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Congressional Attention Needed for the "Stay-Put" Provision of the Individuals with Disabilities Education Act

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CONGRESSIONAL ATTENTION NEEDED FOR THE "STAY-PUT" PROVISION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

I. INTRODUCTION

In 1975, Congress found that millions of disabled students were receiving an inferior education or were being completely excluded from the public school system, and subsequently, passed the Education for All Handicapped Children Act.[1] The purpose of the act was "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and services designed to meet their unique needs. . ."[2] In order to receive federal funds for special education, states and school districts, must provide a "free appropriate public education" for all disabled students who qualify under the act.[3] In 1990, the Act was renamed the Individuals with Disabilities Education Act ("IDEA" or the "Act").[4] All fifty states receive federal funds under IDEA.[5]

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1. 20 U.S.C. § 1400 (1994).

2. 20 U.S.C. § 1400(c). A 'free appropriate education" does not mean the best possible education, but to confer some meaningful educational benefit on the student. *See, e.g.*, Barnett by Barnett v. Fairfax County Sch. Bd., 927 F.2d 146 (4th Cir. 1991) *cert. denied* 502 U.S. 859 (1991).

3. 20 U.S.C. § 1408, 1412 (1994). "Children with disabilities", defined by the Act, includes children:

(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, need special education and related services. 20 U.S.C § 1401(a).

IDEA covers children from the age of 3 to 21, inclusive. 20 U.S.C. § 1408, 1411. For children 3 to 5 years of age, IDEA provides for an expansion of the disabilities covered. *See* 20 U.S.C. § 1401 (a)(B) (1994).

4. 20 U.S.C. § 1400(a).

5. The federal amount given to states who comply with IDEA is determined by multiplying 40% of the national average per pupil expenditure by the number of children with disabilities being served under IDEA. 20 U.S.C. § 1411(a)(1) (1994). The number of children being served is taken from the number of children receiving special education and related services on December 1 of the previous year. 20 U.S.C.

abled student and, which is at a minimum, annually reviewed.[6] An underlying theme of IDEA is referred to as main streaming, the integration of disabled students into the public education system with their peers as much as possible while still fulfilling the disabled student's needs.[7] Additionally, IDEA goes beyond a simple funding statute and confers on disabled students an enforceable substantive right to a public education.[8]

States must comply with substantive and procedural requirements of the IDEA in order to receive federal funds provided under the act.[9] This comment will discuss the "stay-put" provision of IDEA, a procedural requirement for changing the education services of a disabled student.[10] Section One, an introduction, provides a backdrop to the enactment and purpose of IDEA. Section Two discusses the dynamics of the stay-put provision. Section Three addresses the answers provided by the major Supreme Court case interpreting IDEA, and the problems and inconsistencies that are found in rulings of lower federal and state courts. Effects and abuses of the stay-put provision are analyzed in the fourth and fifth sections, respectively. The subsequent two sections discuss the options for school districts and the need for Congressional action. These sections are followed by the conclusion.

IDEA provides a great benefit by ensuring that millions of disabled students receive a free appropriate education. The stay-put provision of IDEA, however, presents several problems

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6. 20 U.S.C. § 1414(a)(5) (1994). An IEP is a written statement which includes present levels of educational performance, annual goals and short term objectives, specific educational services to be provided, extent the child will participate in regular education programs, statement of transition services for those age 16 and over, projected date of initiation and duration, and appropriate criteria and evaluation procedures and schedules. For a more detailed explanation of IEP requirements, *see* 20 U.S.C. § 1401(20) (1994).

An IEP team drafts and, at least, annually reviews each IEP. The IEP team consists of a representative of the local educational agency or an intermediate educational unit who is qualified to provide or supervise the education of disabled students, the teacher, the parents or guardian of the child, and when appropriate the child.

An IEP is required for each disabled student, as well as an Individualized Family Service Plan (IFSP) for disabled student between the age of 3 and 5, inclusive. 20 U.S.C. § 1414(a)(5). The IFSP is described in 20 U.S.C. § 1477 (1994).

7. *See, e.g.*, Lenn v. Portland Sch. Comm., 998 F.2d 1083 (1st Cir. 1993) (recognizing the statutory bias of IDEA of main streaming).

8. Honig v. Doe, 484 U.S. 305, 309 (1988). Case discussed further, *supra* note 16.

9. 20 U.S.C. § 1408, 1412.

10. 20 U.S.C. § 1415(e)(3).

to local school districts. One must remember the great benefits while attempting to solve these problems facing schools. The underlying premise should always be to ensure a quality education.

