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Disciplinary Exclusion of Handicapped Students: An Examination of the Limitations Imposed By The Education For All Handicapped Children Act of 1975

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DISCIPLINARY EXCLUSION OF HANDICAPPED STUDENTS: AN EXAMINATION OF THE LIMITATIONS IMPOSED BY THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975

INTRODUCTION

State laws,[1] as well as tradition,[2] confer upon schools the authority to expel or suspend students whose behavior disrupts the orderly operation of the education process. The Education for All Handicapped Children Act of 1975 (EAHCA or Act),[3] however, prohibits schools from changing or terminating the educational placement of a

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1. Ala. Code § 16-1-14 (1975); Alaska Stat. § 14.30.045 (1980); Ariz. Rev. Stat. Ann. §§ 15-841(b), -842(a) (1981 Special Pamphlet); Ark. Stat. Ann. § 80-1516 (1980); Cal. Educ. Code §§ 48900, 48904.5 (West 1978 & Supp. 1982); Colo. Rev. Stat. §§ 22-33-105 to -106 (1974 & Supp. 1978); Conn. Gen. Stat. §§ 10-233c to -233d (1981), *amended by* 1982 Conn. Legis. Serv. 320 (West); Fla. Stat. Ann. §§ 228.041(25)-(26), 232.26 (West 1977 & Supp. 1982); Ga. Code Ann. §§ 32-856 to -857 (1980); Hawaii Rev. Stat. § 298-11 (1976); Idaho Code §§ 33-205 to -206 (1981); Ill. Rev. Stat. ch. 122, The School Code § 10-22.6 (Smith-Hurd 1965 & Supp. 1982-1983); Ind. Code Ann. §§ 20-8.1-5-4 to -5 (Burns Supp. 1982); Iowa Code Ann. § 282.4 (West 1949); Kan. Stat. Ann. § 72-8901 (1980), *amended by* 1982 Kan. Sess. Laws 1305; Ky. Rev. Stat. Ann. § 158.150 (Bobbs-Merrill 1980); La. Rev. Stat. Ann. §§ 17:223, :416 (West 1982); Me. Rev. Stat. Ann. tit. 20, § 473(5) (1965), *repealed and re-enacted* 1982 Me. Legis. Serv. 30 (to be codified as tit. 20-A, § 1001(9), effective July 1, 1983); Md. Educ. Code Ann. § 7-304 (Supp. 1981); Mass. Ann. Laws ch. 76, §§ 16-17 (Michie/Law. Co-op. 1978); Mich. Comp. Laws Ann. § 380.1311 (Supp. 1982-1983); Minn. Stat. Ann. § 127.29(2) (West 1979); Miss. Code Ann. §§ 37-7-301(e), (h), -9-71 (1972); Mo. Ann. Stat. § 167.161 (Vernon 1965); Mont. Code Ann. §§ 75-6310 to -6311 (1971); Neb. Rev. Stat. §§ 79-4,177 to -4,178, -4,180 (1981); Nev. Rev. Stat. § 392.467 (1979); N.H. Rev. Stat. Ann. § 193:13 (1978); N.J. Stat. Ann. §§ 18A:37-2 to -2.1 (West 1968 & Supp. 1982-1983); N.Y. Educ. Law § 3214(3) (McKinney 1981); N.C. Gen. Stat. § 115C-391 (1981); N.D. Cent. Code §§ 15-29-08(13), -38-13 (1981); Ohio Rev. Code Ann. § 3313.66 (Page 1980); Okla. Stat. Ann. tit. 70, §§ 24-101 to -102 (West 1971 & Supp. 1981-1982); Or. Rev. Stat. § 339.250 (1981); Pa. Stat. Ann. tit. 24, § 13-1318 (Purdon 1962 & Supp. 1982-1983); R.I. Gen. Laws § 16-2-17 (1981); S.C. Code Ann. § 59-63-210 (Law. Co-op. 1976); S.D. Comp. Laws Ann. § 13-32-4 (1975 & Supp. 1981); Tenn. Code Ann. § 49-1309 (1977 & Supp. 1981); Tex. Educ. Code Ann. § 21.301 (Vernon 1972 & Supp. 1982); Utah Code Ann. § 53-24-1(c) (1981); Vt. Stat. Ann. tit. 16, § 1162 (1974 & Supp. 1982); Va. Code § 22.1-277 (1980); Wash. Rev. Code Ann. §§ 28A.58.101, .67.100 (1970 & Supp. 1982); W. Va. Code §§ 18A-5-1 to -1a (1977 & Supp. 1982); Wis. Stat. Ann. § 120.13(1) (West 1973 & Supp. 1981-1982); Wyo. Stat. § 21-4-305 (1977). Only Delaware, the District of Columbia and New Mexico do not have statutory provisions concerning suspension or expulsion.

2. Even in those jurisdictions that do not have statutory provisions concerning disciplinary exclusion, schools have the authority to expel or suspend students under the common-law doctrine of *in loco parentis*. *See* Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. Pa. L. Rev. 373, 377-82 (1969).

3. 20 U.S.C. §§ 1400-1420 (1976 & Supp. IV 1980).

handicapped child except through the formal "change of placement" procedures set forth in the Act.[4] Consequently, when a handicapped child becomes a discipline problem, school officials may find themselves faced with a legal dilemma.[5]

It has been uniformly recognized that the EAHCA's change of placement procedures impose limits on the power of school authorities to expel or suspend handicapped children.[6] There is as yet no agreement, however, as to the extent and nature of these limits.[7] One court has held that any non-emergency exclusion of a handicapped student inherently violates the EAHCA.[8] This approach prevents the interruption of a handicapped child's education by effectively exempting him from the disciplinary devices of suspension and expulsion.[9] To the extent that this affords the handicapped child an unfair advantage over nonhandicapped students, however, this approach may be subject to criticism on equal protection grounds.[10]

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4. *Id.* § 1415.

5. As one commentator has noted, "[s]tatute and case law indicate that there is a conflict between the local school board's perception of its traditional power to suspend or expel a student and the handicapped child's right to an appropriate education." Lichtenstein, *Suspension, Expulsion, and the Special Education Student*, 61 Phi Delta Kappan, 459, 459 (1980); *see* S-1 v. Turlington, 635 F.2d 342, 347-48 (5th Cir.), *cert. denied*, 102 S. Ct. 566 (1981); Doe v. Koger, 480 F. Supp. 225, 228-29 (N.D. Ind. 1979); Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328, 1338 (W.D.N.Y. 1979); Mrs. A.J. v. Special School Dist. No. 1, 478 F. Supp. 418, 430-32 (D. Minn. 1979); Howard S. v. Friendswood Indep. School Dist., 454 F. Supp. 634, 637 (S.D. Tex. 1978); Stuart v. Nappi, 443 F. Supp. 1235, 1240-44 (D. Conn. 1978); Southeast Warren Community School Dist. v. Department of Pub. Instruction, 285 N.W.2d 173, 180 (Iowa 1979); *cf.* H.R. v. Hornbeck, 524 F. Supp. 215 (D. Md. 1981) (parents claiming that schools' use of regular disciplinary procedures for handicapped students violates federal law).

6. *See* S-1 v. Turlington, 635 F.2d 342, 347-48 (5th Cir.), *cert. denied*, 102 S. Ct. 566 (1981); Doe v. Koger, 480 F. Supp. 225, 228-29 (N.D. Ind. 1979); Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328, 1338-39 (W.D.N.Y. 1979); Mrs. A.J. v. Special School Dist. No. 1, 478 F. Supp. 418, 430-32 (D. Minn. 1979); Howard S. v. Friendswood Indep. School Dist., 454 F. Supp. 634, 637 (S.D. Tex. 1978); Stuart v. Nappi, 443 F. Supp. 1235, 1240-44 (D. Conn. 1978); Southeast Warren Community School Dist. v. Department of Pub. Instruction, 285 N.W.2d 173, 180 (Iowa 1979). The limitation has also been recognized by the United States Department of Education in its proposed regulation concerning "Disciplinary rules and procedures" under the EAHCA. 47 Fed. Reg. 33,854 (1982) (to be codified at 34 C.F.R. § 300.114) (proposed Aug. 4, 1982).

7. *Compare* Stuart v. Nappi, 443 F. Supp. 1235, 1242-43 (D. Conn. 1978) (disciplinary exclusion of handicapped students inherently violates § 615 of the EAHCA) *with* S-1 v. Turlington, 635 F.2d 342, 346, 350 (5th Cir.) (disciplinary exclusion of handicapped pupils permissible unless handicap caused the misconduct), *cert. denied*, 102 S. Ct. 566 (1981) *and* Doe v. Koger, 480 F. Supp. 225, 228-29 (N.D. Ind. 1979) (same) *and* 47 Fed. Reg. 33,854 (1982) (to be codified at 34 C.F.R. § 300.114) (proposed Aug. 4, 1982) (same).

8. Stuart v. Nappi, 443 F. Supp. 1235, 1243 (D. Conn. 1978).

9. *See* C.E. Howe, Administration of Special Education 16 (1981).

10. See *infra* notes 81-82 and accompanying text.

A judicial desire to avoid the inherent unfairness of completely immunizing all handicapped students from disciplinary exclusion has resulted in the "cause of misconduct" approach.[11] Under this approach, the EAHCA has been interpreted as prohibiting the disciplinary exclusion of a handicapped student only if an investigation shows that the misconduct is a manifestation of his handicap.[12] This approach has recently been adopted by the United States Department of Education (DOE) in proposed regulation section 300.114.[13]

Under either interpretation of the limits imposed by the EAHCA on school discipline, it is not clear whether formal diagnostic evaluation[14] must be complete before the benefits and protections of the EAHCA can be afforded to a particular child.[15] At least one court has held that a child receives no protection under section 615 of the Act prior to completion of the formal evaluation process even when it is obvious that the child is, in fact, handicapped.[16] A similar position may be inferred from the language of the currently effective DOE regulation defining "handicapped children" for purposes of the EAHCA.[17] Under this mechanistic approach, a child who is handicapped, but who has not been formally identified as such, can be expelled or suspended from school even though his misconduct is actually caused by his handicap.[18]

The "cause of misconduct" approach is concededly the better interpretation of the EAHCA's impact on disciplinary exclusion of handicapped students. This Note suggests, however, that further develop-

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11. See *infra* notes 90-91 and accompanying text.

12. S-1 v. Turlington, 635 F.2d 342, 348 (5th Cir.), *cert. denied*, 102 S. Ct. 566 (1981); Doe v. Koger, 480 F. Supp. 225, 229 (N.D. Ind. 1979); 47 Fed. Reg. 33,854 (1982) (to be codified at 34 C.F.R. § 300.114) (proposed Aug. 4, 1982).

