

Disciplinary Exclusion of Students with Disabilities

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Two preeminent disability rights laws protect children with disabilities against inappropriate school discipline: the Individuals with Disabilities Education Act and section 504 of the Rehabilitation Act of 1973. [/1/](#) The Act was amended in 1997 expressly to address, for the first time, disciplinary exclusion of students with disabilities. [/2/](#) In March 1999 the U.S. Department of Education promulgated regulations implementing this and other aspects of the 1997 amendments. [/3/](#) In some cases the regulations on discipline simply parrot or clarify the statutory provisions. In others they undercut students' statutory rights and thus create difficult advocacy dilemmas for students, parents, and their advocates. Rights under section 504 and the Education Department's Office for Civil Rights regulations implementing them remain unchanged by the amendments to the Act and the Act's regulations.

In representing students with disabilities who are subject to inappropriate school discipline, we must recognize that the 1997 amendments to the Act, besides adding discipline provisions to the statute, underscored schools' long-standing obligation to treat behavioral manifestations as education issues by responding with appropriate services and supports. [/4/](#) Equally important is the Act's requirement, made explicit in the 1997 law, that children who have disabilities and are suspended or expelled from school must be provided with a free appropriate public education. [/5/](#) Although suspension and expulsion continue to an alarming degree, the laws limit the circumstances in which school officials can unilaterally exclude students with disabilities-and deny them a free appropriate public education-from their current educational placements through lengthy suspensions or expulsions.

In this article I introduce the rights of students with disabilities under the **p51** 1997 amendments to the Act, the Act's 1999 regulations, and section 504. My focus is on basic protections in disciplinary exclusion under the Act and section 504. I also discuss a key related issue addressed by the 1997 amendments: the filing of criminal charges against children with disabilities by school personnel. [/6/](#)

When children with disabilities are suspended, expelled, or otherwise denied education for discipline reasons, several statutory provisions and regulations protect their rights. Advocates should understand the various aspects of these rights articulated in the Act, its regulations, and section 504.

I. Denial of Education for Discipline Reasons

Congress explicitly amended the Act in 1997 to state that a free appropriate public education must be provided "to all children with disabilities . . . between the ages of 3 and 21 . . . including children with disabilities who have been suspended or expelled from school." [/7/](#) This unequivocal language requires schools to continue to provide an education meeting the statutory definition of a free appropriate public education during all periods of suspension and expulsion, no matter how long or short. [/8/](#)

A. Under the Act.

The U.S. Department of Education regulations implementing the Act, however, take a different view. Under the regulations, schools do not have to provide a free appropriate public education -or any educational services at all-until a child has already been suspended for a total of ten school days in the same school year or, in other words, until the eleventh total school day of suspension. [/9/](#) This erroneous interpretation of the statute allows a child to be denied up to two weeks of education and related services per school year. However, even under this view, denial of education is allowed only if children without disabilities are also suspended from school for comparable periods with no educational services. [/10/](#)

The Act and its regulations allow school personnel to suspend a child for up to ten school days (if children without disabilities are similarly treated) without determining whether the alleged misconduct is a manifestation of the child's disability. [/11/](#) The statute does not specify whether this limit means ten consecutive school days or ten cumulative school days in a school year. The regulations are specific, providing that these suspensions may last up to ten consecutive school days. [/12/](#) However, the regulations recognize that a series of suspensions that are each less than ten days, when taken together, may constitute a pattern of exclusion requiring that they be treated, for purposes of rights under the Act, as if they were a single, continuous suspension. [/13/](#) Where such a pattern exists, the *p52* upper limit on suspension without a manifestation determination is ten cumulative school days. [/14/](#)

As soon as a school system decides to initiate a suspension of more than ten consecutive school days, a suspension that would include the eleventh cumulative suspension day in a school year where a pattern exists, or an expulsion, it must notify the child's parents and give written notice of all the procedural safeguards available to them and their child under the Act. [/15/](#) Before the school system may proceed with any such suspension or expulsion, however, it must-immediately and no later than within ten days of its decision to take that disciplinary action-conduct a review of the relationship between the behavior at issue and the child's disability and determine whether the behavior is a manifestation of the child's disability. [/16/](#) If the result of the review is a determination that the behavior at issue is not a manifestation of the child's disability, the child may be subjected to the same disciplinary measures, including suspension or expulsion, as are children without disabilities who engage in similar behavior. [/17/](#) However, as discussed above, the school system must continue to provide free appropriate public education during the suspension or expulsion. As discussed in section IX.A below, a determination that the behavior is not a manifestation of disability may be appealed through the Act's complaint and due process hearing procedure.

