LIMITS ON THE ABILITY TO DISCIPLINE DISABLED SCHOOL CHILDREN: DO THE 1997 AMENDMENTS TO THE IDEA GO FAR ENOUGH?

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INTRODUCTION

School districts around the country often are torn between duties of educating children with disabilities and maintaining a safe environment for all children, teachers, and administrators. The guarantees of the Individuals with Disabilities Education Act ("IDEA")[1] demand this double-duty. The purpose of the IDEA is to provide free appropriate public education to all children with disabilities.[2] However, there has been considerable debate in the courtroom and among the general public over how to interpret certain provisions of the IDEA, in light of the growing discipline and safety concerns in public schools.

Since Congress enacted the IDEA in 1975,[3] violence and discipline problems in schools have risen dramatically.[4] In fact, statistics show that juvenile arrests for both murder and aggravated assault have increased by 100% since 1975, and the number of students arrested for possession of weapons has risen almost 200% since that time.[5] Meanwhile, the number of disabled children in public schools has also risen, due to the guarantees of the IDEA[6] and the extensive broadening

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1. 20 U.S.C. §§ 1400-91o (1994 & Supp. II 1996).

2. *See id.* § 1400(d)(1)(A). Prior to enactment of the IDEA, more than half of the children with disabilities in the United States were not receiving appropriate educational services. *See id.* § 1400(c)(2)(B).

3. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (originally enacted as Education of the Handicapped Act, Pub. L. No. 91-230, § 601, 84 Stat. 175 (1970)).

4. *See Disability and Discipline*, NEW ORLEANS TIMES-PICAYUNE, May 19, 1997, at B4. *See also* Fact Sheet 2 on Juvenile Justice Event, The White House Office of the Press Secretary, June 12, 1997 (reporting that the number of juveniles who kill with guns has quadrupled since 1984, making youth violence a high priority for the Clinton Administration); *Goal Seven: Safe Schools Tighten Up On Discipline: A Cry From the Field*, 7 AM. POL. NETWORK DAILY REP. CARD, Apr. 18, 1997 [hereinafter *Safe Schools*]. This article reported the release of a 1997 survey by the National Association of Elementary School Principals, which stated that 60% of those polled said strict adherence to zero tolerance policies for weapons and drugs result in significantly increased numbers of suspensions, while 95% said those regulations are necessary for maintaining school safety. "The results of this survey make it very clear that the safety and well-being of children is the school principal's number one priority." *Id.*

5. *See* Aaron D. Rachelson, *Expelling Students Who Claim to be Disabled: Escaping the Individuals with Disabilities Act's "Stay-Put" Provision*, 2 MICH. L. & POL'Y REV. 127, 134 & n.40 (1997).

6. Up to 10% of the students enrolled in public schools are classified as disabled. *See*

of conditions that are covered under the act.[7] According to U.S. Department of Education estimates, there were "roughly 5.4 million disabled school-aged children in the [United States] in 1996. . . . The rise of violence, drugs and weapons in public schools has been accompanied by an increase in the number of disabled school children engaging in such violent behavior."[8] For example, the New York City teachers' union stated that one half of the 4712 criminal "incidents" committed against its teachers in 1996 were committed by special education students.[9]

In 1997, Congress passed several revisions to the IDEA,[10] some of which gave schoolteachers and administrators more discretion in disciplining disabled students who bring weapons or drugs to school.[11] However, the question remains, do these amendments go far enough, too far, or strike just the right balance?

This Note discusses why the IDEA's guarantee to free appropriate public education is necessary. It first examines the relevant text and history of the IDEA in its original form. It also walks through the discipline debates that followed enactment of the IDEA, including relevant case law and other commentary. Next, this Note discusses the 1997 amendments to the IDEA that relate to the disciplinary measures. The following section examines public reaction to the revisions, of which there are many both positive and negative. In particular, this section attempts to answer the question of whether the 1997 revisions go far enough, or too far, in allowing schools to discipline handicapped children, concluding that the extensive amendments highlight the extent to which the IDEA really does over-exempt disabled students from fair punishment. Finally, this Note discusses the numerous problems left unsolved for schools and explores the possible future of this debate.

I. BACKGROUND OF THE IDEA

The IDEA has undergone many changes since its enactment, not all of them related to discipline.[12] In fact, the disciplinary procedures included in the IDEA stem from the original need to prevent school districts from excluding children

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Disability and Discipline, *supra* note 4.

7. *See id*; *see also infra* notes 29-32 and accompanying text.

8. *Double Standard: A New Law Empowered School Officials to Deal with Disabled Students Who are Discipline Problems Doesn't Go Far Enough*, THE VIRG.-PILOT & LEDGER-STAR, May 16, 1997, at B10 [hereinafter *Double Standard*].

9. *See* June Kronholz, *Educators Say Proposed Law Boosting Ability to Punish Disabled Kids Doesn't Go Far Enough*, WALL St. J., May 14, 1997, at A24 (quoting the United Federation of Teachers). The article defines criminal "incidents" as "assaults, sex offenses, robbery."

10. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (codified at 20 U.S.C.A. §§ 1400-91o (West Supp. 1998)).

11. *Id.* § 101, 111 Stat. at 93-94.

12. *See infra* notes 78-80 and accompanying text.

with disabilities, which many did customarily before the IDEA became law.[13]

A. Pre-IDEA Case Law

Two major court cases in the early 1970s prompted Congress to promulgate the IDEA. The first case, *Mills v. Board of Education*,[14] involved seven children who were excluded from public schooling by the District of Columbia Board of Education.[15] The children ranged in age from eight to sixteen years old and had been classified as a "behavior problem," "retarded," "brain-damaged and hyperactive" or other combination of disabilities.[16] All seven children had been excluded from various public schools without a full hearing or a timely and adequate review of their status.[17] The school board argued that it was financially impossible to provide the services without significant assistance from Congress. However, the U.S. District Court for the District of Columbia held that whatever funds were available "must be expended equitably in such a manner that no child is entirely excluded from publicly supported education consistent with [the child's] needs and ability to benefit therefrom."[18] In addition, the court explained that due process of law required a hearing before children who had been labeled as disabled could be suspended or expelled from regular schooling in publicly supported schools or specialized programs.[19] Anything less, the court ruled, would violate constitutional guarantees of equal protection and due process.[20] In the end, the court required that the school system follow many of the same guidelines and procedures later adopted by Congress in the IDEA.[21]

Similarly, in *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*,[22] thirteen mentally disabled children claimed they were excluded from public schools because of their disability.[23] That state previously had adopted statutes

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13. *See* Joan Beck, *Congress Misses Point on Helping Disabled Children*, CHI. TRIB., May 18, 1997, at 23.

14. 348 F. Supp. 866 (D.D.C. 1972).

15. The plaintiffs estimated that there were "'22,000 retarded, emotionally disturbed, blind, deaf, and speech or learning disabled children, and perhaps as many as 18,000 of these children [were] not being furnished with programs of specialized education.'" *Id.* at 868. The Department of Health, Education and Welfare reported that "the District of Columbia Public Schools admitted that an estimated 12,340 handicapped children were not to be served in the 1971-72 school year." *Id.* at 869.

16. *Id.* at 869-70.

17. *See id.*

18. *Id.* at 876.

19. *Id.* at 875.

20. *Id.* at 874-75.

21. *See generally id.* at 880 (holding that the defendants must provide notice to the parents of any child who is to be placed in an alternative educational setting and the child and parents have the right to a hearing should they object to any such placement).

22. 343 F. Supp. 279 (E.D. Pa. 1972).

