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Disciplining Students with Disabilities: Problems Under the Individuals with Disabilities Education Act

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I. INTRODUCTION

Not long ago, a disabled student would have been forced to fight merely to attend school. Today, all students are guaranteed the right to a free, appropriate public education under the federal Individuals with Disabilities Education Act (IDEA).[1] This act was intended to meet the unique needs of children with disabilities and to protect the rights of both disabled children and their parents.[2] Although ostensibly a great breakthrough for those with disabilities, the act and the litigation it spawned has proven worrisome for school administrators. A free, appropriate education has been interpreted to include a number of procedural protections not afforded to students without disabilities. These protections include: 1) due process hearings with respect to parental complaints about their child's placement and 2) remedies in federal court.[3]

These procedural safeguards have given rise to some rather complicated rules that confuse school districts as to how and when they may discipline a student with disabilities, without invoking burdensome federal IDEA protections. Since IDEA was enacted, extensive litigation occasionally has ensued, sometimes resulting in bright-line tests, but more often resulting in ambiguities that leave schools and even parents befuddled as to the law's provisions. To understand the current state of IDEA, one must understand the legislative history and the body of case law concerning discipline of students with disabilities. Additionally, while IDEA has been clarified in some areas, room remains for extensive debate.

School administrators argue that the rigid rules set forth in recent Supreme Court decisions make it difficult to maintain order in school and deprive them of authority necessary to regulate school environment. On the other hand, students and parents

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1. Individuals With Disabilities Education Act 20 U.S.C. § 1400(c) (Supp. 1995).
2. *Id.*
3. Honig v. Doe, 484 U.S. 305 (1988).

argue that the law affords administrators increased protection necessary to prevent widespread injustice. Whichever side one takes, the position usually is based on one's definition of statutory and common-law phrases like relatedness, change of placement, and free appropriate public education.

This paper examines the semantic challenges of IDEA and provides clear guidelines for school districts, affected students, their parents, and concerned attorneys. This paper begins with an historical overview of relevant law to contextualize the current state of the law, and remaining legal issues. Finally, this paper examines one state's efforts to minimize the problems IDEA inevitably entails, and to maintain discipline and order in school.

II. HISTORY OF SPECIAL EDUCATION LITIGATION AND STATUTORY REFORM

Although 49 million Americans have disabilities, schools failed to accommodate students with disabilities in the past, because they represented strained resources beyond what many school districts felt was feasible. As a result, many students with disabilities received an inadequate education. To combat this problem, legislators enacted IDEA. In it Congress declared:

> (1) there are more than eight million children with disabilities in the United States today; . . .
> (3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;
> (4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers; . . .
> (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; . . .
> (8) State and local educational agencies have a responsibility to provide education for all children with disabilities, but present financial resources are inadequate to meet the special educational needs of children with disabilities.[4]

Congress was well aware of the difficulties faced by those with disabilities. Indeed, a Pennsylvania statute allowed administrators to exclude "uneducable or untrainable" students from public

4. 20 U.S.C. §1400(b) (Supp. 1995).

schools.[5] This uneducable/untrainable standard was used to justify denying public education to students across the nation.

Congress intended IDEA to be the exclusive vehicle for challenging the educational placement of students with disabilities.[6] Because the states had proven either unable or unwilling to provide students with the protection and education they needed, the federal government provided in IDEA a statutory remedy for those so wronged by school districts and administrators. IDEA, while laudable in theory, inadequately addressed discipline and how schools may discipline students with disabilities.

IDEA provided certain safeguards for children with disabilities, but it did not anticipate some of the problems that arose when disabled children misbehaved and needed discipline. Extensive litigation has resulted because IDEA was unclear as to disciplinary procedures. One element of IDEA that may explain its litigious legacy is the apparent dichotomy between the interests of parents and administrators. While both camps proclaim to have the best interests of children at heart, administrators and teachers argued that to maintain order in the classroom they needed authority to discipline even those disabled students who misbehave. On the other hand, parents often contended that under the justification of discipline many students were being effectively excluded from the public school system once again.[7]

A. Overview of Legislation and Litigation Regarding the Discipline of the Disabled

Before IDEA, when students with disabilities misbehaved, school districts would often simply suspend or expel them. This extreme discipline of students with disabilities raised issues about the Fourteenth Amendment rights to procedural and substantive due process. The United States Supreme Court found that temporary suspension from a public school constituted a denial of property and liberty under the Fourteenth Amendment.[8] However, in *Goss v. Lopez* the court held that there was an exception to the finding of a denial of due process when the student presented a

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5. Rosalie Boone, "Legislation and Litigation," CONTEMPORARY ISSUES IN SPECIAL EDUCATION 2D. ED., McGraw-Hill Book Company, (San Francisco, 1983) p. 46 *citing* Pa. Assn. of Retarded Citizens v. Commonwealth, 334 F. Supp. 1257(1971).

