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Cover Page Footnote
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DISCIPLINE OF SPECIAL-EDUCATION STUDENTS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

*Allan G. Osborne, Jr., Ed.D**

In 1975, Congress passed the Education for All Handicapped Children Act.[1] The Act was passed based on findings that the special-education needs of over half of the children in the United States with disabilities were not being fully met.[2] Specifically, Congress found that one million children with disabilities were entirely excluded from the public school system while others were allowed to participate but did not realize the full benefits of an education because their disabilities went undetected.[3] Thus, by mandating a Free Appropriate Public Education ("FAPE")[4] for all students with disabilities[5] in the Least Restrictive Environment ("LRE")[6] possible, Congress effectively required schools to fully incorporate students with disabilities into the public education system. The landmark legislation also gave students with disabilities and their parents unprecedented due process rights.[7] The law included a requirement that school officials and parents jointly design an Indi-

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1. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1400-1487 (1977)).

2. *See* 20 U.S.C. § 1400(c)(2) (2001).

3. *See id.*

4. *See id.* §1401(8). FAPE is special-education and services at the preschool, elementary, and secondary school levels that have been paid for and are supervised by the state or local government. *Id.* Additionally, FAPE must meet the standards of the state educational agency. *Id.*

5. *Id.* § 1401(3) (defining a child with a disability as "a child 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").

6. *See id.* § 1412(a)(5). Education in the LRE means that, where appropriate and to the maximum extent possible, children with disabilities are educated with children who are not disabled. *Id.*

7. *Id.* § 1415(b). In addition to traditional due process rights such as the right to confront and cross examine witnesses, the legislation allows parents to view their child's educational records; provides protections for children without parents; requires written notice to parents when a state agency proposes or refuses a change; and affords parents with the opportunity to present complaints. *Id.*

vidualized Education Program ("IEP")[8] for each student requiring special-education.[9] Since 1975, Congress has amended the statute several times. One of those amendments, enacted in 1990, gave the law a new name: the Individuals with Disabilities Education Act ("IDEA").[10]

Prior to the enactment of the IDEA, some students with disabilities were being totally excluded from the public schools, while others were not able to succeed in their educational programs.[11] The purpose of the IDEA is to ensure that students with disabilities have access to an appropriate education.[12] The IDEA includes a number of provisions to ensure that the rights of students with disabilities are protected. For example, a student's educational placement may not be arbitrarily changed by school officials. Rather, the IDEA specifies that a change in educational placement may occur only after the child's parents have been provided with written notice of the contemplated change.[13] If the parents object to the proposed change in placement, they may request a due process hearing. Depending on the state law, the due process hearing may be conducted by either the state or local education agency.[14]

8. *Id.* § 1414(d) (outlining the requirements for an IEP). An IEP must include a statement of the student's current levels of educational performance; measurable annual goals and short-term objectives; a statement of the special-education and related services or program modifications the student is to receive; an explanation of the extent to which the student will participate in regular classroom activities; a statement concerning modifications required for any state or district-wide assessments; the dates covered by the IEP; and the criteria by which progress toward annual goals will be measured. *Id.* In addition, when a student turns fourteen, the IEP must include a statement of the transition services needed by the child. *Id.* Transition services are a set of coordinated activities for a student with disabilities designed to ensure the successful transition from school to post-school activities (such as vocational training and/or employment). *Id.* §1401(30).

9. *See id.* § 1401(25) (defining special-education as special instruction provided at no cost to the student's parents which is designed to meet the student's unique needs). Special-education programs include instructional strategies specifically designed for students with disabilities. Depending on the nature and severity of the student's disability, a special-education program may range from a modified regular education classroom to a residential school program. Special-education programs typically found in a public school include resource rooms where students receive specialized instruction for only a portion of the school day and self-contained classrooms, where students receive all of their instruction in a special-education environment.

10. Individuals with Disabilities Education Act of 1990, Pub. L. No. 101-476, 104 Stat. 1141) (as codified at 20 U.S.C. §1400-1487 (1994)).

11. 20 U.S.C. § 1400(c)(s) (2001). *See also* Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972) (finding that 18,000 out of 22,000 disabled students in the school district were not being furnished with programs of specialized education).

12. 20 U.S.C. § 1400(c)(3) (2001).

13. *Id.* § 1415(b)(3).

14. *Id.* § 1415(f).

The hearing must be presided over by an impartial hearing officer who is not an employee of the state or local education agency.[15] If the hearing is held at the local level, the losing party may appeal to a state level hearing.[16] Eventually, unfavorable hearing decisions may be appealed to the state or federal courts.[17]

As indicated above, a student with disabilities must be educated in the LRE. For most students the LRE is the regular classroom and they are removed from the class only to the extent necessary to receive needed special-education services. Some students, however, may require a more restrictive placement. This could include a substantially separate special-education classroom in a public school, or a placement in a private day school, or a residential school.

The law, as initially enacted and amended, was silent on the subject of discipline. Many of its provisions, however, had implications for a school's efforts to discipline students with disabilities.[18] Since penalties like expulsion or long-term suspension would deprive a student of educational opportunity, courts found such discipline to deprive students of their due process rights guaranteed under the Fourteenth Amendment.[19] In 1997, Congress passed the most comprehensive amendments to the IDEA to date.[20] The amendments included provisions on the discipline of students with

15. 34 C.F.R. § 300.508 (1999).

16. 20 U.S.C. § 1415(g) (2001).

17. *Id.* § 1415(i)(2).

18. *See, e.g., id.* § 1415(b)(3)(A) (requiring prior written notice whenever a school district proposes to change a student's placement; some disciplinary sanctions can be considered a change in placement).

19. ALLAN G. OSBORNE, JR., LEGAL ISSUES IN SPECIAL-EDUCATION 159-60 (1995). *See also* Goss v. Lopez, 419 U.S. 565, 565-66 (1975) (holding students may be suspended or expelled from school as long as they are afforded certain due process safeguards). The Court in *Goss* held that the Fourteenth amendment entitles students to a public education as a property interest that may not be taken away for misconduct without observing minimum procedures. *Id.* at 565. The Court went on to say the State cannot determine unilaterally whether the misconduct has occurred and a ten-day (or less) suspension from school cannot be imposed without adherence to due process rights. *Id.* at 565-66. Specifically, a student must be given (a) written or oral notice of the charges; (b) an explanation of the evidence in support of those charges; and (c) an opportunity to present his or her version of the incident or conduct. *Id.* at 566. As interpreted by the courts, the IDEA gives special-education students more due process when faced with a possible expulsion. For example, school officials must determine if the student's misbehavior is a manifestation of the student's disability. *See infra* notes 164-171 and accompanying text.