23. *Id.* at 281-82.

that relieved the State Board of Education from any obligation to educate a child who was deemed uneducable and untrainable by a public school psychologist.[24] Plaintiffs contended that their exclusions were based on those statutes and that such provisions were unconstitutional, as they violated due process of the law by failing to require a prior hearing and lacked equal protection by excluding retarded children without basis for support.[25] The court agreed.[26]

These cases demonstrate that some schools were excluding children with disabilities. The courts noticed this practice of exclusion and ordered corrective measures. Perhaps a need to mandate changes in the education, or lack thereof, of disabled children helped to raise awareness among the general public and lawmakers. This need for change set the stage for the IDEA, which Congress passed three years after *Pennsylvania Ass'n for Retarded Children*.

B. 1975—Congress Enacts the IDEA

These court battles only touched the surface of the problem disabled children faced in receiving proper education. In 1975, when Congress enacted the Individuals with Disabilities Education Act, it found that the special education needs of children with disabilities were not being met.[27] In fact, before the enactment, one of every eight disabled children was excluded from the public school, and many others were "'warehoused' in special classes" or ignored until of age to drop out of school.[28] The meaning of disabled under the IDEA has changed significantly since that time and now includes the following conditions: mental illnesses, mental retardation, learning disabilities, serious emotional disturbances, chronic health problems, physical impairments, hearing impairments and deafness, speech impairments, visual impairments, and blindness.[29] Congress began expanding its definition of disabled under the IDEA

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24. *See id.* at 282. In addition, the statutes allowed "indefinite postponement of admission to public school of any child who had not yet attained the mental age of five years." *Id.* Pennsylvania law also defined the compulsory school age as eight to seventeen years; however, in practice, it had been used to delay admitting retarded children until age eight or remove them from public schools at age seventeen. *See id.*

25. *See id.* at 283.

26. *Id.* at 302. The court approved a Consent Agreement created by both parties. The agreement provided, among other things, that because the state of Pennsylvania provided public education for all children between the ages of six and twenty-one, it was also obligated to provide free, public education and training appropriate for mentally retarded children. *Id.* at 285.

27. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3, 89 Stat. 773, 774.

28. Honig v. Doe, 484 U.S. 305, 309 (1988).

29. 20 U.S.C.A. § 1401(3) (West Supp. 1998). Originally the act defined a disabled child as "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, crippled, or other health impaired children who by reason thereof require special education and related services." Education of the Handicapped Act, Pub. L. No. 91-230, § 602(1), 84 Stat. 175, 175.

in 1983 when it replaced the term "speech impaired" with the broader term "speech and language impaired."[30] The dissenting view on the amendment clearly feared vague terms and provisions would lead to "over-classification" of some children.[31] Congress again expanded the conditions included under the IDEA in 1990 when it added autism and "traumatic brain injury," although that disability looks to be a category of its own, covering impairment of such skills as memory, attention, judgment, problem-solving, motor abilities, and information processing.[32]

Before enactment of the IDEA in 1975, Congress found that one million children with disabilities were entirely excluded from public school systems and did not have the same educational process as their peers.[33] After twenty-two years of the IDEA, seventy to eighty percent of disabled children are now educated in regular classrooms.[34] Mainstreaming disabled students gives them not only the same educational opportunities as their peers, but hopefully the same social opportunities as well.

Originally entitled the Education for All Handicapped Children Act, the IDEA sets out requirements for states to receive education grants.[35] According to the IDEA, in order for states to become eligible for grant funds, they must provide a "free appropriate public education"[36] to all children with disabilities in that state through specific procedures and protections spelled out in the IDEA.[37] To the maximum extent possible and appropriate, the education and related services are to be provided in a setting that allows the disabled child to be educated with children who do not have disabilities.[38] This educational setting is called the least restrictive environment.[39]

One provision of the IDEA mandates that a student must remain in his or her current education program unless a change is mutually agreed to by the family and school officials.[40] This is referred to as the "stay-put" provision.[41] Certain procedural safeguards guarantee that parents can prevent removal of their child

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30. H.R. REP. 98-410, at 18 (1983), *reprinted in* 1983 U.S.C.C.A.N. 2088, 2105-06.

31. *Id.* at 92, 1983 U.S.C.C.A.N., at 2131.

32. H.R. REP. NO. 101-544, at 4-5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1723, 1726-27.

33. 20 U.S.C. § 1400 (1994).

34. *See Disability and Discipline*, *supra* note 4.

35. 20 U.S.C.A. § 1411(a)(1) (West Supp. 1998).

36. A free appropriate public education, is defined as a 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 [an] individualized education program." *Id.* § 1401(8).

37. *Id.* § 1412.

38. *See id.* § 1412(a)(5).

39. *See id.*

40. *Id.* § 1415(j).

41. *See e.g.*, Honig v. Doe, 484 U.S. 305, 308 (1988).

from his or her current placement.[42] These safeguards include: (1) the opportunity for parents to examine all of the records relating to their disabled child and to participate in any meetings regarding the identification, evaluation and educational placement of that child, and the provision of a free appropriate public education for that child;[43] (2) mandatory written prior notice to the parents of the child whenever the school proposes to or refuses to initiate or change that identification, evaluation or educational placement;[44] (3) an opportunity for the parents of the child to present complaints with respect to identification, evaluation, or educational placement of the child;[45] (4) the right to mediation, on a voluntary basis, of any disputes involving these matters;[46] (5) and the right of any party dissatisfied after these procedures to bring a civil action in any state court or in a U.S. district court.[47]

One significant problem with the IDEA arose when schools attempted to discipline disabled children by suspension or expulsion. Those that created the law feared that school administrators, in an effort to remove hard-to-educate children from their school systems, would categorize those children as having "discipline problems" and have them removed from school.[48] The legislation therefore prevented that opportunity for school officials; consequently, school officials complain that the IDEA protects disabled children from the disciplinary procedures that are customary for other students who engage in similar behavior.[49] School districts that have not followed these provisions have faced losing federal funds.[50] As this Note's examination of case law indicates, the issue of how to discipline disabled children under the IDEA became an important one.

C. How Would Courts Interpret the IDEA?

In the 1986 case, *Doe v. Maher*,[51] two students who had been labeled as emotionally handicapped children and subsequently suspended for discipline

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42. *See* 20 U.S.C.A. §1415 (West Supp. 1998).

43. *See id.* § 1415(b)(1).

44. *See id.* § 1415(b)(3).

45. *See id.* § 1415(b)(6).

46. *See id.* §§ 1415(b)(5), (e).

47. *See id.* § 1415(i)(2)(A).

48. *See Double Standard*, *supra* note 8.

49. *See id.*

50. *See generally* Donald P. Baker, *Va. Loses Suit on Schooling For Disabled; Suspended Students Need Education, Court Rules*, WASH. POST, June 21, 1996, at B3 (noting a school district in Virginia that refused to provide an alternative education for disabled students who had been suspended for discipline problems, risked losing $50 million in federal funding, despite the state's contention that disabled children should be treated the same as other students).

