AN ANALYSIS OF FEDERAL LAW REGARDING DISCIPLINE FOR STUDENTS WITH DISABILITIES IN THE PUBLIC SCHOOL CONTEXT

by

EDWARD J. SPURKA

(Under the direction of Dr. John Dayton)

ABSTRACT

Children with disabilities have only had the same educational opportunities as other children for 27 years. Federal legislation, such as the Individuals with Disabilities Education Act (IDEA) has provided procedural safeguards to ensure students with disabilities receive a Free, Appropriate, Public Education (FAPE), and protections against unwarranted disciplinary exclusions. Research for this study focused on analyzing federal statutes, regulations, case law, legal commentary, and historical documents in order to track the historical development of the law and to describe the current status of the law regarding discipline for students with disabilities in public schools. Accordingly, the primary data for this study were derived from federal legislation and U.S. Department of Education regulations and interpretations of federal laws, as well as Supreme Court and federal appellate court opinions concerning special education law and public school discipline.

This study analyzed the current status of federal special education law as it applies to discipline of students eligible for special education services in public schools. In the IDEA and the subsequent 1999 Regulations, special education students are afforded more procedural safeguards. Some of the findings in this study include:

- Children eligible for special education services under the IDEA have the right to a free appropriate public education (FAPE) (34 C.F. R. § 300.13).
- The FAPE provision of the IDEA extends to students with disabilities who have been suspended or expelled from the public school system (34 C.F.R. § 300.121).
- School districts are obligated to provide a continuum of alternate placements beginning with the least restrictive environment, in most cases being the regular classroom, and extends to the most restrictive, which is providing instruction and services in a hospital or institutional setting (34 C.F. R. § 300.551).
- Under § 300.520 of the IDEA regulations as affirmed in *The Commonwealth of Virginia Department of Education v. Richard W. Riley* (1997), educational services cannot cease for properly expelled students with disabilities, whether or not the misconduct was a manifestation of the child's disability.

Regulations defining a FAPE, least restrictive environment and IEPs (Individual Education Plans), are relevant to handicapped students during disciplinary proceedings. As school administrators become more knowledgeable in special education law, they will be better equipped to successfully implement school discipline for students who violate school rules and comply with the IDEA and its regulations.

INDEX WORDS: IDEA, special education, discipline, Free Appropriate Public Education, Least Restrictive Environment

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DEDICATION

This paper is dedicated to my wife Leslie, without her love, support, and direction the completion of this work would not have been possible. Being my best friend for the past 17 years was often a tough job. I will always cherish our two biggest lifetime accomplishments: Brittain and Annslie. Thanks for everything!

With Love,

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CHAPTER 1

INTRODUCTION

Purpose of the Study

From its historic roots in *Brown v. Board of Education* (1954) to the 1997 reauthorization of the Individuals with Disabilities Education Act (IDEA), special education law is an increasingly complex compilation of federal and state statutes, regulations, and case law (Dayton and Arnau, 1999). Possibly, the most challenging legal aspect of special education for Local Educational Agencies (LEAs) has been discipline for students with disabilities. Maintaining a safe and orderly educational environment is not a simple task for local school administrators. Although the IDEA and its regulations are intended to be helpful, by virtue of their complexity, local school administrators may fail to provide the necessary procedural safeguards when disciplining students with disabilities.

Special education regulations are rooted in concerns over historical prejudices against students with disabilities, which caused school officials to improperly expel or unilaterally remove these students (Dayton, 1999). Because of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distances from their residence and at their own expense. Education services that were available to these children were often provided in segregated facilities, preventing these children from interacting with their non-disabled peers (Dayton and Arnau, 1999).

Federal legislation provides safeguards to ensure students with disabilities receive a Free, Appropriate, Public Education (FAPE). Only in the last 27 years have children with disabilities had legal rights to the same educational opportunities as other children. Children with disabilities first obtained legal rights of access to education in 1975 with the passage of the federal special education law, P.L. 94-142, the Education for All Handicapped Children Act, (EAHCA) (Osgood and Colon, 1998). P.L. 94-142, later designated as the Individuals with Disabilities Education Act (IDEA), was a significant development in civil rights law (Morrissey, 1998). Due to the IDEA and subsequent 1999 Regulations, students receiving special education services are afforded more positive behavioral interventions, strategies, and supports instead of merely acts of removal by school officials (Conroy, Clark, Gable, and Fox, 1999). Although students with disabilities can be disciplined for rule violations, in the case of long-term suspensions or expulsions, school systems cannot cease educational services in order to comply with the FAPE provision of the IDEA. Section 1412 of the IDEA states that: "A free appropriate public education is available to all children with disabilities residing in the State between the ages 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school."

Zantal-Wiener (1988) found that P.L. 94-142 did not specifically address the disciplinary exclusion of handicapped students. However, regulations defining a FAPE, least restrictive environment, IEP (Individual Education Plan), procedural due process, change of placement, student placement during proceedings, and impartiality are relevant to handicapped students during disciplinary proceedings. Since the enactment and implementation of the Education for All Handicapped Children Act in 1975, children

with disabilities, including children with disabilities that exhibit discipline problems, have gained greater access to a FAPE and have experienced improved educational results (IDEA, 1997).

Prior to enacting the 1997 Amendments to the IDEA, discipline was not even mentioned either within the law or its implementing regulations (Osborne, 1998). On June 4, 1997, President Clinton signed into law the reauthorization of the IDEA (P.L. 105-17). The reauthorization of the IDEA included two important messages that secured the rights of students with disabilities: 1) school systems may not ignore, exclude, segregate, isolate, or provide inferior education to children with disabilities because it is inexpedient and 2) school systems must focus on the needs of children with disabilities- no child can be denied a FAPE, zero-reject (Harwig & Ruesch, 2001).

In addition to ensuring a FAPE for students with disabilities, the reauthorization of IDEA provided some useful guidelines for discipline issues concerning students eligible for special education services. Under the 1997 amendments school officials were permitted to unilaterally remove students who bring weapons or illegal drugs to school or a school function to an Interim Alternative Educational Setting (IAES) for 45 days. The 1997 IDEA amendments also allow school officials to seek help from an independent hearing officer in removing "dangerous students." The IDEA requires school officials to establish by "substantial evidence" that maintaining the current placement of the child is likely to result in injury to the student or other students (Dayton and Arnau, 1999). Hearing officers can then place a student with a disability in an IAES for a renewable 45-day period.

In the 1997 IDEA Amendments, Congress recognized that there is a necessary balance when implementing disciplinary procedures for students with disabilities. Congress realized that school personnel needed increased flexibility in order to deal with safety issues in the public school, and the due process safeguards afforded to children with disabilities needed to be protected in disciplinary proceedings. This careful balance continues today under current IDEA statutes and regulations. However, in most cases the letter of the law does not come into play when parents and school administrators work together and establish clear communication as members of the IEP team. The formal due process procedures of the law only come into play when parents and schools disagree.

School administrators are encouraged to become more knowledgeable in special education law and should approach matters of discipline involving students with disabilities in a conservative fashion and with "best practices" in mind (Zurkowski and Kelly, 1998). School administrators should also seek the support of parents when dealing with discipline and special education placements (Dayton & Arnau, 1999). The purpose of this study is to analyze the current status of federal special education law as it applies to discipline of students eligible for special education services in the public school context. This study will also discuss implications for public educational administrators with regard to disciplining students with disabilities.

Research Questions

This study investigated the following research questions:

1. What is the current status of federal special education law as it relates to discipline for students with disabilities?

2. Based on an analysis of the current status of special education law, what recommendations can be provided for public school administrators concerning discipline and students who receive special education services?

Procedures

Research for this study focused on analyzing federal statutes, regulations, case law, legal commentary, and historical documents in order to track the historical development of the law and to identify the current status of the law regarding discipline for students with disabilities in the public school. Accordingly, the primary data for this study were derived from federal legislation and U.S. Department of Education regulations and interpretations of federal laws, as well as Supreme Court and federal appellate court opinions concerning special education law and public school discipline. Legislation, regulations, and cases involving challenges to discipline for students with disabilities as they relate to the Individuals with Disabilities Education Act were analyzed. The data also include information from law and education journals and historical documents. Relevant cases were identified from law and education journals on discipline and special education law and from citations within court opinions identified earlier in the study. Relevant law and education journal articles, as well as relevant court opinions were also identified through a search of "Lexis-Nexis," "Findlaw," "Thomas" and "ERIC" databases. Historical documents and accounts were identified through a search of the University of Georgia library.

Chapter two is a review of the literature concerning discipline of students with disabilities in the public school system. Included are significant government documents,

such as the federal mandated Individuals with Disabilities Education Act (IDEA) and the Office of Special Education Programs' interpretations of the law's impact on the public school system. Also included are significant U.S. Supreme Court and federal appellate court opinions regarding special education law as it pertains to public school discipline. Each case included, and each document referenced, either deals specifically with the area of discipline in the special education context or has had significant influence on cases in this area. Data in chapter 2 are presented chronologically to demonstrate the historical development of the law concerning discipline of students with disabilities. Also presented are the recent 1999 Regulations of the IDEA that attempt to assist local educational agencies (LEAs) with maintaining discipline within the public school structure and balance this with the FAPE provision of IDEA. Chapter three is an analysis of the current law pertaining to discipline and students with disabilities. IDEA legislation and regulations, Supreme Court and federal appellate court opinions, and other sources will be integrated to form a current composite perspective of the legal status of special education law and discipline. Chapter four concludes with findings, conclusions, and recommendations for school administrators on how to comply with the IDEA in dealing with disciplinary issues concerning students eligible for special education services.

Limitations of the Study

This study is designed to provide accurate information concerning special education law and how it applies to discipline in public schools. The research was limited to published documents involving special education law and discipline and the mandates of the IDEA. This study is not intended to provide legal advice or assistance.

No findings regarding the laws of individual states were made, although cases from state district courts may be cited for clearer understanding of specific issues. Although § 504 of the Rehabilitation Act (1973) follows similar discipline guidelines as current IDEA standards, it was not included in this study. Information about § 504 legislation may be researched through 29 U.S.C. § 794 and relevant opinions offered by the U.S. Office of Civil Rights.

CHAPTER 2

REVIEW OF THE LITERATURE

This chapter presents a chronological account of the development of procedural safeguards for students with disabilities and how these safeguards affect school discipline within the public school system. Part One introduces the concept of "equal protection under the law" and traces the historical prejudices and challenges faced by minorities in the United States up until 1970. Also presented will be how students with disabilities first gained access to the public school system as a result of *Brown v. Board of Education* (1954) and the federal legislation that followed for students with disabilities.

Part Two continues with early legislation for students with disabilities and introduces the landmark federal mandate law, "Education for all Handicapped Children Act", (EAHCA), P.L. 94-142. Also presented is early regular education case law that sets the framework for current regulations concerning school discipline for students with disabilities.

Part Three describes the disciplinary issues for students with disabilities concerning a "change in educational placement" and the "stay-put" provision. The landmark court case *Honig v. Doe* (1988) is included in this part.

Part Four reviews more recent developments in the law relating to discipline for students with disabilities in the public school context. The Reauthorization of the IDEA in 1997 and the Final Regulations to the IDEA published by the Department of Education are included in this section.

Part One: Early Historical Development of Equal Protection and Access Under the Law 1776-1970

The history of the United States diverges from historic precedent in the area of support for individual rights and liberties. The Declaration of Independence (1776) provides the clearest piece of emphasis on individual equality. The drafters of this document called for individual rights and equal protection in the following manner, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness" (U.S. Declaration of Independence, 1776).

The writing and ratification of the U.S. Constitution in 1787 witnessed the continued emphasis on individual freedoms. "To all general purposes we have uniformly been one people each individual citizen everywhere enjoying the same national rights, privileges, and protection" (The Federalist Papers, No.2, 1787). The Fifth Amendment of the U.S. Constitution (1791) states, "no person shall be deprived of life, liberty or property, without due process of law." This sentiment was later reiterated and expanded to the states in 1868 with the Equal Protection Clause of the Fourteenth Amendment. Under this amendment "no *state* shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

On January 1, 1863 President Abraham Lincoln delivered the Emancipation Proclamation that stated the Executive Branch's sentiment in individual rights and

liberties. This address assisted in structuring Amendments Thirteen, Fourteen, and Fifteen, which are also known as the "Civil War Amendments." Lincoln declared:

> I do order and declare that all persons held as slaves within said designated states and parts of states are, and henceforeward shall be, free; and that the Executive and naval authorities of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons (Basler in Hofstadter, 1958, pp. 411-413).

Along with the Fourteenth Amendment in 1868, which applied the equal protection provision to the states, the Thirteenth Amendment (1865) protected the individual rights of former African slaves and prohibited slavery and involuntary servitude except for punishment for crime. The prejudices and discrimination against black minorities were evident in the three-fifths compromise included in Article I of the Constitution. Considering blacks to be less than a complete citizen, taxes were apportioned to the states according to the population where Africans were considered to have the official value of three fifths of other peoples for the values of census.

The nineteenth century was a turbulent one with regard to legal equality under the law in the United States. In 1948, President Truman asked to end Jim Crow laws, which maintained racial discrimination and segregation in the south. Minorities have had a continual fight to gain the individual freedoms guaranteed in the Declaration of Independence and the U.S. Constitution. Although many minority groups have faced prejudices in the historical development of the United States, African Americans have received the most attention from the federal government.

Throughout history, discrimination and social prejudices have been in violation of the equal protection provision of the Fourteenth Amendment. Public school systems have felt the effects of social maladies and have never been exempt from discrimination based on race. *Brown v. Board of Education* (1954) established the right of all children to receive an equal access to an education when it is provided by the state.

The *Brown* case challenged the "separate but equal" doctrine from *Plessy v. Ferguson* (1896). *Plessy* provided a legal basis to have a dual public school system, one for whites and one for blacks. In *Brown*, a black law student applicant challenged the "separate but equal" doctrine and a policy under which he had to attend an out-of-state law school because his home state did not have a "separate" law school for black students. Chief Justice Warren delivered the opinion of the Court:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available to all on equal terms. . .

> . . . We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment. In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation (347 U.S. 483 at 493).

The final findings in the *Brown* decision were:

1) The history of the Fourteenth Amendment is inconclusive as to its intended effect on public education (pp. 489-490).
2) Where a State has undertaken to provide an opportunity for an education in its public schools, such an opportunity is a right, which must be made available to all on equal terms (p. 493).
3) The "separate but equal" doctrine adopted in *Plessy v. Ferguson* has no place in the field of public education (p. 495).

Following the Supreme Court's mandates to desegregate the public schools in *Brown* and the comprehensive Civil Rights Act in 1964, advocates for students with disabilities requested assistance from the government to extend the equal protection provision of the Fourteenth Amendment to students with handicapping conditions.

Several cases were filed nationwide alleging that children with disabilities were being excluded from public schools and were being denied equal protection and due process rights.

In *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania* (1972), a class action suit was filed that claimed students with disabilities were being excluded from the public school system. A federal district court held that mentally retarded students ages six through twenty-one should be provided with access to a free public education, and that children with disabilities should be placed in the regular education setting when possible or in special classes when necessary (LaMorte, 1999).

In *Mills v. Board of Education of the District of Columbia* (1972), the court declared that insufficient funds should not be used as an excuse for disallowing students with disabilities and confirmed the right to an equal opportunity for education. *Mills* extended the *PARC* decision to include all school-age children and held that students with disabilities must be afforded a free and adequate public education. The court reasoned as follows:

> The defendants are required by the Constitution of the United States, the District of Columbia Code, and their own regulations to provide a publicly supported education for these "exceptional" children. Their failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publicly-supported education, and their failure to afford them due process hearing and periodical review, cannot be excused by the claim that there are insufficient funds. Similarly the District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its

> financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child (348 F. Supp. 866, at 876).

Federal legislation regarding children with disabilities was also beginning to be recognized at this time. The first recognition by Congress of the need for categorical aid for the education of students with disabilities was in 1957, P.L. 83-531, the Cooperative Research Act. In 1958, P.L. 85-905, Training of Teachers of the Mentally Retarded provided grants for training leadership personnel in education of the mentally retarded. In 1963, extended support was provided to prepare school personnel to work with all types of disabilities (P.L. 88-164, Mental Retardation Facility and Community Center Construction Act).

In 1965, the Elementary and Secondary Education Act provided financial assistance to states and school districts to develop programs for economically disadvantaged students as well as students with disabilities. This act was amended in 1966 with P.L. 89-313 and P.L. 89-750, Amendments to Title I of the Elementary and Secondary Education Act. Federal grants were now provided for children in state-

operated or state-supported schools for the handicapped and the Bureau for the Education of the Handicapped was established.

This early legislation was the beginning of including all students with disabilities in the public school system. After *Brown v. Board of Education* (1954), students with disabilities had begun to receive assistance from the federal government. Although this legislation provided for "free adequate education" it still did not provide students with disabilities enough support. Legislation in the 1960's, however, provided the framework for Congress to mandate procedural safeguards for students with disabilities and to introduce the following terms: "free appropriate public education" (FAPE), "mainstreaming" and "least restrictive environment."

Part Two: Laying the Foundation for Public School Discipline

1971-1980

In the 1970s the United States public school system started to receive more attention from the courts in two very important areas, protection of rights for students with disabilities and general education school discipline. The Supreme Court and federal appellate courts handled several discipline issues regarding public schools. Although special discipline provisions relating to students with disabilities is not mentioned until the Gun Free Schools Act in 1994 and the 1997 Amendments to the Individuals with Disabilities Education Act, early discipline case-law provides the groundwork for the current discipline regulations. In this section, the historical development of important school discipline case law and continued federal procedural safeguards for students with disabilities begin to come into context.

In 1973, Congress passed P.L. 93-112, § 504 of the Rehabilitation Act, which established that no handicapped-person could be excluded from any program that receives federal funds solely on the basis of the handicapping condition. In 1975 Congress passed the landmark P.L. 94-142 (20 U.S.C. § 1401), the Education for All Handicapped Children Act. Prior to 1990, federal legislation denoted "students with disabilities" as "handicapped students". Before the date of enacting the Education for All Handicapped Children Act of 1975 Congress found that:

1) There are more than eight million handicapped children in the United States today;
2) The special educational needs of such children are not being met;
3) More than one-half of the handicapped children in the United States do not receive appropriate education services which would enable them to have full equality of opportunity;
4) One million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;
5) There are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;
6) Because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

7) Developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

9) It is in the national interest that the Federal Government assist State and local efforts to provide programs that meet the educational needs of handicapped children in order to assure equal protection of the law (20 U.S.C. § 1401, 1975).

