

Safety First: Student Discipline Under the 1997 Amendments to the IDEA and the Need for Further Reform

RICHARD S. BOOTHBY*

The 94th United States Congress passed the Education for All Handicapped Children Act in 1975 to insure that the nation's nearly eight million disabled students would have access to the public schools. The 104th Congress amended the successor to that act, the Individuals with Disabilities Education Act ("IDEA"), in 1997, in part to address the complex and sensitive issue of reforming disciplinary procedures for the millions of students covered by the Act. The author acknowledges that many protections afforded by the IDEA are essential to ensuring access to the public schools for America's disabled students. However, the author argues that the current law unnecessarily creates double standards for dealing with violent disabled students and violent non-disabled students. The author further contends that assuring the physical safety of all children, their teachers, and other school staff is an essential and primary consideration that must take precedence over other worthy policy objectives. The current law, however, hampers the ability of schools to deal effectively with violent disabled students and to provide a safe learning environment for all students. Specifically, this note argues that the IDEA's goal of providing access for the disabled to public schools can be well served while also pursuing the goal of providing a safe learning environment. The author proposes two legislative changes to the IDEA: 1) adopting a flexible expulsion rule for disabled students who bring guns to school, thus aligning the IDEA with the Gun-Free Schools Act; and 2) adopting an emergency removal provision that will allow schools to change the placement of dangerous disabled students who are involved in other violent acts.

"We have examples of kids who have sexually assaulted their teachers and are then returned to the classroom."¹

* B. Mus. Ohio University, *summa cum laude*, 1993; M. Mus. Ohio University, 1996; J.D., The Ohio State University Moritz College of Law, 2003 (expected). I want to express my sincere thanks to Claudia Bentley for her invaluable critique of this note as well as her generosity with her time. I also wish to thank my wonderful wife Christy and my darling daughter Aubrey for the unending patience, love, and support they have given me. I know no man more fortunate and blessed than I.

¹ Kay S. Hymowitz, *Who Killed School Discipline?*, CITY J., Spring 2000, at 34 (statement of Julie Lewis, staff attorney, National School Boards Association).

I. INTRODUCTION

The Individuals with Disabilities Education Act² has effectively provided access to the nation's public schools for millions of disabled students.³ This law represents the single most important victory for the disabled in their struggle to receive fair and equal treatment from the public education establishment.⁴ A shameful history of exclusion⁵ from public education seemed the inevitable lot for America's disabled students until the early 1970s when two important cases⁶ focused attention on this situation, ultimately resulting in passage of the Education for All Handicapped Children Act of 1975.⁷

In 1997, Congress amended the most recent version of this earlier act, the Individuals with Disabilities Education Act.⁸ This amendment addresses, in part, the disciplinary procedures that apply only to special education students.⁹ These disciplinary procedures and the need for their further reform are the focus of this note. Soon Congress will consider the effectiveness of the 1997 Amendments and

² 20 U.S.C. § 1400 (2000).

³ U.S. GEN. ACCOUNTING OFFICE, REPORT TO SENATE AND HOUSE COMMITTEES ON APPROPRIATIONS: STUDENT DISCIPLINE—INDIVIDUALS WITH DISABILITIES EDUCATION ACT 4 (2001) ("Almost 6 million youths . . . were classified as having physical, learning, or emotional disabilities that qualified them to receive educational services under IDEA in school year 1997–98 . . .").

⁴ 20 U.S.C. § 1400(c)(3) ("Since the enactment and implementation of the Education for All Handicapped Children Act of 1975 . . . this [Act] . . . has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education . . .").

⁵ The statute itself outlines some of that history:

(2) Before the date of the enactment of the Education for All Handicapped Children Act of 1975—

....

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

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

20 U.S.C. § 1400(c)(2)(B)–(C).

⁶ See H.R. REP. NO. 94-332, at 3 (1975) (describing the landmark cases of *Pennsylvania Ass'n for Retarded Citizens v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), in which the court ruled that every school-aged mentally retarded child in the Commonwealth had a right to a public education, and *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972), in which the court ruled that every school-age handicapped child had the same right).

⁷ Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. § 1400 (2000)).

⁸ Pub. L. No. 105-17, 111 Stat. 37 (1997) (codified as 20 U.S.C. § 1400 (2000)).

⁹ 20 U.S.C. § 1415; see also 34 C.F.R. § 300.520 (1999).

the need for further changes.¹⁰ The legislative solutions in this note are offered as one approach for Congress to consider as it tries to achieve a balance between the goals of access to the public schools for the disabled while ensuring a safe learning environment for all students.

The overriding goal of the IDEA was to provide access to public schools for the millions of disabled students who had been systematically excluded from them.¹¹ The purpose of the 1997 Amendments to the IDEA was, in large part, to address the need for maintaining safety in our schools and giving school officials the tools needed to achieve this goal.¹² The current conflict between these two goals—access and safety—is unmistakable evidence that both of these goals cannot be pursued with equal fervor. One must take precedence over the other without undermining the pursuit of the other goal—here safety must be the primary goal.

The current law, however, appears to favor the preference of disabled children to remain in the regular classroom setting regardless of any safety concerns presented by their behavior.¹³ More ominous still, there is evidence that

¹⁰ Ronnie Blair, *Disability Law Thorny Issue for Schools*, TAMPA TRIB., Apr. 29, 2001, Pasco, at 1 (“The [IDEA] is scheduled to be revised again in 2003.”).

¹¹ See generally *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 69 (1999) (explaining that the purpose of the IDEA was to open the door of public education to children with disabilities); *Reauthorization of Individuals with Disabilities Act: Hearing Before S. Comm. on Labor and Human Res.*, 105th Cong. 101 (1997) [hereinafter *Hearings (1997)*] (statement of H. Michael Brown, President, National Association of Secondary School Principals) (“Since [the] enactment of the [IDEA] in 1974, school administrators and educators have made great strides in fulfilling the purpose of this Act, . . . access to a learning environment . . .”); see also Blair, *supra* note 10, at 1 (“The original law’s intent was to prevent schools from discriminating against students with disabilities.”).

¹² *Reauthorization of IDEA: Discipline Issues: Hearing Before Subcomm. on Disability Policy of S. Comm. on Labor and Human Res.*, 104th Cong. 1 (1995) (statement of Senator Frist) (“We all want safe schools. We all want teachers to be able to teach and students to be able to learn.”); *Hearings (1997)*, *supra* note 11, at 9 (statement of Judith E. Heumann, Assistant Secretary of Special Education and Rehabilitative Services, U.S. Department of Education) (“Our goal is for safe schools . . .”).

¹³ Consider the following examples:

A 14-year-old special-ed girl, who had been suspended for threatening a class aide, attacked her school principal twice, knocking her unconscious, damaging vertebrae in her neck and causing permanent nerve damage. Police arrested the student, and school officials kept her out of school for 45 days The principal was out for eight months.

A special-ed student, already under an in-school suspension, threatened to burn his school down after being told his suspension was being extended. Days later the school did in fact burn down, and police arrested the student. His brother, also a special-ed student under suspension, subsequently threatened to shoot the principal. The school was forced to lock its doors, keeping students inside, until police could apprehend the student. The law permits the students to return to school in 45 days

Kenneth Smith, *Disabled Educators*, WASH. TIMES, May 6, 1999, at A19.

To say that these examples are not isolated is a great understatement. *See, e.g.,* Jeanette White, *Two Seniors Won't Finish Year at Ferris; Boys Involved in Stabbing Will Be Allowed to Earn Diplomas Through Alternative Program*, SPOKESMAN-REV. (Spokane), Feb. 20, 1999, at B1 (explaining that a special education student who stabbed two other students would be on a forty-five day suspension so that school officials could determine his next placement, while the students who were stabbed by him were suspended for the remainder of their senior year for harassing the special education student);

A West Virginia teacher was repeatedly hit by an autistic child for a year, once ending up in an emergency room, but the child remained in her class. A North Carolina teacher had her arm broken by a student diagnosed with a disability, who was suspended for two days. An eight-year-old in Toledo, Ohio repeatedly set fires, exposed himself and destroyed a classroom, but remained in school.

Peter Applebome, *Enabling Schools: Public School Will Get More Financial, Disciplinary Help with Disabled Students in Bill Awaiting Presidential Approval*, SAN ANTONIO EXPRESS-NEWS, June 13, 1997, at B4 (citing a report by the American Federation of Teachers).

The frustration of school officials that must face this current state of affairs is unmistakable:

The current proscriptive rules under IDEA have established a special class of students that are not subject to the rules of conduct required of all other students. In effect, the federally mandated IDEA rules have undermined my ability to maintain a safe and effective learning environment for every student in my school.

Hearings (1997), *supra* note 11, at 102 (statement of H. Michael Brown, President, National Association of Secondary School Principals). The concern is, in essence, that a double standard exists for the discipline of disabled students and non-disabled students who commit the same offenses, which is deplorable to begin with, but worse still in that the double standard serves no important end while it threatens school safety. *Id.* (“[A] dual code of conduct . . . currently exists between special education and general education children.”); Smith, *supra*, at A19. Smith writes:

School administrators say they are more than willing to educate disabled students, but not at the cost of the safety of everyone else in the school. And they worry that the federal government is teaching disabled students a terrible lesson—that there is one standard for them, and another for everyone else. *What could be more disabling?*

Id. (emphasis added). The problem addressed in this note is how best to deal with those few disabled students who are dangerous and who at present are afforded special protections that put them beyond the reach of ordinary school discipline policies. Leslie Sowers, *The Mental Health of Children: Part II: Up to the Schools?*, HOUSTON CHRONICLE, June 28, 1998, at 1 (“[The] numbers [of seriously behaviorally challenged students] are small relative to their healthier peers . . . [T]he most seriously troubled make up about 3 percent to 5 percent of the [school-age] population.”). One should not think though that, because there are so few disabled students to whom these issues apply, this is a problem not worth addressing. A single student can make learning in a classroom impossible for the entire class if his behavior requires an inordinate amount of attention from the teacher. *See generally* *Hearings* (1997), *supra* note 11, at 103 (statement of H. Michael Brown, President, National Association of Secondary School Principals) (“Disruptive students . . . do interrupt classes and make learning difficult if not impossible.”); Interview with Christy A. Morris-Boothby, Second Grade Teacher, Stone

some disabled students are very aware that they are insulated from normal disciplinary rules as a result of the IDEA.¹⁴ Not surprisingly, there is also evidence of the dissatisfaction of teachers, principals, school boards, parents, students, and entire communities who feel that the safety of the school community is threatened by the current law and the double standards it contains for the discipline of disabled students.¹⁵ Common sense argues for placing

Elementary School of Belpre City Schools, in Belpre, Ohio (Jan. 2, 2002). Morris-Boothby explains:

A student with ADHD that I had last year has since moved on to third grade and now the rest of the school knows what I went through with him. His third grade teacher has resigned after twenty-seven years of teaching, three years short of qualifying for full retirement benefits, because he said that he just could not face [the student's] behavior for one more day. This man was considered by many to be the best teacher in our school district. What is truly sad is that [this student] is very bright—he could read on the tenth grade level at age eight! He has a prescription to help him with his behavior but his mother refuses to give it to him.

Id. Furthermore, the presence of one or two dangerous or violent students, regardless of whether they are disabled, can result in tragedy. Dirk Johnson & Jodi Wilgoren, *A Portrait of Two Killers at War with Themselves*, N.Y. TIMES, Apr. 26, 1999, at A1 (discussing the backgrounds of two students, Eric Harris and Dylan Klebold, who killed thirteen classmates and wounded twenty-three others in an unprovoked shooting spree at their high school).

¹⁴ See Eleanor Chute, *Special Ed or Special Privilege?*, PITT. POST-GAZETTE, Feb. 21, 1999, at C1 (statement of public school superintendent):

In a lot of cases, the special education youngsters are aware of the consequences of their behavior. I've even had principals who have attempted to get youngsters under control who have been told by the kids, "my mom told me that you couldn't do anything about this." Not only is the youngster aware of the consequences, but the youngster is aware of the regulations enough to be able to use them in a very premeditated way.

Id.; Smith, *supra* note 13, at A19 ("The student [who brought a gun to school] later bragged to teachers and students at the school that he could not be expelled."); Elizabeth A. Bunch, *Chalk Talk: School Discipline Under the Individuals with Disabilities Education Act: How the Stay-Put Provision Limits Schools in Providing a Safe Learning Environment*, 27 J.L. & EDUC. 315, 319 (1998):

[I]n the case of *School Board v. Malone*, [762 F.2d 1210 (4th Cir. 1985),] a fourteen year old disabled student acted as a "go-between" for two non-disabled students who persuaded him to purchase drugs from another student. The school board attempted to expel the student but the court ruled that such action violated the IDEA because the student's behavior was a result of his disability.

¹⁵ Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 WASH. L. REV. 1, 4 (2000) ("Educators have been frustrated by the time-consuming requirements of [the] IDEA and claim that they are unable to maintain safe and effective classrooms because of the statute's restrictions."); see also *Hearings* (1997), *supra* note 11, at 102 (statement of H. Michael Brown, President, National Association of Secondary School Principals) ("The dual code of conduct that currently exists between special education and general education children must be eliminated."). Thomas Stobie, a school principal, stated:

physical safety above other goals. Without this proper ordering of goals, learning—the ostensible goal of having a public education system—is just not likely to take place.¹⁶

[T]he Individuals with Disabilities Education Act (IDEA) enacts a [conflict with the Gun-Free Schools Act] concerning the length of time a disabled student can be disciplined [T]he rules regarding discipline in this area must be unambiguous and *equally applied to all students involving an issue as important as school safety*. A principal's ability to ensure a safe learning environment for all children is inhibited by this double standard.

Improving Student Achievement and Reforming the Federal Role in Educ.: Field Hearing Before Subcomm. on Oversight and Investigations of House Comm. on Educ. and the Workforce, 106th Cong. 108 (1999) (emphasis added); Doug Cumming, *Cobb Expulsions Set Political Fireworks: Zero Tolerance on Guns, Federal Special Education Law Clash*, ATLANTA J. & CONST., Feb. 8, 1999, at 1B (describing an angry school board member's position that his job is to uphold the rights of the vast majority of students who go to school to learn, not the rights of the one or two who bring a gun to school).

Far less optimistic appraisals of the current situation are not difficult to find either. Carl F. Horowitz, *Just Expel the Troublemakers?*, INVESTOR'S BUS. DAILY, Nov. 13, 1997, at A1 ("The problem is that under IDEA, the label, 'learning disabled' can apply to students who are little more than criminals reclassified under a new name."). Other commentators' expressions of their distaste for federal regulation of education, traditionally a state function, also seem to be a result of the current debate over disciplinary rules for the disabled:

Worse the influence of lawyers over school discipline means that educators speak to children in an unrecognizable language, far removed from the straight talk about right and wrong that most children crave. . . . Students correctly sense that what lies behind such language isn't a moral worldview and a concern for their well-being and character but a fear of lawsuits.

