# The Application of P.L. 94-142 to the Suspension and Expulsion of Handicapped Children

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The rights of handicapped children in public schools have been the subject of two important federal legislative acts, the Education for All Handicapped Children Act of 1975 (P.L. 94-142)[1] and section 504 of the Rehabilitation Act of 1973 (Section 504).[2] This legislation was a result of congressional findings that more than half of the handicapped children in the United States were not receiving an appropriate education.[3] This was due in part to a failure to detect handicaps and a lack of adequate services in the public school system once a handicap was detected.[4]

To help remedy this problem, Congress, through P.L. 94-142, guaranteed specific rights to handicapped children including: (1) the right to a free and appropriate public education;[5] (2) the right to remain in a present placement until a pending special education complaint is resolved;[6] (3) the right to an education in the least restrictive environment;[7] and (4) the right to have all changes in placement carried out pursuant to specified procedures.[8] P.L. 94-142 is complemented by Section 504, a civil rights statute which prohibits the exclusion of handicapped persons on the basis of their handicaps from a program or activity receiving federal financial assistance.[9]

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1. Pub. L. No. 94-142, 89 Stat. 775 (1975) (codified as amended at 20 U.S.C. §§ 1400-1461 (1976 & Supp. 1980)).

2. Pub. L. No. 93-112, 87 Stat. 394 (1973) (codified as amended at 29 U.S.C. § 794 (Supp. 1980)).

3. 20 U.S.C. § 1400(b)(3) (Supp. 1980).

4. *See id.* § 1400(b) (Supp. 1980).

5. *Id.* § 1412(1), (2)(B) (1976); 34 C.F.R. §§ 300.121, -.300 (1981). *See* Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103 (1979).

6. 20 U.S.C. § 1415(e)(3) (1976); 34 C.F.R. § 300.513 (1981).

7. 20 U.S.C. § 1412(5)(B) (1976); 34 C.F.R. §§ 300.550-.556 (1981).

8. *See* 20 U.S.C. § 1415(a)-(e) (1976). This section enumerates all of the procedural guarantees handicapped children may claim when there is a change in their educational placement. *See also infra* notes 33-38 and accompanying text.

9. Pub. L. No. 93-112, § 504, 87 Stat. 394 (1973) (codified as amended at 29 U.S.C. § 794) (Supp. 1980), specifically provides:

> No otherwise qualified handicapped individual in the United States,. . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

*See* Turillo v. Tyson, 535 F. Supp. 577, 584 (D.R.I. 1982) (Section 504 impliedly grants a private

Although P.L. 94-142 and Section 504 and their implementing regulations are very detailed, there are no explicit guidelines relating to the discipline of handicapped students. This gap in the federal legislation has been filled somewhat by two recent court decisions, *S-1 v. Turlington*[10] and *Kaelin v. Grubbs*.[11] *Turlington* and *Kaelin* are the only federal appellate court decisions to date which have considered whether expulsion violates a handicapped child's rights under P.L. 94-142 and Section 504. Although helpful, the *Turlington* and *Kaelin* decisions are not definitive on the suspension and expulsion of the handicapped.

The purpose of this Note, therefore, is to consider *Turlington* and *Kaelin* in conjunction with prior federal district court decisions and to summarize the current law that local schools must follow when implementing policies to expel or suspend a handicapped child. Part I of this Note examines the legislative history of P.L. 94-142 and Section 504. Part II will discuss the holdings in *S-1 v. Turlington* and *Kaelin v. Grubbs* which require that the procedural safeguards of P.L. 94-142 be followed before a handicapped child may be expelled. Part III will summarize when a handicapped child may be suspended or expelled. Finally, Part IV will consider alternative legislative suggestions to *Turlington* and *Kaelin*.

## I. LEGISLATIVE HISTORY

In 1965, Congress passed the Elementary and Secondary Education Act (ESEA)[12] as part of President Johnson's war on poverty and in response to interest group pressure for more federal assistance in the education of the underprivileged.[13] Although the ESEA did little to address the problems of handicapped children,[14] it provided a foothold for future legislation requiring a free appropriate education for the handicapped.[15]

In 1966, Congress added Title VI to the ESEA.[16] The purpose of Title VI was to upgrade the education of handicapped children through the Bureau of Education for the Handicapped (BEH) which was created in that same year.[17] However, Title VI did not require that handicapped children be mainstreamed into regular public school classrooms nor did it give handicapped children the right to a free appropriate public education.[18] Consequently, Title VI was repealed in 1970 when the Education

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cause of action to handicapped persons to enforce their right to be free from discrimination). *See generally*, Schoenfeld, *Civil Rights for the Handicapped Under the Constitution and Section 504 of the Rehabilitation Act*, 49 U. CINN. L. REV. 580 (1980).

10. 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981).

11. 682 F.2d 595 (6th Cir. 1982).

12. Pub. L. No. 89-10, 79 Stat. 27 (1965) [hereinafter the ESEA].

13. E. LEVINE & E. WEXLER, P.L. 94-142 AN ACT OF CONGRESS 19 (1981) [hereinafter LEVINE & WEXLER].

14. *Id.* at 20.

15. *Id.* at 53.

16. Pub. L. No. 89-750, 80 Stat. 1191 (1966).

17. LEVINE & WEXLER, *supra* note 13, at 53-54. The BEH centralized handicapped education programs in a federal office, making it a federal responsibility to educate handicapped children. *Id.* at 9.