Congress also stated that the purpose of the act was to provide a FAPE that emphasized "special education and related services designed to meet their unique needs" (20 U.S.C. § 1401). In the Act, the term FAPE meant special education and related services which:

A. have been provided at public expense, under public supervision and direction, and without charge,

B. meet the standards of the State educational agency,

C. include an appropriate preschool, elementary, or secondary school education in the State involved, and

D. are provided in conformity with the individualized education program (20 U.S.C. § 1401, 1975).

In the Act Congress addressed the placement issues of handicapped students that gave rise to the terms “mainstreaming” and “least restrictive environment.”

> The State has established (A) procedural safeguards as required by section 615, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public and private institutions or other care facilities, 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 the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412, 1975).

Also included in this law was a “stay put” provision that stated:

> During the pendency of any proceedings, conducted pursuant to this section, unless the State or local educational agency and the parents or guardians 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 (20 U.S.C. § 1415, 1975).

Other procedural safeguards afforded by the act included parental right of written prior notice whenever a school agency or unit proposes to initiate a change in the placement of the child or the provision of a FAPE for the child. Also included was the opportunity for parents to present complaints with respect to any matter relating to the

educational placement of the child or the provision of a FAPE to such child. In summary, the Education of All Handicapped Children Act:

- mandated a free, appropriate public education for all handicapped children ages 5-21,
- required individual education plans for each handicapped child,
- mandated that education be in the least restrictive environment,
- included a "stay put" provision that allowed a child to stay in his or her current educational placement while receiving "due process" requirements in consideration for a change in placement, and
- ensured due process protection for students in the placement process.

While Congress was passing legislation to overcome the historical prejudices against students with disabilities, the courts were beginning to become involved in cases concerning school discipline. In January of 1975, the Supreme Court determined that students are afforded certain procedural safeguards when facing school suspensions. In *Goss v. Lopez* (1975), students alleged that they had been suspended from a public school in Columbus, Ohio for up to 10 days without a hearing of any kind and that the suspensions were in violation of the procedural due process clause of the Fourteenth Amendment. The Supreme Court found:

1. Students facing temporary suspensions from public school have property and liberty interests that qualify for protection under the Due Process Clause of the Fourteenth Amendment (pp. 572-576).
2. Due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him

> and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his version. Generally, notice and hearing should precede the student's removal from school, since the hearing may almost immediately follow the misconduct, but if prior notice and hearing are not feasible, as where the student's presence endangers persons or property or threatens disruption of the academic process, thus justifying immediate removal from school, the necessary notice and hearing should follow as soon as possible (pp. 577-584).

In *Goss*, the appellants contended that because there is no constitutional right to an education at public expense, the "Due Process Clause" does not protect against suspensions or expulsions from the public school system. The Court opined that short suspensions and expulsion warrant some procedural safeguards:

> Education is perhaps the most important function of state and local governments, *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), and the total exclusion from the educational process for more than a trivial period, and the certainly if the suspension is for 10 days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so unsubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary (418 U.S. 565, 577).

The court in *Goss* concluded that in suspensions of 10 days or less, a student should receive at the minimum:

1. Oral or written notice of the charges against him;

2. An explanation of the evidence the authorities have that support the charges; and
3. An opportunity to present his side of the story.

After the Supreme Court in *Goss* stated that students were warranted due process safeguards when being suspended from public schools, other cases began to seek the court's opinion concerning substantive constitutional rights and how they pertain to public education. In *Ingraham v. Wright* (1977), students in Florida alleged that they had been subjected to disciplinary corporal punishment that was "cruel and unusual" and in violation of the 8th Amendment. The students also alleged that they did not receive notice of the paddling prior to the punishment, which was in violation of the Due Process Clause of the Fourteenth Amendment. The Supreme Court ruled:

1. The Cruel and Unusual Punishments Clause of the Eight Amendment does not apply to disciplinary punishment in public schools.
2. The Due Process Clause of the Fourteenth Amendment does not require notice and hearing prior to the imposition of corporal punishment as that practice is authorized and limited by the common law (430 U.S. 651, 652).

In *Ingraham* the Supreme Court refused to impose constitutional restrictions on the common law privilege of permitting a local school administrator to inflict "reasonable" corporal punishment. According to the Court, there is no precise test for reasonableness.

In *Hall v. Tawny* (1980), the Court of Appeals for the Fourth Circuit, the court agreed with the *Ingraham* decision in 1977 however, it developed the framework of legal analysis of whether an instance of corporal punishment violated a student's right to substantive due process. The court stated that in certain instances corporal punishment

could invoke due process rights under the 5th and 14th Amendments. The Court established what is called the "shock the conscience test":

> The substantive due process inquiry . . . must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism, rather than a merely careless or unwise excess of zeal, that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience (621 F.2d. at 613).

In 1978, a state court interpreted the federal statutes and their impact on the rights of a school district to discipline a student with a disability. In *Stuart v. Nappi*, the court granted a preliminary injunction to prevent the expulsion proposed by the school district of a student who had a learning disability. The court held that a student has an absolute right under the EAHCA not to have the special education placement changed without the proper procedural requirements under the EAHCA being fulfilled. The court stated:

> Thus, the use of expulsion proceedings as a means of changing the placement of a disruptive handicapped child contravenes the procedures of the Handicapped Act. After considerable reflection the Court is persuaded that any changes in plaintiff's placement must be made by a PPT [Planning and Placement Team] after considering the range of available placements and plaintiff's particular needs (443 F. Supp. 1235, at 1243).

In 1979, a noteworthy case was brought on behalf of a child with a disability who had been expelled from school for misconduct that was determined to be related to his disability. In *Doe v. Koger* the District Court held that the school was prohibited from expelling a student with a disability if the disruptive behavior was related to the

disability. The school was responsible for changing the child's placement to a more educationally appropriate, more restrictive environment before applying expulsion. The Court concluded that if a handicapped child is placed in an appropriate educational environment, expulsion is just as available as for any other child.

Due to civil rights legislation and case law, students with disabilities were granted access to the public school system through the federally mandated law P.L. 94-142. The federal government in this decade sought to support the rights of students with disabilities and determine what procedural safeguards exist for students in the public school system. The due process rights afforded by *Goss v. Lopez* (1975), coupled with other procedural safeguards guaranteed by the IDEA, protect the rights of students with disabilities in disciplinary proceedings. In this time period the court laid some significant groundwork concerning the due process requirements in applying public school discipline.

Part Three: What is Considered a "Change in Educational Placement?"

1981-1990

Due to the federally mandated P.L. 94-142, Education for All Handicapped Children Act (1975) children with disabilities and their right to equal protection of the law received greater attention than ever before from the American Judicial System, especially in the area of procedural safeguards that apply to public education. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982), the U.S. Supreme Court reiterated the enforceable substantive right to public education conferred upon disabled students by the EAHCA. States are required to develop policies assuring all children with disabilities the right to a free appropriate public education (FAPE).

> When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies the requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and service must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade (458 U.S. 176, at 203-204).

One specific area invoking the procedural safeguards afforded by the EAHCA was when local school officials attempted to change the educational placement of a student with disabilities due to inappropriate behavior. A "change in educational placement" challenged the student's right to a FAPE in the least restrictive environment. As school officials attempted to discipline students with disabilities, the courts in this time period continued to afford students with disabilities more procedural safeguards than their non-disabled peers.

In *S-1 v. Turlington* (1981), several students were expelled in the early part of the 1977-78 school year for alleged misconduct. Each student was expelled for the remainder of the 1977-78 school year and for the entire 1978-79 school year. The issue

regarding S-1 was whether the misconduct was a manifestation of the handicapping condition and whether he could be expelled for the misconduct. The defendants claimed that because S-1 was labeled mentally retarded and not seriously emotionally disturbed, his conduct, as a matter of law, could not be a manifestation of the handicapping condition and that he could be expelled.

The 5th Circuit Court held that the school board erred in acting as the determining agent and deciding that the misconduct was not part of the handicapping condition. Since an expulsion is a change in placement, in order to change the placement of a handicapped student, *a trained and knowledgeable* group of people must determine whether the student's misconduct was related to his handicapping condition. Then, only by this group, can a change in placement occur. In this instance the school board lacked the knowledge necessary to make the manifestation determination. The *Turlington* court also found that students with handicapping conditions can be expelled under the EAHCA for only acts of misconduct not related to the disability, but unlike non-handicapped students, complete cessation of educational services during an expulsion is not authorized for a handicapped child. The court found that an expulsion is a change in educational placement and invokes the procedural safeguards of the EAHCA.

A year after *Turlington* another case followed that also raised the issue of whether or not the courts recognized an expulsion as a change in placement, which triggered the procedural safeguards afforded by the EAHCA. In *Kaelin v. Grubbs* (1982), a 15-year-old ninth grader named Michael, identified as "handicapped," was expelled after assaulting his teacher. The Board of Education determined the expulsion without conferring with the special education placement committee and failed to address the

relationship between Michael's handicapping condition and his disruptive behavior. The student alleged that the defendants violated the EAHCA and the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The Court of Appeals for the 6th Circuit affirmed the judgment entered by the district court where it found for Michael:

1. Michael's suspension constituted a change in placement within the scope of the Handicapped Children Act of 1975;
2. The defendants did not provide a due process hearing for Michael within the meaning of the Handicapped Children Act; and
3. The procedures used to expel Michael violated the change in placement procedures of the Handicapped Children Act.

The court in *Kaelin* reiterated from *Turlington* that an expulsion is a change in placement within the meaning of the EAHCA. An expulsion is a "termination of services" which triggers procedural safeguards for handicapped students. The court noted that the EAHCA failed to provide any guidance concerning a disciplinary "change in placement" but found the logical reasoning in several lower court decisions that supported the holding that an expulsion is a change in educational placement within the meaning of the EAHCA (Kaelin v. Grubbs, 1982). (See *Stuart v. Nappi*, 1978; *Sherry v. New York State Education Department*, 1979; and *Doe v. Koger*, 1979).

In summary, *Kaelin* (1982) determined that:

1. Under *Turlington,* a handicapped child is not totally immunized from disciplinary action by the Handicapped Children Act or supporting case law.

2. A handicapped child may be suspended temporarily without employing the procedures in 20 U.S.C. § 1415 (Stuart v. Nappi, 443 F Supp. at 1242, Doe v. Koger, 480 F. Supp. at 229).
3. As long as the procedural protections of 20 U.S.C. § 1415 are followed, a handicapped child may be expelled in appropriate circumstances (S-1 v. Turlington, 635 F.2d at 348, Doe v. Koger, 480 F. Supp. at 229).
4. A handicapped child may not be expelled if his disruptive behavior was a manifestation of his handicap (S-1 v. Turlington, 635 F.2d at 348, Doe v. Koger, 480 F. Supp. at 229).
5. Even during the expulsion period there may not be a complete cessation of educational services (S-1 v. Turlington, 635 F2d at 348).

The Court of Appeals for the Third Circuit continued to deal with the question regarding a "change in educational placement" within the meaning of the EAHCA in *Deleon v. Susquehanna Community School District* (1984). The question in this case was whether a change in transportation for a handicapped student could be considered a change in educational placement, thus triggering the procedural safeguards of the EAHCA. The court found: "Under some circumstances, transportation may have a significant effect on a child's learning experience and constitute a change in educational placement" (747 F.2d. 149, 1984). Although this case did not deal with misconduct or inappropriate behavior, the premise of the case will be important to future elements of a change in educational placement in the implementation of discipline for inappropriate behavior involving public school transportation.

The issue of corporal punishment was revisited in two cases from the Court of Appeals for the Fifth Circuit. In *Woodard v. Los Fresnos* (1984), and *Cunningham v. Beavers* (1988), the Court recited *Ingraham's* holding in 1977 that corporal punishment in concept is not arbitrary, capricious or wholly unrelated to the legitimate purpose of determining educational policy. The Courts agreed in both cases that:

> the infliction of punishment may transgress constitutionally protected liberty interests; but, if the state affords the student adequate post-punishment remedies to deter unjustified or excessive punishment and to redress that which may nevertheless occur, the student receives all the process that is constitutionally due (732 F.2d 1243 at 1245, 1984).

Honig v. Doe

In 1988, the U.S. Supreme Court interpreted the issue of changing the placement of a student with a disability, due to behavior, under the EAHCA. In *Honig v. Doe* (1988), the U.S. Supreme Court interpreted the "stay-put" provision (20 U.S.C. § 1415) of the EAHCA. In *Honig*, school officials of the San Francisco Unified School District (SFUSD) sought to expel two emotionally disturbed students indefinitely for violent and disruptive behavior unrelated to their disability.

In *Honig v. Doe,* the student's current IEP identified him as a socially and physically awkward 17-year old who experienced great difficulty controlling his impulses and anger. Among the goals of the IEP set was "improving his ability to relate to his peers and cope with frustrating situations without resorting to aggressive acts" (pp.15-16). On November 6, 1980, Doe responded to taunts of a fellow student by choking him

with sufficient force to leave abrasions around the child's neck. Doe admitted his misconduct and was subsequently suspended for 5 days. His principal then referred the matter to the SPC (Student Placement Committee) with the recommendation that Doe be expelled. On the day the suspension was to end, the SPC notified Doe's mother that it was proposing to expel her child permanently from school and was therefore extending the suspension until such time of the expulsion hearing. The SPC advised her that she was entitled to attend the hearing on November 25 and that the committee would be recommending expulsion.

After unsuccessfully protesting these actions by letter, Doe brought this suit against a host of local school officials and the State Superintendent of Public Instruction. Doe alleged that the suspension and proposed expulsion violated the EAHCA and sought a temporary restraining order canceling the SPC hearing and requested school officials to convene an IEP meeting. The District Judge granted the requested injunctive relief, which required school officials to provide home tutoring for Doe on an interim basis. Shortly thereafter, the judge issued a preliminary injunction directing defendants to return Doe to his then current education placement pending completion of the IEP. Doe reentered his school on December 15, five and a half weeks, 24 school days, after his initial suspension.

In determining whether the "stay-put" provision prohibited the unilateral removal of students with disabilities, the U.S. Supreme Court stated:

> The language of the [stay-put provision] is unequivocal. It states plainly that during the pendency of any proceedings initiated under the Act, unless the state or local educational agency and the parents or guardian of a disabled child agree,

"the child shall remain in the then current educational placement"…Faced with this clear directive, [school officials ask] us to read a "dangerousness" exception into the stay-put provision…[school officials'] arguments proceed…from a simple, common-sense proposition: Congress could not have intended the stay-put provision to be read literally, for such a construction leads to the clearly unintended, and untenable, result that school districts must return violent or dangerous students to school while the often length [due process] proceedings run their course. **We think it clear, however, that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students…from school.** In doing so, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts…Congress passed the Act after finding that school systems across the country had excluded one out of every eight disabled students from classes. In drafting the law, Congress was largely guided by the recent decisions in [*PARC v. Pennsylvania and Mills v. Board of Education*], both of which involve the exclusion of hard-to-handle disabled students…Our conclusion that [the stay-put provision] means what it says does not leave educators hamstrung. The Department of Education has observed that, "[w]hile the [child's] placement may not be changed [during any complaint proceeding], this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others"…Such

> procedures may include the use of study carrels, timeouts, detention, or the restriction of privileges. More drastically, where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 schooldays. This authority, which respondent in no way disputes, not only ensures that school administrators can protect the safety of others by promptly removing the most dangerous of students, it also provides a "cooling down" period during which officials can initiate IEP review and seek to persuade the child's parents to agree to an interim placement. And in those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day rule respite gives school officials an opportunity to invoke the aid of the courts (pp. 323-326).

The "stay-put" provision from *Doe* declared that a student "shall remain in the then current educational placement" which is the home school while any proceedings take place to change the student's placement. The court also noted that the "stay-put" provision does not leave school officials "hamstrung" to deal with disciplinary issues. The Supreme Court reasoned that while school officials can not unilaterally remove students with disabilities for more than 10 days, they are not precluded from using normal procedures for dealing with children who are endangering themselves or others. Disciplinary procedures may include the use of study carrels, timeouts, detention, or the restriction of privileges. More seriously, where a student poses an immediate threat to himself or others, the student may be suspended for up to 10 school days and if school officials sought to expel the student, the 10 days could be used to get parental support or request the assistance of the courts.

The *Doe* decision clarified a "change in educational placement" and the "stay-put" provision of the EAHCA. During the first 10 days school officials are only required to provide the simple procedural safeguards afforded by *Goss v. Lopez* (1975). After the 10th day of exclusion from school the procedural safeguards of the EAHCA are triggered because the suspension would be considered a change in placement. The student must stay in the current placement while proceedings are conducted to change a student's placement (Honig v. Doe, 1988). The Supreme Court in *Doe* affirmed the educational rights of students with disabilities but also gave some general guidelines to school administrators on how to deal with discipline issues. The "stay-put" provision and "10 day rule" provide significant framework for future case law and federal legislation regarding discipline and students with disabilities.

At the time of the *Doe* decision, lower courts were still involved in cases concerning methods of discipline. In 1989, *Hayes v. Unified School District No. 377*, two middle school siblings were tested and evaluated to be candidates for the Personal/Social Adjustment Program (PSA Program) through the Unified School District No. 377. The children's mother met with school personnel to discuss the placement and signed a form agreeing to her children's placement. During the year both children behaved in a disruptive manner and violated school rules. Consequently, the children were required, at various times, to stay in what was referred to as a 'time-out" room. The room was three-foot by five-foot and the students were required to stay in it for periods of "cooling off."

The Court of Appeals for the 10th Circuit supported the school's use of the time-out room and determined that it was clearly related to providing an appropriate public

education for the students. School officials placed the students in the time-out room for in-school suspensions as a method of punishment, and for short "cool-down" periods to ensure the safety of other students in the classroom. Rather than sending the children home as a form of punishment, the school preferred to keep suspended students at school so that the children being disciplined would not "just roam the streets and goof off" (p. 1527). The *Hayes* court stated that this case involves the close relationship between the use of discipline and in-class instruction in providing a child with a FAPE.

In 1990 another case challenged a school's ability to enforce corporal punishment on a student with a disability. The Fifth Circuit Court, in *Fee v. Herndon*, found that if a student was the victim of excessive corporal punishment, the student himself could bring a common law tort action seeking damages under the protection of the Fourteenth Amendment and not the Eighth Amendment. The *Fee* decision stemmed from earlier fifth circuit opinions in *Cunningham v. Beavers* (1988) and *Woodward v. Los Fresnos Independent School District* (1984). In *Ingraham v. Wright* (1977) the Supreme Court declared that the Eighth Amendment does not apply to disciplinary corporal punishment in public schools and *Hall v. Tawney* (1980) established the legal analysis of whether corporal punishment violated a student's right to substantive due process under the 14th Amendment. Another circuit court case in the late 1980's followed *Tawney's* "shock of the conscience" test, *Cunningham v. Beavers* (1988).