II. THE STAY-PUT PROVISION OF IDEA

During the pendency of any review proceeding of IDEA, a disabled student is "to remain in the then current educational placement," unless the parents[11] and the state or local educational agencies agree otherwise.[12] In the context of disciplining a disabled student, the student must remain (thus the term "stay-put") in the current educational placement until the ultimate decision on the appropriate discipline or the appropriate placement has been reached. Congress wanted to ensure that "handicapped [disabled] students are not forced to await outside an educational setting the outcome of a placement determination."[13]

The exact dynamics of when and where the stay-put provision controls will be discussed in the following section. The one clear exception to the stay-put provision is activated when a disabled student brings a weapon to school; the student may be placed in an alternative interim placement while the ultimate decision of placement is decided.[14] If the parents or guardian contest the punishment or placement by requesting a due process hearing, the stay-put provision does not control. The student does not remain in the current educational placement, but

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11. Parental participation was recognized by Congress as being an essential element of a disabled student's education. *See generally* 20 U.S.C. § 1415, Note 42 (Parental Participation) (1994). As such, IDEA guarantees parents the opportunity to participate in the decisions that affect their child's education, the right of access to their child's school records, a right to an independent evaluation, and a right to written notice prior to any changes, evaluations or placements. 20 U.S.C. § 1415(b)(1)(A)-(D) (1994).

12. 20 U.S.C. § 1415(e)(3) (1994).

13. 20 U.S.C. § 1415, Note 4 (Purpose) (1994).

14. 20 U.S.C. § 1415(e)(3)(B)(ii) (1994). The Improving America's School Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (to be codified in scattered sections of 20 U.S.C.), amended § 1415(e)(3). The amendment will remain effective until the enactment of legislation reauthorizing IDEA. *See* 20 U.S.C. § 1415, Historical and Statutory Notes (Effective Dates) (1994). Interestingly, "weapon" for this section is defined only as a firearm. 20 U.S.C. § 1415(e)(B)(iv) (1994). A disabled student bringing a knife or other weapon, besides a firearm, can still invoke the stay-put provision.

is placed in the alternative placement pending the conclusion of all proceedings.[15]

III. CASE LAW OF THE STAY-PUT PROVISION

Following the stay-put provision to discipline a student who qualifies under IDEA is often complicated and uncertain. The foundation Supreme Court case in this area is *Honig v. Doe*.[16] In *Honig*, two emotionally disturbed students were expelled indefinitely for violent and disruptive conduct related to their disabilities.[17] The school district argued that Congress could not have meant the stay-put provision to be read literally—such a reading would force schools to return violent or dangerous students to school while the often lengthy review procedures ran their course.[18]

The Supreme Court, however, rejected the district's argument and held that a school district cannot unilaterally change the placement of a disabled student for conduct growing out of the student's disability.[19] If the parents or guardian of the child and the school cannot agree on the placement of the child, the student is to remain in the current education locale until the appeal has been decided. The Court found that Congress intended "to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school."[20] If a disabled student poses a serious threat to himself or herself or other people, and the student's parents contest any change in placement, the school could suspend the student for up to 10 days.[21] But if the parents refuse to accept the interim placement, the school would have to allow the student to remain at the current placement or resort to a court to grant appropriate relief.[22]

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15. 20 U.S.C. § 1415 (1994).
16. 484 U.S. 305 (1988).
17. *Id.* at 323.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 306.
22. *Id.* at 326. A school must first exhaust all administrative remedies before obtaining injunctive relief. *Id.* at 328. The administrative process can be bypassed by overcoming the presumption in favor of the student's current educational placement.

The *Honig* Court found that it was not proper to unilaterally expel a disabled student for conduct that was related to the student's disability.[23] However, there are many areas of the stay-put provision that are unsettled and problematic. For example, the Court did not address the issue of whether a school can expel a disabled student for conduct that is not a manifestation of a disability. Nor did the Court articulate the necessary strength of the relationship between the misbehavior and the disability. Furthermore, the Court did not discuss whether services must be continued to a disabled student if there is a proper expulsion (e.g., after following IDEA procedures or by a court). Lower federal courts and federal agencies differ on their answers to these questions. These are some of the issues that will ultimately have to be addressed by the Supreme Court or clarified by Congress. Following is a brief discussion of the conflicts or inconsistencies that are currently facing IDEA.

A. Relationship to the Disability

The discussion focuses on the distinction between conduct related to or a manifestation of a student's disability and conduct that is not related to or not a manifestation of the student's disability. The Supreme Court in *Honig* addressed the issue of conduct that is a manifestation of the student's disability.[24] Courts have not consistently applied the stay-put provision for conduct that is not a manifestation of the student's disability.

The Ninth Circuit in *Doe v. Maher* was faced with a group of disabled students who alleged violations of the Education of All Handicapped Children Act (EAHCA), a predecessor to IDEA.[25] The circuit court held that while a disabled student may not be expelled for conduct that is a manifestation of a disability, a

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The presumption is defeated by demonstrating that maintaining the child in that placement is substantially likely to result in injury to either that child or to others. *Id.*

23. Honig, 484 U.S. at 323.

24. *Id.* Additionally, a Louisiana federal court ruled that under IDEA and Section 504 of the Rehabilitation Act, discipline for conduct growing out of a disability is illegal and must be cleared from the student's record. Jonathan G. v. Caddo Parish Sch. Bd., 875 F.Supp. 352 (W.D. La. 1994).

25. Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986). The Supreme Court affirmed the ruling of the Ninth Circuit in Honig, 484 U.S. 305 (1988) (discussed *supra* note 15 and accompanying text). The Supreme Court, however, in its ruling did not address IDEA requirements for conduct *unrelated* to a student's disability.

disabled student whose conduct is not a manifestation of a disability may be expelled.[26] The *Maher* court held that once a hearing officer or IEP team has determined that the conduct was not related to the student's disability, the student may be suspended during the pendency of any ensuing expulsion hearing.[27] The court held that whena student is expelled for conduct not related to the student's disability, the school did not have to comply with EAHCA.[28]

Similarly, the Fourth Circuit in *School Board v. Malone* followed the *Honig* court in holding that expelling a disabled student qualified as a change in placement thereby triggering the protective procedures of the act.[29] The court, however, also stressed that during such procedures a determination must be made as to whether the unacceptable behavior was caused by the disability.[30] The court also stated that the proper test for expulsion was centered on whether the behavior was related to the disability, not on whether the current placement was appropriate.[31] The circuit court went on to find that the trial court's ruling that the behavior was caused by the disability was not clearly erroneous.[32] Therefore, the court did not clearly explain what it would have done if the conduct had not been related to the disability.

Although a majorityof courts allow an expulsion for conduct that is not related to a student's disability, the issue is still not resolved.[33] This issue willremain unresolved or will be inconsis-

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26. Maher, 793 F.2d at 1470.

27. *Id.*

28. 20 U.S.C. § 1400.

29. 762 F.2d 1210 (4th Cir. 1985). This line of reasoning was also followed in Doe v. Bd. of Educ.,No. 94-C-6449, 1996 WL 79411 (N.D. Ill. Feb. 16, 1996).

30. Malone, 762 F.2d at 1210.

31. *Id.* A minority of commentaries have focused the discussion on whether the misbehavior was a result of an inappropriate placement.

32. *Id.* Interestingly, the district court found that the disabled student's distribution of drugs was caused by his disability. The court reasoned that as a result of the disability, the student hada loss of self image. The student then felt ostracized and became particularly susceptible to peer pressure. Other students could exploit this susceptibility by using the disabled student as a "go-between" in drug trafficking. For a further explanation of the reasoning, see the district court's opinion at 662 F.Supp. 978, 980-81 (E.D. Va. 1984).

33. *See* Stephen B. Thomas & Charles J. Russo, SPECIAL EDUCATION: LAW ISSUES & IMPLICATIONS FOR THE'90S, 141 (1995) (recognizing that a majorityof courts have allowed expulsions that were based on conduct that was not related to a student's disability).

tently applied, until either the Supreme Court or Congress addresses it.

B. Strength of Relationship

The necessary strength of the relationship between the misbehavior and the disability is also debatable. Many phrases and standards have been articulated. They range from an attenuated relationship to a substantial or fundamental connection to the disability.

Although courts have consistently placed the responsibility on the school district to prove that a relationship exists, each jurisdiction has utilized a different test.[34] Such inconsistencies do not allow schools to base their decisions on a fixed standard. Thus, schools find no predictability or consistency from the courts to aid in their decision.

C. Educational Services after Expulsion

The level of education a school district is required to provide, if at all, after an expulsion is additionally problematic. Although it is not always clear under what circumstances a disabled child can be expelled,[35] it is clear that a disabled child may be expelled, in some instances.[36] The issue discussed here is whether educational services must continue during any such expulsion.

In *Department of Education v. Riley*, the Secretary of the Department of Education decided to withhold more than $50 million in funding from the state of Virginia for not providing education for expelled students under IDEA.[37] The Commonwealth of Virginia sought interlocutory review of the decision. The Fourth Circuit held that IDEA required the continuation of education services to eligible disabled students who are suspended long-term or expelled.[38] The court articulated that "re-

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34. For an in-depth discussion of the relationship to the disability that is necessary, see David L. Dagley, et al., *The Relationship Test in the Discipline of Disabled Students*, 88 EDUC. L. REP. 13 (March 1994) (citing many different standard and requesting Congressional clarification).

35. In the current discussion, the term expulsion is used for a permissible long-term suspension or expulsion of greater than 10 days.

36. Honig, 484 U.S. at 306.

37. 86 F.3d 1337 (4th Cir. 1996).

38. *Id.* at 1344

gardless of whether that conduct is a manifestation of the child's disability," during an expulsion, a school must continue to assure the right to a free appropriate public education in an alternate setting.[39] The state of Virginia contended that this requirement gave disabled students additional educational opportunities over non-disabled students.[40] The court conceded that there were more rights for disabled students, but that this result was clearly Congress' intention in passing IDEA.[41]

The Eighth Circuit, however, held that "the removal of a dangerous disabled child from her current placement alters, but does not terminate, her education under the IDEA."[42] The school had placed a thirteen-year old girl in a self-contained classroom in an effort to better deal with her actions. In the self-contained classroom the girl repeatedly bit, kicked, hit and threw objects. In affirming the trial court's removal of the student, the circuit court found that the student's placement was substantially likely to result in injury and that the school district took all reasonable steps to minimize the propensity to cause injury.[43] Nevertheless, the court required the school to continue the student's education.[44] No matter where she was placed or what she did, the school was still responsible to provide FAPE.

