself or others if he stays in his current placement, they may seek an expedited hearing and an order from a hearing officer for an alternative educational placement of forty-five days, and may repeat the process as necessary.²⁶⁸ The United States district court also has authority in cases of dangerousness.²⁶⁹ School authorities may immediately remove the child for less than ten days and seek an order for an alternative educational placement.²⁷⁰

Step 6. Does the Child Need a Behavioral Assessment and Plan?

For a child whose discipline is a change in placement (i.e., removal for more than ten days, a forty-five day alternative placement for weapon/drug offense, or an order for a forty-five day alternative placement based on dangerousness) or who has been removed from school for more than ten days in the school year, the IEP team should convene within ten days of the action to create or review a behavioral assessment and plan.²⁷¹ The IEP team conducts a behavioral assessment, develops appropriate behavioral interventions, and implements the plan. If the child already has such a plan, the IEP team should review and modify it as necessary.²⁷²

Step 7. Is the Child's Conduct Related to His Disability?

For a child whose discipline is a change in placement, the school must notify the parents of the decision on the date the action is taken and, within ten days, the IEP team must conduct a review, the manifestation determination, of the relationship between the child's disability and the behavior subject to disciplinary action.²⁷³

To find that the behavior is not related to the child's disability, the IEP team must determine that the IEP was appropriate and was being followed and that the child's disability did not prevent him from understanding or controlling his behavior.²⁷⁴

If the IEP team determines that the behavior was not related to the child's disability, the child may be disciplined as a non-disabled child, but with

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267. See *supra* note 83 and accompanying text.
268. See *supra* Part III.A.3, notes 87–91 and accompanying text.
269. See *supra* text accompanying notes 43, 117–120.
270. See *supra* notes 83, 195 and accompanying text.
271. See *supra* Part III.B.2, notes 150–166 and accompanying text.
272. See *supra* Part III.B.2, notes 150–166 and accompanying text.
273. See *supra* Part III.B.1, notes 123–149 and accompanying text.
274. See *supra* notes 131–132 and accompanying text.

continuation of services which the IEP team determines will enable him to progress in the general curriculum and toward the goals of his IEP.²⁷⁵

If the child's behavior is determined to be related to his disability, the usual IEP and IDEA requirements apply to any proposed change in placement, with stay put provisions as set out in Step 8.²⁷⁶

Step 8. Does the Parent Contest the Placement or Manifestation Determination?

If the child is in an interim alternative educational placement triggered by a weapon or drug offense, or ordered by the hearing officer based on dangerousness, this placement will be the stay put placement until the end of the prescribed period or the hearing officer's decision, whichever is sooner.²⁷⁷ After that, the last placement before the interim alternative educational placement will be the stay put placement, unless the expedited procedure for an order based on dangerousness is used.²⁷⁸ For other changes in placement, the usual stay put provisions apply, i.e., the last placement in effect before the contested change.²⁷⁹

B. Applying The Provisions—Andrea, Ben, and Carl

1. Andrea's Case: The Thrown Book

If Andrea has no identified disability, what steps would the school take to respond to this kind of outburst? Suspension or expulsion is unlikely. Andrea might be asked to sit in the front of the room or to visit the principal's office for a talk about appropriate behavior. Or she might be asked to help mend books in the library after school.

If Andrea does have a disability, it is likely the school still can take any of these steps, as they fall short of a change in placement or removal from school. Depending on Andrea's history and the nature of her disability, she might have an IEP that reflects steps the school has identified to deal with her behavior problems. If so, the school must make sure that the steps it contemplates are consistent with the plan.

The bottom line: Andrea will be treated the same way, whether or not she has a disability.

2. Ben's Case: Repetitive Misconduct in the Lunchroom

If Ben has not yet been evaluated for a disability, the school may need to take notice of Ben's behavior as raising a question about a possible disability, particularly if Ben has also been having difficulties with his classwork. Previous

275. See *supra* notes 133–134 and accompanying text.

276. See *supra* notes 160–166 and accompanying text.

277. See *supra* Part III.C, note 224 and accompanying text.

278. See *supra* notes 224–228 and accompanying text.

279. See *supra* note 228 and accompanying text.

disciplinary steps have apparently not affected Ben's control over this behavior. Is he also having problems focusing on his schoolwork? He might have ADD and be lacking in impulse control. Is there an undiagnosed emotional disturbance? It may be time for an evaluation if none has been done.²⁸⁰

What kind of disciplinary action does the school intend to take? Extended detention? A short suspension? These actions can be taken whether or not there is cause to evaluate Ben further.