51. 793 F.2d 1470 (9th Cir. 1986), *aff'd as modified sub nom.*, Honig v. Doe, 484 U.S. 305 (1988).

problems,[52] complained that their suspension pursuant to the initiation of expulsion proceedings violated the Education for All Handicapped Children Act (the "Act").[53] The Ninth Circuit not only agreed that the "stay-put" provision prevented schools from removing disabled students from their current placement pending disciplinary hearings,[54] it also ruled that the Act prohibited expulsion of a disabled student for any misbehavior that is a manifestation of the child's disability.[55] However, the court clarified that where a child's conduct is determined not to be substantially related to that child's disability, the child may be expelled.[56]

On appeal two years later, the U.S. Supreme Court qualified the *Maher* ruling somewhat. The Court granted certiorari in 1987[57] to decide whether, in view of the "stay-put" provision, which prevented school officials from removing disabled children pending any review process, those officials had any recourse for dangerous or disruptive disabled students.[58] The California Superintendent of Public Instruction urged the Court to recognize a "dangerousness" exception to the stay-put provision on the basis of either of two assumptions: "first, that Congress thought the residual authority of school officials to exclude dangerous students from the classroom too obvious for comment; or second, that Congress inadvertently failed to provide such authority and this Court must therefore remedy the oversight."[59] In fact, the Court ruled that there is no "dangerousness" exception, saying, "[w]e think it clear . . . 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."[60] Other disciplinary measures were available to school districts, the Court pointed out, such as the use of detention or restriction of privileges or suspensions of up to ten school days in drastic and imminently dangerous situations.[61] However, the Court made it clear that a plain reading of the Act did not allow for suspension longer than ten days unless the school system could show in court that leaving the student in the current setting was "substantially likely to result in injury either to himself or herself, or to others."[62] The Ninth Circuit also had

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52. *Id.* at 1476-77. One student had assaulted another student and had broken a school window; the other had made sexual comments to several female students. *See id.* at 1477.

53. *Id.* at 1478.

54. *Id.* at 1485-86.

55. *Id.* at 1481.

56. *Id.* at 1482 (citing, inter alia, Kaelin v. Grubbs, 682 F.2d 595, 602 (6th Cir. 1982); S-1 v. Turlington, 635 F.2d 342, 348 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981)).

57. 479 U.S. 1084, 1084 (1987).

58. Honig v. Doe, 484 U.S. 305, 308, 317 (1988).

59. *Id.* at 323.

60. *Id.*

61. *Id.* at 325.

62. *Id.* at 328. Yet, even in 1988, commentators knew that seeking court intervention would be seen as cumbersome for school officials. *See, e.g.*, Nadine Cohodas, *Right to Bar Handicapped Students Limited*, 46 CONG. Q. WKLY. REP. 159, 159 (1988).

stated that a child might be denied a free appropriate public education when that child's misconduct was not related to his or her disability.[63] The Supreme Court did not discuss that issue on appeal, however, so for a time the only discussion on the subject was dicta and the rule was unclear as to whether a student could be suspended or expelled for behavior that was not a manifestation of his or her disability.

This was not the only court battle concerning methods for disciplining handicapped children in schools. Most disabled students and parents who challenged suspensions and expulsions succeeded in doing so.[64] Only a very small minority of courts, and for very detailed reasons, ruled that the right to a free appropriate public education could be forfeited when a disabled child broke school rules.[65]

Therefore, these students remained in school with their non-disabled peers, virtually exempt from the disciplinary procedures to which the other children were routinely subject. The law did not seem to work for many school administrators, who complained that the IDEA was unreasonable in its limitations, thereby threatening the safety of other students and teachers.[66]

It seems parents and administrators alike had good reason to be concerned for the way in which the IDEA compromised safety in schools. A double standard had developed, which gave special protection to disabled students who contributed to classroom disruption and violence, and placed a heavy burden on public schools.[67] Many examples exist, as where an adolescent with a suspected attention deficit disorder who had a pellet gun in his car at school could not be suspended pending administrative proceedings to determine whether he needed

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63. Doe v. Maher, 793 F.2d 1470, 1482 (9th Cir. 1986). *See supra* note 56 and accompanying text.

64. *See, e.g.*, Kaelin v. Grubbs, 682 F.2d 595, 601 (6th Cir. 1982) (holding that a disabled student's expulsion from school was an improper change in placement within the meaning of the Act); Magyar v. Tucson Unified Sch. Dist., 958 F. Supp. 1423, 1435, 1443 (D. Ariz. 1997) (concluding that suspension of 175 days was a change in placement under the IDEA and schools must provide individualized educational services to all handicapped children during the period of time that they are suspended).

65. *See, e.g.*, Virginia v. Riley, 106 F.3d 559, 561 (4th Cir. 1997) (holding that where a disabled student's misbehavior was not related to his or her disability, and the student is suspended or expelled, the IDEA did not impose an obligation to provide a free appropriate public education to that student); Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223, 1230 (8th Cir. 1994) (holding that the school district had met its burden by sufficiently rebutting the presumption in favor of the child's current educational setting, and by establishing that it made every reasonable effort to accommodate that child so as to mitigate any risk of injury before seeking court removal of the student).

66. *See Safe Schools*, *supra* note 4. As many as 78% of school principals surveyed by the National Association of Elementary School Principals criticized the IDEA for "'unreasonably' limiting their ability to manage disruptive or dangerous special education children." *See also House Oks Discipline For Disabled Students*, MPLS-ST. PAUL STAR-TRIB., May 14, 1997, at 1A.

67. *See Discipline for Disabled*, SALT LAKE TRIB., May 24, 1997, at A14.

special education.[68]

Another principal tried to suspend four students whom he found using methamphetamines.[69] Two were immediately suspended without difficulty for one year. One of the students was learning-disabled, so would not have been suspended at all, except that a special hearing officer found that his disability was not linked to his behavior. The school therefore suspended him for one year, but provided him with home tutoring at the school district's expense. The last student was determined to have behavior problems that caused his actions, and so received the maximum discipline possible for disabled students at that time—a ten day suspension.[70]

Another example involves three high school students who robbed a pawnshop, beat the owner, and then brought stolen guns to a high school basketball game where all three were arrested.[71] Two of the students were expelled. The third was a disabled student, so the school was required to provide a private tutor for an entire year while he was in jail awaiting trial.[72]

Most school officials considered the *Honig* decision merely acceptable, but the ruling was a large victory for disabled-rights advocates.[73] Educating disabled children is as important as educating any other student; and putting disabled and non-disabled kids together in the classroom sounded like a good idea. It became clear, however, that no balance had been struck between providing the least restrictive educational setting for children with disabilities and protecting the rights of others attending or working in the school systems to a safe and peaceful environment. The rights of disabled students should not have been protected at the extreme cost to the interests of school officials in ensuring safe schools.[74]

In addition, the Supreme Court in *Honig* did not address all the issues related to disciplining disabled school children. For instance, is the ten day suspension limitation maximized even when the ten days are not consecutive?[75] Also, what would be the profile of a child who was "substantially likely" to be highly dangerous to himself or others, if those are the only disabled students who could be denied schooling for longer than ten days? Overall, the IDEA was not well received by either school officials, or the parents and students it sought to protect because of its inflexibility in dealing with dangerous situations and its uncertain procedural applications.[76] Further, the *Honig* decision was not nearly as broad

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68. *See* M.P. by D.P. v. Governing Bd., 858 F. Supp. 1044 (S.D. Cal. 1994).

69. *See* Kronholz, *supra* note 9.

70. *See id.*

71. *See id.*

72. *See id.*

73. *See* Cohodas, *supra* note 62, at 159.

74. *See id.* (recognizing that a balance of interests was intended).

75. *See* Eugene A. Lincoln, *Disciplining Handicapped Students: Questions Unanswered in* Honig v. Doe, 51 ED. LAW REP. 1, 4 (1989); Edward J. Sarzynski, *Disciplining a Handicapped Student*, 46 ED. LAW REP. 17, 24 (1988).

76. *See* Steven. S. Goldberg, *Discipline, Disability, and Disruptive Students:* Honig v. Doe, 44 ED. LAW REP. 495, 500 (1988).

as many had hoped.[77] The bottom line was that although disabled children were offered the same educational and social advantages as their non-disabled peers, the law still was not quite right.