18. *Id.* at 32-33.

of the Handicapped Act of 1970 was passed.[19] Part B of that Act authorized state grants to improve state programs for the education of the handicapped.[20]

In 1971 and 1972, an impetus for further federal legislation was provided by the decisions in *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*[21] (*PARC*) and *Mills v. Board of Education*.[22] In *PARC*, a class action was brought on behalf of all mentally retarded persons who had been or who were being denied access to a free public education.[23] The court unanimously held that all retarded children in the state between six and twenty-one years of age had a constitutional and state statutory right to be provided a free and appropriate public education.[24]

Similarly, in *Mills*, a class action was brought alleging that handicapped children were being denied admission to public schools or excluded from school after admission with no provisions for alternative educational placement or periodic review.[25] The court ordered that the defendants provide each child of school age a free and suitable publicly supported education regardless of the degree of the child's handicap.[26] As a result of these landmark court decisions,[27] the Elementary and Secondary Education Amendments of 1974 were passed.[28] These amendments greatly expanded the federal fiscal role in the education of the handicapped and provided procedures which guaranteed safeguards to handicapped children and their parents in the identification, evaluation and placement of handicapped children.[29]

Finally, in 1975, P.L. 94-142 was passed.[30] The intent behind P.L. 94-142 was to expand the current federal provisions relating to handicapped children so as to insure maximum benefits to handicapped children and their families.[31] P.L. 94-142 requires that before a state can qualify for federal funds it must adopt a policy which assures all handicapped children an appropriate public education and establishes procedural standards for handicapped children and their parents.[32]

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19. Pub. L. No. 91-230, 84 Stat. 121 (1970).
20. *Id.*
21. 334 F. Supp. 1257 (E.D. Pa. 1971).
22. 348 F. Supp. 866 (D.D.C. 1972).
23. 334 F. Supp. at 1259.
24. *Id.* at 1258. The court also stated that the state could best carry out its obligation to handicapped students by placing them in regular public classrooms when possible and special public school classes when necessary. *Id.* at 1260. Homebound instruction was found by the court to be the least preferable program. *Id.* at 1264.
25. 348 F. Supp. at 868.
26. *Id.* at 878.
27. *See* S. REP. No. 94-168, 94th Cong., 1st Sess. 5-6 (1975); LEVINE & WEXLER, *supra* note 13, at 45.
28. Pub. L. No. 93-380, 88 Stat. 484 (1974).
29. *Id.*
30. Pub. L. No. 94-142, 89 Stat. 775 (1975) (codified as amended at 20 U.S.C. §§ 1400-1461 (1976 & Supp. 1980)). For the legislative history of P.L. 94-142, *see* 1975 U.S. CODE CONG. & AD. NEWS 1425.
31. S. REP. No. 94-168, 94th Cong., 1st Sess. 6 (1975).
32. 20 U.S.C. § 1412 (1976) provides in part:
In order to qualify for assistance under this subchapter in any fiscal year, a state shall

Section 1415 of P.L. 94-142 details the minimal procedural safeguards a state or local educational agency is required to establish and maintain before it will receive federal assistance.[33] These safeguards include: (1) a provision for a free appropriate public education and the opportunity for the parents of a handicapped child to examine all relevant records relating to the child's evaluation and educational placement;[34] (2) a requirement that parents be provided with written notice prior to the initiation of a change in the child's placement;[35] (3) an opportunity for parents to initiate an impartial due process hearing regarding the child's evaluation or placement;[36] (4) an impartial review by the state educational agency if the hearing is conducted by a local agency;[37] and (5) the right of parents aggrieved by the decisions or findings of a state hearing or state review to bring a civil action in federal district court.[38]

The BEH was given the responsibility of writing and implementing federal regulations for both P.L. 94-142 and Section 504.[39] Many of the procedural safeguards provided in P.L. 94-142 regulations are also contained in the regulations which implement Section 504. This similarity was part of the BEH's strategy to provide an incentive for local agencies to accept federal funds under P.L. 94-142 even though accompanying federal regulations are involved.[40] It became clear to the states that if a local

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demonstrate to the Commissioner that the following conditions are met: (1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

20 U.S.C. § 1415(a) (1976) provides:

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

33. *See* 20 U.S.C. § 1415(b)-(e) (1976); 34 C.F.R. §§ 300.500-.513 (1981).

34. 20 U.S.C. § 1415(b)(1)(A) (1976); 34 C.F.R. §§ 300.502-.503 (1981).

35. 20 U.S.C. § 1415(b)(1)(C) (1976); 34 C.F.R. § 300.504 (1981).

36. 20 U.S.C. § 1415(b)(1)(E), (b)(2) (1976); 34 C.F.R. § 300.506 (1981). If a parent utilizes the procedural safeguards for reviewing educational decisions, the educational agency may not take any action which would change the educational placement of the child until all of the administrative and judicial proceedings regarding the parent's complaint have been completed. 20 U.S.C. § 1415(e)(3) (1976); *see* Stuart v. Nappi, 443 F. Supp. 1235, 1241-42 (D. Conn. 1978) (schools should not be able to expel a handicapped child while his special education complaint is pending even if this conflicts directly with the school's disciplinary processes).

37. 20 U.S.C. § 1415(c) (1976); 34 C.F.R. § 300.510 (1981).

38. 20 U.S.C. § 1415(e)(1)-(4) (1976); 34 C.F.R. § 300.511 (1981). *Compare* H.R. v. Hornbeck, 524 F. Supp. 215 (D. Md. 1981) (exhaustion required prior to maintaining of a district court action) *and* Tatro v. Texas, 516 F. Supp. 968 (N.D. Tex. 1981) (no cause of action will lie under 42 U.S.C. § 1983 where P.L. 94-142's administrative mechanism has not been exhausted) *with* Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328 (W.D.N.Y. 1979) *and* Monahan v. Nebraska, 491 F. Supp. 1074 (D. Neb. 1980), *modified on other grounds*, 645 F.2d 592 (8th Cir. 1981) (both holding exhaustion was not required where pursuit of an administrative remedy would have been futile). *See infra* note 88 and accompanying text. *See generally*, Hyatt, *Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies*, 29 U.C.L.A. L. REV. 1 (1981).

39. *See* LEVINE & WEXLER, *supra* note 13, at 111. The regulations for P.L. 94-142 are found at 34 C.F.R. pt. 300 (1981). The regulations for Section 504 are found at 45 C.F.R. § 84 (1981).

40. *See* LEVINE & WEXLER, *supra* note 13, at 113. *See also* Gladys J. v. Pearland Indep. School Dist., 520 F. Supp. 869, 873 (S.D. Tex. 1981) (P.L. 94-142 is both a source of funds and a source of obligations).

agency were to refuse federal funds under P.L. 94-142 it would still have to follow the mandate of Section 504 and implement the regulations of that section without the benefit of federal assistance.[41] Therefore, it was in a state's best interest to implement P.L. 94-142 and receive federal funding to help it do so.

