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# Disciplining Children with Disabilities Under the Individuals With Disabilities Education Act

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# COMMENTS

# DISCIPLINING CHILDREN WITH DISABILITIES UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

For twenty years, the Individuals with Disabilities Education Act[1] (the "IDEA" or the "Act") has provided millions of previously neglected children with disabilities access to "a free appropriate public education."[2] As Congress commences deliberation on legislation to reauthorize the IDEA, educators and legislators will have the opportunity to evaluate and improve on its success.[3] At the heart of the IDEA lie two broad mandates, one substantive and the other procedural. The substantive component of the IDEA affords students with disabilities the right to be educated together with nondisabled students in regular classes, as opposed to segregated special education classes. This concept, commonly known as "mainstreaming,"[4] is articulated in section 1412(5)(B) of Title

1. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1400-1485 (1988 & Supp. V 1993)) (amending Education For All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773).

2. 20 U.S.C. § 1400(c) (Supp. V 1993).

3. *See generally Hearing on the Reauthorization of the Individuals with Disabilities Education Act (IDEA): Hearing Before the Subcomm. on Select Education and Civil Rights of the House Comm. on Education & Labor*, 103d Cong., 2d Sess. 103 (1994) [hereinafter *Reauthorization Hearing of July 19, 1994*] (subcommittee's fifth hearing on the reauthorization of the Individuals with Disabilities Act); *Hearing on the Reauthorization of the Individuals with Disabilities Education Act (IDEA): Hearing Before the Subcomm. on Select Education and Civil Rights of the House Comm. on Education & Labor*, 103d Cong., 2d Sess. 91 (1994) [hereinafter *Reauthorization Hearing of April 28, 1994*] (defining the essential elements that make inclusion work successfully); *Hearing on the Reauthorization of the Individuals with Disabilities Education Act (IDEA): Hearing Before the Subcomm. on Select Education and Civil Rights of the House Comm. on Education & Labor*, 103d Cong., 2d Sess. 74 (1994) [hereinafter *Reauthorization Hearing of March 10, 1994*] (first of a series of hearings on the reauthorization of the Individuals with Disabilities Act).

4. The term "mainstreaming" denotes "the concept of serving the handicapped within the regular school program, with support and personnel and services, rather than placing children in self-contained special classes." Allan G. Osborne Jr., Ed. D., *When Has a School District Met Its Obligation to Mainstream Handicapped Students Under the EHA?*, 58 EDUC. L. REP. 445 (1990) (citing KELLY AND VERGASON, DICTIONARY OF SPECIAL EDUCATION & REHABILITATION (1978)). Mainstreaming should be distinguished from

20 of the IDEA.[5] Specifically, section 1412(5)(B) mandates that states receiving funds under the IDEA must establish:

> [P]rocedures to assure that, to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that . . . removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[6]

Proponents of mainstreaming contend that integrating disabled students with nondisabled students benefits both groups. Through integration, disabled students receive effective educational services and develop social skills, while nondisabled students develop positive attitudes toward their disabled peers.[7] Thus, not only has the IDEA assisted disabled persons to lead more productive lives, but it has also made more nondisabled persons realize the potential for persons with disabilities to make valua-

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"inclusion" which is discussed in Part III of this Comment. *See infra* notes 173-74 and accompanying text; *see also* Board of Educ. v. Holland, 786 F. Supp. 874, 876 n.6 (E.D. Cal. 1992), *aff'd sub nom.* Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994) (noting that "mainstreaming" is distinguished from "inclusion" by the fact that a child may be "mainstreamed" in the regular classroom for parts of the day with the special education class being the primary placement, while "inclusion means a child's primary placement is the regular classroom").

5. This comment will cite to the relevant sections of Title 20 rather than the corresponding sections of the IDEA. The Supreme Court interpreted the IDEA's mainstreaming requirement for the first time in Board of Education v. Rowley, 458 U.S. 176 (1982). Under *Rowley*, a local education agency may provide a disabled child with a free and appropriate public education if the agency (1) follows the procedural guidelines set forth in the Act, and (2) develops an individualized educational program, according to the Act's procedures, which are reasonably designed to provide the child with an educational benefit. *Id.* at 206-07; *see also infra* note 12 (defining local education agency).

6. 20 U.S.C. § 1412(5)(B) (1988 & Supp. V 1993). "[T]his provision sets forth a 'strong congressional preference' for integrating children with disabilities in regular classrooms." Oberti v. Bd. of Educ., 995 F.2d 1204, 1213-14 (3d Cir. 1993) (citations omitted); *see also* Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1403 (9th Cir. 1994) (discussing the mainstreaming requirements of the IDEA); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1045 (5th Cir. 1989) (discussing the mainstreaming requirements of the IDEA); Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983) (discussing the mainstreaming requirements of the IDEA). The regulations implementing section 1412(5)(B) require that children with disabilities be educated in the "least restrictive environment." 34 C.F.R. § 300.550 (1992).

7. *See Reauthorization Hearing of March 10, 1994*, *supra* note 3, at 104-05 (statement of Dorothy K. Lipsky, Director, National Center on Restructuring and Inclusion); Albert Shanker, *Where We Stand on the Rush to Inclusion: Disabled Students* (Jan. 14, 1994), *in* 60 VITAL SPEECHES OF THE DAY 314, 316 (March 1, 1994); Gene I. Maeroff, *Educating the Handicapped: A Decade of Change*, N.Y. TIMES, Dec. 3, 1985, at B14.

ble contributions to society.[8]

The second broad mandate of the IDEA, found in section 1415 of Title 20, consists of detailed procedural safeguards which ensure that students with disabilities are educated in the mainstream environment.[9] A vital, yet controversial component of the IDEA's procedural safeguards is the "stay-put" provision.[10] The stay-put provision emphasizes the IDEA's mainstreaming preference:

> [U]nless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.[11]

The stay-put provision has caused serious concern among educators, legislators, and parents about the ability of local education agencies ("LEAs")[12] to maintain a safe, effective learning environment.[13] Thus, if a child continually engages in disruptive or dangerous conduct in the mainstream classroom and his parents do not consent to a change in

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8. *Reauthorization Hearing of July 19, 1994*, *supra* note 3, at 34 (statement of Boyd W. Boehlje, President, National School Boards Association). *But see* W. N. Bender, *The Case Against Mainstreaming: Empirical Support for the Political Backlash*, 105 EDUCATION 279, 284 (1985) (discussing the negative impact of mainstreaming).

9. 20 U.S.C. § 1415 (1988).

10. 20 U.S.C. § 1415(e)(3) (1988); *see also* Gail P. Sorenson, *The Many Faces of the EHA's "Stay-Put" Provision*, 62 EDUC. L. REP. 833 (1990) (providing a detailed discussion of the stay-put provision).

11. 20 U.S.C. § 1415(e)(3) (1988). "By preserving the status quo ante, the stay-put provision ensures an uninterrupted continuity of education for a disabled child pending administrative resolution." Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223, 1227 (8th Cir. 1994) (citations omitted).

12. 20 U.S.C. § 1401(a)(8) (1988). A local education agency is:

> [a] public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools.