13. 47 Fed. Reg. 33,854 (1982) (to be codified at 34 C.F.R. § 300.114) (proposed Aug. 4, 1982).

14. Regulations promulgated pursuant to EAHCA describe the basic evaluation procedures to be followed. 34 C.F.R. §§ 300.530-.534, 300.540-.543 (1981).

15. Mrs. A.J. v. Special School Dist. No. 1, 478 F. Supp. 418, 432 (D. Minn. 1979); Colley, *The Education for all Handicapped Children Act (EHA) A Statutory and Legal Analysis*, 10 J.L. & Educ. 137, 160 (1981).

16. Mrs. A.J. v. Special School Dist. No. 1, 478 F. Supp. 418, 432 (D. Minn. 1979).

17. 34 C.F.R. § 300.5(a) (1981). " '[H]andicapped children' means those children evaluated in accordance with [specified procedures as being handicapped]". *Id.*

18. This is precisely what occurred in Mrs. A.J. v. Special School Dist. No. 1, 478 F. Supp. 418 (D. Minn. 1979), which concerned an eighth-grade student who had a known history of behavior problems when she was suspended from school for fifteen days. The student had been recommended for evaluation and placement as a handicapped student and was awaiting the results of previously administered psychological and educational assessment tests. The court held that even though the test results were expected to indicate that the student's behavior reflected an underlying handicapping condition, the child would be treated as normal until the results were in. *Id.* at 430-32.

ment and expansion of this approach is necessary in order to give full effect to the broad remedial purposes of the EAHCA.[19] The "cause of misconduct" approach, as currently applied, fails to provide change of placement protection for children who misbehave because of undetected handicaps or who are awaiting formal evaluation.[20] This Note contends that both congressional intent and the express language of the EAHCA require that all serious discipline problems be treated as possible indications of an underlying handicapping condition. This Note therefore suggests that, before any child is expelled or suspended, due process requires that his parents be informed of their right to demand an evaluation to determine whether their child's behavior is the manifestation of an underlying handicap. If parents make such a demand, even after commencement of disciplinary proceedings, the child should be afforded the full protection of the EAHCA.

I. Expulsion and Suspension in the Public Schools

In virtually every school system in this country, exclusion from school is considered an appropriate and reasonable punishment for at least some forms of student misconduct.[21] Two major rationales support the use of exclusion from school as a punishment for breaking school regulations. First, the school has a duty to protect students from the dangerous or disruptive actions of their fellow students.[22] Presumably, this is the most effective way to maintain an orderly setting that is conducive to learning.[23] Second, the school, as an important socializing force in the lives of its students, must express

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19. *See* Education for All Handicapped Children Act, Statement of Purpose, 20 U.S.C. § 1400 (Supp. IV 1980); S. Rep. No. 168, 94th Cong., 1st Sess. 5-9, 32, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1429-33, 1456.

20. *See* Mrs. A.J. v. Special School Dist. No. 1, 478 F. Supp. 418, 432 (D. Minn. 1979); Colley, *supra* note 15, at 160.

21. See *supra* note 1 and accompanying text.

22. *E.g.*, Fortman v. Texarkana School Dist. No. 7, 514 S.W.2d 720, 722 (Ark. 1974); *In re* Fred C., 26 Cal. App. 3d 320, 324, 102 Cal. Rptr. 682, 684 (1972); Southeast Warren Community School Dist. v. Department of Pub. Instruction, 285 N.W.2d 173, 180 (Iowa 1979); Clements v. Board of Trustees, 585 P.2d 197, 204 (Wyo. 1978); R.E. Phay, The Law of Suspension and Expulsion: An Examination of the Substantive Issues in Controlling Student Conduct 7 (1975) [hereinafter cited as R.E. Phay I]; R.E. Phay, The Law of Procedure in Student Suspensions and Expulsions 4-5 (1977) [hereinafter cited as R.E. Phay II]; Goldstein, *supra* note 2, at 387; *see* S-1 v. Turlington, 635 F.2d 342, 348 n.9 (5th Cir.), *cert. denied*, 102 S. Ct. 566 (1981).

23. R.E. Phay I, *supra* note 22, at 7, 61; R.E. Phay II, *supra* note 22, at 4-5; *see* Goss v. Lopez, 419 U.S. 565, 580 (1975); Doe v. Koger, 480 F. Supp. 225, 230 (N.D. Ind. 1979); Graham v. Knutzen, 351 F. Supp. 642, 664-65 (D. Neb. 1972); Davis v. Ann Arbor Pub. Schools., 313 F. Supp. 1217, 1226 (E.D. Mich. 1970); Goldstein, *supra* note 2, at 420.

social condemnation of certain behavior by banishing rule-breakers from the school community.[24]

Disciplinary exclusion takes two general forms: suspension and expulsion. Suspension is a temporary loss of the right to attend school, usually for a fixed period[25] or, occasionally, until the student conforms to the demands of the school administration.[26] Most suspensions are short-term, ten days or less.[27] Expulsion, on the other hand, is a permanent or long-term exclusion from school.[28] It is the most serious sanction that school authorities can impose upon a student.[29] Many states now limit the length of time a student may be deprived of the right to attend school;[30] therefore expulsion usually means the

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24. *See* Ordway v. Hargraves, 323 F. Supp. 1155, 1158 (D. Mass. 1971) (school officials defended expulsion of pregnant high school student on ground that if they allowed her to remain in school, other students "might be led to believe that the school authorities are condoning premarital relations"); Goldstein, *supra* note 2, at 391, 394-95.

25. *E.g.*, E.C. Bolmeier, Legality of Student Disciplinary Practices 96 (1976); E.T. Connors, Student Discipline and the Law 14 (1979); E.G. Gee & D.J. Sperry, Education Law and the Public Schools: A Compendium, at E-40 to E-41 (1978) [hereinafter cited as Compendium].

26. Alaska Stat. § 14.30.047(b) (1980) (readmission only when "cause [for suspension] has been remedied"); La. Rev. Stat. Ann. § 17:416(A) (West 1982) (student guilty of vandalism shall not be readmitted until restitution made); R.I. Gen. Laws § 16-2-17 (1981) (student may be suspended "during pleasure" of school committee); Tenn. Code Ann. § 49-1309(c) (1977 & Supp. 1981) (suspended student must apply for readmission); W. Va. Code § 18-8-8 (1977) (readmission may be refused until child complies with school's requirements); *see* Ring v. Reorganized School Dist. No. 3, 609 S.W.2d 241, 243 (Mo. Ct. App. 1980) (indefinite suspension held not "cruel and unusual punishment"). *But see* Cook v. Edwards, 341 F. Supp. 307, 310-11 (D.N.H. 1972) (indefinite suspension violates substantive due process and causes irreparable harm to student).

27. *See, e.g.*, E.T. Connors, *supra* note 25, at 16-17; Compendium, *supra* note 25, at E-40 to E-41.

28. E.C. Bolmeier, *supra* note 25, at 96; E.T. Connors, *supra* note 25, at 20; Compendium, *supra* note 25, at E-41; McClung, *The Problem of Due Process Exclusion: Do Schools Have a Continuing Responsibility to Educate Children with Behavior Problems?*, 3 J.L. & Educ. 491, 492 (1974).

29. Lee v. Macon County Bd. of Educ., 490 F.2d 458, 460 (5th Cir. 1974); E. T. Connors, *supra* note 25, at 20; McClung *supra* note 28, at 504; Comment, *Due Process in the Public Schools—An Analysis of the Procedural Requirements and a Proposal for Implementing Them*, 54 N.C.L. Rev. 641, 649-50 (1976) [hereinafter cited as *Due Process*].

30. Cal. Educ. Code § 48905 (West 1978 & Supp. 1982) (current plus following semester); Colo. Rev. Stat. § 22-33-105(2)(c) (1974) (current school year); Conn. Gen. Stat. § 10-233a(e) (1981) (180 consecutive school days); Fla. Stat. Ann. § 228.041(26) (West Supp. 1981) (remainder of term plus one additional school year); Kan. Stat. Ann. § 72-8902(a) (1980) (current school year); Minn. Stat. Ann. § 127.27(5) (West 1979) (current school year); Neb. Rev. Stat. § 79-4,179(2) (1981) (current semester); N.Y. Educ. Law § 3214(3)(3)(e) (McKinney 1981) (only if over compulsory school age; otherwise must have alternate education); N.D. Cent. Code § 15-29-08(13) (1981) (current term); Ohio Rev. Code Ann. § 3313.66(E) (Page 1980)

maximum period of exclusion allowed by state law. Suspension is ordinarily imposed by a school official, while expulsion usually requires action by the local school board.[31]

A. *The Due Process Rights of Public School Students*

Schools generally are afforded considerable discretion in regulating student behavior, especially in determining what punishment is to be imposed for a particular offense.[32] If school regulations are reasonable, courts traditionally have deferred to school authorities' judgment in the choice of disciplinary sanctions.[33] Recently, however, as courts have come to recognize that public education is a right as well as a privilege,[34] they have begun to apply independent judicial review to school disciplinary practices.[35]

(current semester); Or. Rev. Stat. § 339.250(5)-(6) (1981) (current semester or current year); S.C. Code Ann. § 59-63-240 (Law. Co-op. 1976) (normally current year but "incorrigible[s]" may be permanently expelled); S.D. Comp. Laws Ann. § 13-32-4 (1975 & Supp. 1981) (current school year); Wyo. Stat. § 21-4-305(d) (1977) (one school year).