Although P.L. 94-142 and Section 504 are the federal laws which regulate the way in which local schools provide an education for handicapped children, it has remained unclear what schools can or must do when faced with a disruptive handicapped child. Schools have received some guidance on discipline procedures from United States district courts,[42] the investigations and published findings of the Office of Civil Rights,[43] the policy letters of the Office of Special Education,[44] and decisions by State Educational Agencies pursuant to P.L. 94-142.[45] However, prior to *Turlington* and *Kaelin* there had not been a consistent interpretation of P.L. 94-142 as to when and for what length of time handicapped students could be expelled or suspended. Consequently, the consistent decisions on this question by two federal courts of appeal, the Fifth Circuit in *Turlington*, and the Sixth Circuit in *Kaelin*, serve as important guides for local school policy and as precedent for other courts to follow.

## II. EXPULSION CONSTITUTES A CHANGE IN EDUCATIONAL PLACEMENT

### A. *The* S-1 v. Turlington *Decision*

The plaintiffs in *Turlington* were nine handicapped students who alleged violations of their rights under P.L. 94-142 and Section 504.[46] They sought injunctive relief to compel state and local officials to provide them educational services and guaranteed procedural safeguards in expulsion proceedings.[47] Seven of the nine students were expelled for almost two

41. *See supra* note 40.

42. *See, e.g.*, Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979) (P.L. 94-142 limits a school's right to expel handicapped students); Sherry v. New York State Educ. Dept., 479 F. Supp. 1328 (W.D.N.Y. 1979) (indefinite suspension constituted such a significant change in the handicapped child's education that the procedural safeguards of P.L. 94-142 could be invoked by the child); Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978) (P.L. 94-142's procedural requirements for changing the placement of a handicapped child may not be contravened through the use of expulsions).

43. *See, e.g.*, 3 EDUC. HANDICAPPED L. REP. (CRR) 250:101 [hereinafter EHLR].

44. *See, e.g.*, 2 EHLR 201:101.

45. State Educational Agency (SEA) decisions are reported in the EHLR. SEA's power to hear and review complaints is found at 20 U.S.C. § 1415(b)(2), (c) (1976).

46. 635 F.2d 342, 344 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981).

47. *Id.* The local officials did not dispute that a student who is properly classified as handicapped is entitled to a free appropriate public education. Appellants' Opening Brief, *in* 3 EHLR 551:353, 356 (1979-80). There was also no contention by the plaintiffs that they had not been expelled in accordance with state requirements or that procedural protections under Goss v. Lopez, 419 U.S. 565 (1975), had not been followed. Appellants' Opening Brief, *in* 3 EHLR 551:353, 356 (1979-80).

In *Goss v. Lopez*, the United States Supreme Court held that due process requires that before a student may be suspended for 10 days or less, the student must receive notice of the charges against him and, if the charges are denied, both the school and the student will have an opportunity to present their versions of the incident. 419 U.S. at 581. However, students who are dangerous may be removed immediately and the due process requirements met at a later date. *Id.* at 582-83.

full school years.[48] For all but one of the students, S-1, there were no hearings conducted to determine whether the students' misconduct was related to their handicaps.[49] S-1's hearing consisted of a determination by the superintendent that because S-1 was not classified as seriously emotionally disturbed, his misconduct, as a matter of law, could not be a manifestation of his handicap.[50]

The trial court granted the plaintiffs' requested injunctive relief for the following reasons: (1) under P.L. 94-142 and Section 504 no handicapped student can be expelled for misconduct related to his handicap; (2) S-2, S-3, S-4, S-5, S-6 and S-8 were not given hearings to determine the relationship between their handicaps and their behavioral problems; (3) the superintendent's determination as to S-1 was insufficient under P.L. 94-142 and Section 504; (4) an expulsion is a change in educational placement; and (5) under P.L. 94-142 and Section 504 only a trained and specialized group may make a change in educational placement.[51]

On appeal, the Fifth Circuit faced two issues necessary to provide clarity in the disciplinary area: (1) whether an expulsion is a change in educational placement which triggers the procedural safeguards of P.L. 94-142 and Section 504; and (2) whether P.L. 94-142, Section 504 and their implementing regulations require a dual system of discipline for handicapped and nonhandicapped students.[52]

The local school officials agreed that handicapped students cannot be expelled for misconduct resulting from their handicaps.[53] The officials also agreed that this determination must be made before an expulsion occurs.[54] Disagreement centered, however, on who may make these determinations and whether procedural safeguards under section 1415 of P.L. 94-142 may be invoked in an expulsion proceeding.[55] The officials contended that they complied with P.L. 94-142 and Section 504 by determining that the plaintiffs knew right from wrong and could understand the school rules and regulations.[56] In addition, they asserted that because the plaintiffs' handi-

48. 635 F.2d at 344. Each plaintiff was given a number, S-1 through S-9. *Id.* This Note will focus on the issues concerning S-1, S-2, S-3, S-4, S-5, S-6, and S-8. S-7 and S-9 were not under expulsion orders. *Id.* Plaintiffs were expelled for the maximum time allowed under Florida law. *Id.* Their misconduct included masturbation, sexual acts against fellow students, willful defiance of authority, insubordination, vandalism, and the use of profane language. *Id.* at 344 n.1.

49. *Id.* at 344.

50. *Id.* The plaintiffs were classified as either educable mentally retarded (EMR), mildly mentally retarded, or EMR/dull normal. *Id.* None of the students were classified as seriously emotionally disturbed. Appellants' Opening Brief, *in* 3 EHLR 551:353, 357 (1979-80).

51. 635 F.2d at 344. Although the expulsion period had ended when the injunction was entered, the trial court found the injunction necessary to ensure that the plaintiffs would be provided their rights. *Id.* at 345. At that point the plaintiffs had lost two years of education. *Id.*

52. *Id.* at 345.

53. *Id.* at 346. The *Turlington* court pointed out that without a determination of whether the misconduct is related to the child's handicap, a school board would not know whether it was violating Section 504. *Id.* For a text of Section 504, see *supra* note 9. In addition, the court found that the burden is upon local officials to make the determination of whether a student's misconduct is related to his handicap because handicapped students and their parents do not have the expertise either to know or assert their rights under P.L. 94-142 or Section 504. 635 F.2d at 349.

