

ARTICLES

THE DEATH KNEEL FOR SCHOOL EXPULSION: THE 1997 AMENDMENTS TO THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

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INTRODUCTION

Americans want safe schools. News reports of gun-wielding students and drive by shootings have generated fear and outrage at the actions of our nation's youth and the lack of safety in our public schools.¹ In response, Congress enacted the Gun Free Schools Act of 1994.² This Act applies to all school systems, and mandates a one year expulsion for any child who brings a firearm to school.³ This law symbolizes the "get tough" attitude on violence in the schools, and recognizes the acceptance of expulsion as the alternative of choice in dealing with dangerous students.⁴ Early reports indicate that 6,276 students from twenty-nine reporting states and the District of Columbia were expelled in the 1995-96 academic year for bringing guns or other weapons to school.⁵ The Gun Free Schools Act also states that it should be construed in a manner consistent with the Individuals with Disabilities Education Act.⁶ Thus, this get tough attitude prevails, in a modified form, in the treatment of disabled students.

Since 1975, disabled students have been entitled to a free appropriate public education under federal law. This law, the Individuals with Disabilities Education Act ("IDEA"),⁷ was enacted in response to

1. See, e.g., Don Jacobs, *Student Caught With Gun—Again*, KNOXVILLE NEWS-SENTINEL, Oct. 8, 1997, at A4 (reporting on seizure of semiautomatic pistol from high school senior); Jim Kirksey, *Gun-case Sentences Suspended; Parents Apologize For Boy Taking Weapon to School*, DENV. POST, Sept. 19, 1997, at B-01 (reporting on case of five-year-old boy who brought revolver to kindergarten class).

2. Gun Free Schools Act of 1994, 20 U.S.C. §§ 8921-8926 (1994).

3. See *id.* § 8921(b)(1).

4. See generally Paul M. Bogos, "Expelled: No Excuses, No Exceptions"—Michigan's Zero-Tolerance Policy in Response to School Violence, 74 U. DET. L. REV. 357 (1997) (discussing toughening approach taken by federal and state legislators in response to school violence).

5. See Vice President Albert Gore, Jr., Address at Dep't of Educ. Conference (June 16, 1997) (on file with *The American University Law Review*); see also LISA D. BASTIAN & BRUCE M. TAYLOR, U.S. DEP'T OF JUSTICE, SCHOOL CRIME: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT 10-12 (NCJ-131645) (1991) (reporting that almost one-half million of surveyed students reported taking weapon to school for self-protection).

6. See 20 U.S.C. § 8921(c). The Jeffords Amendment, discussed below, was enacted to modify the Gun Free Schools Act for disabled students but still includes them in the Gun Free Schools Act's mission of excluding dangerous students from the school environment. See 140 CONG. REC. S10,009 (daily ed. July 28, 1994).

7. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1491(o) (1994) (formerly the "Education of the Handicapped Act"), amended by Individuals with Disabilities

the fact that more than half of the nation's eight million disabled children were not receiving appropriate educational services, and that one in eight were being excluded from the public school system altogether.⁸ The law gives parents of disabled students the right to be a part of educational decisions made for their child and to bring complaints to a due process hearing, with an appeal to state or federal court, if they feel their child is not receiving an appropriate education.⁹ During these appeals the child must remain in the current placement, or "stay put," unless the parents agree to a different placement.¹⁰ These due process and "stay put" provisions were interpreted by the Supreme Court as preventing the expulsion or long term suspension¹¹ of disabled students without proper special education procedure until all appeals were concluded.¹² In addition, the Department and several courts interpreted the Act's right to a free appropriate public education as a prohibition of cessation of educational services to special needs students, regardless of the procedure used or the nature of their misbehavior.¹³ Other courts disagreed.¹⁴

The tension between the stay put and education provisions of the IDEA and the expulsion requirement in the Gun Free Schools Act of 1994 was resolved through the enactment of the Jeffords Amendment to the Improving America's Schools Act of 1994.¹⁵ This Amendment allowed school administrators to bypass the special education due process and stay put requirements and immediately place a disabled student who carried a firearm to school in an alternative educational placement for up to forty-five days.¹⁶ All other disciplinary violations that would result in suspension or expulsion continued to be limited by special education procedures and the stay put rule.¹⁷

Many schools and parents complained that a dual system of discipline is not justified, that the school's authority over disabled youth

Education Act of 1997, Pub. L. No. 105-17, 1997 U.S.C.A.N. (111 Stat.) 37 [hereinafter IDEA Amendments of 1997].

8. See *id.* § 1400(b)(1)-(4).

9. See *id.* § 1415(k)(6)(A)(i),(ii).

10. See *id.* § 1415(k)(7)(A).

11. As used in this Article, the terms "expulsion" and "long-term suspension" mean a removal from school with a termination of all rights to educational services for a significant period of time, at least more than ten days. The terms have varying lengths of exclusion associated with them under state laws and local practice. As discussed at length below, their meaning under the 1997 Amendments is subject to debate.

12. See *infra* Part I.B.

13. See *infra* Part I.C.

14. See *id.*

15. See 20 U.S.C. § 1415(e)(3)(B).

16. See *id.*

17. See *id.* § 1415(e)(3)(A).

was too limited, that the disabled should not be protected from punishment for their dangerous actions, and that others in the school should not be forced to accept the presence of any type of dangerous or highly disruptive student.¹⁸ Others felt that any intrusion on the rights of the disabled to an education ran the risk of returning the country to the "bad old days," when disabled children were shamefully neglected by the public education system.¹⁹

The competing concerns of school safety and the proper education of disabled students have recently achieved at least a temporary truce. On June 4, 1997, President Clinton signed into law the IDEA Improvement Act of 1997.²⁰ The 1997 Amendments received 420 affirmative votes in the house to three nays,²¹ and ninety-eight affirmative votes in the Senate with one negative.²² The law is a remarkable "bicameral, bipartisan, legislative branch, executive branch collaborative effort"²³ to improve the delivery of educational services to disabled children in the United States.²⁴

The Amendments make many substantial changes to the Individuals with Disabilities Education Act. In particular, they add a section to the IDEA that specifically addresses the discipline of special education students.²⁵ Perhaps most significant, the discipline amendments forbid the termination of educational services through expulsion or suspension in excess of ten days for disabled children, even if there is no connection between their misbehavior and handicapping condition.²⁶ In addition, the Amendments extend the IDEA's protection from school discipline to certain students who are not currently identified as disabled students but request that identification, and significantly alter the rights given to school administrators in the Improving American Schools Act of 1994 ("IASA") to remove gun-wielding students.²⁷

This Article addresses the sweeping changes made by the discipline Amendments and how they reflect the tension between the pro-expulsion and pro-special education sentiments of Congress. It as-

18. See 140 CONG. REC. S10,008-19 (daily ed. July 28, 1994) (discussing views on Jeffords amendment).

19. See *id.*

20. IDEA Amendments of 1997, Pub. L. No. 105-17, 1997 U.S.C.C.A.N. (111 Stat.) 37 (amending Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1491(o) (1994)).

21. See 143 CONG. REC. H2567 (daily ed. May 13, 1997).

22. See 143 CONG. REC. S4411 (daily ed. May 14, 1997).

23. S. REP. NO. 105-717, at 2 (1997).

24. See IDEA Amendments of 1997, § 687(c)(1), 1997 U.S.C.C.A.N. (111 Stat.) at 38.

25. See *id.* § 615(k), 1997 U.S.C.C.A.N. (111 Stat.) at 97.

26. See *id.* § 615(k)(8)(A), 1997 U.S.C.C.A.N. (111 Stat.) at 97.

27. See Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified in scattered sections of 20 U.S.C.).

serts that these provisions not only end expulsion of special education students, but will profoundly affect the use of expulsion as a disciplinary tool for regular education students. Section I provides the legal background of the IDEA and its application by the courts and the Department of Education in the area of school discipline prior to the 1997 Amendments. Section II reviews each paragraph of the discipline section of the 1997 Amendments, analyzing the changes made in pre-existing law, the ambiguities, and the inadequacies.

This Article concludes that the 1997 Amendments signal the death knell of expulsion. By extending protection from expulsion to conduct unrelated to the handicap and to students not formally identified as disabled, the new law renders it politically and practically difficult to continue the dual system of school discipline. The problem is exacerbated by the lack of a clear demarcation between the non-disabled and disabled. Research indicates frightening gaps in the identification of disabilities by schools.²⁸ In fact, a strong argument can be made that repeated behavioral incidents resulting in expulsion are sufficient to qualify a child as disabled under the Act. Difficulty of identification and a lack of free alternative education for non-disabled students will mean that those students whose parents are savvy enough to pursue their legal rights under the IDEA or wealthy enough to gain alternative education will avoid expulsion or its concomitant harm, whereas those whose parents are not as savvy or wealthy will not.

Most importantly, even if identification of disabled students were accurate and complete, the 1997 law evinces the realization that failure in and rejection from the public school system is often a precursor to a life of poverty or crime. Although the disabled present a more sympathetic and hopeful picture, the same dismal prognosis is true for non-disabled students. Concern for the future of all expelled children, and for the communities into which they are prematurely pushed, will fuel the funeral pyre of expulsion and the exploration of free alternative education for all students, disabled or not, who are unable to continue their education in a mainstreamed environment.

28. See discussion in Conclusion and notes, and in Part II.H.3.a and notes.

I. BACKGROUND: THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND THE LEGACY OF *HONIG V. DOE*

A. *The Act*

The Individuals with Disabilities Education Act was passed in 1975 in response to a Congressional perception that handicapped children were being excluded from education in America.²⁹ The goal of the IDEA is to ensure a "free appropriate public education" for all children with disabilities.³⁰ The Act attempts to achieve this goal by imposing a variety of substantive and procedural obligations on states that agree to participate in return for federal dollars.³¹ The IDEA is accompanied by detailed implementing regulations with which the state and local educational agencies must also comply.³² In 1994-95, over 5.4 million U.S. students from the ages of three to twenty-one,³³ approximately 10% of the student population,³⁴ were served by this Act.

The Act requires that participating states find and identify students in need of special education.³⁵ The identification and the required services are determined by a group of informed and concerned indi-

29. A thorough discussion of the Act's legislative history is found in *Board of Education v. Rowley*, 458 U.S. 176, 179-180, 191-203 (1982).

30. See Individuals with Disabilities Education Act, § 33, 20 U.S.C. § 1412(1)-(2)(B) (1994) (formerly the "Education of the Handicapped Act"), amended by IDEA Amendments of 1997, 1997 U.S.C.C.A.N. (111 Stat.) 37.

31. See generally 20 U.S.C. § 1412 (establishing eligibility requirements for states to qualify for assistance under IDEA). Currently, all states participate. See U.S. DEP'T OF EDUC., THE DIGEST OF EDUCATION STATISTICS tbl. 54 (1996). It was noted before the 1994 Congress that although the cost of special education is approximately \$30 billion per year, less than ten percent of these funds are federal, with the rest coming from state and local government. See *Hearing on the Reauthorization of the Individuals with Disabilities Act (IDEA), 1994: Hearings Before the Subcomm. on Select Educ. and Civil Rights of the House Comm. on Educ. and Labor*, 103d Cong. 94 (1994) [hereinafter *IDEA Reauthorization Hearing*]. Comments in the 1997 Senate indicate that only 7% of special education costs are funded by the Federal government. See 143 CONG. REC. S4008 (daily ed. May 6, 1997) (statement of Sen. Bond).

32. See Assistance to States for the Education of Children with Disabilities, 34 C.F.R. §§ 300.1 to .754 (1997).

33. See OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP'T OF EDUC., TO ASSURE THE FREE APPROPRIATE PUBLIC EDUCATION OF ALL CHILDREN WITH DISABILITIES: OSEP'S 18TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, Number and Disabilities of Children and Youth Served Under IDEA, Part B 1996 [hereinafter OSEP 1996 REPORT] (providing statistics about effect of IDEA).

34. *IDEA Reauthorization Hearing*, *supra* note 31, at 89, 94 (written testimony of Dorothy Kerzner Lipsky and Alan Gartner, National Center on Educational Restructuring and Inclusion, The City University of New York). In 1995, 12% of students enrolled in public schools were receiving services in federally funded programs as children with disabilities. See *The Condition of Education 1997*, Indicator 46 (on file with *The American University Law Review*). From 1990 to 1995, the number of students identified as having disabilities increased by 12.7%. See OSEP 1996 REPORT, *supra* note 33, at 1.

35. IDEA Amendments of 1997, § 612(a)(3)(A), 1997 U.S.C.C.A.N. (111 Stat.) at 61.

viduals including the parents, teacher, and a special educator.³⁶ If, through thorough testing, the student is identified as disabled, the team will develop an Individualized Educational Plan (IEP) for the student each year.³⁷ The law grants the parents or guardians of the student due process rights to be informed, participate in the meetings to plan the educational program, consent to the initial placement in specialized programming, and challenge the school's proposed program or changes in the program, through administrative hearings and appeals to state or federal courts.³⁸ The Act states that during the course of such administrative and judicial proceedings, the child must remain in their current educational placement, or "stay put."³⁹

B. *Stay Put and School Discipline*

Prior to the 1997 Amendments, the IDEA had no provisions regarding the discipline of special education students. Many cases arose concerning the legality of suspending or expelling identified students, with parents claiming that such action was a change in placement under the IDEA that could not be accomplished without proper IEP and due process procedures.⁴⁰ In its 1988 *Honig v. Doe* decision, the Supreme Court agreed.⁴¹ The Court noted that a long-term suspension or expulsion is a change in the child's educational placement and therefore triggers the Act's procedural protections of notice to the parents, an IEP meeting, evaluation, and stay put.⁴² The Court held that a suspension of less than ten days does not constitute such a change of placement and thus does not involve the IDEA's procedural protections.⁴³ The Court stated that school officials may not suspend for more than ten days or expel special education stu-

36. See 34 C.F.R. § 300.344 (1997).

37. See 20 U.S.C. § 1414(a)(5); see also 34 C.F.R. §§ 300.340 to .350.

38. See 20 U.S.C. § 1415; see also 34 C.F.R. §§ 300.345, .500 to .515.

39. See 20 U.S.C. § 1415(e)(3)(A) provides, "[d]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child." The 1997 Amendments altered this section slightly, to provide exceptions as outlined in the discipline section. See IDEA Amendments of 1997, § 615(j), 1997 U.S.C.A.N. (111 Stat.) at 93.

40. See, e.g., *Jackson v. Franklin County Sch. Bd.*, 765 F.2d 535, 538 (5th Cir. 1985); *Victoria L. v. District Sch. Bd.*, 741 F.2d 369, 374 (11th Cir. 1984); *S-1 v. Turlington*, 635 F.2d 342, 348 n.9 (5th Cir. 1981).

41. *Honig v. Doe*, 484 U.S. 305 (1988). Two emotionally disturbed students challenged the San Francisco United School District's decision to suspend indefinitely, and possibly expel, the students for violent and disruptive behavior. The students claimed that the suspensions violated the "stay put" provisions of the Education of the Handicapped Act.

42. See *id.* at 311-12.

43. See *id.* at 325 n.8 (stating that Court defers to Department of Education's position that a suspension of up to ten school days does not amount to change in placement).

dents for misconduct, even if the student is disruptive or dangerous, without complying with the procedures of the Act.⁴⁴

The *Honig* Court refused to read a dangerousness exception into the stay put requirement that would allow schools to expel students they felt were a danger to themselves or others.⁴⁵ The Court held that an immediate change in placement is possible only if the parents agree with the change.⁴⁶ In emergency situations, however, where a child poses an immediate threat to the safety of himself or others and the parents do not agree to a change in placement, the school may suspend the child for up to ten days and seek a court order temporarily enjoining the child from attending school.⁴⁷ The Court further noted that normal disciplinary procedures such as the use of study carrels, time outs, detention, or restrictions of privileges are still available to school officials for use with special education students.⁴⁸ In addition, through the use of the IEP process, the team may make changes in the child's placement and program to address the misconduct.⁴⁹ Under the IDEA, however, school administrators may not unilaterally decide to cease providing educational services to a disabled child through expulsion because of misconduct related to their disability.⁵⁰

C. Cessation of Educational Services

Although *Honig* did not expressly determine whether a disabled child could ever be expelled, that is, denied services for misconduct *unrelated* to the disability,⁵¹ it seemed unlikely that the Supreme Court would so hold. The language of the Act provided an unqualified right to a free appropriate public education to all disabled students and made no provision for a termination of services to disabled children for disciplinary reasons.⁵² The Supreme Court's refusal in *Honig* to read a dangerousness exception into the Act's stay put provision

44. See *id.* at 324.

45. See *id.* at 323 (rejecting petitioner's request to read a "dangerousness" exception into provision, stating that "we are . . . not at liberty to engraft onto the statute an exception Congress chose not to create").

46. See *id.* at 311-12.

47. See *id.* at 326 (noting that when "the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts . . . to grant any appropriate relief").

48. See *id.* at 325.

49. See *id.* at 326.

50. See *id.* at 323-24.

51. See *id.* at 306 (observing that "stay put" provision applies to disruptive conduct of children that grows out of their disability).

52. See *id.* at 309 (stating that purpose of act was to "assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs" (quoting 20 U.S.C. § 1400(c))).

signaled the unlikelihood that the Court would read a discipline exception into the Act's requirement of a free appropriate public education. Thus, expulsion of handicapped students for unrelated or related conduct would be prohibited.

This view was espoused by the Fifth Circuit in *S-I v. Turlington*.⁵³ The court in *Turlington* stated that a handicapped student could be expelled for conduct unrelated to the disability, but that educational services could not be terminated.⁵⁴ This holding established the principle that "expulsion" could mean removal from the regular school building or program without a cessation of educational services. Although this redefinition of "expelled" and interpretation of the IDEA was widely followed,⁵⁵ the Ninth Circuit disagreed.⁵⁶

The Department of Education attempted to clear the waters by issuing a policy letter interpreting the Act to allow the "expulsion" or "long-term suspension" of a disabled child for conduct unrelated to the handicap, but requiring a continuation of services during the absence from school.⁵⁷ This letter, however, was challenged as an improperly implemented legislative rule.⁵⁸ The Seventh Circuit upheld

53. 635 F.2d 342 (5th Cir. 1981). *Turlington* involved mentally retarded plaintiffs who brought suit under the Education for all Handicapped Children Act and section 504 of the Rehabilitation Act of 1973 after being expelled from a Florida High School for alleged misconduct.

54. See *id.* at 348.

55. See Gail Paulus Sorenson, *Special Education Discipline in the 1990's*, 62 EDUC. L. REP. 387, 392 (1990) (discussing this redefinition of "expelled" and addressing cases that followed this interpretation); see also *Light v. Parkway C-2 Sch. Dist.*, 41 F.3d 1223, 1228 (8th Cir. 1994) (noting that "the removal of a dangerous disabled child from her current placement alters, but does not terminate, her education under the IDEA"); *Kaelin v. Grubbs*, 682 F.2d 595, 602 (6th Cir. 1982) (holding that "even during the expulsion period there may not be a complete cessation of educational services"); *Magyar v. Tucson Unified Sch. Dist.*, 958 F. Supp. 1423, 1428 (D. Ariz. 1997) (stating that schools "must provide educational services to handicapped students who are expelled for reasons found to be unrelated to their handicapping condition").

56. See *Doe v. Maher*, 793 F.2d 1470, 1482 (9th Cir. 1986) ("We do not hold, however, that a school district may never withhold educational services from a handicapped child. If the child's misbehavior is properly determined *not* to be a manifestation of his handicap, the handicapped child can be expelled.") (internal citation omitted), *aff'd as modified sub nom. Honig v. Doe*, 484 U.S. 305 (1988).

57. See R. Davila, *Letter to Mrs. Ruth B. Davis*, Mar. 16, 1990, U.S. DEP'T OF EDUC., OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVS.

We continue to believe that all states and school districts, including those within the Ninth Circuit, are required . . . to ensure that special educational services are provided to children with handicaps, during periods of long-term suspension or expulsion, regardless of whether the child's misconduct is a manifestation of the handicapping condition.

Id. This 1990 letter reaffirmed an earlier pronouncement by the Office of Special Education Programs. See *EHA Policy Letter*, EHLR (CRR) 213-58 (1989) (on file with *The American University Law Review*). The statement was reaffirmed on several occasions. See *OSEP Letter of Aug. 25, 1994*, 21 IDELR 997; *OSEP Letter of Dec. 16, 1994*, 22 IDELR 372; *OSEP Letter of Dec. 16, 1994*, 21 IDELR 1134; *SEP Letter of Oct. 19, 1995*, 23 IDELR 894.