One federal district court's handling of this issue illustrates the confusion surrounding the continuation of educational services to disabled students who are expelled. In *Doe v. Board of Educ. of Oak Park,* the court was faced with the question of the continuance of educational services to an expelled disabled student.[45] The court held that a school did not have to continue educational services, declining to "extend *Honig* or the IDEA."[46] Two months later, on plaintiff's motion, the court reversed its ruling.[47] The court found, pursuant to the Office of Special Edu

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39. *Id.*

40. *Id.* at 1345.

41. *Id.* The Fourth Circuit recognizedthat other courts had reached the contrary position. *Id.* at 1343, n.12.

42. Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223, 1228 (8th Cir. 1994).

43. *Id.* at 1231.

44. *Id.*

45. No. 94-C-6449, 1996 WL 79411, at *1 (N.D. Ill. Feb. 16, 1996).

46. *Id.* at *3.

47. Doe v. Bd. of Educ. of Oak Park, No. 94-C-6440, 1996 WL 197690, at *1-2 (N.D. Ill. April 22, 1996). The court was also faced with additional motions for reconsideration in this action. For purposes of this discussion, only the issue of

cation Programs' ("OSEP") policy and a new reading of the IDEA, that a school was required to provide a free appropriate public education for the duration of any expulsion of disabled students, regardless of the relationship between the misbehavior and the disability.[48] Three months following this ruling, the court reversed itself once again.[49] The court concluded that its prior decision was flawed, due to its overemphasis on OSEP's policy statements.[50] Recognizing the confusion, the Fourth Circuit met en banc and held that a school district was not required to continue educational services for disabled students who are expelled from school for criminal conduct not related to their disability.[51]

As well as many areas of IDEA, what educational services are required when a disabled student is properly expelled continues as unsettled.

IV. EFFECTS OF THE STAY-PUT PROVISION OF IDEA

The stay-put provision of IDEA may have several direct and indirect consequences. Afew of the results presented by current application of the provision will be briefly discussed in the following section to illustrate the need for Congressional action.

A. Classroom Conditions

Perhaps the most dynamic effect of the stay-put provision is the potential harm to other students from a dangerous disabled student who is not immediately removed. A common example is a student who is expelled for assaulting a student or faculty member at school. The parents contest the expulsion by invoking the stay-put provision of IDEA. While the stay-put provision is operative, the student remains in school and the stu-

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continuation of services after expulsion is addressed.

48. *Id.* The policy statements referred to by the court were contained in a letter from the Office of Special Education Programs (OSEP) in response to questions from a school district. The lettermay be found at 23 INDIV. WITH DISABILITIES EDUC. LAW REP. 894 (Oct. 1995).

49. Doe v. Bd. of Educ. of Oak Park, No. 94-C-6449, 1996 WL 392160 (N.D. Ill. July 11, 1996). Plaintiff's motions for reconsideration of other past rulings were denied. Defendant's (the school district) motion was granted. *Id.* at *3.

50. *Id.* at *2.

51. Commonwealth of Virginia v. Riley, __F.3d__ (4th Cir. 1997).

dent, faculty and other students may be placed in significant danger.[52]

In addition to the possible physical harm to the student, other students and faculty, there are several other possible consequences that affect the classroom.[53] For example, the teacher who has to devote additional time to an extremely disruptive child does so at the expense of other children. Teachers are also resigning because they are no longer able to control their classrooms or lack the specialized training to deal with children with special needs.[54] In extreme situations, conditions may escalate to the point where parents of non-disabled students will remove their children from public schools in order to ensure safety and a quality education.[55]

B. Consistency of Punishment

School officials have the responsibility to provide and maintain an environment that is safe for all students and is conducive to learning.[56] School officials often assert the need to respond quickly and consistently to maintain control in the classroom.[57] A student's continued presence in school after inappro

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52. The Supreme Court in Honig held that even if the misbehavior stemmed from a student's disability, a school could still expel a disabled student for up to 10 days. Honig, 484 U.S. at 306. After 10 days, however, the student would have to be allowed to return to school.

53. The great benefit of IDEA should also not be forgotten when balancing the effects of the stay-put provision. IDEA protects the education of millions of disabled students who were previously being excluded or whose needs were not being met. 20 U.S.C. § 1400(b) (1994). Besides the educational services provided to disabled students, non-disabled students additionally learn to have positive attitudes towards their disabled peers.

54. *See* Omyra M. Ramsingh, Comment, *Disciplining Children with Disabilities Under the Individuals with Disabilities Education Act*, 12 J. CONTEMP. HEALTH L. & POL'Y 155, 159 (1995).

55. *Id.*

56. The Supreme Court recognized the school's interest in maintaining a safe learning environment in balancing the interest against a disabled student's interest in receiving a free appropriate public education. Honig, 484 U.S. at 328.