54. 635 F.2d at 346.

55. *Id.*

56. *Id.* Plaintiffs S-2, S-3, S-4, S-5, S-6, and S-8 were not given disciplinary hearings. *Id.* at

caps were not behavioral handicaps, there could not be a relationship between the students' misconduct and their handicaps.[57]

The court rejected both of the local officials' contentions.[58] First, the court found that a student's knowledge of the difference between right and wrong does not preclude his misconduct as resulting from his handicap.[59] Second, to assert that only seriously emotionally disturbed children can have misconduct related to their handicaps is far too generalized and disregards the emphasis on individualized evaluation required by P.L. 94-142 and Section 504.[60]

The court was concerned that S-1 had not been given a proper disciplinary hearing. The determination that his misconduct was unrelated to his handicap was made by a superintendent who had no particular knowledge or training to deal with handicapped children and their problems.[61] Before the court could require evaluation by specialized teams in expulsion proceedings, however, it had to determine whether expulsion was a change in educational placement.[62] Because P.L. 94-142, Section 504 and their regulations are silent as to what procedures are necessary, if any, before a handicapped child may be suspended or expelled, it was necessary for the *Turlington* court to examine prior cases for guidance.[63]

*Stuart v. Nappi*[64] is regarded as the seminal decision which addresses whether an expulsion is a change in educational placement.[65] The plaintiff in *Stuart* was referred to a Planning and Placement Team (PPT) after reports by her teachers that she was unable to achieve in class.[66] The PPT recommended that the plaintiff be placed in a special education program, which the plaintiff remained in for more than a year.[67] At the end of that period the plaintiff's special education teacher reported a problem with the plaintiff's attendance and requested the PPT to consider if plaintiff's hand-

344. Apparently, only the issue of whether they could understand right from wrong was determined, and when it was found that they could, they were then expelled. *See id.* at 346.

57. *Id.* The school officials would prohibit expulsion only as to students who are seriously emotionally disturbed because only then could the misconduct be a manifestation of the handicap itself. *Id.* The court rejected this limitation on the basis of a psychologist's testimony at trial that a connection between the plaintiffs' misconduct and their handicaps may have existed even though they were not seriously emotionally disturbed. *Id.* at 347. Therefore, not only emotionally disturbed children can have behavioral problems related to their handicap. *See* Sindelar, *Suspensions and Expulsions of Handicapped Students: The Evolving Case Law*, SCH. L. BULL., July 1981, at 1, 5.

58. 635 F.2d at 346.

59. *Id.*

60. *Id.* at 347.

61. *Id.*

62. *Id.* The regulations implementing P.L. 94-142 and Section 504 require that evaluation and placement decisions be made by specialized and knowledgeable persons. *See* 34 C.F.R. §§ 300.532(e), -.533(a)(3) (1981). In addition, when evaluations are initiated all of the procedural protections under section 1415 attach. *See* 20 U.S.C. § 1415(b)(1)(C) (1976).

63. 635 F.2d at 347.

64. 443 F. Supp. 1235 (D. Conn. 1978).

65. *See* Kaelin v. Grubbs, 682 F.2d 595, 600 (6th Cir. 1982).

66. 443 F. Supp. at 1238. The PPT's identified and evaluated children requiring special education, prescribed programs and then evaluated these programs as required by P.L. 94-142. *Id.*

67. *Id.* at 1238.

icap might be an emotional disability rather than a learning disability.[68] However, no meeting was held to review the plaintiff's placement nor was her schedule changed.[69]

The plaintiff's attendance became worse during the next school year and she was involved in several incidents resulting in disciplinary conferences.[70] A PPT review held a few months later, however, did not change the plaintiff's placement.[71] The following school year, two years after the initial PPT referral, the plaintiff was still not attending a learning disability program.[72] A request by a member of the school staff that a new PPT review be conducted was never acted on.[73]

During the year the plaintiff became involved in major disturbances at school and received a ten-day suspension.[74] The plaintiff was told to appear at a disciplinary hearing scheduled for over two months later and the superintendent recommended that the plaintiff be expelled for the remainder of the school year.[75] The case reached the court after the school board was enjoined from holding a disciplinary hearing to expel the plaintiff.[76]

The case was one of first impression for the United States District Court of Connecticut.[77] The court found that P.L. 94-142 establishes certain procedures for changing the placement of disruptive children which would be contravened by use of expulsion as a disciplinary measure.[78] Because initial placement, review and revision of individualized education programs for handicapped children are the responsibility of specialized professional teams,[79] the court was persuaded that before an expulsion occurs, a specialized team of persons must evaluate alternative placements and the child's individual needs.[80] After evaluation, the team may then

68. *Id.* at 1238-39. The plaintiff was originally diagnosed as having a major learning disability. *Id.* at 1238.

69. *Id.* at 1239.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* It is unclear if the plaintiff simply refused to go to class or if the school had failed to schedule the plaintiff. *Id.* Whatever the reason, the court felt that the plaintiff's absence should have been an indication that her placement was inappropriate and needed reevaluation. *Id.*

Similarly, in Howard S. v. Friendswood Indep. School Dist., 454 F. Supp. 634 (S.D. Tex. 1978), the court held that the school should have realized the plaintiff's placement was inappropriate when he developed disciplinary problems and was found wandering through the halls. *Id.* at 636. However, there was no attempt made by the school to see if the plaintiff's disciplinary problems were related to his handicap. *Id.* The court concluded that the school had failed to provide a free appropriate public education and thus had discriminated against the plaintiff under Section 504. *Id.* at 639.

74. 443 F. Supp. at 1239.

75. *Id.*

76. *Id.*

77. *Id.* at 1241.

78. *Id.* at 1243.

79. *See* 34 C.F.R. §§ 300.533(a)(3) (specialized teams), -.534 (reevaluation), -.343(d) (review and revision) (1981).