6. *See* Brandon E. v. Wis. Dept. of Pub. Instruction, 595 F. Supp. 740, 743 (Wis. 1984).

7. Rebecca K. Cate, *The Handicapped in the Classroom: the Supreme Court Adopts a New Standard for the Protection of Rights in* Honig v. Doe, 24 Willamette L. Rev. 1141 (1988)

8. Goss v. Lopez, 419 U.S. 565, 576 (1975).

danger to people, property, or the educational process.[9] In another case, *Stuart v. Nappi*, the court determined that school officials could only suspend, not expel, disruptive students with disabilities whose misconduct was related to their disability.[10]

Both *Doe v. Koger*[11] and *S-1 v. Turlington*[12] reiterated *Stuart's* allusion to the relatedness provision in discipline and expanded it, still allowing for removal of the student if she posed a danger to other students or property. Schools are also not forbidden from using normal disciplinary procedures to discipline students as long as those measures do not deprive the student of the "free, appropriate education" promised under IDEA.[13]

This line of cases (*Doe, Goss, Stuart,* and *S-1*) sets the stage for the Supreme Court's holding in *Honig v. Doe* that a suspension of more than ten days was equivalent to a change in placement[14] that triggered IDEA's procedural protections.

B. Honig v. Doe and the Expansion of Rights

In the late 1980s, a student with disabilities brought an action against the San Francisco Unified School District charging violations of an early version of IDEA. The respondent was an emotionally disturbed student who was suspended indefinitely for violent and disruptive conduct related to his disability pending the outcome of expulsion proceedings.[15] At issue was the "stay-put" provision of the act[16] which required that while review proceedings were pending, students were to remain in their current placement if the dangerous or disruptive conduct at issue related to their disability.

The Court held that a suspension of more than ten days constituted a change in placement invoking IDEA's protections, affirmed the stay-put provision, and abolished the dangerousness

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9. *Id.* at 582.

10. *Id.* at 584. Stuart v. Nappi, 443 F. Supp. 1235 (D.Conn. 1978) seems to be the genesis of the "relatedness" provision which has proven to be a hotly contested issue in the area of special education litigation. Look for more about the relatedness provision and its inherent ambiguities.

11. Doe v. Koger, 480 F. Supp. 225, 228-229 (N.D. Ind. 1929).

12. S-1 v. Turlington, 635 F.2d 342, 346 (5th Cir. 1981).

13. *Id.*

14. A "change in placement" is an IDEA catch-phrase meaning, basically, that a child's Individualized Educational Program (IEP) has not been followed and the placement enumerated in the IEP is rendered ineffective by the action. Because the placement is no longer effective, a new one must be agreed upon as soon as possible to ensure the child receives a free appropriate public education.

15. Honig v. Doe, 484 U.S. 305, 312 (1988).

16. 20 U.S.C. § 1415(e)(3)(A)(Supp. 1995).

exception to the stay-put provision.[17] The Court continued, saying that schools could use

> normal, nonplacement-changing procedures, including temporary suspensions for up to 10 schooldays for students posing an immediate threat to other's safety.[18]

While *Honig* seems to have settled the debate about what constitutes a change in placement, it raised a number of other issues. For example, it is unclear whether the rule that a suspension of more than 10 days constitutes a change in placement might still allow schools to suspend students a number of times for smaller periods of time that cumulatively equal 10 days.[19] Additionally, the relatedness provision (stating that a child may not be suspended for misbehavior relating to his or her disability) continues to be a hotly debated issue and one not easily overcome by school districts.

A major problem plaguing the courts in the area of relatedness is the issue of children with emotional disabilities.[20] The problems for children with emotional disabilities arise from the nature of their disabilities — their behavior is generally seen as either something for which they need to be punished or something that needs to be medically treated.[21] More recently, however, behavioral problems in children with emotional disabilities have focused not on the punitive or medical paradigm, but on whether the placement itself is appropriate.[22] This paradigm seems to be the most effective for modifying the behavior, because it focuses not on the behavior itself, but on the reasons behind the behavior.

While *Honig* seemed to put many issues to rest, still several issues remain that may be impossible to answer definitively at any time in the near future. Indeed, the history of special education litigation is far from over.

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17. Honig, 484 U.S. at 328-29.
18. *Id.* at 325.
19. Gail Sorenson, *Update on Legal Issues in Special Education Discipline*, 81 Ed. Law. Rep. 399, 406 (1993).
20. Theresa Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students With Emotional Disabilities*. 60 Tenn. L. Rev. 295 (1993).
21. *Id.* at 296.
22. *Id.* at 297.