George Will, *Why to Fear a Greater Federal Role in Schools*, DALLAS MORNING NEWS, June 26, 2000, at 13A (citations omitted).

¹⁶ This conclusion is supported by Abraham Maslow's well-known hierarchy of human needs:

Any discussion of student psychological needs would be remiss if it did not mention Abraham Maslow's hierarchy of human needs. Most textbook discussions of student motivation start with a presentation of Maslow's theory, and some authors have provided detailed discussions of how teachers can draw upon the theory when designing instructional practices

Maslow . . . believed that individuals are driven to satisfy both their basic, or deficiency, needs and their meta-needs, or growth needs. He conceptualized these two need systems as organized into a hierarchy where satisfaction of basic needs generally takes precedence over satisfaction of growth needs

. . . *Students must feel safe from both physical and psychological harm or intimidation before they can focus their attentions on the work of school*. Both dysfunctional families and dysfunctional classrooms can create a threat to the safety and security of many students. . . . Students also need to feel safe from threats of violence from peers. . . . Regardless of the source . . . a lack of safety, orderliness, and predictability in a student's . . . learning environment can sap the energy that might otherwise be channelled [sic] toward personal growth and academic learning.

However, it is not necessary to sacrifice access for the disabled in order to provide safety for all. That is, schools do not require unfettered discretion in their decisions to remove dangerous disabled students in order to provide a safe learning environment. Parents of disabled children, having learned from history, worry that their children's access to the regular public school may be curtailed by school discipline rules, not because of any serious concerns about safety, but merely because their children may be difficult to teach.¹⁷ But this debate is not about excluding difficult-to-teach children. The concerns expressed by those who call for reform of the IDEA discipline provisions are squarely focused upon the physical safety of all members of the school community.¹⁸

In the few short years since these amendments were enacted, a firestorm of controversy has surrounded their shortcomings.¹⁹ Parents of the disabled and non-

JAMES P. RAFFINI, WINNERS WITHOUT LOSERS: STRUCTURES AND STRATEGIES FOR INCREASING STUDENT MOTIVATION TO LEARN 11-12 (1993) (emphasis added). The essence of Maslow's theory, as regards safety, is that some needs simply must be met before others can be pursued with success. A.H. Maslow, *A Theory of Human Motivation*, in HUMAN RELATIONS 195, 201 (Lyman W. Porter & Gregory A. Bigley eds., 1995) ("Practically everything looks less important than safety A man, in this state, if it is extreme enough and chronic enough, may be characterized as living almost for safety alone.") That student learning is adversely affected by an unsafe environment is also recognized by members of the education establishment. *Hearings* (1997), *supra* note 11, at 8 (statement of Judith E. Heumann, Assistant Secretary of Special Education and Rehabilitative Services, U.S. Department of Education) ("To ensure that children can learn, teachers and administrators must be able to maintain safety and order in the classroom.").

¹⁷ See 20 U.S.C. § 1400 (c)(2)(B)-(C) (2000).

¹⁸ Sowers, *supra* note 13, at 1 ("Some children bring such violent or aggressive behavior that we have a *fundamental duty* to keep all children and teachers safe A lot of people think [that] the No. 1 priority is to teach reading and writing, but *the bottom line is the child must be safe.*") (quoting Gene Lenz, Senior Director, Texas Education agency's division of special education) (emphasis added); Carrie Smith, *School Leaders Target Special Education Law: Federal Guidelines Restrict Response to Violent Students*, CHARLESTON DAILY MAIL, Mar. 2, 2001, at P1A ("I know some people fear that [amending the IDEA] is going to cause special education students to be expelled far too easily It's a difficult issue, but that's not what we want. We want schools to be able to provide a safe environment for the children.") (quoting a representative for the West Virginia Education Association).

¹⁹ *Hearings* (1997), *supra* note 11, at 37 (statement of Dr. Michael Remus, Director of Special Education for the State of Kansas) ("[I] want to talk about . . . discipline, because it seems to be the hot issue of the 1990's."); Chute, *supra* note 14, at C1 ("Discipline is the 'most contentious issue' that [school] districts deal with in special education.") (statement of Kaye Cupples, coordinator of programs for students with exceptionalities). The debate has even pitted the federal government against states:

[A Fairfax Virginia county School Board official] reported that after five gang members used a meat hook in an assault on another student, only three of them were expelled; the other two were special-ed students. When then-Virginia Gov. George Allen dared to challenge the wisdom of using [the] federal law to make school safer for violent offenders,

disabled alike have voiced great concern over the inadequacies of the current law and the danger it poses for all affected.²⁰ In response to such concerns, and fully appreciating the need for disabled students to have access to the regular public school, this note argues that the safety of all students is yet a higher goal—a duty owed to our school children and their teachers—above which we should not place other goals. Without the assurance of their physical safety, our teachers and students cannot be expected to make any progress in the educational enterprise that brings them together.²¹

This note contends that further reform of the IDEA is needed to assure the safety of all students and that this can be achieved without curtailing access for the disabled to public schools.²² Part II of this note provides a brief background of several important events that led to the passage of the IDEA and a description of the law's basic requirements.

Part III describes some current IDEA disciplinary procedures. First, the basic framework of the disciplinary procedures is explained. Then, a hypothetical situation is provided in which each of two students is involved in a separate

the Clinton administration responded by threatening to yank millions of dollars in federal education dollars from the state.

Smith, *supra* note 13, at A19. A prime concern for some legislators has been equal treatment of all students:

All I want to do is get the authority back where it ought to be—away from some federal bureaucrat and in the hands of the local school board. Everyone ought to be treated equally. . . . If a disabled student brings a gun to school they should be treated the same as other students who bring guns to school.

Rebecca Carr, *Barr Wants 'Level Playing Field' for Disabled Students Caught with Weapons*, Cox News Service (May 13, 1999), <http://www.LEXIS.com>, Wire Service Stories.

²⁰ A letter from the mother of a disabled student provides an example:

Having a disability . . . should never be used as an excuse to break school rules. If a special education child is mentally capable of participating in a regular school situation, then they also have the responsibility to obey. . . . As parents, we should demand the safety of our children be paramount and any student, whether special education or not, should be permanently expelled for bringing a loaded firearm into our children's school.

Doretha Weyant, Readers' Letter, *Amendment Is Not a Bright IDEA*, ATLANTA J. & CONST., Mar. 4, 1999, at JG6.

²¹ See *supra* note 16 and accompanying text; see also ABRAHAM H. MASLOW, MASLOW ON MANAGEMENT 19 (1998) (describing those at the safety-need level as perpetually afraid, unable to identify with each other, and suspicious).

²² Clearly, any plan that will permit schools to exclude even a single disabled student must, by definition, be curtailing access to the school for that student. It is not access in the strictest sense of that word to which this note refers. Rather, the note means to convey that access to schools for the disabled, as a group, need not be hindered in order to remove those very few disabled students who are dangerous and are currently beyond the reach of regular school rules. Rules can be created that target the behavior of such students without permitting schools to exclude other disabled students who may be merely difficult to teach.

violent incident at school. Next, the current IDEA disciplinary procedures are applied to these two students, and the differences in the treatment of each student are considered.

Part IV explains the policy lesson to be gained from Part III and then presents two legislative options for further reform of the IDEA's disciplinary procedures. Each option is based on the notion that assuring the physical safety of students must come before other policy objectives. The first is to adopt a flexible expulsion rule for all students who bring guns to school regardless of their disability status, and the other is to provide for the removal of disabled students who commit other acts of violence for the same period of time as that for which non-disabled students are removed.

II. BACKGROUND

The success of the IDEA is seen most clearly, and is often defined by, the increased level of access for the disabled to the general curriculum in the regular classroom setting.²³ The need for access to the regular classroom was one of the most pressing issues facing the disabled before the enactment of the Education for All Handicapped Children Act of 1975,²⁴ the forerunner of the current IDEA.²⁵ Excluding the disabled from the regular classroom environment was a national problem that left the disabled without the opportunity for any kind of education.²⁶ The provisions of the IDEA, however, go far beyond access to the regular public school setting.²⁷

The basic guarantee of the IDEA is that every disabled child will receive a free appropriate public education.²⁸ While not every special education student

²³ 20 U.S.C. § 1400(c) (2000) ("Since the enactment and implementation of the [IDEA, it] has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education . . .").

²⁴ Pub. L. No. 94-142, 89 Stat. 773 (1975). By 1975, approximately one million of our nation's eight million disabled children were completely excluded from our system of public education. Kelly S. Thompson, Note, *Limits on the Ability to Discipline Disabled School Children: Do the 1997 Amendments to the IDEA Go Far Enough?*, 32 IND. L. REV. 565, 568-69 (1999). Furthermore, congressional studies found that over half of these eight million disabled children were not receiving appropriate educational services. Honig v. Doe, 484 U.S. 305, 309 (1988) (citations omitted).

²⁵ Pub. L. No. 101-476, § 901(a)(2), 104 Stat. 1103, 1141-42 (1990) (substituting "Individuals with Disabilities Education Act" for "Education for All Handicapped Children Act").

²⁶ See *supra* note 24 and accompanying text.

²⁷ To understand better the debate about the disciplinary measures of the IDEA and their impact on our public schools one must first appreciate the complex web of regulations that govern the education of the disabled. The following section is a very abbreviated description of a few of these rules found in Department of Education regulations for IDEA implementation.

²⁸ See 20 U.S.C. § 1412(a)(1); 34 C.F.R. § 300.121(a) (1999); 34 C.F.R. § 300.13.

will be placed in a regular classroom, each child is to be taught in the least restrictive environment.²⁹ For many students this will be a regular classroom filled mostly with non-disabled children; for others the setting may be anything from a small class of disabled students to a residential facility located far from their home school districts.³⁰ This determination of where, as well as how, a disabled student will be educated all depends in the first instance upon the school's ability to identify children with special needs.³¹

The IDEA requires every state to have policies and procedures in place that insure that all disabled students will be identified, located, and evaluated.³² Once these first steps have been taken and a student has been found to have a disability, the next step is to create an "individualized education plan," or IEP.³³

[T]he term *free appropriate public education* or *FAPE* means special education and related services that—

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include preschool, elementary school, or secondary school education in the State; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.340–300.350.

Id. (emphasis added).

By 1997, the year of the most recent amendment to the IDEA, between seventy and eighty percent of disabled children were not only being served by our public school education system, but were learning in the regular classroom setting. Thompson, *supra* note 24, at 569 (citations omitted).

²⁹ 34 C.F.R. §§ 300.130, .550–.556.

³⁰ *Id.* § 300.302 ("If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.").

³¹ *Id.* § 300.125(a)(i):

The State must have in effect policies and procedures to ensure that [a]ll children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated.

Id. This is the IDEA's so-called "Child Find" provision, and it means pretty much what it says. The state itself, even when working through local education agencies, has an obligation not only to serve those who have been identified, but also to find those disabled students who need services.

³² *Id.*

³³ *Id.* § 300.340(a).

An IEP must be developed by a multi-disciplinary team to address the unique needs of each disabled student.³⁴ These plans include, in part, statements about the following: the student's present levels of education performance;³⁵ measurable annual goals for the student;³⁶ the special education and related services to be provided to the student;³⁷ the extent to which the student will not participate with non-disabled students in the regular classroom;³⁸ the projected dates for beginning services and the anticipated frequency, location, and duration of those services;³⁹ how the student's progress toward the annual goals will be measured;⁴⁰ and how the student's parents will be regularly informed of their child's progress toward the annual goals.⁴¹ The IEP team develops, reviews and revises the student's IEP. This team includes the following: the parents of the student;⁴² at least one regular education teacher of the student (if the student is participating or may be participating in the regular education environment);⁴³ at least one special education teacher of the student;⁴⁴ a representative of the school system who is qualified to provide specially designed instruction to meet the unique needs of students with disabilities, has knowledge of the general curriculum, and is knowledgeable about the availability of the resources of the school;⁴⁵ an individual who can interpret the instructional implications of evaluation results;⁴⁶ and the student, if appropriate.⁴⁷ The school is required to initiate and conduct IEP team meetings and must convene the team at least once a year.⁴⁸ This exceedingly brief overview of the efforts that must be made to meet the individual needs of each disabled child is indicative of the high expectations embodied in the remainder of the IDEA.

The 1997 Amendments to the IDEA represent a number of changes in the Act. The provisions that address discipline were among the most hotly debated

³⁴ *Id.* § 300.341(a)(1) ("The [State Educational Agency] shall ensure that each public agency . . . develops and implements an IEP for each child with a disability served by that agency.").

³⁵ 34 C.F.R. § 300.347(a)(1).

³⁶ *Id.* § 300.347(a)(2).

³⁷ *Id.* § 300.347(a)(3).

³⁸ *Id.* § 300.347(a)(4).

³⁹ *Id.* § 300.347(a)(6).

⁴⁰ *Id.* § 300.347(a)(7)(i).

⁴¹ 34 C.F.R. § 300.347(a)(7)(ii).

⁴² *Id.* § 300.344(a)(1).

⁴³ *Id.* § 300.344(a)(2).

⁴⁴ *Id.* § 300.344(a)(3).

⁴⁵ *Id.* § 300.344(a)(4).

⁴⁶ *Id.* § 300.344(a)(5).

⁴⁷ 34 C.F.R. § 300.344(a)(7).

⁴⁸ *Id.* § 300.343(a), (c)(1).

and were of greatest interest to many students, parents, teachers, school administrators, and community members.⁴⁹ The next section of this note describes a number of these disciplinary procedures.⁵⁰

III. THE IDEA DISCIPLINARY PROCEDURES AND THEIR APPLICATION

To appreciate the significance of the disciplinary procedures prescribed by the IDEA for the disabled, one must first understand that in America's schools today suspension and expulsion largely define the entire range of disciplinary options available to the schools.⁵¹ A student's poor behavior, more often than not, will result in some type of suspension or expulsion, ranging from an after-school detention or a one-day in-school suspension to a one-year expulsion. Removal from the classroom thus largely defines punishment in American schools today. Given that access to the regular school environment is the primary objective of the IDEA, these punishments have major implications for the success or failure of the IDEA in meeting the access objective.

When a school indicates that it will recommend a change in placement for a disabled student, this means that the student will be moved from her current environment. Particularly when this move is from a regular classroom to any other setting, the parents of disabled children are likely to perceive this as a punishment of some kind. As such, the IDEA defines the term "change in placement" to cover nearly all suspensions and every expulsion.⁵² Parents of the

⁴⁹ See *supra* note 19 and accompanying text.