80. 443 F. Supp. at 1243. In addition, the court pointed out that a handicapped child's right to an education in the least restrictive environment could be circumvented if schools expel handicapped children. *Id.* at 1242. The regulations require that handicapped children be educated with nonhandicapped children whenever possible to fulfill the right to an education in the least restrictive environment. 20 U.S.C. § 1412(5)(B) (1976); 34 C.F.R. § 300.550 (1981).

request a change in the handicapped child's placement if there is evidence that the child's current placement is inappropriate.[81] The court considered a change in placement to be the long-term method by which schools should deal with handicapped children who are disciplinary problems.[82]

Two federal district court decisions, *Doe v. Koger*[83] and *Sherry v. New York State Education Department*[84] followed *Stuart*. The plaintiff in *Doe*, a mildly mentally handicapped student, had been suspended for disciplinary reasons and then formally expelled for the remainder of the school year.[85] Two days after the plaintiff's formal expulsion, the plaintiff's attorney contacted the school officials informing them of an appeal and requesting a special hearing.[86] An agreement was reached to place the plaintiff in an interim educational program under which the plaintiff could return to school for the rest of the school year.[87] A federal court action followed in which the plaintiff claimed he was expelled in violation of P.L. 94-142 and its implementing regulations.[88]

The *Doe* court felt that P.L. 94-142 clearly limits a school's right to expel handicapped students.[89] The court ruled that appropriate placement, not expulsion, is necessary when a child's handicap has caused him to be disruptive.[90] After determining that a child's misconduct is related to his handicap via P.L. 94-142 procedures, the school may only transfer the student to an appropriate, more restrictive, environment.[91] The courts in *Stuart* and *Doe* seem to say that if a child was appropriately placed he would not be disruptive. Consequently, when he is disruptive his placement needs to be reevaluated.

The plaintiff in *Sherry v. New York State Education Department* was indefinitely suspended after she was hospitalized for injuries resulting from self-abusive behavior.[92] The court determined that because of the indefinite suspension, a significant change had occurred in the plaintiff's educational placement.[93] Consequently, the procedural safeguards of section 1415 could be invoked by the plaintiff.[94]

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81. 443 F. Supp. at 1243.
82. *Id.*
83. 480 F. Supp. 225 (N.D. Ind. 1979).
84. 479 F. Supp. 1328 (W.D.N.Y. 1979).
85. 480 F. Supp. at 226.
86. *Id.*
87. *Id.*
88. *Id.* The defendants argued that the action should not be allowed because the plaintiff had not exhausted HEW, state and local administrative remedies. *Id.* The court rejected this argument on two counts: (1) the administrative remedies available under HEW did not provide compensation for individual students whose rights had been violated, and (2) there were no state and local administrative remedies providing a way to challenge the procedure by which the plaintiff was expelled. *Id.* at 228. *See also supra* note 38.
89. 480 F. Supp. at 228.
90. *Id.* The court cited Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978), for a similar finding. It is interesting to note, however, that *Stuart* did not limit its nonexpulsion holding to children whose misconduct is related to their handicap, as did *Doe*. *Stuart*, 443 F. Supp. at 1243.
91. 480 F. Supp. at 228.
92. 479 F. Supp. at 1330. The plaintiff was suspended because the school could not provide adequate supervision to prevent the plaintiff from seriously harming herself. *Id.*
93. *Id.* at 1337.
94. *Id.* The court cited Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978), to support its conclusion. *Id.* The defendants argued that the state procedural safeguards, in effect, substan-

Consistent with the above decisions, the *Turlington* court held that because an expulsion terminates educational services, a change in educational placement has occurred.[95] Therefore, a handicapped student may invoke the procedural protections of P.L. 94-142 in expulsion proceedings.[96] This means that to expel a disruptive handicapped child, the change of placement procedures found in P.L. 94-142 must be followed to determine if the misconduct is related to the child's handicap.[97] The change of placement procedures include evaluation by a specialized team, prior written notice, an opportunity to present complaints, the right to an impartial hearing and appeal of any decision.[98]

### B. *The* Kaelin v. Grubbs *Decision*

The reasoning in *S-1 v. Turlington* was adopted in *Kaelin v. Grubbs*,[99] the most recent federal court of appeals ruling on this issue. The dispute in *Kaelin* arose when the plaintiff, a handicapped child,[100] was suspended from school for disruptive behavior.[101] A month later a hearing was held by the school board to consider the plaintiff's disruptive behavior.[102] As a result of this hearing, the plaintiff was expelled for the remainder of the school year.[103] No consideration was ever given to the relationship, if any, between the plaintiff's handicap and his disruptive behavior.[104]

The plaintiff's request for a due process hearing following his expulsion was denied.[105] He then filed a suit alleging in part a violation of P.L. 94-142 and Section 504.[106] The district court entered a judgment for the plaintiff after it found that the plaintiff's expulsion constituted a change of

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tially complied with section 1415. *Id.* However, the state procedures did not provide for an impartial due process hearing nor was the child allowed to stay in his or her current educational placement pending resolution of the complaint. *Id.* The court directed the defendants to establish procedures to comply with section 1415. *Id.* at 1338.

95. 635 F.2d at 348. The locals officials argued that the court should not follow the *Stuart* decision that expulsion is a change in educational placement. They pointed to the different effect expulsion has in Connecticut as compared to Florida, as the basis for their argument. When a child is expelled in Connecticut, as in the *Stuart* case, he is simply moved from one educational setting to another without a discontinuation of educational services. Therefore, in Connecticut, it makes sense to say expulsion is a change in educational placement. In Florida, however, when a child is expelled all educational services are cut off. Therefore, there is no change in educational placement, but a total lack of an educational placement. The officials concluded by saying that "[e]xpulsion in Florida is a punishment—not an educational placement." Appellants' Opening Brief, *in* 3 EHLR 551:353, 361 (1979-80). The court disregarded this argument in its opinion.

96. 635 F.2d at 348.

97. *Id. quoting* Doe v. Koger, 480 F. Supp. at 229. There was testimony in the trial record by a psychologist who examined five of the seven plaintiffs and reviewed records of the other plaintiffs that there could be a link between the children's misconduct and their handicaps. Brief for the United States, *in* 3 EHLR 551:572, 574 (1979-80) (*amicus curiae*).