If Ben has been identified as having a disability, the school still can use either of these steps, again assuming that his IEP does not call for some alternative method of dealing with his behavior. If this is not Ben's first suspension, the school should check on how long he has been out of school this year. If it is more than ten days, the IEP team should prepare a behavioral plan or review an existing one. And school authorities should decide whether Ben will need any services during this suspension to continue progressing in his coursework.

The bottom line: Whether or not he has been identified as having a disability, Ben can receive detention or a short suspension.

3. *Carl's Case: The Fight and the Knife*

Many schools have a zero tolerance policy for bringing weapons to school. Had the weapon been a firearm, the presumptive action under the Gun Free Schools Act would be to expel the student for a year.²⁸¹ The school may well view this misconduct as warranting extended suspension or expulsion and perhaps referral to law enforcement officials, depending upon the circumstances. If Carl is not a child with a disability, the school can proceed with this plan. Note, though, that nothing prevents the school from providing services to Carl in an alternative setting.²⁸²

Even if Carl has a disability, because he has brought a weapon to school²⁸³ the school authorities can immediately remove him from school for up to

280. This is not to suggest that all behavioral problems constitute a disability. Any evaluation must still be addressed to whether the student has a defined disability and whether because of that disability, the student requires special education and related services to progress in school. *See* 20 U.S.C. § 1401(3) (Supp. III 1997).

281. *See* 20 U.S.C. § 8921(b)(1) (1994). Expulsion is subject to modification by the school superintendent on a case-by-case basis. *See id.* The Act provides for construction consistent with the IDEA. *See* 20 U.S.C. § 8921(c).

282. The Gun Free Schools Act specifically provides that it not be construed as preventing a state from allowing a school district which has expelled a student from the student's regular school setting to provide educational services in an alternative setting. *See* 20 U.S.C. § 8921(b)(2).

283. The IDEA defines a weapon using a reference to the definition of dangerous weapon in 18 U.S.C. § 930(g) (1994). *See* 20 U.S.C. § 1415(k)(10)(D) (Supp. III 1997). That definition includes "a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury,

ten days, and the IEP team can determine an alternative educational setting in which he will spend up to forty-five days.

The IEP team will need to meet and determine whether Carl's actions are related to his disability. If they are not, he can be expelled from his current educational placement. If they are, the team can determine a change in placement and modify his IEP to address his behavior. The school is obliged to provide Carl with educational services, although the nature of the services will vary depending upon the setting.

If at the end of the forty-five days, there is no agreement on Carl's discipline or placement, the school can obtain an expedited hearing and an order from a hearing officer based on a showing of dangerousness, placing Carl in an alternative setting for an additional period of forty-five days. It can renew this process until Carl's placement is resolved. The school also can immediately refer Carl's conduct to law enforcement officials for their action.

The bottom line: Carl can be immediately removed and suspended from school. School officials can refer his conduct to law enforcement officials. Whether or not Carl has a disability, he most likely can be either removed to an alternative educational setting or suspended for an extended period. Carl is entitled to educational services if he has a disability; if he does not have a disability, the school may still provide them but is not required to by federal law.

V. CONCLUSION

The amended IDEA continues to safeguard access to education for children with disabilities and to assure parents an active role in the educational planning for their child. Even where a child's behavior requires changes in approach or a disciplinary response, the goal of supporting the educational development of children with disabilities continues.

Within the IDEA's boundaries, schools have more options now to deal with conduct that threatens the safety of children and the learning environment. The new provisions still leave gaps in their treatment of disruptive conduct. They also create new evidentiary and procedural questions that must be resolved to make the options workable and responsive to the safety and welfare concerns of schools and students. To avoid inequitable results, the IDEA must be construed in particular cases with appreciation of the importance of educating and protecting disabled and non-disabled children alike in our public schools. If this happens, schools should feel empowered to take swift and effective action, when it is required, to create a safe environment where all of our children can learn.

except that such term does not include a pocket knife with a blade of less than 2½ inches in length." 18 U.S.C. § 930(g)(2). The blade on Carl's knife was over the minimum length.