20. Individuals with Disabilities Act Amendments of 1997, Pub. L. No. 105-17, § 111 Stat. 37 (codified as amended at 20 U.S.C. §§ 1400-1413 (1997)).

disabilities.[21] Many of those provisions simply codified existing case law; others, however, helped clarify formerly opaque areas.[22]

This article will analyze the requirements for disciplining a student with disabilities. It begins with a historical overview of the case law prior to the 1997 amendments to the IDEA.[23] This review will help the reader understand why many of IDEA's current disciplinary provisions developed. Next, the article will review the specific requirements of the 1997 amendments and post-amendment case law.[24] The article concludes with some practical recommendations for educators.[25]

I. THE EVOLUTION OF CASE LAW

As indicated above, the IDEA did not initially contain any provisions directly addressing discipline. Courts, however, were frequently asked to settle disputes arising out of disciplinary actions. A large body of case law developed from these lawsuits.[26]

A. Early Lower Court Decisions

The first court case decided under the IDEA involved discipline. In *Stuart v. Nappi,*[27] the public school district in Danbury, Connecticut tried to expel a third-year student with a complex learning disability who had been involved in several school-wide disturbances and had a history of behavioral problems.[28] The student's attorney

21. *Id. See also* Assistance to the States for the Education of Children with Disabilities and the Early Intervention Program for Toddlers and Infants With Disabilities of 1999, 34 C.F.R. §§ 300.1-300.19 (2001) (issuing new IDEA regulations).

22. ALLAN G. OSBORNE, JR., DISCIPLINARY OPTIONS FOR STUDENTS WITH DISABILITIES, addendum 1 (1997).

23. *See infra* notes 26-157 and accompanying text.

24. *See infra* notes 158-214 and accompanying text.

25. Although beyond the scope of this article, it should be noted that students with disabilities also have rights under the Rehabilitation Act, 29 U.S.C. § 794 (2001) and the Americans with Disabilities Act, 42 U.S.C. §§ 12,101-12,213 (2001). *See generally* PERRY A. ZIRKEL & STEVEN R. ALEMAN, SECTION 504, THE ADA AND THE SCHOOLS (2d ed. 2000) (reviewing Section 504 and the ADA requirements and providing commentary on court decisions and administrative rulings).

26. *See generally* STEPHEN B. THOMAS & CHARLES J. RUSSO, SPECIAL-EDUCATION LAW: ISSUES & IMPLICATIONS FOR THE '90s (1995) (providing a comprehensive overview of the case law that developed early in the history of the IDEA).

27. Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978). Three years later, in an unpublished opinion, the same court handed down a similar decision in a case that was procedurally identical to *Stuart. See* Blue v. New Haven Bd. of Educ., No. N-81-41, slip. op. (D. Conn. Mar. 23, 1981) (reiterating the principle that the IDEA could not be circumvented by disciplinary procedures).

28. *Stuart*, 443 F. Supp. at 1237-39.

requested a due process hearing under the IDEA.[29] The attorney also obtained a temporary restraining order from a federal district court enjoining the school board from conducting a hearing to expel the student.[30] The court held that an expulsion was a change in placement inconsistent with the IDEA's procedures.[31] The court did rule, however, that school officials could temporarily suspend a disruptive special-education student[32] or change the student's placement to a more restrictive one by following the Act's given procedures.[33]

In *Doe v. Koger*,[34] a federal district court in Indiana overturned the Board of Education of the City of Mishawaka's expulsion of a mildly mentally disabled student. The court stated that schools could not expel disabled students whose disruptive conduct is caused by their disability.[35] This rule became known as the manifestation-of-the-disability doctrine.[36] The doctrine implies, of course, that schools can expel a disabled student if the student's misconduct is not related to the student's disability. The court also ruled that schools could transfer a disruptive special-education stu-

29. *Id.* at 1239. *See also* 20 U.S.C. § 1415(b) (2001) (defining due process rights under the IDEA).

30. *Stuart*, 443 F. Supp. at 1237-39.

31. *Id.* at 1241- 43. *See* 20 U.S.C. § 1415(b)(3) (2001) (providing that prior written notice must be given to the student's parents if the school district proposes to change the student's educational placement); *id.* § 1415(j) (stating that if the parents object to the change in placement and request a due process hearing, the school district is prohibited from making that change until the proceedings are completed).

32. *Stuart*, 443 F. Supp at 1243. *See* Bd. of Educ. v. Ill. State Bd. of Educ., 531 F. Supp. 148, 151 (C.D. Ill. 1982) (upholding an Illinois public school district's five day suspension of a special-education student and stating that a brief period of forced absence, such as a five-day suspension, could not reasonably be considered a change in placement). *See also* Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 566 (8th Cir. 1988) (holding that a three-day in-house suspension, even when the student was denied access to his special-education teacher and resources, did not violate the student's substantive due process rights under the IDEA).

33. *Stuart*, 443 F. Supp. at 1243.

34. Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979).

35. *Id.* at 229. *See also* Howard v. Friendswood Ind. Sch. Dist., 454 F. Supp. 634, 640- 41. (S.D. Tex. 1978) (granting a preliminary injunction where a student with brain damage and anxiety problems was suspended because he was repeatedly found wandering the halls and skipping school. The court found the school district improperly treated the incidents as disciplinary problems and not as a result of diagnosed handicaps and that the school district had violated the due process rights of the student when it expelled him without a fair hearing).

36. *See generally* Allan G. Osborne, *Making the Manifestation Determination When Disciplining a Special-education Student*, 119 ED. L. REP. 323, 323-30 (1997) (explaining the formulation of the doctrine in *Koger* and clarifying what manifestation means in addition to when and by whom the manifestation determination must be made).

dent to a more restrictive placement as long as proper change in placement procedures were followed under the IDEA.[37] Seven years later, another federal court in Indiana ruled that a school's use of moderate corporal punishment, as allowed by state law, did not infringe on the rights of a student with an emotional handicap.[38] The court noted that the school gave the student the same punishment it would have given any other pupil engaging in similar conduct.[39]

In *S-1 v. Turlington*,[40] decided in 1981, the Fifth Circuit extended the manifestation of the disability doctrine. Seven mentally retarded[41] high school students had been expelled for a variety of acts of misconduct.[42] One student requested a manifestation hearing to determine if the student's behavior was related to his disability.[43] The school superintendent determined that since the student was not classified as emotionally disturbed, the misconduct was not a manifestation of his disability.[44] In overturning the expulsion, the Fifth Circuit ruled that the manifestation decision must be made by a specialized and knowledgeable group of persons.[45] If such a group found no relationship between the student's misconduct and disability,[46] and the school expelled the student in accordance with

37. *Koger*, 480 F. Supp at 228. *See* Victoria v. Dist. Sch. Bd., 741 F.2d 369, 369-74 (11th Cir. 1984) (upholding a Florida public school district's transfer of a student, who had brought weapons to school and threatened another student, to an alternative school over the objections of her parents), *abrogated by* Honig v. Doe, 484 U.S. 305 (1988).