II. CONGRESS FINALLY RESPONDS—1997 REVISIONS TO THE IDEA

Between 1979 and 1994, several amendments clarified and refined the IDEA. One of these amendments included awarding attorney's fees for parents who prevail in due process proceedings and other judicial actions against school districts.[78] Additionally, the Improving America's Schools Act of 1994[79] gave school officials the discretion to move disabled school children into an interim alternative educational setting for up to 45 days when those students bring firearms to school.[80]

When Congress met in 1997, it looked toward further advancing the education of disabled school children. The Senate Committee on Labor and Human Resources and the House Committee on Education and the Workforce recommended the newest revisions to serve several purposes,[81] including making schools safer.[82] The Senate Committee reported that although the number of children originally denied an education had dropped by almost ninety percent, the law's promise had not been fulfilled for many children, because the quality of education for disabled students was below standard.[83] "Ensuring that schools are safe and conducive to learning" was one of the many ways Congress could improve the quality of education for disabled children.[84]

Within this legislation, Congress finally clarified how to interpret the "stay-put" provision. As the Senate Committee noted, the legislation only included two exceptions to the "stay-put" rule: "where guns or drugs are involved, or when continued placement is substantially likely to result in physical harm."[85]

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77. *See* Sarzynski, *supra* note 75, at 22.

78. S. REP. NO. 105-17, at 2 (1997) (citing Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 2, 100 Stat. 796, 796 (codified as amended at 20 U.S.C.A. § 1415(i)(3)(B) (West Supp. 1998)). Other amendments included providing funds for State school programs that practice early intervention with infants and toddlers. *Id.* at 2-3 (citing Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, § 101, 100 Stat. 1145, 1147 (codified as amended at 20 U.S.C.A. § 1433 (West Supp. 1998))).

79. Pub. L. No. 103-382, 108 Stat. 358 (codified as amended in scattered sections of 20 U.S.C.). This act was enacted with the goals of closing the educational gap between disadvantaged children and other children, and enabling schools to provide a high-quality education to all children. *See id.* § 101, 108 Stat. at 3519-22.

80. *Id.* § 314, 108 Stat. at 3936-37 (codified in 20 U.S.C.A. § 1415(k)(1)(A) (West Supp. 1998)).

81. S. REP. NO. 105-17, at 2 (1997); H.R. REP. NO. 105-95, at 82 (1997).

82. S. REP. NO. 105-17, at 2.

83. S. REP. NO. 105-17, at 5.

84. *Id.*

85. *Id.* at 4 (referring to Pub. L. No. 105-17, § 101, 111 Stat. 37, 94 (1997)). Although most

The Senate committee recognized that considerable debate had evolved around whether children with and without disabilities are equally disciplined for school-yard misbehavior and strove to find the proper balance.[86] The committee reported that the IDEA amendments were

> the result of extensive discussions among Senators and Congressmen, and officials of the U.S. Department of Education, as well as recommendations from parents of children with disabilities, educators, and other individuals interested in improving the quality of education for children with disabilities. . . . The legislation was developed through a bicameral, bipartisan, legislative branch, executive branch collaborative effort that preceded committee action.[87]

The proposed revisions passed both the House and Senate by overwhelming majorities.[88]

President Clinton also recognized the importance of the revisions. He signed the legislation on June 4, 1997.[89] The President stated that he believed the legislation would build on the IDEA's prior success by, among other things, "asking children with disabilities, along with schools, teachers, and parents to assume greater responsibility for the children's success."[90] The President added that the bill "also gives school officials the tools they need to ensure that the Nation's schools are safe and conducive to learning for all children, while scrupulously protecting the rights of children with disabilities."[91]

Under new provisions of the IDEA, school personnel have the discretion to order a change in the placement of a child with a disability to an interim alternative educational setting for not more than ten days, to the extent that a child without a disability would be subject to the same.[92] However, a disabled student who is subject to further disciplinary action may be transferred to an interim alternative setting for up to forty-five days if the student brings a weapon to school or to a school function or if 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."[93]

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of the procedural safeguards originally included in the IDEA remain in the new amendments, several refinements were made. *See id.* at 25.

86. *Id.* at 28.

87. *Id.* at 1-2.

88. The House of Representatives approved the amendments 420-3 on May 13, 1997; the Senate approved the measures 98-1 the following day. *See* Edwin Chen, *Senate Approved Landmark Education Bill For Disabled Congress*, L.A. TIMES, May 15, 1997, at A6.

89. Statement by President William J. Clinton Upon Signing H.R. 5, 1997 U.S.C.C.A.N. 147.

90. *Id.*

91. *Id.*

92. Individuals with Disabilities Education Act, 20 U.S.C.A. § 1415(k)(1)(A)(i) (West Supp. 1998).

93. *Id.* § 1415(k)(1)(A)(ii)(II).

If a child's change in placement is limited to forty-five days, and that child previously was being educated in a regular classroom, then after a maximum of forty-five days a child who has pointed a gun in his teacher's face will be back in that teacher's classroom. Should the school attempt further to change the disabled child's placement after forty-five days, the student will return to his or her original educational setting pending any proceeding to challenge the placement.[94] Further, an "interim alternative educational setting" is one provided by the school district and selected so the child may continue to participate in the general curriculum and receive the same educational services as those set out in the student's Individualized Education Program ("IEP").[95]

The parents of any disabled child who is subject to suspension or change in an educational setting must be notified on the day the decision is made, and within ten days or "immediately if possible," a determination must be made as to whether the child's misconduct is related to his disability.[96] If the parents challenge a removal of their child from his or her current setting and during pendency of any review process or appeal, the child must remain in his or her "current educational setting," that is, the setting before disciplinary action.[97]

As for any child who may be considered substantially likely to cause injury to himself, his classmates, teachers, or any other school personnel, a hearing officer may change that child's placement for up to forty-five days, but only if the school has demonstrated that likelihood by substantial evidence.[98] The newest revisions to the IDEA define substantial evidence as "beyond a preponderance of the evidence."[99] In addition, if the school district believes it is dangerous for the child to remain in his current setting pending any proceedings, it may request an expedited hearing.[100]

Overall, Congress made some significant changes to the IDEA. In some ways school districts have more discretion to remove students with disabilities, if those students engage in certain acts of misconduct. At the same time, Congress clarified that the "stay-put" provision otherwise will be applied absolutely. In that sense, the revisions are basically a codification of much of the related case law from the last twenty years. Yet, throughout those years when the courts addressed such issues, educators complained of safety concerns.[101] The question remains, are the 1997 revisions to the IDEA enough to satisfy teachers, administrators, and parents, without stepping on the rights of disabled students and their parents?

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94. *Id.* § 1415(k)(7).

95. *See id.* § 1415(k)(3); *see also id.* § 1401(11).

96. *See id.* § 1415(k)(4)(A).

97. *See id.* § 1415(j). Even where the removal was due to possession or use of guns or drugs, the student will return to the original educational setting if no resolution occurs within 45 days. *See id.* § 1415(k)(7)(A).

98. *See id.* § 1415(k)(2)(A).

99. *Id.* § 1415(k)(10)(C).

100. *See id.* § 1415(k)(7)(C).

101. *See* Kronholz, *supra* note 9.

III. Public Reaction to the IDEA Revisions Is Mixed

Debate over the IDEA is not going to end any time soon. The people and interests that have been involved in shaping the IDEA thus far are, to some extent, adversarial, so it is not surprising that the reactions to the 1997 amendments are varied. Although it remains to be seen what effect the revisions will have on school discipline, the initial reaction is that they do not strike the balance of interests hoped for by many people.