In this time period the procedural safeguards provided to students with disabilities by the EAHCA were being supported throughout the federal court system. Students with disabilities could be suspended for up to 10 days with minimal due process requirements afforded by *Goss v. Lopez* (1975). If school officials sought to suspend students more

than 10 days or permanently expel such students, protections stated by the Supreme Court in *Honig v. Doe* and the procedural safeguards afforded by the EAHCA would be triggered.

P.L. 94-142 provided several procedural safeguards when school officials attempt to change the educational placement of a student with a disability; however, the legislation failed to clearly define any guidelines to determine exactly what constituted an "educational change in placement." Precedent was set by rulings and opinions from the courts during this period, such as *Honig v. Doe*. Federal legislation, at this point, still provided no specific provisions on school discipline for students with disabilities. In 1990, P.L. 94-142 was changed to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476. Congress replaced the term "handicap" with the politically correct term "disability" and thus a "handicapped student" became a "student with a disability." Other new provisions were developed under the IDEA concerning related services and transition services for students with disabilities. However, even with the new regulations, the courts had to continue to rely on judicial precedent on how to deal with issues regarding discipline and students with disabilities.

Part Four: Current Issues Concerning Discipline for Students with Disabilities 1991-2001

As noted in Part Three, federal legislation at this point provided no clear guidelines for school administrators to legally and appropriately discipline students with disabilities in the public school setting. The Education for All Handicapped Children Act of 1975, now referred to as the Individuals with Disabilities Education Act (IDEA), has

been instrumental in the courts' interpretation of a FAPE. The U.S. Supreme Court and the Federal Appellate Courts have established the legal precedent for disciplining regular education students and students with disabilities. The historical case-law presented up to this point lends itself to the current legal ramifications and regulations of today's federal legislation and case-law. Part Four brings the legal analysis of discipline for students with disabilities up to the IDEA regulations published in the Federal Register in 1999.

It has already been discussed that based on a series of court decisions, students with disabilities are guaranteed more procedural safeguards when it comes to suspensions and expulsions from the public school system. In 1992, *Hacienda La Puenta Unified School District of Los Angeles v. Honig*, the court found that students not yet identified as disabled under IDEA before expulsion may be entitled to the procedural protections of the IDEA. The facts of the case are that on November 15, 1989, student B.C. was suspended for frightening another student with a stolen starter pistol. On November 21, the school stated its intention to expel him and extended the suspension pending a December panel hearing. On December 14, 1989, the Hacienda La Puenta Unified School District (HLPUSD) expelled B.C. The decision was affirmed by the Los Angeles Board of Education.

Prior to the suspension, B.C.'s parents expressed concern about his deteriorating academic and social behavior. B.C. was tested by school officials in June of 1989 and was found ineligible for special education services. In September of 1989, the mother presented the school an evaluation from an independent psychologist that requested specialized assistance for B.C. The HLPUSD concluded that he still did not meet the criteria for special education under IDEA. On January 9, 1990, the parents of B.C.

requested an administrative review hearing to determine whether B.C. should have been found eligible for special education services and whether the act he was expelled for was a manifestation of his disability.

The Court of Appeals for the 9th Circuit rejected the school district's allegation that since the student had not previously been identified as disabled, the student's alleged disability may not be raised in an IDEA administrative due process hearing. The court interpreted that the IDEA permits parents to assert due process under the IDEA to challenge the district's failure to identify the student as disabled and conduct a manifestation determination. The court stated that acting contrary to that would allow a school district to frustrate the intent of IDEA by refusing to identify students as disabled.

Another issue in dealing with disciplinary issues in the public school is "mainstreaming" or "inclusion" of students with disabilities. This was addressed in *Oberti v. Board of Education of the Borough of Clementon School District* (1993). In *Oberti*, the Third Circuit Court of Appeals affirmed the decision of the district court that the school system had failed to comply with IDEA in designing an appropriate educational plan that addressed the student's behavioral and academic needs.

In this case Rafael Oberti was an 8-year-old child with Down's syndrome that experienced a number of serious behavioral problems. Rafael had several tamper tantrums, would crawl and hide under furniture, hit and spat on other children, and on several occasions he struck at and hit his teacher and the teacher's aide. The teacher made attempts to modify the curriculum for Rafael, but his IEP provided no plan for addressing his behavioral problems.

At the end of the 1989-90 school year, the Child Study Team proposed a placement in a segregated special education class for children labeled as "educable mentally retarded" for the following year. Since no special education class existed within the Clementon School District, Rafael would have to travel to a different district. The Team's placement decision was based on Rafael's behavioral problems. The Obertis objected to the segregated placement. The Obertis challenged the District's placement and the Administrative Law Judge (ALJ) affirmed the School District's decision that the segregated special education class in the neighboring district was the "least restrictive environment" for Rafael and that Rafael's behavior problems in the kindergarten class were extensive. The ALJ continued that Rafael had received no meaningful educational benefits in the class.

On appeal, the Third Circuit Court of Appeals (995 F.2d.1204) affirmed the district court's conclusion that the School District did not meet its burden of proving by a "preponderance of the evidence" that Rafael could not be educated satisfactorily in a regular classroom with supplementary aids and services. The aids and services include the development of a behavior management plan that addresses the child's deficits. The Court affirmed that the teacher had in fact made attempts to modify the curriculum for Rafael, but his IEP lacked any plan for addressing his behavioral problems. The Court referred to *Daniel R.R. v. State Board of Education* (1989), that even if a child with disabilities cannot be educated satisfactorily in a regular classroom, that child must still be included in school programs with nondisabled students wherever possible.

In setting precedent for "mainstreaming" or "inclusion", *Daniel R.R*. developed an outline of three factors that should be considered by a court in determining whether a child with disabilities can be educated satisfactorily in a regular education setting.

1. Whether the school district has made reasonable efforts to accommodate the child in a regular classroom with supplementary aids and services;
2. A comparison of the educational benefits available in a regular class and the benefits provided in a special education class;
3. The possible negative effects of inclusion on the other students in the class.

The inclusion outline presented in *Daniel R.R.* and the court's opinion in *Oberti* prove to be very significant in changing the education placement of a child due to misconduct or inappropriate behavior. The "mainstreaming' requirements of the IDEA, as stated in *Oberti*, stressed that the school district has an obligation to exhaust supplementary aids and services in order to accommodate a child's behavioral deficits, including behavior management interventions. School Districts must prove by a "preponderance of the evidence" that students can not be educated satisfactorily in a regular classroom with supplementary aids and services before a change of educational placement is recommended (Oberti v. Board of Education of the Borough of Clementon School District, 1993).

In October 1994, the Gun Free Schools Act became the first piece of federal legislation that addressed the discipline of students with disabilities. It was an amendment to the Improving America's Schools Act and modified the requirements concerning the expulsion of students who bring a weapon to school. The term "weapon" means a firearm defined in 18 U.S.C. § 921:

> (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

According to this statute, a student who brings a firearm to school must be expelled for a period of not less than one year. This Act pre-empted the "stay-put" provision of the IDEA and provided for students with disabilities to be placed in an interim alternative placement for not more than 45 days.

> Except as provided in paragraph (3), each State receiving Federal [funds] under this Act shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to school under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis (Gun Free School Zones Act of 1994, 20 U.S.C.§ 921).

When the United States Department of Education was established in 1980 the Office of Special Education Services (OSEP) was created and given the responsibility for administering the Individuals with Disabilities Education Act. OSEP has provided several important memorandums to assist local educational agencies in their interpretation of the IDEA. On November 23, 1994, OSEP issued a policy memorandum to chief state officers to provide them with guidance on the IDEA's least restrictive

environment requirements. *OSEP Memorandum 95-9* explained that the term "inclusion" does not exist in the IDEA and therefore the Department of Education has not defined it. However, according to OSEP, the IDEA does require school districts to place students in the least restrictive environment:

> to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other 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 (20 U.S.C. § 1412, 1990).

OSEP continues in *Memorandum 95-9* that the IDEA does not require that every student with a disability be placed in the regular classroom regardless of individual abilities and needs. The requirement is that school districts must make available a range of placement options, known as a "continuum of alternative placements", to meet the unique educational needs of the students with disabilities. If a student with a disability has behavior problems that are so disruptive in a regular classroom that the education of other children is significantly impaired, the needs of the student with a disability cannot be met in that environment. However, before school districts can make such a determination, they must ensure that consideration has been given to the full range of supplementary aids and services that could be provided to the student in the regular classroom to accommodate the unique needs of the disabled student.

While OSEP was providing guidance on key special education topics, the issue of "an educational change in placement" as it applied to suspensions was again being addressed by the Courts. In *Parents of Student W. v. Puyallup School District* (1994), Student W. received special education services for a deficit in math but also had frequent behavior problems. His parents argued that since his total number of suspensions totaled more than 10 days for the school year, it constituted a "change in placement" and was in violation of the procedural safeguards afforded by the IDEA. This argument was based on *Honig v. Doe* (1988). However, the opinion in *Puyallup* was that the Supreme Court made no finding about the total number of short-term suspensions per semester or per year which was permissible. The parents of Student W. attempted to read the 10-day rule durational limit as a 10-day total limit, but the *Honig* ruling did not support this argument.

The *Puyallup* court opined that a suspension may create a "change in placement" and trigger the procedural safeguards of the IDEA, however not all suspensions constitute a "change in placement." School officials may temporarily suspend students for up to 10 school days when the student poses an immediate threat to the safety of others. The court cited the Office of Civil Rights (OCR) of the Department of Education that noted a series of suspensions that combined exceed 10 days during the school year can create a pattern of exclusion that constitute a significant change in placement. The OCR is another agent of the U.S. Department of Education and has opinions related to the implementation of the IDEA; however, unlike OSEP, it is not directly responsible for the implementation of the IDEA.

The *Honig* Court in 1988 decided that the "stay-put" provision created a presumption in favor of the student's current educational placement, "which school officials can overcome only by showing that maintaining the child in his current placement is substantially likely to result in injury to either himself or to others." In 1994, the Court in *Light v. Parkway*, added an additional requirement to the "stay-put" provision. If a school district is seeking to remove a dangerous student with a disability from his current educational placement, the school district must show:

1. that maintaining the child in that placement is substantially likely to result in injury to himself or others and
2. they have done all that it reasonably can to reduce the risk that the child will cause injury.

In 1995 OSEP released another memorandum, *Memorandum 95-16,* in an effort to clarify some important provisions of the IDEA and the Gun Free Schools Act of 1994. In this memorandum OSEP adopted the OCR's position with respect to § 504. In determining if a series of short-suspensions constitutes a change in educational placement, OSEP noted:

> Factors such as the length of each suspension, the total amount of time that the student is excluded from school, the proximity of the suspensions to each other, should be considered in determining whether the student has been excluded from school to such an extent that there has been a change in placement (22 IDELR at 535).

OSEP in 1995 also affirmed the agencies consistent stand on short-term suspensions and the procedural safeguards that were established in *Goss v. Lopez* in

1975. OSEP stated that a school district was not required to take any specific actions prior to suspending a student with a disability for 10 school days or less. "There are no specific actions under Federal law that school districts are required to take during that time period" (OSEP *Memorandum 95-16*, 1995).

> If the school district believes that further action to address the misconduct and prevent future misconduct is warranted, it is advisable to use the period of suspension for preparatory steps. For example, school officials may convene a meeting to initiate review of the student's current IEP to determine whether implementation of a behavior management plan would be appropriate. If long-term disciplinary measures are being considered, this time also could be used to convene an appropriate group to determine whether the misconduct was a manifestation of the student's disability (*OSEP Memorandum 95-16*, 1995).

Also, according to OSEP in 1995, it has been long established that a student with a disability may be expelled for misconduct that is not related to his disability.

OSEP stated in 1995 that the IDEA restricts the use of time-out, ISS, and other in-school disciplinary methods. OSEP noted that the extent of the disciplinary method's use must be consistent with the student's IEP in order to prevent denying a student with a disability a free appropriate public education (*OSEP Memorandum 95-16*, 1995).

In *Memorandum 95-16* OSEP also offered some opinions from the Department of Education regarding the Gun Free Schools Act. OSEP noted that the Gun Free Schools Act does not have the effect of stripping IDEA eligible students of their rights and procedural protections nor does it exempt such students for weapons offenses addressed by the Act.

> Compliance with the Gun Free Schools Act can be achieved consistent with the requirements that apply to students with disabilities as long as discipline of such students is determined on a case-by-case basis, the requirements of IDEA and Section 504 can be met. IDEA and Section 504 require a determination by a group of persons knowledgeable about the student on whether the bringing of the firearm to school was a manifestation of the student's disability. Under IDEA and Section 504, a student with a disability may be expelled only if this group of persons determines that the bringing of the firearm to school was not a manifestation of the student's disability, and after applicable procedural safeguards have been followed. For students with disabilities eligible under IDEA who are expelled in accordance with these conditions, educational services must continue during the expulsion period (OSEP *Memorandum 95-16*, 1995).

OSEP determined that even when a child with a disability is expelled for misconduct not related to his disability, under the IDEA, educational services must continue. OSEP continued that the IDEA statute does not specify the particular setting in which the educational services must be provided. The setting could include the student's home, an alternative school, or another setting (*OSEP Memorandum 95-16,* 1995).

The OCR issued a memorandum in October of 1996 titled *Discipline of Students with Disabilities in Elementary and Secondary Schools*. Concerning the suspension of students with disabilities, the OCR again reiterated that a series of suspensions, each of which is 10 days or fewer in duration, may constitute a "change in placement." A "change in placement" may occur if the series of suspensions creates a pattern of exclusion. The determination of whether the series of suspensions creates a pattern is

made on a case-by-case basis. Among the factors considered are the length of each suspension, the proximity of the suspensions to each other and the total amount of time the child is excluded from school.

In *Hacienda La Puenta Unified School District of Los Angeles v. Honig* (1991), the court determined that students not yet identified as disabled under IDEA before expulsion may be entitled to the procedural protections of the IDEA. Whether or not the "stay-put" provision applies to a child not yet diagnosed as disabled was questioned in *Rodiriecus L. and Betty H. v. Waukegan School District No. 60 and Alan Brown* (1996).

After stealing cash from school classrooms at night, student Rodiriecus was suspended for 10 days and the principal initiated proceedings to expel him for the remainder of the school year. During the initial suspension, the Illinois Department of Children and Family Services (DCFS) contacted the school board and suggested Rodiriecus might be disabled and suffering from an emotional disorder. DCFS shared that he should undergo a special education evaluation pursuant to the IDEA. Although the local Waukegan School Board initiated a case study, it proceeded to expel Rodiriecus for the remainder of the school year. Rodiriecus asserted that since he was being evaluated for special education services, the school district was prohibited from expelling him from school.

The District Court ordered a preliminary injunction to allow Rodiriecus to return to school and held that that the IDEA required that while Rodiriecus was pursuing administrative remedies to determine whether he was eligible for special education, the school district was barred from expelling him from school. The school district appealed the ruling to the United States Court of Appeals for the Seventh Circuit.

The appeals court reversed the decision of the district court and stated "the IDEA was intended to provide individualized public education for disabled children." The IDEA was not designed to act as a shield to protect disruptive children from routine and appropriate school discipline. The "stay-put" order issued by the district court for the student not yet identified by either the school district or school officials as disabled was pre-mature. In *Honig v. Doe* the Supreme Court stated that the "stay-put" provision "very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students from school". However, if the "stay-put" provision is automatically applied to every student who files an application for special education, then an avenue will be open for disruptive, nondisabled students to forestall any attempts at routine discipline by simply requesting disability evaluation and demanding to stay put.

In *Commonwealth of Virginia Department of Education v. Richard W. Riley* (1997), the issue was addressed concerning a school district's responsibility to provide educational services after a student with a disability has been expelled. In August 1992, Virginia submitted to OSEP its IDEA-B plan for fiscal years 1993, 1994, and 1995. Under Part B of the IDEA, federal funds are provided to participating states for the purpose of helping them to educate disabled children. In order to be eligible for federal assistance, a state must meet numerous criteria prescribed by Congress, one of which is that the state must "assure all children with disabilities the right to a FAPE." OSEP discovered that Virginia had a stated policy under which students with disabilities could be disciplined in the same manner as nondisabled students if the alleged misconduct was unrelated to the student's disability and the student was appropriately placed at the time.

OSEP asserted that even during disciplinary removals that exceed 10 school days, participating states may not cease educational services to students with disabilities.

Virginia refused to amend its policy and argued that if a child's misbehavior is unrelated to his or her disability, IDEA-B does not strip school officials of their right to deprive the student of all educational services by expelling him or her for an extended period of time. Virginia contended that state and local school officials have the right to discipline students as they see fit and pointed out that education is an area "where States historically have been sovereign" (United States v. Lopez, 1995). In *Riley*, Virginia noted that suspension is considered to be a necessary tool to maintain order (Goss v. Lopez, 1975), and that OSEP cannot attempt to compel the state to alter its disciplinary policies by withholding its allotment of federal funds.

The U.S. Court of Appeals for the Fourth Circuit acknowledged that Congress had indeed granted disabled children "more rights" than those enjoyed by nondisabled children. The court upheld the finding by the Secretary of Education that the Virginia policy was in violation of the eligibility requirement for states to "assure all children with disabilities the right to a free appropriate public education" (20 U.S.C. § 1401, 1990). The circuit court stated explicitly that educational services cannot cease for properly expelled students with disabilities, whether or not the misconduct was a manifestation of the disability.

Just after *Riley* stated that educational services cannot cease for students with disabilities upon suspension or expulsion, regardless of manifestation, another case challenged the reasoning of the Fourth Circuit in *Riley*. In *Doe v. Board of Education for the Oak Park River & Forest High School District 200(OPRF)* (1997), the U.S. Court of

Appeals for the Seventh Circuit affirmed the district court's reasoning that the IDEA did not require a school district to continue to provide educational services to a student who has been expelled for reasons unrelated to his disability.