31. E.C. Bolmeier, *supra* note 25, at 96; Compendium, *supra* note 25, at E-41 to E-42.

32. E.C. Bolmeier, *supra* note 25, at 95; McClung, *supra* note 28, at 493 & n.3.

33. For many years courts adhered so strictly to the tradition of deference in matters pertaining to school discipline that expulsions were upheld for such minor offenses as a girl's wearing makeup to school, Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923), or a boy's wearing metal heel plates on his shoes. Stromberg v. French, 60 N.D. 750, 236 N.W. 477 (1931). In recent times, courts often have been unwilling to interfere even when a school's disciplinary policies bordered on oppressive. For example, courts have refused to intervene on behalf of Indian boys expelled for wearing their hair in traditional long braids, New Rider v. Board of Educ., 480 F.2d 693 (10th Cir.), *cert. denied*, 414 U.S. 1097 (1973), a boy expelled for refusing, on grounds of conscience, to participate in ROTC training, Sapp v. Renfroe, 372 F. Supp. 1193 (N.D. Ga. 1974), *aff'd*, 511 F.2d 172 (5th Cir. 1975), or a boy suspended for wearing an armband emblazoned with anti-war slogans. Wise v. Sauers, 345 F. Supp. 90 (E.D. Pa. 1972), *aff'd mem.*, 481 F.2d 1400 (3d Cir. 1973). The prevailing judicial attitude may be summed up as follows: "Since the school board [has] authority to mete out punishment, judicial belief that the punishment [is] too harsh does not warrant 'mixing in.' . . . [A] *laissez-faire* policy must be observed by the courts." Tucson Pub. Schools v. Green, 17 Ariz. App. 91, 94-95, 495 P.2d 861, 864 (1972); *see* Board of Educ. v. Rowley, 102 S. Ct. 3034, 3052 (1982); Board of Curators v. Horowitz, 435 U.S. 78, 90-91 (1978); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 42 (1973); McClung, *supra* note 28, at 493 & n.3. Even when courts have found it necessary to restrict the power of school boards and officials in the area of school discipline, they commonly have expressed reluctance and regret at having to do so. *E.g.*, Goss v. Lopez, 419 U.S. 565, 580 (1975); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 507 (1969); *id.* at 526 (Harlan, J., dissenting); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Lee v. Macon County Bd. of Educ., 490 F.2d 458, 460 (5th Cir. 1974); Stuart v. Nappi, 443 F. Supp. 1235, 1243 (D. Conn. 1978); R.E. Phay I, *supra* note 22, at 5-6.

34. *E.g.*, Goss v. Lopez, 419 U.S. 565, 573 (1975); Brown v. Board of Educ., 347 U.S. 483, 493 (1954); Graham v. Knutzen, 351 F. Supp. 642, 664 (D. Neb. 1972);

In 1975, the Supreme Court determined in *Goss v. Lopez*[36] that, by providing free public education and enacting compulsory attendance laws, a state confers a property right upon students.[37] Under the fourteenth amendment to the Constitution, a state may not deprive any person of property without due process of law.[38] Accordingly, in *Goss* the Court overturned a state statute that permitted imposition of short-term suspension from school at the sole discretion of an individual school official.[39] The Court held that no student could be suspended for any period beyond one day without due process—notice and an opportunity to be heard.[40] For suspensions of ten days or less, an informal due process procedure was held to be a sufficient safeguard of students' rights. The Court suggested, however, that expul-

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Mills v. Board of Educ., 348 F. Supp. 866, 875 (D.D.C. 1972); Fielder v. Board of Educ., 346 F. Supp. 722, 729 (D. Neb. 1972); Cook v. Edwards, 341 F. Supp. 307, 310-11 (D.N.H. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1259 (E.D. Pa. 1971) (per curiam). The concept of public education as a property right grew out of the line of "new property" cases beginning with Goldberg v. Kelly, 397 U.S. 254, 261-63 (1970). The basic premise in "new property" cases is that once conferred, intangible government entitlements cannot be revoked without due process. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974) (loss of prisoner's "good-time" credits); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation); Connell v. Higginbotham, 403 U.S. 207 (1971) (loss of state employment); Bell v. Burson, 402 U.S. 535 (1971) (suspension of driver's license); Wheeler v. Montgomery, 397 U.S. 280 (1970) (loss of pension benefits). *But see* Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) (state college teaching position held not to be conferred entitlement).

35. Perhaps the earliest decision to require due process in school suspensions was Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961), which overturned the summary suspension of college students for participating in a civil rights protest. The due process requirement did not develop more fully until the late 1960's and early 1970's. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 576 n.8, 580 (1975); Lee v. Macon County Bd. of Educ., 490 F.2d 458, 460 (5th Cir. 1974); Black Coalition v. Portland School Dist., 484 F.2d 1040, 1045 (9th Cir. 1973); Vail v. Board of Educ., 354 F. Supp. 592, 602 (D.N.H.), *vacated on other grounds*, 502 F.2d 1159 (1st Cir. 1973); Graham v. Knutzen, 351 F. Supp. 642, 666 (D. Neb. 1972); Fielder v. Board of Educ., 346 F. Supp. 722, 730 (D. Neb. 1972); DeJesus v. Penberthy, 344 F. Supp. 70, 77 (D. Conn. 1972); Cook v. Edwards, 341 F. Supp. 307, 311 (D.N.H. 1972); Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388, 1392-93 (E.D. Mich. 1969); Stricklin v. Regents of Univ. of Wis., 297 F. Supp. 416, 419 (W.D. Wis. 1969), *appeal dismissed*, 420 F.2d 1257 (7th Cir. 1970); Esteban v. Central Mo. State College, 277 F. Supp. 649, 650-51 (W.D. Mo. 1967), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970). As these cases indicate, "the belief is growing [that suspension and expulsion] violate the rights of both the public—which, in its own interest, instituted the schools and made attendance at them compulsory—and of the individual student . . . ." E. Ladd, Students' Rights and Discipline 15 (1975).

36. 419 U.S. 565 (1975).

37. *Id.* at 573-74.

38. U.S. Const. amend. XIV, § 1.

39. 419 U.S. at 584.

40. *Id.* at 579-84.

sion or suspension for more than ten days would require a formal, adversarial procedure.[41] Today, therefore, before any child can be excluded from school for disciplinary reasons, he must be afforded adequate notice of the complaint, presented with evidence against him and informed of his right to a hearing at which he may present mitigating or exculpatory evidence.[42]

B. *Special Protection of Handicapped Students*

Exclusion from school is not always a disciplinary measure. In the past, schools' unwillingness or inability to meet the special needs of handicapped students was considered adequate justification for excluding many handicapped students from public schools.[43] Prior to the landmark decisions of *Pennsylvania Association for Retarded Children v. Pennsylvania*[44] and *Mills v. Board of Education*,[45] and the

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41. *Id.* at 579-84.

42. *See, e.g.*, Montoya v. Sanger Unified School Dist., 502 F. Supp. 209, 213 (E.D. Cal. 1980); Mrs. A.J. v. Special School Dist. No. 1, 478 F. Supp. 418, 423, 426 (D. Minn. 1979). Many states have enacted due process provisions in their statutes governing disciplinary exclusion. Ariz. Rev. Stat. Ann. § 15-843 (1981 Special Pamphlet); Cal. Educ. Code §§ 48901, 48903, 48914 (West 1978 & Supp. 1982); Colo. Rev. Stat. § 22-33-105(2)(c) (1973); Conn. Gen. Stat. §§ 10-233c(a),-233d(a) (1981), *amended by* 1982 Conn. Legis. Serv. 320 (West); Idaho Code § 33-205 (1981); Ill. Ann. Stat. ch. 122, The School Code § 10-22.6 (Smith-Hurd Supp. 1982-1983); Ind. Code Ann. § 20-8.1-5-8 (Burns Supp. 1982); Kan. Stat. Ann. § 72-8902(b) (1980), *amended by* 1982 Kan. Sess. Laws 1305-07; Ky. Rev. Stat. Ann. § 158.150(2) (Bobbs-Merrill 1980); La. Rev. Stat. Ann. § 17:416 (West 1982); Mass. Ann. Laws ch. 76, § 17 (Michie/Law. Co-op. 1978); Minn. Stat. Ann. §§ 127.28, .31 (West 1979); Mo. Ann. Stat. § 167.161 (Vernon Supp. 1982); Neb. Rev. Stat. §§ 79-4,177(3), -4,178(3), -4,181 to -4,205 (1981); Nev. Rev. Stat. § 392.467(2) (1980); N.Y. Educ. Law § 3214(3)(c)-(e) (McKinney 1981); Ohio Rev. Code Ann. § 3313.66(B) (Page 1980); Pa. Stat. Ann. tit. 24, § 13-1318 (Purdon Supp. 1982-1983); S.C. Code Ann. §§ 59-63-230, -240 (Law. Co-op. 1976); S.D. Comp. Laws Ann. § 13-32-4 (Supp. 1981); Tenn. Code Ann. § 49-1309(C) (1977); Tex. Educ. Code Ann. § 21.301 (Vernon 1972 & Supp. 1982); Va. Code § 22.1-277 (1980); Wash. Rev. Code Ann. §§ 28A.58.101(2), .04.132 (Supp. 1982); W. Va. Code § 18A-5-1a (b), (d), (e), (f) (Supp. 1982); Wis. Stat. Ann. § 120.13(1) (West 1973 & Supp. 1982-1983); Wyo. Stat. § 21-4-305 (1977).

43. *See* Board of Educ. v. Rowley, 102 S. Ct. 3034, 3043 (1982); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1266 (E.D. Pa. 1971) (per curiam); S. Rep. No. 168, 94th Cong., 1st Sess. 8, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1432; 121 Cong. Rec. 19,486 (1975) (remarks of Sen. Williams); *id.* at 19,494 (remarks of Sen. Javits); *id.* at 19,502 (remarks of Sen. Cranston); J. Kranes, The Hidden Handicap 15 (1980); H.R. Turnbull, III & A.P. Turnbull, Free Appropriate Public Education—Law and Implementation 19-20 (1978); Colley, *supra* note 15, at 137-38; Miller & Miller, *The Handicapped Child's Civil Right as it Relates to the "Least Restrictive Environment" and Appropriate Mainstreaming*, 54 Ind. L.J. 1, 2 (1978).

44. 334 F. Supp. 1257 (E.D. Pa. 1971) (per curiam).