*Id.*

13. *See Reauthorization Hearing of July 19, 1994*, *supra* note 3, at 35-39, 85-86 (statements of Boyd W. Boehlje and Mary Beth Kluge, Ph.D., Director of Special Education, Akron Public Schools); Pete Idstein, *Swimming Against the Mainstream*, 75 PHI DELTA KAPPAN 336, 339-40 (1993); Maeroff, *supra* note 7, at B14; *see also* Honig v. Doe, 484 U.S. 305, 323-25 (1988) (expulsion of disabled students who engaged in dangerous behavior held to be a violation of the IDEA); M.P. v. Grossmont Union High Sch. Dist. 858 F. Supp 1044 (S.D. Cal. 1994).

placement, the stay-put provision mandates that the child remain in the mainstream setting until both the parents and the LEA exhaust all administrative remedies provided by the IDEA.[14] In essence, the courts limit the discretion of school officials by prescribing the types of disciplinary procedures they may use when dealing with a disruptive student with disabilities.[15] Furthermore, when LEAs are compelled to seek judicial relief, they face an onerous legal burden for removing students.[16]

Consider the following two scenarios. Fourteen-year-old Jerry Malone, a student with "borderline" intelligence and a serious learning disability which impaired his ability to comprehend and analyze written and oral expression, was having difficulty behaving appropriately in school.[17] School officials attempted to discipline Jerry for acting as a "go-between" for two nondisabled students who asked him to purchase "speed" for them from another student.[18] After a hearing, the school board decided to expel Jerry.[19] A federal court ruled that such an expulsion violated provisions of the IDEA because Jerry's misconduct was caused by his disability.[20] Six-year-old Jimmy Peters has been diagnosed as "communicatively handicapped" (*i.e.*, able to speak in only disconnected words).[21] Despite the fact that Jimmy threw chairs, toppled desks, and repeatedly

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14. *See* 20 U.S.C.A. § 1415(e)(3)(A) (West Supp. 1995); *see, e.g.*, *Honig*, 484 U.S. at 305 (1988).

15. *See Honig*, 484 U.S. at 325-26, 325 n.8 (1988) (limiting the discretion of school officials with respect to disciplining procedures to the use of study carrels, time-outs, or restricting privileges). Section 1401(a)(1)(A)(i) defines "children with disabilities" as children:

> (i) 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; and (ii) who, by reason thereof, need special education and related services.

20 U.S.C. § 1401(a)(1)(A)(i) (Supp. V 1993).

16. *Honig*, 484 U.S. at 322-27. Where school officials seek injunctive relief to remove a dangerous or disruptive disabled child pending administrative proceedings, the stay-put provision "effectively creates a presumption in favor of the child's current educational placement which school officials can overcome only by showing that maintaining the child in his or her current placement is substantially likely to result in injury to either himself or herself, or to others." *Id.* at 328. Given this standard, the school district in *Honig* agreed that "the availability of judicial relief is more illusory than real . . . ." *Id.* at 326.

17. School Bd. v. Malone, 762 F.2d 1210, 1212 (4th Cir. 1985).

18. *Id.*

19. *Id.*

20. *Id.* at 1218.

21. Don J. DeBenedictis, *Schools See Disabled Protection As Threat To Safety: Under Federal "Stay-Put" Provisions, It's Hard To Remove Dangerous Students*, NAT'L L.J., June 27, 1994, at A9 (discussing *Ocean View Elementary School v. Peters*).

bit and kicked other students, he remained in a mainstream kindergarten class. When school officials attempted to transfer Jimmy to a special education class over his parents' objections, a federal court ruled that removing Jimmy from the regular classroom violated the IDEA's stay-put provision and ordered the school to readmit Jimmy to the mainstream classroom.[22]

Cases like Jerry and Jimmy illustrate the controversy surrounding the IDEA's stay-put provision. The IDEA has created a dual disciplinary system in public schools where nondisabled students are held fully accountable for their actions, but students protected by the IDEA may utilize the stay-put provision to avoid full responsibility for their actions. Critics of the IDEA's stay-put provision argue that it compromises the learning environment in a variety of ways. In the case of a disruptive or physically abusive student, not only must a teacher devote more attention to that student at the expense of all other students (including other disabled or disadvantaged students), but the stay-put provision jeopardizes the safety of all students for an extended period of time.[23] In addition, teachers, frustrated by their limited ability to control their classroom and their inadequate training to deal with children with specialized needs, are resigning because they can no longer control their classrooms or maintain an effective academic environment.[24] Some educators fear that this situation will inevitably cause parents of nondisabled students to remove their children from public schools.[25]

Most importantly, let us not forget the very students whose interests the IDEA is designed to protect. Mainstreaming may not always be the best placement for a student with a disability. If, as in Jerry's case, the disabled student is exploited by other students, questions arise as to the suitability of the mainstream environment for the education of that child. Where the mainstream environment creates the potential for exploitation of the disabled student, does it not follow that such an environment is inappropriate for the disabled student?

Many educators and legislators agree that the IDEA, particularly its stay-put provision, must be modified in order to enable local educators to adequately attend to the educational needs of both disabled and nondis-

22. *Id.* This case is discussed in Part II of this Comment. *See infra* notes 165-69 and accompanying text (discussing *Ocean View Elementary School v. Peters*).

23. *See Reauthorization Hearing of July 19, 1994*, *supra* note 3, at 36-40 (statement of Boyd W. Boehlje) (discussing safety issues under the IDEA).

24. 140 CONG. REC. S10005 (daily ed. July 28, 1994) (statement of Sen. Gorton).

25. Shanker, *supra* note 7, at 315.

abled students.[26] When Congress commenced hearings on the reauthorization of the IDEA in the spring of 1994, many educators and advocates for disabled children took this opportunity to present to Congress their proposals for improving the IDEA.[27] Not surprisingly, one common suggestion was to amend the stay-put provision.[28]

Deliberation on legislation reauthorizing the IDEA did not resume until the fall of 1995. In the interim, Congress recognized the urgent need to remedy the unfavorable effects of the stay-put provision, and in October 1994, temporarily amended the IDEA by enacting the Improving America's School Act of 1994 ("IASA").[29] This statute amended the IDEA's stay-put provision by permitting school officials to exclude students with disabilities for up to forty-five days for bringing a firearm to school.[30] The amendment will remain effective until the enactment of legislation reauthorizing the IDEA,[31] which will presumably include a modified stay-put provision.

While the newly amended stay-put provision restores some authority to school officials, it fails to address the issue of disciplining or temporarily removing a disruptive or potentially dangerous student with disabilities whose misconduct does not include the use of a firearm.[32] Nor does it address the dual disciplinary system now in effect. Future legislation reauthorizing the IDEA must address these issues.

The IDEA's stay-put provision must be amended to permit local school officials to (1) effectively discipline *all* disruptive or dangerous students with disabilities, not just those who bring a firearm to school, and (2) place such students in responsible interim placements outside of the mainstream classrooms, pending resolution of any disagreement between

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26. *See Reauthorization Hearing of April 28, 1994, supra* note 3, at 19-21 (statement of Elizabeth Truly, American Federation of Teachers); *Reauthorization Hearing of July 19, 1994, supra* note 3, at 37-40, 85-86 (statements of Boyd W. Boehlje and Mary Beth Kluge).

27. *See generally Reauthorization Hearing of July 19, 1994, supra* note 3; *Reauthorization Hearing of April 28, 1994, supra* note 3; *Reauthorization Hearing of March 10, 1994, supra* note 3.

28. *See Reauthorization Hearing of July 19, 1994, supra* note 3, at 37-40, 85-86 (statements of Boyd W. Boehlje and Mary Beth Kluge); *Reauthorization Hearing of April 28, 1994, supra* note 3, at 19-21 (statement of Elizabeth Truly, American Federation of Teachers).

29. Pub. L. No. 103-382, 108 Stat. 3518 (to be codified in scattered sections of 20 U.S.C.). This is "[a]n Act to extend for five years the authorizations of appropriations for the programs under the Elementary and Secondary Education Act of 1965, and for certain other purposes." *Id.*

30. 20 U.S.C.A. § 1415(a)(3)(B) (West Supp. 1995).