In *Doe v. Board of Education for the Oak Park River & Forest High School District 200(OPRF)* student John Doe was expelled by the OPRF after he was in possession of a pipe and a small amount of marijuana at a school dance. The OPRF expelled Doe for the remainder of the semester asserting that OPRF determined that Doe's conduct was unrelated to his learning disability. The OPRF did not offer Doe an alternative educational placement during the time of his expulsion. The circuit court affirmed that the OPRF did not violate the IDEA when it did not provide alternative services to Doe during his expulsion and noted that:

> Neither the text of § 1412, the legislative history, nor the purpose of the IDEA even suggests, much less mandates with the clarity necessary to confirm that the Congress actually confronted and deliberately decided, that a state must continue to provide education services to disabled children after expulsion for misconduct unrelated to their disability (25 IDELR 1201, 1997).

As the courts continued to be involved in special education issues and interpreting the IDEA, some appellate courts had disagreements as to the meaning of "FAPE" and "least restrictive environment". As the court system was challenged to protect the rights afforded to students with disabilities by the IDEA, they were forced to balance these procedural safeguards with the responsibilities of school officials to maintain discipline in the public school system. The 1997 Individuals with Disabilities Education Act

Amendments would provide some needed clarification on the legal ramifications of discipline for students with disabilities.

P.L 105-17

1997 Reauthorization of the Individuals with Disabilities Education Act

One of the major growing issues surrounding the courts during this time was the issue of discipline for children with disabilities under the Individuals with Disabilities Education Act. In July of 1997 President Bill Clinton signed into law Public Law 105-17, also known as the Amendments to the IDEA or the Reauthorization of the IDEA. The new IDEA built upon the procedural safeguards afforded by the original P.L. 94-142 in 1975. The 1997 IDEA addressed the issue of discipline for students with disabilities and regulated the methods by which schools are allowed to discipline students with disabilities.

In the 1997 IDEA Congress listed some of the following findings prior to reauthorizing the IDEA:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of the enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142)-

(A) the Special educational needs of children with disabilities were not being fully met;

(B) more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity;

(C) 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers;

(D) there were many children with disabilities throughout the United States participating in regular school programs whose disabilities prevented such children from having a successful educational experience because their disabilities were undetected; and

(E) because of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this Act has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this Act has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by-

(A) having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible;

(B) strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

(C) coordinating this Act with other local, educational service agency, State, and Federal school improvement efforts in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where they are sent; and

(D) providing appropriate special education and related services and aids and supports in the regular classroom to such children, whenever appropriate (20 U.S.C. § 1400, 1997).

The purpose of the IDEA 1997 was to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living" (20 U.S.C. § 1400, 1997). Congress also stated in the IDEA that the rights of children with disabilities and their parents needed to be

protected and that State, localities, educational service agencies, and Federal agencies would receive the necessary assistance to provide the appropriate education for all children with disabilities. The IDEA 1997 ensures that educators and parents will have the necessary tools to improve educational results for children with disabilities with appropriate support services.

In order to protect the rights of students with disabilities and their parents, the IDEA 1997 (20 U.S.C. § 1415) provides several procedural safeguards that are related to public school discipline:

(1) an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(2) procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents;

(3) written prior notice to the parents of the child whenever such agency-

(A) proposes to initiate or change; or

(B) refuses to initiate or change; the identification, evaluation, or

educational placement of the child, or the provision of a free appropriate public education to the child;

(4) procedures designed to ensure that the notice required is in the native language of the parents, unless it clearly is not feasible to do so;

(5) an opportunity for mediation

(6) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

(7) procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential)-

(A) to the State educational agency or local educational agency, as the case may be,

(B) that shall include-

(i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;

(ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(iii) a proposed resolution of the problem to the extent known and available to the parents at the time; and

(8) procedures that require the State educational agency to develop a model form to assist parents in filing a complaint.

The 1997 IDEA included disciplinary provisions that corresponded to an "educational change in placement" for a child with disabilities. School personnel may order the change in the placement of a child with a disability-

(i) to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities); and

(ii) to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days if-

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

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

Either before or not later than 10 days after taking a disciplinary action that would result in an educational change of placement-

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

(ii) if the child already has a behavioral intervention plan, the IEP Team

shall review the plan and modify it, as necessary, to address the behavior (20 U.S.C. § 1415, 1997).

In the 1997 IDEA, a hearing officer also has the authority to order a change in educational placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer-

(A) determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others;

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

(C) considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services (20 U.S.C. § 1415, 1997).

In general, the IEP team is given the responsibility to determine the alternative educational setting under § 1415 of the 1997 IDEA. The alternative educational setting in which a child is placed must:

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

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

The 1997 IDEA contains provisions that students with disabilities may be disciplined in the same manner nondisabled students if the misconduct was not a manifestation of the

child's disability. Students with disabilities cannot be disciplined for misconduct that is related to their disability. In 1997 IDEA Congress provided the method of how to review the manifestation determination.

The IDEA addresses the issue of the manifestation determination-

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

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

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

(B) Individuals to carry out the review- A review described in subparagraph (A) shall be conducted by the IEP Team and other qualified personnel.

(C) Conduct of the review- In carrying out a review described in subparagraph (A), the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team-

(i) first considers, in terms of the behavior subject to disciplinary action,

all relevant information, including-

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

(II) observations of the child; and

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

(ii) then determines that-

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

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

(III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action (20 U.S.C. § 1415, 1997).

Section 1415 of the 1997 IDEA states the disciplinary implications for children with disabilities if the behavior is determined not be a manifestation of the disability-

(A) In general- If the result of the review described in paragraph (4) is a determination, consistent with paragraph (4)(C), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be

applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in section 612(a)(1):

In general- A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

(B) Additional requirement- If the public agency initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

Parents have a right to appeal the outcome of a manifestation determination as outlined in § 1415-

(A) In general-

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

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

(B) Review of the decision-

(i) In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has

demonstrated that the child's behavior was not a manifestation of such child's disability consistent with the requirements of paragraph (4)(C).

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

The IDEA includes a "stay-put"provision that was presented earlier in *Honig v. Doe* (1988):

> During the pendency of any proceedings, conducted pursuant to this section, unless the State or local educational agency and the parents or guardians 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 (20 U.S.C. § 1415, 1997).

The 1997 IDEA clarified the "stay-put" provision in the original EAHCA in 1975 in § 1415-

(A) In general- When a parent requests a hearing regarding a disciplinary action described in paragraph (1)(A)(ii) or paragraph (2) to challenge the interim alternative educational setting or the manifestation determination, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(A)(ii) or paragraph (2), whichever occurs first, unless the parent and the State or local educational agency agree otherwise.

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

(C) Expedited hearing-

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

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

In addition to providing disciplinary provisions for students that receive special education services, the 1997 IDEA also addressed the safeguards provided for children not yet eligible for special education services in § 1415-

(A) In general- A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in paragraph (1), may assert any of

the protections provided for in this part if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge- A local educational agency shall be deemed to have knowledge that a child is a child with a disability if-

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

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

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

(iv) the teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency.

(C) Conditions that apply if there is no basis of knowledge-

(i) In general- If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B)) prior to taking disciplinary measures against the child, the child may be

subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

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

Congress addressed the issue of referring students with disabilities to law enforcement authorities.

(A) Nothing in this part shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime (20 U.S.C. § 1415, 1997).

The reauthorization of the Individuals with Disabilities Education Act in 1997 marked only the second time federal legislation addressed the issue of public school discipline for students with disabilities. Along with building upon the procedural safeguards afforded by the original Public Law 94-142 in 1975, the 1997 IDEA regulated the methods state educational agents and local school officials use to discipline students with disabilities.

Along with the reauthorization of the IDEA OSEP published the Department of Education's opinions regarding the Act in *Memorandum 97-7*, *Initial Disciplinary Guidance Related to Removal of Children With Disabilities From Their Current Educational Placement for Ten School Days or Less.* This memorandum emphasized some issues concerning removals of students with disabilities for less than 10 school days and reiterated some of the opinions published in OSEP's *Memorandum 95-16*. *Memorandum 97-7* restated that a school district was not required to take any specific actions prior to suspending a student with a disability for 10 school days or less. OSEP also clarified the issue relating to functional behavior assessments and behavior intervention plans. OSEP stated that school districts do not have to conduct a functional behavior assessment or take any other specific action in connection with removing a student with a disability from his educational placement for 10 school days or less.

As the IDEA was reauthorized in 1997 by Congress and OSEP was involved in its interpretation, the Circuit Courts were involved in new areas of special education relating to school discipline. Included were procedural safeguard issues including eligibility, mediation and appeal procedures and compensation that are warranted by the IDEA. Up until the passage of the 1997 IDEA, the Circuit Courts had been involved in various cases

related to students with disabilities and public school discipline, such as short-term and long-term suspensions, the "stay-put" provision, the manifestation determination, and methods of discipline.

The U.S. Court of Appeals for the Fourth Circuit acknowledged that Congress has indeed granted disabled children "more rights" than those enjoyed by nondisabled children (Commonwealth of Virginia v. Riley, 1997), primarily because of historical prejudices and unilateral removals by school officials. Due to the strength of the procedural safeguards afforded to students with disabilities, more school systems became involved in litigation with parents who wanted to have their children found eligible under IDEA for special education services in order to be protected from public school discipline and parents who wanted compensation because they disagreed with local discipline policies for students with disabilities.

In *Springer v. Fairfax County School District* (1998), the Court of Appeals for the Fourth Circuit upheld the State Review Officer's determination that a student was not disabled after he had been involved in several acts of misconduct and was placed on probation. His parents requested an educational review to determine whether or not the student had a "serious emotional disorder" under the IDEA and whether his behavior was a manifestation of this disability. The school system found him ineligible and the Circuit Court affirmed that the IDEA regulations do not equate mere juvenile delinquency with a "serious emotional disturbance." The *Springer* court stated that other courts have routinely declined to equate conduct disorders or social maladjustment with serious emotional disturbances (see In re Morgan Hill Unified School District, 1992).

The Circuit Courts also addressed the issue of the plaintiff's responsibility to exhaust all administrative remedies in accord with the 1997 IDEA prior to appealing any issues of educational placements, evaluation, or provision of a FAPE to the federal appellate court system. In *Doe v. Board of Education* (1998), the parents of student Doe appealed their son's expulsion to the federal district court after the appeal with the school board was not granted. The federal district court found that Doe had failed to exhaust his administrative remedies through the state of Ohio. Doe argued that the district court erred when it dismissed their special education claims for violations of due process and FAPE. The U.S. Court of Appeals for the Sixth Circuit upheld the federal district court's decision that Doe had failed to exhaust his administrative remedies. If a plaintiff fails to exhaust administrative remedies the federal courts are without jurisdiction to hear the plaintiff's claim [see also, *Dreher v. Amphitheater Unified School District, (1994), Charlie F. Board of Education, (1996), and Covington v. Knox County School System, (2000)*].

On October 22nd, 1997, the Department of Education (through the Office of Special Education and Rehabilitative Services) published a notice of proposed rulemaking in the Federal Register to implement changes made by the IDEA Amendments of 1997. Over 6,000 public comments were received that revealed that school administrators and teachers had concerns about their ability to preserve school safety and order and at the same time educate children with disabilities (United States General Accounting Office, 2001).

1999 IDEA Final Regulations

In response to the Department of Education's invitation to comment on the notice of proposed rulemaking in the Federal Register in 1997, one of the major areas of concern in public comment was the issue of discipline for children with disabilities under the IDEA. About 6,000 individuals including parents, teachers, related service providers, individuals with disabilities, and public agencies and organizations submitted written and oral comments. The 1999 IDEA regulations:

> reflect very serious consideration of the concerns of school administrators and teachers regarding preserving school safety and order without unduly burdensome requirements, while helping schools respond appropriately to a child's behavior, promoting the use of appropriate behavioral interventions, and increasing the likelihood of success in school and school completion for some of our most at-risk students (OSEP, 64 Fed. Reg. 12413).

As a part of the effort of the federal government to strengthen the opportunities for America's six million students with disabilities, the U.S. Department of Education published the final regulations to implement the Individuals with Disabilities Education Act Amendments of 1997 on March 12, 1999 in the Federal Register. In the press release, Judith E. Heumann, Assistant Secretary for Special Education and Rehabilitative Services (OSERS) said, "We have prepared a user-friendly package of regulations. They are designed to help parents, teachers, and school administrators understand the federal expectations for educating children with disabilities under the law." Also included with the regulations was a discussion by the Department of Education on several important issues regarding discipline and students with disabilities (64 Fed. Reg. 12406-12672).

The 1999 Regulations affirmed that all children with disabilities aged 3 to 21 residing in the State have a right to a FAPE, including children with disabilities who have been suspended or expelled from school [34 C.F.R. § 300.121(a)]. School systems are not required to provide educational services to students with disabilities that have been removed from his or her school for 10 school days or less in that school year, if services are not provided to a child without disabilities who has been similarly removed [34 C.F.R. § 300.121(d)]. The final regulation also clarified the procedural methods for parental litigation for discipline remediation and appeals. The regulations for these issues are stated in §§ 300.506-300.514, §§ 300.525-300.526 and § 300.528 of the 1999 IDEA regulations.

The 1999 regulations provided the following guidelines concerning discipline for students with disabilities under § 1415 of the IDEA.

(1) A change of educational placement occurs under the IDEA if

(A) The removal is for more than 10 consecutive school days [34 C.F.R. § 300.519(a)]; or

(B) The child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another [34 C.F.R. § 300.519(b)].

(2) School authorities and Hearing Officers may change the educational placement of a child with a disability.

(A) School officials have the authority to

(i) remove children with disabilities to the extent removals would be applied to children without disabilities, the removal of a child with a disability from the child's current placement for not more than 10 consecutive school days for any violation of school rules, and additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under § 300.519(b) [34 C.F.R. § 300.520(a)(1)(i)].

(ii) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days, if-

(a) the child carries a weapon to school or to a school function under the jurisdiction of a State or a local educational agency [34 C.F.R. § 300.520(a)(2)(i)] ; or

(b) the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local

educational agency [34 C.F.R. § 300.520 (a)(2)(ii)].

(B) Hearing Officers under § 300.521 may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer, in an expedited due process hearing-

(i) determines that the public agency has demonstrated by **substantial** evidence (*as used in this section, the term substantial evidence means beyond a preponderance of the evidence)[34 C.F.R. § 300.521(e)], that maintaining the current placement of the child is substantially likely to result in injury to the child or to others [34 C.F.R. § 300.521(a)];

(ii) considers the appropriateness of the child's current placement [34 C.F.R. § 300.521(b)];

(iii) considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services [34 C.F.R. § 300.521(c)]; and

(iv) determines that the interim alternative educational setting that is proposed by school personnel who have consulted with the child's special education teacher, meets the requirements of § 300.522(b) [34 C.F.R. § 300.521(d)].

(3) In order to provide a FAPE, after a child with a disability has been removed from his or her current educational placement for more than 10 school days in the same school year, during any subsequent removals the school officials must provide services to the extent required to meet the goals and objectives of the student's IEP [34 C.F.R. § 300.520(a)(1)(ii)].

(4) Either before and not later than 10 business days after either first removing the child for more than 10 school days in a school year or commencing a removal that constitutes a change in placement under § 300.519:

(A) The local educational agency shall convene an IEP meeting to develop a behavior assessment plan if one had not been previously completed [34 C.F.R. § 300.520(b)(1)(i)] or

(B) If the child already had a behavior intervention plan, the IEP team shall meet to review the plan and modify the plan as necessary to address the behavior [34 C.F.R. § 300.520(b)(1)(ii)].

(5) Definitions for

(A) Controlled Substances [34 C.F.R. § 300.520(d)(1)] are identified through Schedules I, II, III, IV, and V in section 202(c) of the Controlled Substance Act [21 U.S.C. 812(c)] and

(B) "dangerous weapon" [34 C.F.R. § 300.520(d)(3)] is identified under paragraph (2) of the first subsection (g) of § 930 of title 18, United States Code:

> The term "dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that

is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length.

(6) A change in educational placement for disciplinary removals occurs if

(A) The removal is for more than 10 consecutive school days [34 C.F.R. § 300.519(a)]; or

(B) The child is subjected to a series of removals that constitute a pattern because they accumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another [34 C.F.R. § 300.519(b)].

(7) The interim alternative educational setting referred to in § 300.520(a)(2) must be determined by the IEP team [34 C.F.R. § 300.522(a)]. Additional requirements include that for any interim alternative educational setting in which a child is placed under §§ 300.520(a)(2) or 300.521 must:

(A) Be selected so as to enable the child to continue to progress in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP [34 C.F.R. § 300.522(b)(1)]; and

(B) Include services and modifications to address the behavior described in §§ 300.520(a)(2) or 300.521, that are designed to prevent the behavior from recurring [34 C.F.R. § 300.522(b)(2)].

(8) The IEP team and other qualified personnel must determine whether or not the behavior of the child was a manifestation of the child's disability if a disciplinary removal constitutes a change in placement [34 C.F.R. § 300.523(a)] no later than 10 school days after disciplinary action. [34 C.F.R. § 300.523(2)].

(A) If the result of the review described in § 300.523 is a determination, consistent with § 300.523(d), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in § 300.121(d). [34 C.F.R. § 300.524(a)]

(B) If the result is that the behavior was a manifestation of the disability then the IEP team must take immediate steps to remedy the deficiencies in the child's placement, or the IEP or the implementation of the IEP [34 C.F.R. § 300.523(f)].

(9) During any hearings or appeals regarding disciplinary action challenging the interim educational placement or the manifestation determination, the child must remain in the current education placement. If the current

placement is the interim alternative education setting then pending the decision of the hearing or if the educational agency or the parents agree otherwise, the current placement would be the interim alternative educational setting. [34 C.F.R. § 300.526(a)]

(10) Students not yet eligible for special education services that have engaged in behavior that violated any rule or code of conduct of the local educational agency may assert protections under IDEA if the local educational agency had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred (34 C.F.R. § 300.527).

(11) The 1997 IDEA nor the final regulations prohibit an agency from reporting a crime by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability (34 C.F.R. § 300.529).

Accompanying the regulations OSEP offered an opinion regarding in-school suspension. According to the Department of Education, a day of ISS would count as a day of suspension unless the following three conditions are met:

(1) The student is afforded the opportunity to continue to appropriately progress in the general curriculum;

(2) The district continues the services specified in the student's IEP; and

(3) The student continues to participate with nondisabled students to the same extent as he does in his current placement (64 Fed. Reg. 12619).

In January of 2001 OSEP issued another document by Judith Heumann (Assistant Secretary of OSERS) and Kenneth Warlick (Director, OSEP) to assist with interpreting the 1997 IDEA called *Prevention Research and the IDEA Discipline Provisions: A Guide for School Administrators*. In this document, OSEP described the major legal requirements under IDEA and stated "Congress recognized that in certain instances, school personnel needed increased flexibility to deal with safety issues while maintaining needed due process protections of the IDEA".