III. IDEA AND OTHER LEGAL PRECEDENTS

A. IDEA

1. A Free Appropriate Public Education

IDEA guarantees disabled children the right to a free appropriate public education. The relevant statutory language states:

> (18) The term "free appropriate public education" means special education and related services that —
> (A) have been provided at public expense, under public supervision and direction, and without charge,
> (B) meet the standards of the State educational agency,
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
> (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.[23]

"Free" is a relatively clear term. Students with disabilities are not to be charged for the services rendered to them by school districts. Even "public" is not generally disputed. Students with disabilities should be able to participate in the state's public school system.

The dispute arises, however, with the word "appropriate." It has been stated by the Court that an appropriate education is not necessarily the best education available.[24] For example, parents of a hearing-impaired child in Illinois wanted their child to be provided with a full-time sign language interpreter in a regular classroom instead of being placed in a hearing-impaired classroom part-time.[25] In that case, the Supreme Court determined that if a state complied with IDEA's procedures, and if the IEP was reasonably calculated to enable a child to receive educational benefits, there was no sustainable action against the state.[26]

Of course, school districts must supplement their budget to meet the needs of students with disabilities, but they are not required to provide "every conceivable supplementary aid or

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23. 20 U.S.C. § 1401(a)(18).
24. Board of Education v. Rowley, 458 U.S. 176,184 (1982)
25. *Id.*
26. Data Research, Inc. *Students with Disabilities and Special Education 10th ed.*, 10 (1993).

service" to a child.[27] A free, appropriate public education, then, might be seen as a tool for school districts to circumvent the guarantees of IDEA. However, school districts do generally provide appropriate education to students with disabilities. As a general rule, if a child is attending school and making progress her IEP, the child is deemed to be receiving an appropriate education. In this vein states may rest somewhat easy as long as they meet their responsibilities under IDEA.

2. State Responsibilities under Idea

To ensure that states meet the obligation to provide children with a free, appropriate, public education, they are required to submit to the U.S. Secretary of Education a plan detailing the ways in which they will protect that right.[28] Until its plan is approved, the state will not receive federal assistance for schooling. States must also guarantee that each student with disabilities receives an IEP and annual review of that IEP as well as access to procedural mechanisms to protest changes in placement.[29]

Under *Board of Education v. Rowley,* when evaluating a child's placement, the state must determine whether the "child's program [is] reasonably calculated to allow him or her to receive educational benefits."[30] This standard has not been interpreted to require states to provide every possible service to children with disabilities.

> Under the EHA a school is not required to maximize the potential of a disabled child, nor is it required to provide equal educational opportunity commensurate with the opportunity provided to nondisabled children. . . . The EHA was not meant to guarantee a child with a disability a certain level of education but merely to open the door.[31]

It seems clear that states are required to provide not a ceiling, but rather a floor of opportunity for each child.

Determining whether a child is a candidate for special education is also a local question. A trial court has said in *Bermudian Springs School District v. Dept. of Educ.*[32] that local

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27. *See* Oberti by Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist. 995 F. 2d 1204, 1221 (3rd Cir. 1993).
28. *Supra* note 27 at 1
29. *Id.* at 2.
30. *Id.* at 5.
31. *Id.* at 6.
32. 475 A.2d 943 (Pa. Comwlth. 1984)

school districts were responsible for the identification of disabilities and development of the IEPs of their students.[33] An issue of local determination, the question of initial disability diagnosis is addressed extensively by IDEA but is beyond the scope of this paper.

3. The Individualized Education Program.

As stated in § 1412(4) and §1414(a)(5) of IDEA, states must provide each child with an individualized education program designed to meet that student's educational needs and goals. "The IEP should be a truly individualized plan, not merely a checkoff of standard options."[34] To ensure that this plan is indeed individualized, the child's parents, teachers, and school administrators should form a team to develop the plan. This multi disciplinary team is often referred to as an "M-team."

> The IEP should include:
> (A) a statement of the present levels of educational performance of the child,
> (B) a statement of annual goals, including short-term instructional objectives,
> (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs.
> (D) a statement of needed transition services required for students beginning no later than age 16 . . .
> (E) the projected date for initiation and anticipated duration of such services and,
> (F) appropriate, objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.[35]

Failure to provide an adequate IEP necessarily will be found to be a violation of the requirement of the act requiring states to guarantee students the right to a free, appropriate, public education.

While most IEPs cannot use generalized clauses because each child is different, the IEP should include provisions for discipline of the child in case of misbehavior. Using the IEP as a vehicle for discipline is the most effective way to implement discipline of a child with disabilities for two reasons.