38. Cole v. Greenfield-Cent. Cmty. Schs., 657 F. Supp. 56, 58 (S.D. Ind. 1986). The student had been diagnosed with hyperactivity and was otherwise emotionally disturbed. The student had, among other incidents, kicked other students; spit on students; forged his father's signature; knocked other students down; and disrupted the classroom and lunchroom. *Id.* at 58. The alleged punishments used by the school included paddling; sitting the student at an isolated desk in the classroom or in another classroom altogether; preventing the student from attending a field-trip; taping the student's mouth shut; and, on one occasion, denying the student's request to visit the school nurse. *Id.*

39. *Id.* at 58-59.

40. S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, Turlington v. S-1, 454 U.S. 1030 (1981), *abrogated by* Honig v. Doe, 484 U.S. 305 (1988).

41. Each expelled student had been classified as either educable mentally retarded (EMR), mildly mentally retarded, or EMR/dull normal. *S-1*, 635 F.2d at 344.

42. The acts of misconduct included masturbating, sexual acts against another student, insubordination, vandalism, and use of bad language. *Id.* at 344 n.1.

43. *Id.* at 344.

44. *Id.*

45. *Id.* at 347-48. *See also* Kaelin v. Grubbs, 682 F.2d 595, 600-02 (6th Cir. 1982) (adopting the analysis put forth in *S-1* and overturning a ninth grade "handicapped or exceptional" student's expulsion where the student had destroyed school property and acted physically violent towards a teacher).

46. *S-1*, 635 F.2d at 347-48.

the IDEA's procedures,[47] expulsion was permissible but there still could not be a complete cessation of services.[48]

A 1985 Fourth Circuit decision illustrated that courts would sometimes stretch to tie a student's misconduct to the student's disability. In *School Board v. Malone*,[49] a fourteen-year-old male student with a language-related learning disability took part in several drug deals.[50] A committee of special-education professionals met and decided that the youth's disability did not cause him to participate in the drug deals.[51] The school subsequently expelled the student.[52] A district court, however, found that the disability was, indeed, responsible for the youth's behavior.[53] The court found that the student's learning disability resulted in poor self-esteem leading him to seek peer approval by partaking in drug deals.[54] Furthermore, the court found that the boy's learning disability prevented him from understanding the long-term consequences of his actions.[55] The Fourth Circuit affirmed the decision.[56]

Courts did permit schools to exclude students who posed a danger to others as long as the IDEA's due process procedures were followed. In *Jackson v. Franklin County School Board*,[57] the Fifth Circuit upheld a Mississippi school district's exclusion of a seventeen-year-old student diagnosed with a psycho-sexual disorder.[58] A youth court had committed the student to a state hospital for treatment.[59] When he tried to return to school upon release from the hospital, school officials refused to admit him and instead offered to pay for an alternative placement.[60] The court upheld the

47. *Id.*

48. *Id.* at 348 (citing Sherry v. N.Y. State Educ. Dept., 479 F. Supp. 1328 (W.D.N.Y. 1979)) (holding an indefinite suspension is a change of educational placement, invoking the procedural protections of the EHA where a legally blind and deaf student suffering from brain damage and an emotional disorder which made her self-abusive was suspended because there was insufficient staff to care for her).

49. Sch. Bd. v. Malone, 762 F.2d 1210 (4th Cir. 1985).

50. *Id.* at 1212.

51. *Id.*

52. *Id.*

53. *Id.* at 1213.

54. *Id.* at 1216-17.

55. *Id.*

56. *Id.* at 1219.

57. Jackson v. Franklin Sch. Bd, 765 F.2d 535 (5th Cir. 1985), *abrogated by* Honig v. Doe, 484 U.S. 305 (1988).

58. *Jackson*, 765 F.2d at 536.

59. *Id.*

60. *Id.* at 537. The school district offered to pay for the following alternatives: home tutoring, vocational or job training, and semi-structured group or foster homes.

school's right to exclude a student it determined to be dangerous.[61] Almost two years later, however, the Fifth Circuit admonished school authorities for failing to convene a conference when the student was released from the hospital as required under the EHA.[62]

B. U.S. Supreme Court Decision

In 1988, the U.S. Supreme Court gave its first ruling on a case involving the discipline of a student with disabilities. *Honig v. Doe* [63] involved two special-education students, sixteen-year-old John Doe and twelve-year-old Jack Smith.[64] Doe was an emotionally disturbed student in San Francisco who had difficulty controlling his "impulses and anger."[65] Under his IEP, he attended a developmental center for disabled students.[66] Shortly after being placed in the center, he assaulted another student and broke a school window.[67] The center suspended the student for five days and referred the matter to the school district's Student Placement Committee ("SPC"), which, in turn, indefinitely suspended him pending an expulsion hearing.[68] Doe's counsel requested that the expulsion hearing be canceled and the IEP team convened.[69] When these efforts were unsuccessful, Doe sued various school officials and the State Superintendent of Public Instruction.[70] The school eventually canceled the expulsion hearing, and the district court issued a temporary restraining order readmitting Doe to school.[71] The court later issued a preliminary injunction preventing the school from excluding Doe while an alternative placement was being found.[72]

Id. The student's mother refused any placement outside of the Franklin County public school system. *Id.*

61. *Id.*

62. *Jackson v. Franklin County Sch. Bd.*, 806 F.2d 623, 628-29 (5th Cir. 1986) (holding that the failure to convene a conference at that time was a per se violation of the EHA).

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

64. *Honig*, 484 U.S. at 312, 314.

65. *Id.* at 312.

66. *Id.*

67. *Id.*

68. *Id.* at 313.

69. *Id.*

70. *Id.* at 313-14.

71. *Id.* at 314.

72. *Id.* at 316.

Smith was also emotionally disturbed with aggressive tendencies.[73] Smith's IEP put him in a special-education program in a regular school on a trial basis.[74] Following a number of incidents of misconduct (including stealing, extorting money from other students, and making sexual comments) the school reduced his program to a half-day schedule.[75] Although his grandparents agreed to this reduction, the school did not advise them of their rights or options regarding his IEP.[76] The school later suspended Smith for five days and recommended his expulsion after he made sexual comments to female students.[77] Smith's suspension was continued by the SPC pending resolution of expulsion proceedings.[78] When Smith's attorney objected to the expulsion hearing, the SPC canceled it and offered to either restore the half-day program or provide home tutoring.[79] His grandparents chose home tutoring.[80] The district court later held that a reduction in schedule without first convening the IEP team violated the IDEA.[81]

The district court held and the Ninth Circuit affirmed that a school could not expel a student with disabilities for behavior unrelated to the student's disabilities.[82] In *Honig*, the Supreme Court affirmed this holding.[83] In his majority opinion, Justice Brennan stated that in passing the IDEA, Congress intended to limit school officials' ability to exclude students with disabilities, even for disciplinary purposes:

> 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. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self help," and directed that in the future the removal of

73. Smith's school records showed that he could not control his "verbal or physical outbursts." *Id.* at 314.

74. *Id.* at 315.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 316.