The legal requirements under the law, according to OSERS and OSEP in January 2001 are:

- School personnel can remove a student with a disability for 10 consecutive school days or less at a time for a violation of the school code of conduct (to the same extent applied to children without disabilities). School personnel can immediately remove for up to 10 consecutive school days or less, the same child for separate incidences of misconduct.
- School personnel can also order a change of placement of a child with a disability to an appropriate interim alternative educational setting for up to 45 days for possession of weapons or drugs or the solicitation or sale of controlled substances while at school and school functions.
- If school personnel believe that a child is dangerous to him or herself or others, they can ask a hearing officer in an expedited due process hearing to remove a student to an interim alternative educational setting for up to 45 days.

- 45-day interim alternative educational placements can be extended in additional 45-day increments if the hearing officer agrees that the child continues to be substantially likely to injure himself or herself or others if returned to his or her prior placement.
- School personnel can remove a child with a disability, including suspending or expelling for behavior that is not a manifestation of the child's disability, to the same extent as is done for children without disabilities, for the same behavior.
- School personnel can report crimes to appropriate law enforcement and judicial authorities.
- School personnel can always ask a court for a temporary restraining order in order to protect children or adults from harmful behaviors.

Along with the 1999 Regulations to the IDEA, OSEP delivered an opinion regarding bus suspensions:

> Whether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child's IEP. If the bus transportation is a part of the child's IEP, a bus suspension would be treated as a suspension under § 300.520 unless the public agency provides the bus service in some other way, because that transportation is necessary for the child to obtain access to the location where all other services will be delivered. If the bus transportation is not part of the child's IEP, a bus suspension would not be a suspension under § 300.520. In those cases, the child and his or her parents would have the same obligation to get to and from school as a nondisabled child who had been suspended from the bus. However, public agencies should attend to whether the behavior on the bus is similar to behavior in a classroom that is

addressed in an IEP and whether the behavior should be addressed in the IEP or behavioral intervention plan for the child (64 Fed. Reg.12619).

The 1999 IDEA regulations affirmed that students with disabilities receive additional protections from disciplinary proceedings in the public school system. Public Law 107-7, Strengthening and Improvement of Elementary and Secondary Schools: Gun Possessions, 2001, provides that each state shall have a law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to school. Section (c) of this Act is titled *Special Rule* and states "The provisions of this section shall be construed in a manner consistent with the Individuals with Disabilities Education Act."

In *Prevention Research and the IDEA Discipline Provisions: A Guide for School Administrators*, 2001, OSEP stated that "punishment and exclusion remain the most common responses to problem behavior by students" and that "reprimands, detentions, and exclusion are documented as ineffective strategies for improving the behavior of children in schools." OSEP continues that positive behavior support is an approach to discipline and intervention that is proving both effective and practical in schools and is effective by utilizing functional behavior assessments and behavior intervention plans. The IDEA regulations in § 300.346 emphasize that the IEP team must consider appropriate strategies including positive behavioral interventions to address behavior that impedes the learning of the student with a disability. In administering a school district's discipline cycle or method of discipline, school officials must be consistent with a child's IEP and the behavior interventions listed.

The 1997 IDEA regulations and the Office of Special Education Programs (OSEP) have provided the current interpretations of the law concerning public school discipline as it relates to students eligible for special education services. While local school administrators work to maintain a safe educational school environment, this effort must be balanced with complying with the procedural safeguards afforded by federal legislation for students with disabilities.

CHAPTER 3

AN ANALYSIS OF THE CURRENT STATUS OF SPECIAL EDUCATION DISCIPLINE LAW

Chapter three is an analysis of the current law pertaining to discipline and students with disabilities. The IDEA and its regulations, Supreme Court and federal appellate court opinions, and other sources will be integrated to form a composite current perspective of the legal status of special education law and discipline. Information in this chapter is presented in a topical format to provide a clearer presentation of how the current laws and regulations regarding discipline pertain to students with disabilities in the public school context.

Free Appropriate Public Education (FAPE)

The 1999 IDEA regulations affirmed that all children with disabilities aged 3 to 21 residing in the State have a right to a free appropriate public education, (FAPE). These services are outlined in 34 C.F.R. § 300.13:

> As used in this part, the term free appropriate public education or FAPE, means special education services that-
>
> (a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the State Educational Agency (SEA), including the requirements of this part;

(c) Include preschool, elementary school, or secondary school education in the State; and

(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.340 – 300.350.

The 1999 IDEA regulations state in § 300.121 titled "Free appropriate public education" that all children with disabilities aged 3 to 21 residing in the State have a right to a (FAPE), including children with disabilities who have been suspended or expelled from school. The IDEA regulations clarify in § 300.121(d)(1) that for removals for 10 school days or less in a school year a public agency is not required to provide any services if services are not provided to a child without disabilities who has been similarly removed. The procedural safeguards outlined in the FAPE provision of the IDEA are however, triggered when students with disabilities are removed for more than 10 cumulative days in a school year or when removals constitute a change of placement.

After the 10th cumulative day of suspension in a school year, whether or not the removals constitute a change of educational placement, a FAPE still must be provided to a student with a disability. Upon removal for the 11th cumulative day, school officials, in consultation with the student's special education teacher, determine the services that are appropriate under § 300.121(d)(2)(i) of the IDEA regulations. Removals that constitute a change of educational placement will trigger certain procedural safeguards of the IDEA, such as conducting functional behavior assessments and manifestation determinations, and developing behavioral intervention plans.

The procedures regarding a FAPE under specific types of disciplinary removals are included in the following sections of this chapter titled “Short term Removals and Suspensions”, “Cumulative Suspensions that do not Constitute a Change of Placement”, and “Expulsions or Removals that Constitute a Change of Placement.”

The IDEA regulations clarify that there are instances when school officials are not obligated to provide a FAPE in relation to disciplinary procedures for students with disabilities. In § 300.121(d)(1) the regulations state that for removals for 10 school days or less in a school year a public agency is not required to provide any services if services are not provided to a child without disabilities who has been similarly removed. Also, § 300.122, titled “Exception to FAPE for certain ages” states that the obligation to make FAPE available to all children with disabilities does not apply with respect to the following:

(1) Children aged 3, 4, 5, 18, 19, 20, or 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in one or more of those age groups.

(2) Students aged 18 through 21 to the extent that State law does not require that special education and related services under Part B of the Act be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility-

(A) Were not actually identified as being a child with a disability under § 300.7; and

(B) Did not have an IEP under Part B of the Act.

*This exception does not apply to students with disabilities, aged 18 through 21, who:

(1) Had been identified as a child with disability and had received services in accordance with an IEP, but who left school prior to their incarceration; or

(2) Did not have an IEP in their last educational setting, but who had actually been identified as a "child with a disability" under § 300.7.

(3)(i) Students with disabilities who have graduated from high school with a regular high school diploma.

(ii) The exception in paragraph (a)(3)(i) of this section does not apply to students who have graduated but have not been awarded a regular high school diploma.

(ii) Graduation from high school with a regular diploma constitutes a change in placement, requiring written prior notice in accordance with § 300.503.

Placements: LRE and Inclusion

"Least restrictive environment" and "inclusion" are terms that relate to the procedural safeguards of the IDEA regarding the placement of a student with a disability. This section presents the general procedures regarding the placement of a child with a

disability with a focus on the LRE provision of the 1999 IDEA regulations. Section 300.550 of the 1999 IDEA regulations define LRE as:

> the public agency's obligation to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if 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 (34 C.F.R. § 300.550).

The LRE provision of the IDEA regulations states that in developing or amending the IEP for a student with a disability, the child must be placed in the LRE in compliance with § 300.520 of the IDEA regulations. In addition, the placement team must also consider:

- Under § 300.552(d), whether the placement in the regular classroom will result in any potential harmful effect on the child or on the quality of services that he needs and
- Under § 300.346(a)(2)(i), whether placement in the regular classroom, even with appropriate behavioral interventions, will significantly impair the learning of classmates.

The 1999 IDEA regulations mandate that school districts have the obligation to provide a continuum of alternate placements for students with disabilities. The LRE provision in § 300.551 always begins with the regular classroom and continues in a more restrictive order from special classes, special schools, home instruction and finally to

instruction in hospitals and institutions. In addition, the continuum must include provisions for supplementary services such as resource room or itinerant instruction to be provided in conjunction with regular class placement.

OSEP stated in *Memorandum 95-9* that the IDEA does not require that every student with a disability be placed in the regular classroom regardless of individual abilities and needs. The requirement is that school districts must make available a range of placement options, known as a "continuum of alternative placements", to meet the unique educational needs of the students with disabilities. If a student with a disability has behavior problems that are so disruptive in a regular classroom that the education of other children is significantly impaired, the needs of the student with a disability cannot be met in that environment. However, before school districts can make such a determination, they must ensure that consideration has been given to the full range of supplementary aids and services that could be provided to the student in the regular classroom to accommodate the unique needs of the disabled student.

The term "inclusion", also commonly referred to as "mainstreaming" means that a student receives at least a portion of his education in the regular classroom. "Full inclusion" means that a student with a disability is placed in his home school in a regular education classroom with age and grade-appropriate peers. The 1999 IDEA regulations adopted the "inclusion" definition outlined in *Oberti* (1993) and in *Daniel R.R.* (1989). The court's opinion in *Oberti* proves to be very significant in changing the education placement of a child due to misconduct or inappropriate behavior. The "inclusion' requirements of IDEA, as stated in *Oberti*, stressed that the school district has an obligation to exhaust supplementary aids and services in order to accommodate a child's

behavioral deficits, including behavior management interventions. School districts must prove by a "preponderance of the evidence" that students can not be educated satisfactorily in a regular classroom with supplementary aids and services before a change of educational placement is recommended (Oberti v. Board of Education of the Borough of Clementon School District, 1993).

The 1999 IDEA regulations permit school officials to unilaterally remove a student with a disability for up to 45 days for weapon or drug violations to an "interim alternative educational setting" (IAES). School officials may also seek the assistance from an independent hearing officer to remove a potentially dangerous student for 45 days to an IAES. According to § 300.522 of the IDEA regulations, the IAES must be determined by the IEP team and must-

(1) Enable the child to continue to progress in the general curriculum, although in another setting;

(2) Provide services and modifications, including those described in the child' IEP, that will enable the child to meet the goals set out in that IEP; and

(3) Provide services and modifications to address the behavior that caused the removal so that it does not recur.

During all disciplinary removals that constitute a change of placement the IEP team is obligate to ensure the student receives a FAPE in accordance with § 300.121(d)(2)(i) of the IDEA regulations.

The "stay-put" provision of the IDEA is invoked when there is a request for a special education due process hearing to challenge the IAES placement. The "stay-put" provision is outlined in § 300.526 of the 1999 IDEA regulations and states that if the

parents challenge the IAES or the manifestation determination, the child must remain in the then current placement pending the decision of the hearing officer. If a child is placed in an IAES and school officials wish to change the child's placement after expiration of the interim alternate placement, during the pendency of any proceeding to challenge the proposed change the child will remain in the current placement which is the IAES. For more information regarding the placement during appeals please see the section of this chapter titled "Stay-Put Provision."

Short-Term Removals and Suspensions

The legal requirement under the law, according to OSERS and OSEP in January 2001 is that school personnel can remove a student with a disability for 10 consecutive school days or less at a time for a violation of the school code of conduct to the same extent applied to children without disabilities. OSEP has consistently taken the stance that was first noted in *Honig v. Doe* in 1988 that a school district is not required to take any specific actions prior to suspending a student with a disability for 10 consecutive school days or less. In addition, school officials are not required to provide any educational services during this time. The IDEA regulations clarify in § 300.121(d)(1) that:

> A public agency need not provide services during periods of removal under § 300.520(a)(1) to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if services are not provided to a child without disabilities who has been similarly removed.

OSEP's *Memorandum 97-7* restated previous opinions of the U.S. Department of Education and affirmed the agencies consistent stand on short-term suspension and the procedural safeguards that were established in *Goss v. Lopez* in 1975. "There are no specific actions under Federal law that school districts are required to take during that time period" (OSEP *Memorandum 95-16*, 1995).

During the first 10 days of suspension school officials are only required to provide the simple procedural safeguards afforded by *Goss v. Lopez* (1975). In *Goss* the Supreme Court found:

1. Students facing temporary suspensions from public school have property and liberty interests that qualify for protection under the Due Process Clause of the Fourteenth Amendment (pp. 572-576).
2. Due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his version. Generally, notice and hearing should precede the student's removal from school, since the hearing may almost immediately follow the misconduct, but if prior notice and hearing are not feasible, as where the student's presence endangers persons or property or threatens disruption of the academic process, thus justifying immediate removal from school, the necessary notice and hearing should follow as soon as possible (pp. 577-584).

The court opined that short suspensions and expulsion warrant some procedural safeguards. The court in *Goss* concluded that in suspensions of 10 days or less, a student should receive at the minimum:

1. Oral or written notice of the charges against him;
2. An explanation of the evidence the authorities have that support the charges; and
3. An opportunity to present his side of the story.

OSEP has consistently held the opinion that during short-term removals "there are no specific actions under Federal law that school districts are required to take during that time period" (OSEP *Memorandum 95-16*, 1995). During the first 10 days of suspension school officials are only required to provide the simple procedural safeguards afforded by *Goss v. Lopez* (1975). However, there are circumstances when a series of short-term removals may trigger certain procedural safeguards of the IDEA, whether or not the removals constitute a change of educational placement. For information regarding when short-term removals trigger the IDEA procedural safeguards please see the sections titled "Cumulative Suspensions that do not Constitute a Change of Placement" and "Expulsions and Removals that Constitute a Change of Placement."

Cumulative Suspensions That Do Not Constitute a Change of Placement

Under the current federal law, there may be instances where a series of short-term removals trigger the procedural safeguards of the IDEA without constituting an official change of educational placement. The IDEA regulations clarify in § 300.121(d)(1) that

school officials are not required to take any specific actions prior to suspending a student with a disability for 10 school days or less. In addition, school officials are not required to provide any educational services during this time. However, after the 10th cumulative day of suspension in a school year, whether or not the removals constitute a change of educational placement, a free appropriate public education, FAPE, still must be provided to a student with a disability. Upon removal for the 11th cumulative day, school officials, in consultation with the student's special education teacher, must determine the services that are appropriate under § 300.121(d)(2)(i) of the IDEA regulations.

In determining whether or not a series of short-term removals would constitute a change of placement the 1999 IDEA regulations identify the circumstances when a series of short-term suspensions totaling more than 10 school days during the course of a school year may be a change of placement. § 300.519, entitled "Change of placement for disciplinary removals", states:

> For purposes of removals of a child with a disability from the child's current educational placement under §§ 300.520-300.529, a change of placement occurs if -
>
> (a) The removal is for more than 10 consecutive school days; or
>
> (b) The child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.

The IDEA regulations are consistent with OSEP's opinions in the department's *Memorandum 95-16,* 1995. In this memorandum OSEP adopted the OCR's position with respect to Section 504. In determining if a series of short-suspensions constitutes a change in educational placement, OSEP noted:

> Factors such as the length of each suspension, the total amount of time that the student is excluded from school, the proximity of the suspensions to each other, should be considered in determining whether the student has been excluded from school to such an extent that there has been a change in placement (22 IDELR at 535).

If it is determined that a series of short-term removals does not result in a change of placement then the requirements of the regulations in § 300.520 of the IDEA regulations mandate the following after the 10th day of removal of a student with disabilities:

> Either before and not later than 10 business days after either first removing the child for more than 10 school days in a school year or commencing a removal that constitutes a change in placement under § 300.519:
>
> (A) The local educational agency shall convene an IEP meeting to develop a behavior assessment plan if one had not been previously completed [34 C.F.R. § 300.520(b)(1)(i)] or
>
> (B) If the child already had a behavior intervention plan, the IEP team shall meet to review the plan and modify the plan as necessary to address the behavior [34 C.F.R. § 300.520(b)(1)(ii)].

> If subsequently, a child with a disability who has a behavioral intervention plan and who has been removed from the child's current educational placement for more than 10 school days in a school year is subjected to a removal that does not constitute a change of placement under § 300.519, the IEP team members shall review the behavioral intervention plan and its implementation to determine if modifications are necessary [34 C.F.R. § 300.520(c)(1)].

Consistent with § 300.121 of the 1999 IDEA regulations titled "Free appropriate public education (FAPE)":

> (1) A public agency need not provide services during the periods of removal under § 300.520(a)(1) to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if services are not provided to a child without a disability who has been similarly removed.
>
> (2) In the case of a child with a disability who has been removed from his or her current placement for more than 10 school days in that school year, the public agency, for the remainder of the removals, must –
>
> (i) Provide services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP.

The 1999 IDEA regulations clarify that when a series of removals does not constitute a change of placement, a FAPE still must be provided to the student with disabilities after the 10th cumulative day of suspension in a school year. The regulations clarify that there is no absolute limit on the number of days that a child may be removed

during a school year however, upon removal for the 11th cumulative day, school officials, in consultation with a the student's special education teacher, determine the services that are appropriate under § 300.121(d)(2)(i) of the IDEA regulations. In addition, the 1999 IDEA regulations mandate that appropriate procedures regarding functional behavior assessments (FBAs) and behavior intervention plans (BIPs) must be followed after removing a child with a disability for more than 10 days.

Expulsions or Removals That Constitute a Change of Placement

Unlike the case with short-term removals or suspensions, expulsions or removals in excess of 10 consecutive school days are considered a change in placement and require that specific procedures under the IDEA and its regulations be followed for students with disabilities. Whenever disciplinary removals constitute a change of educational placement, specific procedures under the IDEA must be followed in order to secure a FAPE for students with disabilities.

In addition to expulsions or removals in excess of 10 consecutive school days there are circumstances where a series of short-term removals may constitute a change of placement. The 1999 IDEA regulations clarify that there is no absolute limit on the number of days that a student with a disability may be removed in a school year, but school officials may not engage in a pattern of removals that would challenge the FAPE provision of the IDEA. The 1999 IDEA regulations identify the circumstances when a series of short-term suspensions totaling more than 10 school days during the course of a

school year may be a change of placement. Section 300.519, entitled "Change of placement for disciplinary removals" states:

> For purposes of removals of a child with a disability from the child's current educational placement under §§ 300.520-300.529, a change of placement occurs if –
>
> (A) The removal is for more than 10 consecutive school days; or
>
> (B) The child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.