⁵⁰ Again, this note does not address every change in the IDEA that concerns discipline, only those dealing with students who use guns and the provisions that allow a school to request a change in placement based on the substantial likelihood of injury to the student and others. For a more complete description of the 1997 Amendment's other disciplinary provisions, see Terry Jean Seligmann, *Not As Simple As ABC: Disciplining Children with Disabilities Under the 1997 IDEA Amendments*, 42 ARIZ. L. REV. 77 (2000).

⁵¹ Corporal punishment is all but gone from public schools. See generally OHIO REV. CODE ANN. § 3319.41(A)(1) (West 1999) ("[N]o person employed or engaged as a teacher, principal, administrator, . . . in a public school may inflict or cause to be inflicted corporal punishment as a means of discipline upon a pupil . . ."); Alison Ashton, *Addressing the Problems with School Discipline*, Copley News Service (June 10, 2001), <http://www.LEXIS.com>, Wire Service Stories. ("A number of organizations, including the [National Education Association] and the American Academy of Pediatrics condemn corporal punishment in schools."); Fanny Seiler, *Schools Should Hire More Counselors, Teacher Groups Say*, CHARLESTON GAZETTE, May 18, 1999, at 2A ("The Legislature took away the deterrent of corporal punishment . . .") (quoting the Executive Secretary of the West Virginia School Service Personnel Association).

⁵² 34 C.F.R. § 300.519(a)-(b):

For purposes of removals of a child with a disability from the child's current educational placement . . . , a change of placement occurs if—

- (a) The removal is for more than 10 consecutive school days; or

disabled are thus very concerned that changes of placement, to say nothing of actual suspensions and expulsions, will result in decreased access to the general curriculum for their child.⁵³

A. Current Disciplinary Procedures Under the 1997 IDEA Amendments

Schools are permitted to suspend disabled students within certain limits. A school may suspend a disabled student for up to ten days in a school year, to the extent that such a punishment would also apply to a non-disabled student, and the school need not provide that student with the services provided for in his IEP during such suspensions.⁵⁴ However, when a disabled student has been suspended for more than ten days in a school year, he must be provided with the services described in his IEP at the school's expense.⁵⁵ The ten day suspension is

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

⁵³ This is where the desires of the parents of disabled children to keep their children in a particular school setting and the IDEA begin to part ways a little. It is not very difficult to understand a parent's desire for her child to be allowed to remain in the regular classroom setting. Common sense tells us that having one's child placed in an alternate setting for children who are in some way different from other children would be upsetting. However, the IDEA requires that the services prescribed by a child's IEP continue regardless of where that child is placed. Parents in these situations, then, are not arguing that services for their child have been suspended, but rather that the recommended new placement for their child is not the least restrictive environment for that child. The requirement of the IDEA that disabled children be educated in the least restrictive environment, then, is yet another tool given to parents to prevent the removal of their child from the regular classroom setting:

(b) Each public agency shall ensure—

(1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are non-disabled; and

(2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Id. § 300.550(b)(1)–(2).

⁵⁴ *Id.* § 300.520(a).

⁵⁵ *Id.* § 300.520(a)(ii) (“After a child with a disability has been removed from his or her current placement for more than 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under § 300.121(d) . . .”). Section 300.121(d)(2)(i) requires, among other things, that services be provided “to the extent necessary to enable the child to appropriately progress in the general

the school's maximum penalty, unless one of two exceptions applies: (1) the disabled student's offense involved a gun or other weapon, or the possession, sale, solicitation or use of illegal drugs at school;⁵⁶ or 2) the school has proven that maintaining the student's current placement presents a substantial likelihood of injury to the student or others.⁵⁷ In such situations, the school may place the student in an appropriate interim alternative educational setting for up to forty-five days.⁵⁸ At the end of this forty-five day period, the student will ordinarily return to his former placement where the offense occurred.⁵⁹

The connection between a disabled student's disability and her behavior requiring discipline affects the range of punishment that a school may consider. Whenever a school plans to use the forty-five day interim placement option as a result of a disabled student's behavior involving a weapon or illegal drugs, the school must first determine the nature of the connection between the behavior and the student's disability. This determination is made in a manifestation review.⁶⁰ If it is determined that the student's behavior was a manifestation of her disability, the school is not permitted to extend the interim alternative education placement beyond the forty-five day term.⁶¹ On the other hand, if it is determined that this behavior was not the result of the student's disability, the school may apply the disciplinary procedures that are applicable to children without disabilities—with the caveat that the services in the student's IEP be provided to her for any suspensions beyond ten days.⁶²

Parents have many rights under these disciplinary provisions. Parents may, for example, contest the IEP team's decision about an interim alternate

curriculum and appropriately advance toward achieving the goals set out in the child's IEP" *Id.* § 300.121(d)(2)(i).

⁵⁶ See 34 C.F.R. § 300.520.

⁵⁷ See *id.* § 300.521.

⁵⁸ *Id.* § 300.520(a)(2). Note that this does not permit the school to suspend the disabled student for forty-five days. Rather the student may be placed in some other "appropriate interim alternative educational setting" for forty-five days. In other words, the IEP team must determine where to place this child during this period of up to forty-five days. This must of course then be a place where the services in the IEP can be provided.

⁵⁹ Whenever the child has been suspended for more than ten days in a school year, or when a change in placement has occurred because of the forty-five day alternative placement, a student's IEP team must meet. *Id.* § 300.520(b)(1). The team will then consider the behavior that led to the suspension and develop an intervention plan that addresses this behavior with a goal of correcting it. *Id.* § 300.520(b)(1). Also, when the incident involves a weapon or illegal drugs, allowing the school to move the student to an interim alternative education setting for up to forty-five days, the IEP team must decide on that interim alternative educational setting. *Id.* § 300.522(a).

⁶⁰ 34 C.F.R. § 300.523 (1999).

⁶¹ *Id.* §§ 300.520(2), .524.

⁶² *Id.* § 300.524.

educational setting.⁶³ If the parents are not satisfied that this setting is appropriate for their child, they may request a due process hearing in which the matter will be resolved.⁶⁴ Also, the parents may challenge an IEP team's determination that their child's behavior was not a manifestation of her disability.⁶⁵ An important question arises about the student's placement during a due process hearing: should the student stay in the placement determined by the IEP team or in her placement prior to that decision, presumably where the parents believe she should stay? The answer depends upon the nature of the student's behavior. If the behavior involved weapons or illegal drugs, the student will stay in the setting chosen by the IEP team.⁶⁶ If the behavior does not fall into this category, the child will return to her previous placement while a decision is made.⁶⁷ This last placement is referred to as the "stay-put placement."⁶⁸

An IEP team may also decide that the placement for a student must be changed because of the danger presented by leaving that student in her current placement.⁶⁹ Due process hearing officers entertaining a school's request that a student be moved because of this danger do have the power to place a student in

⁶³ *Id.* § 300.525.

⁶⁴ *Id.* The school must then arrange for this hearing to take place. *Id.* § 300.525(a)(2). Due process hearings in which IDEA issues are to be resolved take place before a hearing officer who is often, but is not required to be, an attorney. *See id.* § 300.508. Naturally the school may work out any problems with the parents themselves without going to a hearing. However, should this not prove to be a possibility, the school faces another difficulty as a result of the hearing. If the parents are successful in their appeal of an IEP team's decision, the parents may file a separate action for attorney's fees. Seligmann, *supra* note 50, at 86 (citing Johnson v. Bismark Pub. Sch. Dist., 949 F.2d 1000, 1003 (8th Cir. 1991)). Also, should the parents receive an adverse decision from the hearing officer and then appeal to the courts under 34 C.F.R. § 300.512 (1999), and there succeed in their action, the school may be required to pay the parents' reasonable attorney's fees. *Id.* § 300.513.

⁶⁵ 34 C.F.R. § 300.525.

⁶⁶ *Id.* § 300.526(a).

⁶⁷ *Id.* § 300.514(a). There is one other possibility here. If a hearing officer determines that permitting a student to stay in his current placement presents a substantial likelihood of injury to the student or others, the student will stay in the interim alternative education setting determined by the child's IEP team during any appeal of this decision by the parents. *Id.* §§ 300.526, 300.521.

⁶⁸ The term "stay-put placement" refers to the educational placement in which a student will stay during the pendency of any litigation over the issue of where the student's placement ought to be. *Id.* § 300.514(a) ("[D]uring the pendency of any administrative or judicial proceeding . . . unless the State or local agency and the parents of the child agree otherwise, *the child involved in the complaint must remain in his or her current educational placement.*") (emphasis added). This would be a situation in which the parents and the school disagree about the placement of the child—for example, when a student's dangerous behavior has convinced the school that this student needs to be placed in another environment, presumably one better suited for a student with behavioral problems. *See generally* Bunch, *supra* note 14.

⁶⁹ Of course, a parent may appeal any such decision. 34 C.F.R. § 300.525.

an interim alternative education setting for up to forty-five days under very limited circumstances. If the hearing officer determines that a school has proven by “substantial evidence”⁷⁰ that maintaining the student’s current placement is substantially likely to cause injury to that student or others, the hearing officer may order that the student be placed in the interim alternative educational setting recommended by the student’s IEP team.⁷¹

Schools must also be prepared to answer the charge that they should have known that certain students were disabled even though the students had not been identified as such. If a non-disabled student is to be disciplined, that student’s parents may invoke all of the protections for the disabled available under the IDEA. They may do this by claiming that, while their child had not yet been

⁷⁰ The term “substantial evidence” is defined as “beyond a preponderance of the evidence.” *Id.* § 300.521(e). While this does not say “beyond a reasonable doubt,” consider what is to be proved here. The school must show by “substantial evidence” that there is a substantial likelihood that further injury will occur in the future. In other words, the school is forced to prove that something bad is very, very likely to happen in the future (the future being totally unknown by definition) before a hearing officer will even consider making an interim forty-five day placement change. When a student’s behavior involves weapons or illegal drugs however, the school may unilaterally select the alternative placement for the forty-five day change of placement, and the student’s stay-put placement during any litigation over the appropriateness of this placement will be the placement chosen by the school. *Id.* §§ 300.520(a)(2), .526(a). Without one of these two circumstances, a school may not remove the student for more than ten days. *Id.* § 300.520(a)(1)(i).

When a school is facing a serious violent incident involving a disabled student who did not involve a weapon or illegal drugs, the school’s only avenue for removing that student from the environment in which the incident occurred is trying to prove the substantial likelihood of future injury to the student or others under § 300.521. Regardless of the seriousness of the violence, absent the use of a weapon or drugs, the school must go to a hearing officer and attempt to prove its case to get permission to remove this student for up to forty-five days. *Id.* It is not difficult to understand that a school might be frustrated by this situation.

⁷¹ *Id.* §300.521. Bear in mind the school has requested an expedited hearing, indicating its concern that the matter of placement be resolved as quickly as possible. *See id.* § 300.528(a)(1) (explaining that schools may introduce evidence at expedited due process hearings two days after such evidence has been presented to the other party when ordinarily a school could not introduce such evidence until five days after the evidence had been presented to the other party). Yet during these expedited hearings, when schools are arguing that the current placement of the disabled student is substantially likely to result in injury to that student or others, the student still remains in the same placement (less a ten day suspension allowed under § 300.520) in which he or she committed the act that prompted the hearing in the first place. This is because only a hearing officer may move a student to an interim placement based on the substantial likelihood of future injury, not the student’s school. *Id.* § 300.526 (explaining that a student’s placement *during an appeal* of any action under § 300.521 is the interim alternative educational setting determined by the hearing officer). When a school first asks a due process hearing officer to make a decision based on the substantial likelihood of injury, no interim alternative educational setting has yet been approved by the hearing officer. Only after the hearing officer makes a ruling for a change in placement does that new placement become the stay-put placement for the student during any appeal, not before.

identified as disabled, the school knew or should have known that their child was in fact disabled before the incident of behavior that prompted the school to discipline their child.⁷²

B. *Applying the Current IDEA Disciplinary Procedures to a Hypothetical*

The following hypothetical and the discussion that follows it demonstrate the difficult issues surrounding the discipline of disabled children under the IDEA. The background and a little personal history are given for two students. Their behaviors requiring discipline and the relevant circumstances surrounding these behaviors are described in some detail. Then, the disciplinary options available to

⁷²*Id.* § 300.527(a)–(b):

(a) *General.* A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior [involving weapons, drugs, or the substantial likelihood for further injury to himself or others], may assert any of the protections provided for in this part if the [child's school] had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(b) *Basis of knowledge.* [A child's school] must be deemed to have knowledge that a child is a child with a disability if—

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

(2) The behavior or performance of the child demonstrates the need for these services . . . ;

(3) The parent of the child has requested an evaluation of the child . . . ; or

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

It is not difficult to understand the policies behind such a rule. If schools believed that they would be hamstrung by all of these rules when it came to disciplining students who appeared to have disabilities, but whom the school had not yet identified as such, the school could do itself a favor by not identifying those students at all. Then the schools could apply the same code of conduct to these students as they would to non-disabled students.

The opportunities for mischief by students and their parents are even more obvious still. When a student is about to face expulsion, time can be bought by making claims of having a disability. More importantly, the student could maintain his current placement in the school while all of these procedures are being pursued. This provision has provided a number of examples of just such behavior by students and their parents. *See infra* note 124 and accompanying text.

the school system are described.⁷³ Finally, the results of possible disciplinary action for these two students under the IDEA are analyzed.

1. *Meet Adam and Belle*

Adam Smith and Belle Smith⁷⁴ are twin siblings. Each is fifteen years old and each is a first-year student at River County High School in suburban middle-America. Adam and Belle are the only children of Carol and David Smith. The Smiths are an upper-middle income family, with each parent working in the field of civil engineering. Both Adam and Belle have above average intelligence.

Shortly after entering the public schools, Adam's teachers noted that he had a great deal of difficulty focusing on any task for more than a few seconds. By the time Adam was in second grade, his reputation for wild classroom antics and a total inability to complete the simplest of assignments (including merely signing his name to his papers) had frustrated his teachers to the point of exasperation. Adam's erratic behavior included hitting other students from time to time. Adam's second grade homeroom teacher eventually suggested to Adam's parents that Adam be tested by the school psychologist to determine if there was any explanation for his behavior and any hope for a change. Adam was tested and diagnosed with ADHD or Attention Deficit Hyperactivity Disorder.⁷⁵ After being assured of the benefits of drug therapies and the successful treatment of other students with ADHD, Adam's parents reluctantly agreed to take Adam next to a psychiatrist so that treatment with prescription medications could be considered.