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33. *Supra* note 27 at 8.

34. Nancy McCormick, *Working With the Special Education System to Benefit Children*. 5 Jun. S.C. Law. 10 (1994).

35. 20 U.S.C. § 1401(a)(20) (Supp. 1995).

First, parents involved in the formation of the IEP, are more likely to approve of disciplinary action taken against their child than if school administrators act unilaterally to suspend or expel the child. Second, judicial economy necessitates this protection for school boards. When parents have agreed, in writing, to a certain method of discipline, schools can more easily defend themselves against a parent that exercises his or her procedural rights under IDEA.

4. Procedural Protections for Parents & Students under Idea

a. Annual Review

The federal government has not left students and parents without power to affect their education. There are many procedural protections provided to help parents and students break through the barriers that traditionally denied a free, appropriate, public education to students with disabilities. Among these protections is the requirement that the IEP be reviewed annually.[36] This review allows parents to express dissatisfaction each year with the IEP and/or to implement the changes they feel are necessary to give their child an appropriate education. Additionally, IDEA requires states to afford parents and students certain procedural safeguards including: the opportunity to examine all records pertaining to the identification, evaluation, and placement of the child.[37] Many times, especially in the realm of the discipline of a child with disabilities, the annual review is inadequate and does not come soon enough to affect the free appropriate education standard. For this reason, Congress created a set of interim procedural mechanisms to ensure due process to all involved.

b. Prior Notice, Parental Consent

Whenever a school district wants to change a child's placement, evaluation, or identification, or refuses to implement a change of the same, the school must give the parent written notice before it takes the proposed action.[38] Additionally, the school must obtain parental consent to conduct a preplacement evaluation, or to initially place a child in a special education

36. IDEA Regulation, 34 C.F.R. § 300.146 (1995).
37. 20 U.S.C. § 1415(b)(1)(a) (Supp. 1995).
38. 34 CFR § 300.504 (a).

program.[39] The state may also require consent for other services as long as the consent does not interfere with the child's free, appropriate public education.[40]

Parents should be wary of feeling too secure with these provisions. After the child's initial placement in a special education program, educators are not required to obtain consent to subsequent IEP changes. They are only required to give notice of the proposed change to the parent.[41] Also, if a parent refuses to consent to a preplacement evaluation, the public agency must obtain a court order under state law authorizing them to conduct the evaluation, or to provide the services without parental consent.[42]

The notice to parents must include an explanation of procedural safeguards available to them, a description of all evaluation procedures and tests to be performed, a description of the action to be performed, and a description of any other factors relevant to the agency's proposal or refusal and the reasons therefor.[43] Also, the notice must be in generally understandable language or in the native language of the parent as long as that is feasible.[44]

c. Due Process Hearings

Because schools do not have to obtain consent from parents to implement changes to a student's IEP, Congress has given parents the right to due process hearings on matters regarding their child's evaluation, placement, identification, or anything they believe will act as a denial of a free, appropriate public education to their child.[45] The due process hearing must be conducted by the agency directly responsible for the child and must inform the parent of any available legal help if the parent requests this information.[46]

Everyone involved in this hearing has the right to be accompanied by an attorney (or other specially trained representative) to present and object to evidence, to cross-examine

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39. 34 CFR at § 300.504 (b).
40. 34 CFR at § 300.504(c).
41. 34 CFR at § 300.504 n 1 (But remember, parents can be involved in the creation of the IEP and should take this initial job seriously as it may be one of the few times they are able to have a direct and influential say in their child's IEP).
42. 34 CFR at § 300.504 n 2.
43. 34 CFR at § 300.505(a).
44. 34 CFR at § 300.505(b).
45. 34 CFR at § 300.506 (a).
46. 34 CFR at § 300.506 (b), (c).

witnesses, to obtain a recording of the hearing, and to obtain written findings of fact from the public agency.[47] If a parent or school district disagrees with the finding of the public agency, they may appeal the decision to the state educational agency for review.[48] If a party disagrees with the decision of the reviewing officer and does not have a right to an appeal under CFR § 300.510, she may bring a civil action under §615(e)(2) of IDEA.[49]

d. The Stay-put Provision

While the stay-put provision is typically discussed separately from the other procedural protections of the Act, it appropriately belongs in the class of procedural protections provided for parents and children. If a child is suspended for more than ten days, that suspension will be considered a change of placement triggering the due process protections of the Act.[50] As is typically the case in government bureaucracy, however, hearings and appeals and further appeals may prolong the period that a child is in transition between placements, while she is not receiving any education. Previously, it was found that students could not obtain the free appropriate education they were guaranteed during this time. "The so-called 'stay put' provision requires that the student 'shall remain in the then current educational placement' unless the parents and school agree on an interim placement."[51]