Under the 1999 IDEA regulations school authorities and hearing officers may change the educational placement of a child with a disability. Section 300.520(a)(1)(i)] states that school officials have the authority to:

> order a change in placement of a child with a disability to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days, if-
>
> (a) the child carries a weapon to school or to a school function under the jurisdiction of a State or a local educational agency [34 C.F.R. § 300.520(a)(2)(i)] ; or
>
> (b) the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a

school function under the jurisdiction of a State or local educational agency [34 C.F.R. § 300.520 (a)(2)(ii)].

For more information regarding a disciplinary removal relating to weapons or drugs, please refer to the appropriate titled sections of this chapter.

In addition to disciplinary removals related to weapons or drugs, school officials may seek the aid of a hearing officer to assist in changing the placement of a child with a disability who is believed to be "potentially dangerous." Under § 300.521 of the IDEA regulations, hearing officers may order a change in the placement of a "potentially dangerous student" with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer, in an expedited due process hearing determines–

(A) that the public agency has demonstrated by substantial evidence (*as used in this section, the term substantial evidence means beyond a preponderance of the evidence)[34 C.F.R. § 300.521(e)], that maintaining the current placement of the child is substantially likely to result in injury to the child or to others [34 C.F.R. § 300.521(a)];

(B) considers the appropriateness of the child's current placement [34 C.F.R. § 300.521(b)];

(C) considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services [34 C.F.R. § 300.521(c)]; and

(D) determines that the interim alternative educational setting that is proposed by school personnel who have consulted with the child's special education teacher, meets the requirements of § 300.522(b) [34 C.F.R. § 300.521(d)].

When a student with a disability is expelled or receives additional disciplinary removals that constitute a change of placement, school officials are required to provide a FAPE to a student with a disability on the 11th day of suspension. A FAPE must be provided to a student with a disability on the 11th day of suspension whether or not the removal constitutes a change of placement: "School officials must provide services to the extent required to meet the goals and objectives of the student's IEP" [34 C.F.R. § 300.520(a)(1)(ii)].

In order to provide a FAPE, the 1999 IDEA regulations require that the procedures involving behavioral assessments and manifestation determinations be followed whenever expulsions or removals constitute a change of placement. The 1999 IDEA regulations state that:

> either before and not later than 10 business days after either first removing the child for more than 10 school days in a school year or commencing a removal that constitutes a change in placement under § 300.519
>
> (A) the local educational agency shall convene an IEP meeting to develop a behavior assessment plan if one had not been previously completed [34 C.F.R. § 300.520(b)(1)(i)] or

(B) if the child already had a behavior intervention plan, the IEP team shall meet to review the plan and modify the plan as necessary to address the behavior [34 C.F.R. § 300.520(b)(1)(ii)].

In addition to the behavioral assessments and behavior intervention plans, the IEP team must determine for removals constituting a change of placement, whether or not the inappropriate behavior that violated a school rule was a manifestation of child's disability. The IDEA uses the term "manifestation determination" in both the statute and the regulations to mean the evaluation of the relationship between a student's disability and the act of misconduct that was committed. The 1999 IDEA regulations state that:

> The IEP team and other qualified personnel must determine whether or not the behavior of the child was a manifestation of the child's disability if a disciplinary removal constitutes a change in placement [34 C.F.R. § 300.523(a)] no later than 10 school days after disciplinary action [34 C.F.R. § 300.523(2)].
>
> (A) If the result of the review described in § 300.523 is a determination, consistent with § 300.523(d), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in the FAPE provision in § 300.121(d) [34 C.F.R. § 300.524(a)].
>
> (B) If the result is that the behavior was a manifestation of the disability then the IEP team must take immediate steps to remedy the deficiencies in the

> child's placement, or the implementation of the IEP [34 C.F.R. § 300.523(f)].

In summary, disciplinary removals that constitute a change of placement include expulsions, suspensions in excess of more than 10 consecutive days, and in some situations a series of short-term removals that amount to more than 10 cumulative days in a school year. The specific procedural safeguards of the IDEA concerning expulsions and suspensions that constitute a change of placement include:

- On the 11th day of suspensions, students with disabilities must be provided a FAPE as outlined in § 300.520(a)(1)(ii).
- The IEP team will convene to conduct functional behavior assessment and implement a behavioral intervention plan (or modify existing plan) as outlined in § 300.520(b) and (c).
- The IEP team will convene to conduct a manifestation determination as outlined in § 300.523.
- Educational services cannot cease for properly expelled students with disabilities, whether or not the misconduct was a manifestation of the disability (Commonwealth of Virginia Department of Education v. Richard W. Riley, 1997).

Weapons

Public Law 107-7, *Strengthening and Improvement of Elementary and Secondary Schools: Gun Possessions*, 2001, reiterates the gun regulation stated in the Gun Free School Zones Act of 1994 and provides that each state shall have a law

requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to school. Section (c) of this Act is titled *Special Rule* and states "The provisions of this section shall be construed in a manner consistent with the Individuals with Disabilities Education Act." The act allows an educational agency to modify such expulsion requirement for a student with a disability on a case-by-case basis.

The 1997 IDEA included disciplinary provisions that corresponded to an "educational change in placement" for a child with disabilities regarding any possession of a weapon. The IDEA authorizes school officials to unilaterally place a student with a disability in an appropriate IAES for no more than 45 days for weapons possession on school grounds or at school functions (20 U.S.C. § 1415, 1997). OSEP stated that the language of the IDEA also covers instances in which the child is found to have a weapon at school that he or she obtained at school (OSEP, 1999).

The 1999 Regulations provided the following guidelines concerning discipline for students with disabilities under § 1415 of the IDEA. Under § 300.520, school personnel may order:

> A change in placement of a child with a disability to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days, if-
>
> (i) the child carries a weapon to school or to a school function under the jurisdiction of a State or a local educational agency.

For the purpose of this section of the federal regulations to the IDEA, the term weapon has the meaning given to the term "dangerous weapon" under paragraph (2) of the first subsection (g) of § 930 of Title 18, United States Code:

> The term "dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length.

In October 1994, the first piece of federal legislation that addressed the discipline of students with disabilities took effect. The Gun Free School Zones Act of 1994 amended the Improving America's Schools Act and modified the requirements concerning the expulsion of students who bring a weapon to school. Under this Act, the term "weapon" means a firearm defined in Section 921 of Title 18 of the United States Code:

> (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

According to this statute, a student who brings a firearm to school must be expelled for a period of not less than one year. This Act pre-empted the "stay-put" provision of IDEA and provided for students with disabilities to be placed in an interim alternative placement for not more than 45 days.

> Except as provided in paragraph (3), each State receiving Federal [funds] under this Act shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to school under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis (Gun Free School Zones Act of 1994, 20 U.S.C.A. § 8921).

The Gun Free Schools Act and Public Law 107-7 provide that each state shall have a law requiring local educational agencies to expel from school for a period of not less than one year, any student who is determined to have brought a weapon to school or to any function under school jurisdiction. The Act does not mandate that a school system must expel a student without exception. In allowing local educational agencies (LEAs), to modify the expulsion requirement on a case-by-case basis, local school officials are able to comply with the Act and also the procedural safeguards mandated by the 1999 IDEA and its regulations.

The 1999 IDEA regulations permit school officials to change the placement of a student with a disability for weapon violations. For more information regarding the specific procedural safeguards for removals that constitute a change of placement, please see the section titled “Expulsions or Removals that Constitute a Change of Placement.”

Drugs

The 1997 IDEA allows school officials to unilaterally remove students with disabilities if the child knowingly possesses or used illegal drugs, or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a state or local educational agency. The 1999 IDEA regulations state that school personnel may order:

> A change in placement of a child with a disability to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days, if-
>
> > the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local educational agency [34 C.F.R. § 300.520(2)(ii)].

The term "controlled substance" refers to any drug or other substance identified under schedules I, II, III, IV, or V in § 202(c) of the Controlled Substances Act [21 U.S.C. 812(c)]. The term "illegal drugs" means a controlled substance; but does not include such substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal Law [34 C.F.R. § 300.520(d)(1)(2)].

Whenever disciplinary removals, including removals regarding drug violations, constitute a change of educational placement, specific procedures under the IDEA must

be followed in order to secure a FAPE for students with disabilities. For more information regarding the specific procedural safeguards under the IDEA, please see the section titled "Expulsions or Removals that Constitute a Change of Placement."

Dangerous Students

The 1999 IDEA regulations permit school officials to seek assistance with students that may pose a physical threat to themselves or others in the current educational placement. Hearing officers, under § 300.521 may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer, in an expedited due process hearing-

(A) Determines that the public agency has demonstrated by **substantial** evidence (*as used in this section, the term substantial evidence means beyond a preponderance of the evidence)[34 C.F.R. § 300.521(e)], that maintaining the current placement of the child is substantially likely to result in injury to the child or to others [34 C.F.R. § 300.521(a)];

(B) Considers the appropriateness of the child's current placement [34 C.F.R. § 300.521(b)];

(C) Considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services [34 C.F.R. § 300.521(c)]; and

(D) Determines that the interim alternative educational setting that

> is proposed by school personnel who have consulted with the child's special education teacher, meets the requirements of § 300.522(b) [34 C.F.R. § 300.521(d)].

Section 300.526(C) states that if at the end of an interim alternative educational placement of up to 45 days, school officials maintain that it would be dangerous to return the child to the regular placement because the child would be substantially likely to injure himself or others in that placement, they can ask an impartial hearing officer to order that the child remain in an interim alternative educational setting for an additional 45-day period. If necessary, school officials can also request subsequent extensions of these interim alternative educational settings for up to 45 days at a time if school officials continue to believe that the child poses a substantial risk to injure himself or others if returned to his regular placement [34 C.F.R. § 300.526(C)(4)].

School officials are also permitted under the 1999 IDEA regulations to seek a court order to remove a child with a disability from school or to change a child's current educational placement if they believe that maintaining the child, in the current educational placement, is substantially likely to result in injury to the child or others. Also, OSEP stated in 2001, *Prevention Research and the IDEA Discipline Provisions: A Guide for School Administrators*, that school personnel can always ask a court for a temporary restraining order in order to protect children or adults from harmful behaviors. Finally, school officials are permitted to report crimes committed by children with disabilities to appropriate law enforcement authorities to the same extent they report crimes committed by nondisabled students (34 C.F.R. § 300.529) and nothing prohibits school officials from pressing charges against a student with a disability who breaks a

law. For more information concerning reporting crimes, please see the appropriate section of this chapter titled "Crimes: Reporting to Law Enforcement Agents."

Crimes: Reporting to Law Enforcement Agents

The 1997 IDEA nor the final regulations prohibit an agency from reporting a crime by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability. According to OSEP, the procedural protections that apply to reports of a crime are established by criminal law, not the IDEA (OSEP, 1999). Section 300.529 of the 1999 IDEA regulations titled "Referral to and action by law enforcement and judicial authorities" states:

> (1) Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.
>
> (2) An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.
>
> (3) An agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that

> the transmission is permitted by the Family Educational Rights and Privacy Act.

According to OSEP in opinions accompanying the IDEA regulations in 1999, the Act does not address whether or not school officials may press charges against a child with a disability when they have reported a crime by that student. School districts may press charges as long as they follow correct procedures and do not exercise their responsibility in a discriminatory manner against a student with a disability (OSEP, 1999).

Stay-Put Provision

The "stay-put" provision of the IDEA is invoked when there is a request for a special education due process hearing to challenge the placement of a student with a disability. During any hearings or appeals regarding disciplinary action challenging the interim educational placement or the manifestation determination, the child must remain in the current education placement. If the current placement is the interim alternative education setting, then pending the decision of the hearing or if the educational agency or the parents agree otherwise, the current placement would be the interim alternative educational setting. The "stay-put" provision is outlined in § 300.526 of the 1999 IDEA regulations:

> (a) If a parent requests a hearing or an appeal regarding a disciplinary action described in § 300.520(a)(2) or § 300.521 to challenge the interim alternative educational setting or the manifestation determination, the child must remain in the interim alternative educational setting pending

the decision of the hearing officer or until the expiration of the time period provided for in § 300.520(a)(2) or 300.521, whichever occurs first, unless the parent and the State agency or local educational agency agree otherwise.

(b) If a child is placed in an interim alternative educational setting pursuant to § 300.520(a)(2) or 300.521 and school personnel propose to change the child's placement after expiration of the interim alternative placement, during the pendency of any proceeding to challenge the proposed change in placement the child must remain in the current placement (the child's placement prior to the interim alternative educational setting).

In *Rodiriecus L. and Betty H. v. Waukegan School District No. 60 and Alan Brown* (1996), the court noted that the "stay-put" provision of the IDEA does not apply to students not yet identified as having a disability under the IDEA. The circuit court stated that the IDEA was intended to provide individualized public education for disabled children, the IDEA was not designed to act as a shield to protect disruptive children from routine and appropriate school discipline. The court reasoned that if the "stay-put" provision was automatically applied to every student who files an application for special education, then an avenue will be open for disruptive, nondisabled students to forestall any attempts at routine discipline by simply requesting disability evaluation and demanding to stay put.

Students Not Yet Eligible for Special Education

Students not yet eligible for special education services may be granted some of the procedural safeguards under the IDEA for behavior that violated any rule or code of conduct of the Local Educational Agency (LEA), including any removals due to drug or weapon violations. A child not yet eligible may assert any of the protections provided in the IDEA if the LEA had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action. An LEA is considered to have knowledge that a child is a child with a disability if-

(1) The parent of the child has expressed concern in writing (or orally if the parent does not know how to write or has a disability that prevents a written statement) to personnel of the appropriate educational agency that the child is in need of special education and related services;

(2) The behavior or performance of the child demonstrates the need for these services, in accordance with § 300.7;

(3) The parent of the child has requested an evaluation of the child pursuant to §§ 300.530-300.536; or

(4) The teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of the agency or to other personnel in accordance with the agency's established child find or special education referral system (34 C.F.R. § 300.527).

The IDEA regulations also note that there are circumstances when the discipline procedural safeguards would not be invoked for students not yet eligible for special

education. A public agency would not be considered to have knowledge under the 1999 IDEA regulations, if the agency conducted an evaluation under §§ 300.530 – 300.536 and determined that the child was not a child with a disability. Also the LEA would not be considered to have knowledge if an evaluation was not deemed to be necessary and the LEA provided notice to the child's parents of its determination, consistent with § 300.503.

If the LEA does not have knowledge that a child is a child with a disability prior to taking disciplinary measures or determined that the child was not a child with a disability under this part, whether an evaluation was conducted or not, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors. If the LEA determines that the child does not have a disability through an evaluation or determined that an evaluation was not necessary, the LEA would be obligated under the regulations in § 300.527 to provide notice to the child's parents of its determination.

If a request is made for a child to be evaluated for special education services at the same time period in which the child is subjected to disciplinary measures because of drug or weapon violations, or was removed after a hearing officer deemed the student "potentially dangerous", the evaluation must be conducted in an expedited manner (§ 300.527). Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and

related services in accordance with the provisions of this part, including the requirements of §§ 300.520-300.529. If the LEA concludes that the child does not have a disability, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors.

The court noted in *Rodiriecus L*. (1996) that the "stay-put" provision of the IDEA does not apply to students not yet identified as having a disability under the IDEA. The "stay-put' provision states that during any hearings or appeals regarding disciplinary action challenging the interim educational placement the child must remain in the current education placement. For more information regarding this provision please see the section of this chapter titled "Stay-Put Provision."

Manifestation Determinations

The term "manifestation determination" appears in the 1999 IDEA and can be defined as the relationship between a student's disability and the act of misconduct that was in violation of a school rule. Section 300.523(a) identifies three specific instances when the procedures regarding a manifestation determination must be followed:

(1) Placement by school district personnel in an interim alternative educational setting for drug or weapon offenses pursuant to § 300.520(a)(2).

(2) Placement by a hearing officer in an interim alternative educational setting of students whose continued presence in the current placement poses a threat in accordance with § 300.520(a)(2).

(3) Removal that constitutes a change of placement under § 300.519.

The manifestation determination must be conducted not later than 10 days after the date on which the decision to take action is made.

The 1999 IDEA regulations make it clear that the IEP team and other qualified personnel must conduct the manifestation determination. The IEP team must consider the following in order to determine whether the misconduct was related to the student's disability:

(1) Evaluation and diagnostic results, including the results or other relevant information supplied by the parents of the child;

(2) Observations of the child; and

(3) The child's IEP and placement [34 C.F.R. § 300.523(c)(1)].

In order for the IEP team to determine that the misconduct was not a manifestation of the student's disability, all of the following must be met:

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

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

(3) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action [34 C.F.R. § 300.523(c)(2)].

If the IEP team and other qualified personnel determine that any of the standards listed above were not met, the behavior must be considered a manifestation of the child's

disability. If there were any deficiencies in the IEP or placement or in their implementation during the manifestation determination, the IEP team must take immediate steps to remedy those deficiencies.

If the IEP team determines that the misconduct was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities. Students with disabilities would still be under the FAPE provision of the IDEA that mandates in § 300.121 that a FAPE must be provided to suspended or expelled students with disabilities. Additionally, if the LEA initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

Functional Behavior Assessments

The terms "functional behavioral assessment" (FBA) and "behavior intervention plan" (BIP) were added to the 1997 IDEA amendments however, the statute lacked a clear explanation of either term except that the plan must address the behavior that led to the student's removal. FBAs were defined by OSEP in 2001 in *Prevention Research and the IDEA Discipline Provisions: A Guide for School Administrators,* as "a systematic way of identifying problem behaviors and the events that predict occurrence, non-occurrence, and maintenance of those behaviors." OSEP also noted that the development of a BIP is guided by the data from the FBA. According to the 1999 IDEA regulations,

the IEP team has the obligation to conduct a FBA and develop any necessary BIPs after a student with a disability has been removed from his current placement for more than 10 school days in a school year or has been removed from his current placement that constitutes a change of placement. The IEP team has the responsibility of assessing a student's targeted behavior and implementing the appropriate intervention strategies.

The 1999 IDEA regulations in § 300.520 mandate the following regarding "functional behavior assessments" and "behavior intervention plans":

> Either before and not later than 10 business days after either first removing the child for more than 10 school days in a school year or commencing a removal that constitutes a change in placement under § 300.519
>
> (1) The local educational agency shall convene an IEP meeting to develop a behavior assessment plan if one had not been previously completed or
>
> (2) If the child already had a behavior intervention plan, the IEP team shall meet to review the plan and modify the plan as necessary to address the behavior.
>
> If subsequently, a child with a disability who has a behavioral intervention plan and who has been removed from the child's current educational placement for more than 10 school days in a school year is subjected to a removal that does not constitute a change of placement under § 300.519, the IEP team members shall review the behavioral intervention plan and its implementation to determine if modifications are necessary [34 C.F.R. § 300.520(c)(1)].