A. Still Not Enough Discretion for School Officials?

Although the newest revisions to the IDEA may be fair and, for now, satisfactory, lobbyists on both sides of the issue failed to get exactly what they wanted.[102] Congress will need to continue its efforts to balance "teachers' needs to maintain a safe and orderly classroom environment with disabled students' rights to equal access [to education]."[103] Many school representatives agree, cautioning that the new legislation does not go far enough to enable teachers to deal with handicapped students who are violent or seriously disruptive.[104]

1. Almost Getting Away With Murder?—Many teachers and principals think that by failing to provide enough flexibility and safety precautions within the revisions, Congress did little to help them.[105] Although more clarity is certainly an advantage to school officials, many other behavioral problems exist aside from guns and knives. Fists and teeth can be just as dangerous to other students and teachers—at least one school principal had to order hepatitis shots for a teacher who was bitten by a special-education student.[106] In addition, classroom disruptions, robbery, assaults, sex offenses, and other problems are not excluded from the "stay-put" rule.[107] Yet advocates for the disabled oppose allowing sanctions for disruptive behavior because "it could be used against a large population of children."[108]

One student terrorized his school, "throwing punches, brawling, and, finally, breaking the nose of a male teacher-aid."[109] The school principal could not suspend, expel, or transfer that student because the child had been diagnosed as emotionally disturbed. Instead, school officials were forced to hire a private teacher and a private aide to work with that child for the rest of the school year

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102. *See IDEA Bill Passes Senate, Cleared For Clinton's Signature*, CONGRESS DAILY, May 14, 1997.

103. *Id.*

104. *See Dealing with Disabled Students Series: Editorials; Issues in Education*, ST. PETERSBURG TIMES, Aug. 17, 1997, at 2D [hereinafter *Dealing with Disabled Students Series*].

105. *See id.*; *see also* Beck, *supra* note 13.

106. *See* Kronholz, *supra* note 9.

107. *See supra* notes 40-41, 92-101 and accompanying text.

108. Kronholz, *supra* note 9.

109. *Id.*

at a total cost of $40,000—a cost borne by the school district.[110] That is hardly the discipline that comes to mind when a child acts in such an unruly and destructive manner. Time, energy, and money was devoted to one disruptive individual, rather than a classroom full of children who follow school rules.

The IDEA defines "weapon" as defined in 18 U.S.C. § 930(g)(2): "[A] weapon, device, instrument, material, or substance . . . that is used for, or is readily capable of causing death or serious bodily injury."[111] So disabled students who bite, scratch, and kick their teachers are never subject to the consequences—at least not the same consequences—as non-disabled students. The punishment often does not fit the crime. For example, two emotionally handicapped children who had plotted to kill their teacher will receive expensive, individual home instruction as their punishment.[112]

2. Double Standard.—The new legislation does not solve the problem of a "two-tiered system of discipline."[113] If a state wants to continue receiving federal funds for education grants, the double standard discipline system is forced upon school districts. After two students and their twelve friends attacked another student and shots were fired, a school official said:

> It should have been easy. Our rules are clear and simple: Any student who participates in what we call a 'mob assault' will be expelled. Any student who brandishes a gun of any kind—even a starter gun—will be expelled. Except in this case it wasn't a bit simple.[114]

Because the student who fired the shot had a mild speech impairment and was therefore protected under the IDEA,[115] the school could not deny him a free appropriate public education.[116] Although that student's behavior did not relate to his disability, the school principal could not expel him—as he did the other student.[117]

School administrators want a single system of discipline for all students, although they see the changes in the IDEA as better than the previous law.[118] The

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110. *See id.*

111. 18 U.S.C. § 930(g)(2) (1994) (referred to at 20 U.S.C.A. § 1415(k)(10)(D) (West Supp. 1998)).

112. *See* Linda K. Wertheimer & Mike Berry, *Schools Find it Difficult to Punish Special Ed Students for Bad Behavior*, ORLANDO SENTINEL, Sept. 8, 1996, at A1. The two fourth-graders, who were protected by the IDEA, took a gun and knives to school in an attempt to further their plan. *See id.*

113. *Double Standard*, *supra* note 8.

114. Kristen J. Amundson, *Exceptions to the Rule; Why Schools Can't Expel Some Troublemakers*, THE WASH. POST, Nov. 2, 1997, at C04.

115. *See id.*

116. *See id.*

117. *See id.*

118. *See* David Hess & Elsa C. Arnett, *House Votes for Greater Latitude in Disciplining Disabled Students*, HOUSTON CHRON., May 14, 1997, at 7.

gray areas that affect most teachers in most classrooms remain difficult.[119] Those gray areas exist where disabled students disrupt the classroom and lives of others, but have not committed an offense that falls under an exception to the "stay-put" rule.[120]

The discipline double standard extends even into other legislation. The Gun-Free Schools Act of 1994[121] requires "local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon[122] to a school under the jurisdiction of local educational agencies in that State."[123] However, the Gun-Free Schools Act specifically mandates that "[t]he provisions of this section shall be construed in a manner consistent with the Individuals with Disabilities Education Act."[124] That means a child with disabilities can be suspended for forty-five days, all the while receiving educational instruction at the extra expense of the school district.[125]

States and local school districts also have adopted their own "zero-tolerance" policies, many going so far as to immediately expel students who bring weapons or drugs to school.[126] And at least one state supreme court has ruled that a "right to education" does not apply to any one individual student, but to children of the state generally, therefore allowing the school district to completely deny an educational setting to a child under zero-tolerance policies.[127] That attitude does not apply to disabled students, however, as *Honig* makes quite clear.[128] "Unfortunately, the special protections given to disabled children under court decisions or legislation do not generally apply to other youths facing charges, no matter how educationally or personally vulnerable they may be."[129]

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119. *See id. See generally Double Standard*, *supra* note 8; *Inclusion A New Idea: Legislation Goes to President*, 7 AM. POL. NETWORK DAILY REP. CARD, May 16, 1997 (quoting Sandra Feldman, president of the American Federation of Teachers, who called this double standard "unfortunate," saying that in the past it has led to serious consequences).

120. *See* Hess & Arnett, *supra* note 118.

121. 20 U.S.C. § 8921 (1994).

122. Weapon is defined here as "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device." 18 U.S.C. § 921(a)(2) (1994).

123. 20 U.S.C. § 8921(b)(1) (1994).

124. *Id.* § 8921(c). *See also* Magyar v. Tucson Unified Sch. Dist., 958 F. Supp. 1423, 1441 (D. Ariz. 1997) (noting also that the Gun-Free School Zones Act requires school districts to continue providing appropriate educational services for disabled students during the time of discipline).

125. *See* Kronholz, *supra* note 9.

126. *See* Robert D. Shepherd, Jr. & Anthony J. DeMarco, *Weapons in Schools and Zero Tolerance*, 11-SUM CRIM. JUST., Summer 1996, at 46, 46.

127. *Id.* at 47 (citing Doe v. Superintendent of Sch., 653 N.E.2d 1088 (D. Mass. 1995)).

128. Honig v. Doe, 484 U.S. 305 (1988); *see supra* notes 57-63 and accompanying text. *See also* Shepherd & DeMarco, *supra* note 126, at 47-48.

129. Shepherd & DeMarco, *supra* note 126, at 48.

Federal legislation certainly cannot sort out every possible disciplinary circumstance. It would be better to give teachers and principles the discretion needed to make on the spot decisions; to give them the authority to apply the IDEA with flexibility, especially now that three fourths of disabled children are taught in the regular classroom.[130] Now, schools' hands are still tied when caught between the need to maintain classroom order and the legal requirement to teach a disturbed child.[131] Protecting the rights of some groups means compromising the rights of others.