57. Congress found that in 1975 there were over 8 million children with disabilities in the United States and that over half of these children were not receiving an appropriate education. 20 U.S.C.A. § 1400(b)(1),(3) (1994). Arguably, today's principals are better informed of the needs of children with disabilities than in 1975. Additionally, individual schools and school districts have acquired trained personnel to work with disabled students. It may be the appropriate time to loosen the hands of trained school personnel to do what is best for the disabled student and other students. As mandated in Honig, the school cannot have the authority to unilaterally remove a disabled student for conduct that is related to the student's disability. Honig, 484 U.S. at 323. However, when the conduct is unrelated to a

priate behavior could weaken discipline in the school.[58] At times, school officials are forced to discipline disabled students in ways that are different from those for non-disabled students. An official must maintain order and control in the school, must follow the substantial and procedural requirements of IDEA, and must not discriminate in a discipline scheme for disabled students.[59] The line school officials must walk is gray, with legal actions lurking on either side.[60] Though this complexity is arguably justified, given the sensitivity to change that some disabled students possess and a history of not providing disabled students with any type of education, the principal has, nevertheless, lost one more level of control.[61]

Additionally, one of the greatest potential dangers of the current status of IDEA is backlash. Many teachers and school officials are becoming frustrated with the inability to teach in school. One possible ramification of such a frustration is a decreased sensitivity to students with disabilities. Not only are school officials lessenthusiastic about identifying students with disabilities because of the increased costs and complexities that follow, but the education of previously classified disabled students may decrease. An attitude of dealing with disabled students to avoid law suits is intrinsically contrary to the goal of

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disability or is dangerous, the school should have more flexibility with itsoptions. Not only is the protection of the disabled student and the regular education student essential, the protection of other disabled students and the overall precedent need also to be considered.

58. IDEA covers many physical, emotional and learning disabilities. *See supra* note 2. Not all students who qualify under IDEA appear to be disabled.

59. Problems may arise with creating a discipline system for disabled students that is substantively different than that of non-disabled students. Section 504 of the Rehabilitation Act prohibits discrimination based on a disability. 29 U.S.C. § 794 (1994). School officials must continually assess their actions against the backdrop of not only IDEA, but also Section 504.

60. *See* DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954 (1987).

61. *See generally*, Peter E. Leone et al., *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. REV. 389 (1995). Consistently, children with disabilities are over-represented in juvenile detention facilities. While approximately 10% of all students are identified as having mental retardation, emotional disturbance, and/or learning disabilities, some studies show that 50% of incarcerated children have disabilities impacting their ability to learn*See* Interagency Implementation of Public Law 94-142 for Institutionalized Handicapped Juveniles 4 (May, 1986). Whether this overrepresentation stems solely from manifestations of a child's disability or from discrimination under § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1994) deserves consideration, but will not be addressed in this comment.

providing a free appropriate education for disabled students. This possible trend needs to be considered and prevented through changes in the current application of IDEA.

C. Length of Review Process— Mootness

The review process of a school district's decision can be very lengthy.[62] The process at its worst can first entail a hearing officer at the school level, then appeal at the school level, followed by a review at the state school board level, then a federal district court, then to a federal circuit court and finally the Supreme Court (a state court may also be accessed, but generally the federal judicial system is used). The large amount of time may still render a decision moot.

The extended period is not necessarily good for either the student or the school. In the context of a developing student, time plays a vital role. During the pendency of review proceedings, the student may not be in the proper placement, even though the student remains in his or her current placement. Such a setting may result in a lack of student progression. Additionally, a student may graduate by the time the appeal is complete. The school is likewise forced to expend resources that may not be properly applied. For example, if main streaming is first attempted and does not work, a teacher not trained to teach disabled students may be forced to work inefficiently with a disabled student for a substantial time.

D. Responsiveness to Disabled Students

Though the discussion can digress to whether a disabled child is really responsible for his or her actions, it is not always clear that most, if not all, disabled students are able to distinguish between right and wrong.[63] Consequences or discipline for inappropriate behavior is as important for disabled students as it is for non-disabled students. Granted, due to possible differences between disabled students and non-disabled students, application of discipline may be different, yet all students must

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62. The Supreme Court found its decision moot as to one of the two boys in Honig v. Doe, 484 U.S. at 306. By the time the action reached the Supreme Court, one of the students was 24 years old and no longer entitled to a free appropriate public education. *Id.*

63. *See* Maureen Fitzgerald & Eve Proffitt, *Special Education: The New Throw Away Kids*, 4 KY. CHILDREN'S RTS. J. 8 (Fall 1995).

learn the difference between behavior that is acceptable and not acceptable. Some disabled students may never see the consequences of unacceptable conduct.[64] Schools have been given much of the responsibility of instilling a solid foundation of society's values in our children. Teaching disabled students that the system treats them differently concerning significant misbehavior is not providing this foundation.