The 1999 IDEA emphasizes that the LEA must address the behavior of a student with a disability that leads to a removal that cumulates to more than 10 school days in a year or leads to an educational change of placement. The IDEA regulations in § 300.346 emphasize that the IEP team must consider appropriate strategies including positive behavioral interventions to address behavior that impedes the learning of a student with a disability. The IDEA regulations do not require a specific plan of discipline for school officials to follow for students with disabilities and leave the responsibility for the implementation of behavioral interventions to school personnel and more specifically the IEP team. The Department of Education, however, has supported a number of activities such as training institutes, conferences, clearinghouses and other technical assistance and research activities to assist school personnel appropriately address behavioral concerns for students with disabilities (OSEP, 1999). For information regarding federal legislation and opinions concerning behavior interventions or current disciplinary strategies please see the section of this chapter titled "Possible Disciplinary Methods."

Possible Disciplinary Methods

In Prevention Research and the IDEA Discipline Provisions: A Guide for School Administrators, 2001, OSEP stated that "punishment and exclusion remain the most common responses to problem behavior by students" and that "reprimands, detentions, and exclusion are documented as ineffective strategies for improving the behavior of children in schools." OSEP continues that positive behavior support is an approach to

discipline and intervention that is proving both effective and practical in schools and is effective by utilizing functional behavior assessments and behavior intervention plans.

The 1999 IDEA regulations addressed disciplinary removals that constituted an educational change of placement for a student with a disability. Suspensions and expulsions that trigger the procedural safeguards of the IDEA were the main focus in §§ 300.520 and 300.521. Other disciplinary methods or interventions used by school officials or the IEP team were not specifically mentioned in the IDEA. The IDEA regulations in § 300.346 emphasize that the IEP team must consider appropriate strategies including positive behavioral interventions to address behavior that impedes the learning of the student with a disability.

Although the regulations give the IEP team the responsibility to conduct FBAs and develop BIPs, OSEP emphasized in 1999 that it was the responsibility of state and local educational agencies to work to ensure that superintendents, principals, teachers and other school officials were equipped with the knowledge and skills to address behavior problems. In administering a school district's discipline cycle or method of discipline, school officials must be consistent with a child's IEP and the behavior interventions listed.

The most common alternative to a disciplinary removal used by school officials is "in-school suspension" (ISS). In most cases ISS does not trigger the procedural safeguards of the IDEA even if a student is assigned for more than 10 days in a school year. Accompanying the final regulations in 1999, OSEP provided a discussion about the issue of ISS and determined that a day of ISS would count as a day of suspension unless the following three conditions are met:

(1) The student is afforded the opportunity to continue to appropriately progress in the general curriculum;

(2) The district continues the services specified in the student's IEP; and

(3) The student continues to participate with nondisabled students to the same extent as he does in his current placement (64 Fed. Reg. 12619).

If in-school suspensions did not meet all three requirements above, a day served in ISS would count as a day of suspension and would follow the same guidelines concerning removals that either constitute a change of educational placement or add to the number of days served as a short-term suspension. If the number of suspensions cumulates to more than 10 days in a school year, certain procedural safeguards are afforded by the IDEA.

The issue of corporal punishment was addressed at the federal level. The Supreme Court ruled in *Ingraham v. Wright*, (1977), that the Cruel and Unusual Punishment Clause of the Eighth Amendment does not apply to corporal punishment in public schools, it only protects prisoners. Students subjected to other aversive techniques including corporal punishment may, however, claim other constitutional protections. In *Hall v. Tawny* (1980), the Court of Appeals for the Fourth Circuit agreed with the *Ingraham* decision in 1977 however, it developed the framework of legal analysis of whether an instance of corporal punishment violated a student's right to substantive due process. The court stated that in certain instances corporal punishment could invoke due process rights under the 5th and 14th Amendments. The Court established what is called the "shock the conscience test":

> The substantive due process inquiry . . . must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so

> inspired by malice or sadism, rather than a merely careless or unwise excess of zeal, that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience (621 F.2d. at 613).

The current federal court opinions have been consistent with the *Tawney* and *Ingraham* court decisions. The Fifth Circuit Court, in *Fee v. Herndon* (1990), found that if a student was the victim of excessive corporal punishment, the student himself could bring a common law tort action seeking damages under the protection of the Fourteenth Amendment and not the Eighth Amendment.

Although the statutory language of the IDEA made it clear that Congress preferred positive behavioral interventions, the IDEA continues to leave the selection of specific disciplinary techniques to the state and local educational agencies, as long as the IDEA's procedural requirements are met. According to OSEP in discussing the 1999 IDEA regulations, schools can address the student misconduct through appropriate instructional and/or related services, including conflict management, behavioral management strategies, and measures such as study carrels, time-outs, and restriction of privileges (64 Fed. Reg. 12415).

Regarding what behavioral interventions and strategies can be used, and whether the use of aversive behavioral management strategies is prohibited under these regulations, the needs of the individual child are of paramount importance in determining the behavioral management strategies that are appropriate for inclusion in the child's IEP. In making these determinations, the primary focus must be on ensuring that the behavioral management strategies in the child's IEP reflect the Act's requirement for the

use of positive behavioral interventions and strategies to address the behavior that impedes the learning of the child or that of other children (OSEP, 1999).

The regulations do not require a specific plan of discipline for school officials to follow for students with disabilities. The IEP team has the responsibility to develop and review behavior intervention plans and behavioral interventions because specific elements of BIPs would vary depending on the child and the behavior involved (OSEP, 1999). There is nothing in the IDEA that prohibits the use of aversives, detentions or time-outs as long as these disciplinary methods are consistent with the student's IEP. Although OSEP refers to these methods of behavior modification as negative reinforcement, federal legislation does not prohibit them. These behavior strategies must, however, be in compliance with state and local polices.

Bus Removals

Bus suspensions or removals are not directly mentioned in the IDEA however along with the 1999 regulations, OSEP delivered an opinion regarding bus suspensions:

> Whether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child's IEP. If the bus transportation is a part of the child's IEP, a bus suspension would be treated as a suspension under § 300.520 unless the public agency provides the bus service in some other way, because that transportation is necessary for the child to obtain access to the location where all other services will be delivered. If the bus transportation is not part of the child's IEP, a bus suspension would not be a suspension under § 300.520. In those cases, the child and his or her parents

> would have the same obligation to get to and from school as a nondisabled child who had been suspended from the bus. However, public agencies should attend to whether the behavior on the bus is similar to behavior in a classroom that is addressed in an IEP and whether the behavior should be addressed in the IEP or behavioral intervention plan for the child (64 Fed. Reg. 12619).

The opinion expressed by OSEP in 1999 was rooted in an early court case, *Deleon v. Susquehanna Community School District* (1984). The court determined that a change in transportation for a student with a disability could be considered a change in educational placement, thus triggering the procedural safeguards of the IDEA. The court found: "Under some circumstances, transportation may have a significant effect on a child's learning experience and constitute a change in educational placement" (EHLR 556:262).

CHAPTER 4

FINDINGS, CONCLUSIONS, RECOMMENDATIONS, AND FINAL COMMENTS

Findings

In the Education for All Handicapped Children Act, P.L. 94-142, (1975), Congress found that there were more than eight million "handicapped" children in the United States and that one million of the handicapped children in the United States were excluded entirely from the public school system. Congress continued in its findings in the Education for All Handicapped Children Act, P.L. 94-142, (1975), that it is of national interest that the Federal Government assist state and local efforts to provide programs that meet the educational needs of handicapped children in order to assure equal protection of the law.

In 1990, P.L. 94-142 was changed to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476. Congress replaced the term "handicapped" with the term "disability" and thus a "handicapped student" became a "student with a disability." In 1997 President Bill Clinton signed into law P. L. 105-17 building upon the procedural safeguards afforded by the original P.L. 94-142 in 1975. The 1997 reauthorization of the IDEA addressed some concerns that were being raised regarding discipline and special education in the public school system and included some of the guidelines resulting from court cases such as *Honig v. Doe* (1988) and *Daniel R.R. v. State Board of Education* (1989). The 1997 IDEA addressed the issue of discipline for students with disabilities

and regulated the methods by which school officials were permitted to discipline students with disabilities.

The purpose of the 1997 IDEA was to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living" (20 U.S.C. § 1400). The FAPE provision of the IDEA states that special education services are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.340 – 300.350 of the IDEA regulations. Congress affirmed in the 1999 IDEA regulations that all children with disabilities aged 3 to 21 residing in the State have a right to a FAPE, including children with disabilities who have been suspended or expelled from school.

The review of federal legislation, U.S. Department of Education regulations and guidelines, and court cases lead to significant findings regarding students with disabilities and discipline in the public school context.

A. The findings from federal legislation including the IDEA regulations are as follows:

   1. Children eligible for special education services under the IDEA have the right to a free appropriate public education (FAPE) (34 C.F. R. § 300.13).
   2. The FAPE provision of the IDEA extends to students with disabilities who have been suspended or expelled from the public school system (34 C.F.R. § 300.121).
   3. Under the IDEA and its regulations, a student with a disability must be placed in the least restrictive environment (LRE) (34 C.F. R. § 300.550).

In determining the placement of a child with a disability, the IEP team must consider whether the placement in the regular classroom will result in any potential harmful effects on the child (34 C.F. R. § 300.552) or will significantly impair the learning of classmates (34 C.F. R. § 300.346).

4. School districts are obligated to provide a continuum of alternate placements beginning with the least restrictive environment, in most cases being the regular classroom, and extends to the most restrictive, which is providing instruction and services in a hospital or institutional setting (34 C.F. R. § 300.551).

5. Under § 300.121 of the IDEA regulations, for removals of 10 school days or less in a school year, a public agency is not required to provide any services if services are not provided to a child without disabilities who has been similarly removed. As noted in *Honig v. Doe* (1988), a school district is not required to take any specific actions prior to suspending a student with a disability for 10 consecutive school days or less. During the first 10 days of suspension school officials are only required to provide the simple procedural safeguards afforded by *Goss v. Lopez* (1975).

6. Under the IDEA and its regulations, after the 10th cumulative day of suspension in a school year, whether or not the removals constitute a change of educational placement, a free appropriate public education, (FAPE), must be provided to any student determined to have a disability (34 C.F. R. § 300.121).

7. Under § 300.520 of the IDEA regulations as affirmed in *The Commonwealth of Virginia Department of Education v. Richard W. Riley* (1997), it was affirmed that educational services cannot cease for properly expelled students with disabilities, whether or not the misconduct was a manifestation of the child's disability.

8. The 1999 IDEA regulations (34 C.F. R. § 300.520), mandate that appropriate procedures regarding functional behavior assessments (FBAs) and behavior intervention plans (BIPs) must be followed after removing a child with a disability for more than 10 days in a school year or if a removal results in a change of educational placement.

9. Suspensions, expulsions or removals of a student with a disability in excess of 10 consecutive school days are considered a change in placement and require specific procedures under the IDEA including FBAs and manifestation determinations (34 C.F. R. §§ 300.520-300.529).

10. There are circumstances where a series of short-term removals may constitute a change of placement. Under §§ 300.520-300.529, a change of placement occurs if the child is subjected to a series of removals that constitute a pattern because they accumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.

11. The IDEA regulations authorize school officials to unilaterally change the placement of a student with a disability who is involved in a weapon or drug violation under § 300.520 for up to 45 days.

12. School officials may seek the aid of a hearing officer to assist in changing the placement of a child with a disability who is believed to be "potentially dangerous." Under § 300.521 of the IDEA regulations, hearing officers may order a change in the placement of a "potentially dangerous student" with a disability to an appropriate interim alternative educational setting for not more than 45 days. § 300.526(C) states that if at the end of an interim alternative educational placement of up to 45 days, school officials maintain that it would be dangerous to return the child to the regular placement because the child would be substantially likely to injure himself or others in that placement, they can ask an impartial hearing officer to order that the child remain in an interim alternative educational setting for an additional 45-day period. If necessary, school officials can also request subsequent extensions of these interim alternative educational settings for up to 45 days at a time if school officials continue to believe that the child poses a substantial risk to injure himself or others if returned to his regular placement [34 C.F.R. § 300.526(C)(4)].

13. According to § 300.522 of the IDEA regulations, the IAES must be determined by the IEP team and must-

- Enable the child to continue to progress in the general curriculum, although in another setting;
- Provide services and modifications, including those described in the child's IEP, that will enable the child to meet the goals set out in that IEP; and
- Provide services and modifications to address the behavior that caused the removal so that it does not recur.

14. The IEP team and other qualified personnel must determine whether or not the behavior of the child was a manifestation of the child's disability. The manifestation determination must take place no later than 10 school days after disciplinary action [34 C.F. R. § 300.523(2)] if a disciplinary removal constitutes a change in placement [34 C.F. R. § 300.523(a)]. The 1999 IDEA regulations make it clear that the IEP team and other qualified personnel must conduct the manifestation determination (34 C.F.R. § 300.523).

- If the IEP team and other qualified personnel determine that the behavior was a manifestation of the student's disability, any deficiencies in the IEP or the BIP must be remedied (34 C.F.R. § 300.523).
- If the IEP team determines that the misconduct was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to

children without disabilities. However, students with disabilities would still be protected under the FAPE provision of the IDEA that mandates in § 300.121 that a FAPE must be provided to suspended or expelled students with disabilities (34 C.F.R. § 300.524).

15. The "stay-put" provision of the IDEA was adopted from *Honig v. Doe* (1988) and requires that during any hearings or appeals regarding disciplinary action challenging the interim educational placement or the manifestation determination, the child must remain in the current education placement. If the current placement is the interim alternative education setting then pending the decision of the hearing or if the educational agency or the parents agree otherwise, the current placement would be the interim alternative educational setting (34 C.F. R. § 300.526).

16. Students not yet eligible for special education services may be granted some of the procedural safeguards under the IDEA for behavior that violated any rule or code of conduct of the local educational agency, including any removals due to drug or weapon violations, if it is deemed that the LEA had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary removal (34 C.F. R. § 300.527).

17. The IDEA focuses on disciplinary removals for inappropriate behavior and does not specifically mention any other disciplinary methods or interventions currently accessible to school officials or the IEP team. The

IDEA regulations in § 300.346 emphasizes that the IEP team must consider appropriate strategies including positive behavioral interventions to address behavior that impedes the learning of the student with a disability.

18. Neither the IDEA nor the final regulations prohibit an agency from reporting a crime by a child with a disability to appropriate authorities, nor do they prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability (34 C.F. R. § 300.529).

19. The findings from the *Gun Free Schools Act of 1994* and Public Law 107-7, *Strengthening the Improvement of Elementary and Secondary Schools*: *Gun Possessions* (2001), provide:

    1. That each state shall have a law requiring local educational agencies to expel from school for a period of not less than one year, any student who is determined to have brought a weapon to school or to any function under school jurisdiction.
    2. Each local educational agency (LEA) has the ability to modify the expulsion requirement on a case-by-case basis in order for LEAs to comply with the Act and also the procedural safeguards mandated by the 1999 IDEA and its regulations.

B. The findings from the U.S. Department of Education include:

1. OSEP emphasized in 1999 that in administering a school district's discipline cycle or method of discipline, school officials must be consistent with a child's IEP and the behavior interventions listed (OSEP & OSERS, 2001).

2. According to the Department of Education in 1999, a day of In School Suspension (ISS) can count as a day of suspension from school (64 Fed. Reg. 12619).

3. According to OSEP, a bus suspension would be treated as a suspension under § 300.520 if transportation services were part of a student's IEP unless the public agency provides the bus service in some other way, because that transportation is necessary for the child to obtain access to the location where all other services will be delivered (OSEP, 1999).

4. OSEP stated in 2001*, Prevention Research and the IDEA Discipline Provisions: A Guide for School Administrators*, that school personnel can always ask a court for a temporary restraining order in order to protect children or adults from harmful behaviors.

C. The findings from significant court cases include:

1. Insufficient funds is not an acceptable excuse for providing inappropriate discipline for students with disabilities (Mills v. Board of Education of the District of Columbia*,* 1972).

2. D*aniel R.R. v. State Board of Education* (1989) affirmed the inclusion requirements of the IDEA and stressed that school districts have an

obligation to exhaust supplementary aids and services in order to accommodate a child's behavioral deficits, including behavior intervention plans.

3. During the first 10 days of suspension school officials are only required to provide the simple procedural safeguards afforded by *Goss v. Lopez* (1975):
   - Oral or written notice of the charges against the student;
   - An explanation of the evidence the authorities have that support the charges; and
   - An opportunity for the student to present his side of the story.

Conclusions

The following conclusions of this study are grounded in the "Findings" and "Review of the Literature" sections of this paper. Based on these, it can be concluded that:

1) The procedural safeguards of the IDEA only come into play when school officials and parents fail to agree on the appropriate placement of a child with a disability. The limitations of the IDEA and its regulations about the amount of time a student with a disability can be removed from his current placement are applicable when school officials and parents fail to work out an agreeable placement. Although school officials have the authority to unilaterally remove students with disabilities for 10 days in a school year, the IEP team is generally responsible for making placement decisions, especially when a change of placement is a result of a rule violation (34 C.F.R. § 300.121). Parents and/or

legal guardians play an important role on the IEP team. In many cases involving discipline for students with disabilities, schools officials and parents are often able to reach agreement on the appropriate placement and respond appropriately to students who violate a school rule or policy.

2) Every child with a disability has a right to a FAPE. The FAPE provision of the IDEA states that all children with disabilities aged 3 to 21 residing in the State have a right to a FAPE, including children with disabilities who have been suspended or expelled from school. Congress originally enacted the IDEA in 1975 to overcome the historical prejudices against students with disabilities. In the Education for All Handicapped Children Act, P.L. 94-142, (1975), Congress found that there were more than eight million "handicapped" children in the United States and that one million of the handicapped children in the United States were excluded entirely from the public school system. Congress carried the same opinion held in *Brown v. Board of Education* (1954): "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available to all on equal terms."

3) The IDEA nor its regulations place an absolute limit on the number of days that a child with a disability may be removed from his current placement during a school year. Although the IDEA and its regulations differentiate between short-term and long-term suspensions or expulsions, it does not place a limit on the number of days a child with a disability can be removed in a school year. The IDEA regulations state that after the 10th

cumulative day of suspension in a school year, whether or not the removals constitute a change of educational placement, a free appropriate public education, FAPE, still must be provided to the student with a disability. In addition, all removals, which constitute a change of educational placement under the IDEA, will invoke the procedural safeguards of the IDEA. Students with disabilities may be suspended long-term or expelled but special education services are required after the 10th day so that the student can progress toward the goals set forth in the IEP.