31. *Id.*

32. 140 CONG. REC. H10119 (daily ed. Sept. 28, 1994) (statement of Mr. Kildee).

the school and the child's parents regarding the child's appropriate placement. However, any change in the law must remain sensitive to the purposes for which the IDEA was originally enacted and should retain the strongest possible safeguards to further these goals.[33] Ultimately, any amendment to the stay-put provision must not create another loophole by which disabled students may again be excluded from the mainstream and be deprived of an appropriate public education.[34]

This Comment will discuss the need to amend the stay-put provision of the IDEA. Following a brief description of the IDEA's statutory framework, this Comment will trace the development of the case law relating to disciplining students with disabilities. Next, this Comment will describe the negative consequences of the limitations placed on the authority of local school officials to discipline disabled students. This Comment concludes with several proposals for refining the IDEA, including amending the stay-put provision in order to better achieve its objectives.

## I. The Statutory Framework

### *A. Substantive Provisions*

In 1975, Congress enacted the Education for All Handicapped Children Act ("EAHCA")[35] which requires that children with disabilities have access to "a free appropriate public education."[36] This legislation followed congressional findings that one million children with disabilities were unilaterally excluded from public schools, and that more than half of the nation's eight million disabled children were not receiving appropriate educational services.[37] Congress was also motivated by two landmark federal court decisions concerning the denial of an appropriate

33. *See* 20 U.S.C. § 1400(c) (Supp. V 1993). According to the Act:

> It is the purpose of this Chapter to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

*Id.*; *see also infra* notes 35-55 and accompanying text (discussing the goals of the IDEA).

34. *See* 140 Cong. Rec. S10009-10 (daily ed. July 28, 1994) (statement of Sen. Harkin).

35. Pub. L. No. 94-142, 89 Stat. 773 (amending the Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 121 (1970)). The EAHCA was renamed the IDEA in 1990. Pub. L. 101-476, Title IX, § 901(a)(1), Oct. 30, 1990, 104 Stat. 1141, 1142.

36. 20 U.S.C. § 1400(c) (Supp. V 1993).

37. 20 U.S.C. § 1400(b)(1)-(4) (1988 & Supp. V 1993).

education to children with disabilities:[38] *Pennsylvania Ass'n for Retarded Children ("PARC") v. Pennsylvania*[39] and *Mills v. Board of Education.*[40] Congress cited these two cases numerous times as sources of inspiration for the legislation.[41]

*Mills*, in particular, demonstrated to Congress that many children with disabilities were excluded pursuant to state statutes or local policies, typically without any consultation or notice to their parents.[42] In *Mills*, school officials had labeled two of the seven "exceptional" plaintiffs as "behavioral problems," and had excluded all seven of them from classes without providing any alternative education to them or any notice or hearing to their parents.[43] After finding that this practice was commonplace, affecting between 12,000 to 18,000 students with disabilities,[44] the District Court for the District of Columbia fashioned a detailed plan whereby students with disabilities would be assured access to a free and appropriate public education.[45]

The IDEA confers upon disabled students an enforceable substantive right to a public education in states which receive federal funding under the Act.[46] A participating state must demonstrate that it "has in effect a

38. S. REP. No. 168, 94th Cong., 1st Sess. 6 (1975), *reprinted in* 2 U.S.C.C.A.N. 1425, 1430 (1975).

39. 334 F. Supp. 1257 (E.D. Pa. 1971). *PARC* involved a suit on behalf of retarded children challenging a state statute which effectively excluded them from public education and training. *Id.* at 1258. The Federal District Court for the Eastern District of Pennsylvania held that the denial of educational services to children with mental retardation contravened the equal protection clause. *Id.* The court issued a consent decree enjoining the state from "deny[ing] to any mentally retarded child access to a free public program of education and training." *Id.*

40. 348 F. Supp. 866 (D. D.C. 1972). In *Mills*, the District Court for the District of Columbia held that the exclusion of children with disabilities from public schools violated the due process clause. *Id.* at 875.

41. *See* CONG. REC. H10119 (daily ed. Sept. 28, 1994) (statement of Mr. Kildee).

42. *Mills*, 348 F. Supp at 868.

43. *Id.* at 869-70.

44. *Id.* at 868.

45. *Id.* at 878-83. It is important to note that in its detailed plan, the *Mills* court preserved the school principal's authority to maintain a safe environment. Whenever the school board proposed to suspend, expel, transfer, or otherwise deny access to regular instruction for more than two days, the school board must afford the student a hearing. *Id.* at 880. Pending the hearing and notification of the decision, no change in placement shall occur, "unless the principal . . . shall warrant that the continued presence of the child in his current program would endanger the physical well-being of himself or others." *Id.* at 883.

46. Honig v. Doe, 484 U.S. 305, 310 (1988) (citing Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)). The IDEA conditions receipt of financial assistance on a state's compliance with the Act's substantive and procedural provisions. *Id.* at 310. At present, all 50 states and the District of Columbia receive federal funding under this statute. *Id.* at 310 n.1.

policy that assures all children with disabilities the right to a free appropriate public education."[47] The IDEA prescribes the criteria with which this policy must comply.[48] The policy must also be reflected in a formal plan detailing the procedures under which the state will implement this policy.[49] The formal plan must be submitted to the Secretary of Education for approval.[50]

Central to the goal of providing each disabled child with an appropriate education tailored to his or her unique needs, is the "individualized education program" ("IEP").[51] An IEP is a comprehensive document which sets forth objectives, policies, and guidelines to govern each student's day-to-day schooling.[52] The IDEA requires that after a multidisciplinary team has evaluated a student and determined that the student has a disability requiring special services,[53] the public school agency must hold a meeting within thirty days to develop an IEP detailing the child's present educational performance, the annual goals and short term objectives for improvement, and the special instruction and related services that will enable the child to meet those objectives.[54] The LEA must review and, where appropriate, revise each child's IEP at least annually.[55]

### *B. Procedural Safeguards*

Congress recognized the importance and necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness. Thus, the IDEA establishes various procedural provisions that guarantee parents both the opportunity to participate in decisions affecting their child's education, and the right to seek review of any decisions they think inappropriate.[56] Section 1415 of the IDEA pro-

47. 20 U.S.C. § 1412(1) (Supp. V 1993).
48. 20 U.S.C. § 1412(2)-(7) (1988 & Supp. V 1993).
49. 20 U.S.C. § 1412(2) (1988 & Supp. V 1993).
50. 20 U.S.C. § 1413(a) (1988).
51. 34 C.F.R. § 300.340 (1995).
52. 34 C.F.R. § 300.341-300.350 (1995).
53. 34 C.F.R. § 300.533(e) (1995).
54. 34 C.F.R. §§ 300.343, 300.346 (1995). The meeting shall include a representative of the school agency, the child's teacher, the child's parent, the child if appropriate, and a member of the multidisciplinary team or some other person with knowledge of the particular evaluation procedures employed and familiar with the results. 34 C.F.R. § 300.344(a)-(b).
55. 20 U.S.C. § 1413(a)(11)-1414(a)(5) (1988 & Supp. V 1993) (providing that participating states must provide procedures for evaluating the effectiveness of each child's IEP at least annually).
56. *See* 20 U.S.C. § 1415 (Supp. V 1993); Stewart R. Hakola, *Suspension, Expulsion, and Discipline of Handicapped Students*, 68 MICH. B.J. 1088 (1989).

vides parents or guardians of children with disabilities a right of access to all school records pertaining to their child, a right to an independent educational evaluation, and a right to written notice prior to any changes or refusals to change their child's identification, evaluation, or placement.[57] In addition, parents must have an opportunity to present complaints to the LEA about their child's IEP.[58] These procedural requirements allow the parents of disabled students to actively collaborate with school authorities in the development of the student's IEP.