⁷³ Not every conceivable eventuality will be considered here. The discussion of the options under the IDEA for each of the imagined characters is meant to demonstrate that double standards do exist and that ultimately this is not the best approach to maintaining a safe learning environment. Furthermore, the current options available to schools are simply inadequate.

⁷⁴ Neither of these students are real persons. However, elements of various actual events have been incorporated into this hypothetical. This author also acknowledges the fact that Adam and Belle, as you will find, are two very sympathetic characters. Neither has a history of violent behavior at school and each becomes, for a time, a model student. This is done for a purpose. Regardless of any reasonable and understandable explanations for these students' behaviors that require discipline, regardless even of their past good behavior, the danger represented by their continued presence at their school after their individual acts of violence must be taken very seriously. It is easy to lose one's objectivity when considering how it comes to pass that each of these students eventually acts out. The largely good character of Adam and Belle then is a foil for demonstrating the need to consider safety first in all situations that involve student violence—not merely when such situations involve violent acts committed by students who, for one reason or another, are more easily disliked and are less well understood.

⁷⁵ DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 92–93 (4th ed., text rev. 2000) (describing the test for a diagnosis of ADHD).

Adam started on Ritalin⁷⁶ in December of his second grade year and has visited his doctor once a quarter to monitor his progress. Adam takes one pill at breakfast and another at noon. He occasionally will take one at dinner. While Adam's dosage has changed over the years, the results of his treatment have been consistently outstanding. Adam is now an "A" student and is very involved in the school's youth orchestra.

Belle was always a fine student, earning high Bs and occasional As, rarely saying anything in class unless being prompted and strongly encouraged to speak by her teachers. Belle had a small circle of friends from her neighborhood and enjoyed playing with this same group of children after school almost every day. None of Belle's teachers ever suggested that Belle be tested for any type of disability whatsoever. Before Adam's successful treatment, the stark difference in behavior between Belle and her brother was often the source of relief for their teachers as they considered the difficulties of managing two students with ADHD.

Approximately two weeks after entering River County High School as a freshman, Belle became more withdrawn than usual, rarely engaging other students in conversation, and largely discontinuing her after-school interaction with her friends from the neighborhood. Belle's academic performance also began to suffer during this transition into high school. Belle's mother contacted Ms. Jones, one of Belle's teachers, after seeing these changes. Mrs. Smith asked Ms. Jones if she had noticed any changes in Belle's behavior at school. Ms. Jones stated that she was concerned as well because Belle no longer seemed prepared for class and, on one occasion, had refused to participate in a class activity and then left the room in tears. Ms. Jones stated that she would try to observe Belle more carefully for the next few weeks to determine if there was "a problem."

At the start of their second semester in high school, Adam and Belle took a turn for the worse. Adam had gone to stay with a friend over a weekend and while there had misplaced his Ritalin prescription. On Monday morning, Adam still had not found his medication and went to school unmedicated. By noon, Adam's behavior was noticeably different. Adam was distracted, unable to focus, and seemed very irritated.⁷⁷ Several students, quite unaware of Adam's ADHD diagnosis, noticed his behavior and then, jokingly and loudly, suggested to him that it was "time for a pill." Adam was very embarrassed and angry.

That evening, for reasons that no one was ever able to ascertain, Adam went into his parents' bedroom and took an unloaded handgun from a desk drawer.

⁷⁶ Methylphenidate hydrochloride is the generic name for this drug commonly prescribed for Attention Deficit Hyperactivity Disorder. THE PDR FAMILY GUIDE TO PRESCRIPTION DRUGS 536 (6th ed. 1998).

⁷⁷ See *id.* at 537 ("[W]ithdraw the drug only under your doctor's supervision."). The side effects of this drug, while documented, do not apparently occur with any consistency or predictability. *Id.* ("Side effects cannot be anticipated.").

Adam and Belle had both been told about the gun and instructed never to touch it. Adam took the gun to his room and went to bed.

The next day, Adam, still without his medication, placed the gun into his backpack and left for school. Upon arriving at school, Adam tracked down the students who had made their unwittingly dangerous comments to him the previous day. As these students stood by a long row of lockers, Adam slowly removed the gun from his backpack and moved toward the other students. Adam, standing twelve inches at most from this group of students, waived the gun at them and shouted, "I think it's time for you to take a pill!" Within moments, dozens of panicked students were running in every direction. Adam quickly jammed the gun back into his backpack and ran away as well. In fact, Adam ran out of the building and all eight blocks separating the school from his house. The police arrived at Adam's house some twenty minutes later and arrested Adam.

River County High School officials decided to send all of their 1500 students home for the rest of the day. School officials immediately met to discuss the situation. It was determined that, while the police and the courts might ultimately be involved, the first step was to suspend Adam for ten days⁷⁸ to give the school time to consider its options and to convene a meeting of Adam's IEP team.⁷⁹

The next day, Belle went back to school. Belle, while concerned for her brother, was nonetheless just as distant and withdrawn as she had been the previous day, and so her parents decided that it was best for her to be occupied with schoolwork for the time being. Upon arriving at school, Belle immediately noticed that everyone was suddenly interested in her. Throughout the day, students and teachers alike stared at her. Belle was understandably very upset by all of this and was totally unprepared for what happened next.

During lunch period, Belle sat alone as usual. While she was eating, Belle was approached by a group of students, comprised partially of those students who had been the target of her brother's anger the day before. These students taunted and teased Belle until she began to cry. Shortly thereafter, Belle's teacher, Ms. Jones, entered the room and sought to disband the students and assist Belle. After telling the other students to return to their seats, Ms. Jones gently placed her hand on Belle's shoulder and, in a hushed voice, asked if she would like to come to the office. Belle's teary-eyed and defeated visage quickly transformed into one of extreme confusion and anger. Without warning, Belle grasped each edge of her lunch tray and struck her teacher in the head several times. In addition to a large head wound, it was later determined that Ms. Jones had also suffered a serious, but not life-threatening, spinal cord injury. Ms. Jones was not able to return to work until the following fall semester.

Belle was immediately suspended for the rest of the week. The principal sent a notice to Belle's parents explaining that a hearing would take place before the

⁷⁸ See 34 C.F.R. § 300.520(a)(1)(i) (1999).

⁷⁹ *Id.* § 300.520(b)(1).

school board in one week at which a decision was to be made regarding Belle's punishment. A week later, Belle and her parents attended this meeting. River County High School's principal recommended that Belle be expelled for one full school year, as prescribed in the student code of conduct for physical assault of a teacher. Belle's parents made a statement in which they described the difficulties the family had encountered recently and asked the school to consider that Belle had never so much as received a detention prior to this incident. The board expelled Belle for one full school year. Adam's discipline, however, was not so simply decided.

2. Discipline for Adam (and Belle) under the IDEA

Adam was identified as a disabled student many years ago, and as such he has an IEP.⁸⁰ The details of Adam's IEP are not especially important here. However, we know that one part of that IEP must include Adam's placement in a regular school with a goal of accessing the general curriculum.⁸¹ First, as a result of using a gun on campus, Adam can be placed in an alternative educational setting for up to forty-five days.⁸² Next, the IEP team must determine if Adam's behavior was related to his disability in a manifestation determination review.⁸³ Indeed, the nature of the behavior and the connection between that behavior and a student's disability define the range of possible outcomes for disciplining a student with a disability.⁸⁴ While Adam's parents are a part of the IEP team, the determination as to whether Adam's behavior was related to his disability is a decision to be made by the whole IEP team. In the event that consensus cannot be reached by all members of the team, the chair of the team, who is always a school official, must make the decision.⁸⁵ If it is determined that Adam's behavior was

⁸⁰ *Id.* § 300.341(a)(1) ("The [state education agency] shall ensure that each [school] . . . develops and implements an IEP for each child with a disability served by that [school] . . .").

⁸¹ *Id.* § 300.347(a)(3)(ii)–(iii) (requiring IEPs to have a statement of program modifications that will be provided for the child "[t]o be involved and progress in the general curriculum" and "[t]o be educated and participate with other children with disabilities and non-disabled children in the activities described in this section").

⁸² *Id.* § 300.520(a)(2).

⁸³ *Id.* § 300.523.

⁸⁴ See generally 34 C.F.R. § 300.520(a)(1)(i) (describing the ten-day limit on suspensions of disabled students for violations of school rules); *id.* § 300.520(a)(2) (describing the different suspension lengths associated with student use of weapons and drugs); *id.* §§ 300.523–.524 (explaining the process by which a school must determine the relationship between a disabled student's behavior and his disability, and the resultant effect on the punishment that the disabled student may receive).

⁸⁵ *Id.* § 300.523(c). Parents of disabled students have the right to appeal the school's decision about whether their child's behavior was a manifestation of his disability. *Id.* § 300.525.

not related to his disability, then the school district is free to treat Adam as it would a non-disabled student—with the stipulation that the school is still responsible for implementing Adam's IEP during any suspension or expulsion.⁸⁶ Under the Gun-Free Schools Act, Adam can be expelled for one year.⁸⁷

While Adam's behavior resulted in no physical injuries to any student or staff member, he did nonetheless bring a gun, albeit an unloaded one, on campus and threaten other students with it. However, given Adam's ADHD and the circumstances surrounding this event, it seems likely that the manifestation determination review will result in the conclusion that Adam's behavior was in fact a manifestation of his disability.⁸⁸ Assuming this to be the case, forty-five days is the limit of any change in placement for Adam under these circumstances.⁸⁹ There is only one method for extending Adam's suspension

⁸⁶ Generally speaking, disabled students may be subjected to suspensions and expulsion in the same manner as are non-disabled students when their misbehavior is not a manifestation of their disability. *Id.* § 300.524(a). However, schools are still responsible for providing any suspended or expelled disabled students with the services included in their IEP plans. *Id.* § 300.121(d)(2)(i)(B).

⁸⁷ 20 U.S.C.A. § 7151 (West Supp. 2002).

⁸⁸ The language of the regulations indicates a presumption in favor of finding that the behavior was a manifestation of a child's disability, thus restricting the school's suspension options:

[T]he IEP team and other qualified personnel may determine that the behavior of the child was not a manifestation of the child's disability *only if* the IEP team and other qualified personnel—

(1) First consider, in terms of the behavior subject to disciplinary action, all relevant information, including—

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

(ii) Observations of the child; and

(iii) The child's IEP and placement; and

(2) Then determines that—

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

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

(iii) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

(d) *Decision.* If the IEP team and other qualified personnel determine that any of the standards in paragraph (c)(2) of this section were not met, *the behavior must be considered a manifestation of the child's disability.*

34 C.F.R. § 300.523(c) (1999) (emphasis added).

⁸⁹ *See id.* § 300.520(a)(2).

beyond this forty-five day period—an expedited hearing before an impartial hearing officer.⁹⁰

Adam's school, if it is willing to pay the high cost of litigating the issue,⁹¹ may request an expedited hearing in which it can argue that Adam's

⁹⁰ The Code of Federal Regulations states:

A hearing officer . . . may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer, in an expedited due process hearing—

(a) Determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

Id. § 300.521(a). Obviously, the juvenile justice system may also become involved, in which case a judge may do any number of things without regard to Adam's IEP. However, regardless of any court's decision, the school district is still be responsible for implementing Adam's existing IEP. *See Id.* § 300.311 (providing for the free appropriate public education of jailed disabled students who had IEPs prior to incarceration). Moreover, it is not clear that resorting to the juvenile justice system will result in a student's extended removal from the school environment. Ronnie Blair, *Disability Law Thorny Issue for Schools*, TAMPA TRIB., Apr. 29, 2001, Pasco, at 1 (“[W]ith arrests, the students rarely spend much time incarcerated and soon are back at school and being dealt with under the IDEA rules”) (quoting Ken Miesner, special education supervisor).

⁹¹ Litigating IDEA claims can consume an enormous amount of a school's limited resources. *See, e.g., Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1402 n.10 (9th Cir. 1994) (“The [school's and parents'] unfortunate inability to reach agreement has resulted in legal expenses of over \$100,000 for the school district alone—money that might have been better spent improving educational opportunities for Ryan and other disabled students.”). Furthermore, litigation is not well suited to resolving educational disputes, making these costs all the more pointless. *Id.* at 1402 (“Though the doors to federal courts are always open, the slow and tedious workings of the judicial system make the courthouse a less than ideal forum in which to resolve disputes over a child's education.”). The use of due process hearings, the IDEA's main forum for resolving such disputes, does not appear to be any cheaper or more effective than litigation in the courts:

Disagreements between parents and school districts over special education are not unique to Boulder, [an advocate for children with special needs] says. She knows of 27 disputes in the Jefferson County School District—which is three times the size of the Boulder Valley School District—that had to be resolved in due process hearings last year.

Julie Jargon, *Communication Breakdown: The Boulder Valley School District Has a Hard Time Learning How to Teach Kids with Special Needs*, DENVER WESTWORD, Dec. 16, 1999, at Features. A one-day due process hearing can cost a school district \$10,000, with protracted battles costing parents and schools upwards of \$300,000. Telephone Interview with Claudia Bentley, Education Attorney and Member, Bowles Rice McDavid Graff & Love, P.L.L.C. (Jan. 5, 2002); *see also* Jargon, *supra*, at Features (“Even though the district settled with [the parent], he had to fork over a lot of money . . . ‘I had to put my job on hold to fight the school district. My wife and I had to triple-mortgage our house.’”).

As a matter of common knowledge, public schools in the United States, largely funded by local property taxes, are plagued with financial troubles. Therefore, schools that spend their

limited resources on litigation, regardless of the forum in which the funds are spent, have that much less money to spend on educating children. *See, e.g., Evelyn Theiss, Lawyers Miss the Cut: School Legal Fees Hit \$1.18 Million*, PLAIN DEALER (Cleveland), Apr. 12, 1993, at 1B (“While nearly every [Cleveland public school] district department has had its budget cut from 10% to 39% over the past four years, the Legal Department budget has zoomed by 40% in that time—because of fees paid to outside lawyers.”). *See generally* Jargon, *supra*, at Features (explaining that a single school district’s legal fees for cases dealing with special education students for the 1998–1999 school year totaled \$290,000). It does appear that the option of using a mediator to resolve IDEA claims has reduced the number of disputes that have to be resolved through due process hearings. *See* 34 C.F.R. § 300.506 (“Each public agency shall ensure that procedures are established and implemented to allow parties to disputes . . . to resolve the disputes through a mediation process that, at a minimum, must be available whenever a hearing is requested . . .”); Telephone Interview with Arron K. Gregory, Educational Consultant, Ohio Department of Education (Jan. 11, 2002) (“Due process hearings are becoming more unusual in Ohio because most disputes are resolved in mediation or are settled before a requested hearing takes place.”).