The stay-put provision is a boon for the student and may assure a free, appropriate, public education, but it is a definite bane to the school administrators who may have to keep a potentially dangerous disciplinary problem in school with other children. The Court, however, has consistently refused to recognize a 'dangerousness' exception to the stay-put provision. The Court in *Honig* stated, "[Congress meant] to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school."[52]

The Court emphasized that school administrators were not without acceptable, effective courses of action. These alternative

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47. 34 CFR at § 300.508 (a).
48. *Id.* at § 300.510.
49. *Id.* at § 300.511.
50. *See* Honig v. Doe, 484 U.S. 305, 328-329 (1988).
51. Stewart R. Hakola, *Suspension, Expulsion, and Discipline of Handicapped Students*, 68 Mich. B. J. 1088, 1091 (1989).
52. Honig v. Doe, 484 U.S. at note 3.

methods of discipline will be discussed at a later point in this paper. It presently suffices that generally children must remain in their current placement despite the danger they might pose to others in the school.

6. Least Restrictive Environment / Mainstreaming

Section 1412(5) of IDEA requires that states:

> assure that, to the maximum extent appropriate, children with disabilities. . . 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.[53]

School districts are required under IDEA to place students in the least restrictive environment available that would allow that student to derive some educational benefit.[54] This procedure has been termed "mainstreaming." Mainstreaming presents some unique disciplinary problems. Because the child is being placed in an environment with children who have no disabilities, teachers and administrators must be careful when they implement the disciplinary procedures. Often many other children are in the classroom. They may see that a student with a disability is being disciplined differently for the same offenses. This creates tension in the classrooms that may be difficult for students to understand or accept.

Fortunately, the courts have not said that teachers may not discipline students, only that they may not expel a student or suspend her for more than ten days without providing the procedural protections mentioned above. The courts have said that agencies may use their normal procedures for dealing with children who are endangering themselves or others.[55] These normal procedures may include but are not limited to "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."[56]

However, as stated previously, after the ten days have run,

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53. 20 U.S.C. § 1412(5).
54. 20 U.S.C. § 1412(5)(B).
55. Honig v. Doe, 484 U.S. 305, 325 (1988) *(citing* the Department of Education).
56. *Id.*

the child must be reinstated in his or her placement pending due process proceedings until a change in placement or an interim placement is agreed upon by the child's M-team, his or her parents, and the court. In *Honig* the court implies that this ten-day period should be used to persuade parents to accept an interim placement[57] so the child does not have to be reinstated in the placement where the misbehavior occurred. How often this actually happens is unclear.

B. The Relationship Test

IDEA does not allow punishment for misbehavior that is related to or is a manifestation of the student's disability.[58] This stems from "the principle of Anglo-American law that punishment should attach to the notion of fault."[59] This provision was not originally in IDEA and actually seems to stem from Section 504 of the Rehabilitation Act of 1973 which prohibits discrimination against a person with disabilities solely by reason of their disability.[60] As most students are eligible to receive the benefits of Section 504 if they are eligible under IDEA, all discussion of the relationship provision will be under the umbrella of IDEA.

While the relationship test may seem workable in theory, it is often difficult to apply. The burden to prove that a behavior is not related to the disability generally falls upon the school district.[61] Some circuits have even determined that this test must be conducted before proceeding to an expulsion hearing.[62]

The biggest problem with the relationship test is that nobody really knows what the criteria to determine relatedness really are. Cases on the subject do shed a little light, however.[63] The test is an individualized one. There are no generic lists of behaviors that are related to certain disabilities. Instead, each school district must make the relatedness determination on a case by case basis.[64]

Often the question of relatedness will spark debates about

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57. *See Id.* at 326.

58. David L. Dagley et. al. *The Relationship Test in the Discipline of Students with disabilities*, 88 Ed. Law Rep. 13, 29. (1994).

59. *Id*. at 14.

60. *Id.* at 19.

61. *Id.*

62. *Id.* at 20. Discussing Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982), a Kentucky case in which Turlington, Sherry, Koger, Stuart, and Hornbeck were used to determine that the Relationship Test had to be conducted before proceeding to an expulsion hearing.

63. *Id.*

64. *Id.*

the appropriateness of the placement. The correlation is clear. If a child's placement is inappropriate, they may be acting out because their needs are not being met. In this way the behavior is related to the disabling condition. As stated earlier, these questions often arise in the context of students with emotional disabilities or those who possess a combination of physical, emotional, and learning disabilities. The relationship between talking back to the teacher and being in a wheelchair is tenuous at best. Some courts have, however, held that a child's learning disabilities made him a ready stooge to be set up by his peers who were drug traffickers.[65] Acceptance of such a tenuous relationship seems to say that relatedness will be found if there is any conceivable connection between the behavior and the disability.