4) When considering the placement of a child with a disability, the first consideration must be a placement with non-disabled peers in a regular education classroom. Under the LRE provision of the IDEA, local educational agencies have the obligation to educate students with disabilities with children who are non-disabled to the maximum extent possible. More restrictive environments including separate classes or separate schools cannot be considered unless the nature or severity of the disability is so severe that an appropriate education cannot be achieved satisfactorily with the use of supplementary aids and services. The IEP team has the responsibility to determine an appropriate placement if a child's behavior significantly impairs the learning of classmates even when appropriate behavioral interventions are in place.

5) Federal legislation emphasizes positive behavioral interventions to address behavior that impedes the learning of a student with a disability. The IDEA regulations do not require a specific plan of discipline for school officials to follow for students with disabilities and leave the responsibility for the implementation of behavioral interventions

to school personnel and more specifically the IEP team. In 2001 OSEP stated that "punishment and exclusion remain the most common responses to problem behavior by students" and that "reprimands, detentions, and exclusion are documented as ineffective strategies for improving the behavior of children in schools." OSEP continued that positive behavioral support is one approach to discipline that is proving both effective and practical in schools and is effective by utilizing functional behavior assessments and behavior intervention plans.

6) School officials must be in compliance with the student's IEP and state and local policies when administering discipline or using any type of behavioral intervention. Although the IDEA regulations emphasize positive behavioral interventions to address behavior that impedes the learning of a student with a disability, there is nothing in the IDEA that prohibits the use of detentions, time-outs or aversives, including corporal punishment, as long as these disciplinary methods are consistent with the student's IEP. Although OSEP refers to these methods of behavior modification as negative reinforcement, federal legislation does not prohibit them. These behavioral strategies must, however, be in compliance with state and local policies.

7) School officials may seek extensions to the initial 45-day removal of "potentially dangerous" students. School officials have the ability to change the placement for 45 days at a time if a child with a disability has brought a weapon to school or to a school function, or knowingly possessed, sold or used illegal drugs while at school or a school function. School officials may also ask an impartial hearing officer to remove a student

with a disability to an IAES for 45 days if school officials believe the student is likely to injure himself or others in the current placement. Unlike the removal for weapon or drug violations which carry a 45-day limit, school officials may ask for extensions of up to 45 days if school officials still believe that the student continues to be "potentially dangerous" after being removed for the initial 45 days. If necessary, school officials may request subsequent extensions for up to 45 days at a time.

8) Students with disabilities can serve more than 45 days when removed for weapon or drug violations. Under the IDEA, school officials have the ability to change the placement for 45 days at a time if a child with a disability has brought a weapon to school or to a school function, or if the student knowingly possessed, sold, or used illegal drugs while at school or a school function. While these infractions carry a maximum 45-day removal, students can actually be removed for up to 55 days if the determination for the 45-day removal is on the 10th day. School officials are not required to provide any services during the first 10 days a student has been removed in a school year. During the 10-day short-term suspension school officials may hold an IEP meeting and assign a 45-day placement in an IAES.

9) All students receiving special education services, regardless of disability, are afforded the procedural safeguards of the IDEA regarding disciplinary proceedings. The IDEA and its regulations provide procedural safeguards for all students with disabilities in disciplinary proceedings. These protections are not afforded strictly to students eligible for Emotional Behavior Disorders under the federal guidelines. All students

eligible for special education services are provided the same protections afforded by the IDEA, regardless of category or classification of disability.

10) Any disciplinary removal in which a student with a disability is not afforded the services to appropriately progress toward the goals of his IEP may constitute a day of suspension. In addition to suspensions, disciplinary removals may include other behavior interventions such as time-out rooms, restriction of privileges, in-school suspension, or bus suspensions. During these removals students must be given the opportunity to progress toward the goals listed in the IEP. If students are denied this opportunity then the removal may count as a day of suspension, which may trigger the procedural safeguards of the IDEA.

11) Nothing in the IDEA or its regulations prevents school officials from seeking the aid of the court system to assist with dangerous students. School personnel can report crimes to appropriate law enforcement and judicial authorities and can always ask a court for a temporary restraining order to protect children or adults from students who exhibit harmful behaviors.

Recommendations

The following recommendations are based on the findings and conclusions in this study and are intended to assist local school administrators comply with the IDEA and its regulations. These recommendations will enable administrators to maintain a safe

educational environment while implementing discipline for students with disabilities that have violated a federal, state, or local school policy.

1) Be proactive with parental involvement. Parents or guardians play an integral part of the school community and in the education of their child. Since many school codes of conduct reflect the values of the local community, parental assistance should be solicited for the development of a school-wide discipline plan. Involving parents will give parents ownership in helping the school maintain a safe educational environment and will help create a positive school-community relationship. In addition all parents should be educated in the school's official code of student conduct as well as any federal or state discipline policies.

It is important to establish a clear line of communication between the parents of a child with a disability and the school. The parents should be informed of any initial behavioral concerns or of any inappropriate behaviors that are in violation of a school rule or policy. Parents should be notified from the onset of any disciplinary issues or concerns. Communicating with parents from the beginning and seeking their assistance to change their child's inappropriate behavior will have a positive impact on the school-community relationship. As already noted, the limitations of the IDEA and its regulations concerning changing the placement of a child with a disability only come into play when school officials and parents fail to work out an agreeable placement. In many cases, parents will work with school officials to seek the appropriate placement or agree to appropriate disciplinary interventions if a positive relationship has already been established. This may eliminate time spent on due process hearings and litigation.

Parents of a student with a disability are an important part of the IEP team and should work with school officials to determine appropriate educational placements for their child, even in the case of changing a placement due to inappropriate behavior.

2) All local school administrators should have a good general working knowledge of how federal, state, and local policies affect disciplining students with disabilities. The responsibility of special education should not be assigned to one individual, as all local school administrators are likely to encounter issues in special education relating to discipline. Local school officials should have a good working knowledge of the procedural safeguards afforded to students with disabilities and also be aware of their local district's special education contacts and coordinators.

3) Local school officials should ensure that the teaching faculty is educated in their responsibility to comply with the IDEA and the procedural safeguards afforded to students with disabilities. Providing discipline for students is not the job of one individual. Teachers play an important role in the social development of students in addition to basic academics. Teachers should be trained in various positive behavior interventions and should have a general working knowledge of an IEP and its components. General education teachers will serve students with disabilities in the regular classroom and should know that they are legally responsible for providing the appropriate services listed on the student's IEP. Under the IDEA, both general and special education teachers are required to implement the modifications listed on the child's IEP, including any behavioral interventions or modifications that are listed.

4) Suspensions and expulsions should only be for the most serious rule violations and should be used as a last resort in a discipline cycle for repeated minor infractions. The IDEA requires school district personnel to examine other disciplinary actions other than suspension and/or expulsion for students with disabilities who violate a school rule or policy or threaten the safety of the school (34 C.F.R. § 300.346). School districts are advised to use interventions such as time-outs, restriction of privileges and in-school suspensions when appropriate and not rely on suspensions. The IDEA supports the use of positive behavioral interventions instead of negative reinforcement including disciplinary removals or the use of aversives. It is recommended that school officials use proactive measures to reinforce positive behaviors and use interventions such as modifying the school day or school week as an incentive. Positive incentives are unique to each individual student and should be identified on the student's behavior intervention plan.

5) Administrators should be aware that medical recommendations such as the use of medication as an intervention to control attention and behavior should be made only by a medical doctor, not by the school system. If a school official recommends the use of a medication, the school system may incur the costs of such treatment. As part of the IEP team, school officials are considered experts in designing appropriate behavioral interventions for students with disabilities. *Mills,* in 1972, determined that if school officials make recommendations for behavioral interventions, insufficient funds would not be an acceptable excuse for not providing the appropriate services for students with

disabilities. If school officials recommend behavioral interventions that they feel are necessary in order for the child to be successful, then the school must be willing to provide these services. If school officials recommend the use of the drug Ritalin for a student with a behavior disorder, the school should be willing to pay for the medication.

6) Do not limit the development of behavior management plans to students classified as having an emotional behavior disorder. The IDEA regulations state that in the case of a child whose behavior impedes his or her learning or that of others, then the IEP team should consider positive behavioral interventions, strategies, and supports to address the inappropriate behavior (34 C.F.R. § 300.346). The IDEA does not limit this provision to students who meet the criteria as having an emotional behavior disorder. It may be appropriate to develop BIPs for other students eligible for special education services under any category where a behavior exists that impedes the child's learning or the learning of others.

Providing appropriate BIPs for all students who are involved in inappropriate behaviors will help local school officials document the school's awareness of any inappropriate behaviors and more importantly document the proactive interventions and steps taken to change the inappropriate behavior. This documentation will be useful in cases where school officials seek to change the educational placement of a child with a disability due to inappropriate behaviors.

7) Avoid zero-tolerance policies. Zero-tolerance refers to policies in which any violation of a specified type, such as violence, drugs, weapons, etc., will result in a severe consequence including long-term suspension, expulsion or arrest. Zero-tolerance also includes disciplinary limitation policies such as "three strikes and you're out."

Zero-tolerance policies take the decision making power away from local school administrators when administering discipline for rule violations. For students with disabilities, these types of policies may challenge the FAPE provision of the IDEA. In determining the appropriate disciplinary consequence for a student with a disability, zero-tolerance rules do not take into account the legalities of the student's behavior management plan or any individual issues associated with the said student.

If a school system develops any type of zero-tolerance policy, the decision-making authority regarding punishment should be left to the local school administration, and more specifically, the IEP team. To comply with the IDEA, the IEP team is responsible for changing the educational placement of a child with a disability (34 C.F.R. § 300.121). Since many disciplinary removals result in a change in educational placement, these decisions are best left up to the IEP team. This importance was noticed in the zero-tolerance weapon law, The Gun Free Schools Act of 1994. This act does allow local educational agency (LEAs) the ability to modify the year-long mandatory expulsion requirement on a case-by-case basis in order to comply with the IDEA.

8) No discipline has to be determined immediately. It is important that school administrators are thorough in implementing discipline for students with disabilities. Administrators are encouraged not to feel pressured to implement discipline

consequences immediately after a rule infraction, but are encouraged to ensure that the consequence or intervention applied is consistent with the IEP and the procedural safeguards of the IDEA. If there is any question as to the appropriate disciplinary consequence, administrators should take the time to review federal, state, or local policies and review the facts of the case with the student's caseload teacher, other special education personnel or other administrators, as deemed appropriate. Inappropriate disciplinary actions, once applied to a student with a disability, are often difficult to reverse.

9) The attendance of attorneys at IEP meetings and disciplinary proceedings should not be encouraged. The IEP team generally consists of people who have the best working knowledge of a student's strengths, weaknesses and individual characteristics that are taken into consideration when developing the IEP. This team consists of the student and his parents, teachers, counselors, and other local school officials who work together to develop appropriate interventions and accommodations that will help the student with a disability be successful (34 C.F.R. § 300.344). Attorneys may create an adversarial relationship between the parents and the school and may not look at what is in the best interest of the child. Attorneys may feel more obligated to focus on the client role that the parents have hired them for and this may limit the ability of school officials and parents to work out differences. If parents insist on bringing legal counsel it is recommended that local school officials have the school district’s legal counsel present as well.

10) Ensure that students who are exhibiting inappropriate behaviors meet the criteria for having an emotional behavior disorder under the IDEA. Some school administrators may be too quick to classify students who exhibit inappropriate behaviors as having an emotional behavior disorder and thus leave themselves restricted by the procedural safeguards of the IDEA. Due to historical prejudices, students with disabilities now receive more procedural rights than general education students. The term emotional disturbance is defined in the IDEA regulations [34 C.F.R. § 330.7 (c)(4)] and lists the characteristics that must be present in order for a child to be eligible for special education services. Not all students who behave inappropriately can be classified as having an emotional behavior disorder. The IDEA regulations [34 C.F.R. § 300.7(c)(4)(ii)] specifically exclude students who are socially maladjusted on the basis of an emotional disturbance. The court in *Springer v. Fairfax County School Board* (1998) stated that "adolescence is almost by definition, a time of social maladjustment."

11) Document all information involving discipline for students with disabilities. School administrators are encouraged to document all steps taken to change any inappropriate behavior exhibited by a student with a disability. This includes any interventions implemented and disciplinary actions applied, as well as any communication with school personnel and most importantly communication with parents.

Final Comments

Local school administrators are faced with the responsibility of maintaining a safe educational environment that includes protecting the school community from students who violate local, state, or federal codes of conduct. A challenge for local school administrators is to balance this responsibility with the procedural safeguards afforded to students with disabilities who violate these same codes of conduct. Under the IDEA, students with disabilities are afforded more protections in disciplinary proceedings than regular education students. The 1999 IDEA regulations clarified procedural safeguards in disciplinary proceedings and provided LEAs with specific guidelines concerning the appropriate procedures to follow when providing discipline for students with disabilities. School administrators have a responsibility to the school community to uphold high expectations for student conduct and should not feel that their hands are tied by the IDEA.

Future research should continue to monitor any revisions to the IDEA and the provisions that surround discipline in the public school context. Focus should also be on individual state codes and legislation that impact students with disabilities. It should be noted that the federal guidelines are the minimum standards that must be applied and states may actually provide more stringent standards.

Since the tragedy at Columbine on April 20, 1999 and other recent incidents of school violence, in addition to the attacks on the World Trade Center and the Pentagon on September 11, the world has never been more focused on school safety than it is today. The area of public school discipline and the need to maintain a safe educational environment should be a priority for state and local educational agencies. As school

administrators become more knowledgeable in special education law, they will be better equipped to successfully implement school discipline for students who violate school rules and comply with the IDEA and its regulations.

DEFINITION OF TERMS

BIP (Behavior Intervention Plan)

A plan that proactively addresses the behavior that impedes the child's learning or the learning of others. The plan consists of a description of the target behavior, consequences for such behavior, and positive behavioral interventions and strategies that support the target behavior.

Continuum of Educational Services

The full range of services available for students with disabilities. The range extends from full-time residential placement, which is the most restrictive, to full-time regular classroom placement, which is the least restrictive.

EAHCA (Education for All Handicapped Children Act)

The original federal statutory provision in 1975 that governed special education.

FAPE (Free Appropriate Public Education)

FAPE is defined in 34 C.F.R. § 300.13 of the IDEA to mean the special education and with related services that: 1) are provided at public expense, under public supervision and direction, and without charge to the student or parent; 2) meet the standards of the stated educational agency; 3) included preschool, elementary school or secondary school education in the state involved; and 4) are provided in conformity with an individualized education program (IEP) that meets the requirements of 34 C.F.R. §§ 300.340-300.350.

FBA (Functional Behavior Assessment)

A formal or informal method of assessment used to explore and evaluate the antecedents and consequences associated with the behavior in question in order to determine the purpose of the behavior.

Hearing Officer

Standards, examinations for impartial hearing officers, and decisions about training and hearing officer selection, have been left up to individual States. The IDEA regulations in § 300.508 determine who may not serve as an impartial hearing officer for special education proceedings: (1) By a person who is an employee of the State agency or the LEA that is involved in the education or care of the child; or (2) By any person having a personal or professional interest that would conflict with his or her objectivity in the hearing.

IDEA (Individuals with Disabilities Education Act)

Formerly known as the Education for All Handicapped Children Act which was changed in 1990 to the Individuals with Disabilities Education Act.

IEP (Individual Education Program)

The written document describing the essential components of an IDEA-eligible student's appropriate educational program and the collaborative process between the parents and the school.

IAES (Interim Alternative Educational Setting)

Any setting determined by the IEP team as a result of a disciplinary infraction committed by a student. The setting shall be selected to enable the student to continue in the general curriculum, receive those services and modifications described in the IEP that will enable the child to meet the goals and objectives prescribed in the IEP, and include services and modifications designed to address the inappropriate behavior.

Inclusion

(Also referred to as Mainstreaming) Refers to the placement of a student with a disability in which the student receives his/her education in the regular classroom with supplementary aids and services along with age and grade appropriate peers.

LEA (Local Education Agency)

LRE (Least Restrictive Environment)

LRE is the legal mandate of the IDEA requiring that each student with a disability is to be educated in a learning environment that most closely approximates the learning of his/her peers and provides for appropriate educational opportunities for the student with disabilities. The LRE legal mandate is set out in 34 C.F.R. §§ 300.550-300.554.

Mainstreaming

See *Inclusion*

Manifestation Determination

The evaluation and determination whether a relationship exists between a student's disability and the act of misconduct.

OCR (The Office of Civil Rights)

OSEP (The Office of Special Education Programs)

Procedural Safeguards

Procedural safeguards are the requirements of the IDEA that are designed to afford parents or guardians of students with disabilities meaningful involvement in the educational placement of their children.

Related Services

Related services are support services provided to children with disabilities to assist a student in benefiting from special education. These services may include, but are not limited to: Occupational and Physical therapy, Audiological services, Aural rehabilitation, Mobility instruction, Recreational therapy management, Music therapy, Clean Intermittent Catheterization (CIC), Transportation, and Counseling.

SEA (State Educational Agency)

SED (Severely Emotionally Disturbed)

This term is used to describe students who display one or more of the following characteristics over a long period of time: a) Inability to learn which cannot be explained by ability, health, vision or hearing deficits, b) Problems relating to other children and adults, c) Inappropriate behaviors or feelings, d) Severe depression or unhappiness, and/or e) Tendency to develop physical symptoms or fears about personal or school problems.

SLD or LD (Specific Learning Disability)

This term refers to problems in academic functioning, such as writing, spelling, math, reading, which cannot be explained by ability, vision, hearing or health impairments.

Social Maladjustment

There is no clear definition of social maladjustment, however the IDEA regulations at 34 C.F.R. § 300.7(c)(4) clearly exclude students who are socially maladjusted from eligibility on the basis of an emotional disturbance. Students who are socially maladjusted can be defined as "a persistent pattern of conduct in which the basic rights of others and other age-appropriate societal norms are violated (Springer v. Fairfax County School Board, 27 IDELR 367, 1998).

Transition Services

A coordinated set of activities for a student that promotes movement from school to post-school activities including employment, community experiences and daily living skills.

Zero Reject

Under the zero reject principle, no disabled child will be excluded from receiving a free appropriate public education.

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