If the parents of a student with disabilities object to any aspect of the LEA's provision of an appropriate public education, parents are entitled to a local or state-level "impartial due process hearing" to resolve their complaint.[59] If the initial hearing is conducted by the LEA, as opposed to a state-level agency, either party may seek further state review.[60] Where a formal state appeal or an initial decision by the state-level agency proves unsatisfactory, any aggrieved party may bring a civil action in state or federal court. There, the judge will review the record *de novo* and base his decision on the preponderance of the evidence.[61] The "stay-put" provision governs the placement of a child pending the completion of these often lengthy administrative and judicial review procedures.[62]

## II. Disciplining the Handicapped Student under the Stay-Put Provision

### A. *The Authority to Discipline Students with Disabilities*

It is well established that students facing temporary suspension from a public school possess property and liberty interests that qualify for protection under the due process clause of the Fourteenth Amendment.[63] "Once it is determined that due process applies, the question remains what process is due."[64] In *Goss v. Lopez*, the Supreme Court articulated the degree of procedural protection required before a student may be excluded from school.[65] The necessary protection corresponds to the

57. 20 U.S.C. § 1415(b)(1)(A)-(D) (1988 & Supp. V 1993).
58. 20 U.S.C. § 1415(b)(1)(E) (1988).
59. 20 U.S.C. § 1415(b)(2) (1988).
60. 20 U.S.C. § 1415(c) (1988).
61. 20 U.S.C. § 1415(e)(2) (1988).
62. 20 U.S.C. § 1415(e)(3) (1988).
63. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 573 (1975) (holding that plaintiffs had a property and liberty interest in a public education which qualified for protection under the due process clause of the Fourteenth Amendment).
64. *Id.* at 577 (citing Morrisey v. Brewer, 408 U.S. 471, 481 (1972)).
65. *Id.* at 565.

length of the exclusion.[66]

In *Goss*, nine students suspended from their respective high schools for various incidents of alleged misconduct challenged the constitutionality of a state statute permitting school principals to suspend students for up to ten days without a hearing.[67] The Court held that the state could not deprive the students of the right to a public education without due process.[68] The holding in *Goss* requires that if a school undertakes to suspend a student for ten days or less, the student is entitled to oral or written notice of the charges against him and an opportunity to respond before the suspension occurs.[69] No formal hearing is required. The Court, however, did provide for the immediate removal of students who "pose [ ] a continuing danger to persons or property or an ongoing threat of disrupting the academic process."[70] In such cases, the required notice and hearing must follow as soon as practicable.[71]

The *Goss* Court, however, did not define what procedural due process is required for suspensions of longer than ten days, stating only that "[l]onger suspensions or expulsions . . . may require more formal procedures."[72] What this additional protection includes has been the subject of much litigation involving the disciplining of students with disabilities. While *Goss* articulates the procedural protection afforded nondisabled students subject to disciplinary proceedings, section 1415 sets forth the framework within which handicapped students in the mainstream public school environment may be disciplined.[73] Determining when and how protection for disabled students applies depends on the particular disciplinary action involved. The threshold question is "when do disciplinary exclusions of handicapped students constitute a change in educational placement, thereby invoking the stay-put provision."[74]

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66. *Id.*

67. *Id.* at 568.

68. *Id.* at 573-74. According to the Court:

> On the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. OHIO REV. CODE ANN. §§ 3313.48 and 3313.64 (1972 and Supp. 1973) direct local authorities to provide a free education to all residents between five and 21 years of age, and a compulsory-attendance law requires attendance for a school year of not less than 32 weeks.

*Id.*

69. *Id.* at 581.

70. *Id.* at 582.

71. *Id.* at 582-83.

72. *Id.* at 584.

73. 20 U.S.C. § 1415 (1988 & Supp. V 1993).

74. *See* 20 U.S.C. § 1415(b)(1)(C) (1988); 34 C.F.R. § 300.504 (1994).

"Current placement" refers to the last, uncontested educational program or status prior to the development of a controversy between the school and the parents.[75] A "change in placement"[76] refers to any change in a student's program, services, or education which has a significant effect on the child's learning experience.[77] In order to achieve a change in placement, at a minimum, parental acquiescence is required.[78] Parental objection to a new educational program invokes the stay-put provision, thus preventing the removal of a child with disabilities from the mainstream setting.

In the case of short-term suspensions of ten days or less, students with disabilities are entitled to the same procedural protections as those afforded nondisabled students under *Goss*.[79] In other words, short-term exclusions do not constitute a change in placement for the purpose of section 1415.[80] However, exclusions in excess of ten days constitute a change in placement, invoking the stay-put provision.[81]

In *Stuart v. Nappi*,[82] the District Court for the District of Connecticut considered for the first time the legality of disciplinary procedures in the context of the IDEA (then called the EAHCA). In *Stuart*, a learning disabled student became involved in a school-wide disturbance.[83] When the school district undertook to expel the student, she sought injunctive relief.[84] Although the court was reluctant to intervene in the disciplinary process, it determined that the expulsion violated the stay-put provision.[85] In an effort to refrain from usurping the authority and discretion of school officials, the court took care to note the limited nature of its

75. Sorenson, *supra* note 10, at 834.

76. The IDEA does not define the phrase "change in placement." Honig v. Doe, 484 U.S. 305, 325 n.8 (1988).

77. DeLeon v. Susquehanna Community Sch. Dist., 747 F.2d 149, 153 (3d Cir. 1984).

78. *See* 34 C.F.R. § 300.504(a) (1994) (written notice must be given before change in placement occurs); Sorenson, *supra* note 10, at 834.

79. *See Honig*, 484 U.S. at 325, 325 n.8.

80. *Id.*

81. *Id.* at 326 n.8; *see also* Kaelin v. Grubbs, 682 F.2d 595, 602 (6th Cir. 1982) (holding that expulsion is a change in placement within the meaning of the Act); S-1 v. Turlington, 635 F.2d 342, 348 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981) (holding that expulsion constitutes a change in placement).

82. 443 F. Supp. 1235 (D. Conn. 1978).

83. *Id.* at 1239.

84. *Id.*

85. *Id.* at 1243 ("It is important that the parameters of this decision are clear. This [c]ourt is cognizant of the need for school officials to be vested with ample authority and discretion. It is, therefore, with great reluctance that the [c]ourt has intervened in the disciplinary process . . . .").

intervention and emphasized that children with disabilities were not immune from a school's disciplinary procedures.[86]

The *Stuart* court based its decision on an interpretation of the federal regulations promulgated pursuant to the IDEA.[87] Specifically, the court considered a comment to section 121a.513 of Title 45 of the Code of Federal Regulations ("C.F.R."), which provides: "While the placement may not be changed, this does not preclude [a school] from using its normal procedures for dealing with children who are endangering themselves or others."[88] The court interpreted this comment as prohibiting disciplinary measures that have the effect of changing a child's placement, while simultaneously permitting schools to use normal disciplinary procedures for dealing with "children who are endangering themselves or others."[89] Furthermore, the court supported its interpretation by citing to the comment-to-the-comment,[90] which states: "[A] comment has been added to make it clear that this section would not preclude a public agency from using its regular procedures for dealing with emergencies."[91]

The *Stuart* court concluded that, when necessary, the school could immediately suspend a student for less than ten days and then take the necessary steps to remove the student from the mainstream placement for a longer period, as provided by the procedural safeguards of section 1415.[92] Thus, in the court's view, the school could deal with disruptive behavior within the IDEA's procedural mandates. By recognizing the responsibility and authority of school officials to maintain order, the *Stuart* court established that school officials had the authority to discipline students with disabilities under the protection of the IDEA.