Indeed, the courts do not agree on whether the relationship can be an attenuated one or must be directly related to the disability. For example, the Fifth Circuit has found that even children who are orthopedically challenged would be likely to pick fights as a way of dealing with stress and feelings of vulnerability.[66] Other circuits, however, have said that attenuated relationships like these are no more determinative than those of other children with low self esteem who are considered non-disabled and cannot, therefore be afforded a stay of discipline.[67]

The relationship test is a crucial portion of a student's claim against a school. If a judge declines to find a relationship between the disability and the behavior, the procedural protections of IDEA and Section 504 simply do not apply and the child can be punished as would any other child in the school.

C. Remaining Issues

Although *Honig* seemed to answer many of the questions regarding discipline of special education students, there remained some questions about appropriate disciplinary policies and tests. The question of relatedness remains a divisive issue and eventually, the relatedness test may become merely a battle of the experts, each clawing to convince a court that her own theory is the most correct one.[68]

If a child is properly suspended or expelled (meaning her behavior was unrelated to her disability) she must still be provided with continuing educational services under IDEA, but may not be

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65. *See,* e.g., *Sch. Bd. of Prince William County v. Malone*, 762 F.2d 1210, 1216 (1985).

66. Dagley, supra note 59, at 22 (*citing* S-1 v. Turlington. *supra* note 13, at 347).

67. *Id. (citing* Doe by Gonzales v. Maher, 793 F. 2d 1470, 1480 n.8 (9th Cir. 1986)).

68. Sorenson, *supra* note 20, at 402.

entitled to continuing educational services if she only qualifies for special education under Section 504. This "suggest[s] a reasonable and simplified policy for school districts: Educational services should continue for all students with disabilities who are suspended or expelled for a long term."[69]

Second among the alternative disciplinary measures articulated in *Honig* was in-school suspension. When an in-school suspension is longer than ten days it may be considered a change in placement if deemed significantly different from the placement delineated in the IEP.[70]

Another issue deals with transportation. Often, students with disabilities must ride the public school bus to get to school. If a child misbehaves on the bus and subsequently has her transportation privileges suspended, is this the same as suspension from school? Arguably, yes. The state funds transportation to school as well as curricular programs, and a suspension from transportation services for more than ten days would likely require M-team review and change of placement procedures.[71]

Does it constitute a change in placement if a child is suspended more than once in a semester, always less than ten days at a time but totalling over ten days? A letter from the Office of Civil Rights stated:

> While school districts may suspend handicapped children for a total of ten days in a school year for seriously disruptive or dangerous behavior, the exclusion of a handicapped child for more than a total of ten days during a school year constitutes a significant change in the students' educational placement.[72]

The last issue is that of determining what constitutes appropriate alternative disciplinary procedures. Corporal punishment is not unconstitutional.[73] However, when corporal punishment enters the picture, there are many opportunities for teachers and administrators alike to overstep the bounds of ordinary discipline into abuse. As a general rule, even if the school district policy allows corporal punishment, in light of the stringent protections offered students with disabilities, schools should refrain from disciplining them with corporal punishment. If the punishment results in injury to the child, the school district may

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69. *Id.* at 404.
70. *Id.*
71. *Id.* at 405.
72. *Id. citing* York (SC) School Dist. #3, 17 EHLR 475,479 (OCR 1990)).
73. *Id* at 408; *citing* Fee v. Herndon, 16 EHLR 1178 (5th Cir. 1990).

find itself in federal court charged with violating the child's constitutional right to Due Process.[74] Additionally, corporal punishment may not be an effective method of discipline for a child with disabilities.

IV. WHAT SCHOOLS CAN DO

School districts are not left powerless to discipline their students with disabilities. Recall that the court in *Honig v. Doe* outlined some examples of appropriate disciplinary measures for students with disabilities. Among these were "study carrels, timeouts, detention, or the restriction of privileges."[75] In addition to these methods of discipline, the school district has a number of other options open to them.

A. Changing the Placement

Schools may choose to take the course that is readily apparent and has always been available to them. They may modify the placement through the IEP from a "regular/normal" placement to a "restrictive/special" placement.[76] Of course, as with any change in placement, the procedural protections of review and hearing may apply, but the change in placement allows the student to remain in school while giving the administration a little more control over an unruly or willfully disobedient child. Schools should remember that the courts presume that children with disabilities gain the most benefit from being in the least restrictive environment.[77] Therefore, courts will carefully review any change in placement to a more restrictive environment.