82. *Id.* at 305 (citing Doe v. Maher, 793 F. 2d 1470 (9th Cir. 1986)).

83. *Id.* at 329.

> disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts.[84]

The Court's ruling left school officials with some recourse. School officials could temporarily suspend a disabled student for up to ten days if the student posed an immediate threat to the safety of others.[85] During the ten-day "cooling off" period, the Court hoped school officials would reach an agreement with the parents for an interim placement.[86] However, if the parents adamantly refused to a change in placement, the Court ruled that school officials could seek the aid of the courts by filing a § 1415(e)(2) suit for an injunction.[87] In such circumstances, school officials would not be required to exhaust administrative remedies[88] before filing a court action if they could show administrative review would be futile or inadequate.[89] The majority opinion went on to state that in appropriate cases the courts could temporarily enjoin a dangerous child from attending school.[90] The Court summarized by stating that the IDEA created a presumption in favor of a student's current educational placement and that school officials could overcome that presumption only by showing that maintaining the status quo was substantially likely to result in injury to that child or other students.[91]

C. Post-*Honig* Lower Court Decisions

Although the Supreme Court decision in *Honig* clarified many issues regarding the discipline of special-education students, the litigation did not come to a halt.[92] The *Honig* decision made it clear that students with disabilities could not be expelled for behavior related to their disabilities.[93] However, the court also indicated that other normal disciplinary sanctions, like a short-term suspension of up to ten days, could be used as long as they did not involve a change of placement.[94]

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84. *Id.* at 323-324.
85. *Id.* at 325.
86. *Id.* at 326.
87. *Id.*
88. 20 U.S.C. § 1415(i) (2001) (stating that parties to a special-education dispute must exhaust all administrative remedies prior to filing a lawsuit in the courts).
89. Honig v. Doe, 484 U.S. 305, 327 (1988).
90. *Id.*
91. *Id.* at 328.
92. *Id.* at 329.
93. *Id.*
94. *Id.* at 325 n.8.

Approximately one year after the *Honig* opinion, the Tenth Circuit affirmed that short-term disciplinary measures did not constitute a change in placement under the IDEA.[95] In *Hayes v. Unified School District,*[96] the parents of two students, a male and female with histories of academic and behavior problems objected to the use of in-school suspensions and time-out.[97] Although the court found that the short-term measures did not amount to a change in placement, it held that such measures related to the students education, and thus were subject to the IDEA's administrative due process procedures.[98] Similarly, a district court in North Carolina, citing *Honig*, held that a ten-day suspension did not violate the IDEA's stay-put provision.[99]

In allowing suspensions of up to ten school days, the Supreme Court in *Honig* envisioned a "cooling off" period allowing school officials and parents to work together to devise another placement for the student if necessary.[100] Unfortunately, school officials and parents do not always agree, and an alternative placement cannot always be worked out in ten days. If an agreement cannot be reached, the dispute would formerly have been subject to the often lengthy administrative and judicial process.[101] The *Honig* decision gave school officials the ability to seek a court injunction to remove a student with disabilities who was either dangerous or seriously disruptive of the educational process during the pendency of administrative and judicial proceedings.[102] The burden is on school officials, however, to show the student is truly dangerous and that removal from the current educational placement is the only feasible option.[103]

After *Honig* several lawsuits involved school district requests for such injunctions. A Virginia state court granted an injunction against a twelve-year-old boy who had fought with several stu-

95. Hayes v. Unified Sch. Dist., 877 F.2d 809, 814 (10th Cir. 1989).

96. *Id.*

97. Time-out is a common tool used in many special-education classrooms whereby the student is placed in an isolated area (generally within the classroom) until he or she can return to the larger group without disruption. *Id.* at 811 n.3.

98. *Id.* at 813.

99. Glen III v. Charlotte-Mecklenburg Sch. Bd. of Educ., 903 F. Supp. 918, 935 (W.D.N.C. 1995); *see also* 20 U.S.C. § 1415(e)(3)(A) (2001) (defining "stay-put" to mean that the child must remain in his or her current educational placement until all proceedings have been completed unless both sides agree otherwise).

100. Honig v. Doe, 484 U.S. 305, 326 (1988), *aff'g sub nom.* Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986).

101. *See supra* notes 26-62 and accompanying text.

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

103. *Id.*

dents, struck and yelled obscenities at school officials, and required police restraint on several occasions.[104] An Illinois federal district court issued an injunction barring a student who violently struck other students and threatened to kill students and staff.[105] A New York State court found that school officials met their burden of showing that a student who ran out of the school waving an iron bar while threatening to kill someone was likely to endanger other students if he returned to school.[106]

A federal district court in Missouri, however, refused to issue an injunction against a student who threw furniture, repeatedly exploded in anger, and made threats to students and school officials.[107] Even though another student had been injured in one of these incidents and teachers testified they were afraid of the student, the court held that these facts were not sufficient to establish that serious personal injury would likely occur if the student remained at school.[108] A district court in Pennsylvania likewise refused to issue an injunction when school officials failed to show they had taken every reasonable measure to mitigate the danger posed by a student who had threatened another student with a box-cutter.[109]

In other cases, courts not only issued injunctions to bar students from attending school, but also ordered alternative placements. A Texas district court issued an injunction preventing a student who had used profanity, destroyed school property, and assaulted students and teachers from attending general education classes.[110] School officials had recommended that the student be placed in a special-education behavior management class.[111] The parents had rejected that option, but the court held that the student could either attend the class or receive home tutoring pending completion of the administrative review process.[112] Similarly, a New York dis-

104. Sch. Bd. v. Wills, 16 EHLR 1109 (Va. Cir. Ct. 1989). *See also* Sch. Bd. v. Farley, 16 EHLR 1119 (Va. Cir. Ct. Apr. 25, 1990) (issuing an injunction against a student who had set a fire in a school locker among other infractions).

105. Bd. of Educ. v. Kurtz-Imig, 16 EHLR 17 (N.D. Ill. 1989).

106. East Islip Union Free Sch. Dist. v. Andersen, 615 N.Y.S.2d 852, 852, 854 (Sup. Ct. 1994).

107. Clinton County R-III Sch. Dist. v. C.J.K., 896 F. Supp. 948, 950, 952 (W.D. Mo. 1995).

108. *Id.* at 950-51.

109. Sch. Dist. v. Stephan, No. 97-1154, 1997 WL 89113 at *1, 3 (E.D. Pa. Feb. 27, 1997).

110. Tex. City Indep. Sch. Dist. v. Jorstad, 752 F. Supp. 231, 233-39 (S.D. Tex. 1990).

111. *Id.* at 233.