In *Doe v. Koger*[93] the District Court for the Northern District of Indiana recognized the authority of school officials to discipline students with disabilities. *Koger* involved the indefinite suspension of a mildly mentally disabled youth who claimed his suspension was a violation of the IDEA

86. *Id.*
87. *Id.* at 1242.
88. 45 C.F.R. § 121a.513 (1977).
89. Stuart v. Nappi, 443 F. Supp. 1235, 1242 (citing 42 Fed. Reg. 42,473, 42,496 (1977)).
90. *Id.* at 1242.
91. *Id.* at 1242 n.5; 42 Fed. Reg. 42,473, 42,512 (1977).
92. *Stuart*, 443 F. Supp. at 1243. The court suggested that school authorities could take immediate disciplinary action against a disruptive handicapped student, such as suspension. In addition, the members of the child's Planning and Placement Team could seek the long-term remedy of requesting a change in placement of a handicapped student "who . . . [has] demonstrated that . . . [his] present placement is inappropriate by disrupting the education of other children." *Id.*
93. 480 F. Supp. 225, 230 (N.D. Ind. 1979).

and the Fourteenth Amendment's equal protection clause.[94] First, the court held that school authorities could not expel the handicapped student without first determining whether his propensity to disrupt was the result of his handicap.[95] If so, the LEA was required to place the student in a more suitable, restricted school environment.[96] On the other hand, if the reason for the student's misconduct was not his disability, then he could be expelled.[97]

The *Koger* court reasoned that while section 1415 and its accompanying regulations did not provide for the expulsion of handicapped children, it did not prohibit such disciplinary action either.[98] Rather, the IDEA only prohibited expulsion of children whose disability caused the disruptive conduct.[99] The court reasoned that "[f]or an appropriately placed handicapped child, expulsion is just as available as for any other child. . . . [T]he distinction is that, unlike any other disruptive child, before [expulsion], it must be determined whether the handicap is the cause of the child's propensity to disrupt."[100] Therefore, the validity of any disciplinary action resulting in an exclusion equivalent to a change in placement depends upon whether the child's misconduct is caused by his disability.

Next, the *Koger* court rejected the handicapped student's Fourteenth Amendment claim.[101] The court concluded that "[t]o subject the handicapped to the same disciplinary expulsions as other students is not to invidiously discriminate against the handicapped."[102] In addition, the *Koger* court described a school's reservation of the right to expel any student who interfered with the education of other students as a rational disciplinary policy.[103] In the court's view, the rationality of such a policy outweighed any potential invidious discrimination.[104]

The first appellate court case involving exclusion of disabled students

94. *Id.* at 226.
95. *Id.* at 229.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* "While 20 U.S.C. § 1412 and its accompanying regulations require schools to guarantee that handicapped students have the right to be educated, they do not require schools to guarantee that handicapped students be educated." *Id.*
100. *Id.*
101. *Id.* at 229-30.
102. *Id.* at 230. The court did not reach the issue as to whether students with disabilities constitute a suspect class. *Id.*
103. *Id.*
104. *Id.*

was *S-1 v. Turlington*.[105] In this case, seven mentally retarded students were expelled for various acts of misconduct ranging from sexual acts against fellow students to insubordination, vandalism, and the use of profanity.[106] Like the district court in *Koger*, the United States Court of Appeals for the Fifth Circuit in *Turlington* noted that a handicapped child could not be expelled if his handicap was the cause of his disruptive behavior.[107] However, this determination on causation could be made only by a qualified group of individuals with specialized knowledge of disabled children.[108]

Therefore, under *Turlington*, expulsion constitutes a proper disciplinary tool only if there is compliance with the change in placement procedures of the IDEA.[109] Citing the C.F.R. comment relied upon in *Stuart*, the *Turlington* court noted that a school has limited authority to remove a handicapped child who is a danger to himself or to others.[110] The court believed this was an appropriate interpretation of the comment because "nothing in the statute, the regulations, or the legislative history suggests that Congress intended to remove from local school boards . . . their long recognized authority and responsibility to ensure a safe school environment."[111]

*Stuart* and its progeny[112] make it clear that students with disabilities who are a considerable risk to themselves or to others are not immune from disciplinary action. However, such disciplinary action may contravene the purposes of the IDEA by effectively depriving children with disabilities of a public education. Thus, LEAs are obligated to provide educational services during the expulsion period.[113]

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105. 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981).

106. *Turlington*, 635 F.2d at 344, 344 n.1. This case concerned whether nine handicapped students were denied their rights under the Act. At all material times, however, two of the students were not under expulsion orders. *Id.* at 344.

107. *Id.* at 346.

108. *Id.* at 350; *c.f.* School Bd. v. Malone, 762 F.2d 1210 (4th Cir. 1985) (upholding district court's reversal of a determination by committee of special education professionals that a disabled student's sale of illegal drugs was not related to his disability).

109. *Turlington*, 635 F.2d at 350.

110. *Id.* at 348, 348 n.9.

111. *Id.* at 348 n.9.

112. Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978); *see also* Victoria L. v. Dist. Sch. Bd., 741 F.2d 369 (11th Cir. 1984) (stating that the Act was not intended to deprive school boards of their authority and responsibility to ensure a safe school environment); Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982) (stating that as long as the procedural protections of the Act are followed, children with disabilities may be expelled in appropriate circumstances).

113. *Turlington*, 635 F.2d at 350.

The preceding case law seemingly defers to the discretion of LEAs to discipline disruptive disabled students who significantly hinder the education of other students. The United States Supreme Court, however, in *Honig v. Doe*,[114] essentially stripped school officials of their discretionary authority to discipline students with disabilities. In *Honig*, the San Francisco Unified School District ("SFUSD") sought to expel indefinitely two emotionally disturbed students for violent and disruptive conduct related to their disabilities.[115] The Court held that the school board's disciplinary actions against the disruptive students violated the IDEA.[116]

In *Honig*, Respondent John Doe was a student at Louise Lombard School, a development center for disabled children.[117] Doe admitted to choking a fellow student and kicking out a school window while being escorted to the principal's office.[118] After suspending Doe for five days, Doe's principal recommended to the SFUSD Student Placement Committee ("SPC") that Doe be expelled.[119] On the final day of the suspension, the SPC, pursuant to California law at the time, extended Doe's suspension pending the completion of the expulsion proceedings.[120] Furthermore, the SPC notified Doe's mother of its proposal to permanently expel Doe[121] and advised Doe's mother of her right to attend the hearing on the proposed expulsion.[122] Doe immediately sought a "temporary restraining order canceling SPC's hearing and requiring the school to convene an IEP meeting."[123]

The other respondent in *Honig*, Jack Smith, was an emotionally disturbed student who had difficulty controlling his verbal and physical outbursts.[124] Based on the SPC's evaluation, the SFUSD initially placed Smith "in a learning center for emotionally disturbed children."[125] However, Smith's grandparents believed their grandson's "needs would be

114. 484 U.S. 305 (1988).
115. *Id.* at 312.
116. *Id.* at 328.
117. *Id.*
118. *Id.* at 313.
119. *Id.* California law at the time granted school principals the authority to suspend students for up to five consecutive school days, but permitted school districts seeking to expel a student to extend the suspension pending resolution of expulsion proceedings. *Id.* at 313 n.2 (citing CAL. EDUC. CODE ANN. § 48903(a), (h) (West 1978)).
120. *Id.*
121. *Honig*, 484 U.S. at 313.
122. *Id.*
123. *Id.* at 314.
124. *Id.*
125. *Id.*

better served in the public school" environment.[126] Thus, the SFUSD enrolled Smith in a public school, the A.P. Giannini Middle School, in September 1979.[127]

Within a year at Giannini Middle School, Smith began to engage in disruptive conduct.[128] Smith's misconduct included stealing, extorting money from fellow students, and making sexual comments to female classmates.[129] In November 1980, school officials suspended Smith for five days and recommended his exclusion from the SFUSD to the SPC.[130] Thereafter, the SPC extended Smith's suspension indefinitely pending expulsion proceedings.[131] After learning of Doe's action, Smith obtained leave to intervene in the suit.[132]