58. See *Metropolitan Sch. Dist. v. Davila*, 969 F.2d 485, 487 (7th Cir. 1992) (stating that school district challenged implementation of policy letter as a legislative rule because it did not

the letter as a policy interpretation which is not subject to the notice and comment requirements of the Administrative Procedures Act.⁵⁹ The Seventh Circuit noted, however, that "[i]nterpretive rules, although they are entitled to deference, do not bind reviewing courts."⁶⁰ The Fourth and Seventh Circuits recently disregarded the policy letter and followed the Ninth Circuit in holding that no educational services were required when a handicapped child was expelled or placed on long-term suspension for conduct unrelated to their disabilities.⁶¹

The holding and progeny of *Honig* established a clear dichotomy in public education discipline. Under *Honig*, special education children could not be expelled until after due process proceedings had been completed, and could not be expelled at all for conduct related to their disability.⁶² The typically generous interpretation of conduct relating to a disability, and the uncertainty of whether expulsion was permissible even for conduct unrelated to the disability, largely eliminated expulsion as a viable disciplinary tool for special education students. The discipline of regular education students can involve expulsion, however, as long as the school complies with the minimal due process notice and hearing requirements established in *Goss v. Lopez*.⁶³ This stark difference in the treatment of disabled and

provide notice or opportunity for district to comment).

59. See *id.* at 494. The IDEA Amendments of 1997 address the concerns of the schools that were raised in the *Davila* case. Section 607(c) now states "[t]he Secretary may not, through policy letters or other statements, establish a rule that is required for compliance with, and eligibility under, this part without following the requirements of Section 553 of Title 5, United States Code." IDEA Amendments of 1997, Pub. L. No. 105-17, § 607, 1997 U.S.C.C.A.N. (111 Stat.) 37, 48.

60. *Davila*, 969 F.2d at 490; see also *Honig*, 484 U.S. at 325 n.8 (noting that in cases of ambiguity the court will defer to construction adopted by agency charged with monitoring and enforcing the statute).

61. See *Doe v. Oak Park & River Forest High Sch. Dist.* 200, 115 F.3d 1273, 1279 (7th Cir.) (finding no violation of IDEA when school did not provide alternative services to expelled child during expulsion for conduct unrelated to disability), *cert. denied*, 118 S. Ct. 564 (1997); *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 561 (4th Cir. 1997) (stating that IDEA does not require that "every disabled child be provided a free public education regardless of state disciplinary policies governing the provision of educational opportunities to disabled students expelled or suspended for criminal or other serious misconduct wholly unrelated to their disabilities").

The Gun Free Schools Act, which requires schools to have a policy of expelling students for one year for possession of a gun, also does not provide whether an "expelled" child can or must continue to receive educational services. See 20 U.S.C. § 8921 (1994). The Department of Education, however, has noted that it does not prohibit the provision of alternative education while a special education student is expelled. See U.S. DEP'T OF EDUC., CREATING SAFE AND DRUG-FREE SCHOOLS: AN ACTION GUIDE—SEPTEMBER 1996, PREVENTING JUVENILE GUN VIOLENCE IN SCHOOLS (1996).

62. See *Honig*, 484 U.S. at 323-24 (stating that the child remains in school "during the pendency of any proceedings initiated under the Act").

63. See *Goss v. Lopez*, 419 U.S. 565, 581 (1975) (stating that due process requires that the student be given oral or written notice of charges against them and an opportunity to present

non-disabled students created incentives, apart from educational services, for students to request classification as special education students.⁶⁴ Following *Honig*, it was clear that the courts would not have long to wait to address the issue of whether students who were involved in the regular education program at the time of a disciplinary event could then request special education status and its concomitant disciplinary treatment—in particular, the stay put provision.

D. Stay Put and Non-Identified Students

A regular education student requesting special education status and services following a disciplinary incident may be seeking two disciplinary benefits: first, a delay in disciplinary action, and second, a less harsh result. By activating the stay put requirement, the student cannot be expelled while administrative and judicial appeals are in progress.⁶⁵ Despite the expedited schedule of administrative hearings required by the federal regulations⁶⁶ and many states' regulations,⁶⁷ these guidelines do not govern the federal or state court schedule; therefore, the stay put rule may delay expulsion for months, if not years.⁶⁸ For many students this delay would see them through graduation.

The second benefit is the potential result. If the student is found to be a child with a disability and entitled to services under the Act, then expulsion is not an option for conduct related to the disability and perhaps even for conduct not related to the disability.⁶⁹ If any student can trigger this process by claiming a not easily discovered disability, such as a learning disability or emotional handicap, the potential impact on discipline in public education is enormous.

Given these incentives, two questions were quickly presented to the

their side of story).

64. See Omyra M. Ramsingh, *Disciplining Children with Disabilities under the IDEA*, 12 J. CONTEMP. HEALTH L. & POL'Y 155, 172-75 (1995) (discussing and criticizing practice of non-disabled, disruptive students escaping discipline by requesting identification as disabled and thus allowed the benefit of the stay put provision).

65. See 20 U.S.C. § 1415(e)(3)(A), amended by IDEA Amendments of 1997, Pub. L. No. 105-17, 1997 U.S.C.A.N. (111 Stat.) 37 (providing that during pendency of any proceedings, the child shall remain in his current educational placement).

66. Department of Education Regulation requires a final decision within 45 days of the request for a hearing. See 34 C.F.R. pt. 300.512 (1997).

67. For example, Massachusetts regulations require that a special education hearing be conducted within twenty days of a request, see 603 Mass. Regs. Code tit. 603, § 28.402.3 (1993), and that a written decision be issued within forty-five days of the request, see *id.* § 28.403.1.E.

68. The Supreme Court in *Honig* noted that "administrative and judicial review under the EHA is often 'ponderous,'" and observed that "this case, which has taken seven years to reach us, amply confirms that observation." *Honig v. Doe*, 484 U.S. 305, 322 (1988) (citation omitted).

69. See *id.* at 324 (stating that the District Court enjoined future expulsions "on grounds of discipline") (internal citation omitted).

federal courts: first, whether a student can properly request special education identification after the school plans to expel the child for a disciplinary event, and second, if such a request is granted, whether the stay put provision would then apply. In 1992, the Ninth Circuit addressed the first issue in *Hacienda La Puente Unified School District of Los Angeles v. Honig*.⁷⁰ The court held that "[t]he IDEA and accompanying federal regulations . . . make plain that, even though not previously identified as disabled, the student's alleged disability may be raised in an IDEA administrative due process hearing."⁷¹ The court stated further:

A contrary result would frustrate the core purpose of the IDEA, which is to prevent schools from indiscriminately excluding disabled students from educational opportunities. In enacting the IDEA, Congress specifically recognized that undetected disabilities prevent many children from "having a successful educational experience." If we found issues concerning the detection of disabilities to be outside the scope of IDEA "due process hearings," school districts could easily circumvent the statute's strictures by refusing to identify students as disabled.⁷²

Although stay put was not specifically raised in this case, *Hacienda's* dicta strongly suggests that stay put is required for students in such situations.⁷³ The court noted that its holding was consistent with the Supreme Court's *Honig* decision. Citing *Honig*, the court held that in passing the IDEA, "Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school."⁷⁴ *Hacienda*, then, argues that "the broad language used by the Supreme Court leaves the unmistakable impression that all disabled students, whether or not possessing 'previously identified exceptional needs' are entitled to the procedural protections afforded under IDEA."⁷⁵ The right to a due process hearing on identification is one of these procedural protections, and stay put is another.⁷⁶

70. 976 F.2d 487 (9th Cir. 1992) (considering whether child not previously identified as disabled may raise an alleged disability at hearing following disciplinary event).

71. *Id.* at 492.

72. *Id.*

73. See *id.* (stating in dicta that stay put provision should apply to situation in which parent attempts to classify his child as disabled after a disciplinary event). The Ninth Circuit discussed how California law, which was urged as support for *Hacienda's* petition, if so interpreted, would be contrary to the IDEA and null. See *id.* at 493. *Honig* also invalidated a provision of California special education law as contrary to the IDEA. See *Honig*, 484 U.S. at 316-17.

74. *Id.* (citing *Honig*, 484 U.S. at 323).

75. *Id.* at 494.

76. See 20 U.S.C. § 1415(e)(3) (1994), amended by IDEA Amendments of 1997, Pub. L. No. 105-17, 1997 U.S.C.C.A.N. (111 Stat.) 37.

The Massachusetts District Court took *Hacienda* another step when it held in *Deborah V. v. Leonard* that the stay put provision applies when a student who is suspended, pending expulsion, requests special education services.⁷⁷ The Southern District of California, in *M.P. v. Grossmont Union High School District*,⁷⁸ similarly expanded the *Hacienda* holding by extending it to students who had never previously requested special education services.⁷⁹ In its opinion, the court expressed serious concerns that such holdings would undermine the disciplinary process of the public schools, but felt obligated to honor the binding precedent of the Ninth Circuit.⁸⁰

The District Court for the Western District of Wisconsin also accepted the *Hacienda* reasoning in *Steldt v. School Board of Riverdale*, applying it to a student who had been in special education but whose parents had removed him from special services over a year before the disciplinary incidents that resulted in his expulsion.⁸¹ The court held that the student could request special education services after the expulsion was recommended and that stay put must apply.⁸² Unlike the more reluctant *M.P.* court, the court in *Steldt* concluded that:

The IDEA is intended to restrict school authorities from expelling students with disabilities arbitrarily and unilaterally. The elaborate hearing and review procedures, the stay-put provision and the lack of any exception for dangerous students reveal Congress's intent to end what it found to be a widespread practice of dealing with hard-to-handle disabled students simply by labeling them as behavioral problems and barring them from the classroom without providing educational alternatives. In drafting these acts, Congress evinced its belief in the importance of free appropriate public instruction for all children and a correlative belief that the schools could find more effective ways than expulsion of responding to the discipline problems presented by emotionally disturbed students. . . . Although in this case there is nothing to suggest that defendants have been remiss in any respect in allowing plaintiff to be removed from special education, a holding that a school board may unilaterally expel any student not currently classified as being in need of services could undermine the purposes of the legislation. Other school districts might read such a holding as an incentive to delay the classification of emotionally disturbed students as students in need of

77. See *Deborah V. v. Leonard*, No. 93-11984, 1993 U.S. Dist. Lexis 13805 (D. Mass. Sept. 24, 1993). The Massachusetts District Court reaffirmed the *Hacienda* interpretation of the IDEA in 1996 in *Richard V. v. City of Medford*, 924 F. Supp. 320, 322 (D. Mass. 1996).

78. 858 F. Supp. 1044 (S.D. Cal. 1994).

79. See *id.* at 1048.

80. See *id.* (discussing potential for abuse of protections provided by IDEA).

81. *Steldt v. School Bd. of Riverdale Sch. Dist.*, 885 F. Supp. 1192, 1197 (W.D. Wis. 1995).

82. See *id.* at 1196.

services.⁸³

In *Rodiericus v. Waukegan School District No. 60*,⁸⁴ the Northern District of Illinois accepted this line of precedent as staunchly based on the IDEA, its regulations, and its history.⁸⁵ The court recognized that a student might utilize this procedure simply to avoid justifiable discipline, but noted that under *Honig* the school can use alternative forms of discipline or request a court order to exclude a "truly dangerous child."⁸⁶ In its holding, the court emphasized that a disabled person should not be denied the protection of the IDEA because of the fear of improper use:

Congress concluded that many children with disabilities are excluded from school, probably often as a result of disciplinary problems that are caused by their disabilities. Indeed, the *Honig* Court cited Congressional statistics which revealed that more than 12 percent of the 8 million disabled children in 1975 were excluded from school and that 82 percent of children with emotional disabilities were not having their educational needs met. It would not be surprising that the precipitating event that would trigger a parent or guardian's awareness that a student had a right to an evaluation under IDEA, or that a serious problem in fact existed, would be the point at which a school began to attempt to exclude the student.⁸⁷

The *Rodiericus* defendants argued that the court should only apply the stay put provision if the school "knew or should have known" that the student had a disability,⁸⁸ a limitation that was espoused by the U.S. Department of Education in an official memorandum.⁸⁹ The

83. *Id.* at 1197 (citations omitted).

84. 889 F. Supp. 1045 (N.D. Ill. 1995), *rev'd*, 90 F.3d 249 (7th Cir. 1996).

85. *See id.* at 1050. In its decision, the court stated:

To accomplish its goals, the Act requires states to provide an opportunity to present complaints regarding "any matter relating to the identification, evaluation, or educational placement of the child." States must insure that once such complaints are submitted, there is an opportunity for "an impartial due process hearing." The federal regulations issued pursuant to IDEA also state that a parent or public educational agency may obtain a hearing when a school district refuses to initiate or change the identification, evaluation or educational placement of the child. These provisions clearly authorize children who are not yet identified as disabled to invoke the IDEA evaluation and due process hearing procedures.... "The language of Section 1415(e)(3) is unequivocal."... *Rodiericus* "shall remain in the then current educational placement."

Id. at 1048-49 (internal citations omitted).

86. *Id.* at 1050.

87. *Id.* (citations omitted).

88. *See id.*

89. *See* OSEP MEMORANDUM NO. 95-16, 22 IDELR 531, 540 n.4 (OSEP Apr. 26, 1995) [hereinafter OSEP MEMORANDUM]:

For a student not previously identified by the school district as a student potentially in need of special education, a parental request for evaluation or a request for a due

court refused, holding that this standard has no basis in the statute and would place the court in the untenable position of determining this educational fact.⁹⁰

On appeal, however, the Seventh Circuit did not agree.⁹¹ Reversing the lower court opinion, the Seventh Circuit noted that *Hacienda* properly held that only a hearing officer may conduct a hearing regarding a child's identification as disabled after an expellable disciplinary incident.⁹² It noted that *M.P.* extended this ruling to apply stay put during these hearings, but announced that it prefers the "more flexible" approach given in the Department of Education memorandum since:

If the stay put provision is automatically applied to every student who files an application for special education, then an avenue will be open for disruptive, non-disabled students to forestall any attempts at routine discipline by simply requesting a disability evaluation and demanding to "stay put," thus disrupting the educational goals of an already over-burdened and of times classified as a chaotic public school system. In fact the emergence of this practice has been noted and criticized.⁹³

The court gave no statutory, precedential, or legislative historical support for its acceptance of the "knew or reasonably should have known" limitation on the application of stay put.⁹⁴ Instead, the decision was grounded in the court's concern that stay put would be used as a sword by disruptive miscreants to disarm the school's primary disciplinary weapon, expulsion.⁹⁵

process hearing or other appeal after a disciplinary suspension or expulsion has commenced does not obligate the school district to reinstitute the student's prior in-school status. This is because in accordance with the "stay-put" provision of IDEA, the student's "then current placement" is the out-of-school placement. After the disciplinary sanction is completed, if the resolution of the due process hearing is still pending, the student must be returned to school as would a non-disabled student in similar circumstances. It should be noted that, pending the resolution of the due process hearing or other appeal, a court could enjoin the suspension or expulsion and direct the school district to reinstate the student if the court determines that the school district knew or reasonably should have known that the student is a student in need of special education.

90. See *Rodiricus*, 889 F. Supp. at 1050.

91. See *Rodiricus L. v. Waukegan Sch. Dist. No. 60*, 90 F.3d 249, 253 (7th Cir. 1996).

92. See *id.*

93. *Id.*

94. See *id.* at 254 (stating that before a court invokes stay put provision, petitioners must show that school officials knew or should have known of student's disability, but providing little support for acceptance of this rule).

95. See *id.* The court stated:

We wish to make clear that parents of other young offenders should not conclude that they can use this approach to allow the hindsight opinion of some "expert" to qualify a delinquent child for preliminary protections under the Act. For a child not previously diagnosed as disabled, the statement of one social worker, teacher, or doctor excusing a child's aberrant behavior because of some perceived problem should be con-

II. THE AMENDMENTS

The 1997 Amendments to the IDEA attempt to bring order to this area by modifying section 615(j), the stay put provision, and enacting section 615(k), "Placement in Alternative Education Settings."⁹⁶ Section (j) maintains the stay put provision but provides an exception for actions under section 615(k)(7).⁹⁷ Section (k) provides several disciplinary alternatives for schools or hearing officers to use with special education children in specific disciplinary situations and modifies the stay put provision for these scenarios. This portion of the Article explores these changes, analyzing each provision of section (k).

A. *Authority of School Personnel*

School personnel under this section may order a change in the placement of a child with a disability:

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

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

(I) The child carries a weapon to school or to a school function under the jurisdiction of a state or a local educational agency; or

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

sidered insufficient to meet the standard of "staying put." Rather, courts should defer to the policy makers at the Office of Civil Rights of the U.S. Department of Education who have issued an opinion letter after considering the problem setting forth the test that should apply in the future for the granting of injunctive relief under IDEA's "stay put" provision: The student must be or reasonably should have been determined to be eligible through the administrative procedures of the IDEA.

Id. (citations omitted).

96. See IDEA Amendments of 1997, Pub. L. No. 105-17, § 615(j), (k), 1997 U.S.C.C.A.N. (111 Stat.) 37, 93.

97. The IDEA Amendments of 1997 state:

Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

Id. § 615(j), (k), 1997 U.S.C.C.A.N. (111 Stat.) at 93.

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

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

(ii) If the child already has a behavioral intervention plan, the IEP team shall review the plan and modify it as necessary to address the behavior.⁹⁸

Paragraph 1 limits a school's suspension power, as established in *Honig*,⁹⁹ expands and limits the Improving America's Schools Act firearm exception to "stay put" while maintaining its limited relief, and highlights the treatment-versus-discipline focus of the Amendments.

1. *Redefining Honig: ten-day placement powers limited*

Prior to the 1997 Amendments, courts followed the *Honig* rule that a suspension of less than ten days was not a change of placement and therefore did not trigger the procedural or substantive protections of the IDEA.¹⁰⁰ Under *Honig*, schools were free to use these short suspensions, or to otherwise make changes to the child's educational program or setting, as long as they did not exceed ten days.¹⁰¹ Subsection (A) (i) attempts to incorporate that key *Honig* holding by providing that a school can order a "change in placement" of a child to an alternative interim educational setting, another setting, or suspension for not more than ten days to the extent that the same would be applied to regular education children.¹⁰² The Amendment, however, has made three key changes to the *Honig* rule.

a. *Short-term suspension is a change of placement*

First, the Amendment expressly proclaims that a suspension or

98. See IDEA Amendments of 1997, § 615(k)(1), 1997 U.S.C.C.A.N. (111 Stat.) at 93-94.

99. *Honig v. Doe*, 484 U.S. 305, 325-26 (1988) (interpreting Education of the Handicapped Act to grant school administrators use of normal, nonplacement changing procedures).

100. See, e.g., *Parents of Students W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1495 (9th Cir. 1994) (stating that "not all suspensions constitute a prohibited 'change in placement'" and holding that *Honig's* ten-day rule did not mean ten days within one year); *Hayes v. Unified Sch. Dist. No. 377*, 877 F.2d 809, 813 (10th Cir. 1989) (citing *Honig* rule to find that time-out periods and in-school suspensions did not constitute "change in placement"); *Magyar v. Tucson Unified Sch. Dist.*, 958 F. Supp. 1423, 1434-35 (D. Ariz. 1997) (deciding that new IEP was unnecessary following ten-day suspension because it was not change in placement).

101. See *Honig*, 484 U.S. at 325.

102. See IDEA Amendments of 1997, § 615(k)(1)(A)(i), 1997 U.S.C.C.A.N. (111 Stat.) at 93.

change in educational setting for less than ten days is a change in placement.¹⁰³ Because the provision authorizes these changes without compliance with the Act's procedures for other changes in placement, such as IEP meetings, due process, and stay put, it is arguably a change in form, but not substance. The identification of the short-term suspension as a change in placement may have other ramifications, however, which will be discussed in Subsection c.

b. Alternatives are limited to regular education alternatives

Subsection (A)(i) limits a school's ability to order an alternative setting to situations when the same alternative is provided to regular education students.¹⁰⁴ The tie to regular education students was probably meant to prevent discrimination against disabled students by forbidding discipline of disabled students in a circumstance when discipline would not be issued for a regular education student.¹⁰⁵ Under the language of (A)(i), however, if a typical school uses only in-school suspensions and regular suspensions¹⁰⁶ for regular education students, it would be foreclosed from using creative and more appropriate educational options for special education students. Although a school can remedy this problem by granting the alternative education options which it may wish to give handicapped students, such as home schooling during the suspension or placement in a behavioral program, to everyone, this multiplies the expense and disregards the heightened educational needs of special education students.¹⁰⁷

c. Is cessation of education services during suspension allowed?

Although suspension is expressly authorized under subsection

103. See *id.* The proposed Department of Education regulations, however, state that "[r]emoving a child with disabilities from the child's current educational placement for not more than 10 school days does not constitute a change in placement under the Part B regulation." Note to Proposed Rule, Dep't of Educ., 62 Fed. Reg. 55,102 (1997) (to be codified at 34 C.F.R. pt. 300.520). This is in direct contradiction to the statutory language.

104. See IDEA Amendments of 1997, § 615(k)(1)(A)(i), 1997 U.S.C.C.A.N. (111 Stat.) at 93.

105. The Amendments' predecessor, S. 1578, allowed ten-day sanctions "if the rules or code of conduct of the agency also applies to children without disabilities." S. 1578, 104th Cong. § 615A(a) (1996).

106. The term "suspension" as used in this Article refers to the total cessation of educational services for a short period of time, not to exceed ten days, unless described otherwise, as in "in-school suspension" or "long-term suspension."

107. The courts and the Department of Education could interpret the word "alternatives" in the provision to require that only the categories of interim alternative education setting, another setting, and suspension need be applicable to the non-disabled as well. This interpretation may also preclude options for the disabled students if a school uses only one category, such as suspension, for non-disabled students.