45. 348 F. Supp. 866 (D.D.C. 1972).

enactments of section 504 of the Rehabilitation Act of 1973[46] and the EAHCA,[47] exclusion of handicapped children from school was a common and rarely challenged practice.[48]

1. The Rehabilitation Act of 1973

In the 1954 decision of *Brown v. Board of Education*,[49] the Supreme Court interpreted the fourteenth amendment to require that public education be made available to all on an equal basis.[50] It was not until nearly twenty years later that Congress expressly extended the right of equal access to education to handicapped students in section 504 of the Rehabilitation Act of 1973.[51] Under section 504, no institution or program that receives federal funds may exclude any handicapped person "solely by reason of his handicap."[52] The implications of this provision are broad, but the area most profoundly affected is public education. Section 504, as interpreted by the regulations promulgated thereunder,[53] codifies the right of all handicapped children to a "free, appropriate public education."[54]

To comply with the Rehabilitation Act, the public school system of each state must make affirmative efforts to identify, evaluate and educate all handicapped children within its jurisdiction.[55] In order to ensure the availability of an appropriate educational program for

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46. 29 U.S.C. § 794 (1976) (commonly referred to as "§ 504.")
47. 20 U.S.C. §§ 1400-1420 (1976 & Supp. IV 1980).
48. See *supra* note 43 and accompanying text.
49. 347 U.S. 483 (1954).
50. *Id.* at 493.
51. 29 U.S.C. § 794 (1976).
52. *Id.*
53. 45 C.F.R. §§ 84.31-.39 (1981). These regulations were promulgated by the Department of Health and Human Services to "effectuate section 504 of the Rehabilitation Act of 1973." *Id.* § 84.1.
54. *Id.* § 84.33. 45 C.F.R. § 84.33(b)(1)(i) defines "appropriate education" as that which is "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met . . . ." *Id.* In order to be "appropriate," education must take place in the "least restrictive," that is, most "normal," setting capable of meeting a particular handicapped child's special needs. The requirement of "free appropriate public education" places a heavy burden on states and school systems. Courts, however, have not hesitated to enforce these requirements regardless of their accompanying financial burden. *See, e.g.*, Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328, 1338-39 (W.D.N.Y. 1979); Barnes v. Converse College, 436 F. Supp. 635, 638-39 (D.S.C. 1977). The Supreme Court has held, however, that the Rehabilitation Act does not prohibit an educational institution from requiring "reasonable physical qualifications for admission to a clinical training program." Southeastern Community College v. Davis, 442 U.S. 397, 414 (1979) (deaf applicant denied admission to nursing program on ground she could not safely perform in hospital setting). *See generally* H.R. Turnbull, III & A.P. Turnbull, *supra* note 43, at 137-56.
55. 45 C.F.R. §§ 84.32, .35 (1981).

every handicapped child, schools must provide a continuum of possible educational settings or "placements" ranging from regular classroom instruction supplemented with specialized tutoring for a mildly handicapped child to a highly restrictive residential care facility for a severely handicapped child.[56]

2. The Education for All Handicapped Children Act of 1975

The broad right of handicapped children to an appropriate education is codified in the Rehabilitation Act.[57] Specific procedures for implementing and protecting that right are set forth in section 615 of the EAHCA.[58] Compliance with the EAHCA is not mandatory, but is instead a condition to receiving federal funds specifically earmarked to help offset the tremendous costs of identifying, evaluating and educating all handicapped children.[59] To qualify for funds under the EAHCA, a state must submit a plan that satisfies detailed requirements governing the methods to be used in evaluating the nature and extent of a child's handicap and the system by which a handicapped child is to be placed in an appropriate educational setting.[60] The EAHCA requires that whenever it appears that a school-age child[61] is or may be handicapped, the child must be tested and evaluated to determine the nature of the problem.[62] After a diagnosis has been made, a team of appropriate specialists must meet with the child's parents and teacher to develop a detailed, written "individualized education plan" (IEP).[63]

Section 615 of the EAHCA establishes a system of due process protections for children undergoing either initial evaluation or a change in a previously established IEP.[64] Initiation or alteration of an IEP requires detailed notice to the child's parents.[65] If the parents

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56. *Id.* § 84.33-.34. *See generally* H.R. Turnbull, III & A.P. Turnbull, *supra* note 43, at 137-56.

57. See *supra* notes 51-54 and accompanying text.

58. 20 U.S.C. § 1415 (1976).

59. *Id.; see* Board of Educ. v. Rowley, 102 S. Ct. 3034, 3037 (1982).

60. 20 U.S.C. § 1413 (1976); 34 C.F.R. §§ 300.110-.240 (1981).

61. The EAHCA specifically requires the provision of free, appropriate public education

> for all handicapped children between the ages of three and twenty-one . . . except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice.

20 U.S.C. § 1412(2)(B) (1976).

62. *Id.* § 1412(5)(C); 34 C.F.R. §§ 300.128(a), .530-.532, .540-.543 (1981).

63. 20 U.S.C. § 1401(19) (1976); 34 C.F.R. §§ 300.340-.349 (1981).

64. 20 U.S.C. § 1415 (1976).

65. *Id.* § 1415(b)(1)(C).

disagree with the proposed action, they are entitled to an impartial administrative hearing as well as an appeal to the state educational agency.[66] If still not satisfied, they may seek relief in the courts.[67] Throughout the hearing and appeals process, the child must be permitted to remain in his current educational placement.[68]

Moreover, whenever the parents of a handicapped child present complaints "with respect to any matter relating to the identification, evaluation, or educational placement" of their child, they are entitled to the same hearing and appeals process.[69] Thus, parents who are aware of their rights under the EAHCA have a potent weapon against school authorities who either attempt to change or refuse to change a handicapped child's educational program for any reason other than the best interests of the child.

II. The Problem of Expelling or Suspending Handicapped Students

When a handicapped child misbehaves in school, a conflict may arise between state laws permitting the imposition of disciplinary exclusion as a punitive measure,[70] and section 615 of the EAHCA, which prohibits schools from unilaterally removing a handicapped student from his current educational placement.[71] Neither the EAHCA itself nor the currently effective regulations thereunder specifically provide for disciplinary action against handicapped students.[72] Nevertheless, it has been consistently recognized that the EAHCA's change of placement procedures limit the power of school authorities to expel or suspend handicapped students.[73] There is as yet no consensus, however, as to the precise nature or extent of the limitation.[74]

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66. *Id.* § 1415(b)(2), (c)-(d); 34 C.F.R. §§ 300.506-.510 (1981).

67. 20 U.S.C. § 1415 (e)(1), (2) (1976); 34 C.F.R. § 300.511 (1981).

68. 20 U.S.C. § 1415(e)(3) (1976); 34 C.F.R. § 300.513 (1981). This "stay put" provision has been interpreted as prohibiting parents, as well as school officials, from unilaterally changing the child's placement during the pendency of a dispute. Stemple v. Board of Educ., 623 F.2d 893, 897-98 (4th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981); *see* Stuart v. Nappi, 443 F. Supp. 1235, 1243 (D. Conn. 1978). This requirement, however, does not prevent the emergency removal of an extremely disruptive or dangerous handicapped child pending alternative placement. 34 C.F.R. § 300.513 comment (1981); *see* Doe v. Koger, 480 F. Supp. 225, 229 (N.D. Ind. 1979); Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328, 1336 (W.D.N.Y. 1979); Stuart v. Nappi, 443 F. Supp. 1235, 1242 (D. Conn. 1978); Southeast Warren Community School Dist. v. Department of Pub. Instruction, 285 N.W.2d 173, 180 (Iowa 1979).

69. 20 U.S.C. § 1415(b)(1)(E), (b)(2) (1976).

70. See *supra* note 1 and accompanying text.

71. See *supra* note 4 and accompanying text.

72. *See* H.R. Turnbull, III & A.P. Turnbull, *supra* note 43, at 70.

73. See *supra* note 6 and accompanying text.

74. See *supra* note 7 and accompanying text.

A. *The* Stuart *Approach*

Stuart v. Nappi[75] presented the first opportunity for a federal district court to interpret the effect of the EAHCA on the power of school officials to suspend or expel a handicapped student. The *Stuart* court held that any disciplinary expulsion of a handicapped student violates the change of placement provisions of the Act, and is therefore invalid.[76] The court expressed concern that "[t]he right to an education in the least restrictive environment may be circumvented if schools are permitted to expel handicapped children."[77] Thus, the court held that section 615 change of placement procedures "replace expulsion as a means of removing handicapped children from school if they become disruptive."[78] This holding reflects an apparent judicial determination that retaining handicapped children in appropriate educational placements is a goal of such importance[79] that expulsion and suspension are never valid punishments for a handicapped child.[80]

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75. 443 F. Supp. 1235 (D. Conn. 1978).
76. *Id.* at 1241-43.
77. *Id.* at 1242.
78. *Id.*
79. The legislative history of the EAHCA states that "[t]his Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and the prosperity of our people." S. Rep. No. 168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1433. The importance of full education for handicapped children in the least restrictive environment has been emphasized repeatedly by courts. *See, e.g.*, Springdale School Dist. No. 50 v. Grace, 656 F.2d 300, 305 (8th Cir. 1981), *vacated*, 102 S. Ct. 3504 (1982); Gladys J. v. Pearland Indep. School Dist., 520 F. Supp. 869, 875, 877 (S.D. Tex. 1981); Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F. Supp. 1263, 1276-78 (N.D. Ga. 1981); Armstrong v. Kline, 476 F. Supp. 583, 597, 603 (E.D. Pa. 1979), *aff'd in part, remanded in part*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981); Stuart v. Nappi, 443 F. Supp. 1235, 1243 (D. Conn. 1978). Courts have expressly ruled that a claimed lack of funds or facilities is no excuse for failure to provide appropriate education and services to handicapped students. *See* Espino v. Besteiro, 520 F. Supp. 905, 912 (S.D. Tex. 1981); Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328, 1339 (W.D.N.Y. 1979); Lora v. Board of Educ., 456 F. Supp. 1211, 1292-93 (E.D.N.Y. 1978), *vacated on other grounds*, 623 F.2d 248 (2d Cir. 1980); Barnes v. Converse College, 463 F. Supp. 635, 638-39 (D.S.C. 1977); Hairston v. Drosick, 423 F. Supp. 180, 189 (S.D.W. Va. 1976); Mills v. Board of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972).
80. As the *Stuart* court pointed out, "expulsion has the effect not only of changing a student's placement, but also of restricting the availability of alternative placements." Stuart v. Nappi, 443 F. Supp. 1235, 1242-43 (D. Conn. 1978); *see* Southeast Warren Community School Dist. v. Department of Pub. Instruction, 285 N.W.2d 173, 180 (Iowa 1979). Thus, "the bottom line must be that no matter how disruptive or irritating a child's behavior, s(he) still has a right to education." McClung, *supra* note 28, at 527. The *Stuart* court acknowledged that extremely disruptive or dangerous children should be removed on an emergency basis during the formal change of placement process. 443 F. Supp. at 1243; *accord* Doe v. Koger, 480 F. Supp. 225, 229 (N.D. Ind. 1979); Sherry v. New York State Educ. Dep't, 479

The *Stuart* decision was plainly intended to give handicapped children the greatest possible protection against interruption or termination of their individualized educational programs. At the same time, however, by effectively exempting handicapped students from disciplinary exclusion, the *Stuart* approach unfairly insulates handicapped students from punishments that are routinely applied to nonhandicapped students. Some educators have vigorously objected that *Stuart* would create an unfair double standard in school discipline.[81]

Beyond simple unfairness, the double standard inherent in *Stuart* potentially conflicts with the constitutional principal of equal protection.[82] Although the United States Supreme Court has refused to elevate education to the status of a fundamental right,[83] it has clearly recognized that education is an important interest.[84] Unequal treatment in imposing disciplinary exclusion on handicapped and nonhandicapped students can therefore be justified only by a showing that such treatment is rationally related to a substantial public purpose.[85] While educating the handicapped is clearly a substantial pub-

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F. Supp. 1328, 1336 (W.D.N.Y. 1979). This is a significant part of the opinion because it makes clear that *Stuart* was not intended to protect handicapped children at the expense of others. This assumes, however, the possibility of a swift change of placement process so that the emergency suspension period would not be long enough to constitute an invalid change of placement. This assumption appears unrealistic in light of the commonly found backlog of children awaiting evaluation. Moreover, evaluation is considered prompt if it is completed within 30 days after referral. U.S. Department of Education, Fourth Annual Report to Congress on Implementation of Public Law 94-142: The Education for All Handicapped Children Act 51-52 (1982) [hereinafter cited as Fourth Annual Report]. An emergency suspension of 30 days would probably be considered excessively long under the EAHCA. *See* Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328, 1337 (W.D.N.Y. 1979).