The SFUSD posited that case law[133] implied a "dangerousness exception" to the stay-put provision, authorizing a school's expulsion of dangerous students.[134] The Court rejected this assertion, finding the language of the stay-put provision "unequivocal" and without exceptions.[135] The Court reasoned that the stay-put provision was "very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school."[136]

Therefore, except for such limited disciplinary procedures as study carrels, time-outs, detentions, or the restriction of privileges, dangerous or disruptive disabled students must "stay-put," unless the LEA and the parents otherwise agree.[137] If an agreement between the LEA and the parents proves unattainable, the LEA can seek judicial relief. However, this option does not attach until the LEA first exhausts the admittedly "pon-

126. *Id.*
127. *Id.*
128. *Id.* at 315.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *See* Jackson v. Franklin County Sch. Bd., 765 F.2d 535, 538 (5th Cir. 1985); Victoria L. v. Dist. Sch. Bd., 741 F.2d 369, 374 (11th Cir. 1984); S-1 v. Turlington, 635 F.2d 342, 348 n.9 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981).
134. *Honig*, 484 U.S. at 317.
135. *Id.* at 323.
136. *Id.*
137. *Id.* at 325-26. Although the Court did not provide a basis for the validity of these types of disciplinary actions, presumably, the Court considered these examples as not carrying "the potential for total exclusion that Congress found so objectionable." *Id.* at 326 n.8.

derous" process and obtains an injunction[138] of administrative remedies.[139] Nevertheless, the LEA can bypass the administrative process by overcoming the presumption in favor of the child's current educational placement. This presumption can be defeated by demonstrating that maintaining the child in his or her current placement is substantially likely to result in injury to either that child or to others.[140] In sum, the *Honig* court interpreted the stay-put provision as effectively creating an "automatic injunction" in favor of the child which, without parental consent, can be overcome only by judicial decree.[141]

The *Honig* decision has had a negative impact on the public education system in several important respects. First, if the student's misconduct stems from his disability and he continually exhibits disruptive behavior or is exploited by other students (as in Jerry's case[142]), a school may not transfer him to an interim placement pending the formulation of a more effective IEP.[143] Second, by failing to address whether an LEA can suspend a student when there is no causal connection between his misconduct and his disability, the Court inadvertently created a loophole whereby a student facing expulsion can claim a disability to bring himself under the protection of the IDEA and avoid immediate disciplinary action.[144] Thus, the Court has created a dual system of disciplinary procedures, whereby disabled students are not subject to the same consequences for their misconduct as nondisabled students.

### *B. The Superior Rights of Students with Disabilities*

Since *Honig*, there have been several other cases illustrating the inability of LEAs to responsibly address the inappropriate placements of disruptive students in a timely manner. In *Hacienda La Puente School District v. Honig*,[145] a seventh-grade boy with academic and emotional problems was expelled for frightening another student with a starter pistol.[146] The child's parents contested the expulsion and requested an ad-

138. *Id.* at 328. *But see id.* at 326 (arguing that "the availability of judicial relief is more illusory than real . . . ").
139. *Id.* at 322, 326.
140. *Id.* at 328.
141. *Id.* at 326.
142. *See supra* notes 17-20 and accompanying text.
143. *See Honig*, 484 U.S. at 328.
144. *Reauthorization Hearing of July 19, 1994*, *supra* note 3, at 37 (statement of Boyd W. Boehlje).
145. 976 F.2d 487 (9th Cir. 1992).
146. *Id.* at 489.

ministrative hearing.[147] A California Special Education Hearing Officer concluded that the student was afflicted with a serious emotional problem and that the actions for which he was expelled were manifestations of this disability.[148] Accordingly, the United States Court of Appeals for the Ninth Circuit held that the LEA wrongly denied him the protection afforded by the IDEA and ordered the reinstatement of the child.[149] In doing so, the court expressly rejected the contention that the protection of the IDEA applied solely to children who had been determined to have a disability *prior to their misconduct.*[150]

While the outcome in *Hacienda* is consistent with the goals of the IDEA,[151] it inadvertently creates a loophole whereby the Act can be manipulated by students to undermine a school's ability to discipline them. In *M.P. v. Governing Board of Grossmont Union High School District*,[152] for example, a high school student in California was suspended pending expulsion hearings for bringing a gun onto school grounds. The student filed for a temporary restraining order against the LEA in the District Court for the Southern District of California, and the LEA filed a counter-claim seeking an injunction to block the student's return to school "because he pose[d] a danger both to himself and to others."[153]

Prior to the incident precipitating the disciplinary actions, there was no indication that the student was disabled in any manner that would require special education.[154] In addition, his family had never requested any evaluation to determine the possible need for special education.[155] Rather, only after the suspension meeting did the student's attorney claim that the student suffered from Attention Deficit Disorder ("ADD") without hyperactivity,[156] which under the IDEA required the school to allow the student to return to school. The court noted that, although there was a possibility that the student was wrongfully manipulating the law in order to gain the protection of the IDEA, the Act did not provide a remedy for such a situation.[157]

147. *Id.*
148. *Id.*
149. *Id.* at 490, 492.
150. *Id.* at 494.
151. *See* 20 U.S.C. § 1400(c) (Supp. V 1993); Honig v. Doe, 484 U.S. 305, 323 (1988).
152. 858 F. Supp. 1044 (S.D. Cal. 1994).
153. *Id.* at 1046.
154. *Id.* at 1045.
155. *Id.*
156. *Id.* at 1049. The school psychologist, however, disputed this diagnosis. *Id.*
157. *Id.* at 1047.

As a preliminary matter, the *Grossmont* court noted that *Hacienda* mandates the application of the IDEA's procedural safeguards, regardless of whether a child has been previously diagnosed as having a disability.[158] Therefore, the defendants faced the burden of demonstrating that returning the student to school was "substantially likely to result in injury either to himself . . . or to others."[159] To determine whether the LEA had satisfied its burden, the district court examined the potential for dangerous behavior inherent in ADD and the history of the student's misbehavior at school.[160] Given the definition of the disorder,[161] it did not appear that harmful behavior was necessarily a symptom of the disorder.[162] In addition, the student no longer had access to the firearm at issue, thereby eliminating the possibility of repeating his previously inappropriate behavior.[163] Although the record indicated that the plaintiff had been a disciplinary problem in the past, given the facts presented, the district court determined that the LEA had not satisfied its burden of proving a substantial likelihood that danger to the plaintiff or to other students would result if the plaintiff were returned to school.[164]

*Hacienda* and *Grossmont* demonstrate the dilemma presented by the stay-put provision. On the one hand, the stay-put provision protects students with disabilities from being wrongfully excluded from a mainstream setting. On the other hand, the provision can undercut school officials' disciplinary authority and their ability to maintain a safe, orderly learning environment.

Another recent California case illustrates the harmful ramifications of *Honig's* injunction principle. *Ocean View Elementary School v. Peters*[165] concerned a six-year-old boy with developmental and communicative disabilities placed in a regular kindergarten class.[166] The school district

158. *Id.*

159. *Id.* at 1049 (quoting Honig v. Doe, 484 U.S. 305, 328 (1988)).

160. *Id.*

161. "[T]his disorder is referred to as 'undifferentiated attention-deficit disorder,' and the predominant feature is the persistence of developmentally inappropriate and marked inattention." *Id.* (citing DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 95 (3d ed. rev. (1987)).

162. *Id.* The sole issue before the court was whether the LEA had satisfied its burden to overcome the stay-put provision, thus the court had to assume the plaintiff was entitled to the procedural protections of the IDEA. *Id.* at 1049 n.8.