In many cases a change in placement may minimize the disruptive behavior. This is especially true with students whose disabilities are emotionally based. In many cases, a child's misbehavior is directly related to an inappropriate placement and changing the placement often results in a cessation of the behavior. Additionally, when a child is inappropriately placed, she does not receive an education that satisfies IDEA.

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74. *See* Waechter v. School Dist. No. 14-030, 773 F. Supp. 1005, 1010 (W.D. Mich. 1991).

75. Honig v. Doe, 484 U.S. 305, 325 (1988).

76. Caryn Gelbman, *Suspensions and Expulsions Under the Education for all Handicapped Children Act: Victory for Handicapped Children or Defeat for School Officials*, 36 Wash. U. J. Urb. & Contemp. L. 137, 153 (1989).

77. *Id.* at 154.

B. Temporary Suspension

Schools may temporarily suspend students as long as the suspension does not exceed the ten-day limit articulated in *Honig*. Temporary suspensions may be necessary when a child wilfully misbehaves or poses a threat to others in order to restore classroom order and give the child a cooling off period. Although some parents may oppose the action, it is perfectly within the rights of the school district to exclude the child for this short period of time and does not constitute a change in placement. Thus, *Honig* may suggest that "for short-term suspensions, handicapped students can be treated exactly like nonhandicapped students, with no need to consider the type of behavior involved."[78]

Long-term suspensions and expulsions of students whose behavior is related to the disabling condition, however, do violate IDEA's guarantee of a free appropriate public education and effect a change in placement. If a child's misbehavior is found to be unrelated to the disabling condition, that child may be expelled for as long as the district deems necessary as if he or she were not disabled. However, if a child must be suspended for a long time the school may be required to provide home tutoring during the period of suspension or expulsion. Indeed, "a free appropriate education may not cease during the period of a properly imposed long-term suspension or expulsion of EHA-Identified students."[79]

C. IEP Anticipation of Discipline

The IEP is a device promulgated in the wake of Congress' concern for the unique needs of students with disabilities.[80]

> The term 'individualized education program' means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include--
>
> (B) a statement of annual goals, including short-term instructional objectives,
>
> (C) a statement of the specific educational services to

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78. Gail Paulus Sorenson, *Special Education Discipline in the 1990s*, 62 Ed. Law Rep. 387, 391 (1990).

79. *Id.* at 390.

80. U.S.C. § 1400 (b) (Supp. 1995).

be provided.[81]

The IEP shall meet the unique needs of children with disabilities, and state the annual goals. While none of these says specifically that an IEP must include anticipated disciplinary measures for a child, there is no better place for it. The IEP is agreed upon by the parents, teachers, and often the child in question. It states all educational goals for the child and, presumably, governs all action taken toward the child in special education.

There is no better place to anticipate and provide for accepted disciplinary procedures than the IEP. When discipline is anticipated in the IEP, invariably the punishment will correlate directly to the child's understanding and need for punishment. Additionally, the IEP allows the child input into her punishment, promoting her acceptance of it.

Despite the utility of such an approach, some worries arise about IEP anticipation of discipline. On one hand, parents may be reluctant to admit that their child might need discipline in the future. On the other, schools may be unwilling to tip their hand, so to speak, and limit the ways that they may discipline the child. Of course, not all misbehavior can be anticipated, but with a plan of discipline that is set out in the IEP and followed, school districts will have fewer parental complaints and more children receiving appropriate, case-specific discipline in the schools.

D. In-school Disciplinary Procedures

The Court in *Honig* outlined some procedures considered appropriate when a child's behavior was a manifestation of her disability. Among these, as mentioned before, were study carrels, time-outs, and detentions. In addition to these disciplinary devices, schools have begun to implement comprehensive disciplinary programs that ensure students receive all the protections they need, while allowing administrators to maintain order in their schools. "The Courts have long taken the position of creating their own, often arbitrary standards where none exist. However, where commonly agreed upon standards do exist, the courts tend to measure compliance against the existing standards."[82]

These programs allow teachers to plan behavioral strategies to reach students before their misbehavior reaches

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81. 20 U.S.C. § 1401(a)(20)(A) and (B).

82. *Selection of Least Restrictive Behavioral Interventions for use with Students with Disabilities*. Utah State Board of Education Special Education Rules, H-1 (May 1993).

intolerable levels.

One example of these behavioral programs has been promulgated by the Utah State Board of Education.[83] This program outlines possible behavioral intervention strategies and also lists possible side-effects of those strategies. Additionally, it explicitly tells teachers what procedures to follow in emergency disciplinary procedures.