3. Expensive Discipline.—It is important to remember that whether or not a student's misbehavior is related to that student's disability, no child under the IDEA may be denied a free appropriate public education for any reason.[132] This often will result in private home tutoring, which is costly for the school system and provides unruly children with many hours of specialized attention.[133] In fact, according to the U.S. Education Department, the program has increased to a cost of $39 billion a year.[134] The cost of these individualized tutoring sessions often takes money away from other students, in addition to the costs involved with using a team of teachers, parents, psychologists, and other specialists to prepare the disabled student's IEP.[135] This is the case even where a student gets drunk, barges into school in the middle of the day to terrorize teachers and students, leaving vomit and other bodily fluids on staff members, and frightening children as young as thirteen years old.[136]

4. A Legal Nightmare.—To implement any disciplinary procedure against a child with disabilities is a legal nightmare; it is a legal maze that frustrates the ability to discipline at all.[137] Teachers and school officials who are faced with those discouraging processes might be tempted to give up and simply allow

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130. *See House Oks Discipline For Disabled Students*, *supra* note 66.

131. *See As Barriers Fall*, CHRISTIAN SCI. MONITOR, May 22, 1997, at 20. *See also* Chen, *supra* note 88 (noting that the American Association of School Administrators does not believe the revisions go far enough in the area of discipline); Tait Trussell, *A Welcome Crackdown on Special-Education Abuses*, ORLANDO SENTINEL, May 16, 1997, at A23 (reporting that the National School Boards Association declared that the "current inflexible restrictions and costly mandates" of the IDEA should be replaced by "balance and common sense . . . so that all children will benefit").

132. The IDEA states that even where a student's misconduct is unrelated to his or her disability, a school may only deny a free appropriate public education for up to 45 days. 20 U.S.C.A. § 1415(k) (West Supp. 1998).

133. *See* Wertheimer & Berry, *supra* note 112.

134. *See* Beck, *supra* note 13.

135. *See Federal Education Programs Evaluation: Field Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Educ. and the Workforce*, 105th Cong. (1997) [hereinafter *Field Hearing*] (testimony of John Pennycuff, Vice Pres., Winton Woods City District Bd. of Educ.); *see also supra* note 95.

136. *See Field Hearing*, *supra* note 135 (testimony of John Pennycuff). That school district was forced to take $20,000 in funds away from other students to pay for a teacher to go to that student's home daily.

137. *See* Bruce Fein, *Handicapping Education*, WASH. TIMES, May 20, 1997, at A18.

questionable behavior to continue. After the legislative revisions were passed, at least one advocacy group for children with disabilities expressed concern that the procedural requirements create too much paperwork for teachers.[138]

Virtually every decision made by school officials is subject to review, and by the time the required review process is completed, a student may have graduated and therefore escaped a suspension or expulsion completely. A review must immediately be held to determine whether the child's misbehavior relates to his or her disability.[139] This review is performed by the IEP Team,[140] which considers all information relevant to the behavior subject to discipline, including evaluation and diagnostic results, observations of the child, and the child's placement and IEP.[141] The IEP Team then determines whether all appropriate services were offered to the student, including supplementary aids and services and behavior intervention strategies.[142] The IEP Team must also consider whether the child's disability impaired the child's ability to understand the impact and consequences of the behavior, and to control his or her behavior.[143] After this review, if the school is able to discipline the child through suspension, all special education and disciplinary records must be sent to the individual making the final decision.[144]

Following any disciplinary action, the parents may appeal the determination that the student's misbehavior was related to the disability, or may appeal any interim alternative educational setting.[145] A hearing officer will investigate and make a proper ruling.[146] Throughout all of these processes, the child will remain in his original educational setting unless the school district can show, by substantial evidence, in an expedited hearing, that the child is a threat.[147] As the Court explained in *Honig*, the IDEA "establishe[d] a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree."[148]

Sometimes the battle between parent and school extends to the issue of whether a child is even disabled. The IDEA now gives school districts a wide basis for knowledge of a child's disability.[149] If the school has no basis for

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138. *Bill Helps Schools Balance Needs of All Children*, SAN ANTONIO EXPRESS-NEWS, May 12, 1997, at 14A.

139. *See* 20 U.S.C.A. § 1415(k)(4) (West Supp. 1998).

140. *See id.* § 1415(k)(4)(B); *see also supra* note 95.

141. *See* 20 U.S.C.A. § 1415(k)(4)(C)(i) (West Supp. 1998).

142. *See id.* § 1415(k)(4)(C)(ii).

143. *See id.*

144. *See id.* § 1415(k)(5)(B).

145. *See id.* § 1415(k)(6)(A)(i).

146. *See id.* § 1415(k)(6)(B).

147. *See id.* § 1415(k)(7).

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

149. 20 U.S.C.A. § 1415(k)(8) (West Supp. 1998). The IDEA will treat a school as having knowledge that a child is disabled if: (1) the parent has given written acknowledgment that the

knowledge of a disability, it may attempt to discipline the student as it would any other.[150] However, the parents of the student may request an evaluation, conducted in an expedited manner.[151] Meanwhile, at least one court has held that disciplinary measures do not have to be delayed pending resolution of a parent's claim that a student should be classified as disabled.[152]

B. Too Far and Too Much?

Although advocates for the disabled are generally satisfied with the IDEA amendments of 1997, their tone still seems to be one of warning—the concessions made could be the beginning of a slippery slope, ending with the ability of school officials to expel disabled students just to be rid of them. Advocates fear that too much flexibility in the law would tempt school districts to "routinely dump disabled kids."[153] This fear probably stems from the way in which some school districts had "turned away severely handicapped youngsters or expelled some emotionally disturbed kids with the excuse that they could not 'fit into' regular classes."[154] While parents of children with disabilities would not think any student should be allowed to bring guns and drugs to school, they believe that the IDEA is needed to prevent some school administrators from finding any reason to expel a disruptive child.[155]

Advocates for the disabled have lobbied heavily against most of the amendments to the discipline provisions over the years.[156] It seems clear that those who fight for the rights of students with disabilities fear a reversion to a time when those children were excluded from public schools. One advocate noted: "Our concern is once they start weakening the protections for the students to continue to get the education, other rights are going to deteriorate."[157] It has been suggested that teachers and administrators have an ultimate goal of "making it easy to disregard students who are too expensive or too difficult to educate."[158] If some school officials really do have such motives, the IDEA keeps them from depriving disabled students of the social, emotional, and educational advantages

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child needs special education; (2) the child demonstrates a need for special education; (3) the parent requests evaluation of the child; or (4) a teacher or other school employee brings the child's behavior or performance to the attention of the special education director. *Id.*

150. *See id.* § 1415(k)(8)(C).

151. *See id.*

152. *See, e.g.*, Miller v. Board of Educ., 690 A.2d 557, 560 (Md. Ct. Spec. App. 1997).

153. *Dealing with Disabled Students Series*, *supra* note 104.

154. Beck, *supra* note 13.

155. *See* Cathy W. Heizman, *No Discrimination*, CINCINNATI ENQUIRER, June 3, 1997, at A9.

156. *See* Kronholz, *supra* note 9.

157. Wertheimer & Berry, *supra* note 112 (quoting Carolyn Tavel, Executive Dir. of the Learning Disabilities Resource Ctr., a Florida organization representing parents of disabled children).

158. Mike Ervin, *Getting Tough on Kids in Wheelchairs*, THE PROGRESSIVE, Nov. 1, 1995, at 27.

of being with other children.[159]

Not all school officials look for reasons to remove disabled students from their schools. Some of them do not experience the severe problems and horror stories that seem so prevalent. Those reports may stem from a perceived need by some education organizations to respond to complaints from their constituents.[160] Quite possibly, some advocates believe, the criticisms of the IDEA are overstated and cannot be supported by facts beyond the infamous anecdotes.[161]

Besides, it is argued, the IDEA legislation aimed to ensure disabled students' equal access to education, not to "coddle those students or protect them from punishment if they broke the rules."[162] Also, the IDEA is helpful for children who are not disabled, as it helps teach everyone not to categorize people, but to accommodate each child as an individual.[163] However, schools must follow the rules, just as they expect their students to do the same,[164] and whatever legislation has been created to protect the rights of some students, school officials must follow or they will face consequences of their own—loss of federal funds.