163. *Id.* at 1050.

164. *Id.* at 1050-51.

165. DeBenedictis, *supra* note 21, at A9 (discussing *Ocean View Elementary School v. Peters*).

166. *Id.*

charged that the boy had become disruptive: hitting and biting students, kicking staff members, throwing loud temper tantrums, and eventually putting his teacher on a stress-related leave.[167] The school district asked to have the student removed to a special education setting.[168] A state superior court granted the request, but a federal district court ruled against the school two weeks later based on the stay-put provision.[169]

*Ocean View* and *Grossmont*, read in conjunction with *Hacienda*, demonstrate that the stay-put provision compels the California federal district courts to grant injunctive relief, while preventing the judge from reviewing whether such relief is appropriate.[170] These decisions, in effect, undermine the school's disciplinary authority. At the same time, they provide an avenue by which a nondisabled student can circumvent state education laws and gain the protection of a federal statute to which he or she is not entitled.

## III. The Need to Amend the Stay-Put Provision

### *A. The Impact on the Learning Environment*

The IDEA provides a disabled student the right to an appropriate public education equivalent to that provided to nondisabled students. However, nothing in the IDEA requires that the rights of all students to a safe and effective learning environment be sacrificed in the process. Nevertheless, the IDEA's procedural safeguards have evolved into a cumbersome creature that has magnified the concept of due process to the point that it overshadows other educational concerns.[171] The ramifications extend to all aspects of the educational system. Children are sometimes maintained in an environment which does not benefit them and which often detracts from the educational process for other students.[172] In ad-

167. *Id.*
168. *Id.*
169. *Id.*
170. M.P. v. Grossmont Union High Sch. Dist., 858 F. Supp. 1044, 1047-48 (S.D. Cal. 1994). "[A]s this present case suggests, if a child brings a gun to school, a parent or guardian's response could simply be to claim that the child is disabled and therefore bypass the laws' discipline procedures of suspension and expulsion." *Id.* at 1048.
171. *See generally* Idstein, *supra* note 13 (discussing the time-consuming and often frustrating due process procedures necessary to remove a disabled child from a mainstream classroom under the IDEA).
172. *See Reauthorization Hearing of July 19, 1994*, *supra* note 3, at 35-37 (statement of Boyd W. Boehlje); Idstein, *supra* note 13, at 340; John Leo, *Mainstreaming's "Jimmy Problem"*, U.S. News & World Rep., June 27, 1994, at 22. *See generally* Bender, *supra* note 8 (providing a study on the negative effects of mainstreaming on nondisabled students).

dition, teachers become extremely frustrated with the inability of schools to effectively discipline disruptive students, while parents of nondisabled students question the ability of the public school system to provide their children with a quality education. These factors signal the need for a change in the law.

In addition to these negative consequences, the rush toward "full inclusion" further supports the need for reassessment of the stay-put provision. The concept of full inclusion goes far beyond mainstreaming. In mainstreaming, as interpreted by the federal courts, the degree to which students with disabilities are integrated into the regular classroom varies according to the severity of a child's disability and the difficulty of providing him or her with specialized services necessary for an appropriate education.[173] A student's IEP could, for example, include special education classes for part of the day and regular classes for the remainder of the day. Full inclusion, on the other hand, calls for the placement of all students with disabilities into general education classrooms, irrespective of the particular disability and, at times, irrespective of the student's needs or the impact on the learning environment.[174]

Keeping students who cannot control their disruptive behavior in regular classrooms is unfair to them. It is also unfair to the rest of the children in the classroom who are deprived of the opportunity to learn and the right to a "chaos-free" classroom. The current application of the stay-put provision does a disservice to both disabled and nondisabled children. It not only threatens the future success of the IDEA, but also the ability of public schools to provide a free and appropriate education to all students. In order to meet the challenge ahead, Congress must amend the stay-put provision and restore the balance between the interests of disabled and nondisabled students.

### *B. Restoring the Balance*

Students are suspended and expelled from school for the safety of other students. The Court in *Goss* noted that, "[s]uspension is considered

173. Mei-lan E. Wong, *The Implications of School Choice for Children with Disabilities*, 103 YALE L. J. 827, 843-44 (1993); *see also* Abigail L. Flitter, *Civil Rights-A Progressive Construction of the Least Restrictive Environment Requirement of the Individuals with Disabilities Education Act-Oberti ex rel. Oberti v. Board of Education*, 67 TEMPLE L.Q. 371 (1994) (discussing the different tests that have been developed by the United States circuit courts to determine whether a LEA's placement of a disabled student complies with the IDEA mainstreaming requirement).

174. Shanker, *supra* note 7, at 314.

not only to be a necessary tool to maintain order, but also a valuable educational device."[175] Further, "[s]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school."[176] The stay-put provision deprives school officials of this tool, rendering their degree of disciplinary authority negligible.[177]

School officials need greater flexibility in cases where there is a relationship between the disability and the student's misconduct.[178] The authority of school officials to discipline students with disabilities must be restored, while ensuring that such disciplinary actions do not serve as a means of depriving these students a free and appropriate education. Congress must also address the manipulation of the IDEA by students (1) who do not have any history of requesting special education services, (2) who do not have any credible basis for claiming a disability, and (3) whose disability is not related to the misconduct.[179]

The recent controversy surrounding the IDEA's stay-put provision has prompted Congress to enact the Improving America's Schools Act of 1994 ("IASA").[180] Section 314 of the IASA amends the stay-put provision of the IDEA by providing that if a child brings a weapon to school, a school may place that child in an interim alternative educational setting for up to forty-five days.[181] The term "weapon" is defined as a firearm.[182] If, on the other hand, the child's parents request a due process hearing to dispute the interim placement, the child shall remain in the alternative educational placement during the pendency of any proceedings conducted pursuant to the IDEA's procedural mandates.[183] If the child's behavior is determined to be unrelated to his disability, the child must be suspended.[184]

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175. Goss v. Lopez, 419 U.S. 565, 580 (1975).

176. *Id.* at 582.

177. 140 CONG. REC. S10005 (daily ed. July 28, 1994) (statement of Sen. Gorton).

178. *Reauthorization Hearing of July 19, 1994*, *supra* note 3, at 38 (statement of Boyd W. Boehlje).

179. *Id.*

180. Pub. L. No. 103-382, 108 Stat. 3518 (to be codified in scattered sections of 20 U.S.C.).

181. 20 U.S.C.A. § 1415(e)(3)(B)(i) (West Supp. 1995).

182. 20 U.S.C.A. § 1415(e)(3)(B)(iv) (West Supp. 1995). "[T]he term 'weapon' means a firearm as such term is defined in section 921 of Title 18, United States Code." *Id.*

183. 20 U.S.C.A. § 1415(e)(3)(B)(iii) (West Supp. 1995).

184. Section 101 of the IASA, which amends section 14601 of the Elementary and Secondary Education Act of 1965, to be codified at 20 U.S.C. § 8921. This section provides that:

During congressional debates on the IASA, Senator Gorton of Washington introduced an amendment that would have also provided for the exclusion of students engaging in "life-threatening" behavior.[185] Congress, however, chose a more narrowly defined amendment encompassing only students who bring weapons to school. Some legislators feared that the broader Gorton amendment could lead to manipulation by schools to exclude children with disabilities.[186]

Section 314 of the IASA is certainly a step in the right direction. However, it only addresses one issue: disciplining a disabled student who brings a firearm to school. What about the perpetually disruptive student or the student who claims to have a disability after being disciplined for misconduct? Congress must amend the stay-put provision to address these issues.