V. ABUSES OF THE STAY-PUT PROVISION OF IDEA

As we have seen, the laws governing students with disabilities are complex and frequently misapplied and misunderstood. Additionally, weaknesses in the current structure of IDEA may encourage abuse. Concerned parents or guardians may hire a lawyer, inexperienced in education law, whose representation results in the prolonging of the process. Similarly, a competent lawyer may use, although arguably unethically, the same complexity of IDEA to drag out the process in order to keep the student in school. Such action can result in a moot final decision.[65]

Additionally, courts have held that IDEA applies to students who were not classified under IDEA before the misbehavior occurred.[66] IDEA requires schools to actively search for students that qualify.[67] Students who are not classified still merit the procedural and substantive protection of IDEA. However, some students invoke the protection of IDEA to sidestep punishment. A federal district court in California held that the act did not provide for a remedy when a student manipulates the

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64. For an article discussing punishment as incorrect for behavior relating to a handicap condition, see Gail Sorenson, *Update on Legal Issues in Special Education Discipline*, Comment, 81 ED. LAW REP. 399, 401-02 (May 1993) (reasoning that whether the behavior stems from a disability or an inappropriate placement, punishment is only appropriate when attached to the notion of fault). *See also* Maureen Fitzgerald and Eve Proffitt, *Special Education: The New Throw Away Kids*, 4 KY. CHILDREN'S RTS. J. 8, (Fall 1995) (comparing discipline scenarios of a child's disability related conduct to a deaf child who refuses to obey verbal directives, or punishment of a blind child for failure to accurately describe a sunset).

65. *See supra* note 62 and accompanying text.

66. Hacienda La Puente Sch. Dist. v. Honig, 976 F.2d 487 (9th Cir. 1992); *See also* M.P. v. Grossmont Union High Sch. Dist., 858 F.Supp. 1044 (S.D. Cal. 1994) *But cf.* Rodiriecus v. Waukegan Sch. Dist., 90 F.3d 249 (7th Cir. 1996) (stay-put provision of IDEA applies to a student that has not previously been diagnosed only if the student reasonably should have been diagnosed).

67. IDEA requires schools to identify, locate and evaluate all students with disabilities. 20 U.S.C. § 1412(2)(A)(I).

law to receive the protection of IDEA.[68] The court explained that the inquiry into a temporary restraining order (which the student sought here to prevent the school from excluding him), generally, includes an inquiry into the likelihood of success on the merits of the claim; part of such an inquiry would be actually showing that the student qualifies for IDEA.[69] The court concluded, however, that the language of IDEA prevented "the court from determining whether a plaintiff [student] is actually entitled to the protection of IDEA," while enforcing the stay-put provision against the school.[70]

VI. OPTIONS FOR SCHOOL DISTRICTS

Traditionally, schools removed students from school whose conduct was not appropriate.[71] Today, however, with respect to disabled students such procedures are substantially limited. Although some discipline options are no longer available, other options still remain.

A. Court Orders

If school officials feel that a disabled student poses a serious threat to the order of the school, they must get a court order to remove the child, an expensive and time-consuming process.[72] A school can remove a disabled student for up to 10 days without the removal being considered a change of placement, triggering the strictures of IDEA.[73]

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68. M.P. v. Grossmont Union High Sch. Dist., 858 F. Supp. 1044 (S.D. Cal. 1994).

69. *Id.* at 1048.

70. *Id.*

71. IDEA was an effort to limit this practice with disabled students. *See,* 20 U.S.C. § 1400 (1994).

72. In removing a disabled student from school through an injunction, verbal threats by the student may not be sufficient evidence of the student's dangerousness to support a change in placement. *See* Cherry Hill Township Bd. of Educ., 16 EDUC. FOR THE HANDICAPPED LAW REP. 340 (1990) (discussing a district court case in New Jersey). *But cf.* Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223, 1230 (8th Cir. 1994) ("[W]e reject the proposition that a child must first inflict serious harm before that child can be deemed substantially likely to cause injury [to justify a court order removing the child].").

73. Honig, 484 U.S. at 326.

Obtaining a court order has proven to be difficult,[74] because a claimant must show thatthere is a substantial likelihood that injury will result to a disabled student or others.[75] In *M.P. v. Grossmont Union High School District*, a district court addressed whether the school had satisfied its burden to overcome the stay-put provision.[76] A child who had not previously been qualified under IDEA brought a gun to school.[77] The court held that the school did not meet its burden of proving there was a substantial likelihood that danger to the student and others would result in returning the student to school.[78] The court reasoned that the student no longer had access to the gun.[79] Ironically, the court justified its holding on the fact that the student no longer had *access to the specific gun*, instead of the fact that the student's actions clearly demonstrated *his willingness* to put others in danger.

B. "Conventional" Forms of Discipline

While the Supreme Court in *Honig* stripped the schools of the power to unilaterally remove disabled students for conduct related to their disabilities, the Court emphasized that the school could still use "normal procedures for dealing with children who are endangering themselves or others."[80] Options listed by the Court included: use of study carrels, timeouts, detention, the restriction of privileges, and temporary suspension of up to 10 days when there is an immediate threat to the

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74. An additional option in dealing with a dangerous disabled student is to integrate future discipline options into the IEP. A change in placement, removal or specific punishment could be outlined in correlation to specific actions. Because of IDEA's emphasis on parental participation, the parents may contest such an IEP. However, discussion and proper review of the IEP could be conducted prior to an emergency situation if the student were to become dangerous in the future. It is uncertain how a hearing officer or a court would respond to such a preemptive tactic. The parents' or guardian's level of understanding of IDEA procedures would probably carry considerable weight.