81. C.E. Howe, *supra* note 9, at 15-16.

82. The fourteenth amendment to the Constitution requires that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

83. *See, e.g.*, Plyler v. Doe, 102 S. Ct. 2382, 2397 (1982); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

84. *See* Plyler v. Doe, 102 S. Ct. 2382, 2397-98 (1982); Ambach v. Norwick, 441 U.S. 68, 76 (1979); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Brown v. Board of Educ., 347 U.S. 483, 493 (1954). *But see* Sherer v. Waier, 457 F. Supp. 1039, 1047 (N.D. Mo. 1977).

85. Plyler v. Doe, 102 S. Ct. 2382, 2398 (1982). The term "substantial public interest" indicates the newly emerging standard of intermediate equal protection scrutiny. *See id.* at 2395 & n.16; Lalli v. Lalli, 439 U.S. 259, 265 (1978); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978); Craig v. Boren, 429 U.S. 190, 197 (1976); *id.* at 211 (Powell, J., concurring); *id.* at 212 (Stevens, J., concurring); Reed v. Reed, 404 U.S. 71, 76 (1971). Intermediate scrutiny is to be distinguished from the more firmly established standards of equal protection scrutiny: "rational basis" and "strict scrutiny." Under the "rational basis" test, governmental classifications that lead to unequal treatment of particular persons or groups are considered constitutional if they bear a rational relation to the furtherance of a legitimate public purpose. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Railway

lic purpose,[86] it is questionable whether granting every handicapped child complete immunity from disciplinary exclusion bears a rational relation to furthering that purpose. In fact, the very principle underlying the EAHCA "mainstreaming"[87] requirement is that handicapped students should be treated as much as possible like their nonhandicapped counterparts.[88] Particularly in view of the presumed educational and deterrent value of disciplinary exclusion,[89] handicapped students should not be automatically exempt from expulsion and suspension. At the same time, formulating a precise standard for determining whether a particular handicapped student may be validly expelled has proved to be a difficult task.

B. *The "Cause of Misconduct" Approach*

Although the *Stuart* approach has never been challenged directly on equal protection grounds, subsequent interpretations of the EAHCA's

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Express Agency v. New York, 336 U.S. 106, 109 (1949); Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 406 (1928) (Brandeis, J., dissenting), *overruled,* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 365 (1973); Tanner v. Little, 240 U.S. 369, 382 (1916); Connolly v. Union Sewer Pipe, 184 U.S. 540, 560 (1902). "Strict scrutiny," on the other hand, which requires a showing of a compelling state interest, is applied only when governmental classification either impinges upon a "fundamental right," *see, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966); Reynolds v. Sims, 377 U.S. 533, 562 (1964); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886), or disadvantages a "suspect class." *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Brown v. Board of Educ., 349 U.S. 294, 298 (1955); Hirabayashi v. United States, 320 U.S. 81, 100-01 (1943); United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938).

86. *See, e.g.*, Board of Educ. v. Rowley, 102 S. Ct. 3034, 3037-40 (1982); Frankel v. Commissioner of Educ., 480 F. Supp. 1156, 1159 (S.D.N.Y. 1979); Lora v. Board of Educ., 456 F. Supp. 1211, 1225 (E.D.N.Y. 1978), *vacated on other grounds,* 623 F.2d 248 (2d Cir. 1980); Howard S. v. Friendswood Indep. School Dist., 454 F. Supp. 634, 641 (S.D. Tex. 1978); Mills v. Board of Educ., 348 F. Supp. 866, 878 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1260 (E.D. Pa. 1971) (per curiam).

87. The term "mainstreaming" is used to refer to the goal of integrating all handicapped children in regular classes to the maximum extent possible. *See, e.g.*, H.R. Turnbull, III & A.P. Turnbull, *supra* note 43, at 137; Miller & Miller, *supra* note 43, at 1.

88. The EAHCA requires that "to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when . . . education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5)(b) (1976); *see id.* § 1414; 34 C.F.R. § 300.550 (1981); H.R. Turnbull, III & A.P. Turnbull, *supra* note 43, at 137-44; Colley, *supra* note 15, at 148; Note, *Enforcing The Right to An "Appropriate" Education: The Education For All Handicapped Children Act of 1975*, 92 Harv. L. Rev. 1103, 1118-20 (1979) [hereinafter cited as *Enforcing the Right*].

89. *See* Goss v. Lopez, 419 U.S. 565, 580 (1975).

effect on disciplinary exclusion reveal an implicit concern with fairness and equal protection.[90] As a result, the current trend is toward the position that expulsion or suspension of a handicapped student is prohibited only if the student's misconduct is found to have been caused by the handicapping condition.[91]

In August, 1982, the United States Department of Education proposed new regulations under the EAHCA,[92] including, for the first time, a regulation governing disciplinary actions against handicapped students.[93] The proposed discipline regulation essentially incorporates the judicially created "cause of misconduct" approach. Under the "cause of misconduct" approach, whenever a handicapped child becomes subject to disciplinary exclusion, a determination must be made as to whether the child's misbehavior was caused by his handicap.[94] If so, the child is afforded the protection of section 615.[95] If not, suspension or expulsion may be imposed in the same manner as for a nonhandicapped child.[96] Although the courts have not established clear standards for determining the cause of particular misconduct,[97] under the proposed regulation, the "cause of misconduct" determination would be made according to procedures "consider[ed] appropriate" by the state or local board of education.[98]

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90. *See* S-1 v. Turlington, 635 F.2d 342, 348 (5th Cir.), *cert. denied*, 102 S. Ct. 566 (1981); Doe v. Koger, 480 F. Supp. 225, 229 (N.D. Ind. 1979); *cf.* Sherer v. Waier, 457 F. Supp. 1039, 1048 (W.D. Mo. 1977) (court refused to require unusual services for handicapped, which are not provided to nonhandicapped); Colley, *supra* note 15, at 152 (questions whether EAHCA "works a reverse discrimination"); *Enforcing the Right*, *supra* note 88, at 1107 n.33 (considers problem of children claiming EAHCA protection to thwart disciplinary exclusion).

91. *See* S-1 v. Turlington, 635 F.2d 342, 348 (5th Cir.), *cert. denied*, 102 S. Ct. 566 (1981); Doe v. Koger, 480 F. Supp. 225, 229 (N.D. Ind. 1979); 47 Fed Reg. 33,854 (1982) (to be codified at 34 C.F.R. § 300.114(c)) (proposed Aug. 4, 1982).

92. Assistance to States for Education of Handicapped Children, 47 Fed. Reg. 33,835 (1982) (to be codified at 34 C.F.R. pt. 300) (proposed Aug. 4, 1982).

93. *Id.* at 33,854 (proposed regulation § 300.114).

94. *Id.* (proposed regulation § 300.114(c)).

95. *Id.* (proposed regulation § 300.114(c)(2)).

96. *See* S-1 v. Turlington, 635 F.2d 342, 346 (5th Cir.), *cert. denied*, 102 S. Ct. 566 (1981); Doe v. Koger, 480 F. Supp. 225, 229 (N.D. Ind. 1979); 47 Fed. Reg. 33,854 (1982) (to be codified at 34 C.F.R. § 300.114(c)(3) (proposed Aug. 4, 1982).

97. For example, in Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979), the court stated that the determination of whether a handicapped child's misbehavior was caused by his handicap "must be determined through the change of placement procedures required by the [EAHCA]." *Id.* at 229. This statement is confusing because the section 615 change of placement procedure is neither intended nor suited for use as a vehicle for testing a handicapped child's ability to refrain from proscribed behavior. Rather, it is specifically intended to determine whether a change in educational placement would better serve a particular handicapped child's special needs.

98. 47 Fed. Reg. 33,854 (1982) (to be codified at 34 C.F.R. § 300.114(c)(1)) (proposed Aug. 4, 1982). As used in proposed regulation § 300.114(c)(1), the term "agency" includes "the State educational agency, a local educational agency, or an

The cause of misconduct approach is emerging as the dominant interpretation of the EAHCA's impact on disciplinary exclusion of handicapped children.[99] Thus, understanding both the reasoning that gave rise to this approach and the negative effects that might result from its uncritical adoption is important.

1. Development of the "Cause of Misconduct" Rationale

The position that the EAHCA prohibits disciplinary exclusion of a handicapped student only if the handicap is found to be the cause of the misconduct originated in the case of *Doe v. Koger*.[100] In arriving at its "cause of misconduct" approach, the *Koger* court reasoned that "[i]t is not the purpose of the [EAHCA] to provide handicapped students placement which will guarantee their education despite the students' will to cause trouble."[101]

Subsequently, in *S-1 v. Turlington*,[102] the United States Court of Appeals for the Fifth Circuit attempted to refine and develop the rationale underlying the "cause of misconduct" approach. The *Turlington* case concerned nine mentally retarded children who challenged their total exclusion from public school.[103] The exclusions had been effected in accordance with basic due process requirements.[104] With the exception of one student, however, the plaintiffs had been afforded neither a change of placement hearing nor a hearing to determine whether their misconduct was caused by their handicaps.[105]

In adopting the "cause of misconduct" position, the Fifth Circuit relied upon the Rehabilitation Act's mandate that a student may not be excluded "solely by reason of his handicap."[106] The court reasoned that in order to determine whether disciplinary exclusion would violate the Rehabilitation Act, school officials must ascertain whether a handicapped child's misconduct is a manifestation of his handicap.[107]

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intermediate educational unit, and any other public institution or agency in the State which is responsible for providing education to handicapped children." *Id.* § 300.4(9).

99. See *supra* note 91 and accompanying text.

100. 480 F. Supp. 225 (N.D. Ind. 1979).