98. All of these guarantees are provided for by P.L. 94-142. 20 U.S.C. § 1415 (1976).

99. 682 F.2d 595 (6th Cir. 1982).

100. The plaintiff was a 15-year-old ninth grader who was placed in an educable mentally retarded classroom. *Id.* at 597.

101. *Id.* at 597. The plaintiff was suspended on March 14, 1979. *Id.*

102. *Id.* at 597. At the suspension hearing the school board did not consider whether there was a relationship between the plaintiff's handicap and his misconduct. *Id.*

103. *Id.* at 597-98. The expulsion was effective April 30, 1979. *Id.* at 598.

104. *See id.* at 597-98.

105. *Id.* at 598.

106. *Id.*

placement within the meaning of P.L. 94-142 and that no due process hearing as required by P.L. 94-142 had been afforded.[107]

After narrowing the only issue on appeal to whether an expulsion is a change in educational placement, the Sixth Circuit affirmed the district court's holding.[108] The court surveyed the decisions in *S-1 v. Turlington*,[109] *Stuart v. Nappi*,[110] *Doe v. Koger*[111] and *Sherry v. New York State Department of Education*[112] and concluded that: (1) a handicapped child may be suspended temporarily without employing the procedures of P.L. 94-142; (2) when the procedural protections of P.L. 94-142 are followed, a handicapped child may be expelled in appropriate circumstances; and (3) a handicapped child may not be expelled if his behavior is a manifestation of his handicap.[113]

The court also concluded that although the procedural protections of P.L. 94-142 must be followed when a handicapped child is expelled, handicapped children generally can be disciplined in the same manner as non-handicapped students.[114] Consequently, the court felt that its holding struck a delicate balance between the special educational needs of handicapped children and the school's need to discipline disruptive students.[115]

## III. The Use of Expulsion and Suspension as a Disciplinary Tool

### A. *Suspension*

A case which deals exclusively with the suspension of a handicapped child is *Board of Education of the City of Peoria v. Illinois State Board of Education*[116] (*Peoria*). In *Peoria*, a handicapped high school student was suspended for five days for verbal abuse of a teacher.[117] The federal district court felt that such a brief suspension could not be considered a change in educational placement nor a termination of educational services.[118] Consequently, schools may suspend handicapped students for short periods of time without first determining if their misconduct is related to their handicap or if their educational placement is inappropriate.

In *Kaelin*, the court dealt briefly with the suspension of handicapped students. The school board argued that affording procedural protections under P.L. 94-142 to a handicapped child upon expulsion but not upon suspension creates an artificial distinction between suspensions and expul-

107. *Id.*
108. *Id.* at 595-96.
109. *See supra* notes 95-98 and accompanying text.
110. *See supra* notes 64-82 and accompanying text.
111. *See supra* notes 83-91 and accompanying text.
112. *See supra* notes 92-94 and accompanying text.
113. 682 F.2d at 602.
114. *Id.*
115. *Id.*
116. 531 F. Supp. 148 (C.D. Ill. 1982).
117. *Id.* at 149.
118. *Id.* at 151. For a discussion and critique of the *Peoria* decision, see Comment, *The Rights of Handicapped Students in Disciplinary Proceedings by Public School Authorities*, 53 Univ. Colo. L. Rev. 367 (1982).

sions.[119] The court rejected this argument by finding that requiring school officials to provide the procedural protections under P.L. 94-142 for expulsions but not suspensions serves two important policy interests.[120] First, school officials need the ability to temporarily control disruptive behavior and suspensions serve that purpose.[121] Second, a handicapped child would not receive the individualized treatment required under P.L. 94-142 if that child could be expelled in the same manner as a nonhandicapped child.[122]

Likewise, in *Reineman v. Valley View Community School District*[123] a federal district court held that a lack of notice or a formal hearing prior to a ten-day suspension does not violate any child's due process rights because, under *Goss v. Lopez*,[124] the most informal of hearings can justify a suspension of up to ten days.[125]

These holdings seem consistent with dictum in *Stuart v. Nappi*.[126] In *Stuart*, the plaintiff received a ten-day disciplinary suspension for participating in school-wide disturbances.[127] The court noted that the regulations to P.L. 94-142 give schools the authority to use normal procedures for dealing with children who are endangering themselves or others.[128] From this the court concluded that authorities can deal with emergencies by suspending handicapped children while at the same time permitting the children to continue in their current placement.[129] Thus, there is no violation of P.L. 94-142 and Section 504 when schools use such swift short-term disciplinary measures for disruptive students.[130]

The *Stuart* court, however, implied that the allowable short-term suspension period is limited to ten days.[131] If a ten-day suspension does not

119. 682 F.2d 595, 602 (6th Cir. 1982).

120. *Id.*

121. *Id.* The court noted that if a child is suspended he must still receive the procedural protections under Goss v. Lopez, 419 U.S. 565 (1975). *Id.*

122. *Id.*

123. 527 F. Supp. 661 (N.D. Ill. 1981).

124. 419 U.S. 565 (1975). *See supra* note 47.

125. 527 F. Supp. at 665.

126. 443 F. Supp. 1235 (D. Conn. 1978).

127. *Id.* at 1239.

128. *Id.* at 1242.

129. *Id.* Consequently, since no change in the child's educational placement has occurred, there is no need to adhere to the procedural safeguards required under P.L. 94-142 or Section 504. *Id.*

130. *Id.* at 1243. *Accord* Victoria L. v. District School Bd. No. 80-67 (N.D. FLA. 1980), *in* 3 EHLR at 552:265, 266 (1980-81) (P.L. No. 94-142 was not violated when a school suspended a handicapped child who brought dangerous objects to school and threatened other students with bodily harm).