(1)(A)(i),¹⁰⁸ the term is not defined in the Act or its regulations. As discussed in Section I of this Article, there has been much confusion about whether true suspensions and expulsions, defined as cessations of educational services, are allowed under the IDEA. This definition of suspension receives support from the dictionary,¹⁰⁹ the common usage in state law and school practice,¹¹⁰ and the *Honig* decision.¹¹¹ Although the Department of Education has had a policy for the last decade requiring the continuation of educational services during long-term suspension and expulsion of special needs students, they have stated that such services are not required during a suspension of less than ten days.¹¹² Both the Department of Education and the *Honig* Court based their determinations that educational services were not required during short-term suspensions on their conclusion that a suspension of ten days or less was not a "change in placement."¹¹³ The 1997 Amendments clearly state that a ten-day or less suspension is a change of placement,¹¹⁴ thus undermining the legal basis of the *Honig* and Department of Education rulings and reopen-

108. See IDEA Amendments of 1997, § 615(k)(1)(A)(i), 1997 U.S.C.A.N. (111 Stat.) at 93.

109. The term "suspension" is defined as "[a] temporary stop, a temporary delay, interruption, or cessation. . . . A temporary cutting off or debarring one, as from the privileges of one's profession." BLACK'S LAW DICTIONARY 1447 (6th ed. 1990).

110. See *Reauthorization of the IDEA: Discipline Issues, 1995: Hearing Before the Subcomm. on Disability Policy of the Senate Comm. on Labor and Human Resources*, 104th Cong. 11 (1995) [hereinafter *Senate Hearing*] (statement of Carl Cohn, Superintendent of Long Beach Unified School District) (noting that "our parents and public believe that if the education has to continue that you have not in fact expelled the youngster. That is really where this issue kind of breaks down.").

111. Although *Honig* did not define suspension, its discussion accepts the school's use of the term as a disciplinary tool authorized by state law for regular education. See *Honig v. Doe*, 484 U.S. 305, 323-28 & n.8 (1988) (discussing stay-put provision of Education of the Handicapped Act and noting that "the power to impose fixed suspensions of short duration does not carry the potential for total exclusion that Congress found so objectionable").

112. See *OSEP Letter of August 1, 1996*, 25 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 513 (1996) ("Nothing in state or federal law precludes a school district from providing alternative education or interim services to special education students . . . who are suspended from school for ten days or less. However, neither state nor federal law requires the school district to do so in those circumstances."); see also *OSEP Memorandum 95-16, Apr. 26, 1995*, 22 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 531, Question 8 (1995) ("[I]n order to meet the . . . requirements of IDEA, educational services must continue for students with disabilities who are excluded for misconduct that was not a manifestation of their disability during periods of disciplinary removal that exceed ten school days.").

113. See *Honig*, 484 U.S. at 325-26 (citing Department of Education's finding that suspension of not more than ten days was not change in placement); *OSEP Letter of Aug. 1, 1996*, *supra* note 112, at 513 ("Under the federal Individuals with Disabilities Act (IDEA) . . . exclusion of a student with special needs for more than ten consecutive school days constitutes a change in placement. The U.S. Department of Education requires the school to continue providing educational services to the excluded special education student in the case of an exclusion that exceeds ten school days.").

114. See IDEA Amendments of 1997, Pub. L. No. 105-17, § 615(k)(1)(A)(i), 1997 U.S.C.A.N. (111 Stat.) 37, 93.

ing the issue of whether educational services may cease during a suspension of less than ten days.

To determine whether Congress intended that educational services continue during a suspension of less than ten days, one looks first to the language and structure of the Act.¹¹⁵ Although suspension is not defined anywhere in the Act, the language and structure of subparagraph (1)(A)(i) indicates that a suspension is a cessation of services. Under (A)(i), suspension is listed as one of three changes in placement, the other two being "another setting" and an "interim alternative educational setting."¹¹⁶ If educational services were contemplated in a ten-day suspension, the ten-day suspension would be equivalent to "another setting" such as home instruction or an "interim alternative educational setting."¹¹⁷

Section 612(a)(1), however, requires all states to provide that a Free Appropriate Public Education ("FAPE") be "available to all children with disabilities residing in the state between ages 3 and 21, inclusive, *including children with disabilities who have been suspended or expelled from school.*"¹¹⁸ A FAPE is defined by the Act as special education and related services that:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the state educational agency;
- (C) include an appropriate preschool, elementary, or secondary school education in the state involved; and
- (D) are provided in conformity with the individualized education program required under section 614(D).¹¹⁹

This language appears to establish that educational services, or a FAPE, must continue during suspension and expulsion. It may be argued that a cessation of educational services during a short-term suspension is not a denial of a FAPE, since the services are merely suspended for a brief interval and this brief suspension is considered part of the educational system, not a removal from it. The express inclusion of suspended children under 612(a)(1), however, argues against this interpretation.¹²⁰ On the other hand, the omission of

115. See *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("The starting point for interpreting a statute is the language of the statute itself.").

116. See IDEA Amendments of 1997, § 615(1)(A)(i), 1997 U.S.C.C.A.N. (111 Stat.) at 93.

117. See *id.*, 1997 U.S.C.C.A.N. (111 Stat.) at 93.

118. *Id.* § 612(a)(1)(A), 1997 U.S.C.C.A.N. (111 Stat.) at 60 (emphasis added).

119. *Id.* § 602(8), 1997 U.S.C.C.A.N. (111 Stat.) at 44.

120. See *id.* § 612(a)(1)(A), 1997 U.S.C.C.A.N. (111 Stat.) at 60 ("A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.").

suspensions from the allowance of subgrants to establish "alternative programming for children who have been expelled from school" implies that educational services, i.e., alternative programming, is not required for suspended students.¹²¹

Resolution of this issue is not assisted by a rather ambiguous legislative history. Although some of the Act's history indicates that section (k) requires educational services to continue for disabled students during suspension and expulsion,¹²² there is evidence that a short-term suspension may be treated differently. In a Statement to the House of Representatives on the IDEA Amendments of 1997, Senator Goodling stated that the "bill codifies existing authority to suspend a student for 10 days *without educational services*"¹²³ but a House Press Release stated that educational services *could not* cease for children with disabilities when properly subject to a school's general disciplinary procedures.¹²⁴

In addition, the Department of Education, in its Summary of the 1997 Law,¹²⁵ notes that the law will explicitly require the continuation of educational services during suspension and expulsion,¹²⁶ but notes in the next sentence that this provision codifies the Department's long-standing understanding of the current law and overrides the recent *Riley* decision of the 4th Circuit permitting cessation of services.¹²⁷ As noted above, the Department's long-standing understanding was that services could cease during a suspension of less than ten days,¹²⁸ and the *Riley* decision only addressed long-term suspensions and expulsions.¹²⁹ The Senate Committee on Labor and Human Re-

121. See *id.* § 611(4)(A)(i), 1997 U.S.C.A.N. (111 Stat.) at 54.

122. See *Senate Hearing, supra* note 110, at 6-7, 11 (statement of Nancy Jones, Staff Attorney, American Law Division, Congressional Research Service) (noting that the Department of Education requires educational services for any expulsion); 104 CONG. REC. S4405 (daily ed. May 14, 1997) (statement of Sen. Bingaman) (noting that Act strengthens teacher and administrator control "without ceasing educational services to students"); DEP'T OF EDUC., IDEA 1997: QUESTIONS AND ANSWERS, Question 7, at 4 ("[T]he law guarantees that children under suspension or expulsion would still receive special education services elsewhere.").

123. 104 CONG. REC. H2531 (daily ed. May 13, 1997) (statement of Rep. Goodling) (emphasis added).

124. See HOUSE OF REPRESENTATIVES, IDEA IMPROVEMENT ACT AMENDMENTS PASS COMMITTEE ON VOICE VOTE (May 7, 1997) (press release) ("The bill also eliminates the double standard for school discipline allowing disabled children to be disciplined like their nondisabled peers when their conduct is unrelated to their disability, except that education services for disabled students may not be ceased.").

125. DEPARTMENT OF EDUC., IDEA 1997: SUMMARY (on file with author).

126. See *id.*

127. See *id.*

128. See *supra* note 112 and accompanying text.

129. See *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 561 (4th Cir. 1997) (holding that the plain language of IDEA does not require schools to continue providing educational services to disabled students who have been "suspended long-term due to serious misconduct wholly unrelated to their disabilities").

sources also noted that the section (k) provisions were meant to "reinforce and clarify the understanding of Federal policy on this matter, which is currently found in the statute, case law, regulations, and informal policy guidance."¹³⁰ All of these sources allowed for a cessation of educational services for a suspension of less than ten days.

The conflict between sections 612(a)(1) and 615(k)(1) can be reconciled by reading "suspension" as used in section 612 as a long-term suspension; that is, one in excess of ten days. The term suspension, when modified by "for not more than 10 school days," as in section 615(k)(1),¹³¹ would be considered a separate term, indicating a short-term suspension. Such an interpretation of the Amendment would allow cessation of educational services for suspensions of less than ten days but forbid cessation of educational services for longer suspensions. This reading places great emphasis on the "ten-day" language established in the Supreme Court and Department of Education rulings.¹³²

Perhaps the most poignant support for a ten-day suspension as a cessation of education services is the stark reality of running a school. If a suspension is to be used as an immediate removal of a dangerous or disruptive child, it provides little time for arranging alternative educational services. Although on-call tutors are conceivable for regular education students, the special educational needs of the disabled child often require special instructors and programs. It is highly unlikely that this individualized program could be replicated without some advance notice and planning. The *Honig* decision fully recognized this reality.¹³³

130. S. REP. NO. 105-17, at 28 (1997).

131. See IDEA Amendments of 1997, Pub. L. No. 105-17, § 615(k)(1)(A)(i), 1997 U.S.C.A.N. (111 Stat.) 37, 93.

132. The Department of Education stated that one of its purposes in the Amendments was to reduce unnecessary lawsuits that create emotional and financial burdens for parents and school districts. See DEPARTMENT OF EDUC., MAKING A GOOD LAW BETTER: THE IDEA AMENDMENTS OF 1995, at 4 (1996). The ambiguity of these provisions, however, does not achieve this goal.

The Department of Education has attempted to correct this conflicting language of the Amendment in its proposed regulations. These regulations redefine "children with disabilities who have been suspended or expelled from school" as those who have been removed for more than 10 days. See Proposed Rule, Dep't of Educ., 62 Fed. Reg. 55,074 (1997) (to be codified at 34 C.F.R. pt. 300.121). Proposed Rule 34 C.F.R. pt. 300.520 explicitly states that school personnel may remove a child for a 10-day suspension without the provision of educational services. See 62 Fed. Reg. at 55,102.

133. In *Honig*, the Court stated:

This authority, which respondent in no way disputes, not only ensures that school administrators can protect the safety of others by promptly removing the most dangerous of students, it also provides a "cooling down" period during which officials can initiate IEP review and seek to persuade the child's parents to agree to an interim

2. *Limiting and expanding the Improving America's Schools Act: alternative placements for up to forty-five days*

In 1994, Congress amended the IDEA, through the Improving America's Schools Act ("IASA"),¹³⁴ to grant a school the authority to place a child in an interim alternative educational setting for up to forty-five days when the student brought a weapon to school.¹³⁵ In such a situation, the alternative setting had to be chosen by the IEP team and was exempt from the stay-put provisions of the Act.¹³⁶ Thus, if the child's parents contested the alternative placement, the child would remain in the alternative placement during the due process proceedings. The 1997 Amendments maintain several key features of the 1994 law: a forty-five day alternative placement;¹³⁷ IEP team involvement;¹³⁸ and the stay-put exception.¹³⁹

Section (k) was billed as an expansion of the old law's grant of authority to schools to remove dangerous disabled children from the schools¹⁴⁰ because it expands the covered behavior to include bringing weapons to school functions,¹⁴¹ expands the definition of weapons to include more than guns,¹⁴² and includes possession, use, or sale of drugs.¹⁴³ The new amendments impart three limitations on the forty-

placement.

Honig v. Doe, 484 U.S. 305, 325-26 (1988).

134. Pub. L. No. 103-382, 108 Stat. 3937 (codified at 20 U.S.C. § 1400 (1994)).

135. See 20 U.S.C. § 1415(e)(3)(B)(i), amended by IDEA Amendments of 1997, Pub. L. No. 105-17, 1997 U.S.C.C.A.N. (111 Stat.) 37.

136. See *id.* § 1415(e)(3)(B)(ii), (iii).

137. See IDEA Amendments of 1997, § 615(k)(1)(A)(ii), (k)(2), 1997 U.S.C.C.A.N. (111 Stat.) at 93-94 (placing child in an alternative educational setting for not more than 45 days if the child brings a gun to school, possesses a controlled substance at school, or by determination of a hearing officer).

138. See *id.* § 615(k)(3), 1997 U.S.C.C.A.N. (111 Stat.) at 94 (stating that alternative educational setting shall be determined by IEP team).

139. See *id.* § 615(k)(7), 1997 U.S.C.C.A.N. (111 Stat.) at 96 (requiring the child to stay in the interim alternative educational setting during a parental hearing request or pending any challenge to change the child's placement unless it is deemed dangerous for the child).

140. In his letter to the President of the Senate, Albert Gore, Jr., Secretary Riley specifically stated that "[o]ur proposal would extend the Improving America's Schools Act amendment to IDEA, which permits schools to immediately remove a child from the classroom for up to 45 days for bringing a gun to school, to cover other dangerous weapons such as knives." 141 CONG. REC. S10,733 (daily ed. July 26, 1995) (Letter from Richard Riley, Secretary, U.S. Dep't of Educ.).

141. See IDEA Amendments of 1997, § 615(k)(1)(A)(ii)(I), 1997 U.S.C.C.A.N. (111 Stat.) at 94.

142. The earlier law applied to weapons, which were defined as "firearms," as that term was defined in Title 18 section 921. See 20 U.S.C. § 1415(e)(3)(B)(iv) (1994), amended by IDEA Amendments of 1997, 1997 U.S.C.C.A.N. (111 Stat.) 37. The 1997 Amendments retained the term "weapon" but broadened its definition to include all dangerous weapons as the term is defined in Title 18, section 930, subsection (g). See IDEA Amendments of 1997, § 615(k)(10)(D), 1997 U.S.C.C.A.N. (111 Stat.) at 98.

143. See *id.* § 615(k)(1)(A)(ii)(II), 1997 U.S.C.C.A.N. (111 Stat.) at 94.

five day alternative placement, however, which significantly reduce the authority that the 1994 law granted to the school to provide alternative placements for gun possession: first, the interim placement must provide for the continuation of the IEP and include needed behavior modification services,¹⁴⁴ second, the alternative placement is limited to forty-five days,¹⁴⁵ and third, the behavior must raise the likelihood of future injury.¹⁴⁶

a. "Stay put" in alternative placement limited to forty-five days

The 1994 law modified the "stay put" provision of the IDEA by providing that the child should remain in the alternative placement for the entire time it may take to complete due process challenges to the alternative placement.¹⁴⁷ The Office of Special Education Programs ("OSEP") in the Department of Education interpreted the 1994 provision to require the child to remain in the alternative educational placement not only for the duration of an appeal based on the parents' disagreement with the forty-five day alternative placement, but also for the duration of appeals of the placement that the school suggests should follow the forty-five day placement, even if such time exceeded forty-five days.¹⁴⁸ The 1997 Amendments, however, provide for "stay put" in the alternative placement for a maximum of forty-five days, and then a return to the earlier placement.¹⁴⁹

Although it is possible to complete an administrative hearing in forty-five days, it is clearly impossible to complete court appeals of that hearing in the forty-five day timeframe. If the school feels a return to the regular placement is still inappropriate, it could seek parental approval to lengthen the alternative placement. Such agreements, however, are difficult to achieve for three reasons. First, animosity between the parents and the school is not uncommon at such stressful times. Second, true differences of opinion about the appropriateness of the placement may exist. And third, it is entirely possible that the school has been unable to develop an appropriate alternative placement within the forty-five day limit.¹⁵⁰ Paragraph 7 of

144. See *id.* § 615(k)(1)(B)(ii), 1997 U.S.C.C.A.N. (111 Stat.) at 94.

145. See *id.* § 615(k)(1)(A)(ii), 1997 U.S.C.C.A.N. (111 Stat.) at 93.

146. See *id.* § 615(k)(2)(A), 1997 U.S.C.C.A.N. (111 Stat.) at 94.

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

148. See OSEP MEMORANDUM 95-16, *supra* note 89, Questions 11 and 12.

149. See IDEA Amendments of 1997, § 615(k)(7)(A), 1997 U.S.C.C.A.N. (111 Stat.) at 96.

150. Virginia's Superintendent of public instruction reports that their experience indicates that it often takes sixty to ninety calendar days to develop an alternative placement. See *Hearings on the Individuals with Disabilities Education Act: Hearings Before the Subcomm. on Early Childhood, Youth and Families of the House Comm. on Econ. and Educ. Opportunities*, 104th Cong. 387 (1995) (written testimony by William Boshier, Jr., Superintendent of Public Instruction, Com-

section 615(k) provides some relief for this problem by authorizing a hearing officer to allow a school to place a child in a different setting than "stay put" would demand if the child is dangerous.¹⁵¹

b. Likelihood of injury required

Under sections 614(k) (6) (A) (i) and (ii), if, pursuant to a parental complaint, a hearing officer reviews the school's action in ordering a forty-five day interim placement, he or she must apply the standards of section 614(k) (2).¹⁵² Thus, the four standards of section 614(k) (2) are superimposed on section 614(k) (1), allowing the school to use an alternative placement in excess of ten days only when maintaining the current placement is substantially likely to result in injury to the child or to others, the school has made reasonable efforts to minimize the risk of harm, the child's program is appropriate, and the interim placement is satisfactory.

This inclusion of an injury requirement is tantamount to the wholesale adoption of the *Honig* "dangerousness" exception as the only justification for schools or hearing officers to change a disabled child's placement without IEP procedures.¹⁵³ Because it has been held that possession of a gun on school grounds by a student does not always constitute a likelihood of "injury to himself or to others" under the *Honig* exception to stay put,¹⁵⁴ and possession of drugs for personal consumption may also not meet this standard, this is a major restriction on the weapon and drugs alternative placement power. The legislative history of the Amendments, however, does not identify this new "harm" requirement for the weapon alternative placement.¹⁵⁵ The harm requirement, and the other three limitations from section 615(k) (2), are addressed in Part II.B below.

monwealth of Virginia).

151. See IDEA Amendments of 1997, § 615(k) (7) (C), 1997 U.S.C.C.A.N. (111 Stat.) at 96.

152. See *id.* § 615(k) (6) (B) (ii), 1997 U.S.C.C.A.N. (111 Stat.) at 96.

153. See *Honig v. Doe*, 484 U.S. 305, 323 (1988) (making it clear that no "dangerousness" exception is provided for by Congress in the Act and that the Court will not remedy its omission).

154. See *Hacienda La Puente Sch. Dist. of Los Angeles v. Honig*, 976 F.2d 487, 489, 493 (9th Cir. 1992) (denying school right to expel plaintiff who frightened other student with starter pistol); *M.P. v. Governing Bd. of Grossmont Union High Sch. Dist.*, 858 F. Supp. 1044, 1050-51 (S.D. Cal. 1994) (holding that school failed to show that it was a "substantial likelihood that injury would result" if student who brought pellet gun to school returned).

155. See U.S. DEP'T OF EDUC., THE IDEA COMPARISON CHART, reprinted in 143 CONG. REC. H2531 (daily ed. May 13, 1997) (stating requirement of paragraph one as allowing forty-five day placement for carrying weapon or possessing, using, or soliciting illegal drugs); see also 143 CONG. REC. H2531 (daily ed. May 13, 1997) (statement of Rep. Goodling) (recognizing codification of right to suspend student—disabled or not—for bringing weapons or drugs to school). But see *Senate Hearing*, *supra* note 110, at 2 (opening statement of Sen. Frist) (noting that focus of discipline hearing was students who were a danger to themselves and others).

3. *Emphasis on behavioral services*

Section 615(k)(1)(B) highlights the new focus on behavioral services for students with disabilities.¹⁵⁶ It directs the school to conduct a behavioral assessment and implement or modify a behavior plan for every disabled child who has engaged in a triggering incident.¹⁵⁷ This focus is reinforced by section 614(d)(3)(B)(i), which specifically directs the IEP team to consider behavior strategies when developing the IEP for students whose behavior impedes their learning, or that of others.¹⁵⁸ Section 612(a)(22) requires the states to examine suspension and expulsion data to determine if there are significant discrepancies between expulsion and long-term suspension rates for children with disabilities between school districts or as compared to the regular education statistics.¹⁵⁹ If such discrepancies are detected, the states must revise their policies to comport with the Act.¹⁶⁰ None of these provisions require that the misbehavior be related to, or caused by, the child's disability. These provisions state a strong Congressional emphasis on treatment for behavioral problems that are sabotaging a child's education, instead of exclusion, regardless of their etiology.