112. *Id.* at 239.

trict court issued an injunction to place a student in a special-education class pending completion of a due process hearing.[113] The student had frequently exhibited aggressive behavior such as sticking a pencil in another student's ear, throwing his shoes at staff, tipping over desks, and throwing chairs.[114] A Florida district court also granted a preliminary injunction allowing a school board to transfer a student to a special-education center after he had been involved in forty-three instances of aggressive physical, sexual, and other inappropriate behavior.[115]

In *Light v. Parkway C-2 School District*,[116] the Eighth Circuit provided excellent guidance on how to remove a student with disabilities from school. The court held that a student with mental disabilities who had exhibited a steady stream of aggressive and disruptive behavior could be removed from her current special-education placement.[117] In so ruling, the court held that even a child whose behaviors flowed directly from the disability was subject to removal if she posed a substantial risk of injury to herself or others.[118] However, the court found that in addition to showing the student presented such a danger, school officials must also show they made a reasonable effort to accommodate the student's disabilities to minimize the likelihood that she would injure herself or others.[119] The court emphasized that only a showing of the likelihood of injury was required; serious harm need not be inflicted before a child could be deemed likely to cause injury.[120] Furthermore, the court ruled that injury is not defined solely as an infliction that draws blood or sends the victim to an emergency room but also includes bruises, bites, and poked eyes.[121]

Another issue that developed in the post-*Honig* era was whether a student who had not yet been identified by school officials as being disabled was entitled to IDEA protections if the student claimed to be disabled. In *Hacienda La Puente Unified School District v. Honig*,[122] the Ninth Circuit held that *Honig* indicated that all disabled students, even if not previously identified as disabled, are

113. Binghampton City Sch. Dist. v. Borgna, 17 EHLR 677 (N.D.N.Y. Mar. 6, 1991).
114. *Id.*
115. Sch. Bd. v. J.M., 957 F. Supp. 1252, 1253-59 (M.D. Fla. 1997).
116. Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223 (8th Cir. 1994).
117. *Id.* at 1228.
118. *Id.*
119. *Id.* at 1230.
120. *Id.*
121. *Id.*
122. Hacienda La Puente Unified Sch. Dist. v. Honig, 976 F.2d 487 (9th Cir. 1992).

entitled to the procedural protections of the IDEA.[123] Similarly, in *M.P. v. Governing Board*,[124] a California federal district court held that the procedural safeguards of the IDEA must be applied regardless of whether a student has been previously diagnosed with a disability.[125] The court recognized that a non-disabled student could attempt to be labeled disabled solely to gain the benefits of the IDEA but stated that the Act did not address this possibility.[126] In *Doe v. Manning*,[127] however, a Virginia district court held that a student who had been suspended for handling a loaded pistol on school property was not entitled to the IDEA's protections because the question of her disability was raised well after the incident leading to her suspension.[128] A determining factor may be whether school authorities knew or had reason to know that the student was disabled.[129]

A similar issue is whether a former special-education student, who is not receiving services at the time of the disciplinary infraction, is entitled to IDEA protections. A federal district court in Wisconsin indicated that such a student is entitled to IDEA protections, especially if the student was removed from special-education at the request of a parent. In *Steldt v. School Board*,[130] a student who was removed from a special-education class at his mother's request, but against the recommendation of his teacher, was expelled for a series of acts including assaults on the teacher, the principal, and fellow students.[131] The court held that the mother's request for the student to be removed from special-education did not change the student's status as a student in need of special-edu-

123. *Id.* at 491.

124. M.P. v. Governing Bd., 858 F. Supp. 1044 (S.D. Cal. 1994).

125. *Id.* at 1047-48.

126. *Id.* at 1047.

127. Doe v. Manning, 4 A.D.D. 987, 1994 WL 99052 (W.D. Va. Mar. 15, 1994).

128. *Id.* at *1.

129. *See, e.g.*, Davis v. Indep. Sch. Dist., Rosemount-Apple Valley-Eagan Schs., 23 IDELR 644 (D. Minn. 1996) (holding that a student who had been diagnosed as having significant language delays by a private facility, but not by the school district, was entitled to the IDEA's protections because the school district had a copy of the evaluation report and thus, had reason to know that he required special-education); J.B. v. Indep. Sch. Dist. 191, 21 IDELR 1157 (D. Minn. 1995) (holding that a student who had not been assessed as being disabled could assert the procedural protections of the IDEA because evidence indicated that school officials were aware that the student might have a disability. Part of that evidence was the fact that the student was flunking all of his courses).

130. Steldt v. Sch. Bd., 885 F. Supp. 1192 (W.D. Wis. 1995).

131. *Id.* at 1197.

cation.[132] Thus, as a student with disabilities, he was entitled to the IDEA protections.

A similar issue concerns the way schools should treat a student evaluated by the school district but found not to be disabled. The answer may be determined by the particular facts of the case. In one such instance, where the school's staff concluded that the student did not require special-education, but his mother had contested that decision, the Seventh Circuit held the student was not entitled to an injunction barring his expulsion while administrative proceedings were pending.[133] The court stated that in situations such as this, a flexible approach to applying the IDEA's stay put provision was needed and that the provision should not be automatically applied to every student who filed an application for special-education.[134]

The Supreme Court in *Honig* stated that a special-education student could be suspended for up to ten days.[135] However, the Court did not indicate whether that ten-day limit was consecutive or cumulative. In other words, if a student received a ten-day suspension could that student be suspended again later that same school year? In *Parents of Student W. v. Puyallup School District*,[136] the Ninth Circuit held that the Supreme Court's opinion did not support the argument that the ten-day limit referred to ten total days.[137] The court held that the school district's suspension guidelines, whereby each suspension triggered an evaluation to determine whether the student was receiving an appropriate education, were lawful.[138] However, in *Manchester School District v. Charles*,[139] a New Hampshire federal district court held that cumulative suspensions totaling more than ten days resulted in a pattern of exclusion that constituted a change of placement.[140]

In the 1981 decision *S-1 v. Turlington*,[141] the Fifth Circuit held that even when a school properly expels a special-education stu-

132. *Id.* at 1197.

133. Rodiriecus v. Waukegan Sch. Dist., 90 F.3d 249, 250-55 (7th Cir. 1996).

134. *Id.* at 253.

135. Honig v. Doe, 484 U.S. 305, 328-29 (1988), *aff'g sub nom.* Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986).

136. Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489 (9th Cir. 1994).

137. *Id.* at 1495.

138. *Id.* at 1496.

139. Manchester Sch. Dist. v. Charles, 6 A.D.D. 1103, 1994 WL 485754 (D.N.H. Aug. 31, 1994).

140. *Id.* at *10.