101. *Id.* at 229.

102. 635 F.2d 342 (5th Cir.), *cert. denied*, 102 S. Ct. 566 (1981).

103. The children were all classified as educable or mildly mentally retarded. None was considered emotionally disturbed. The misconduct upon which the expulsions were based ranged from masturbation or sexual acts toward other students to defiance of authority, insubordination, vandalism and use of profane language. *Id.* at 344 & n.1.

104. *Id.* at 344 (citing Goss v. Lopez, 419 U.S. 565 (1975)).

105. *Id.*

106. *Id.* at 345-46 (quoting Rehabilitation Act, § 504, 29 U.S.C.A. § 794 (1973)).

107. 635 F.2d at 346, 348.

If so, the child cannot be expelled.[108] Instead, he must be given a change of placement to an educational setting that is better suited to handling students whose handicaps cause them to misbehave.[109] By clear implication, if a handicapped student's misbehavior is determined not to be caused by his handicapping condition, disciplinary exclusion could be imposed upon the handicapped child to the same extent that it could be imposed upon a nonhandicapped child.[110]

Although it expressly approved the *Stuart* opinion,[111] the *Turlington* court apparently believed that it could not go as far in insulating handicapped children from expulsion. The court considered itself bound by state education law, which specifically permitted expulsion as a "disciplinary tool for *all* students."[112] This deferential attitude[113] led the court to the conclusion that "expulsion is still a proper disciplinary tool under the [EAHCA] and section 504 [of the Rehabilitation Act] when proper procedures are utilized and under proper circumstances."[114]

The chief advantage of the "cause of misconduct" approach is that it offers what appears to be a fair and logical solution to the equal protection problem inherent in *Stuart*. Unlike *Stuart*, the "cause of misconduct" cases do not create a personal exemption from disciplinary exclusion for all handicapped students. Rather, this approach prevents the application of disciplinary sanctions only when the misconduct is an involuntary effect of the handicap. Thus, the cause of misconduct approach provides the constitutionally necessary "rational basis" for affording some handicapped children greater protection against disciplinary exclusion than they would enjoy if they were not handicapped.

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108. *Id.*

109. *See id.* at 346.

110. This is precisely the approach taken by the DOE in the proposed regulation concerning disciplinary actions against handicapped students. 47 Fed. Reg. 33,854 (1982) (to be codified at 34 C.F.R. § 300.114) (proposed Aug. 4, 1982).

111. 635 F.2d at 347.

112. *Id.* at 348 (emphasis added). The court was apparently alluding to Fla. Stat. Ann. § 232.26 (West 1977), which expressly permits expulsion and suspension of students.

113. For a discussion of the tradition of federal judicial deference in matters of public education, see *supra* note 33 and accompanying text.

114. 635 F.2d at 348. Despite this conclusion, the court stated that it would not "authorize the complete cessation of educational services [to a handicapped child] during an expulsion period." *Id.* This anomalous statement illustrates the confusion inherent in the Fifth Circuit's reasoning. To say that it is possible to expel a handicapped child but not to deprive him of an education is virtually the same as saying the child must be given an alternative educational placement. Yet the court held that "change of placement protection" is to be afforded only to those handicapped students whose misconduct is found to have been caused by their handicaps. *Id.*

2. Practical Problems Under the Cause of Misconduct Approach

Implicit in the "cause of misconduct" approach is the assumption that causes of specific behavior can be isolated and identified.[115] In fact, notwithstanding the tremendous advances in the ability of psychologists and special education professionals to diagnose many handicapping conditions, an exact determination of whether a particular handicap causes specific behavior is often impossible to make.[116] Therefore, any attempt to determine the cause of specific misconduct is necessarily subjective and inexact.

The determination of whether particular misconduct was caused by a handicap will often require expert testimony. Predictably, the outcome of such an inquiry will depend largely upon which party's expert testifies more persuasively. A family that lacks the means to obtain outside evaluations and expert testimony will be at a disadvantage in defending its handicapped child's right to remain in an appropriate educational setting.[117] The proposed DOE regulation would perpetuate this problem by requiring that the "cause of misconduct" determination "involve persons who are familiar with the child and with the behaviors associated with the handicapping condition."[118]

Moreover, the result of a "cause of misconduct" determination depends to a large extent on how "cause" is defined. In *Turlington*, for example, the Fifth Circuit took a broad view of causality, suggesting that even the indirect effects of a handicapping condition should be considered.[119] The court cited the example of an orthopedically handicapped boy whose extreme aggressiveness could be traced to the

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115. *See* Colley, *supra* note 15, at 160.

116. *Id.* at 160; Levine & Oberklaid, *Hyperactivity—Symptom Complex or Complex Symptom?*, 134 Am. J. Disabilities in Children, 409, 410, 412 (1980); Lewis, Shanok, Pincus & Glaser, *Delinquency and Seizure Disorders: Psychomotor Epileptic Symptomatology and Violence*, in Vulnerabilities to Delinquency 51, 53 (D.O. Lewis ed. 1981); Mauser, *Learning Disabilities and Delinquent Youth*, 9 Academic Therapy 389, 391-92 (1974).

117. *See Enforcing the Right*, *supra* note 88, at 1110-11. Both the Act and the corresponding DOE regulations provide that parents shall have the right to "independent educational evaluation of [their] child." 20 U.S.C. § 1415(b)(1)(A) (1976); 34 C.F.R. § 300.503 (1981). If parents avail themselves of the opportunity for an independent evaluation, the school may challenge the independent findings. If the school succeeds in establishing that its original evaluation was appropriate, however, the parent loses the right to have independent evaluation at public expense. 34 C.F.R. § 300.503(b) (1981).

118. 47 Fed. Reg. 33,854 (1982) (to be codified at 34 C.F.R. § 300.114) (proposed Aug. 4, 1982).

119. 635 F.2d at 347; *accord* Howard S. v. Friendswood Indep. School Dist., 454 F. Supp. 634, 640 (S.D. Tex. 1978); Frederick L. v. Thomas, 408 F. Supp. 832, 835 (E.D. Pa. 1976); Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 Calif. L. Rev. 40, 153 (1974). *But see In re* Mecca, 82 Misc. 2d 497, 499, 369 N.Y.S.2d 282, 284 (Fam. Ct. 1975).

frustration he felt as a result of his condition.[120] It was implied that in such a case the child's aggressive behavior should be regarded as having been caused by his handicap.[121] Under such a broad view of causality, virtually any misconduct by a handicapped child can be argued to have been "caused" by the handicap.[122] Paradoxically, a broad interpretation of "cause of misconduct" would effectively exempt handicapped children from disciplinary exclusion. This is precisely the result sought to be avoided by formulating the "cause of misconduct" approach.[123]

A narrow view of causality, on the other hand, would reduce the limitations imposed by the EAHCA on disciplinary exclusion of handicapped students. In effect, change of placement protection would be afforded only when a handicapped child's misbehavior amounted to a clinical symptom of the handicapping condition. In *Turlington*, for example, the defendant school officials claimed that only a serious emotional disturbance could be said to "cause" the kinds of misconduct attributed to the plaintiff children.[124] Such a standard would result in the disciplinary exclusion of many handicapped children whose misbehavior is in fact caused, albeit indirectly, by their handicaps. This result would clearly contravene the intent,[125] if not the letter, of the EAHCA.

C. *The Evaluation Requirement*

Whether the formal evaluation process must be complete before the due process protections of the EAHCA can be invoked is as yet unclear. The definition of "handicapped children" in section 601 of the

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120. 635 F.2d at 347.

121. *Id.* The defendant state and local education officials conceded that a handicapped child cannot be expelled for misconduct that is "a manifestation of the handicap itself." They argued, however, that only a serious emotional disturbance could "cause" a child to misbehave. The court firmly rejected this contention. *Id.* at 346-47.

122. *See* Howard S. v. Friendswood Indep. School Dist., 454 F. Supp. 634, 636, 640 (S.D. Tex. 1978); Frederick L. v. Thomas, 408 F. Supp. 832, 835 (E.D. Pa. 1976). One commentator has observed that "it seems clear that *any* behavior problem which is found to be severe enough to justify the *expulsion* of a pupil . . . almost by definition is also severe enough to qualify the pupil for special educational placement." McClung, *supra* note 28, at 526 (emphasis in original); *accord* Kirp, Buss & Kuriloff, *supra* note 119, at 153 ("A child who disrupts classes may just be misbehaving, but he may also be exhibiting the need for special educational assistance not being provided."); *cf.* H.R. Turnbull, III & A.P. Turnbull, *supra* note 43, at 72 ("Most children in correction or [juvenile] facilities can be diagnosed as seriously emotionally disturbed, learning disabled, or otherwise handicapped.").

123. See *supra* notes 90-91 and accompanying text.

124. 635 F.2d at 346.

125. *See* S. Rep. No. 168, 94th Cong., 1st Sess. 6, 8-9, 14, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1430, 1432-33, 1438.

EAHCA[126] clearly indicates that the Act is intended to protect those who suffer from a handicap, and not, as has been argued, only those who are officially identified as handicapped.[127] According to one federal district court, however, EAHCA protection is predicated entirely upon a formal identification and evaluation of the child's handicap. In *Mrs. A.J. v. Special School District No. 1*,[128] an eighth-grade girl challenged a fifteen-day suspension that had been imposed while she was awaiting the results of formal evaluation.[129] The court rejected the plaintiff's contention that the basic due process mandated for nonhandicapped students was inadequate in her case because she was a handicapped student under the EAHCA.[130] The court held that, even though it appeared likely that the forthcoming evaluation would indicate that the plaintiff was a handicapped child entitled to the full benefits of the EAHCA, until the test results were complete she would be treated as nonhandicapped.[131] The court reasoned that because the EAHCA prescribes procedures for evaluating the nature and extent of a handicap, only the results of those procedures can establish that a particular child is in fact a "handicapped child."[132]

In the currently effective regulations promulgated under the EAHCA,[133] the Department of Education[134] appears to have taken a position similar to that of the court in *Mrs. A.J.* Regulation section 300.5 defines "handicapped children" as "those children *evaluated*" according to specified procedures as falling into one of the categories enumerated in section 601 of the EAHCA.[135] This administrative interpretation arguably limits EAHCA protection to those children who have been identified as handicapped before the commencement of disciplinary action against them.[136]

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126. According to § 601 of the EAHCA, "the term 'handicapped children' means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services." 20 U.S.C. § 1401(1) (1976).