Another potentially cost-inflating problem is that the definition of “disabled” seems to be somewhat fluid. Theresa J. Bryant, *The Death Knell for School Expulsion: The 1997 Amendments to the Individuals with Disabilities Education Act*, 47 AM. U. L. REV. 487, 549–51 (1998) (noting the increasingly blurry line between students who are disabled and those who are not). For example, the IDEA definition of “child with a disability” includes children with serious emotional disturbances:

(4) *Emotional disturbance* is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.7(a)(1), (c)(4) (emphasis added). Some have suggested that this definition is so broad that nearly any student with a bad attitude may claim to be disabled:

Part of the legal definition of emotional disturbance is ‘an inability to build or maintain satisfactory interpersonal relationships with peers and teachers.’ So children who are unruly, for whatever reason, can claim—and litigate for—protected status within schools that, before 1975, would have had a freer hand to expel them.

Will, *supra* note 15, at 13A. However, there is some evidence that the enacting 94th United States Congress understood that many emotional and behavioral conditions, like the more recently recognized disability known as Attention Deficit Hyperactivity Disorder, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 75, at 92–93, were disabilities under the IDEA, and also that the definition of a disabled child was subject to some abuse. H.R. REP. NO. 94-332, at 64 (1975) (“Specific learning disabilities take many forms. Some children are hyperactive to the extent that they literally cannot sit still or concentrate for more than a few seconds.”); *id.* at 8 (“The Committee is aware of the problems in obtaining a precise definition

placement should be changed to some location other than the high school. To prevail at such a hearing, the school must prove by “substantial evidence” that Adam is “substantially likely” to injure himself or others in the future if left in his

of a learning disabled child and urges the Commissioner of Education fully to study the definition . . . to assure that *no* abuses take place with regard to the eligibility for services under this bill.”).

It is worth noting, though, that some events affecting the cost of implementing the IDEA could not have been easily anticipated by anyone. *See, e.g.*, Lisa Fine Goldstien, *Maternity Wars*, EDUC. WEEK, Nov. 20, 2002, at 26, <http://www.edweek.org/ew/ewstory.cfm?slug=12munchausen.h22> (describing how parents, often mothers, suffering from Munchausen by Proxy make fictitious claims that their children are disabled in order to get attention for themselves, and even threaten litigation in order to get that attention).

More importantly, some members of Congress believed from the outset that Congress would never be able to meet the financial obligations that they were making by passing the Education for All Handicapped Children Act, the predecessor to the current Act. For example, Representative John M. Ashbrook stated:

I voted in favor of reporting this bill out of Committee. I did so because I believe that education of handicapped children is an important area, an area that merits our assistance. I strongly disagree, however, with the authorization levels provided for in this legislation. If fully funded, expenditures could run as high as \$680 million for fiscal 1976 and 1977 and \$2.4 billion to \$3.9 billion for each year thereafter.

This is in sharp contrast to the \$100 million we appropriated in 1975. *Furthermore it is totally unrealistic.*

I repeat, it is totally unrealistic to hold out to the education community that we can spend from \$2 to \$4 billion yearly on this program. One of the objections I have always had to many federal aid programs is that false hopes are held out and appropriations do not match the authorizations. . . . [T]he tendency of Congress is to increase everything without thought to where the money will come from.

Id. at 61 (emphasis added). This assessment has largely been proven true, with Congress providing only a fraction of the funds once promised for IDEA implementation. Clare Kittredge, *Changes Due in Special Ed Raise Fear; Some Foresee Downgrading Under U.S. Laws*, BOSTON GLOBE, Oct. 29, 2000, *New Hampshire Weekly*, at 7 (“Congress pay[s] a mere 9 or 10 percent share of special education costs instead of the 40 percent it once promised.”). More recently, some members of Congress have plainly called the IDEA a “35-billion-a-year almost totally unfunded mandate.” Peter Applebome, *Enabling Schools: Public School Will Get More Financial, Disciplinary Help with Disabled Students in Bill Awaiting Presidential Approval*, SAN ANTONIO EXPRESS-NEWS, June 13, 1997, at B4.

Consider further that litigation is just one of the many costs associated with the implementation of the IDEA. *See, e.g.*, Andrew D.M. Miller, Note, *Irrelevant Costs and Economic Realities: Funding the IDEA After Cedar Rapids*, 62 OHIO ST. L.J. 1289, 1299 (2001):

[I]t is now settled that public schools are required by the IDEA to provide all-day nursing care to students who require such services in order to be present in the classroom. More importantly, it is now well settled that the cost of the services requested by a student with a disability is *completely* irrelevant as a factor in determining a public school’s responsibility to provide those services under the IDEA.

current placement.⁹² To say the least, it would be very difficult to remove Adam under the “substantially likely” standard.⁹³ Here, there was a single incident with an unloaded gun. In addition, it seems clear that this event was something of an aberration, as Adam’s behavior is best understood as a result of losing his medication. Furthermore, no pattern of events has occurred such that one might deduce that more events are likely to occur.⁹⁴

As a result of this incident, Adam’s IEP team must meet to discuss whether his IEP needs to be reconsidered in light of this event.⁹⁵ The team will develop an assessment plan for determining what behavioral interventions are needed, considering the results of that assessment plan, and implementing the needed changes.⁹⁶ Given the facts surrounding this event, it is unlikely that Adam will require any interventions other than a plan to keep track of his medication and perhaps to store an emergency supply of it in the nurse’s office for just such an emergency. After all, Adam is a very bright student, and he enjoys participating in extra-curricular activities. Also, the cause of the incident seems to be purely a function of his lost medicine. As such, Adam likely will be away from school for

⁹² 34 C.F.R. § 300.521(a), (e). It should also be noted that even if Adam’s school is willing to spend the money for this hearing and actually manages to succeed in proving that he does in fact present a risk of injury to others, Adam’s school must still convince the hearing officer that it has “made reasonable efforts to minimize the risk of harm in the child’s current placement” *Id.* § 300.521(c). So, even if Adam is a danger to others, the school must show that no reasonable measures could be taken by the school that would minimize this risk of harm before the hearing officer would agree to change Adam’s placement. Thus, a certain amount of risk of harm is apparently acceptable under the IDEA, regardless of the student’s behavior.

⁹³ See *supra* note 70 and accompanying text.

⁹⁴ This author described a very similar hypothetical to a leading education lawyer. She was of the opinion that a student like Adam would almost certainly not be removed under this provision of the IDEA. Tellingly, she also would ordinarily advise her school clients not to bother pursuing this action under such circumstances. Interview with Claudia Bentley, *supra* note 91. She indicated that, without some kind of pattern upon which to base an opinion, a hearing officer would not likely find that a school had met its very high burden, proof beyond a preponderance of the evidence, in proving that a student like Adam would be substantially likely to injure himself or others in the future. *Id.* See also *infra* note 167 and accompanying text. This opinion is shared by at least one other author. Seligmann, *supra* note 50, at 96–97:

Of the handful of reported cases where the risk of injury is considered, many have offered a long history of aggressive behavior. The better documented that history is, the easier it appears to be for the court, or now the hearing officer, to approve a change in placement. An unfortunate side effect of such amply documented situations may have been a tendency by some reviewing authorities to conclude that evidence of conduct short of such a history does not justify relief.

⁹⁵ See 34 C.F.R. § 300.520(b)(1).

⁹⁶ See *id.* § 300.520(b)(1)(i), (b)(2).

a maximum of forty-five days and then return to his regular classroom⁹⁷—notwithstanding the fact that he brought a gun to school and waved it at other students in a threatening manner.

Belle's violent behavior resulted in the long-term incapacity of Ms. Jones, but, as yet, Belle has not been identified as a disabled student. Therefore, it would appear that Belle will be disciplined under the school's student code of conduct and will receive the penalty prescribed for severely assaulting a teacher. However, Belle's parents might claim that Belle has a severe emotional disturbance and as such is disabled. More importantly for the purpose of determining her punishment, her parents may argue that the school should have been aware of her disability, given her unusual behavior and changes in her academic performance.⁹⁸ It does appear from the facts both that something was causing Belle to behave oddly and that perhaps the school should have been aware of this due to her withdrawn nature, instances of unexplained emotional outbursts, and changes in her academic performance.⁹⁹ Also, it is not clear whether Ms. Jones ever discussed her concerns with any of the school's special education teachers, though this is certainly possible.¹⁰⁰

Belle's parents, if they are to keep Belle in her regular school, would have to request a due process hearing in which they would make the argument that the school should have known of Belle's disability.¹⁰¹ Assuming their success in this argument, all the protections of the IDEA would apply to Belle, and she would be disciplined in accordance with the statute.¹⁰² Therefore, a second phase is warranted, and it must be determined if Belle's violent attack on Ms. Jones was

⁹⁷ See *id.* § 300.520(a)(2) ("A change of placement . . . for not more than forty-five days"). Note how easy it is to appreciate that this entire episode was merely a consequence of a lost prescription. It is, however, important to consider how this must look to the school community and consider its reaction to Adam's pending return to the high school. See generally Kristen Kromer, *School Fears Return of Expelled Student: Gun Incident Draws Attention to Special Education Law*, SPOKESMAN-REV. (Spokane), Oct. 13, 1999, at A1 (explaining that after a disabled student who had brought a gun to school was to return forty-five days after the incident, other students "distributed fliers calling for a walkout . . . to call attention to the issue").

⁹⁸ See 34 C.F.R. § 300.527 (explaining how a student who has not been determined to be eligible for special education can assert protections based on the fact that the school had constructive knowledge of the student's disability).

⁹⁹ While these facts alone would not necessarily lead to the conclusion that Belle has a disability, it is a colorable possibility here. For the purpose of demonstrating the direct connection between a child's disability and her punishment, Belle's school will be deemed to have had knowledge of her disability. See *id.* § 300.527(b)(2).

¹⁰⁰ See *id.* § 300.527(b)(4) (explaining that a teacher's expressed concern about the child's behavior is one basis for determining that the school had knowledge of the disability).

¹⁰¹ Seligmann, *supra* note 50, at 120–21 (citing 34 C.F.R. § 300.527).

¹⁰² See 34 C.F.R. § 300.527(a).

related or unrelated to this disability.¹⁰³ As with her brother, the facts of the hypothetical may lead to the conclusion that her unexpected violent outburst was a manifestation of her disability—here a serious emotional disturbance.¹⁰⁴ Assuming this connection exists between her behavior and her disability, the maximum penalty for Belle would be a ten-day suspension.¹⁰⁵ An initial IEP meeting would take place, and a plan for dealing with Belle's particular disability would be created.¹⁰⁶

Belle's parents, as members of the IEP team, can also give their opinion as to the best placement for Belle.¹⁰⁷ Moreover, Belle's parents have the right to contest a placement with which they disagree.¹⁰⁸ This is important here because one would assume that River County Schools might have something to say about

¹⁰³ See *id.* § 300.523 (discussing the procedures for reviewing the "relationship between the child's disability and the behavior subject to the disciplinary action").

¹⁰⁴ See *id.* § 300.7(a)(1), (c)(4).

¹⁰⁵ See *id.* § 300.520(a)(1)(i). If Belle's behavior were determined to be unrelated to her disability, Belle could be punished as if she were a non-disabled student with the stipulation that any punishment beyond a ten-day suspension would also require that Belle's school continue to provide her with the services described in her IEP. See *id.* § 300.520(a)(2). A slight change to the facts above demonstrates how parents are encouraged to make such belated claims of disability as soon as an incident occurs. Had Belle's parents not requested a due process hearing, nor made the claim that Belle's school knew or should have known of her disability, and had instead waited to request an actual evaluation of Belle sometime after her expulsion began, Belle would have been excluded from school without services until the entire evaluation was completed. See *id.* § 300.527(d)(2)(i) ("If a request is made for an evaluation of a child during the time period in which the child is subject to disciplinary measures . . . the evaluation must be conducted in an expedited manner.") (emphasis added); *id.* § 300.527(d)(2)(ii) ("Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.") (emphasis added). It goes without saying that "in an expedited manner" might mean something very different to a school that has just had one of its teachers brutally assaulted.

¹⁰⁶ See *id.* § 300.341(a)(1).

¹⁰⁷ See *id.* § 300.345.

¹⁰⁸ See 34 C.F.R. § 300.507 (explaining parent participation in the IEP meeting). It is very important to understand that the issue of placement for a disabled student is one on which the parents and the school may often agree. In this situation, Belle's parents may want to protect her from further taunting by other students. The point of this illustration is that ill-conceived options such as allowing disabled students to return to their current placement after being involved in serious incidents of violence should not even be possible under the IDEA when a non-disabled student would have been excluded from that placement. In other words, the safety policies that ultimately underlie the removal of a violent student apply with equal force to disabled and non-disabled students alike. Moreover, the longer removal periods under a student code of conduct would provide a longer period of time during which a violent disabled student could receive needed services. Also, regardless of whether a disabled student's behavior is related or unrelated to his disability, his school is still required to provide him the services listed in his IEP. See *id.* § 300.121(a). Therefore, it is difficult to appreciate the necessity of allowing such a student to return to the placement in which she committed an act of violence.

the best placement for a student who has seriously injured a faculty member. Here, as with Adam, the school may attempt to argue that maintaining Belle's current placement would be substantially likely to lead to the injury of Belle or others. Once again, however, the school would have to prove by substantial evidence—that is, by more than a preponderance of the evidence—¹⁰⁹ that allowing Belle to return to the high school, despite the fact that she has never done anything even remotely similar to this in the past, is substantially likely to result in injury to her or others.¹¹⁰ Even if the school is miraculously successful in this effort, Belle will likely return to school in forty-five days.¹¹¹

3. *Is Safety Being Considered at All?*

Should Adam's and Belle's placement be determined solely as a function of their disability status? Is there a justification for being more concerned with meeting their needs as disabled students—to the extent that Belle and Adam believe that returning them to the placement in which they committed violent acts meets such need—than for taking appropriate steps to remove them from the school to protect all members of the school community?¹¹² More generally, in terms of the efficacy of IDEA disciplinary rules, consider the curious results that may occur here. Assume that Adam will return to his school in forty-five days.¹¹³ If, during Adam's time away from the high school, it is ultimately determined that his behavior was not related to his disability, then he would face a one-year expulsion.¹¹⁴ If the opposite conclusion is reached, the forty-five day change of placement will be the limit of his absence from school. In either case, Adam's

¹⁰⁹ See *id.* § 300.521(e).

¹¹⁰ See *id.* § 300.521(a).

¹¹¹ See *id.* § 300.521 (“A hearing officer . . . may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for *not more than 45 days . . .*”) (emphasis added). The school is also permitted to repeat this process at the end of the first forty-five-day period should they wish to extend Belle's alternative placement for another forty-five days. *Id.* § 300.526(c)(4).