75. Honig, 484 U.S. at 328.

76. 858 F. Supp. 1044 (S.D. Cal. 1994).

77. The case occurred prior to Congress' making an explicit exception for bringing a weapon (a gun) to school.Today, a school could remove a disabled student who brought a gun to school. If the weapon had been a knife, however, the student would still be in school. The case still illustrates the difficulty schools can face in obtaining a court order.

78. Grossmont, 858 F.Supp at 1049.

79. *Id.*

80. Honig, 484 U.S. at 306.

safety of others.[81] These limited options restrict the school to making short term and modest attempts at correcting the behavior or removing a dangerous, disabled student.

C. Juvenile Proceedings

Courts are divided on the question of whether disabled students whose behavior is unacceptable may be referred to juvenile court in an effort to remove them from school. For example, in Tennessee, courts have construed *Honig* to prevent school districts from initiating juvenile proceedings against students with disabilities as a means of circumventing requirements of IDEA and excluding them.[82] A school is barred from going forward with juvenile proceedings until parties exhaust all administrative remedies required by IDEA.[83] The commencement of a juvenile court proceeding may be treated as a change in educational placement, entitling the student to the procedural and substantive protection of IDEA; if the parents or guardian contest the change, the school must first exhaust administrative remedies.[84]

Similar reasoning and adescriptive scenario can be found in *In re Tony McCann*.[85] Tony, a fourteen-year old boy, had been classified as mildly, mentally retarded and emotionally handicapped. The school district alleged that Tony was physically abusive to other students, that he exhibited disruptive behavior, and that he verbally threatened school staff members. Before following IDEA's change in placement procedures, the local school district filed a petition in juvenile court to have the boy removed from school following state law.[86] The court held that although it possessed "exclusive and original jurisdiction," it was "statutorily limited" both by the Education of the Handi-

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81. *Id.*

82. *See* Morgan v. Chris L., 21 INDIV. WITH DISABILITIES EDUC. LAW REP. 783 (E.D. Tenn. 1994), *aff'g In re* Child with Disabilities, 20 INDIV. WITH DISABILITIES EDUC. LAW REP. 61 (1993); *see also In re* Tony McCann, 17 EDUC. FOR THE HANDICAPPED LAW REP. 551 (Tenn. 1990).

83. *See* 20 U.S.C. § 1415(e)(2) (1994); 34 C.F.R. § 300.511 (1994).

84. Morgan, 21 INDIV. WITH DISABILITIES EDUC. LAW REP. at 785 (E.D. Tenn. 1994).

85. 17 EDUC. FOR THE HANDICAPPED LAW REP. 551 (Tenn. Ct. App. 1990).

86. *Id.* at 553-54.

capped Act, a predecessor of IDEA, and local regulations implementing the act.[87]

Other courts have not interpreted so narrowly the unilateral removal restriction given schools in *Honig*. With *In re B.C. v. J.R..*, a Louisiana state court ordered "homebound instruction" because of a student's actions at school.[88] The stay-put provision prohibited unilateral action by the school, but "it does not limit the authority of juvenile courts."[89] However, given the deference to school officials' expertise as to placement determinations, a school may be apprehensive about pursuing juvenile proceedings that essentially change placement, before a school has completed its own evaluation of the effects of such a change.[90] Although the court would issue the order to remove the student, such action may be seen as a change in placement by the school.

VII. CONGRESSIONAL ACTION NEEDED

In 1996, Congress began working on the reauthorization of IDEA; the debate has been heated and may result in no reauthorization for some time.[91] Nevertheless, Congress must continue fighting to improve the education of disabled and nondisabled students. Courts are inconsistently implementing IDEA, and schools are left to hypothesize about its required procedures. The education of disabled students needs to have clear guidance and consistent, predictable outcomes.

Congress needs to clarify IDEA by determining whether a disabled student, who qualifies under IDEA, can be expelled for

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87. Tony McCann, 17 EDUC. FOR THE HANDICAPPED LAW REP. at 551-52.

88. *In re* B.C. v. J.R., 610 So.2d 204 (La.Ct. App. 1993), *cert. denied*, 510 U.S. 963 (1992).

89. *In re B.C.* 610 So.2d at 205. *See also In re* Christopher V.T., 620 N.Y.S.2d 213, 215 (N.Y. Fam. Ct. 1994) (ruling that the authority and concerns of a *juvenile proceeding* were "broader than merely ensuring that respondent is receiving a free appropriate public education" required by IDEA).