131. 443 F. Supp. at 1239, 1242. *Compare* Blue v. New Haven Bd. of Educ., No. N81-41 (D. Conn. 1981), *in* 3 EHLR 552:401, 407 (1980-81) (court held that the school violated plaintiff's rights when the school attempted to suspend him for more than 10 days and expel him through the use of the normal disciplinary process) *with* Stanley v. School Admin. Unit No. 40, No. 80-9-D (D.N.H. 1980), *in* 3 EHLR 552:390, 395-96 (1980-81) (court denied an injunction because the plaintiff was unlikely to succeed in his claim that a 21-day suspension violated his rights under Section 504). The *Stanley* court based its decision on a finding by the school board that the plaintiff's disruptive behavior was not caused by his handicap or his current placement but by family problems. *Id.* The court then cited *Stuart v. Nappi* in support of its position. *Id.* Note, however, that after *Turlington*, school boards are not allowed to make determinations as to the relationship between a child's misconduct and his handicap, as was done in *Stanley*. S-1 v.

seem adequate, schools then have long-term methods of dealing with disruptive children.[132] Anything longer than a ten-day suspension, therefore, requires a specialized team to consider whether the plaintiff's current placement is appropriate according to applicable procedures.[133] Similarly, in *Doe v. Koger*[134] the court held that disruptive handicapped students may be suspended only until the school is able to place the student in an appropriate, more restrictive environment.[135]

B. *Expulsion*

The Fifth Circuit in *Turlington* focused on whether a handicapped student may ever be expelled, an issue the trial court did not decide.[136] The court held that expulsion may be used as a disciplinary measure without violating P.L. 94-142 and Section 504 if the proper procedures are used.[137] Specifically, if a placement team concludes that a student's misconduct is unrelated to his handicap and does so according to section 1415, the student may be expelled.[138] However, the court limited its holding by saying there could not be a complete cessation of educational services during the expulsion period.[139] The court in *Kaelin* specifically adopted this part of the *Turlington* decision.[140]

Given this limitation in *Turlington* and *Kaelin*, the amount of educational services required during an expulsion is unclear. One decision indicates that homebound instruction is not adequate during expulsion. In *John Blue v. New Haven Board of Education*,[141] a federal district court found that homebound instruction or placement in a different school pending an expulsion hearing deprived the plaintiff of his right to an education in the least restrictive environment.[142] The court based its decision on the fact that academic instruction on the homebound program was limited to ten hours per week and the plaintiff would have been cut off from all peer

Turlington, 635 F.2d 342, 347 (5th Cir. 1981). This determination must be made by a specialized and knowledgeable group of persons. *Id.* Although the *Stanley* court did not think a 21-day suspension violated the plaintiff's rights it reduced the suspension to 10 days. 3 EHLR at 552:396 (1980-81).

132. 443 F. Supp. at 1243.

133. *See id.*; Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328, 1337 (W.D.N.Y. 1979).

134. 480 F. Supp. 225 (N.D. Ind. 1979).

135. *Id.* It has been noted in a recent article that there remains a gray area after the *Turlington* decision, namely, whether frequent short-term suspensions amount to a constructive change in educational placement. Sindelar, *supra* note 57, at 7. The article concludes that a school system would be on notice that a child's placement was inappropriate if a given child was suspended too frequently. *Id.*

136. 635 F.2d 342, 348 (5th Cir.), *cert. denied* 454 U.S. 1030 (1981).

137. *Id.*

138. *See id.*

139. *Id.* The school officials argued that Congress would not have eliminated such an important disciplinary tool without stating so explicitly in either P.L. 94-142 or Section 504. Appellants' Opening Brief, *in* 3 EHLR 551:353, 362 (1979-80).

140. 682 F.2d 595, 602 (6th Cir. 1982). The *Kaelin* court takes an inconsistent position when it adopts the holding that there cannot be a complete cessation of services when handicapped children are expelled, yet feels that generally handicapped children can be disciplined in the same manner as nonhandicapped children. *See supra* text accompanying note 114.

141. No. N81-41 (D. Conn. 1981), *in* 3 EHLR 552:401 (1980-81).

142. *Id.* at 552:407.

interaction.[143] In addition, the plaintiff would have been denied participation in any special education programs.[144] The court concluded that expelling the plaintiff would exclude him from a placement more appropriate for his academic and social development.[145]

Likewise, in *Stuart* the court was particularly concerned that if the plaintiff was expelled her education might be reduced to homebound instruction which would hinder her social development and "perpetuate the vicious cycle" in which she was caught.[146] The court found that when a school expels a handicapped student it limits alternative placements as a method of implementing the requirement of an education in the least restrictive environment.[147]

Where homebound instruction is inadequate, the courts seem to be saying a handicapped child cannot be expelled from school even if his misconduct is unrelated to his handicap. This result creates a dual system of discipline for handicapped and nonhandicapped children.[148]

The local school officials in *Turlington* argued that a dual system of discipline ultimately harms handicapped children.[149] The officials explained that when a school cannot expel handicapped children it conveys to the children that their inappropriate behavior is excused because they have emotional problems stemming from their handicaps.[150] Consequently, the handicapped children receive a false perception of what society will expect from them as adults.

Opponents to expulsion feel that this superficially persuasive argument is clearly outweighed when the detrimental effect of expulsions on handicapped children is considered. Nonhandicapped children, they assert, are not as likely to be detrimentally affected when expelled.[151] The difference between a productive or an institutionalized life for a handicapped child will often depend on the amount of education the child receives.[152] Likewise, making individuals productive, versus social or financial burdens, serves the public interest.[153] The opponents concede a dual system of discipline may result, but argue that the potential benefits to handicapped children from not being expelled justifies differential

143. *Id.*
144. *Id.*
145. *Id.*
146. 443 F. Supp. 1235, 1240 (D. Conn. 1978).
147. *Id.* at 1242-43; *see* 20 U.S.C. § 1412 (1976). One commentator suggests that home-based instruction might only withstand judicial scrutiny if less restrictive alternatives, "such as one-to-one supervision, self-contained placement, placement in a special day school, and a residential program—have been tried and failed." Sindelar, *supra* note 57, at 6; *See* 34 C.F.R. § 300.552 (1981).
148. The local school officials in *Turlington* concluded that, "the effect of ruling that an expulsion in Florida constitutes a change in placement is that a handicapped child could not lose the right to educational services for the same misconduct for which a nonhandicapped child could lose the right to educational services." Appellants' Opening Brief, *in* 3 EHLR 551:360 (1979-80).
149. *Id.* at 551:361-62.
150. *Id.* at 551:362.
151. The plaintiffs' psychologist in *Turlington* testified that a total cessation of educational services during an expulsion is damaging to a handicapped child's educational potential. Brief for the United States, *in* 3 EHLR 551:572, 575 (1979-80) (*amicus curiae*).
152. *See* S. REP. No. 94-168, 94th Cong., 1st Sess. 9 (1975).
153. *See id.*

treatment.[154]