C. Between A Rock and A Hard Place

Clearly, school districts are caught between two duties—to provide a free appropriate public education for children with disabilities, and keep schools fair, safe, and conducive to learning for all children. The rights of all children, teachers, and administrators must be balanced.[165] Perhaps the most important of those rights is safety in the school systems.[166]

1. What Do We Want to Teach the Children?—Making disciplinary concessions for children with disabilities may be sending a message that no one expects them to live up to the same standards as their peers.[167] We should be teaching children that certain opportunities are forfeited by criminal conduct or conduct that goes against the principles of that opportunity.[168] Violence in schools is too big a problem to make exceptions for certain students. Disabled students who fight, steal, make sexual attacks, and are otherwise destructive should not be left in the classroom to strike again. No students—disabled or

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159. *See Disability and Discipline*, *supra* note 4.

160. *See Revision of Special Education Programs: Congressional Testimony on H.R. 5 Before the Subcomm. on Early Childhood, Youth, and Families*, 105th Cong. (1997) [hereinafter *Congressional Testimony*] (testimony of Elisabeth T. Healey, School Dir. of the Pittsburgh Bd. of Educ.).

161. *See id.*

162. *Following the Rules*, TENNESSEAN, June 12, 1997, at 18A.

163. *See* Amundson, *supra* note 114.

164. *See Following the Rules*, *supra* note 162.

165. *See Bright Idea for Students With Disabilities*, ST. LOUIS POST-DISPATCH, June 8, 1997, at 2B.

166. *See Safe Schools*, *supra* note 4.

167. *See* Amundson, *supra* note 114.

168. *See id.*

not—will be able to learn if classroom disruptions and school-yard bullying are permitted to continue.

Moreover, the IDEA makes disciplinary exceptions out of children with all sorts of disabilities, and several of the disabilities covered under the IDEA seem to have little to do with a child's ability to obey school rules or to behave himself or herself the same as other children.[169] In fact, children with learning, speech or language problems make up about seventy-two percent of school children with disabilities.[170] Rating disabilities according to their seriousness is not a task for a lay person, but maybe some difference should be recognized between more mild disabilities and those that are more likely to keep a child from learning rules or understanding right from wrong. Should a child with dyslexia or a hearing impairment be any more excused from facing the consequences of his or her actions than any other student? As one commentator suggests, the reasoning is as follows: "If a kid is a bully, that must mean he has an emotional problem; if he has an emotional problem, it qualifies him as disabled; if he's disabled, he cannot be punished or even be removed from a classroom without a huge federal civil rights hassle."[171]

Indeed, what makes misbehavior any more excusable when it comes from a child with a mild speech impairment than when it comes from a non-disabled child who might simply be a "bad apple" or is just looking for some extra attention? Maybe the key is to teach all children that adversity is not an excuse for disrespectful, or even dangerous, behavior.

2. Equality in Education?—If the goal of the IDEA is to provide equal educational opportunities for all students, perhaps all students, disabled or not, should be provided alternative education when they are suspended. Why should we put any troubled or misbehaving kid out on the streets? It seems counterproductive to deny schooling to any child.[172] When considering the future of our youth and community, it would be in everyone's interest to seek interim alternative education for *all* students who are temporarily removed from the regular classroom setting.[173] Realistically, however, the costs involved would soar above the current costs of providing such alternatives for only a percentage of students. Undertaking such an expense likely would be almost impossible.

This entire issue revolves around social objectives. Promoting a policy of denying educational services for students who bring weapons or drugs to school will bring about minimal good, regardless of whether the suspended students are disabled. Even Congress, by introducing the Violent and Repeat Juvenile Offender Act of 1997 legislation,[174] has considered the goal of "encourag[ing] and promot[ing] programs designed to keep in school juvenile delinquents

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169. *See supra* note 29 and accompanying text.

170. *See* Kronholz, *supra* note 9.

171. Paul Carpenter, *Feds Develop a Great Idea to Alter IDEA*, ALLENTOWN MORNING CALL, May 13, 1997, at B1.

172. *See* Shepherd & DeMarco, *supra* note 126, at 48.

173. *See id.*

174. S. 10, 105TH CONG. (1997).

expelled or suspended for disciplinary reasons."[175] Expelling any child who has brought drugs or weapons to school for an entire year is likely to deter that child from ever returning to school.[176]

The bottom line is that the disciplinary provisions of the IDEA contaminate the entire objective of treating students equally. The IDEA may be an excellent tool for teaching non-disabled children to live and work with people who are not like them. However, any examples of equality are also defeated by the same legislation: "[I]t condescends and encourages persistent stereotyping of the disabled, which is what they purportedly protest."[177]

3. Some Alternatives.—If the current law does not provide equal educational opportunities for subjects of disciplinary actions, and doing so would be too expensive, the search for alternatives should continue. School districts may try other strategies, such as keeping skilled behavior specialists on staff who are trained in positive behavioral programs.[178] Perhaps such programs could focus on helping disabled school children cope with school and social stresses, or offer them positive incentives for remaining in the classroom with their non-disabled peers. This option, too, will incur costs, but in the long run distributing a portion of education funding to this type of program may produce a more positive result than hiring home tutors for children who are suspended from school.

One commentator suggests that simplicity is the key.[179] Rather than the extensive language in the IDEA that directs disciplinary procedures, two easy provisions might have provided the desired effect: (1) require use of "reasonable professional standards and judgment;" and (2) grant parents of disabled children a legal right to double damages and attorney fees "if the misconduct that prompted the discipline was caused by the school's unreasonable neglect to treat or accommodate the disability."[180] This suggestion, however, fails to define "reasonable professional standards" and overlooks the litigation that would likely ensue regarding the ambiguous nature of the two rules. Simplicity may not be an option.

Before Congress approved the 1997 revisions to the IDEA, some further alternatives may have been possible. For example, schools could have raised teacher accountability, government could have given discretionary grants directly to school systems to make positive lasting changes that meet the needs of that school, and everyone could have more actively enforced the law as it stood.[181] However, even with the amendments in effect, these suggestions are not altogether moot. Raising teachers' accountability might include raising those teachers' expectations of children with disabilities. Low expectations may be preventing disabled children from developing incentives to remain in regular

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175. S. REP. NO. 105-108 (1997).

176. *See Congressional Testimony*, *supra* note 160 (testimony of Elisabeth T. Healey).

177. Fein, *supra* note 137.

178. *See Congressional Testimony*, *supra* note 160 (testimony of Elisabeth T. Healey).

179. *See* Fein, *supra* note 137.

180. *Id.*

181. *See Congressional Testimony*, *supra* note 160 (testimony of Elisabeth T. Healey).

classrooms or to do well in school generally.[182] In conjunction, if discretionary grants were awarded directly to school systems, schools may use funds to train teachers with the skills to work with students who have a broad range of learning skills. [183] And some improvements could be made by going all the way back to where the teachers were educated—universities offering education degrees could spend more time educating its own students on how to teach in a classroom that includes children with disabilities. Alternatives such as these would require less involvement from Congress and the courts and would eventually give schools more autonomy in their treatment of students with special needs.