B. Authority of the Hearing Officer

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

- (A) determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of such

156. See IDEA Amendments of 1997, § 615(k)(1)(B), 1997 U.S.C.C.A.N. (111 Stat.) at 94. This theme was reported by the Committee on Labor and Human Resources. The committee stated that it "believes that the focus will quickly shift from what a child did to how adults can help the child avoid dangerous or seriously disruptive behavior in the future." S. REP. NO. 104-275, at 29 (1996).

157. See IDEA Amendments of 1997, § 615(k)(1)(B)(i)-(ii), 1997 U.S.C.C.A.N. (111 Stat.) at 94. Subparagraph B applies to all disciplinary action described in Subparagraph A. Thus, it states another limitation on the *Honig* 10-day suspension power by requiring even 10-day suspensions to result in behavior planning. However, the Department of Education Proposed Rule 300.520(c) attempts to alter this application.

If the child with a disability is removed from the child's current education placement for 10 school days or fewer under paragraph (a)(1) of this section in a given school year, and no further removal or disciplinary action is contemplated, the activities in paragraph (b) of this section need not be conducted.

Department of Educ. Proposed Rules, 62 Fed. Reg. 55,102 (1997) (to be codified at 34 C.F.R. pt. 300.520(c)).

158. See IDEA Amendments of 1997, § 614(d)(3)(B)(i), 1997 U.S.C.C.A.N. (111 Stat.) at 86.

159. See *id.* § 612(a)(22)(A)(i)-(ii), 1997 U.S.C.C.A.N. (111 Stat.) at 70.

160. See *id.* § 612(a)(22)(B), 1997 U.S.C.C.A.N. (111 Stat.) at 70.

child is substantially likely to result in injury to the child or to others;

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

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

(D) determines that the interim alternative educational setting meets the requirements of paragraph (3) (B).¹⁶¹

Section 614(k)(2) codifies the *Honig* rule for exclusion of dangerous children but modifies it by granting this power to hearing officers and adding a substantial evidence requirement. This section also incorporates the analysis used by courts in placement cases that do not directly involve discipline. These placement decisions apply the least restrictive alternative ("LRA") requirement of the IDEA. The LRA requirement states that students with disabilities must be educated "to the maximum extent appropriate" with non-disabled children and that the school must use supplementary aids and services to attempt to achieve the least restrictive educational setting.¹⁶² This statutory requirement is applicable to all placement decisions, including disciplinary placements. It has been interpreted by the courts in LRA cases to require that the courts consider the effect of the disabled students on others in the class, the appropriateness of the educational setting for the student, and the adequacy of the schools efforts in providing supplementary aids and services.¹⁶³ These requirements are clearly reflected in sections 614(k)(2)(A)(B) and (C).

1. Defining "substantially likely"

The standard of section 614(k)(2)(A), which focuses on whether "the current placement of a child is substantially likely to result in injury to the child or others,"¹⁶⁴ is almost identical to the standard established in *Honig v. Doe* for court sanctioned removals from the current placement.¹⁶⁵ In *Honig*, the Court held that the school must

161. IDEA Amendments of 1997, § 615(k)(2), 1997 U.S.C.C.A.N. (111 Stat.) at 94, *reprinted in* Department of Educ. Proposed Rules, 62 Fed. Reg. at 55,102-03.

162. 20 U.S.C.A. § 1412(a)(5)(A) (West Supp. 1998).

163. See Theresa J. Bryant, *Drowning in the Mainstream: Integration of Children with Disabilities After Oberti v. Clementon School District*, 22 OHIO N.U. L. REV. 83, 98-108 (1995) (describing elements and consequences of applying "mainstream tests" established by Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982)).

164. IDEA Amendments of 1997, § 615(k)(2)(A), 1997 U.S.C.C.A.N. (111 Stat.) at 94.

165. See *Honig v. Doe*, 484 U.S. 305, 328 (1988) (affirming lower court's decisions and stat-

overcome a presumption to keep the child in their current placement by showing "that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others."¹⁶⁶ Section 614(k)(2)(A), however, adds to the *Honig* danger standard by requiring "substantial evidence," defined in section 614(k)(10)(C) as beyond a preponderance of the evidence,¹⁶⁷ that the current placement is substantially likely to result in injury to the child or others.¹⁶⁸

The phrase "substantially likely" is not defined in the Act, however, if "substantial evidence" means beyond a preponderance, that is, more than 50%, perhaps "substantially likely" means more than a 50% chance of occurrence? If so, a school system would need to show, by a preponderance of the evidence, that there is a greater than 50% likelihood that the child will cause injury before the hearing officer could order an interim alternative placement. This seems like an unacceptably high risk of injury. In *Clinton County R-III School District v. C.J.K.*, a pre-Amendment case, the Western District of Missouri agreed.¹⁶⁹ While the *Honig* "substantially likely" standard has rarely been subjected to numerical analysis, the Missouri Court related the required probability of harm to the seriousness of the harm.¹⁷⁰ It held that an injury was "substantially likely" if there was a "5% danger of *material* personal injury or some appreciable danger of *serious* personal injury."¹⁷¹

2. What is "injury"?

Because neither the Amendments nor *Honig* define "injury," it is unclear whether emotional injury will justify an alternative placement or if any physical injury, such as a slap or shove, is sufficient. The

ing that schools can seek injunctive relief under IDEA in "appropriate cases").

166. See *id.* at 328-29.

167. See IDEA Amendments of 1997, § 615(k)(10)(C), 1997 U.S.C.C.A.N. (111 Stat.) at 98.

168. See *id.* § 615(k)(2)(A), 1997 U.S.C.C.A.N. (111 Stat.) at 94.

169. See *Clinton County R-III Sch. Dist. v. C.J.K.*, 896 F. Supp. 948, 950 (W.D. Mo. 1995) (explaining that even a 5% chance of fire or exposure to asbestos injuries is intolerable).

170. See *id.* (ignoring counsel for defendants' suggestion that a 33% chance of injury was equal to "substantial likelihood" and agreeing with a 5% value).

171. *Id.*; see also *School Dist. of Phila. v. Stephan M.*, Civ. No. 97-1154, 1997 U.S. Dist. LEXIS 2713, at *1-2 (E.D. Pa. Mar. 10, 1997) (citing the standard set forth in *Light v. Parkway C-2 Sch. Dist.*, 41 F.3d 1223 (8th Cir. 1994), the court found that the school did not show that the student who stabbed another student who sexually assaulted her posed an "imminent danger or substantial risk of injury" like the student in *Light* who engaged in fifteen violent acts per week—some requiring medical attention); *Phoenixville Area Sch. Dist. v. Marquis B.*, Civ. No. 97-0840, 1997 U.S. Dist. LEXIS 1617, at *1-2 (E.D. Pa. Feb. 18, 1997) (holding that six incidents, three of verbal abuse and three of assaulting classmates by punching them in the face—resulting in "significant facial bruising" to one—did not constitute a substantial likelihood of further injury).

Eighth Circuit addressed the nature of "injury" under the *Honig* standard in the recent case of *Light v. Parkway C-2 School District*.¹⁷² In its opinion, the court emphatically rejected the notion 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.¹⁷³

Although emotional harm that may result from threats was completely discounted by the District Court for the Western District of Missouri in *Clinton County R-III School District v. C.J.K.*,¹⁷⁴ the Ninth Circuit considered its harmful effects in a non-discipline placement decision.¹⁷⁵

The legislative history proves strikingly unhelpful. In 1995, Secretary of Education Riley testified at a Congressional hearing on this issue.

Chairman Cunningham: Would you consider a child that bit three teachers and put them out of work dangerous?

Secretary Riley: Well, if that is determined to be dangerous by people who know more about it than I do. It sounds rather dangerous. It is according to how bad he bit them, I guess. But they wouldn't—they would make that determination. We in the Federal

172. *Light*, 41 F.3d at 1229-30 (rejecting parent's argument that child was only a "nuisance" and sanctioning schools' effort to remove student).

173. *Id.*; see also *Texas City Indep. Sch. Dist. v. Jorstad*, 752 F. Supp. 231, 234, 238 (S.D. Tex. 1990) (finding child's repeated physical and verbal assaults on students and teachers, use of profanity, destruction of school and students' property, and suicidal behavior, were sufficient to constitute dangerous conduct for removal). Several least-restrictive-alternative placement cases provide some guidance on the extent of both physical and emotional harm that is necessary to justify a more restrictive placement. See *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1398, 1401 (9th Cir. 1994) (ruling that a student who frequently taunted other students with name-calling and profanity, directed sexually explicit remarks at female students, kicked, hit, and pushed other students, was properly placed in more restrictive setting); *Victoria L. v. District Sch. Bd.*, 741 F.2d 369, 371 n.1, 374 (11th Cir. 1984) (deciding that student who brought razor blade and martial arts weapon to school and threatened to injure or kill another student indicated that she should be placed in different setting); *Binghamton City Sch. Dist. v. Borgna*, No. 90-CV-1360, 1991 U.S. Dist. LEXIS 2565, at *6-7 (N.D.N.Y. Mar. 6, 1991) (finding that punching, slapping, kicking, sticking a pencil in a student's ear, throwing his shoes and chalkboard eraser at others, and threatening student he would "get him" are sufficient). But see *Mavis v. Sobol*, 839 F. Supp. 968, 991-92 (N.D.N.Y. 1993) (refusing to order more restrictive placement for child who struck other students and jabbed them with sharp pencils since school did not have adequate supplementary services in place); *Phoenixville Area Sch. Dist.*, 1997 U.S. Dist. LEXIS 1617, at *1 (detailing how court minimizes face punching incidents by noting that only one caused bruising, there were no averments that medical attention was required, and school did not elaborate on what preventative measures have been taken).

174. See *Clinton County*, 896 F. Supp. at 949; see also *Phoenixville Area Sch. Dist.*, 1997 U.S. Dist. LEXIS 1617, at *1 (discounting three of six incidents since they involved "only" verbal abuse).

175. See *Clyde K.*, 35 F.3d at 1398, 1401 (concluding the court was particularly concerned with "the extremely harmful effects sexual harassment can have on young female students").

Government don't make that, obviously.¹⁷⁶

An earlier version of the Act provided a definition of the term "serious injury." This term was used in H.R. 3268 as a third ground for the school to issue an interim alternative placement. It was defined as "an injury that involves substantial risk of death, extreme physical pain, obvious or protracted disfigurement, loss of the use of bodily members or organs, broken bones, or significant endangerment to an individual's emotional health or safety that is the result of a physical or verbal assault."¹⁷⁷ Even in H.R. 3268, however, a hearing officer was only required to find "injury," which was not defined.¹⁷⁸ Although inconclusive, the inclusion of emotional harm and verbal assault in the definition of serious injury is evidence of a Congressional intent to include these types of behaviors and harm. Another precursor, S.1578, specifically limited changes of placement to situations of drugs, weapons, or serious *bodily* injury, but defined bodily injury to include a physical or sexual assault that may have endangered emotional health or safety.¹⁷⁹

Because Congress dodged this divisive issue in refusing to clarify "injury," hearing officers and the courts will soon be asked to elucidate. The *Light* opinion serves as valuable precedent in defining injury as the likelihood of any injury, including bruises from a shove.¹⁸⁰ Although precedent on emotional injury is sparse, to properly protect the well-being of students, emotional injury must be included as "injury." Repeated insults, sexual comments, threats, or intimidation should not be tolerated while lengthy appeal procedures are underway. The seriousness of emotional harm is apparent when the stereotype of a disabled student as a frail, physically handicapped child is abandoned. In fact, 51.1% of identified disabled children are learning disabled and 8.7% are emotionally disabled.¹⁸¹ When a disabled child is a six foot, one hundred-eighty pound eleventh grader with emotional disabilities that cause him to make explicit and potentially threatening sexual comments to younger girls, or to publicly deride small boys he views as exhibiting homosexual tendencies, or to re-

176. See *Hearings on the Individuals with Disabilities Education Act: Hearings Before the Subcomm. on Early Childhood, Youth and Families of the House Comm. on Econ. and Educ. Opportunities*, 104th Cong. 36 (1995) [hereinafter *Hearings on IDEA*] (statements of Rep. Cunningham and Sec'y Riley).

177. H.R. 3268, 104th Cong., § 615(k)(9)(B) (1996).

178. See *id.* § 615(k)(2)(A).

179. See S. 1578, 104th Cong., § 615(A)(b)(1), (e)(4) (1996).

180. See *Light v. Parkway C-2 Sch. Dist.*, 41 F.3d 1223, 1230 (8th Cir. 1994).

181. See Eighteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Act, Number and Disabilities of Children and Youth Served under IDEA, Ch. 1, Part B, at 3 (visited Oct. 20, 1997) (providing chart from the U.S. Department of Education that describes disabled students from ages 6-21 during years of 1993-95).

peatedly insult disabled students based on their handicapping condition, the importance of including emotional harm becomes obvious.¹⁸² The modifier of "substantially likely" and the other requirements of section 614(k)(2) assure that the provision will not be overused to remove underserved disabled students who have engaged in an isolated act or caused minimal harm.

3. *Determining appropriateness of the existing program*

Section 614(k)(2)(B) requires that a hearing officer consider the appropriateness of the program as it existed at the time of the incident.¹⁸³ Section 2(B), however, leaves two areas of ambiguity. First, it does not state whether the hearing officer should assess the program's appropriateness with or without the knowledge culled from the misbehavior and concomitant evaluations and meetings. Because the provision does not bar such information and it is highly relevant, it is likely to be considered. With the aid of this 20/20 hindsight, hearing officers will often find the program inappropriate.

Second, section 614(k)(2)(B) does not state what the hearing officer should do if he or she "considers" the placement and finds it inappropriate. If the hearing officer finds that the original placement was inappropriate but believes there is substantial evidence of substantial risk of injury, even with the modifications required by section 614(k)(2)(D), may she order an alternative placement? Congressional history indicates the answer is "no."¹⁸⁴

4. *Determining reasonable efforts*

Section 614(k)(2)(C) also considers the school system's past activities in determining whether it has made reasonable efforts to minimize the risk of harm posed by the student's presence. This re-

182. Cf. *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1401-02 (9th Cir. 1994) (arguing that student who made sexual comments to female students, attacked staff, and taunted others with "name calling" and profanity was disruptive enough to warrant alternative placement).

183. This standard incorporates the standard established by the Department of Education and Office of Civil Rights in discipline placement decisions. See *Department of Educ. Letter to Steink*, ELHR 213:179, Nov. 10, 1988 (stating that if a student's misconduct is either a manifestation of the handicap or due to an inappropriate placement, the student may not be suspended); *Discipline of Students with Disabilities in Elementary and Secondary Schools*, OCR Pamphlet, Oct. 1996 (stating that before implementing a suspension or expulsion, the school must determine if the misconduct is caused by the disability and, if so, whether the current educational placement is appropriate).

184. The Senate Report from the Committee on Labor and Human Resources on S. 717 states, "[i]f the school district has failed to provide the child an appropriate placement or to make reasonable efforts to minimize the risk of harm, the appropriate response by an impartial hearing officer is to deny the school district's request to move the child to an alternative setting." S. REP. NO. 105-17, at 29 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 107. The Report assumes that if these requirements have not been achieved, the child's behavior "can be addressed in the current placement." *Id.*, *reprinted in* 1997 U.S.C.C.A.N. at 107.

quirement is stated in the Act's LRA provision¹⁸⁵ and is often discussed in the LRA cases.¹⁸⁶ *Light* added this requirement to the *Honig* dangerousness exception in discipline change-of-placement cases.¹⁸⁷ Its application, however, can be problematic. Because the school system has just received new and very important information on the risk of harm from the disciplinary incident, it is likely that their earlier efforts will be found to be inadequate. This situation is exacerbated by the elastic nature of the terms "supplementary aids and services."¹⁸⁸

Section 614(k)(2)(C) also does not indicate what impact a finding of the school's failure to provide "reasonable efforts" should have. If the school's services were not "reasonable," should the hearing officer refuse the interim placement? Once again, legislative history indicates that the interim placement should be refused.¹⁸⁹ But this does not serve the interests of the school or the individual. Assume a hearing officer has determined that there is substantial evidence of a substantial likelihood that "Tommy," a hypothetical student, will cause injury to himself or others if he returns to his mainstreamed placement (requirement 2(A)). The hearing officer has checked the interim placement and found that it will immediately implement necessary behavior therapy (requirement 2(B)), and Tommy's IEP has been revised to clearly include appropriate behavior goals and services (requirement 1(B)). The hearing officer does not feel, however, that the program at the time of the misbehavior was appropri-

185. See 20 U.S.C.A. § 1412(a)(5) (West Supp. 1998).

186. See *Oberti v. Board of Educ. of the Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1220-21 (3d Cir. 1993) (finding that in the past, school only made "negligible" efforts to accommodate plaintiff by placing him in a "regular classroom" with neither a curriculum or behavioral management plan, nor adequate special education support to teach); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989) (holding that if state has not already taken any measures to accommodate the disabled students in "regular education," it is in violation of Act).

187. The *Light* court stated the following:

[W]e hold today that there is an essential second test which must be met by a school district seeking judicial sanction for removal of a dangerous disabled child: The school district must show that it has made reasonable efforts to accommodate the child's disabilities so as to minimize the likelihood that the child will injure herself or others.

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

188. Supplementary aids and services are defined in § 612(a)(29) as "aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with non-disabled children to the maximum extent appropriate in accordance with section 612(a)(5)." IDEA Amendments of 1997, Pub. L. No. 105-17, § 602(29), 1997 U.S.C.A.N. (111 Stat.) 37, 46. For a discussion of the requirements expansive nature, see Bryant, *supra* note 163, at 98-101 (describing the "supplemental aids and services" requirement as "undefined and sometimes unlimited" and demonstrating this assertion through the discussion of its application by three different circuits).

189. See S. REP. NO. 105-17, at 29, *reprinted in* 1997 U.S.C.A.N. at 107 (describing preference that child's behavior should be addressed in current placement).

ate (requirement 2(C)) and feels that the school could have done more to prevent the incident (requirement 2(D)). Under this scenario, according to the interpretation in the legislative history of section 614(k)(2), the hearing officer should refuse the interim placement. The main result of this action will be to punish the school system for its perceived past inadequacies by requiring it to immediately deal with a dangerous student in a mainstreamed environment. Because few behavior plans are likely to have immediate and guaranteed results, barring hiring security guards,¹⁹⁰ one must question the wisdom of this response.

5. *Disruptive behavior not addressed*

Although section 614(k)(2) includes several principles of the LRA cases, it does not adopt their recognition that behavior that significantly disrupts the class requires that an alternative placement be considered.¹⁹¹ Section 614(k) addresses a discrete area of discipline of special needs students—behavior that causes injury to themselves or others.¹⁹² This close focus leaves a critical weakness of the IDEA unaddressed, to the detriment of educational quality for all students. Although violence is an important issue in our schools, the most common discipline problems involve non-criminal student behavior.¹⁹³

Under current law, if a school can not address the disruptive student adequately with supplementary supports and services, its only alternative is to attempt a change of placement. If the parents do not agree to this and challenge the proposed change, the child must stay put pending the final outcome of the appeal. A school is free to use the *Honig* alternatives of study carrels, time outs, detentions, restriction of privileges or suspensions of less than ten days to control this behavior, but extended use of any such technique may constitute a "change in educational placement" which would trigger the "stay put" provision and also require the school to conduct mandatory due process proceedings.¹⁹⁴ Thus, unless the parents agree, a school

190. This suggestion is not ludicrous. See *Department of Educ. Letter to Hubbard*, Mar. 7, 1991, 17 EHLR 837, where a principal reported that "Our school system has had to resort to hiring 'muscle' or 'protection' simply to protect our staff and other students."

191. See Bryant, *supra* note 163, at 101 (highlighting cases from the Third, Fifth and Sixth Circuits "that consider the disruptive effect of the disabled student on the rest of the class").

192. See 20 U.S.C.A. § 1415(k)(2) (West Supp. 1998).

193. See Joan Gaustad, *School Discipline*, ED 350727, ERIC Digest, No. 78 at 2 (Dec. 1992) (explaining how the criminal and violent behavior is what makes the headlines).

194. See *DeLeon v. Susquehanna Community Sch. Dist.*, 747 F.2d 149, 150 (3d Cir. 1984) (deciding whether change in method of transporting disabled child constitutes a change in educational placement). A change in placement refers to any change in a student's program, services, or education which has a significant effect on the child's learning experience. See *id.*

could be forced to continue the ill-fated placement of a highly disruptive child for months or years while due process appeals are pursued. The *Honig* exception to stay put, which allows an immediate plea for court intervention to remove a child, is phrased in terms of dangerous students only, leaving it unlikely that courts would consider a plea to relieve a school from the stay put provision for a highly disruptive student.¹⁹⁵ Even if the courts expand the *Honig* rule to include disruptive students, it is unsatisfactory as a sole remedy due to the extensive litigation expense it causes and the harm to the continuing relationship between the school and parents that litigation often engenders.¹⁹⁶

Congress, while aware of the ability of a disabled student to disrupt the educational process, chose not to include this area as an exception to "stay put" in the 1997 Amendments.¹⁹⁷ Senate Bill 1578, the 1996 precursor to the IDEA Amendments of 1997, had extensive provisions allowing alternative placements for students displaying serious disruptive behavior.¹⁹⁸ The provisions were carefully circumscribed to prevent abuse,¹⁹⁹ by requiring that the child in question must have "engage[d] in ongoing serious disruptive behavior that significantly impair[ed] the education of the child or the education of other children and the ability of the teacher of the child to teach."²⁰⁰ The principal had the authority to make this determination

at 153 (noting that changing child's instructor should not require hearing and that "bright lines" can be drawn in some areas).