The Utah rules divide behavioral intervention strategies into four levels. The first of these categories is "Positive Intervention" and includes such strategies as positive and differential reinforcement, tracking, modeling, shaping, and chaining as well as self-management, extinction, structured recess and other methods.[84] Positive reinforcement is a procedure in which a stimulus event or object is presented contingently upon a response, usually immediately following the response, resulting in the likelihood that the response will be strengthened or maintained.[85]

This type of behavior modification is considered the least restrictive. Because the behavior is being extinguished, not punished, this is the preferred method for school districts to implement to curb behavioral problems. It will rarely result in angry parents or be considered a violation of the IEP because it is the least restrictive way to modify behavior.

The second level of Utah's scheme involves mildly intrusive contingent procedures. Among these methods are verbal reprimand, nonseclusionary time outs, detention (before school, after school, and during lunch), work detail and in-school suspension.[86] Additionally, this is likely the level anticipated by the court in *Honig*. A caution to keep in mind while using these strategies is that many of them verge on violating the student's rights. The State of Utah includes a caution statement with each strategy in this and subsequent areas to remind teachers that even acceptable methods of discipline must be kept within certain bounds. Also, all level II procedures require parental permission.[87] This parental permission is a key protection for school administrators and should be strictly observed.

The third level, moderately intrusive contingent procedures, poses significant problems to classroom teachers as they require consent from parents and approval from the state and local human

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83. *Id.*
84. *Id.* at H-31.
85. *Id.* at H-32.
86. *Id.* at H-40.
87. *Id.* at H-16.

rights division. In addition, classroom personnel must be able to show that level I and II strategies were ineffective to modify the behavior.[88] One problem with Level III and IV strategies is that they may be construed as abusive by uninformed observers.[89]

Although these least restrictive behavioral intervention strategies may have been implemented into the IEP, if a parent observes her child being disciplined in a level III or IV manner, she may request a change in placement, invoking IDEA's procedural protections. Because of the added cautions that accompany level III and IV interventions, schools must be particularly careful when implementing them. Often the teacher is required to keep a log of when the method is used, or participate in in-service training to implement the more intrusive strategies.

Level IV (highly intrusive contingent procedures) includes manual restraint, physical restraint, and contingent intrusive substances and stimuli.[90] As with level III strategies, level IV strategies must be implemented only with the most extreme caution. Level IV strategies should only be implemented after consultation with the IEP Team, parents, and/or the child's physician, because not only are they viewed as abusive by uninformed observers, but also methods like manual restraint may pose some danger to the child and the teacher, if not implemented correctly.

When a staff member reaches the point where conventional techniques prove ineffective, extraordinary measures may be implemented, but the individual must comply strictly with the following procedure:

> 1. A member of the school district, who is qualified must document that the procedure is a recognized and accepted method of dealing with the behavior, must document the need for it in this particular case along with the qualifications of the staff member who will be implementing the procedure, and seeks and receives written informed consent from the parent or guardian.
>
> 2. The written request is submitted to the State Professional Peer Review Committee who reviews the plan, makes suggestions, and then grants permission to use the procedure.
>
> 3. While the strategy is implemented, the committee reviews the progress every two weeks that it is in operation.[91]

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88. *Id.* at H-15.
89. *Id.* at H-46.
90. *Id.* at H-50.
91. *Id.* at H-55.

While these procedural restrictions may seem harsh, in light of the problems that regular disciplinary procedures like suspension and expulsion cause, extraordinary measures should be undertaken with extreme caution. However, if the IEP Team and parents agree to the strategy, it may be the best way to correct the child's behavior.

While Utah's guidelines are an example of what school districts can do to change behavior, administrators should remember, as stated before, that if a school must resort to some of the level III and IV strategies, it may be in the best interest of the student to reexamine the placement instead.

IDEA and the subsequent cases do not articulate preferred disciplinary strategies. However, it is clear that schools are required to place the child in the least restrictive environment. In light of this mandate, schools should carefully outline disciplinary procedures for administrators and teachers as the State of Utah has done. In doing so, schools can be assured that their strategy provided the disabled student and her parents with all legally required procedural protections. Leaving the question open only invites litigation from angry parents.

V. CONCLUSION

The Individuals with Disabilities Education Act has often been viewed as unwieldy and unintelligible, especially in the often-litigated area of discipline. The confusion should not, however, scare administrators away from disciplining a child with disabilities. Although schools must comply with certain bright-line rules set forth in recent case law, they still have the power to keep discipline and order in their schools. One way to do this is to prepare to discipline through extensive use of the IEP, a comprehensive, uniform plan of discipline like that in Utah, and wise implementation of the in-school disciplinary measures that *Honig* allows.

Gail Jensen