Special education funding could find several other useful purposes aside from private instruction. At least one commentator has suggested looking to Congress to find more money within the IDEA to fund counseling and other special education in the hopes of reducing the need for suspension and expulsion.[184] At least one other commentator would push Congress to use more funds for prevention and early detection of disabilities, rather than trying to remedy the problem later.[185] In fact, in a May 1997 report, Congress stated its intent to use IDEA funding for research, personnel preparation activities, and outreach programs that would "improve early intervention, educational, and transitional results for children with disabilities."[186] Clearly, Congress is aware that more improvements in the education of disabled children are not only preferable, but achievable. The far-reaching effects of a preventive approach would hopefully nullify the need for much of the present language in the IDEA and, most importantly, eliminate the currently perceived need to repair damage already done.

V. THE FUTURE OF THE IDEA

The potential exists for litigation to continue to flourish in the issues related to whether students with disabilities may be denied a free appropriate public education. Already, it seems that with such extreme procedural processes, determinations of whether a student is truly disabled, and further, whether a student's misconduct was related to his disability, are issues which courts will continue to face. As historical data show, these procedural guarantees may be necessary to prevent school districts from excluding special education students

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182. *See id.*

183. *See id.*

184. *Dealing With Disabled Student Series*, *supra* note 104.

185. Beck, *supra* note 13.

186. H.R. REP. NO. 105-95, at 363 (1997). Congress hopes to achieve early intervention, education, and transitional results a number of ways, including: (1) providing national technical assistance, support, and information dissemination activities, *id.* at 375; (2) providing parent training and information activities, *id.*; (3) requiring the Secretary of Education, through grants, contracts, or cooperative agreements, to assess the progress of state programs in achieving goals such as early intervention services for infants and toddlers with disabilities, *id.* at 371.

altogether.[187] Regardless, a student who is dangerous to others should not remain in the classroom where that student can continue to harm others. Even when a child's misbehavior is disability-related, that child is no less a threat to his fellow students and teachers than when that nexus does not exist.

Another issue that often arises, is whether administrative remedies have been, or should be, exhausted by parents and students who protest suspensions and expulsions. Some courts have already held that where parents have failed to exhaust their administrative remedies under the IDEA, their court claims for IDEA violations fail for want of jurisdiction.[188] Litigation of that issue will only increase with the addition of procedural reviews.[189]

If violence in schools continues to increase in coming years to the degree it has since enactment of the IDEA, further compromise will be needed. Both school officials and advocates for disabled students must be willing to recognize that as societal and environmental changes affect school systems, legislation like the IDEA will also require another look. No amount of national objectives will solve violence problems if exceptions are continually made. Teachers, school administrators, and parents of children without disabilities need to continue their fight for equal discipline in schools and work together to reach the compromises that are ultimately best for the students. Maybe those who design educational programs for children with disabilities will be "more rigid" with their educational plans,[190] thereby preventing a disabled child from undertaking an educational challenge beyond his or her reach. The IDEA can work well for everyone—Congress has spent twenty-two years perfecting it.

The underlying purpose of the IDEA is a good one. The Senate Committee on Labor and Human Resources intended for the 1997 legislation to

> encourage exemplary practices that lead to improved teaching and learning experiences for children with disabilities, and that in turn, for these children, result in productive independent adult lives, including employment. Through these efforts, the committee intends to assist States in the implementation of early intervention services for infants and toddlers with disabilities and their families, and support the smooth

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187. *See supra* notes 13, 153-54 and accompanying text.

188. *See, e.g.*, Bills v. Hommer Consol. Sch. Dist. Number 33-C, 959 F. Supp. 507, 511 (N.D. Ill. 1997) (noting that exhaustion of administrative remedies is required for several reasons); Brown v. Metropolitan Sch. Dist., 945 F. Supp. 1202, 1206 (S.D. Ind. 1996) (holding that although plaintiffs may have exhausted administrative remedies under the state pupil discipline statute, they did not do so under the IDEA because they did not request a due process hearing and pursue the appeals process); *but see* Hayes v. Unified Sch. Dist. No. 377, 877 F.2d 809, 814 (10th Cir. 1989) (stating that exhaustion of administrative remedies under the IDEA is not required "if adequate relief is not reasonably available or pursuit of such relief would be futile").

189. See *supra* notes 96-100 and accompanying text for discussion on the additional review proceedings included in the 1997 amendments to the IDEA.

190. *See* Cohodas, *supra* note 62, at 159 (quoting Gwendolyn Gregory, Deputy Gen. Counsel of the National Sch. Bds. Ass'n).

> and effective transition of these children to preschool. The committee views the structure and substance of this legislation as critically important, if the country is to see clearer understanding of, and better implementation and fuller compliance with, the requirements of IDEA.[191]

No one knows where public education would be now if the IDEA had never been enacted. It is likely that many children with disabilities would still be marginalized or completely excluded from public schools. Without a doubt, the IDEA remains in the future of education law, but will require continuing reflection by lawmakers and those affected by the act. If interested groups do not continue to stay knowledgeable about the widespread effects of the IDEA and maintain the public awareness of the direction of the law, educational progress in this country could be seriously impeded. It is unlikely, however, that advocates of involved groups will allow the IDEA to swallow the rights of any children, parents, teachers or school officials without putting up a fight.

CONCLUSION

The IDEA amendments have the potential to make great strides in education law, and probably have already done so. Without the IDEA, children with disabilities quite possibly still would be systematically excluded from the opportunity to be educated alongside their peers. Any time this much is at stake, an agreement will not be easily achieved. The IDEA is rooted in good intentions and important goals for remedying past wrongs. But in correcting the historical mistakes of school officials, its protections for children with disabilities are extreme. Of course, the IDEA consists of much more than restrictions on disciplinary measures, but the disciplinary provisions have been cause for alarm for many years.

The 1997 revisions definitely are a step in the right direction, and for now, may be the best compromise for the important rights that lie on both sides of the issue. These changes answer many of the questions that the courts have been attempting to answer for over twenty years. With constant monitoring and reaction, this legislation could be just the right tool for protecting those rights—those of children with disabilities and those of all teachers and students who desire a safe place to learn. Although reaction of advocates on both sides is the key to shaping the IDEA into the most effective legislation it can be, everyone involved must be unselfish in their desires and willing to try new programs and ideas. The court in *Maher* said it well: "[T]hose who love their children must sometimes make sacrifices in order to accommodate the interests of other children and their equally loving parents, and . . . those of us who administer the law must recognize the limits of our capacity to achieve perfect justice."[192]

The goals of the IDEA are positive. The funding incentives for states to

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191. S. REP. NO. 105-17, at 5-6 (1997).

192. Doe v. Maher, 793 F.2d 1470, 1476 (9th Cir. 1986), *aff'd as modified sub nom.*, Honig v. Doe, 484 U.S. 305 (1988).

create learning opportunities for children with disabilities are needed, but until teachers and school administrators find other incentives to include children with disabilities in their schools—such as fostering an environment where children with a broad array of backgrounds learn to work together—the goal of safe schools with a learning-conducive environment is still far from real. At the same time, the "guarantee" of a free appropriate public education should not be read so literally. That guarantee should come with certain qualifications—such as obeying state and school rules and learning that consequences follow from certain behaviors. Public schools cannot continue to compromise the safety of their teachers and students. The results could range from losing good teachers to losing good students to private schooling.

The increased amount of discretion provided by the newest changes in the IDEA, if given some time to be tested within the school districts, might be just what school officials need to improve education for all students. But at this time, no one should rule out the possibility that the courts will continually be called upon to resolve disputes created by language in the IDEA. Neither is Congress probably finished perfecting this act. Eventually, Congress will be called upon to make further revisions in light of public policy demands and changing educational environments. Perhaps future contouring of the IDEA will form it into an effective educational tool for *all* students.