195. See *Clinton County R-III Sch. Dist. v. C.J.K.*, 896 F. Supp. 948, 949 (W.D. Mo. 1995) (stating that the court's intervention is reserved for near emergency situations where personal injury is likely and cannot be used for mere disruptive or offensive behavior). The court's hesitancy to carve out an exception for dangerous children further supports this prediction. See *id.* at 950, 952 (holding that school failed to show requisite level of danger to support removal and posturing that Congress was well aware that an "appreciably heightened risk of physical danger" would be a necessary cost in providing mainstream education to disabled).

196. See *Senate Hearing, supra* note 110, at 90 (statement of Charles Weatherly, National School Board Association) (explaining that a rule which requires schools to go to court every time they must deal with a dangerous or disruptive student is impractical).

197. See *Reauthorization of the IDEA: Discipline Issues, 1995: Hearing on S. 541 Before the Subcomm. on Disability Policy of the Senate Comm. on Labor and Human Resources*, 104th Cong. 41-42 (1995), cited in S. REP. NO. 104-275, at 23 (1996) (statement of Marcia Reback, Vice-President, American Federation of Teachers) (requesting that a multidisciplinary team be empowered to change placement in the case of a highly disruptive child). But see *IDEA Reauthorization Hearing, supra* note 31, at 62-63 (testimony of Diana Autin, Managing Attorney, Advocates for Children of New York, Inc.) (opposing weakening *Honig's* "stay put" protections).

198. See S. 1578, 104th Cong. § 615A(b)(1) (1996) (outlining provisions for placement of disabled student manifesting disruptive behavior).

199. This concern of abuse is reflected in the 1995 hearings as well. "I am uneasy with the new attempt to give more flexibility to the States. The States obviously failed before Now if we give more flexibility to the States, I am afraid we are going to go back in time again instead of going forward" *Hearings on IDEA, supra* note 176, at 47 (statement of Rep. Romero-Barcelo).

200. S. 1578, § 615A(d)(1)(A).

after consultation with knowledgeable individuals and based upon a documented record of the disruptions and the efforts made to address the behavior.²⁰¹ The IEP team was required to develop an appropriate alternative placement, but if the parents disagreed with the placement of a disruptive student, the bill provided for a due process hearing within ten days of their communicating that disagreement.²⁰² Stay put was then modified, for the duration of any further appeals, to be the placement determined by the hearing officer.²⁰³

The physical safety of all students in our schools is a critical need that is currently in the news and was strongly presented to Congress during the IDEA reauthorization process.²⁰⁴ This media attention, however, should not blind us to the fact that a school is also responsible for the education of each student. Disruptive students can affect the quality of education in many ways. Frequent disruptions cause loss of class time as a teacher or aide addresses the behavior.²⁰⁵ Such disruptions can model inappropriate behavior, threaten other students, and affect the learning process for longer periods by affecting the students' ability to concentrate.²⁰⁶ Constant disruptions may also affect a teacher's ability to concentrate, as well as their energy and motivation.²⁰⁷ This type of frustration may cause excellent teach-

201. See *id.* § 615A(d)(1)(B) (describing role of principal and IEP team); § 615A(d)(3)(A), (B) (describing required documentation of behavior and efforts to address the behavior).

202. See *id.* § 615A(d)(2)(A) (providing for hearing officer determination in cases of parental disagreement).

203. See *id.* § 615A(d)(2)(C) (describing placement procedure during pendency of due process hearing).

204. See *Senate Hearing, supra* note 110, at 58 (statement of Shirley Igo, National PTA, Vice-President for Legislative Activity).

[A] National Institute of Education study revealed that 40% of juvenile robberies and 36% of the assaults against urban youth took place in the schools. Each day, 100,000 children and youth bring weapons to school; forty a day are killed or seriously wounded by these weapons according to the Department of Justice.

Id.

205. See, e.g., *Minor Child, R.O. v. Clementon Borough Bd. of Educ.*, OAL Dkt. No. EDS 901-91 at 9 and 13 (N.J. A.L.J. Mar. 8, 1991). The Oberti child, a kindergartner, was placed in a developmental kindergarten class for those not quite ready for kindergarten. He preoccupied the teacher and an aide due to his toileting needs (he needed to be taken to the bathroom every 15 minutes at first, and eventually every 30 minutes), but also due to problems with crawling under the furniture, touching, hitting, and spitting at other children. He also hit the teacher, threw books, and repeatedly ran away. See *Oberti v. Clementon Bd. of Educ.*, 995 F.2d 1204, 1207, 1208, 1209 n.7, 1212 (3d Cir. 1993).

206. See *Oberti*, 995 F.2d at 1222-23. In *Oberti*, the child engaged in inappropriate touching, and caused the other children to mimic his behavior. He "was often overcome by outbursts and 'tantrumming,' which disrupted not only the Clementon developmental kindergarten class, but a nearby on-grade kindergarten."

207. See Pete Idestein, *Swimming Against the Mainstream*, 75 PHI DELTA KAPPAN 336, 340 (1993) (giving a former principal's first hand account of the frustration and animosity generated in attempting to remove a disruptive, and somewhat dangerous, child from his mainstreamed placement).

ers to leave the profession²⁰⁸ and parents to remove their children from public schools.²⁰⁹ Some argue that "in the name of inclusion, we may end up getting the most separated and segregated school system that we can possibly have in this country."²¹⁰

C. *Determination of Setting*

(A) IN GENERAL—the alternative educational setting described in paragraph (1) (A) (ii) shall be determined by the IEP team.

(B) ADDITIONAL REQUIREMENTS—any interim alternative educational setting in which a child is placed under paragraph (1) or (2) shall—

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

(ii) include services and modifications designed to address the behavior described in paragraph (1) or paragraph (2) so that it does not recur.²¹¹

Note first that the requirement for IEP team development of the alternative setting does not apply to interim alternative educational settings of less than 10 days as discussed in section 615(k) (1) (A) (i).²¹² This provision allows the school to make an immediate decision for a short-term change of placement without calling an IEP meeting. These short-term placements are bound, however, by the requirements of section 615(k) (3) (B).²¹³

Section 615(k) (1) (A) (i) contains three alternatives for short-term changes in placement for students, only one of which is termed an "interim alternative educational setting." Because the Act does not define "another setting" or a "suspension," it appears that school administrators could avoid the requirements of 615(k) (3) (B) for

208. See 140 CONG. REC. S10,005 (daily ed. July 28, 1994) (statement of Sen. Gorton) ("In some instances, teachers are resigning their positions because they can no longer control their classrooms.").

209. See Albert Shanker, *Where We Stand on the Rush to Inclusion: Disabled Students*, 60 VITAL SPEECHES OF THE DAY 314, 316 (1994).

210. *Id.* at 315.

211. IDEA Amendments of 1997, Pub. L. No. 105-17, § 615(k) (3), 1997 U.S.C.C.A.N. (111 Stat.) 37, 94. The Department of Education Proposed Rule follows the language of this provision rather closely, however, it allows the interim setting to include services and modifications that address paragraph 1 and 2 behaviors as well as "any other behavior that results in the child being removed from the child's current educational placement for more than 10 school days in a school year." 62 Fed. Reg. 55,103 (1997) (to be codified at 34 C.F.R. pt. 300.522).

212. See IDEA Amendments of 1997, § 615(k) (1) (A), 1997 U.S.C.C.A.N. (111 Stat.) at 93.

213. See *id.* § 615(k) (3) (B), 1997 U.S.C.C.A.N. (111 Stat.) at 94.

placements of less than ten days by using the expediency of calling them "another setting" or a suspension. If, however, the school is still bound by the requirement of section 612(a)(1) in a ten-day suspension, that each disabled student receive a FAPE, then the use of the other 2(A)(1) alternatives may achieve little.²¹⁴

D. Manifestation Determination Review

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

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

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

(B) INDIVIDUALS TO CARRY OUT REVIEW—a review described in subparagraph (A) shall be conducted by the IEP team and other qualified personnel.

(C) CONDUCT OF REVIEW—In carrying out a review described in subparagraph (A), the IEP team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP team—

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

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

(II) observations of the child; and

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

(ii) then determines that -

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

214. The Proposed Department of Education Rule authorizes a 10-day suspension without education services. See 62 Fed. Reg. at 55,102 (to be codified at 34 C.F.R. pt. 300.520(a)(1)).

placement;

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

(III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.²¹⁵

Section 615(k)(4) appears to adopt the reasoning of the 1994 Amendments,²¹⁶ the Department of Education,²¹⁷ and several court opinions²¹⁸ that misconduct caused by a disability should be treated differently from misconduct not caused by a disability when considering appropriate discipline.²¹⁹ A close look at the Amendments and court precedent, however, indicates that the distinction between disability-related conduct and conduct not related to a disability may be illusory.

215. IDEA Amendments of 1997, § 615(k)(4), 1997 U.S.C.C.A.N. (111 Stat.) at 95. This provision is addressed in Department of Education Proposed Rule, 62 Fed. Reg. at 55,103 (to be codified at 34 C.F.R. pt. 300.523). The proposed rule generally tracks the statutory provision, however, the DOE has created an exception to the MDR requirement where "the child with disabilities is removed from the current educational placement for 10 school days or fewer in a given school year, and no further disciplinary action is contemplated." 34 C.F.R. pt. 300.523(b).

216. When the Gun Free Requirements were added by the Improving America's Schools Act of 1994, Congress explicitly targeted non-handicap related conduct for expulsion:

Nothing in the Individuals with Disabilities Education Act shall supersede the provisions of section 14601 of the Elementary and Secondary Education Act [the gun requirements] if a child's behavior is unrelated to such child's disability, except that this section . . . shall be interpreted in a manner that is consistent with the Department's final guidance concerning State and local responsibilities under the Gun-Free Schools Act of 1994.

Improving America's Schools Act of 1994, Pub. L. No. 103-382, Title III, Part A, § 314(b), 108 Stat. 3937 (codified at 20 U.S.C. § 1400 (1994)).

217. The Department of Education also recommends that schools conduct a manifestation determination. See *OSEP Memorandum 95-16*, Apr. 26, 1995, 22 IDELR 531. Many previous letters indicated OSEP's policy on differentiating handicap related conduct from that which is not caused by the disability. See *OSEP Letter of Aug. 25, 1994*, 21 IDELR 997; *OSEP Letter of Jan. 30, 1991*, 17 EHLR 469; *OSEP Letter of Nov. 10, 1988*, EHLR 213:179.

218. See, e.g., *Doe v. Maher*, 793 F.2d 1470, 1482 (9th Cir. 1986) (holding that district may withhold educational services from handicapped child as long as behavior is not manifestation of handicap), *aff'd modified sub nom. Honig v. Doe*, 484 U.S. 323 (1988); *School Bd. v. Malone*, 762 F.2d 1210, 1218 (4th Cir. 1985) (stating that whether "child's unacceptable behavior was caused by his handicap" is determinate in decision to expel); *Kaelin v. Grubbs*, 682 F.2d 595, 602 (6th Cir. 1982) (explaining that handicapped child may be expelled, but only if relevant behavior was not manifestation of his handicap); *S-1 v. Turlington*, 635 F.2d 342, 350 (5th Cir. 1981) (holding that, prior to expulsion of a handicapped child, determination must be made as to whether student's misconduct is related to the handicap); *Doe v. Koger*, 480 F. Supp. 225, 229 (N.D. Ind. 1979).

219. Under Section 615(k)(4), the manifestation determination review (MDR) applies to all misbehavior that may result in suspension, expulsion, or a temporary alternative placement, not merely misconduct involving drugs, weapons, and injury. See IDEA Amendments of 1997, § 615(k)(4), 1997 U.S.C.C.A.N. (111 Stat.) at 94.

1. *Precedent left intact: the black hole of manifestation determination*

The Act broadly defines children with disabilities as children "with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities."²²⁰ In *S-I v. Turlington*, the Fifth Circuit held that handicap-related misconduct was not limited to the category of emotionally disturbed, but could include the aggressive conduct of an orthopedically impaired student or of a child with a low intellect.²²¹ The court cited a psychologist's testimony with approval. The testimony stated that an orthopedically impaired child, "would behave in an extremely aggressive way toward other children and provoke fights despite the fact that he was likely to come out very much on the short end of the stick. That this was his way of dealing with stress and dealing with a feeling of physical vulnerability."²²² Similarly, children with low intellect, "would respond to stress or respond to a threat in the only way that they feel adequate, which may be verbal aggressive behavior."²²³ Other courts have shown a similar willingness to rely on an expansive interpretation of handicap-related conduct if supported by the testimony of experts.²²⁴

In *School Board v. Malone*, the District Court for the Eastern District of Virginia held that a learning-disabled student who was doing well in school under an appropriate IEP could not be expelled for distribution of drugs in school because that conduct was caused by his handicapping condition.²²⁵ The court stated that the learning disability prevented the child from giving long-term consideration to the consequences of his action, and caused a loss of self image, which left him particularly susceptible to peer pressure, thereby causing the misconduct.²²⁶ Other courts, such as the District Court of Arizona, have ignored findings of knowledgeable educators to hold that misbehavior, such as bringing a knife to school, was caused by a student's emotional disability.²²⁷

220. 20 U.S.C. § 1401(a)(i)(A)(j) (1994), amended by IDEA Amendments of 1997, 1997 U.S.C.A.N. (111 Stat.) 37.

221. See *S-I*, 635 F.2d at 346-47.

222. *Id.* at 347.

223. *Id.* (quoting psychologists testimony).

224. See, e.g., *Stuart v. Nappi*, 443 F. Supp. 1235, 1241 (D. Conn. 1978) (finding that expert testimony supported existence of connection between student's disruptive behavior and her handicapping condition).

225. See *School Bd. v. Malone*, 662 F. Supp. 978, 981 (E.D. Va. 1984).

226. See *id.* at 980.

227. "[H]ow can a knowledgeable group of educators in good conscience, fairly conclude

The Ninth Circuit, in *Doe v. Maher*, recognized the danger of this reasoning and held that a handicapped child's misconduct is related to his handicap "only if the handicap significantly impairs the child's behavioral controls."²²⁸ The court cited behavior that would not result in IDEA protections as where:

a child's physical handicap results in his loss of self-esteem, and the child consciously misbehaves in order to gain attention, or win the approval, of his peers. Although such a scenario may be common among handicapped children, it is no less common among children suffering from low self-esteem for other, equally tragic reasons.²²⁹

Without some limitation, the self esteem reasoning creates a black hole, totally capable of sucking all misbehavior by disabled students into the protected class of conduct.²³⁰

Despite the contradictions and lack of clear guidance in pre-existing caselaw, section 615(k)(4) makes no effort to use these cases to establish standards to guide the IEP team in determining when conduct is related to a disability. Instead, the paragraph states additional, possibly unrelated, grounds for holding that conduct is *not* related to a disability. The Amendments' failure to establish a standard for manifestation determination review, and the parent's right to appeal the IEP determination as established in 615(k)(6), leave the IEP team with pre-existing law, further muddled by the add-ons in section

that the knife incident did not relate to Jeremy's chronic inability to have 'satisfactory interpersonal relationships,' or to his 'inappropriate behavior,' or to his 'strong conduct disorder?'" *Magyar v. Tucson Unified Sch. Dist.*, 958 F. Supp. 1423, 1445 (D. Ariz. 1997). *But cf. Doe v. Oak Park & River Forest High Sch. Dist.* 200, 115 F.3d 1273, 1281-82 (7th Cir.) (ignoring testimony of experts and holding that student's possession of marijuana was not related to disability and questioning whether any disability existed), *cert. denied*, 118 S. Ct. 564 (1997).

228. 793 F.2d 1470, 1480 n.8 (1986), *aff'd modified sub nom. Honig v. Doe*, 484 U.S. 305 (1988).

229. *Id.*; see also *Doe v. Board of Educ.*, 115 F.3d at 1282 (approving *Doe* limitation on conduct related to disability and refusing to find that possession of marijuana by learning disabled child was conduct related to disability).

230. See *Senate Hearing, supra* note 110, at 70-71 (statement of Marcia Reback).

[I]t has before nearly pro forma to find that any disruptive or violent behavior is a manifestation of a disability. The logic works this way: there is a presumption that any disability causes a loss of self-esteem and it is this damage to self-esteem that causes the violent or disruptive behavior. This logic has led hearing officers and judges to find that virtually any type of disability is the root cause of disruption or violence among disabled children.

Id.; see also *IDEA Reauthorization Hearing, supra* note 31, at 79 (comments of Dorothy Wendel) (noting that regardless of nature of disability, it will always impact on emotional development and self esteem). Another commentator noted that "[m]any, if not all, behaviors that a student displays can be interpreted by some assessment tool or diagnostician as a reflection of the handicap. It is doubtful whether the diagnostic skills of team members are so accurate and refined that such a link can be established beyond a reasonable doubt." Kathy Zantal-Wiener, ED295397 *Disciplinary Exclusion of Special Education Students* ERIC Digest #453, at 2 (1988).

615(k)(4).²³¹

2. *Implicit assumption that poor behavior is disability related*

Section 615(k)(4)(C)(ii)(I) states that the IEP team must determine that the misbehavior is a manifestation of the handicap if the former IEP was not appropriate "in relation to the behavior subject to the disciplinary action" or behavior intervention strategies and services were not consistent with the IEP or placement.²³² This requirement assumes that the IEP contains behavioral provisions and reflects the requirements of sections 615(k)(1)(C) and 614(3)(B)(I), that the IEP must include behavioral services whenever a behavior problem occurs. The striking omission, however, is that none of these sections require that the team first determine if the problem behavior is related to the disability. The Amendments either presuppose that the disability causes the misbehavior, or are indifferent to causation, because in every situation the IEP team is required to address the behavior problems of identified students with IEP behavior intervention.

3. *Appropriateness of placement and the IEP*

Section 615(k)(4)(C)(II)(i) analyzes the adequacy of the school's past conduct, rather than the student's conduct, and the relation of the school's conduct to the misbehavior.²³³ It requires that the IEP and services provided to the child at the time of the disciplinary incident be appropriate *in relation to the misconduct*.²³⁴ This proviso focuses the analysis on the behavioral terms of the IEP, possibly preventing a hearing officer from ruling that an IEP that was slightly inappropriate on math goals, for example, justifies a manifestation determination on an unrelated behavior incident.²³⁵

In application, however, the standard will effectively tip the scales in favor of finding the IEP inadequate. If a hearing officer finds that no behavior controls were in place, then the placement was obviously

231. Department of Education Proposed Rules make no attempt to elucidate this area.

232. An earlier OSEP pronouncement on this issue clearly stated that the misconduct must be caused by the inappropriate program. "If the student's misconduct is determined to be a manifestation of the handicapping condition, or due to an inappropriate placement, or both, then the student may not be suspended or otherwise excluded for more than 10 school days." OSEP Letter, Nov. 10, 1988, EHLR 213:179.

233. See IDEA Amendments of 1997, Pub. L. No. 105-17, § 615(k)(4)(C)(II)(i), 1997 U.S.C.A.N. (111 Stat.) 37, 95.

234. See *id.*, 1997 U.S.C.A.N. (111 Stat.) at 95.

235. This section is not intended to require an IEP team to find that a child's behavior was a manifestation of a child's disability based on a technical violation of the IEP or placement requirements that are unrelated to the educational/behavior needs of the child. See H. REP. NO. 105-95, at 110-11 (1997).

inadequate because it resulted in a major disciplinary incident. If behavioral controls were in place, then in light of a major disciplinary incident, they must have been inadequate.

Similarly, although the IEP team can easily check to determine if the supplementary aids, services and behavior strategies provided were consistent with the IEP, what does it mean to be consistent with the placement? Misbehavior sufficient to warrant suspension or expulsion indicates that the existing behavior strategies were not consistent with the mainstream placement.²³⁶

4. *Ability to understand consequences and control behavior*

The requirements of sections 615(k)(4)(C)(ii)(II) and (III), that the child understand the impact and consequences of the behavior and be able to control the behavior, may categorically exclude students disabled with hyperactivity, attention deficit disorder, emotional impairments, and low intellect, from regular school discipline. Because students with learning disabilities constitute slightly over 50% of the 4.8 million school-aged children receiving special education services of that population, 12% are students with mental retardation, and 9% are students with emotional disturbance cases addressing the interactions of these disabilities and the criteria of these subsections will have enormous impact.²³⁷ If the *Malone* case, discussed above, is indicative of the genre, the vast majority of special education children will be exempted from regular education discipline.²³⁸

E. *Determination that Behavior Was Not A Manifestation of Disability*

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

(B) ADDITIONAL REQUIREMENT—if the public agency initiates

236. See *Magyar v. Tucson Unified Sch. Dist.*, 958 F. Supp. 1423, 1445 (D. Ariz. 1997) (noting that "with [the handicapped student's] history of behavioral problems and suspensions, it's obvious that his emotionally handicapped needs were unmet").