90. Generally, the incarceration of a disabled juvnile does not end the right of a free appropriate public education.*See e.g.*, Green v. Honmson, 512 F.Supp. 965, 96 (D. Mass. 1981). Furthermore, a court may find that the school district must first attempt to address the educational needsof a child in good faith, before the court is willing to destine the student by a "destructive placement" (implying the negative influences of incarceration). Ruffel P. v. Malone, 582 N.Y.S.2d 631, 631 (N.Y. Fam. Ct. 1992).

91. *See IDEA Bill Fighting for Life* THE SPECIAL EDUCATOR, vol 12, iss. 1 (Aug. 2, 1996).

conduct that is not a manifestation of his or her disability. Congress should also specify a proper standard to evaluate the necessary strength ofthe relationship between the conduct and the disability. Additionally, Congress needs to clarify whether educational servicesmust continue if a disabled student is properly expelled from the current placement. Furthermore, Congress should state a standard to evaluate whether a previously unclassified student can, after improper behavior, qualify for IDEA's protection. Disabled students who are not previously classified need to be ensured protection, while avoiding IDEA protection to students who do not qualify under the act.

Congress has already recognized the need for some exceptions to the stay-put provision in mandating the temporary expulsion of a disabled student who brings a gun to school. With the difficulties of dangerous disabled students, the addition of a dangerousness exception, without having to get a court order, will help further the protection of all students and school staff. A dangerousness exception may be placed within the discretion of the superintendent of the school or of a majority vote of the IEP team in certain enumerated situations.

Alternatively, a dangerousness exception could be founded on the ability to immediately move a dangerous disabled student to an interim location to await an ultimate decision. The school could then be required to retain the educational services offered the student. While shuffling of school staff and other costs may be expensive during this interim period, it would allow the IEP team and the parents time to agree on appropriate punishment and/or placement while not endangering other students or school staff.

Congress not only must address these issues, but it must readdress a problem with which it has already dealt—funding. While Congress intended to encourage schools to comply with the act through reimbursement, the reimbursement has not approached the stated amount.[92] With proper reimbursement, schools would not be as apprehensive in searching for and classifying students under IDEA. It may be inherently inconsistent

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92. The goal of the federal government is to reimburse the states for 40% of their average per pupil expenditures. For a discussion of the federal government not meeting this expectancy, see Leslie A. Collins & Perry A. Zirkel, *To What Extent, If Any, May Cost be a Factor in Special Education Cases*, 71 EDUC. L. REP. 11 (1992) (reporting that in 1990, the federal funding was only at 9% state reimbursement).

to say that school officials are opposed to providing an education to disabled students, yet they are likely inhibited by budgetary constraints. Federal funding of IDEA programs was intended to help alleviate this problem by reimbursing schools for part of the money they expend on providing an education for disabled students.[93]

VIII. CONCLUSION

Given the benefits, IDEA is helping move the country in the right direction of protecting the rights of disabled students. Due to the intrinsic complexities and problems associated with disabled students, generally, a student's educational services should not be drastically changed before a complete evaluation of the situation. A drastic change can destroy months or years of progress by a disabled student.

Concurrently, the provision needs to be flexible to incorporate the possible danger to the disabled student and others and the need to be responsive to the actions of a disabled student.[94] When a school district is faced with a dangerous student, it must be able to properly protect all those involved. Additionally, providing more flexibility will allow the district to deal with the growing abuse of the stay-put provision by those who use it to avoid punishment for misbehavior.

Flexibility may be accomplished through allowing a change in placement, as long as there is no substantial change in educational services. This procedure may result in additional costs to the district (e.g., transporting district personnel to the student's home, if that is the new location). Yet, a school district, motivated by the protection of its students and concerned with the education of a disabled student would probably pay the extra cost until a final decision has been reached as to the status of the student.

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93. Local taxpayer back lash may result from federal mandates that do not support the required services for students with disabilities. *See Hearing on the Reauthorization of the Individuals with Disabilities Education Act (IDEA)*, 104th Cong., 44 (1994).

94. "Educators need flexibility to hold all disruptive students accountable for their actions. No student can learn if disruptive students are allowed to destroy the learning environment." *Id.* at 30 (Boyd Boehlje, President of the National School Boards Association, speaking on the need to adjust IDEA).

Schools desire more flexibility and discretionary control to deal with the complexities of educating students with disabilities.[95] The tight requirements of IDEA were necessary for a recognition of the need to provide all children with an appropriate education. Implementation of the act was furthered by its strictness. The education of disabled students has improved. In the field of disability education, rights of disabled students are now more well-known, and therights are more consistently protected. Principals and counselors at public schools are also better educated and better trained to work with disabled students. Additionally, courts and schools are searching for Congressional clarification. Although some schools may need improvement in providing a free appropriate public education, IDEA should now become more flexible in recognition of the overall progression. The implementation by Congress of additional flexibility and control, as discussed in this comment, will ensure that the education of disabled students and non-disabled students, continues to improve.

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95. *But cf.* Honig v. Doe, 484 U.S. 305 (1988). A limited sphere of this discretin was found to not exist under IDEA in the Supreme Court's ruling in Honig. *Id.* at 323.