127. *See* Mrs. A.J. v. Special School Dist. No. 1, 478 F. Supp. 418, 432 (D. Minn. 1979); Colley, *supra* note 15 at 160; *see also Enforcing the Right*, *supra* note 88, at 1107 n.33 (discussing both sides of the question).

128. 478 F. Supp. 418 (D. Minn. 1979).

129. *Id.* at 422-23.

130. *Id.* at 432-33.

131. *Id.* at 430-32.

132. *Id.*

133. 34 C.F.R. §§ 300.1-.754 (1981).

134. Regulations implementing the EAHCA were initially promulgated by the Department of Health, Education and Welfare. 45 C.F.R. pt. 121a (1979). All regulatory functions under the EAHCA were transferred subsequently to the newly formed Department of Education. Pub. L. No. 96-88, § 301, 93 Stat. 677, 677 (1979).

135. 34 C.F.R. § 300.5 (1981) (emphasis added).

136. The new regulations proposed by the DOE would alter the definition to correspond with the language of the Act. 47 Fed. Reg. 33,845 (to be codified at 34

Under *Mrs. A.J.* and DOE regulation section 300.5, children awaiting EAHCA evaluation[137] or suffering from undetected handicaps[138] might be suspended or expelled without either an investigation into the underlying cause of their misconduct or placement into a more appropriate educational setting. The change of placement protections of the EAHCA would be available only to those students previously identified and evaluated as handicapped. Such a limitation may simplify the task of determining whether the EAHCA applies to a particular case, but it is inconsistent with congressional intent.[139]

III. Improving the "Cause of Misconduct" Approach

Notwithstanding the practical problems associated with the "cause of misconduct" approach,[140] it offers the greatest potential for giving broad effect to the EAHCA's change of placement provision without conferring an unjust advantage upon handicapped students. The most serious shortcoming of the "cause of misconduct" approach, as currently interpreted, is that it fails to account for the possibility that a seemingly normal child can become a discipline problem because of a

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C.F.R. § 300.4(4)) (proposed Aug. 4, 1982). This change does not appear to reflect a policy decision by the DOE to extend any of the EAHCA protections to children who are not evaluated. *See id.* at 33,837.

137. In many areas the waiting period between referral and evaluation is long. In fact, reducing waiting lists for special education evaluation has been identified as the "critical remaining challege" in implementation of EAHCA evaluation procedures. Fourth Annual Report, *supra* note 80, at 51. A recent study shows that waiting periods of 30 to 60 days are not uncommon. *Id.* at 52. Under a mechanistic approach such as that espoused in *Mrs. A.J.*, unevaluated handicapped students would remain vulnerable to disciplinary exclusion long after their handicaps had become apparent to teachers and school officials.

138. Ample evidence exists that extreme misbehavior in children often results from a mental or neurological handicap that is not readily detected. *See, e.g.*, J. Kranes, The Hidden Handicap 48-49 (1980); Cantwell, *Hyperactivity and Antisocial Behavior Revisited: A Critical Review of the Literature*, in Vulnerabilities to Delinquency 21, 31 (D.O. Lewis ed. 1981); Kirp, Buss & Kuriloff, *supra* note 119 at 153; Levine & Oberklaid, *supra* note 116, at 413; Lewis, Shanok, Pincus & Glaser, *supra* note 116, at 51-53; Mauser, *supra* note 116 at 391-93; McClung, *supra* note 28, at 526; McKay & Brumback, *Relationship Between Learning Disabilities and Juvenile Delinquency*, 51 Perceptual & Motor Skills 1223, 1225 (1980); Weiss & Hechtman, *The Hyperactive Child Syndrome*, 205 Sci. 1348, 1348-49, 1353 (1979). The uncertain state of expert opinion as to what "causes" bad behavior in children is illustrated by the fact that some experts still reject the premise that a causal connection exists between, for example, learning disabilities and juvenile delinquency. *See* D. Offer, R.C. Marohn & E. Ostrov, The Psychological World of the Juvenile Delinquent 145-52 (1979).

139. *See* Education for All Handicapped Children Act of 1975, Statement of Purpose, §§ 601(17), 612(c), 20 U.S.C. §§ 1400(b)(5), 1401(17), 1412(c) (1976 & Supp. IV 1980); 34 C.F.R. §§ 300.13(b)(1)(i), (3), (12)(i), .128(a)(1) (1981); S. Rep. No. 168, 94th Cong., 1st Sess. 18, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1442.

140. See *supra* pt. II(B)(2).

previously undetected handicapping condition.[141] The only judicial pronouncement on this point[142] expressly limits the EAHCA change of placement protection to children who have been formally evaluated and identified as handicapped.[143] Schools, therefore, are under no general obligation to investigate the possibility that particular misbehavior is caused by a handicap unless the child has already been proven handicapped.[144] Moreover, even if such an investigation is performed, the school need not afford the child the protections of section 615 until after the finding of a handicap. As a result, children may still be expelled or suspended from school for conduct that is in fact caused by a handicap. Such a result is contrary to the logic of the "cause of misconduct" approach[145] and to the broad remedial goals of the EAHCA.[146]

A solution to this problem would be to permit a formal evaluation whenever any child faces disciplinary exclusion for misconduct that might reasonably be attributed to an underlying handicap. During the evaluation the child should be protected by the section 615 change of placement procedures, including the "stay in place" provision.[147] Support for this proposition can be found in the opinion of the United States District Court for the District of Columbia in *Mills v. Board of Education*[148] and in statutory provisions recently adopted by two state legislatures.[149]

According to its legislative history, enactment of the EAHCA was prompted in large part by the *Mills* decision.[150] The *Mills* case concerned a group of mentally and emotionally handicapped children who had been denied the right to attend public school because their handicaps made them difficult to control.[151] The court held that,

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141. See *supra* pt. II(B)(3).

142. Mrs. A.J. v. Special School Dist. No. 1, 478 F. Supp. 418 (D. Minn. 1979).

143. *Id.* at 431.

144. *Id.*; *see* Colley, *supra* note 15, at 160; *see also Enforcing the Right*, *supra* note 88 at 1107 n.33 (discussing both sides of the question).

145. Implicit in the "cause of misconduct" approach is the belief that wrongdoing is punishable only if it is intentional. *See* Doe v. Koger, 480 F. Supp. 225, 229 (N.D. Ind. 1979); *cf.* McClung, *supra* note 28, at 504 ("'[N]o rule is reasonable which requires of the pupil what they cannot do.'").

146. *See* Education for All Handicapped Children Act, Statement of Purpose, 20 U.S.C. § 1400 (Supp. IV 1980); S. Rep. No. 168, 94th Cong., 1st Sess. 5-9, 32, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1429-33, 1456.

147. 20 U.S.C. § 1415(e)(3) (1976).

148. 348 F. Supp. 866 (D.D.C. 1972).

149. Mich. Comp. Laws Ann. § 380.1311 (Supp. 1981-1982); W. Va. Code § 18A-5-1a(e) (Supp. 1982).

150. *See* S. Rep. No. 168, 94th Cong., 1st Sess. 6, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1430. *See generally* Board of Educ. v. Rowley, 102 S. Ct. 3034, 3037 n.2 (1982) (discussion of the influence of *Mills* on enactment of EAHCA).

151. 348 F. Supp. at 868-70.

under the due process clause of the fifth amendment,[152] the District of Columbia must provide "suitable publicly-supported education" to every school-age child "regardless of the degree of the child's mental, physical or emotional disability or impairment."[153] The court was concerned particularly with preventing the use of disciplinary procedures as a way of evading the duty to educate handicapped children.[154] As a result, the court ordered that no child could be expelled or suspended for more than two days without due process,[155] including notice to the parents "that if the child is thought . . . to require special education . . . such child is eligible to receive, at no charge . . . diagnostic . . . evaluation."[156] In addition, *Mills* required that the child be permitted to remain in school pending completion of diagnostic evaluation and hearings.[157] The *Mills* court thus expressly found both that the right to evaluation of a possible handicapping condition may properly be invoked even after school officials seek to expel or suspend a misbehaving child, and that this right encompasses the right to remain in school until the cause of the child's misconduct has been determined.

By requiring notice to parents that they are entitled to free diagnostic evaluation before disciplinary exclusion of their child, the *Mills* court wisely allowed for the possibility that disciplinary procedures could serve indirectly as an effective additional mechanism for discovering cases of children who suffer from undetected handicaps. Recently, the soundness of this position has been recognized by the legislatures of two states. Both Michigan[158] and West Virginia[159] require schools to offer appropriate diagnostic testing to children who become subject to disciplinary exclusion because of behavior that might indicate an underlying handicap.[160] Prior to the completion of

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152. *Id.* at 847-75 (construing U.S. Const. amend. V).

153. 348 F. Supp. at 878.

154. Several of the plaintiff children had been permanently expelled because of their behavior problems. *Id.* at 868-70. The *Mills* court was therefore especially concerned with the effect of disciplinary exclusion practices on handicapped children. *Id.* at 878-80; Kirp, Buss & Kuriloff, *supra* note 119, at 153.

155. 348 F. Supp. at 878.

156. *Id.* at 882.

157. *Id.* at 883.

158. Mich. Comp. Laws Ann. § 380.1311 (Supp. 1981-1982).

159. W. Va. Code § 18A-5-1a(e) (Supp. 1982).

160. The Michigan statute provides that when "there is reasonable cause to believe that the pupil [who faces disciplinary exclusion] is handicapped, and the school district has not evaluated the pupil in accordance with the rules [for evaluating handicapped children] the pupil shall be evaluated immediately." Mich. Comp. Laws Ann. § 380.1311 (Supp. 1981-1982). The West Virginia statute is even more comprehensive: "[I]f a pupil . . . is eligible to be classified as [a handicapped child] . . . his parent or custodial guardian may show an explanation of the actions complained of that such actions were the proximate result of a condition which . . .

the testing and a determination of whether the child's misbehavior is caused by a handicap, school officials are prohibited from expelling or suspending the child.[161]

Both the language and the legislative history of the EAHCA favor requiring investigation of the possibility that a misbehaving child is, in fact, a handicapped child. In the EAHCA "Statement of Purpose,"[162] Congress expressly acknowledged that "there are many handicapped children . . . participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are *undetected.*"[163] The EAHCA therefore requires states to implement procedures to locate and identify all handicapped children within their respective jurisdictions.[164] Moreover, section 615 of the EAHCA states that "[w]henever a complaint has been received [concerning identification, evaluation, or educational placement of a child,] the parents or guardian shall have an opportunity for an impartial due process hearing . . . . During the pendency of any proceedings conducted pursuant to this section . . . the child shall remain in the then current educational placement . . . ."[165] It is submitted that this provision would encompass a complaint by parents that their child is in need of special educational services because of a handicap that school officials have failed to detect.[166] Even if such a complaint were made after disciplinary

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would qualify the pupil for a special educational program. . . . If the principal or [school] board finds that such actions were the proximate result of such a condition, the pupil shall not be suspended or expelled . . . but the pupil shall be forthwith referred to the appropriate personnel . . . for development of an individual learning program." W. Va. Code § 18A-5-1a(e) (Supp. 1982). The West Virginia statute expressly permits temporary removal of a very disruptive child during the period necessary to set up a special education placement. *Id.* Illinois similarly requires that the state "Department of Mental Health and Developmental Disabilities shall be invited to send a representative to consult with the [school] board . . . whenever there is evidence that mental illness may be the cause for expulsion or suspension." Ill. Ann. Stat. ch. 122, § 10-22.6(c) (Smith-Hurd Supp. 1982-1983).