237. See OSEP 1996 ANNUAL REPORT, Number and Disabilities of Children and Youth Served under IDEA, pt. B, at 3.

238. See *School Bd. v. Malone*, 662 F. Supp. 978, 980 (E.D. Va. 1984), *aff'd*, 762 F.2d 1210 (4th Cir. 1985) (arguing that even disruptive behavior by handicapped student which significantly impairs education of other students warrants only a transfer to a more restrictive environment, not expulsion).

disciplinary procedures applicable to all children the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.²³⁹

This paragraph answers the largest question that has hovered over special education discipline both before and after *Honig v. Doe*.²⁴⁰ Can a special education student who has engaged in misconduct unrelated to their disability be expelled? Section 615(k)(5)(A) purports to allow schools to treat disabled students whose misconduct is not a manifestation of their disability the same as regular education students. It contains, however, the enormous exception, "except as provided in section 612(A)(1)."²⁴¹ As previously discussed, section 612(A)(1) requires the states to provide a free appropriate public education to special education students who have been suspended or expelled.²⁴² Thus, under the 1997 law, there cannot be a true suspension in excess of ten days, or expulsion, for special education students, whether or not the misconduct was a manifestation of their disability.²⁴³

So what difference does it make if a school finds that the child's

239. IDEA Amendments of 1997, Pub. L. No. 105-17, § 615(k)(5), 1997 U.S.C.C.A.N. (111 Stat.) 37, 95. The Department of Education Proposed Rule tracks the language of this provision but adds that if a parent brings a hearing to challenge the manifestation determination, the child will remain in their current educational placement. The Note to this provision muddies the waters by stating that the child remains in the current placement *or* the section 7 placement "whichever applies." 62 Fed. Reg. 55,103 (1997) (to be codified at 34 C.F.R. pt. 300.524).

240. 484 U.S. 305 (1988).

241. H.R. 3268, an earlier version of the 1997 Amendments, did not have this exception and provided that services could be terminated for unrelated conduct. See H.R. 3268, § 615(j)(6)(A)(ii) (1997); see also H.R. REP. NO. 104-614, at 18 (1996) ("The legislation provides that students whose actions were unrelated to their disability may be treated as any other student, up to and including expulsion without services for weapon and illegal drug cases if so provided by local or state law."). This view was strongly contested in the "Additional Views" section of the Report. See *id.* at 257-58. H.R. 3268 passed in the House but the Senate was unable to complete work on it in 1996. See 143 CONG. REC. H2531 (daily ed. May 13, 1997) (statement of Rep. Goodling).

242. See IDEA Amendments of 1997, § 612(a)(1)(a), 1997 U.S.C.C.A.N. (111 Stat.) at 60 ("A free appropriate public education is available to all children with disabilities . . . including children with disabilities who have been suspended or expelled from school.").

243. The legislative history supports this interpretation. Secretary Riley stated that "this agreement still retains the essential rights and protections for children with disabilities. The bill also makes clear that educational services may not be terminated for any child with a disability." Statement of Secretary of Education Richard W. Riley, Press Release, May 7, 1997; see also U.S. DEP'T OF EDUC., THE IDEA COMPARISON CHART, reprinted in 143 CONG. REC. H2531 (daily ed. May 13, 1997); IDEA IMPROVEMENT ACT AMENDMENTS PASS COMMITTEE ON VOICE VOTE, *supra* note 124. The Senate precursor to the 1997 Amendments, S. 1578, contained express language allowing educational services to cease if the conduct was not a manifestation of the disability. This language was not retained. See S. 1578, 105th Cong. § 615A(b)(2)(B) ("[T]he child shall continue to receive educational services . . . unless . . . the behavior of the child was not a manifestation of the disability of the child.").

misconduct was unrelated to the disability? Perhaps the section 612(A)(1) FAPE services can be provided in the home without going through the due process procedures that a change in placement would normally require under the Act. The FAPE definition, however, requires that the education meet the standards of the state educational agency.²⁴⁴ Section 612(a)(5) requires the state to enact policies to assure that disabled students are placed in the least restrictive alternative,²⁴⁵ and section 612(a)(6) requires the state to meet the procedural requirements of section 615.²⁴⁶ These procedures include annual reviews²⁴⁷ and the right to bring a due process hearing for any complaints regarding, among other things, placement.²⁴⁸ Thus, it appears that a manifestation determination achieves precious little.²⁴⁹

F. Parent Appeal

(A) IN GENERAL—

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

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

(B) REVIEW OF DECISION—

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

(ii) In reviewing a decision under paragraph (1)(A)(ii) to place the child in an interim alternative educational setting, the hearing officer shall apply the standards set out in paragraph (2).²⁵⁰

244. See IDEA Amendments of 1997, § 602(8)(B), 1997 U.S.C.C.A.N. (111 Stat.) at 44.

245. See *id.* § 612(a)(5), 1997 U.S.C.C.A.N. (111 Stat.) at 61.

246. See *id.* § 612(a)(6), 1997 U.S.C.C.A.N. (111 Stat.) at 61-62.

247. See *id.* § 615(b), 1997 U.S.C.C.A.N. (111 Stat.) at 88.

248. See *id.* § 615(f)(1), 1997 U.S.C.C.A.N. (111 Stat.) at 91.

249. Considering the difficult and subjective determination of "manifestation" and the limited benefits achieved, the point of commentator Gail Sorenson is well taken: "The better and easier approach should relatedness be a relevant issue, would be to assume relatedness unless there is substantial and convincing evidence to the contrary; in that way, attention can be focused on the more important issue of providing an appropriate education." Sorenson, *supra* note 55, at 394.

This advice is even sounder if one considers the Department of Education Proposed Rule:

In providing FAPE to children with disabilities who have been suspended or expelled from school, a public agency shall meet the requirements of § 300.522.

Section 615(k)(6) makes clear that parents have a right to an expedited due process hearing when they disagree with an IEP team's determination that the conduct was not related to the disability or "any decision regarding placement."²⁵¹

Although section 615(k)(6)(B)(ii) is limited to placement decisions of a child with a disability under section 615(1)(A)(ii), paragraph A applies to all decisions regarding placement.²⁵²

Section 615(k)(6)(B)(i) requires the school system to bear the burden of proving that the case meets the highly discretionary "manifestation" standards stated in paragraph (4)(C).²⁵³ Section 615(k)(6)(B)(ii) requires a hearing officer to apply the standards set out for hearing officers in paragraph 2, to the review of interim placements made by a school official under section 615(k)(1)(A)(ii). This adds consideration of the "injury to the child or to others" to the drug-or-weapon criteria for interim placements by school officials, as well as consideration of the appropriateness of the current and interim placement, and the adequacy of the school's efforts to minimize the risk of harm in the current placement.

G. Placement During Appeals

(A) IN GENERAL—When a parent requests a hearing regarding a disciplinary action described in paragraph (1)(A)(ii) or paragraph (2) to challenge the interim alternative educational setting or the manifestation determination, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(A)(ii) or paragraph (2), whichever occurs first, un-

62 Fed. Reg. 55,074 (1997) (to be codified at 34 C.F.R. pt. 121(c)(3)). Section 300.522 gives the requirements for an alternative educational setting. Thus, whatever the result of the manifestation determination the educational services and setting will be the same.

250. IDEA Amendments of 1997, Pub. L. No. 105-17, § 615(k)(6), 1997 U.S.C.C.A.N. (111 Stat.) 37,96. These provisions are addressed in Department of Education Proposed Rules, 62 Fed. Reg. at 55,103 (to be codified at 34 C.F.R. pt. 300.525).

251. The IDEA Amendments of 1997 maintain the general right to a hearing. *See id.* § 615(b), 1997 U.S.C.C.A.N. (111 Stat.) at 88-89 (preserving 20 U.S.C. § 1415(b)(1)(E), which provides that children with disabilities and their parents must have "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child"); *id.* § 615(f)(1), 111 Stat. at 91 (preserving 20 U.S.C. § 1415(b)(2)(1994), which states that "whenever a complaint has been received under [§ 1415] § 615(b)(6) or (k) . . . , the parents involved in such complaint shall have an opportunity for an impartial due process hearing").

252. *Compare id.* § 615(k)(6)(B)(ii), 1997 U.S.C.C.A.N. (111 Stat.) at 96 (permitting parent to appeal change in the placement of a child with a disability), *with id.* § 615(k)(6)(A), 1997 U.S.C.C.A.N. (111 Stat.) at 96 (permitting parent appeal of determination that the child's behavior was not manifestation of child's disability).

253. *See id.* § 615(k)(6)(B), 1997 U.S.C.C.A.N. (111 Stat.) at 96 (requiring "public agency [to] demonstrate . . . that child's behavior was not a manifestation of such child's disability").

less the parent and the State or local educational agency agree otherwise.

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

(C) **EXPEDITED HEARING**—

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

(ii) In determining whether the child may be placed in the alternative educational setting or in another appropriate placement ordered by the hearing officer, the hearing officer shall apply the standards set out in paragraph (2).²⁵⁴

Section 615(k)(7) reverses the presumption of the "stay put" provision by allowing a child in an alternative placement for disciplinary action to stay put in the alternative placement during the pendency of the appeal, or the time limit of the interim placement, whichever is shorter.²⁵⁵ Any change in placement that exceeds forty-five days must abide by the traditional "stay put" provision of returning to the "current," that is pre-interim, placement.²⁵⁶

Section 615(k)(7)(C) recognizes that it is not always appropriate to return the child to the "current" setting after forty-five days and that the parents may not agree to a change in placement in these situations. If the school believes that the child is dangerous, they may request an expedited hearing. If the school can demonstrate by substantial evidence that the child is substantially likely to harm

254. *Id.* § 615(k)(7), 1997 U.S.C.C.A.N. (111 Stat.) at 96-97.

255. *Compare id.* § 615(j), 1997 U.S.C.C.A.N. (111 Stat.) at 93 (allowing child to remain in then-current educational setting during pendency of proceedings), *with id.* § 615(k)(7)(A), 1997 U.S.C.C.A.N. (111 Stat.) at 96 (allowing child with disciplinary problems to remain in alternative educational setting during proceedings).

256. *See id.* § 615(k)(7)(B)-(C), 1997 U.S.C.C.A.N. (111 Stat.) at 96-97 (affording expedited hearing if it is dangerous for child to return to current, or pre-interim placement and allowing child to remain in alternative interim placement). Section 615(k)(7) is another retrenchment of the Improving American's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified at 20 U.S.C. §§ 1400-1491(o)), which requires the child to remain in the interim alternative placement for the entire duration of the due process challenge. *See id.* § 314, 108 Stat. at 3936 (codified at 20 U.S.C. § 1415(e)(3)(B)(iii)).

themselves or others in the current placement, and otherwise meets the requirements of paragraph 2, the hearing officer may order that the child remain in the alternative placement.²⁵⁷ Section 615 (k) (7) (C) allows hearing officers to fully exercise the *Honig* dangerousness exception by extending the hearing officer's powers under paragraph 2 to place the child in an alternative setting for more than forty-five days.²⁵⁸

H. Protections for Children Not Yet Eligible for Special Education and Related Services

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

(B) BASIS OF KNOWLEDGE—A local educational agency shall be deemed to have knowledge that a child is a child with a disability if

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

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

(iii) The parent of the child has requested an evaluation of the child pursuant to section 614; or

(iv) The teacher of the child, or other personnel of the local edu-

257. See *id.* § 615(k) (7) (C) (ii), 1997 U.S.C.C.A.N. (111 Stat.) at 96-97. A Note to the Department of Education Proposed Rule states that a (c) (2) placement may not be longer than 45 days, however, a note to the regulation states:

An LEA may seek subsequent expedited hearings under paragraph (c) (1) of this section if, at the expiration of the time period of the placement ordered under paragraph (c) of this section, the LEA maintains that the child is still dangerous and the issue has not been resolved through due process.

62 Fed. Reg. 55,104 (1997) (to be codified at 34 C.F.R. pt. 300.526(c) (2)).

258. See *Honig v. Doe*, 484 U.S. 305, 328 (1988) (recognizing exception where child is dangerous). "The Amendments do not revoke the courts authority, as stated in *Honig*, to grant relief as part of its statutory authority under § 1415(e) (2) (IDEA Am of 1997 § 615(I) (2)) to grant such relief as the court determines is appropriate." Exhaustion principles will work to exclude the court, however, as a primary actor. See IDEA Amendments of 1997, § 615(I) (2), 1997 U.S.C.C.A.N. (111 Stat.) at 92.

cational agency, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency.

(C) CONDITIONS THAT APPLY IF NO BASIS OF KNOWLEDGE—

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

(ii) Limitations - If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under paragraph (1) or (2), the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with the provisions of this part, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.²⁵⁹

1. The “deemed to have knowledge” standard

a. Application

Although some students not previously identified as special education students must be allowed to request identification and “stay put” during the pendency of that action, section 615(k)(8) adopts the principle of the *Rodriguez* decision that mechanisms must be in place to prevent the abuse of “stay put” by students with disciplinary problems who are not disabled.²⁶⁰ Section 615(k)(8) codifies a variant of

259. IDEA Amendments of 1997, § 615(k)(8), 1997 U.S.C.C.A.N. (111 Stat.) at 97. These provisions are repeated, almost verbatim, in Department of Education Proposed Rule, 62 Fed. Reg. at 55,104 (to be codified at 34 C.F.R. pt. 300.527). Proposed Rule 34 C.F.R. pt. 300.528 provides that an expedited hearing must result in a decision within 10 days of the request for hearing. See 62 Fed. Reg. at 55,104.

Section 615(k)(9) authorizes referral to, and action by, law enforcement and judicial authorities for crimes committed by a child with disabilities. See *id.* § 615(k)(9), 1997 U.S.C.C.A.N. (111 Stat.) at 98. The section is not central to the topic of this paper and is not discussed. Section § 615(k)(10) defines several terms which are discussed in the appropriate sections of this article.

260. See IDEA Amendments of 1997, § 615(k)(8), 1997 U.S.C.C.A.N. (111 Stat.) at 97; *Rodriguez v. Waukegan Sch. Dist. No. 60*, 90 F.3d 249, 252 (7th Cir. 1996) (acknowledging Act’s “stay put” provision and describing that its purpose is to give parents choice of maintaining their children in the existing program until their dispute with school is resolved).

the *Rodiriecus* "knew or should have known standard"—that the school had knowledge or is deemed to have knowledge that the child is a child with disabilities *before* the disciplinary incident—by listing four possible bases of knowledge of the disability.²⁶¹ These bases present many issues of application and questions of relevance. The *Rodiriecus* case illustrates these issues.

First, Roderiecus would probably not meet the first requirement of section 615(k)(8) since his parent did not express concern in writing.²⁶² The *Roderiecus* opinion does not indicate whether his parent is illiterate or disabled, but more importantly, section 615(k)(8)(B)(i) does not indicate whether if there are two parents, both must be disabled, how the parent's disability is to be determined, or what happens if they are disabled. Can parents allege a learning disability or emotional disability that was not previously diagnosed? If they do so, does the existence of a parental disability eradicate the "deemed to have known" standard and allow the courts or hearing officer to consider identification while "stay put" is in effect?

The second requirement, past behavior and performance, is the same standard that was subject to various interpretations by the *Rodiriecus* courts. The Seventh Circuit crisply stated, "[I]t is apparent that the school officials had neither knowledge nor reasonable suspicion to base a rational decision that Rodiriecus L. was in fact disabled. In fact his academic performance, although not outstanding, did not raise their suspicions and they deemed it 'average.'"²⁶³ Yet the District Court stated that the report card issued before the disciplinary incidents showed two incompletes, four F's, one D, two C's, and three B's (two in physical education).²⁶⁴

The third basis of knowledge under section 615(k)(8) is a parental request for special education evaluation. The Seventh Circuit noted that, "[n]either the parent nor the guardian nor Rodiriecus requested any special education during his period of enrollment at Abbott Middle School."²⁶⁵ Yet the facts of the case illustrate that Rodiriecus had been at the Abbott Middle School for only three months prior to the incident and that prior to that time he was receiving supplemental educational and behavioral services from a pri-

261. See IDEA Amendments of 1997, § 615(k)(8)(B), 1997 U.S.C.A.N. (111 Stat.) at 97.

262. See *Rodiriecus*, 90 F.3d at 254 (noting that "neither the parent [nor] the guardian . . . requested any special education during [Rodiriecus'] period of enrollment").

263. *Id.* at 254.

264. See *Rodiriecus v. Waukegan Sch. Dist. No. 60*, 889 F. Supp. 1045, 1046 (N.D. Ill. 1995), *rev'd*, 90 F.3d 249 (7th Cir. 1996).

265. *Rodiriecus*, 90 F.3d at 254.

vate, non-school program.²⁶⁶ His caseworker from this program requested, six months before he went to Abbott Middle School, that his then-current school district evaluate him for special education services.²⁶⁷ It is unlikely that these actions would meet the third requirement because the request was not by a parent or legal guardian, nor was it made to the now-current school district.

The fourth basis requires a teacher or other employee to express concern to the special education director or other school personnel. The Seventh Circuit states, "[i]ndeed the record reflects that not one single individual, teacher, guardian, parent or school official, proposed or suggested that Rodiriecus may be in need of special education."²⁶⁸ The District Court reports:

Rodiriecus was cited for misbehavior on four occasions between October, 1994 [when he arrived at the school] and February, 1995 The communications teacher noted in her report of the insubordination that "Willie and his sister, Tiffany, seem so angry at everyone. Treating them with respect and patience doesn't touch them in any way."²⁶⁹

On November 18, 1994, Rodiriecus was suspended for the remainder of the school day after two incidents of insubordination. On December 8, 1994, Rodiriecus was sent to the alternative learning center for the rest of the day because he was too talkative in his communications class. The teacher's referral report stated that "Willie cannot keep himself under control—so that the rest of us can get our work done."²⁷⁰

It is uncertain whether the communications teacher's completion of a disciplinary report form, which does not frame its concern in terms of special education, would fulfill the fourth basis of knowledge.

A cursory inspection of Rodiriecus's record by his school, however, would have provided a wealth of information on the need for a special education referral. The District Court notes that:

Rodiriecus had been living in a residential facility under the guardianship of the Illinois Department of Children and Family Services for over one year during 1993 and 1994, where he had been placed after repeatedly coming under court supervision for misbehavior, including robbery. He had been involved in disturbances at his prior school, including a fight in which he reportedly

266. See *Rodiriecus*, 889 F. Supp. at 1046.

267. See *id.*

268. *Rodiriecus*, 90 F.3d at 254.

269. See *Rodiriecus*, 899 F. Supp. at 1046.

270. *Id.*

attacked another student. At the facility where he resided under DCFS guardianship, he at times ran away, stole, and beat his head against a brick wall.²⁷¹

Yet, under the Seventh Circuit's analysis, and probably also under section 615(k)(8), the child does not qualify for special education treatment under the should-have-known standard.

b. Relevance

Section 615(k)(8) raises even more basic concerns. One may argue that it is immaterial whether the school system is somehow at fault, because they knew or should have known the child was disabled, or the parents are at fault for failure to notify the school of problems. Stay put is not meant to be a punitive provision against school systems for past dereliction of duty, nor is a refusal to provide special education services and protection meant to punish parents for a lack of diligence. These are educational provisions which attempt to assure that the most appropriate education will be provided to a disabled youngster while disagreements are sorted out. Thus, regardless of whether the school knew or should have known the child was disabled, the issue is whether, at the time of the disciplinary incident, the school should continue the child's placement while it addresses, perhaps for the first time and perhaps with information it has never before known, whether the child is disabled and is in need of assistance. Section 615(k)(8)(C)(ii) recognizes the potential legitimacy of a claim for identification that does not meet the should-have-known standard.²⁷² It requires that if a child requests identification after a paragraph 1 or 2 disciplinary incident, the school must provide an expedited evaluation and, if the child is found to be disabled, the school must place the child in special education.

2. The right of immediate evaluation and alternative placement

a. More severe treatment of nondangerous conduct

Subpart (C)(i) of Section 615(k)(8) states that students not "known" to be suffering from a disability will be disciplined as regular education students.²⁷³ This is a marked departure from non-*Rodriguez* precedent, which required that the child stay put in the predisciplinary placement during any evaluation and due process proceed-

271. *Id.* at 1051.

272. See IDEA Amendments of 1997, Pub. L. No. 105-17, § 615(k)(8)(C)(ii), 1997 U.S.C.A.N. (111 Stat.) 37, 97.

273. See *id.* § 615(k)(8)(C)(i), 1997 U.S.C.A.N. (111 Stat.) at 97.

ings.²⁷⁴ Subpart (C) (ii), creates an exception to C(i) regulation education treatment when a request for evaluation is made during the time period the child is subject to discipline under Paragraph 1 or 2. In these situations the child should be given an expedited evaluation²⁷⁵ and during the evaluation period, the child should remain in the educational placement chosen by the school.²⁷⁶

Therefore, Subpart (C) (i) provides more authority to school officials in the nondrug, weapon, and dangerous conduct cases where the child may be subjected to regulation education discipline. Most likely, the child would be suspended or expelled and processed through a nonexpedited evaluation and appeal process without the benefit of education services.²⁷⁷ In Paragraph 1 and 2 situations, Subpart (C) (ii) requires that the child be placed in an alternative education setting and that an expedited evaluation be conducted.²⁷⁸ It is unclear why non-dangerous students should be treated more severely than those involved in dangerous conduct.

b. Must an evaluation be conducted?