141. S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981), *abrogated by* Honig v. Doe, 484 U.S. 305 (1988).

dent in accordance with the IDEA's due process procedures, the school cannot completely cut off services.[142] Under this ruling, a school district would still have to provide special-education and related services to an expelled student with disabilities. This issue arose again in 1992 when Virginia submitted its three year-plan for special-education to the U.S. Department of Education.[143] Included was a regulation stating that students with disabilities could be disciplined in the same manner as non-disabled students if there was no causal relationship between the misconduct and the disability.[144] The Department of Education responded by notifying Virginia that it could not discontinue educational services to expelled special-education students, even if the discipline resulted from behavior unrelated to the students' disabilities.[145] Virginia failed to change the regulation and the dispute eventually ended up in the courts.[146] After much litigation, the Fourth Circuit, sitting en banc, held that the IDEA did not require local school boards to discipline disabled students if their misconduct was unrelated to their disabilities.[147] The Fourth Circuit held that the IDEA only required states to provide disabled students with access to a free appropriate public education and, as with any right, that right of access could be forfeited by conduct antithetical to the right itself.[148] Thus, the court ruled that school districts were not required to provide educational services to disabled students who had forfeited the right to a free appropriate education by willfully engaging in conduct so serious as to warrant expulsion.[149]

Several months later, the Seventh Circuit issued a similar ruling in *Doe v. Board of Education.*[150] In this case, a student had been expelled for possessing a pipe and a small amount of marijuana.[151] The school district's evaluation team determined there was no causal relationship between the student's disability and misconduct.[152] The district court held that the school was not required to provide alternative educational services during the expulsion pe-

142. *Id.* at 350.
143. Dept. of Educ. v. Riley, 106 F.3d 559, 560 (4th Cir. 1997).
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 561.
148. *Id.*
149. *Id.* at 559.
150. Doe v. Bd. of Ed., 115 F.3d 1273, 1278-79 (7th Cir. 1997).
151. *Id.* at 1275.
152. *Id.*

riod.[153] The Seventh Circuit agreed, holding the IDEA was not intended to shield special-education students from the usual consequences of misconduct when that misconduct was not related to their disabilities.[154]

The Fourth Circuit's *Riley* and the Seventh Circuit's *Doe* decisions can be contrasted with an Arizona district court decision in *Magyar v. Tucson Unified School District*[155] where a learning disabled fifteen-year-old student was expelled after giving a combat knife to another student.[156] In granting summary judgment for the student, the court noted that the IDEA requires school districts to provide an appropriate education for all students with disabilities.[157] The court held that the use of the word "all" in the IDEA was clear and unequivocal and did not include an exception for misbehaving students.[158]

II. THE 1997 IDEA AMENDMENTS

The Individuals with Disabilities Education Act Amendments of 1997 implemented the most far-reaching changes to the IDEA since it was enacted in 1975.[159] For the first time Congress included specific provisions for disciplining students with disabilities.[160] Some of these provisions simply codified existing case law; others, however, clarified previously gray areas, and settled disagreements that had split the courts.[161]

A. Functional Behavioral Assessments and Behavior Intervention Plans

Several sections of the 1997 amendments require that school officials conduct a functional behavioral assessment and implement a behavioral intervention plan or review such assessments and plans

153. *Id.*
154. *Id.* at 1280.
155. Magyar v. Tucson Unified Sch. Dist., 958 F. Supp. 1423 (D. Ariz. 1997).
156. *Id.* at 1428.
157. *Id.* at 1438.
158. *Id.*
159. *Compare* 20 U.S.C. §§ 1400-1487 (2001) *with* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1400-1487 (1977)). Congress amended the Education for All Handicapped Children Act in 1986, 1990, 1994, and 1997.
160. *See, e.g.*, 20 U.S.C. § 1415(k) (2001) (detailing the procedures to be followed when disciplining a student with disabilities).
161. *See, e.g., id.* § 1412(a)(1)(A) (declaring that students with disabilities who have been expelled are still entitled to a FAPE).

if they are already in place.[162] Neither the IDEA nor its implementing regulations, however, provide much guidance as to what constitutes a functional behavioral assessment or a behavior intervention plan.[163] There have been no judicial decisions to date and very few due process hearings dealing with either functional behavioral assessment or behavior intervention plans.[164]

B. Manifestation Doctrine

For the first time, the procedures required to conduct a manifestation determination are now spelled out in the IDEA.[165] The IDEA states that this determination must be conducted by the IEP team and other qualified personnel.[166] In making the manifestation determination, the team must consider evaluative, diagnostic, and other relevant information (including information provided by the parent or child), observations of the student, and the student's IEP and placement.[167] In deciding whether the misconduct is a manifestation of the disability, the team must determine if the student's disability impaired his or her ability to understand the impact and consequences of the misbehavior and if the disability impaired the student's ability to control the behavior.[168] If the team determines that the misconduct is not a manifestation of the disability, the student may be disciplined in the same manner as non-disabled students, except that a free appropriate public education may not be terminated.[169] The team also must ascertain that the student's IEP and placement were appropriate, and that all services were provided in accordance with the IEP at the time of the misconduct.[170] If there was any problem in this regard, the behavior must be considered a manifestation of the student's disability.[171]

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162. *See, e.g., id.* § 1415(k)(1)(B)(i).

163. *See id.* § 1414(d)(3)(B)(i) (stating that "in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior").

164. *See generally* Cynthia A. Dieterich & Christine J. Villani, *Functional Behavioral Assessment: Process Without Procedure*, 2000 BYU EDUC. & L.J. 209 (2000) (noting that most special-education practitioners are unaware that the Functional Behavioral Assessment is mandated under the 1997 amendments to the IDEA).

165. *See* 20 U.S.C. § 1415(k)(4) (2001). *See also* 34 C.F.R. § 300.523 (1999) (implementing regulations).

166. 20 U.S.C. § 1415(k)(4)(B) (2001).

167. *Id.* § 1415(k)(4)(c)(i).

168. *See id.*

169. *Id.* § 1415(k)(5)(A). *See also id.* § 1412(a)(1) .

170. 34 C.F.R. § 300.523(c)(2)(i) (1999).

171. *Id.* § 300.523(d).

If the student's parent disagrees with the team's manifestation determination, the parent may request an expedited hearing.[172]

C. Provision of Special-education Services During an Expulsion

The IDEA now makes clear that special-education services must continue during an expulsion.[173] This provision is in line with the position previously taken by the U.S. Department of Education[174] and effectively reverses the Fourth Circuit's decision in *Virginia Department of Education v. Riley*.[175] This should end the controversy that existed among the circuits.[176]

D. Injunctions to Allow School Districts to Exclude Dangerous Students

Ever since the Supreme Court decided *Honig*,[177] school officials have had the authority to seek injunctions from the courts to exclude dangerous students with disabilities from the regular education environment. School officials now have an additional option as well. The 1997 amendments to the IDEA gave hearing officers the authority to order a change in placement to an appropriate interim alternative educational setting for up to forty-five days if school officials can demonstrate that maintaining the student in his

172. 20 U.S.C. § 1415(k)(6)(A)(i) (2001); 34 C.F.R. § 300.528 (1999) (outlining the requirements for an expedited hearing).