## IV. OPPOSITION TO *S-1 v. TURLINGTON* AND *KAELIN v. GRUBBS*

Some local school boards have opposed the *Turlington* and *Kaelin* holdings. They take the position that Congress never intended that suspension or expulsion constitute a change in educational placement.[155] They believe that Congress never meant to prohibit school boards from expelling handicapped students guilty of, for example, sexual assault, selling drugs, or attacking a teacher, as is the case under current law.[156] They assert that this is especially true in the case of children who are not seriously emotionally disturbed but who have slight physical handicaps or learning disabilities.[157]

The local school boards argue that changes in educational placement procedures were not designed to determine whether a child has committed certain misconduct. Instead, the procedures were designed to determine if a handicap exists and the appropriate placement.[158] One suggestion, by a Florida school board, is to allow handicapped students the same procedural and substantive due process protections that other students are entitled to under state law and *Goss v. Lopez*.[159] In Florida, these due process rights include informing the student what he is accused of and providing an opportunity for a hearing in which the student can confront and cross-examine the witnesses against him, and be represented by counsel.[160] At this evidentiary hearing all data relating to the child's handicap which might explain the misconduct or be considered a mitigating circumstance would be heard.[161] Consistent with current law, if the misconduct is found to be a manifestation of the handicap, the child would not be expelled.[162] If suspended or expelled the child would only be provided with the educational services which nonhandicapped students receive when expelled or

154. *See id.*

155. The school board where the *Turlington* case arose circulated a resolution for local school boards to sign to show their solidarity for legislation which would explicitly state that suspension and expulsion are not changes in educational placement. *See* Resolution attached to Position Paper and Rationale on Handling Suspensions and Expulsions of Handicapped Students, by Superintendent of Schools and the School Board of Hendry County, Florida (on file with the *Arizona Law Review*) [hereinafter Position Paper].

156. *See id.*

157. *See id.* Conceivably a child with an orthopedic handicap could assault a teacher or fellow student and never be expelled, even though she clearly knows her conduct is wrong. As long as someone will testify that the misconduct is related to her handicap, her punishment is at most to be moved to a more restrictive environment. *See* Position Paper, *supra* note 155, at 2. Part of this problem is due to the broad definition of "handicapped" in P.L. 94-142 and Section 504. Currently, any child who is "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired or other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of these impairments need[s] special education related services," is considered handicapped. 34 C.F.R. § 300.5(a) (1981). The school boards are particularly concerned that, for example, an orthopedically impaired or speech impaired child could be selling large quantities of drugs at the school, yet under current law could not be expelled. *See infra* note 164.

158. *See* Position Paper, *supra* note 155, at 2.

159. *Id.* at 1. See the discussion of *Goss v. Lopez, supra* note 47.

160. *See* Position Paper, *supra* note 155, at 3.

161. *Id.*

162. *See id.* at 4.

suspended.[163] Because these evidentiary hearings would be used in all discipline proceedings for all children, no dual system of discipline would exist.[164] Additionally, costly educational placement hearings for disciplinary matters could be avoided.

Those who represent handicapped students, however, fear that returning the disciplinary function to school boards will result in discrimination against the handicapped. School board members who are untrained may neither understand nor be able to effectively discipline handicapped children.[165] Because change of placement procedures are carried out by specialized persons familiar with the individual needs of handicapped children, there is a greater assurance that these children will not be summarily dismissed from classrooms and denied an appropriate education.[166]

## CONCLUSION

P.L. 94-142 and Section 504 were passed to guarantee that handicapped children would receive an appropriate public education. To ensure this right, procedural safeguards have been established that allow parents to make complaints regarding any matter affecting their handicapped children's education. One area in which parents have taken advantage of the complaint mechanisms is in the suspension and expulsion of their handicapped children. The decisions in *S-1 v. Turlington* and *Kaelin v. Grubbs* have validated this avenue of contesting suspensions and expulsions by holding that expulsion is a change in educational placement triggering all of the procedural safeguards in P.L. 94-142. Clearly, the trend in this area is to interpret P.L. 94-142 and Section 504 liberally to fully ensure a handicapped child's right to an appropriate public education.

The current status of suspensions may be summarized as follows: (1) handicapped children may be suspended immediately if they are a danger to themselves, other students, or teachers; (2) a handicapped child may be suspended using the same procedures used for nonhandicapped children for periods of ten days or less; and (3) if any disciplinary action longer than ten days is necessary there must be a determination by a qualified group of persons whether the child's placement is appropriate.

The decisions pertaining to expulsions clearly hold that: (1) no child may be expelled if a qualified group of persons determines that his misconduct is related to his handicap; and (2) if a child's misconduct is not related

163. *See id.*

164. The Florida proposal uses the following example to show the disparity in the current law. Suppose two students were caught selling drugs, one handicapped and the other nonhandicapped. Currently, the handicapped child would be reevaluated and placed appropriately without termination of services. The nonhandicapped student would be expelled through regular expulsion proceedings and would have all educational services cut off. The local school officials consider this result patently unfair. Position Paper, *supra* note 155, at 4.

165. The local school officials argue it should not be presumed that returning disciplinary decisions to the local level would result in the abuse of handicapped students simply because the students are handicapped. Position Paper, *supra* note 155, at 5.

166. 34 C.F.R. § 300.533(a)(3) (1981) requires that placement decisions be made by persons knowledgeable about the child, the meaning of evaluation data and placement options.

to his handicap he may be expelled, although all educational services may not be terminated.

In effect, expulsion as one traditionally thinks of it—a period away from school with no educational services—is not available when a handicapped student is involved. The consensus of all decisionmaking bodies is that appropriate placement, not expulsion, is the correct method of dealing with disruptive handicapped students.