The IDEA states an affirmative requirement for participating states to identify, locate, and evaluate disabled children.²⁷⁹ Neither the Act itself, however, nor its regulations, address whether schools must conduct an evaluation whenever a parent requests an initial identification.²⁸⁰ The only reference in the regulations to this situation is with regard to reevaluation of disabled students.²⁸¹ The regulations provide that the education authorities "shall ensure . . . [t]hat an evaluation . . . is conducted every three years, or more frequently if conditions warrant, or if the child's parent or teacher requests an

274. See *Honig v. Doe*, 484 U.S. 305, 323 (1988) (stating that child should remain in disciplinary placement during proceedings).

275. See IDEA Amendments of 1997, § 615(k)(8)(C)(ii), 1997 U.S.C.C.A.N. (111 Stat.) at 97.

276. See *id.* § 615 (k)(8)(C)(ii), 1997 U.S.C.C.A.N. (111 Stat.) at 97.

277. See *supra* Part I.B. These non-Paragraph 1 and 2 cases may benefit from the holding by the Office of Civil Rights that a school should expedite a student's initial evaluation for special education, rather than allow an extended suspension. See *Lumberton (MS) Pub. Sch. Dist.*, Complaint No. 04-91-1133, 18 IDELR 33 (June 24, 1991) (finding violation of Section 504 where student was suspended for 94 days during the evaluation process).

278. See IDEA Amendments of 1997, § 615(k)(8)(C)(ii), 1997 U.S.C.C.A.N. (111 Stat.) at 97.

279. See *id.* § 612(a)(3)(A), 1997 U.S.C.C.A.N. (111 Stat.) at 61; *id.* § 614(a)(1), 1997 U.S.C.C.A.N. (111 Stat.) at 81.

280. See *id.* § 612(a)(3)(A), 1997 U.S.C.C.A.N. (111 Stat.) at 61 (stating only that evaluation must be conducted to find children with disabilities); 34 C.F.R. § 104.32, 104.35(a) (1997) (requiring schools to conduct yearly evaluations but not addressing parental requests for evaluations); 34 C.F.R. §§ 300.128(a)(1), 300.220, 300.531 (requiring evaluation to discover disabilities but not referring to parental requests).

281. See 34 C.F.R. § 300.534.

evaluation.²⁸²

Based on this statutory uncertainty, the Department of Education has stated that a school is not required to evaluate a child upon parental request if the school does not believe the child is disabled.²⁸³ The Department of Education has also noted that if a school refuses to initiate an evaluation or identification, they must provide written notice and an opportunity for the parents to initiate a hearing to challenge the refusal.²⁸⁴

Although Subpart 8(C)(ii) provides for expedited evaluations in certain disciplinary situations, it does not state whether the school is required to conduct an evaluation when the evaluation is requested by parents.²⁸⁵ The language of the provision states, "the evaluation *shall* be conducted in an expedited manner."²⁸⁶ But Section 614(a)(1), which has been interpreted by the Department of Education as not requiring evaluation in response to a parental request, also states that agencies "*shall* conduct a full and individual initial evaluation."²⁸⁷

The legislative history of S.1578, a predecessor to the 1997 Amendments, indicates that the Paragraph 8 evaluations are discretionary, similar to the Section 614(a) evaluations.²⁸⁸ In discussing language that is identical to the 1997 law, the Committee on Labor and Human Resources reported to the Senate that

[t]he committee intends that nothing in this subsection should be interpreted as requiring the agency to conduct an evaluation for the sole reason that a parent requests an evaluation. The committee endorses the Department of Education's interpretation that school districts are not required to conduct evaluations unless the agency suspects or has reason to suspect that the child has a disability.²⁸⁹

282. See *id.*

283. See *Letter to Anonymous*, 21 IDELR 998 (May 5, 1994); *Letter to Williams*, 20 IDELR 1210 (Aug. 3, 1993).

284. See *Letter to Anonymous*, 21 IDELR 998; *Letter to Anonymous*, 19 IDELR 497 (Sept. 29, 1992). But see *School Dist. of Phila.*, Complaint No. 03-90-5001, 18 IDELR 931 (Feb. 28, 1992) (concluding that significant delays in evaluating students, who parents or members of PSC believe need such evaluation to determine their eligibility for special education services, effectively denied approximately two-thirds of students who were ultimately found to be in need of special education services timely provision of an appropriate free public education). The OCR is the component of the U.S. Department of Education that is responsible for enforcing Section 504 of the Rehabilitation Act and its implementing regulations.

285. See IDEA Amendments of 1997, Pub. L. No. 105-17, § 615(k)(8)(C)(ii), 1997 U.S.C.A.N. (111 Stat.) 37, 97.

286. *Id.*, 1997 U.S.C.A.N. (111 Stat.) at 97 (emphasis added).

287. *Id.* § 614(a)(1)(A), 1997 U.S.C.A.N. (111 Stat.) at 81 (emphasis added).

288. See S. REP. NO. 104-275, at 58 (1996) (discussing standard for evaluations under the proposed IDEA Amendments of 1996).

289. *Id.*

This interpretation of the evaluation provision incorporates the "knew or deemed to have known" standard, expanding it to include knowledge of the precipitating behavior incident.²⁹⁰

If a school refuses to conduct an expedited evaluation under (C) (ii), the parents could presumably request a hearing.²⁹¹ The issue then becomes, does the child stay put in her or his disciplinary placement (suspended or expelled), pre-disciplinary placement, or in the (C) (ii) placement chosen by the school? Because (C) (ii) placement is limited to expedited evaluations and "stay put" in the pre-disciplinary placement is only relevant to identified students, under (c) (i) the student should remain in the disciplinary placement.²⁹² This will be an enormous incentive for schools to refuse an expedited evaluation. For these reasons (C) (ii) should be read to require an expedited evaluation on parental request.

c. Must the school's "educational placement" include education?

Under (C) (ii), students who receive an expedited evaluation must remain "in the educational placement determined by school authorities."²⁹³ Must the "educational placement determined by the school authorities" include education, or can the school simply indefinitely suspend these children?

Educational placement is not defined by the Act. Although the term implies a continuation of services, courts have long held that a long-term suspension or expulsion, without the provision of educational services, was a "change of educational placement."²⁹⁴ The 1997 law requires schools to provide a FAPE to special education students when suspending or expelling such students,²⁹⁵ however, the students referenced in (C) (ii) have not been identified as special education

290. See IDEA Amendments of 1997, § 615(k)(8)(B), 1997 U.S.C.C.A.N. (111 Stat.) at 97 (describing "deemed to have known" standard).

291. The Committee was careful to note that it "does not intend this amendment to be used to undermine or otherwise qualify school systems' affirmative, ongoing obligation under IDEA to identify, locate, and evaluate all children from birth through age 21 who are in need of special education and related services." S. REP. NO. 104-275, at 59 (1996).

292. See generally IDEA Amendments of 1997, § 615(k)(8)(C)(i), (ii), 1997 U.S.C.C.A.N. (111 Stat.) at 97.

293. *Id.* § 615(k)(8)(C)(ii), 1997 U.S.C.C.A.N. (111 Stat.) at 97.

294. See, e.g., *Honig*, 484 U.S. at 325-326 n.8 (discussing that suspension of over ten days constitutes "change in placement"); *S-1 v. Turlington*, 635 F.2d 342, 348 (5th Cir. 1981) (holding that "a termination of educational services, occasioned by an expulsion, is a change in educational placement").

295. See IDEA Amendments of 1997, § 612(a)(1)(A), 1997 U.S.C.C.A.N. (111 Stat.) at 60 ("A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.")

students.²⁹⁶ This provision should be clarified as soon as possible.

d. What happens after the evaluation?

Finally, what is the child's placement following the evaluation if the school determines that the child is not disabled? If the evaluation is ambiguous, or the parents disagree with its result or methodology, they can request a due process hearing.²⁹⁷ Although Subpart (C) (ii) does not address the placement of the child during that process, Section 615 presents three alternatives.²⁹⁸ First, it may be argued that (C) (ii) assumes a continuation of the child's school-chosen alternative placement throughout any appeals.²⁹⁹ Second, if section (j), the standard stay put provision, is applicable, the student should remain in the "current educational placement," which is typically defined as his placement prior to the actions in issue, or his predisdisciplinary placement.³⁰⁰ Finally, if (C) (i) is applicable, it may be argued that the school is authorized to act on the evaluation and expel the child as a regular education student.³⁰¹

3. Removing incentives for refusal to identify

a. The problem

The conflicting provisions of Paragraph 8 are products of Congress' desire to prevent the abuse of the stay put provision by students who are not disabled,³⁰² while protecting disabled students who have not been identified as such because of the school's incompetence, poor motive, oversight, or the mere subtlety of the disability. In 1990, Congress found that children with serious emotional disturbances were the most underserved population of disabled students.³⁰³ It is alleged that "[f]ewer than one-half of this nation's children with serious emotional disabilities are being identified and provided special education."³⁰⁴ The National Adult Literacy and Learning Disabili-

296. See *id.* § 615(k)(8), 1997 U.S.C.C.A.N. (111 Stat.) at 97 (applying to "children not yet eligible for special education and related services").

297. See *id.* § 615(f), 1997 U.S.C.A.A.N (111 Stat.) at 91.

298. See *id.* § 615, 1997 U.S.C.C.A.N. (111 Stat.) at 91.

299. See *id.* § 615(k)(8)(C)(ii), 1997 U.S.C.C.A.N. (111 Stat.) at 97.

300. See *id.* § 615(j), 1997 U.S.C.C.A.N. (111 Stat.) at 93 ("[D]uring the pendency of any proceedings conducted pursuant to this section . . . the child shall remain in the then-current educational placement of such child . . .").

301. See *id.* § 615(k)(8)(C)(i), 1997 U.S.C.C.A.N. (111 Stat.) at 97.

302. See S. REP. NO. 104-275, at 59 (1996) (stating that subsection on non-identified students is "a response to the potential misuse of the protections under IDEA by children who do not have disabilities").

303. See H.R. REP. NO. 101-544, at 39 (1990), reprinted in 1990 U.S.C.C.A.N. 1723, 1762.

304. Senate Hearing, *supra* note 110, at 102 (statement of Kathleen Boundy, Center for Law

ties Center found that "60% of adults with severe literacy problems have undetected or unremediated learning disabilities."³⁰⁵ These statistics substantiate the concern for school failure, or refusal, to detect disabilities.

The existence of a dual disciplinary system for disabled and non-disabled students, where the school is limited to expensive and legally-involved options for disabled students, may exacerbate the failure to identify problems by tempting schools to avoid identification of students who have behavior problems. Even without impugning the motivation of educators,³⁰⁶ the considerable gray area in identifying a handicapped student and the potentially unappealing nature of a 16-year-old, foul-mouthed, but disabled, bully suggest that schools should be given every incentive to research the misbehavior and determine if there is a disability at its root.³⁰⁷ Although there was no evidence of a willful delay in *Rodiricus*,³⁰⁸ the facts of the case illustrate that unless the school shows initiative in investigating the needs of students who are experiencing school difficulties, academic or behavioral, their disabilities may go undetected and their education may end.³⁰⁹

b. Paragraph 8 weakens earlier incentives to identify

Pre-existing caselaw prevented the weakening of incentives to identify by imposing stay put on students who requested special education evaluation after a disciplinary incident,³¹⁰ thereby preventing the school from using its more expeditious avenues of discipline. Paragraph 8's "deemed to have known"³¹¹ standard weakens this disincentive. Section C of Paragraph 8 informs us that if the parent cannot prove the school had pre-existing knowledge, the child can be disci-

and Education).

305. *Hearings on IDEA*, *supra* note 176, at 124 (emphasis omitted).

306. *But see Senate Hearing*, *supra* note 110, at 35 (testimony of Diane Lipton, Disability Rights and Education Defense Fund) ("Why do teachers tell us that they are told by their school administrators not to refer children for behavior and other necessary assessments and services and instead are encouraged to simply remove the children who present problems?").

307. *See* *Chris D. v. Montgomery County Bd. of Educ.*, 753 F. Supp. 922, 923-27 (M.D. Ala. 1990) (noting that school, apparently without bad intent, failed to properly identify special needs child for six years, despite constant failing grades, being held back for two years, and consistent behavior problems resulting in repeated discipline and multiple suspensions).

308. *Rodiricus v. Waukegan Sch. Dist.* No. 60, 90 F.3d 249, 250-51 (7th Cir. 1996) (describing factual and procedural history of case).

309. *See id.* at 254-55 (concluding that "there may very well be instances where disabled children, unidentified by the school district, are entitled to and indeed may need the protection of the IDEA").

310. *See supra* Part I.B.

311. IDEA Amendments of 1997, Pub. L. No. 105-17, § 615(k)(8)(B), 1997 U.S.C.A.N. (111 Stat.) 37, 97.

plined like a regular education student.³¹² If the incident involved Paragraph 1 or 2 behavior and the parent subsequently requests an expedited evaluation, (C)(ii) provides that stay put does not apply and the school may change the child's placement while the evaluation is conducted.³¹³ These provisions significantly weaken the school's incentive to identify, however, the threat of potential liability may counteract this effect.

c. School liability: a potent motivator

In the past, courts have been hostile to educational malpractice cases.³¹⁴ The IDEA, however, specifically allows a court to provide the relief it deems to be appropriate.³¹⁵ The Supreme Court expressly sanctioned reimbursement for the cost of alternative placement if the state had not provided an appropriate placement,³¹⁶ but the Court did not establish a standard for determining damages or even discuss their availability. Several courts have agreed that a school should be liable for the cost of compensatory education when parents are not able to afford alternative placement for their child at the time of the school's dereliction of duty.³¹⁷ Some courts have refused to allow general damages,³¹⁸ or have sharply limited their recovery to reimbursement of education related expenses³¹⁹ or to cases of intentional

312. See *id.* § 615(k)(8)(C)(i), 1997 U.S.C.C.A.N. (111 Stat.) at 97.

313. See *id.* § 615(k)(8)(C)(ii), 1997 U.S.C.C.A.N. (111 Stat.) at 97.

314. See generally John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349 (1992) (discussing judicial hostility to educational malpractice claims in general, and under purview of IDEA); Catherine D. McBride, *Educational Malpractice: Judicial Recognition of a Limited Duty of Educators Toward Individual Students; A State Law Cause of Action for Educational Negligence*, 1990 UNIV. ILL. L. REV. 475, 479 (arguing that special education cases of removal and misclassification should be treated differently by courts).

315. See IDEA Amendments of 1997, § 615(I)(2)(A), 1997 U.S.C.C.A.N. (111 Stat.) at 92 (an aggrieved party "shall have the right to bring civil action").

316. See *School Comm. v. Department of Educ.*, 471 U.S. 359, 371 (1985) (discussing availability of reimbursement). This is now codified in the IDEA as IDEA Amendments of 1997, § 612(a)(10)(C), 1997 U.S.C.C.A.N. (111 Stat.) at 63.

317. See *Miener v. Missouri*, 800 F.2d 749, 754 (8th Cir. 1986) ("[W]e hold that the plaintiff is entitled to recover compensatory educational services if she prevails on her claim that the defendants denied her a free appropriate education in violation of the EHA."); *Punxsutawney Area Sch. Dist. v. Kanouff*, 663 A.2d 831, 836-37 (Pa. Commw. Ct. 1995) (affirming award of compensatory damages where school failed to provide appropriate placement under IDEA after it was informed that student may have disability); *White v. California*, 240 Cal. Rptr. 732, 741 (Ct. App. 1988) (finding that compensatory education is available when school did not follow proper procedure). But see *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 536-37 (3d Cir. 1995) (holding that court will not allow compensatory services unless plaintiff establishes flagrant or egregious failure to comply with IDEA); *Yankton Sch. Dist. v. Schramm*, 900 F. Supp. 1182, 1193 (D.S.D. 1995), *aff'd and reh'g denied*, 3 F.3d 1369 (8th Cir. 1996) (denying compensatory services because parents failed to show egregious or culpable conduct by school district).

318. See, e.g., *Loughran v. Flanders*, 470 F. Supp. 110, 115 (D. Conn. 1979); *Johnson v. Clark*, 418 N.W.2d 466, 468 (Mich. Ct. App. 1987) (stating that Congress did not intend for statute to give rise to damages).

319. See *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 919-20 (1st Cir. 1983) (allowing recov-

misconduct or bad faith.³²⁰ A few recent cases, however, show a new willingness to consider damage claims for violation of the IDEA.

The Third Circuit Court of Appeals recently held that monetary damages are available under 42 U.S.C. § 1983 for a school district's persistent refusal to evaluate and provide an appropriate program for a student under the IDEA, and also denied qualified immunity to school officials.³²¹

The circuit court noted the Supreme Court's recent statement that it will "presume the availability of all appropriate remedies [under a statute] unless Congress . . . expressly indicated otherwise,"³²² and that nothing in the text or history of the IDEA precluded an award of compensatory damages for generalized pain and suffering or monetary damages.³²³ The circuit court held that qualified immunity was inappropriate in this case because qualified immunity only protects individuals who are sued in their individual capacity and whose "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."³²⁴ Because the requirements of the statute were clear, the court held that plaintiffs were not entitled to immunity.³²⁵ A New York court recently raised the ante for schools by allowing punitive damages against individual school officials under 42 U.S.C. § 1983 for violations of IDEA.³²⁶

Despite these trends, probably the greatest deterrent to schools against risking a legal challenge for their failure to identify is liability for parents' attorney's fees. In 1986, Congress passed the Handicapped Children's Protection Act, which allowed prevailing parents in IDEA actions to recover their attorney's fees.³²⁷ This provision was slightly modified in the 1997 Amendments, but the key liability re-

ery equal to cost of tuition).

320. See *Anderson v. Thompson*, 658 F.2d 1205, 1209-14 (7th Cir. 1981) (explaining why damages are limited to intentional misconduct or bad faith).

321. See *W.B. v. Matula*, 67 F.3d 484, 495, 499 (3d Cir. 1995).

322. *Id.* at 494 (citing *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992)).

323. See *id.* at 495. In addition, the Court held that because a monetary recovery is not available in an IDEA administrative action, plaintiffs need not exhaust the avenue because it would prove futile for the relief required. See *id.*; see also *Salley v. Saint Tammany Parish Sch. Bd.*, 57 F.3d 458, 466 (5th Cir. 1995) (affirming award of nominal damages to parents for school district's procedural errors).

324. *W.B.*, 67 F.3d at 499 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

325. See *id.* at 502 ("[S]ummary judgment . . . on the basis of qualified immunity as argued by defendants would be inappropriate.").

326. See *Mason v. Schenectady City Sch. Dist.*, 879 F. Supp. 215, 220-21 (N.D.N.Y. 1993). The court also held that the school defendants could not take advantage of qualified immunity because the law in this area was clear.

327. See 20 U.S.C. § 1414(e)(4)(B) (1994).

mains.³²⁸

4. *Preventing abuse of the system by non-disabled students*

The limitation on the use of stay put for non-identified students that is established by Paragraph 8 reflects the concern, stated by the *Rodriguez* court, that full application of stay put would promote abuse of the system.³²⁹ If we assume, as Congress apparently does, that expulsion is a valid disciplinary tool, and that every misbehaving child is not disabled as defined in the IDEA, we must question whether the balance struck by the Amendments serves the disciplinary needs of the schools and the needs of the disabled students.

Imagine School A is composed of concerned professionals who wish to comply with the IDEA and provide a quality educational experience for every student in their system. Tom is in the 11th grade and has always been a disciplinary problem. He achieves mostly C's, with occasional D's and B's in his "general" track courses. He has always been short on respect for adults and his fellow students. He uses obscene language constantly, disrupts class, and is a bully, although he has never done more than intimidate, threaten, shove, and verbally harass other students. Over the years, he has been referred for special education evaluation twice by concerned teachers and staff, but the full psychological and intellectual evaluations simply indicate that Tom is of low average intellect, is achieving a little less than his abilities due to laziness or lack of motivation, and has extremely poor social skills based in part on his rough upbringing and in part on his enjoyment of the responses his behavior elicits from others. His last referral was completed two months ago.

After numerous warnings, several sessions with the guidance counselor, multiple detentions, in-school suspensions, and two short out-of-school suspensions in Tom's 11th grade year, the school deems it necessary to expel Tom when he continues to make sexually explicit comments or threats to female students. Tom's parents then request a special education evaluation and that Tom stay put pending its resolution. At first, the school delays Tom's expulsion while it considers application of stay put. But Tom's behavior escalates as he tells

328. See IDEA Amendments of 1997, Pub. L. No. 105-17, § 615(i)(3)(B), 1997 U.S.C.A.N. (111 Stat.) 37, 95 ("In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.").

329. See *Hearings on IDEA*, *supra* note 176, at 299 (testimony of Rebecca Sargent, President-Elect, California School Board Association) (noting the perceived increase in false requests to avoid discipline and cost in time and money).

one and all that there is nothing the school can do to him.³³⁰ In conversation with its lawyer, the school wonders if this is not true.