173. 20 U.S.C. § 1412(a)(1)(A) (2001).

174. *See* Letter from Thomas Hehir, Director, Office of Special Education Programs, to Hartman (Oct. 19, 1995), *reprinted in* 23 IDELR 894 (1996); Letter from Patricia J. Guard, Acting Director, Office of Special Education Programs, to JoAnne Boggus, Teacher, Piper High School in Sunrise, Florida (Jul. 14, 1993), *reprinted in* 20 IDELR 625 (1994); Letter from William L. Smith, Acting Assistant Secretary, Office of Special Education and Rehabilitative Services, to Hon. David Price, House of Representatives (Apr. 2, 1993), *reprinted in* 20 IDELR 1256 (1994); Letter from Judith E. Heuman, Office of Special Education and Rehabilitative Services, to Hon. Charles H. Taylor, House of Representatives (Sept. 23, 1993), *reprinted in* 20 IDELR 542 (1993); Letter from Judy A. Schrag, Director, Office of Special Education Programs, to Uhler (May 14, 1992), *reprinted in* 18 IDELR 1238 (1992); Letter from Dr. William C. Bosher, Jr., Superintendent, Henrico County Public Schools, to Smith (Oct. 9, 1991), *reprinted in* 18 IDELR 469 (1991); Letter from Robert R. Davlia, Assistant Secretary, Office of Special Education and Rehabilitative Services, to Joseph R. Symkowick, General Counsel, California State Department of Education (Jan. 30, 1991), *reprinted in* 17 EHLR 469 (1991).

175. Dept. of Educ. v. Riley, 106 F.3d 559, 559-61 (4th Cir. 1997).

176. *See* Allan G. Osborne, Jr., *Provision of Special-education Services During an Expulsion:* Commonwealth of Virginia v. Riley, 118 EDUC. L. REP. 557 (1997) (discussing early litigation and providing a comprehensive treatment of the *Commonwealth of Virginia v. Riley* litigation).

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

or her current placement is substantially likely to result in injury to the student or others.[178] In making this determination, the hearing officer must consider whether the school district has made reasonable efforts to minimize the risk in the student's current placement.[179]

According to a ruling by an Alabama district court in *Gadsden City Board of Education v. B.P.*,[180] the 1997 amendments to the IDEA allow a school district to seek an injunction from a hearing officer but do not require this to be done prior to seeking a court order.[181] According to the court, the expedited hearing provision is permissive, and administrative remedies do not have to be exhausted if a school district chooses to seek a *Honig* injunction from the courts.[182]

E. Short Term Suspensions

The 1997 amendments also gave schools the authority to suspend a special-education student for up to ten days as long as a similar sanction would be applied to students who are not disabled.[183] However, a functional behavioral assessment must be made first and action must be taken to address the student's misconduct.[184] The IDEA's regulations state that a series of removals which cumulatively equal more than ten school days may be considered a change in placement.[185] The length of each removal, the total amount of time the student is removed, and the proximity of the removals to one another are all factors that will be considered in determining if a change in placement occurred.[186]

F. Transfers to Other Settings for Disciplinary Reasons

As will be discussed later, the IDEA allows schools to place students with disabilities who have committed drug and weapons violations in an interim alternative educational setting.[187] However, school officials may also seek to place students they consider dan-

178. 20 U.S.C. § 1415(k)(2) (2001). *See also* 34 C.F.R. § 300.521 (1999) (implementing regulations regarding the authority of hearing officers).
179. 34 C.F.R. § 300.521(c) (1999).
180. Gadsden City Bd. of Educ. v. B.P., 3 F. Supp. 2d 1299 (N.D. Ala. 1998).
181. *Id.* at 1300.
182. *Id.* at 1303.
183. 20 U.S.C. § 1415(k)(1)(A)(i) (2001).
184. *Id.* § 1415(k)(1)(B)(i).
185. 34 C.F.R. § 300.519(a) (1999).
186. *Id.* § 300.519(b).
187. *See infra* notes 208-11 and accompanying text.

gerous in a permanent alternative educational setting. If the parents disagree with the recommended change in placement, school personnel may seek an expedited hearing to make the transfer.

In *Randy v. Texas City ISD*,[188] school officials recommended that a special-education student who, in consort with another student, ripped the pants off a female student, be transferred to an alternative education program for the remainder of the school year.[189] Prior to making this recommendation, the IEP team determined that this act of misconduct was not a manifestation of the student's disability.[190] The student's parents sought a court injunction to prevent the transfer.[191] In denying the injunction the court stated that the disciplinary response by the school district was entirely appropriate given the facts of the case.[192] The court felt that school officials were "justified in taking stern and aggressive remedial action when faced with such conduct."[193]

G. Rights of Students Not Yet Identified as Disabled

The enactment of the 1997 amendments to the IDEA has settled the controversy over the treatment of students who have not yet been identified as being disabled but who allege disabilities. The amendments mandate that a school district must provide the IDEA's protections to such a student if school officials knew the student was disabled before the misbehavior occurred.[194] The amendments also specify the circumstances under which school district personnel shall be deemed to have such knowledge.[195] Factors such as a parent's written expressed concern that the student may require special-education or a request for an evaluation; the student's prior behavioral and academic performance; and a teacher's expressed concern about the student's performance are all indicators that school officials had reason to know that the student was disabled.[196] If the school district has conducted an evaluation and determined the student does not have a disability then the district

188. Randy v. Tex. City ISD, 93 F. Supp. 2d 1310 (S.D. Tex. 2000).
189. *Id.* at 1310.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 1311.
194. 20 U.S.C. § 1415(k)(8)(A) (2001). *See also* 34 C.F.R. § 300.527 (1999) (implementing regulations).
195. 20 U.S.C. § 1415(k)(8)(B) (2001).
196. *Id.* § 1415(k)(8)(B); 34 C.F.R. § 300.527(b) (1999).

would not be considered to have knowledge of a disability under this section.[197]

If the school district did not have prior knowledge that the student was disabled, the student may be disciplined in the same manner as a non-disabled student.[198] However, any request for an evaluation during a time period in which disciplinary sanctions have been imposed must be conducted in a expedited manner.[199]

In an interesting case, *Colvin v. Lowndes County*[200] the federal district court held that parents had not shown that the student was a child with a disability even though they had requested an evaluation.[201] However, the court stated that the school violated the IDEA by failing to provide some assessment procedure to determine whether the student was disabled.[202] In contrast, a Connecticut district court, in *J.C. v. Regional School District*,[203] found that a student whose parents had expressed concern over his poor performance and requested evaluations was entitled to the protections of the IDEA when faced with expulsion.[204] While the student had been evaluated and determined not to be disabled, when he faced expulsion he was evaluated again at his parents' request.[205] This time the school district determined that the student was eligible for special-education.[206]