The Clinton Administration's proposal to reauthorize and improve the Individuals with Disabilities Act currently before Congress addresses some of these issues. A bill embodying the proposal was introduced in the Senate by Senator Harkin on July 26, 1995,[187] and introduced in the House of Representatives by Congressman Kildee on June 30, 1995.[188] The bill proposes to provide hearing officers, as well as courts, the authority to order the placement of a disabled student in an interim alternative setting for not more than forty-five days.[189] In order to exercise this authority, however, the LEA must demonstrate, by substantial evidence, that maintaining the child in his or her current placement is substantially likely to result in injury to him or herself or to others.[190] In such a case, the state or LEA must arrange for an expedited hearing.[191] The bill also changes the term "firearm" to "dangerous weapon" as defined in section

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> Nothing in the Individuals with Disabilities Education Act shall supersede the provisions of section 14601 of the Elementary and Secondary Education Act [20 U.S.C. § 8921] if a child's behavior is unrelated to such child's disability, except that this section shall be interpreted in a manner that is consistent with the Department [of Education's] final guidance concerning State and local responsibilities under the Gun-Free Schools Act of 1994.

Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 314, 108 Stat. 3937 (1994) (codified as amended 20 U.S.C. § 8921 note).

185. 140 CONG. REC. S10004 (daily ed. July 28, 1994) (statement of Sen. Gorton).

186. *Id.* at S10009 (statement of Sen. Harkin).

187. S.1075, 104th Cong., 1st Sess. (1995).

188. H.R. 1986, 104th Cong., 1st Sess. (1995).

189. S. 1075, 104th Cong., 1st Sess. § 205(h)(3)(C)(i) (1995).

190. *Id.*

191. *Id.* at § 205(h)(3)(C)(ii).

930(g)(2) of Title 18 of the IDEA.[192]

The need to restore a greater balance to the IDEA is not limited to amending the stay-put provision. For instance, the problem of a continually disruptive child may just as much be the result of a teacher's lack of necessary skills to deal with such a student, as it is the result of an inappropriate placement.[193] Therefore, the provision offering more control to school officials must be supplemented by other initiatives, such as conditioning federal funding under the IDEA on a participating state's implementation of professional development programs designed to provide its teachers with the necessary skills to manage an integrated classroom.[194]

Under the IDEA, participating states are entitled to forty percent of the excess cost of educating students with disabilities.[195] However, federal funding has never exceeded fourteen percent and is now approximately seven percent.[196] With the increasing demands on school systems, it is extremely difficult to meet the mandates of the IDEA under the current inadequate funding structure.[197]

The lack of funding, in turn, contributes to the continuing shortage of skilled teachers and related services personnel in public schools. In spite of recent cutbacks, classes are continuing to increase in size, while teacher's aides are being eliminated as further cost-saving measures.[198] Further, full inclusion initiatives could potentially place millions of special education students in regular classrooms.[199] In dealing with a dis-

192. *Id.* at § 205(h)(3)(B)(ii).

193. *See Reauthorization Hearing of July 19, 1994*, *supra* note 3, at 31, 41 (statement of Boyd W. Boehlje).

194. *Reauthorization Hearing of April 28, 1994*, *supra* note 3, at 23-25 (statement of Elizabeth Truly); *see also Reauthorization Hearing of July 19, 1994*, *supra* note 3, at 123 (statement of Fred Orelove, Ph.D., Director, American Association of University Affiliated Programs for Persons with Developmental Disabilities) (discussing the need for a strategic plan for personnel development).

195. 20 U.S.C. § 1411(a)(1)(B)(v) (1988 & Supp. V 1993).

196. *Reauthorization Hearing of July 19, 1994*, *supra* note 3, at 83 (statement of Mary Beth Kluge) (stating that funding under the IDEA has never exceeded 14%); *Reauthorization Hearing of April 28, 1994*, *supra* note 3, at 15 (stating that funding under the IDEA has never reached the mandated 40%).

197. *Reauthorization Hearing of April 28, 1994*, *supra* note 3, at 15-16 (statement of Elizabeth Truly).

198. Shanker, *supra* note 7, at 316-17.

199. *Id.* During the 1990-91 school year, more than five million children were receiving special education services. *Reauthorization Hearings of March 10, 1994*, *supra* note 3 at 94 (statement of Dorothy K. Lipsky) (discussing the United States Department of Education, Fifteenth Annual Report to Congress on the implementation of the Individuals with Disabilities Education Act (1993)).

ruptive, disabled student, these factors will test the teacher's ability to maintain order and provide adequate attention to all students.

The present system of personnel development falls short of providing our schools with skilled and competent administrators, teachers, and related service personnel to meet the educational needs of all students.[200] Certain skills are critical to providing a free and appropriate education to students with disabilities. They include child assessment, program planning, communication and consultation with parents, and the ability to serve students with challenging needs in less restrictive educational settings.[201] One solution is to support and expand opportunities for interdisciplinary training for professionals, paraprofessionals, families, and individuals with disabilities. This will in turn result in the delivery of appropriate education and related services.[202]

In short, effective implementation of the IDEA requires the commitment of the federal government to adequately fund the provisions the Act mandates.[203] A mandate of greater integration, without providing the resources to make it work, offers a false promise of improved opportunities for students with disabilities and the real possibility of disruptions in the learning environment for all students. One solution may be to shift some of the resources consumed by the long and cumbersome due process requirements, and instead provide adequate training of teachers and related services personnel.[204] This would ensure a more careful monitoring of disabled students and would allow them to be moved into the mainstream when appropriate.[205] The provision of a quality education to all students requires educational personnel equipped with the skills and resources necessary to face the challenge of the diverse and increasingly complex needs of students.

## IV. Conclusion

The issues involved here are not simple. Many students who are mainstreamed under the IDEA are properly placed and are benefitting greatly

200. *Reauthorization Hearing of July 19, 1994*, *supra* note 3, at 123 (statement of Fred Orelove).

201. *Id.* at 101 (statement of Mary A. O'Brien, Director of Support Services, Monroe County, NY).

202. *Id.* at 123-25, 127 (statement of Fred Orelove) (describing a strategy for implementing a personnel development program).

203. *Id.* at 44 (statement of Boyd W. Boehlje).

204. *Reauthorization Hearing of July 19, 1994*, *supra* note 3, at 28 (statement of Pam Gillet, President, The Council for Exceptional Children); Idstein, *supra* note 13, at 340.

205. Idstein, *supra* note 13, at 340.

from that placement.[206] Nevertheless, all students deserve the benefit of a safe, "chaos-free"[207] learning environment.

Granted, students with disabilities are not the only students who are disruptive in schools. In fact, students with disabilities are more likely to be the victims of violence and disruption than its perpetrators.[208] In addition, there are cases in which a teacher simply lacks the skills necessary to handle an individual child or group of children with special needs. In such cases, students with disabilities may mistakenly be placed in more restrictive environments when a different teacher or a different setting in the mainstream would best meet their needs.[209] The need to protect these children from a segregated educational environment continues to exist today.

The IDEA can work effectively for many students with disabilities, while enriching the classroom experience for all students. However, parents of nondisabled students must be assured that the government is at least equally concerned about the education of their children as it is about the education of children with disabilities.[210] If Congress does not take action to restore the balance between educating disabled and nondisabled students, legislators will risk the creation of a dangerous backlash against the IDEA that could threaten important protection for students with disabilities.[211] Congress must act to insure the safety and education of all students.

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206. *Id.* at 337.
207. Leo, *supra* note 172, at 22.
208. *Reauthorization Hearing of April 28, 1994*, *supra* note 3, at 20 (statement of Elizabeth Truly).
209. Idstein, *supra* note 13, at 340.
210. *Id.*
211. *Reauthorization Hearing of July 19, 1994*, *supra* note 3, at 44 (statement of Boyd W. Boehlje).