The school is uncertain how a hearing officer will review the "deemed to have known" standard. Probably all four of the "deemed to have known" criteria are met, but the school conducted IEP team-identification meetings and reached the determination that Tom does not qualify. After reviewing (8)(C)(i), the school feels they should be able to treat him as a regular education student and expel him. They are not really sure if the disciplinary events with Tom constitute a Paragraph 2 "harm" incident, but if (C)(ii) applies, it appears they must again allow an evaluation and decide on an "educational placement" until the evaluation is completed, or until the appeal is completed.³³¹

The school recognizes that an appeal is likely because there are very few disincentives for Tom's family to pursue this matter.³³² Although attorneys are expensive, the family can pursue mediation³³³ and administrative appeals without the assistance of counsel.³³⁴ If an attorney becomes necessary for the judicial appeal, the IDEA requires that the school pay attorneys fees to a prevailing plaintiff.³³⁵ There is no similar provision requiring parents to pay attorney's fees to a prevailing defendant. Tom may ultimately lose his hearing and then be expelled, which appears to be a solid disincentive to investing time, energy, and perhaps money into this pursuit, but the potential drawbacks are muted by the advantages of delay. Tom may gain bargaining power³³⁶ or in all likelihood will be able to delay the expulsion

330. Similar examples were given in testimony by Marcia Reback, American Federation of Teachers, in *Senate Hearing*, *supra* note 110, at 71.

331. See IDEA Amendments of 1997, § 615(k)(8)(C), 1997 U.S.C.C.A.N. (111 Stat.) at 97.

332. In fact, the Advisory Commission on Intergovernmental Relations cited the IDEA as the fourth most litigious law in its study. See S. REP. NO. 104-275, at 85 (1996) (additional view of Sen. Gorton).

333. See IDEA Amendments of 1997, § 615(e), 1997 U.S.C.C.A.N. (111 Stat.) at 90 (requiring states to establish voluntary mediation procedures).

334. See *id.* § 615(f), 1997 U.S.C.C.A.N. (111 Stat.) at 91; *id.* § 615(g), 1997 U.S.C.C.A.N. (111 Stat.) at 91 (granting right to pursue appeal and right to, but not requirement of, assistance of counsel).

335. See *id.* § 615(I)(3)(B), 1997 U.S.C.C.A.N. (111 Stat.) at 92 (modifying 20 U.S.C. § 1415(e)(4)(B) (1988), which originally stated that the court may award reasonable attorney fees to "parents or guardian of a handicapped child or youth," to its current reading of "parents or guardian of a child or youth with a disability").

336. Testimony in Congress indicates that the attorneys' fee provision

has had the predictable result of encouraging such litigation and of driving up special education costs. . . . Studies have found that the amount of special education litigation has dramatically increased in recent years. Sadly, some parent attorneys seem encouraged to use due process, as a fishing expedition or to threaten districts with protracted litigation over non-issues as a tactic to force school districts to comply with parental demands.

143 CONG. REC. S4007 (daily ed. May 6, 1997) (statement of Sen. Bond). But see 143 CONG.

until after his graduation.³³⁷

Assume the school decides to act conservatively and evaluate Tom again while providing an alternate educational placement. The evaluation again indicates that Tom is not a disabled student. Although the parents are planning to appeal, the school considers expelling him after the evaluation. They note that Subpart (C)(ii) does not address placement after the expedited evaluation and (C)(i) states that he can be treated as a regular education student. The school discusses liability with their attorney and reject expulsion as an option. Under the Amendments, the school could arguably continue Tom in the interim alternative placement and avoid the risk of liability for compensatory education. But such interim alternative placement may get expensive. Under *Honig*, the school could deal with Tom in his "current placement" during the stay put period,³³⁸ but the suggested study carrels, time outs, detentions, less than 10-day suspensions, and restriction of privileges³³⁹ have proven rather ineffective for Tom.³⁴⁰ Additionally, it is probable that extended use of any of the suggested methods may constitute a change in placement and violate the stay put provision, if those are applicable.³⁴¹

After considering the above, the school may decide to ignore Tom's distracting and inappropriate behavior, lessening the quality of others' educational experience. Or, the school may agree to qualify Tom as a disabled student so it can provide special education services aimed at behavioral control or emotional issues. Under either of these alternatives, Tom has successfully abused the system, if we as-

REC. S4405 (daily ed. May 14, 1997) (statement of Sen. Harkin) (stating that number of court cases under IDEA has declined from 1992 to 1996).

337. In *M.P. v. Governing Board of Grossmont Union High School District*, 858 F. Supp. 1044 (S.D. Cal. 1994), the court noted that Congress had not adequately considered the fact that a student who is not disabled may abuse the system. The court commented,

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

Id. at 1048.

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

339. See *id.* at 324-25.

340. See *id.*

341. The Third Circuit has held that whether a change at school is a change of placement is determined by whether "the decision is likely to affect in some significant way the child's learning experience." *Deleon v. Susquehanna Community Sch. Dist.*, 747 F.2d 149, 153 (3d Cir. 1984). The Court held that "we should focus on the importance of the particular modification involved." *Id.*; see also Gail Sorenson, *Update on Legal Issues in Special Education Discipline*, 81 WEST'S EDUC. L. REP. 399, 404 (1993). OSEP, however, has stated that in-school discipline is not a change in placement and that study carrels, time-outs, and other restrictions of privileges may be used as long as they are not inconsistent with the student's IEP. See OSEP MEMORANDUM, *supra* note 89, at 7.

sume he is not disabled. While all can agree that the first alternative is negative, opinions on the second alternative hinges on whether one believes that all students with disciplinary or behavior problems have disabilities which should be addressed by special education. The stated premise of the Act, with its repeated attempts to differentiate conduct related to the disability and to decide which students with disciplinary referrals are disabled, is that all students do not.³⁴²

CONCLUSION

The 1997 Amendments to the IDEA sound the death knell for long-term suspension and expulsion of special education students. The Amendments make clear that regardless of the reason for the discipline or the relation of the action to the disability, disabled students must continue to receive educational services by a school system even when a change of placement may be allowed. The 1997 Amendments will also push schools and state legislatures to question the use of expulsion as a disciplinary tool for all students, disabled or not.

First, because the Amendments extend special education protections to unrelated conduct and to students who have not been identified as needing special education services, they highlight the issue of a disciplinary double standard that may be politically and practically impossible for school administrators to enforce.³⁴³ Where once the different treatment of disabled and non-disabled students could be justified on the basis of the disability causing the misbehavior or on a previously-identified disability, these justifications are gone. In addition, the difficulty of identifying certain disabilities and the legal repercussions of ceasing educational services for a child who claims to

342. See IDEA Amendments of 1997, Pub. L. No. 105-17, § 615(k)(5), 1997 U.S.C.A.N. (111 Stat.) 37, 95 (stating that once a determination is made "that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities").

343. See *Senate Hearing, supra* note 110, at 9 (comments of Carl Cohn, Superintendent of Long Beach Unified School District) (describing resulting dual system as "unfair and ultimately unworkable"). Senator Gorton also questioned the double standard the Amendments establish and their blindness to the rights of the non-disabled. See 143 CONG. REC. S4402 (daily ed. May 14, 1997) (statement of Sen. Gorton). The Ninth Circuit Federal Circuit Court of Appeals stated the political dilemma clearly:

When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. . . . To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that that is not the case.

Doe v. Maher, 793 F.2d 1470, 1482 (9th Cir. 1986), *aff'd in part and modified in part sub nom. Honig v. Doe*, 484 U.S. 305 (1988).

be disabled will make schools hesitate to use regular education discipline with any complaining party.

Second, the only justification for the different treatment of disabled and non-disabled students when the misconduct is not caused by the disability is the notion that the disabled student is savable and deserving,³⁴⁴ or a victim of an inadequate education. The dichotomy falters, however, when we consider that the non-disabled who are expelled and suspended may in fact be students with undetected disabilities. One study found that up to 80% of youths who dropped out of school may have been eligible for special education services.³⁴⁵ The National Center for State Courts and the Educational Testing Service found that at least 50% of juvenile delinquents have undiagnosed/unremediated learning disabilities.³⁴⁶ In fact, a strong argument can be made that any student who is expelled because of a persistent inability to control his behavior is an emotionally handicapped student under the IDEA, and therefore, should not be expelled.³⁴⁷

Third, even if we were confident that schools were correctly and

344. See NATIONAL CENTER FOR EDUCATION STATISTICS, DROPOUT RATES IN THE UNITED STATES: 1995 (1997).

Although they are often held to the same standard as the general population, students with disabilities must overcome serious obstacles that can interfere with their education. To graduate from high school, students with disabilities may need to work harder, study longer, or possess greater academic ability than their peers without a corresponding physical, emotional, or learning handicap.

Id.

345. See STEVE LICHTENSTEIN & KATHY ZANTAL-WIENER, SPECIAL EDUCATION DROPOUTS 1 (Education Resources Information Center Digest No. 451, 1988) (citing a study by St. Paul Public Schools retrospectively examining the records of 4500 students who left school prior to graduation).

346. See *Hearings on IDEA*, *supra* note 176, at 124 (statement of Mary Ann Fielack) (citing statistics of National Center for State Courts and the Educational Testing Service).

347. Under the IDEA, children with disabilities include those with a serious emotional disturbance. A serious emotional disturbance is defined as:

(i) . . . a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance—

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) *Inappropriate types of behavior* or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) . . . The term does not apply to children who are socially maladjusted, unless it is determined that they have a serious emotional disturbance.

34 C.F.R. § 300.7(b)(9) (1996) (emphasis added). One could argue that a child who receives repeated detentions and suspensions until he or she is finally expelled shows a long term pattern of inappropriate behaviors which adversely affect his or her education.

completely identifying special-needs students, our rationale for banning expulsion of special-needs students also applies to the non-disabled. The major motivating force behind the ban on cessation of educational services for disabled students was the specter of disabled school dropouts draining public funds and threatening the safety of society.³⁴⁸ Fifty percent of students identified as suffering from serious emotional disturbances drop out of school and twenty-three to thirty percent of students with mental retardation, learning disabilities, and other health or speech impairments drop out of school.³⁴⁹

One of the most common reasons disabled children drop out of school is because of suspension or expulsion. According to a 1992 study conducted in the U.S. Department of Education, children with mental illness who drop out of school have a post school arrest record of 73 percent, and the percentage for learning-disabled students is 62 percent. Will the unintended effect of expelling disabled children and ceasing services for them be increasing the crime rate and creating new clients for the juvenile justice system?³⁵⁰

As one commentator has pointed out, "[t]he statistics on school dropout rates, crime, incarceration, mental illness and lifelong economic dependence for children expelled from school speak for themselves."³⁵¹

Although children with disabilities drop out of school at twice the rate of their peers,³⁵² the correlation of school failure and life failure

348. See *Senate Hearing, supra* note 110, at 5, 50 (comments of Sen. Harkin) (explaining risk that expelled students will commit crimes); 143 Cong. Rec. H2537 (daily ed. May 13, 1997) (statement by Rep. Scott).

349. See U.S. DEP'T OF EDUC., SIXTEENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE IDEA 109-110 (1994). OSEP has estimated that given current trends, 26% of students with disabilities will drop out of school and that dropouts with disabilities are far less likely to eventually earn their diploma than dropouts without disabilities. See U.S. DEPARTMENT OF EDUCATION, TO ASSURE THE FREE APPROPRIATE PUBLIC EDUCATION OF ALL CHILDREN WITH DISABILITIES: EIGHTEENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (1996).

350. *Senate Hearing, supra* note 110, at 5 (statement of Sen. Harkin) (explaining increased risk of criminal behavior by expelled students). Other studies have shown that of the 84,000 juveniles incarcerated in detention centers and corrections facilities in the United States, at least 28% have been identified as having disabilities. See PETER E. LEONE, ROBERT B. RUTHERFORD & C. MICHAEL NELSON, JUVENILE CORRECTIONS AND THE EXCEPTIONAL STUDENT 1 (Educational Resources Information Center Digest No. E509, 1991).

351. *Senate Hearing, supra* note 110, at 35 (comments of Diane Lipton, Disability Rights and Education Defense Fund).

352. See U.S. Dep't of Educ., *Remarks from the IDEA '97 Signing Ceremony June 4, 1997* (visited Nov. 8, 1997) <http://www.ed.gov/offices/OSERS/IDEA/speech_1.html> (remarks of President Clinton); see also *Hearing on the Reauthorization of the Individuals with Disabilities Act (IDEA): Hearing Before the Subcomm. on Select Educ. and Civil Rights of the House Comm. on Educ. and Labor*, 103d Cong. 83 (1994) [hereinafter *Hearing on the Reauthorization of the IDEA*] (testimony of Dr. Alan Gartner, Dean for Research, the Graduate School and University Center).

is also true of non-disabled dropouts.³⁵³ Non-disabled students who are suspended are also at high risk of dropping out.³⁵⁴ Dismal statistics indicate that dropouts comprise nearly half of the heads of households on welfare, and that dropouts cite being suspended or expelled from school as a factor causing them to drop out.³⁵⁵ Eighty-two percent of state and local prisoners are high school dropouts.³⁵⁶ As poignantly stated by the National PTA, "[r]idding the school of violence offenders without any attempt at reclaiming these children means that these offenders will be in our neighborhoods and in our homes."³⁵⁷

Finally, because of the failure to identify all disabled students and the lack of free alternative education for regular education students in many states, the damage of expulsion will fall disproportionately on those without the means to pursue the IDEA remedies of due process review or to obtain alternative education.³⁵⁸ Poor,³⁵⁹ disabled, uneducated,³⁶⁰ or simply overwhelmed parents may be unable to champion their child's cause in special education hearings.³⁶¹ Students with savvy parents will bring due process challenges to expulsion actions, always delaying, and often defeating³⁶² the action. For those who are expelled, if alternative education is not provided free of charge by the expelling school, parents must either move to a dif-

353. See *Hearing on the Reauthorization of the IDEA*, *supra* note 352, at 113.

354. See NATIONAL CENTER FOR EDUCATION STATISTICS, *THE CONDITION OF EDUCATION* 1997, at 158-59 (1997).

355. See WENDY SCHWARTZ, *SCHOOL DROPOUTS: NEW INFORMATION ABOUT AN OLD PROBLEM* 2-3 (Educational Resources Information Center Digest No. 109, 1995).

356. See H.R. REP. NO. 104-614, at 257 (1996).

357. *Senate Hearing*, *supra* note 110, at 62 (statement of Shirley Igo, Vice-President of Legislative Activity, National Parent-Teacher Association).

358. Recent studies have shown that of the 850,000 children with disabilities from birth to age five, 300,000 are living in poverty. See *Hearing on the Reauthorization of the IDEA*, *supra* note 352, at 4-5, 13 (testimony of Frank Bowe, Professor, Hofstra University). Studies also show that disabled students are more likely to live in poverty than non-disabled students. In 1986, 40% of general population students came from households with an annual income of less than \$25,000, whereas 68% of secondary students with disabilities came from such households. See *id.* at 31 (statement of Dr. Mary Wagner, Project Director, SRI International, on the National Longitudinal Transition Study).

359. The National Longitudinal Transition Study indicated that poor students spent less time in regular education classes than their wealthier peers, statistically controlling for other differences. See *id.* at 34.

360. About 22% of regular education students come from families where the heads of the household were high school dropouts, whereas 41% of secondary school students with disabilities come from such households. See *id.* at 31.

361. See *id.* at 41 (testimony of Frank Bowe) ("[A] lot of parents don't know how to advocate for their children. They don't know how to approach the school system.").

362. Cf. *Senate Report*, *supra* note 110, at 70-72 (testimony of Marcia Reback) (describing difficulties faced by school districts across the country in effectively disciplining students who misbehave because of the threat of litigation from parents claiming their children's misdeeds are caused by disabilities).

ferent school district to obtain a public education, or pay for private education. Not only are many families unable to pay for private education or make such a move, but the expelled child may be shunned by other public school systems.³⁶³

These factors will force the end of both the dual system of discipline and expulsion as the centerpiece of school discipline. Just as physical punishment, once widely accepted as a necessary and proper disciplinary tool,³⁶⁴ has gone the way of the horse and buggy,³⁶⁵ so too will school expulsion fade and die in education's annals. Yet the twin goals of a safe school environment and appropriate education for all students must be met. The obvious choice is alternative education for all students who should not be educated in a mainstreamed environment, regardless of whether they have been identified as disabled.

The Department of Education, recognizing these concerns, has voiced its desire to move away from "our current categorical education system into a system for all children that meets the individual needs of each child."³⁶⁶ In fact, "[t]he consensus among educators and others concerned with at-risk youth is that it is vital for expelled students to receive educational counseling or other services"³⁶⁷ Thus, many school systems have established alternative programs to provide services to expelled students.³⁶⁸ Several states are adopting this policy as well. Texas has recently enacted legislation requiring every school to provide an alternative education program for all expelled students, in cooperation with the juvenile board of each county.³⁶⁹ California also requires the provision of educational services to all expelled students.³⁷⁰

Even under a system of alternative education for all students who require it, the protections of the IDEA will still be necessary to encourage inclusion and full educational opportunity for disabled stu-

363. Arkansas and Massachusetts law allow their public school systems to refuse to admit a student who is under an expulsion from another school. See ARK. CODE ANN. § 6-18-510 (Michie 1995); MASS. GEN. LAWS ANN. ch. 71, § 37H1/2(2) (West 1996).

364. See *Ingraham v. Wright*, 430 U.S. 651 (1977) (upholding the use of corporal punishment in schools and discussing its history and valid use).

365. Twenty-seven states and the District of Columbia now prohibit corporal punishment. See U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, 1994 Elementary and Secondary School Civil Rights Compliance Report (1994).

366. U.S. Department of Education, *Making A Good Law Better: The IDEA Amendments of 1995* (visited Oct. 17, 1997) <<http://www.ed.gov/IDEA/sum-rbi.html>>.

367. See U.S. DEPARTMENT OF JUSTICE & U.S. DEPARTMENT OF EDUCATION, CREATING SAFE AND DRUG-FREE SCHOOLS: AN ACTION GUIDE 65 (1996).

368. See *id.*

369. See TEX. EDUC. CODE ANN. § 37.011 (West 1997). But see Antonucci Letter, Massachusetts Department of Education, Apr. 16, 1997 (noting that no law requires alternative regular education in Massachusetts).

370. See CAL. EDUC. CODE § 48915 (Deering 1996).

dents. The IDEA, however, must be amended and applied with the knowledge that inclusion in the mainstream environment is a means to the end of an appropriate education, not the end itself. Provisions found in the predecessor to the 1997 Amendments, S.1578, provide a structure to balance education, inclusion, and safety concerns.³⁷¹ These provisions allow schools to place a disruptive student in an alternative placement on a documented record of disruption and efforts to address the behavior.³⁷² Separate provisions allowing a school to act upon an IEP team finding that the child is substantially likely to cause injury to his or her self or to others should also be included.³⁷³ S. 1578 also provides that the parents can receive an expedited hearing within ten days and that the hearing officer's decision will determine the placement until the termination of all appeals.³⁷⁴ These provisions allow the school to act promptly to preserve the safety and education of its students, but also provide an almost immediate, impartial check on their activities to assure that both the integration and educational rights of the disabled are adequately protected.³⁷⁵

The death of expulsion will create a challenge to our schools and communities. It will further the discussion of adequate funding, collaborative efforts, and innovative initiatives to allow a community to assume more responsibility for its youth.³⁷⁶ Although schools may not be able to continue to absorb all of the societal demands for the raising of our youth, they also cannot abdicate their responsibility to educate all children, even those who are not easy to educate. Stark reality is the most telling indictment of expulsion. As stated by Senator Frist,

371. See S. 1578, 104th Cong. (1996).

372. See *id.* § 206.

373. See *id.*

374. See *supra* Part II.B.5 (discussing S. 1578).

375. The Supreme Court in *Honig* stated, "We think it clear, however, that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school." *Honig v. Doe*, 484 U.S. 305, 323 (1988). On behalf of the American Federation of Teachers and the National Education Association, Marcia Reback requested that Congress give relief from stay put for students exhibiting significant and persistent disruption and to allow a multi-disciplinary team to determine the alternative placement. See *Senate Hearing, supra* note 110, at 72, 81 (statement of Marcia Reback, Vice-Pres., American Federation of Teachers) (requesting that an exception be made to stay put in situations involving weapons, drugs, sexual assault, dangerous behavior and serious or chronic disruption, and that the multi-disciplinary team be empowered to change placement).

376. *Senate Hearing, supra* note 110, at 83 (comments by Carl Cohn).

Do I believe school systems by themselves are able to achieve this educational continuum for violent students? My answer is unequivocally no Unless schools can be brought into partnership with human service agencies, the juvenile justice system, the foster care system, the department of social services and the recreational departments, these most dangerous children will continue to be underserved in their education.

I ask myself again and again: When a student is suspended and returns to school, do we have a student who is better able to control behavior and to benefit from school? Today, I guess I doubt it in many cases. When we expel a student, is the student more likely to engage in constructive activity? Again, I doubt it.³⁷⁷

377. *Id.* at 51 (statement of Sen. Frist).