161. Mich. Comp. Laws Ann. § 380.1311 (Supp. 1982-1983); W. Va. Code § 18A-5-1a(e) (Supp. 1982).

162. 20 U.S.C. § 1400 (Supp. IV 1980).

163. *Id.* § 1400(b)(5) (emphasis added). See *supra* note 122 and accompanying text for a discussion of how this rationale might apply to children whose education is hampered by undetected handicaps that cause them to become behavior problems in school.

164. 20 U.S.C. §§ 1401(17), 1412 (c); 34 C.F.R. §§ 300.13(b)(1)(i), (3), (12)(i), .128, .321(a)(1); *see* S. Rep. No. 168, 94th Cong., 1st Sess. 18, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1442.

165. 20 U.S.C. § 1415(b)(2), (e)(3) (1976).

166. *See Enforcing the Right, supra* note 88, at 1107 n.33. In Frankel v. Commissioner of Educ., 480 F. Supp. 1156 (S.D.N.Y. 1979), the court held that during pendency of a parental complaint for a school's failure to identify their child as handicapped, the procedural protections of section 615 would apply. *Id.* at 1160. *Contra* Mrs. A.J. v. Special School Dist. No. 1, 478 F. Supp. 414, 431 (D. Minn. 1979).

proceedings had been instituted against the child, the "stay in place" provision of section 615[167] should prohibit disciplinary exclusion of the child at least until after he is evaluated and the complaint resolved. Expanding the "cause of misconduct" approach to include a requirement that all instances of serious student misconduct be treated as potential indications of an undetected handicap would afford maximum EAHCA change of placement protection to all handicapped children, whether previously identified or not, without creating a double standard in school discipline.

Even if EAHCA change of placement protection is extended to children whose misbehavior is caused by previously undetected handicaps, cases will continue to arise in which no empirical link can be found between a handicap and particular misconduct. In such cases, handicapped children will be subject to disciplinary exclusion to the same extent as nonhandicapped students.[168] This result preserves the principles of fairness and equal protection in school discipline; however, insofar as it permits some handicapped children to be completely deprived of appropriate public education, it fails to implement the EAHCA goal of assisting all handicapped children to become self-sustaining and productive citizens.[169] Any long-term disciplinary exclusion causes harm both to the child and to society as a whole.[170] The

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167. 20 U.S.C. § 1415(e)(3) (1976); *see Enforcing the Right*, *supra* note 88, at 1107 n.33.

168. See *supra* note 96 and accompanying text.

169. In enacting the EAHCA, Congress determined that "[t]he long range implications of [statistics showing half of all handicapped children to be receiving no or inadequate education] are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society." S. Rep. No. 168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1433. Many of the Congressional sponsors of the EAHCA espoused a similar goal: "[P]roviding appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds." 121 Cong. Rec. 19,492 (1975) (remarks of Sen. Williams); *accord* 121 Cong. Rec. 25,541 (1975) (remarks of Rep. Harkin); 121 Cong. Rec. 37,024-25 (1975) (remarks of Rep. Brademas); 121 Cong. Rec. 37,027 (1975) (remarks of Rep. Gude); 121 Cong. Rec. 37,410 (1975) (remarks of Sen. Randolph); *see* Board of Educ. v. Rowley, 102 S. Ct. 3034, 3048 n.23 (1982); Gladys J. v. Pearland Indep. School Dist., 520 F. Supp. 869, 875 (S.D. Tex. 1981).

170. *See, e.g.*, Lee v. Macon County Bd. of Educ., 490 F.2d 458, 460 (5th Cir. 1974) (expulsion amounts to a "lifetime sentence to second rate citizenship"); Cook v. Edwards, 341 F. Supp. 307, 310 (D.N.H. 1972) (indefinite suspension causes "irreparable harm"); E.T. Connors, *supra* note 25, at 20 (expulsion compared to "educational capital punishment"); McClung, *supra* note 28, at 504 ("capital punishment for misdemeanors"). *See generally* E.C. Bolmeier, *supra* note 25, at 136-39 (expulsion causes harm both to the student and to society); E. T. Ladd, *supra* note 35, at 15-16 (same); McClung, *supra* note 28, at 504-07 (same).

detrimental effects, however, are more pronounced when the child who is deprived of an education is handicapped. By definition, handicapped children require a greater concentration of educational and remedial effort in order to progress.[171] Handicapped children, therefore, lose more than their nonhandicapped peers when they are expelled or suspended from school.[172] Moreover, the loss to society, in terms of decreased productivity and increased dependency, is greater when handicapped children are excluded from school.[173]

A perfect solution to this problem may not be possible. The only fair way to create an absolute right to education for handicapped children, regardless of whether they misbehave, would be to extend such a right to all children. The *Mills* court sought to achieve this result by stating that the District of Columbia was required to offer alternative educational placements to all children, handicapped and nonhandicapped alike, who were expelled or suspended from public school.[174] Similarly, a few states have chosen to provide the opportunity for alternate education for all students who are subject to disciplinary exclusion from regular school.[175] As long as education is not consid-

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171. *See* Education for All Handicapped Children Act of 1975, § 601(1), 20 U.S.C. § 1401(1) (1976).

172. *See, e.g.*, Armstrong v. Kline, 476 F. Supp. 583, 593-97 (E.D. Pa.) (extended school year must be provided for handicapped children who would suffer substantial educational setback if IEP interrupted over summer), *aff'd in part, remanded in part*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981); Howard S. v. Friendswood Indep. School Dist., 454 F. Supp. 634, 639 (S.D. Tex. 1978) (consequences of not enjoining the effective expulsion of handicapped boy "could be disastrous, and . . . could destroy [his] chances to lead a normal life").

173. *See* S. Rep. No. 168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1433.

174. Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972). The *Mills* court ordered that, as an element of due process in all disciplinary exclusions, school officials must "describe alternative educational opportunities to be available to the child during the proposed suspension period." *Id.* at 882. Furthermore, a growing body of opinion favors the provision of alternate education for any child expelled or suspended from school. *See, e.g.*, E.C. Bolmeier, *supra* note 25, at 136; Colley, *supra* note 15, at 549; McClung, *supra* note 28, at 527; *Due Process*, *supra* note 29, at 649 n.75, 658.

175. Only five states clearly require that alternative education must be provided for expelled or suspended students of compulsory school age. Conn. Gen. Stat. § 10-233d(c) (1981), *amended by* 1982 Conn. Legis. Serv. 320 (West) (must be offered to children up to age 16; optional ages 16-18); La. Rev. Stat. Ann. § 17:416.2 (West 1982) (must supervise and educate all suspended or expelled students if government allocates funds); Minn. Stat. Ann. §§ 127.27(10), .29(1) (West 1979) (any student suspended over 5 days or expelled); N.Y. Educ. Law § 3214(3)(e) (McKinney 1981) (all students of compulsory school age); 22 Pa. Admin. Code § 12.6(h) (Shepard's 1982) (same). Several other states give the school board discretion to offer alternative education or a rehabilitation program. Cal. Educ. Code § 48907.5 (West 1978 & Supp. 1982) Fla. Stat. Ann. § 228.061(2)(a)(2) (West Supp. 1982); Hawaii Rev. Stat. § 298.11 (1976); Iowa Code Ann. § 299.13 (West Supp. 1982-1983); S.C. Code Ann. § 59-63-250 (Law. Co-op. 1976); Va. Code § 22.1-279 (1980); W. Va. Code § 18A-5-1(a)(e) (Supp. 1982).

ered a fundamental right,[176] however, there can be no general requirement of uninterrupted education for any child, handicapped or not.

CONCLUSION

In determining the circumstances under which handicapped children may be suspended or expelled from school, three important factors must be considered: (1) the EAHCA's mandate that, to the maximum extent possible, handicapped children must be placed and retained in appropriate educational settings; (2) the practical necessity for school officials to be able to exclude disruptive or disobedient students; and (3) the basic principles of fairness and equal protection, which demand that handicapped children not be afforded an unreasonable exemption from sanctions that are commonly imposed upon their nonhandicapped peers. The "cause of misconduct" approach offers a reasonable balance among these three elements. Even so, it is not an entirely satisfactory solution to the problem of expelling and suspending handicapped students.

The "cause of misconduct" approach reflects a belief that only deliberate misconduct should be punished. Thus, this approach requires an investigation of whether particular misconduct by a handicapped child is in fact a manifestation of the handicap. Currently, however, the duty to investigate the cause of particular misconduct may be limited to cases in which the child has been diagnosed previously as handicapped. This limitation fails to account for the fact that misbehavior is sometimes the first observable symptom of an undetected handicapping condition. When that is the case, application of normal disciplinary exclusion procedures can result in the expulsion or suspension of a child for behavior that was actually caused by a handicap. Such a result plainly confounds the basic premise upon which the "cause of misconduct" approach is based. Both the Department of Education and the courts, therefore, should expand the due process requirements in school disciplinary proceedings to include an opportunity for diagnostic evaluation of any seriously misbehaving child while the child continues to receive an education.

Furthermore, the "cause of misconduct" approach, by definition, permits disciplinary exclusion of any child who cannot demonstrate a causal connection between his or her misconduct and a handicapping condition. While this may comport with basic principles of fairness and equal protection, it does so at the cost of punishing some handicapped children by depriving them of the special education necessary to enable them to become self-sufficient, contributing citizens. It should be recognized that the long-term consequence of suspending or

176. See *supra* note 83 and accompanying text.

expelling a handicapped child is that society as a whole is punished by being deprived of the increased productivity and decreased dependency of an optimally trained and educated handicapped population. Unfortunately, short of imposing a nationwide requirement that all children be provided with alternative educational services during periods of disciplinary exclusion, a remedy for this problem may not be available.

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