¹¹² One may argue that this note has already conceded that neither Adam nor Belle presents any real danger. This is incorrect. The note only points out that Adam and Belle's school would not be able to argue successfully that these students should be removed under the “substantial evidence” test required by § 300.521. Obviously, a strong argument can be made that a danger is presented by these students' continued presence in the school and that removing the students is simply a common sense response to their behavior. Balancing the need for such common sense safety measures with the important goal of protecting the interests of disabled students was at issue even after the 1997 Amendments to the IDEA were passed, indicating that these amendments did little to satisfy those on both sides of the issue. See *infra* note 169.

¹¹³ See 34 C.F.R. § 300.520 (a)(2).

¹¹⁴ See Gun-Free Schools Act, 20 U.S.C.A. § 7151 (West Supp. 2002).

removal from school will be longer than Belle's removal, even though his behavior, unlike Belle's, did not actually result in physical harm to anyone.¹¹⁵

Belle has caused a very serious injury to her teacher. It does appear, however, that she suffers from some kind of severe emotional disturbance.¹¹⁶ Furthermore, there seems to be a good argument that her behavior should have put the school on notice that she might have a disability.¹¹⁷ Finally, it appears that her already delicate disposition was shoved over the edge by the taunting of other students. Assuming all of this, Belle will be able to claim the protections of the IDEA.¹¹⁸ Therefore, Belle's punishment and the services with which the school must provide her depend upon a determination of whether Belle is disabled and whether her actions were a manifestation of that disability. Is this really the question that should be asked after a teacher has been violently attacked and severely injured by a student? Does Belle pose less of a threat to others because she is disabled or because her actions were related to that disability? Should Belle be returned to her regular classroom merely because the school district will not be able to meet its burden of proof in claiming that her continued presence at the school poses a substantial risk of injury to her or others, or, worse still, because her school cannot afford to litigate the matter? One has to believe that the answer to each of these questions is "no." It may very well be true that this was an unusual event that is unlikely to occur again. It may be that this event would lead to Belle's ultimate diagnosis and successful treatment. However, Ms. Jones is no less injured as a result of any of this. Nor are Belle's other teachers reasonably to be expected to accept her into their classrooms again without a second thought for their own safety merely because a federal law has insulated Belle from ordinary school disciplinary procedures.

The students at River County High School are likely to want to know only one thing about all of this: Why is it that Belle can return to school merely because we have discovered a possible explanation for her behavior?¹¹⁹ Student perceptions of this double standard threaten everyone.¹²⁰ The lesson of this event, for at least some students, will unquestionably be that disabled students can get away with behaviors that non-disabled students cannot.¹²¹

¹¹⁵ This assumes, of course, that it will be determined that she has a disability, the school should have known of it, and her behavior was related to her disability.

¹¹⁶ See 34 C.F.R. § 300.7(c)(4) (defining emotional disturbance).

¹¹⁷ See *id.* § 300.527(b)(2) (indicating that a child's behavior can be a basis for the LEA's knowledge of the child's disability). Recall that Belle's teacher had noticed this behavior and communicated this fact to Belle's mother. Also, it is possible that Ms. Jones discussed all of this with the school district's special education director. See *id.* § 300.527(b)(4).

¹¹⁸ See *id.* § 300.527(a).

¹¹⁹ See *infra* note 142.

¹²⁰ See *supra* note 13.

¹²¹ See *supra* note 13.

While one may appreciate that both Adam and Belle have acted out as a result of their disabilities, one cannot logically conclude that understanding this fact alters the danger posed by each of these students. Adam could lose his prescription again. Belle's treatment may require years of psychotherapy. Finding the correct medication and dosage for Belle's particular problem may also be a long and difficult journey—it should not be an equally long and difficult journey for Belle's classmates and teachers who reasonably and understandably believe that Belle's continued presence in their school presents a danger to them. Her unprovoked attack on Ms. Jones may be the first of several attacks to come. Belle's case is a good example of how the IDEA provisions for implying a school's knowledge of a student's disability after the fact,¹²² and for determining whether a student is substantially likely to cause injury to herself or others,¹²³ create a great deal of frustration for schools and considerable anger in the school community.¹²⁴

¹²² See 34 C.F.R. § 300.527.

¹²³ See *id.* § 300.521(a).

¹²⁴ These two regulations, one imputing knowledge of a student's disability only after the student has misbehaved and the other requiring schools to prove by substantial evidence the substantial likelihood of future harm to the student or others should she be left in her current placement, must be particularly exasperating to schools. See, e.g., *Proposed IDEA Regulations, Joint Hearing Before the Senate and House Labor and Human Resources Committee*, 105th Cong. 52 (1998) (comments of Martha Feland, President, Cabot, Ark. School Board):

We find that these students, particularly at the secondary level, when faced with long-term suspension or expulsion, take the position that school personnel should have realized there was a possible disability.

We've recently had two young men from our junior high campus who were caught with drugs. Their parents attended the school board meeting, apologized on behalf of their children for the incident, and accepted the punishment of expulsion. However, following the meeting an advocate approached these parents. The parents subsequently have requested that their children be considered as having a disability. These were both honor roll students, never been suspended a single day, never had a behavioral problem, never had an academic problem. We think that will recur frequently as we get into this.

See also, e.g., *Board Mulls Settlement*, PITT. POST-GAZETTE, Aug. 2, 2001, at B2:

The Warren County School Board will vote, probably later this month, on whether to approve settlement of a federal lawsuit filed by a student who was expelled for putting Viagra in a classmate's lunch.

Michael Baker, 19, filed suit . . . challenging the expulsion and claiming the school district didn't evaluate him for possible emotional and behavioral problems before expelling him.

. . . .
Baker[']s . . . lawsuit claimed he was denied a "free and appropriate education" once he was expelled from Warren Area High School.

Consider the implications of these types of claims by students in the context of a student who has committed a serious act of violence. First, note that it is only after this serious incident that schools are faced with the charge that they were not aware of a disability when they should

IV. FIRST THINGS FIRST: SAFETY BEFORE ACCESS

America's schools are not as safe as they once were.¹²⁵ The events of Columbine,¹²⁶ Paducah,¹²⁷ Pearl,¹²⁸ and Jonesboro¹²⁹ were thought to be a wake-up call to our nation. These shootings and bombings in our schools were to many symbols of how very lost we have become as a nation—causing schools to consider which brand of metal detector is the most effective instead of which textbook meets the requirements of the curriculum. The Oklahoma State legislature, apparently without any other substantive solution to the perceived problem, passed a bill, in part it appears, to remind parents that it was okay to

have been. Assume for the moment that this violent student is successful in making this argument. This student now enjoys the protections of the IDEA. If the school then wants to remove this violent student, the IDEA requires the school to meet a very high burden of proof in claiming that this particular student is likely to injure himself or others in the future before he can be removed. In other words, despite the fact that this student has successfully argued that the school failed to recognize his disability, even though he was present in the school for years apparently with a noticeable condition of disability, the school must now argue that it is able to accurately predict the future behavior of this same student before it will be permitted to remove him and protect its students and staff from this student whose behavior triggered this entire mess in the first place. It is difficult to imagine anything more frustrating than this.

¹²⁵ *Recess from Violence: Making Our Schools Safe: Hearing Before the Subcomm. on Education, Arts, and Humanities of the Sen. Comm. on Labor and Human Resources*, 103d Cong., 3 (1993) (statement of Senator Dodd) (“The very title of this hearing should give all of us pause. It is startling that today our schools are not safe and that we truly need a recess from violence There is an epidemic of violence plaguing our youth”); *Field Hearing on Violence in Our Nation's Schools: Subcomm. on Elementary, Secondary, and Vocational Education of the H.R. Comm. on Education and Labor*, 102d Cong., 3 (1992) (statement of Representative Serrano):

I requested the subcommittee to hold this hearing to discuss the escalating crisis of violence inside schools . . . across the country I have been shocked and deeply saddened by these reports of innocent children being killed while in classrooms and elsewhere on school property which we have always considered to be quiet refuges from harm.

¹²⁶ See generally Johnson & Wilgoren, *supra* note 13 (discussing the background of two students who killed thirteen people at their Littleton, Colorado high school).

¹²⁷ See generally *Two Killed in School Shooting in Kentucky*, N.Y. TIMES, Jan. 19, 1993, at A19.

¹²⁸ See generally Kevin Sack, *Southern Town Stunned by Arrests in Murder Plot*, N.Y. TIMES, Oct. 9, 1997, at A16 (“[Luke] Woodham is charged with killing two students, including a former girlfriend, and wounding seven.”).

¹²⁹ See generally Rick Bragg, *Judge Punishes Arkansas Boys Who Killed 5*, N.Y. TIMES, Aug. 12, 1998, at A1 (explaining that a fourteen-year-old and twelve-year-old were being sentenced for killing a teacher and four little girls).

spank their children.¹³⁰ At least for our nation's lawmakers, the lesson for their future reference ought to have been "better safe than sorry."¹³¹

Safety and maintaining order in the schools were two of the primary goals that prompted Congress to amend the IDEA in 1997.¹³² Among the key changes in this regard were the following: (a) permitting forty-five day suspensions when drugs or weapons are involved, ten day suspensions having previously been the maximum;¹³³ (b) allowing schools to decide a student's stay-put placement during any appeals about placement or other issues when the offense involved weapons or drugs;¹³⁴ (c) basing some disciplinary decisions on a determination as to the relationship between the child's behavior and his disability;¹³⁵ and d) allowing schools to request a change in placement based on the substantial likelihood of injury to the disabled student or others.¹³⁶ These changes have affected two important areas of the IDEA disciplinary model: determining the circumstances under which a disabled student can be sent to an alternate placement as a result of her behavior and how long she will stay in that placement.

Safety is the policy most clearly served by any rule that expands the amount of time during which a student is prevented from attending his regular school. Safety was the chief concern of Congress when in 1997 it amended the IDEA to

¹³⁰ OKLA. STAT. tit. 21, § 844 (2000) ("[N]othing contained in this act shall prohibit any parent . . . from using ordinary force as a means of discipline, including but not limited to spanking, switching, or paddling.").

¹³¹ Two students, Dylan Klebold and Eric Harris, managed to kill thirteen of their classmates and wound twenty-three others without warning. See Ann Beeson, Remarks at News Conference on the Law and the Columbine High School Shooting (Aug. 13, 1999) (transcript available from FDCH Political Transcripts). It has not been determined that either of these students was disabled within the meaning of the IDEA, nor is this central to the point here. The point is that students who have not been identified as dangerous can turn out to be unimaginably dangerous, and that it is irresponsible to ignore those students who, like Adam and Belle, have demonstrated that they can be dangerous simply because they are classified as disabled. Columbine occurred in April 1999, approximately one month before the Department of Education issued its final regulations for IDEA implementation. See 34 C.F.R. pts. 300, 303 (1999) ("These regulations take effect on May 11, 1999."). Congress now has the lesson of Columbine to consider when next it visits IDEA disciplinary procedures.

¹³² See *infra* note 137 and accompanying text.

¹³³ Seligmann, *supra* note 50, at 93-94; 34 C.F.R. § 300.520(a)(2)(i)-(ii) (1999).

¹³⁴ 34 C.F.R. § 300.526.

¹³⁵ *Id.* § 300.523.

¹³⁶ *Id.* § 300.521(a).

include the provisions discussed above.¹³⁷ Those amendments, however, have proven ineffective.¹³⁸

The chief goal of the Education for All Handicapped Children Act,¹³⁹ now the Individuals with Disabilities Educational Act, was to insure access for the disabled to regular public schools.¹⁴⁰ There is simply no denying both the historical exclusion of the disabled from public schools and the high costs to society of that exclusion.¹⁴¹ It is in society's best interest that every child should

¹³⁷ See *Reauthorization of the IDEA: Discipline Issues: Hearing Before the Subcomm. on Disability Policy of the Sen. Comm. on Labor and Human Resources*, 104th Cong. 1-2 (1995) (statement of Senator Frist):

We all want safe schools. We all want teachers to be able to teach and students to be able to learn.

....

Three months from now, I want to be able to look into the eyes of children with and without disabilities and say, "Come to school, learn, . . . *and be safe.*" I want to be able to look into the eyes of parents of children with and without disabilities and be able to say, "Send your children to school. They will be treated fairly and with respect. They will learn and they will *be safe.*" I want to be able to look into the eyes of general and special education teachers and say, "If given new challenges to face, you will be given the tools and help you need. You will be able to teach, to make a difference, and *to feel safe.*" I want to be able to look into the eyes of principals, superintendents, and school board members and say, "We have given you tools *to help you make schools safe.*"

(emphases added). See generally Peter Appleborne, *Push for School Safety Led to New Rules on Discipline*, N.Y. TIMES, May 14, 1997, at B8.

¹³⁸ See Appleborne, *supra* note 137 ("The [1997 Amendments to the IDEA] . . . do not fully satisfy . . . representatives of schools and teachers, who say that the needs of the few should not imperil the education and safety of the many."). It has even been suggested that the 1997 Amendments actually end many effective disciplinary measures. See, e.g., Theresa J. Bryant, *The Death Knell for School Expulsion: The 1997 Amendments to the Individuals with Disabilities Education Act*, 47 AM. U. L. REV. 487, 550 (1998).

¹³⁹ Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. § 1400 (2000)).

¹⁴⁰ See *supra* note 11 and accompanying text.

¹⁴¹ Unfortunately, some have reacted to the inadequacies of the current IDEA disciplinary procedures by calling for an end to the requirement that schools continue to provide educational services to suspended and expelled disabled students. Carr, *supra* note 19:

Barr introduced legislation in March that would "level the playing field" by giving local school boards the authority to expel disabled students who bring firearms to school.

In addition, the local school board would not be responsible for the cost of educating that child at home as it is now required to do [under IDEA] if a student is removed from the school for disciplinary reasons.

See also Aisha Sultan, *Ashcroft Bill Will Address Discipline "Double Standard"; Senator Wants Tougher Rules for Students Who Have Disabilities*, ST. CHARLES COUNTY POST (Mo.), Jan. 11, 2000, at 1. ("Ashcroft, R-Mo., wants to amend the federal Individuals with Disabilities Education Act so that school officials can suspend or expel [and relieve themselves of any obligation to educate] special education students who threaten to carry, possess or use a weapon

be educated. However, as laudable and important as this goal of access is, it cannot logically be maintained that it should be pursued at the expense of the safety of students and school personnel.¹⁴² Safety, then, is paramount, and this reality must be reflected in the IDEA disciplinary procedures.

or actually bring a weapon to school.”). While the frustration of those proposing such amendments may be understandable, these efforts are misguided. It simply makes no sense to expel troubled disabled students, allow them to roam free in the community during the school day without supervision or any educational services, and then expect this choice not to have longlasting and serious consequences for society. In other words, this is a “pay now or pay later” situation. H.R. Rep. No. 94-332, at 11 (1975):

The long-range implications are that taxpayers will spend many billions of dollars over the lifetime of these handicapped individuals simply to maintain such persons as dependents on welfare and often in institutions.