H. Effect on the Juvenile Court and Law Enforcement Authorities

As amended, the IDEA states that it should not be interpreted to prohibit school officials from reporting a crime committed by a special-education student to the proper authorities or to allow them to impede law enforcement and judicial authorities from carrying out their responsibilities.[207] Furthermore, if school officials do report a crime, the amendments provide that they must furnish the student's special-education and disciplinary records to the appropriate authorities.[208]

197. 34 C.F.R. § 300.527(c)(1)(i) (1999).
198. 20 U.S.C. § 1415(k)(8)(C)(i) (2001).
199. *Id.* § 1415(k)(8)(C)(ii).
200. Colvin v. Lowndes County, 114 F. Supp. 2d 504 (N.D. Miss. 1999).
201. *Id.* at 509.
202. *Id.* at 510.
203. J.C. v. Reg'l Sch. Dist., 115 F. Supp. 2d 297 (D. Conn. 2000).
204. *Id.* at 301.
205. *Id.*
206. *Id.*
207. 20 U.S.C. § 1415(k)(9)(A) (2001); 34 C.F.R. § 300.529 (1999).
208. 20 U.S.C. § 1415(k)(9)(B) (2001).

I. Guns, Alcohol, and Drugs

School officials now have the explicit authority to transfer a student with a disability to an appropriate interim alternative placement for up to forty-five days for possession of a weapon or the possession, use, sale, or solicitation of illegal drugs on school property or at a school function.[209] This clause expands the authority previously granted to school officials by the Gun-Free Schools Act of 1994[210] to exclude students from mainstream public schools for drug violations. The 1997 amendments to the IDEA also provided definitions of weapons and illegal drugs by referencing other federal legislation.[211] In this regard the definition of a dangerous weapon is expanded beyond the previous definition enunciated in the Gun-Free Schools Act. Under the new definition a dangerous weapon includes other instruments capable of inflicting harm but does not include small pocket knives.[212]

J. Interim Alternative Settings

Under the new amendments, school districts are required to conduct a functional behavioral assessment and implement a behavioral intervention plan for any student placed in an interim alternative setting.[213] If a parent disagrees with the placement in the interim alternative placement and requests a hearing, the student is to remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the forty-five day period.[214] However, after the expiration of the forty-five day period the student is entitled to return to his or her former placement even if a hearing regarding a school district proposal to change the student's placement is pending.[215]

III. Conclusions and Recommendations for Practice

Unfortunately all students, including those with disabilities, sometimes misbehave and require discipline. Under the IDEA, as it has been amended, students with disabilities are subject to the

209. *Id.* § 1415(k)(1)(A)(ii)(I), (II) (2001). *See* 34 C.F.R. § 300.520 (1999) (implementing regulations).
210. 20 U.S.C. § 8921 (2001).
211. *Id.* § 1415(k)(10)(A), (B), (D); *see also* Controlled Substances Act, 18 U.S.C. § 930(g)(2) (2001); 21 U.S.C. § 812(c) (2001).
212. 20 U.S.C. § 1415(k)(10)(B) (2001).
213. *Id.* § 1415(k)(1)(B)(i).
214. *Id.* § 1415(k)(7)(A).
215. *Id.* § 1415(k)(7)(B).

disciplinary process; however, because they are entitled to a FAPE under that act, additional due process may be required if the disciplinary action could result in a substantial loss of educational opportunity.

Schools may suspend students with disabilities for up to ten school days by following the usual procedures. Other normal minor disciplinary sanctions, such as detentions or time-outs, may also be imposed without resort to the IDEA's procedures. However, when the sanction may involve an expulsion or a transfer to another educational setting, such as an alternative school, the IDEA's protections are implicated.

School officials must first determine if the misconduct was a manifestation of the student's disability. If it was, the student cannot be expelled. This decision must be made within ten school days of any decision to change a student's placement and must be made by the school's IEP team. The IDEA states that other qualified individuals may be included in making this decision. This allows school administrators who were not part of the original IEP team to participate in making the manifestation determination. In making the manifestation decision, school personnel must determine if the nature of the student's disability is such that it either impaired the student's ability to understand the impact and consequences of the behavior, or it impaired the student's ability to control the behavior. If the IEP team determines that the misconduct was not a manifestation of the student's disability, the student may be expelled. However, during the expulsion period the student must be provided with special-education services. If the misconduct was not a manifestation of the student's disability, the student cannot be expelled. The IEP team could, however, propose a new placement if it is determined that the current placement is not meeting the student's needs. If the parents disagree with the manifestation determination, they may contest it via the IDEA's administrative due process mechanism.

The IDEA does permit the emergency removal of dangerous students with disabilities regardless of whether the misconduct stems from their disabilities. If the student is charged with the possession of a weapon or drugs on school property, the student may immediately be removed for ten school days by following the normal suspension procedure. The student may then be placed in an interim alternative placement for a forty-five day period. This alternative placement must allow the student to progress in the gen-

eral education curriculum and must be one in which the student's special-education services can be delivered.

In situations not involving drugs or weapons but that nevertheless cause school officials to feel the student's continued presence in the school would cause a danger to others or could substantially interrupt the education process, relief may be obtained via a judicial or hearing officer order. However, in order to obtain an injunction to prevent a student from attending his or her former educational program, school officials must show they have done all they could to mitigate the danger or chance of disruption and that there is no less restrictive alternative.

School districts are also required to conduct a functional behavioral assessment and develop a behavior intervention plan at certain junctures in the disciplinary process. School personnel would be prudent to include these as part of the annual IEP process for all students with disabilities who have a history of misbehavior. Neither the IDEA nor its implementing regulations specify what elements should be included in a functional behavioral assessment. However, it should include elements such as observations of the student that document aspects of his or her behavior; analysis of the situations that trigger misbehavior; analysis of the effectiveness of previous interventions; medical, psychological, and social data that could affect behavior; and any other information that could provide insight into the student's behavior.

Similarly, the IDEA and its implementing regulations provide little guidance as to what elements should be included in a behavior intervention plan. Obviously, the plan should include strategies for dealing with the student's behavior. This would include both strategies for dealing with the behavior at the time it surfaces as well as long-term strategies for preventing future occurrences. The plan should also include supports that will be provided to the student to help him or her deal with the situations that tend to precipitate the behavior. Finally the plan should outline expected behaviors, delineate inappropriate behaviors, and specify the positive and negative consequences for any behavior.

The imposition of disciplinary sanctions on students with disabilities has been one of the more controversial aspects of the IDEA. It is a difficult issue because it counters the ever-present duty of school administrators to maintain order, discipline, and a safe educational environment balanced against the rights students with disabilities have to a free appropriate public education in the least restrictive environment. The current provisions of the IDEA,

along with the case law that exists, strike an appropriate balance. School officials may take disciplinary action against a student with disabilities. However, to do so they must follow the IDEA's procedures. This allows misbehaving students to be disciplined but also removes the possibility that they will be deprived of educational opportunities for behavior that stems from their disabilities.