With proper educational services many of these handicapped children would be able to become productive citizens contributing to society instead of being left to remain burdens on society.

See also Reauthorization of the IDEA: Discipline Issues: Hearing Before the Subcomm. on Disability Policy of the S. Comm. on Labor and Human Resources, 104th Cong. 75 (1995) (statement of Stevan J. Kukic, At Risk and Special Education Services Consultant, Ohio Department of Education) (emphasis added):

It is appropriate to remove a student from an environment from which he has brought a dangerous weapon or engaged in other life-threatening behavior. In my opinion, it is not morally defensible for schools to disengage themselves from the life of this young person who is obviously at risk. In fact, *not only is that young person at risk, but society is at greater risk* given the probability that this young person will continue along a path of life-threatening behaviors. Purely from a safety perspective, as a citizen of this country, I also do not want children and youth who have been violent in schools to have unsupervised access to my home during the day, as well as during the evening, thus reinforcing their anti-social behavior.

Tamara Henry, *Disciplining Students with Disabilities*, USA TODAY, June 4, 1997, at 4D (quoting Lawrence A. Larsen, Professor of Special Education at Johns Hopkins University):

“What’s worse than having a student with a disability who has behavior problems who demonstrates anti-social or very negative, even dangerous behavior? What’s worse than having that individual on the street as an adult? Probably the only thing that I can think of is to have him on the street uneducated.”

“Pay me now or pay me later,” he says. “In some instances” with suspensions and expulsions, “I’m convinced it’s like throwing gasoline on fire—you make the situation worse.”

Carrie Smith, *Autism Group Wants Schools to Try Harder*, CHARLESTON DAILY MAIL, Mar. 26, 2001, at 1A (“‘If you just kick these kids out of school and don’t deal with it now, you’re going to pay later,’ she said. ‘You’ll be trading the money you save by not dealing with it to build jail cells for these students when they get older.’”).

¹⁴² The obvious and common counter to this is, of course, that IDEA disciplinary procedures do not present any threat to the safety of students and school personnel. However, evidence to the contrary is overwhelming. *See supra* note 13 and accompanying text. Perhaps most disturbing is the suggestion made by those opposed to further IDEA reform that the

A. A Flexible Expulsion Rule for Bringing a Gun to School

Guns have no place in our schools.¹⁴³ More to the point, the danger posed by a gun in a school full of children is not altered by the disability status of the

proponents of reform are somehow hell-bent on removing all disabled children from schools. See, e.g., Clare Kittredge, *For Special Ed Advocates, Rumor is a Call to Arms*, BOSTON GLOBE, Apr. 26, 1998, New Hampshire Weekly, at 1 (emphasis added) (comments of Judith Roskin, director of the Parent Information Center in Concord, Massachusetts):

“What’s wrong with [a proposed IDEA amendment that would allow schools to discipline special education students according to each local school’s own policy] is [that] it appears to give school districts *too much flexibility in excluding these kids* from school

....

“....

“I am opposed to this amendment because it lets kids with disabilities and their families be discriminated against *because of their disability*”

Educators and school administrators, however, overwhelmingly support the access goals of the IDEA and have been key players in their implementation. *Reauthorization of the Individuals with Disabilities Education Act: Hearing Before the S. Labor and Human Resources Comm.*, 105th Cong. 41 (1997) (statement of Anne Bryant, Executive Director, National School Boards Association) (“About 22 years ago, the National School Boards Association proudly supported the announcement of the IDEA. We were and are committed to treating students with disabilities equitably and fairly.”). *Id.* at 101 (statement of Michael Brown, President, National Association of Secondary School Principals):

Since enactment of the Individuals with Disabilities Education Act in 1974, school administrators and educators have made great strides in fulfilling the purpose of this Act, by assuring every child, disabled or not disabled, access to a learning environment that encourages them to be in school with other children learning to the best of their ability.

Furthermore, to the extent that there is any truth to the notion that examples of IDEA compliance causing school safety compromises are isolated incidents, one should remember that Columbine, while not involving disabled students, was an isolated incident. Yet those thirteen innocent children are no less dead and those twenty-three wounded children are no less wounded because the events leading to their deaths and wounds were unusual or isolated. This is why zero-tolerance policies exist: The risk of even one student losing her life while attending school at the hands of a violent fellow student, no matter how low the probability, is intolerable. A great deal of damage can be done with one gun and much physical harm can be done without one. These situations are rare, but that rarity is often inversely proportional to the severity of the damage done.

¹⁴³ It is just inconceivable in an age when students have committed mass murder in their schools that one should need to point this out. Yet there are advocates for the disabled who insist that different rules must apply to the disabled to protect their access to public schools and that the 1997 Amendments actually go too far in allowing schools to remove dangerous disabled students. See generally Applebome, *supra* note 37, at B8 (“The approach is totally wrong . . . [Schools] have many avenues open to them . . . [T]he knee-jerk reaction is to move the kids out . . .”) (quoting Diane J. Lipton of the Disability Rights Education and Defense Fund). Think for a moment how completely desensitized to gun violence one would have to be to defend a policy of returning a formerly gun-toting disabled student to the scene of his act. It

person who brings that gun to school. Furthermore, creating a double standard for disabled students who bring guns to school creates anger and frustration for non-disabled students, teachers, and the parents of disabled and non-disabled students alike whose children are exposed to those students who have taken guns to school and then been allowed to return.¹⁴⁴ A rule must be adopted that values safety above access and brings the IDEA into compliance with existing federal law, namely the Gun-Free Schools Act.¹⁴⁵

Fortunately, there is a workable and simple solution to the current shortcomings of the IDEA in this regard.¹⁴⁶ Current IDEA regulation 34 C.F.R. § 300.520(a)(2)(i) allows a disabled student who brings a gun to school or a school event to be suspended in the manner that a non-disabled student would be “but for not more than 45 days.” This last phrase, “but for not more than 45 days,” should be removed. Next, the following phrase should be inserted: “This provision is to be interpreted in a manner consistent with the Gun-Free Schools Act.”¹⁴⁷ The

is just not clear what important public policy is served by doing this—certainly not providing access to the schools for the disabled as a class.

¹⁴⁴ See e.g., Kromer, *supra* note 97 (“It’s horrible . . . I think that most of us [students] feel scared that someone can bring a gun to school and then be allowed to come back.”); Readers’ Letters, ATLANTA J. CONST., Mar. 4, 1999, at JG6 (letter written by mother of special education student) (“As parents, we should demand the safety of our children be paramount and any student, whether special education or not, should be permanently expelled for bringing a loaded firearm into our children’s school.”).

¹⁴⁵ 20 U.S.C.A. § 7151 (West Supp. 2002).

¹⁴⁶ Clearly, some of what is offered in this note will impact a number of other provisions in the IDEA, and those other provisions will need to be altered in order to conform to the changes suggested throughout this section. It is not the goal of this note to provide an exhaustive analysis of the impact of the offered legislative solutions; rather, it is only to offer them.

¹⁴⁷ This then is the converse of the current situation in which the Gun-Free Schools Act states that it is to be interpreted in a manner consistent with the IDEA. 20 U.S.C. § 7151. It seems advisable, in order to prevent any confusion, to remove that phrase from the Gun-Free Schools Act. To the extent that it would otherwise be necessary for the Gun-Free Schools Act to be cognizant of and in some way defer to the IDEA, any person searching for such a state of affairs would understand that both laws must be obeyed.

What are the implications of simply adopting this other rule? What about the mentally impaired student who has merely picked up a gun and brought it to school as an interesting item to show friends with no appreciation of the rules prohibiting this or the danger posed by it? While one can appreciate that this student had no intent to use this weapon to harm others, it does not follow that he does not pose a danger to others. What do we know about this student? He was able to procure and bring a gun to school. We do not know how or really even why he did this. However, an examination of zero-tolerance policies generally suggests that the danger posed by this student’s ability to bring the gun on campus is the real danger, regardless of his intentions or appreciation of his act. If a non-disabled student brings a newly purchased gun to school to impress his friends who also have an interest in guns, and with no intention of harming anyone, this student can be expelled under the Gun-Free Schools Act. *Id.* Any number of highly dangerous scenarios could unfold that would put that weapon into the hands of a

Gun-Free Schools Act already has a flexible provision that allows for unusual circumstances to be considered by the local school so that utterly arbitrary expulsions will not occur.¹⁴⁸ Note that this change does not affect the most important IDEA provision regarding services for the disabled in this context: After a child with a disability has been removed from his current placement for more than ten school days in the same school year, *the public agency must provide services* during any subsequent days of removal.¹⁴⁹ Disabled students who are expelled under this rule would still receive the services described in their IEPs. So, while physical access to the school building would not be permitted as a consequence of the student's behavior (assuming that the school did not find a reason to recommend something other than expulsion under this flexible rule), access to the services of the school would continue.

B. An Emergency Removal Provision

Schools must have the authority to remove dangerous disabled students for the same period of time as that considered appropriate for dangerous non-disabled students, regardless whether this student has used a weapon. The current provision,¹⁵⁰ used to request a change of placement for dangerous students, should be replaced with an emergency removal provision.¹⁵¹

student who does have the desire to harm others, or the gun could go off by accident. Regardless of how or why a gun is brought to school, it is a gun no less and poses a danger to the safety of students and school staff. It follows then that the danger posed by a student's ability to successfully bring a gun to school, whatever the reason, is the danger to be eliminated by the arbitrary nature of zero-tolerance policies—policies that are not concerned with *why* something happened, only that it did happen.

¹⁴⁸ 20 U.S.C. § 7151(b)(1) (emphasis added):

(b) Requirements.

(1) In general. Except as provided in paragraph (3), each State receiving Federal funds under any subchapter of this chapter [20 U.S.C. §§ 6301] shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school, under the jurisdiction of local educational agencies in that State, *except that such State law shall allow the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing.*

¹⁴⁹ 34 C.F.R. § 300.520(a)(1)(ii) (1999).

¹⁵⁰ *Id.* § 300.521(a). (“[T]he public agency has demonstrated by substantial evidence that maintaining the current placement of the child is substantially likely to result in injury to the child or to others . . .”). Recall that neither Adam nor Belle would likely be removed under this provision requiring the schools to meet a very high burden of proof.

¹⁵¹ Some have incorrectly stated that the current provision already allows schools to remove dangerous students. *All Things Considered: Senate Votes to Remove Problem Children* (NPR radio broadcast, May 14, 1997) (“[Under the 1997 IDEA Amendments], school officials

An emergency removal provision is the next logical step in the development of IDEA discipline policy. Congress recognized the need to address student use of guns in 1994 by allowing the longer forty-five day suspension for students who brought guns to school or to school events.¹⁵² Having recognized this once unthinkable situation at schools, the 1997 Amendments went further and allowed for suspending disabled students for forty-five days for using any weapon or illicit drugs.¹⁵³ The obvious and sensible next step is to recognize that acts of extreme violence can take place without the presence of a gun or other weapon.¹⁵⁴

An emergency removal provision should both allow for the extended removal of the most dangerous disabled students and have built-in safeguards to prevent schools from using such a provision to remove disabled students merely because they may be difficult to teach. The following plan deals with only the most severe behavior that warrants immediate action by a school—namely any behavior that, had it been committed by a non-disabled student, would have caused a school to take immediate action. Schools are already permitted by the IDEA to use less severe punishments such as in-school and short suspensions for common disruptive behavior,¹⁵⁵ and so a school should only be able to use this extraordinary provision for good cause.¹⁵⁶

An emergency removal proceeding would be conducted before a hearing officer.¹⁵⁷ The hearing officer would need to answer the following two questions in the affirmative before an emergency removal could be granted: (1) Is the removal consistent with existing written school policies and procedures;¹⁵⁸ and

will now be allowed to decide *unilaterally* to remove learning disabled students who pose [sic] a threat to themselves or others” (emphasis added). Aside from ignoring the difficulty of effecting such a removal, this statement also says something about the difficulty of interpreting a large and complex set of regulations. If this professional journalist got it wrong, might schools, already over-burdened with administrative tasks, state and federal law compliance, and of course their mission to educate children, do the same?

¹⁵² Thompson, *supra* note 24, at 574 (“[T]he Improving America’s Schools Act of 1994 gave school officials the discretion to move disabled school children into an interim alternative educational setting for up to forty-five days when those students bring firearms to school”) (citations omitted).

¹⁵³ 34 C.F.R. § 300.520(a)(2)(i)–(ii).

¹⁵⁴ It should be obvious that, for example, a 250-pound male student needs no weapon in order to harm a 125-pound female teacher or that a small female student with a lunch tray and the element of surprise can be equally brutal to the unwary teacher, regardless of her size.

¹⁵⁵ *Id.* § 300.520(a)(1)(i).

¹⁵⁶ Note how narrow this change is. It would apply only to those extreme situations in which a school would remove and ordinarily expel a non-disabled student—events so extreme that immediate removal from the school is absolutely necessary to ensure the physical safety of those in the school community.

¹⁵⁷ See *id.* § 300.508 (explaining the qualifications of an impartial hearing officer).

¹⁵⁸ It goes without saying that rules cooked up for certain students just prior to making use of this provision would not withstand even the most deferential review.

(2) has the school demonstrated by clear and convincing evidence that it would have made the same disciplinary decision for a non-disabled student?¹⁵⁹ If either question is answered in the negative, the student will be returned to his current placement and the IEP team will convene to discuss modification of his IEP. No modification of the IEP plan would be required though. If the hearing officer answers both questions affirmatively, she will then decide what the next placement should be for the student.

The hearing officer first decides if the behavior is a manifestation of the student's disability, though this determination shall not limit the placement options of the hearing officer. This determination will be used only to inform the hearing officer of the best placement option for a particular student. The hearing officer may require the testimony of all IEP team members, school officials, and the student's parents for this purpose. The hearing officer will make a determination about the next placement for the student. After this hearing is over, the IEP team, which includes the student's parents, will of course be able to reconsider the student's placement whenever it would be appropriate to do so under IDEA regulations. If, for example, another change in placement is recommended by the IEP team at a later time, and the parents wish to contest this placement, the placement by the hearing officer will be the stay-put placement during the pendency of any hearings or litigation.

Safeguards against the arbitrary use of such an emergency removal provision are necessary in order to assure the disabled continued access to regular public schools. Therefore, after answering one or both of the two questions in this provision in the negative, the hearing officer, if she determines that the school's request was frivolous or made in bad faith, may sanction the school by awarding the student's parents an amount equal to twice their reasonable attorney's fees or \$10,000, whichever is greater (if they are not represented by counsel, \$10,000 would be the limit).¹⁶⁰ If the school is unable to prove that it would have taken the

¹⁵⁹ The focus of this provision is the equal treatment of students in matters of student discipline, not the wisdom of any particular disciplinary method. It is far from certain, for example, that zero-tolerance policies, with their mandatory suspensions and expulsions of a predetermined length, are effective in creating a safer school environment for all members of the school community. (After all, some member of the school staff will be responsible for implementing a suspended student's IEP and will be exposed to whatever level of danger that student presents.) However, it is plain enough that a violent student who is not at school is less of a danger to the school community than one who is.

¹⁶⁰ A hearing in which one party has brought a claim in bad faith presumably will be short—one day at most, one would think. The amount of the penalty here, twice one's attorney's fees or \$10,000, is based upon the average attorney's fee for preparations and appearance at such a one-day hearing. Interview with Claudia Bentley, *supra* note 91 (explaining that preparing for and attending a one day hearing can cost a school, on average, \$10,000). By providing for double attorney's fees in such cases, parents will be encouraged to hire counsel, and schools will be encouraged to think carefully before resorting to this provision.

same actions had a non-disabled student committed the same act, but its invocation of the emergency provision was not found by the hearing officer to be frivolous or made in bad faith, the school will be required only to reimburse the parents' reasonable attorney's fees.¹⁶¹

Other IDEA disciplinary procedures must be modified to effectively implement this emergency removal provision. First, a school invoking this provision may suspend the student for up to twenty days. No services for the student would be required for the first ten days but must be provided after the tenth day.¹⁶² A hearing must be convened within this twenty-day period. If the hearing is not completed by the twentieth day, the student's removal will be extended until the hearing is finished. However, if the hearing has not been convened by the nineteenth day of the suspension, the student will be returned to the school the day after the twentieth day and this will be his stay-put placement until the hearing is completed.¹⁶³ If the hearing has been commenced by the nineteenth day, the student will simply remain at home, receiving IEP services there until the hearing is completed. If the IEP team or the child's parents decide that a placement different from that ultimately determined by the hearing officer is appropriate, the child's stay-put placement will be that determined by the hearing officer during any appeals to the courts.¹⁶⁴

¹⁶¹ Cf. 34 C.F.R. § 300.513(a) ("In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorney's fees as part of the costs to the parents of a child with a disability who is the prevailing party.").

¹⁶² Cf. *id.* § 300.520(a)(1)(ii) ("*After a child with a disability has been removed from his or her current placement for more than 10 school days . . . during any subsequent days of removal the public agency must provide services . . .*") (emphasis added). Note the only change is that an initial suspension of twenty days is permitted. This is twice the current limit. However, this may only be done when the school has committed itself to pursuing the matter in an expedited due process hearing. Schools that invoke these extraordinary provisions lightly in order to exclude a disabled student merely because he may be difficult to teach must be punished in order to prevent such discrimination.

¹⁶³ If schools are using the emergency removal provision for the situations for which it was intended (the removal of very dangerous students) this rule would encourage them not to try delaying tactics to extend the period of exclusion for the student.

¹⁶⁴ Remember that the hearing officer has determined that this student has committed an act that justified his school's decision to remove him, and so the hearing officer is in a very good position to determine the next best placement. Also, this is a convenient point at which to explain why this emergency provision does not require the manifestation review to be conducted by the IEP team prior to the hearing. Determining whether the behavior was a manifestation of the child's disability should be irrelevant where serious safety concerns exist. If the act is such that a non-disabled student would be removed, then we already know that it was very serious indeed, and insuring the safety of others should not turn on whether the offense was a result of a disability. If the school proves that it would have treated a non-disabled student in the same manner, then that is enough to prove that safety and maintaining order were the goals being served, instead of some impermissible intent to discriminate against a disabled student. Furthermore, the school is still required to provide IEP services regardless of the results

This proposed rule serves a number of useful ends. First, the safety of students and school staff is ensured by eliminating the disciplinary double standard and setting a uniform expectation of behavior for all students. This also serves a popular political end by tying the treatment of the disabled to that of non-disabled students.¹⁶⁵ Currently, when no weapon is involved in a student's violent act, the IDEA only permits a change of placement for that disabled student for up to forty-five days after his school proves the substantial likelihood of future injury to the student or others. Specifically, the school must request a due process hearing in which it must prove by substantial evidence (i.e., by more than a preponderance of the evidence) that the continued placement of the child in his current setting where he committed his act of violence is "substantially likely to result in injury to the child or to others."¹⁶⁶ Often this requires the school to show a pattern of behavior by the student in order to meet its burden of proof.¹⁶⁷ The emergency removal provision would prevent the frustration associated with forcing a school to wait for multiple severe acts of violence before getting some relief from a student who cannot adjust to his current placement. It also would avoid the largely pointless exercise of trying to prove that these incidents are substantially likely to happen again; this is a nearly impossible hurdle to overcome.¹⁶⁸

This emergency removal provision balances the goals of ensuring the disabled access to public schools and providing all students with a safe learning environment.¹⁶⁹ The equal treatment of students is assured because disciplinary

of the due process hearing. *See id.* § 300.121(a). This provision does have a manifestation review, but it is conducted by the hearing officer and does not have any compulsory consequences.

¹⁶⁵ *See supra* note 14 and accompanying text.

¹⁶⁶ 34 C.F.R. § 300.521(a), (e).

¹⁶⁷ Interview with Claudia Bentley, *supra* note 91 ("Unless the school can show a pattern of behavior that indicates that future injury to the child or others is likely to result from the continued placement of the child in that environment, it will be very hard for them to win this argument.").

¹⁶⁸ Seligmann, *supra* note 50, at 99 (emphasis added) (citing Scranton Sch. Dist., 29 Indiv. with Disabilities Educ. L. Rep. 133, 134 (Pa. Educ. Agency, June 22, 1998)):

The statutory use of the term "substantial evidence" to mean more than a preponderance standard thus creates a different, and undefined, quantum of proof. Particularly where such a difficult proposition as predicting future injury is involved, this places *an unfortunate and probably unrealistic burden* on school districts, for whom the safety of school children must be a high priority. Hearing officers and reviewing courts need to interpret and apply this standard in a way that appropriately balances safety concerns against the temporary removal of the child. In doing so, they should give deference to school officials' assessment of safety conditions within their schools and to their more extended experience with the child in question.

¹⁶⁹ Not surprisingly, achieving this balance and removing double standards have been identified as goals toward which Congress should strive. *Proposed IDEA Regulations, Joint*

decisions are based on the severity of a student's behavior and the attendant risks associated with the continued placement of that student in the environment in which the behavior occurred—not on whether the student is disabled. The current substantial likelihood standard is based on the high probability that a similar event or series of events will occur again, placing the disabled student's right to stay in his current placement above the rights of other students to be safe in that same environment. The reform provisions offered here would allow schools the flexibility needed to maintain a safe environment. However, this approach also would force schools to prove the necessity and fairness of the removal and severely penalize schools for any removal action made in bad faith. Thus, it would protect disabled students' access to public schools by preventing rampant discrimination against them.

C. Discipline for Adam and Belle Under the Proposed Legislative Solution

Adam's case is a simple one at first glance. Adam brought a gun to school and he may be expelled for up to one year under the Gun-Free Schools Act. However, that Act does have a flexible rule that allows schools to consider unusual or special circumstances that may merit a punishment that is less severe than the one-year expulsion.¹⁷⁰ If the school determines that Adam's loss of his pills is the real culprit here, then Adam may face a less harsh penalty—ideally a penalty serious enough to prompt Adam and his parents to make sure that this event will never happen again, while removing Adam for no longer a period than necessary to achieve this result.

Belle's attack on Ms. Jones, without question, would have resulted in the expulsion of a non-disabled student. Also note that if the reforms above are adopted, Belle cannot rely on the "should have been identified" provisions to prevent her expulsion because, even if Belle's school should have identified her emotional disturbance, she can still be removed under the emergency removal provision. There is, however, an important reason for Belle to pursue a claim that the school should have identified her disability. If it is determined that she should

Hearing Before the Senate and House Labor and Human Resources Comm., 105th Cong. 7 (1998) (comments of Senator Kennedy):

One question that is being raised in this hearing is whether a fair balance has been achieved between the rights of a child with a disability and school safety in regard to school suspension. During the debate last year, schools asked for additional leeway to discipline students with disabilities to help guarantee a safe learning environment for all students.

¹⁷⁰ See *supra* note 148.

have been identified, she will be entitled to receive educational services under any IEP then developed for her, even if she is ultimately expelled.¹⁷¹

Again, one may appreciate that both Adam's and Belle's actions were likely the result of unfortunate circumstances, their disabilities, or both. This observation, however, does not alter the danger presented by either of them. Returning them to the classroom after a short ten or forty-five day period, when non-disabled students would be expelled for a year or longer, would also generate feelings of anger and fear among their fellow students, these students' parents, and school staff.¹⁷²

¹⁷¹ It is arguable that this result does not achieve increased safety for all school personnel because ultimately someone must implement Belle's IEP in whatever alternative setting she may be placed. In other words, the emergency removal provision just shifts the danger from school personnel in the regular classroom setting to personnel in alternative educational settings. The fact of the matter is that these kinds of policy debates are ultimately searches for the best solution in a second-best world. However, when the choices are as clear as they are here, and the stakes include the physical safety of children, there really should not be any question about the *best way* to proceed.

¹⁷² Take a moment to imagine that you are one of the children whom Adam threatened with a gun. Returning Adam to your school is obviously going to concern you. Now imagine that you are one of these children's parents, perhaps a parent of an only child who was threatened by Adam. Obviously, you are not willing to take a chance with your child's safety in order to do your part to advance whatever social policy is served by returning Adam to your child's classroom. Consider in this regard a United States Senator's explanation of why safety in our schools is so important to parents in particular:

I did notice a thread of concern from discipline to safety brought out by this group. I appreciate that and do think that that is a prime concern among the people that I talk to, and that is safety for both students with disabilities as well as other students. And I really do not think there is any place in our school system for violence. The threat of violence to anybody just should not be a part of it, and we do have to give our school districts the flexibility to deal with the violence before people get hurt.

My oldest daughter, when she was three—and she was my only child at that time—was going to have her tonsils taken out, and the doctor very carefully explained to us what the possibilities were of something happening. He said it is such a good process now that nothing can happen; it is less than two-tenths of one percent. But I still reflect back on that and say that was my only child, and she was 100 percent if that two-tenths of one percent happened. And that is what we have to watch out for on the safety issue . . .

Hearing Before the Senate Labor and Human Resources Committee, Reauthorization of the Individuals with Disabilities Act: 105th Cong. 45-46 (1997) (comments of Senator Enzi). Even a small chance that Adam will return to school with a gun, for whatever reason, is too large a chance to take with the lives of children. Likewise, Belle's teachers should not have to offer up their personal safety to provide Belle with the opportunity to be educated in the least restrictive environment. Non-disabled students would unquestionably be removed from their school were they to commit the acts committed by Adam and Belle, and no federal law forces schools to provide services to non-disabled students who are expelled under such circumstances. It is very difficult to appreciate, then, why disabled students who are guaranteed continued educational services in the event that they are expelled should be permitted to remain in their schools after

Disciplining disabled students and non-disabled students under one set of rules does not result in discrimination against the disabled. This is instead the definition of equal treatment.¹⁷³ Requiring gun-toting disabled students to be expelled for one year when non-disabled students would be expelled for that same period is not discrimination. This conclusion is all the more inescapable when one considers that federal law requires that expelled disabled students continue to receive educational services, but does not provide expelled non-disabled students with any such guarantee to an education. Likewise, removing dangerous disabled students from their school for offenses not involving a weapon when a dangerous non-disabled student would also be removed is not discrimination. Moreover, the removal of the very few disabled students whose behavior would make them subject to the disciplinary provisions offered in this note would have no appreciable impact on access to public schools for the disabled.¹⁷⁴ Therefore, insuring a safe learning environment for all students can be achieved without hindering access to public schools for the disabled.

V. CONCLUSION

Insuring the physical safety of our children while they are at school should be Congress's first priority. Without some level of assurance of their safety, it is unrealistic to expect students to focus their energies on learning or teachers to focus on teaching.¹⁷⁵ America's school communities are demanding meaningful reform of the IDEA disciplinary procedures that will return control of school discipline policies to local management and common sense.¹⁷⁶ Returning all control over disabled student discipline issues to local schools is not necessary. However, Congress must recognize the common sense conclusion that safety is of primary importance when drafting amendments to the IDEA disciplinary provisions. This single recognition should be enough to counsel for the adoption of amendments to the IDEA similar to those proposed here. The disabled must

committing such acts. There is, in effect, no loss of access to an education, but only the loss of a disabled student's preferred learning environment.

¹⁷³ While this is equal treatment, *per se*, the more difficult question is whether it is appropriate for disabled students to be treated in the same manner as are non-disabled students when in fact these students are not the same? This question, considerably beyond the scope of this note, should be closely examined by Congress to determine if in fact there is some substantive difference between disabled and non-disabled students that, in and of itself, could actually justify retaining the current rules that unquestionably value access over safety.

¹⁷⁴ Indeed, the number of disabled students who are the source of serious discipline problems is far from large. Sowers, *supra* note 13 ("The[] numbers [of seriously behaviorally challenged students] are small relative to their healthier peers. [T]he most seriously troubled make up about 3 percent to 5 percent of the [school-age] population.").

¹⁷⁵ See *supra* note 14 and accompanying text.

¹⁷⁶ See *supra* note 137 and accompanying text.

continue to have access to the public schools and they must be secure in the knowledge that Congress will not allow schools to discriminate against them because of their disabilities. Adopting the legislative reforms suggested here will not permit schools to discriminate against the disabled and will penalize schools that do with exemplary monetary damages.

Ultimately, every policy agenda is pursued and advanced at the expense of some other policy. Moreover, no policy may be implemented without costs. Who is paying for the implementation of the current IDEA disciplinary procedures? How high are these costs? Under the 1997 amendments to the IDEA, Congress has, unintentionally perhaps, but at least implicitly, asked our public school administrators, teachers, staff, and students to accept that their personal safety is the currency with which the present disciplinary procedures for the disabled are being purchased. Common sense and basic issues of fairness suggest that this cost is too high. While the 1997 Amendments to the IDEA were a step in the right direction, they still fail to achieve the optimal balance between the goals of access to the general curriculum for the disabled and providing a safe learning environment for all students.