If the review determines that the behavior is a manifestation of disability, the child may not be suspended or expelled. [/18/](#) However, if appropriate, the school system may propose changes in the child's individualized education program, placement, or both. Except in certain cases involving weapons, drugs, or other particular kinds of dangerous behavior, as discussed in sections III and V below, the usual procedures under the Act for making such changes apply, including prior notice to parents, individualized education program team meetings, and parent participation requirements. [/19/](#) Parents retain the right to reject the school's proposal and use the Act's dispute resolution procedures to challenge any decision with which they disagree. [/20/](#)

The Act requires that the school system convene the individualized education program team to plan a functional behavior assessment, arrange for the assessment to be conducted, and develop and implement a plan of appropriate interventions to address the behavior either before or within ten days of making a "change in the placement of a child with a disability" for discipline reasons, including suspensions of ten school days *p53* or less. [/21/](#) Contrary to the statute, the regulations state that these steps need not be taken until the child will have been excluded for eleven or more cumulative days in a school year. [/22/](#) If a child has already had a functional behavior assessment and has a behavioral intervention plan, the individualized education program team must

meet to review the plan and its implementation and modify it as necessary to address the behavior that prompted the exclusion. [/23/](#)

If a child with a new or modified behavioral intervention plan is subsequently excluded from the child's placement, the individualized education program team members must review the plan and its implementation to determine if changes are necessary. [/24/](#) If any member of the team—including the parent—believes that the plan should be changed, the team must meet to change it to the extent the team determines necessary. [/25/](#)

B. Under Section 504

Much like the Act, the section 504 regulations require that certain procedures be followed before a child's educational placement may be changed. For example, a comprehensive evaluation by appropriate, qualified personnel must be conducted before any "significant change in placement." [/26/](#) A suspension exceeding ten consecutive (or sometimes ten cumulative) school days or an expulsion constitutes a "significant change of placement" under the regulations. [/27/](#) The school system therefore must conduct a comprehensive evaluation meeting all of the requirements of the section 504 regulations before attempting to exclude a student for more than ten days. [/28/](#) The evaluation must also include a determination of whether there is a connection between the behavior for which discipline is to be imposed and the student's disability. [/29/](#)

If the behavior is found not to be a manifestation of disability, the student may be subjected to the same disciplinary measures as are nondisabled students, including suspension or expulsion without education. However, by judicial decision, educational services should continue in at least those states covered by the U.S. courts of appeals for the Fifth, Sixth, and Eleventh Circuits. [/30/](#)

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A series of short-term suspensions of ten days or less that cumulate to more than ten days may constitute a pattern of exclusion tantamount to a "significant change in placement" for section 504 purposes, triggering the prior evaluation and manifestation determination requirements. [/31/](#) According to the Education Department's Office for Civil Rights, which enforces section 504, factors to be considered in determining whether such a pattern exists include but are not limited to the length of each suspension, the proximity of the suspensions to one another, and the total amount of time that the child is excluded from school. [/32/](#) Other factors, such as the pattern of exclusions from the previous school year, other disciplinary sanctions imposed, or the student's history, may

also be relevant. [/33/](#) Cases in which the Office for Civil Rights has found an impermissible pattern of short-term suspensions under the totality of the circumstances include cases where suspensions totaled fifteen days over a three month period; sixteen days from the start of the school year to March; eighteen days from mid-December through May; twelve days from mid-November through early February; twenty days from mid-January through May; and twenty-two days between September and March. [/34/](#)

According to Office for Civil Rights policy, a suspension of ten days or less does not, in and of itself, constitute a "significant change in placement" triggering reevaluation rights under the section 504 regulations, including a manifestation determination. However, the overriding prohibition against disability-based discrimination in section 504, the Americans with Disabilities Act, and their implementing regulations should preclude imposition of any punitive discipline for conduct that is a manifestation of disability. [/35/](#)

II. Incidents Involving Weapons or Illegal Drugs Under the Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act now contains explicit provisions concerning children who (1) carry to or possess a weapon at school, on school premises, or to or at a school function or (2) knowingly possess or use illegal drugs or sell or try to sell a controlled substance while at school or at a school function. [/36/](#) For purposes of these provisions, *p55* "weapon" means "a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length." [/37/](#)

A. Under the Act

The term "controlled substance" means a drug or other substance identified in certain sections of the federal Controlled Substances Act. [/38/](#) The term does not include alcohol. "Illegal drug" means a controlled substance, unless the child's possession or use is legal by virtue of being under the supervision of a licensed health care professional or by virtue of any other provision of federal law. [/39/](#)

Students with disabilities involved in this kind of behavior may be suspended or expelled from school under the same terms described in section I above: for up to ten days without a manifestation determination and for longer upon a finding that the behavior was not a manifestation of disability. Suspension or

expulsion is subject, of course, to the school system's obligation to continue to provide a free appropriate public education, albeit in another setting. The difference in legal rights comes when the behavior is found to be a manifestation of the child's disability.

Ordinarily, as discussed in section I above, when behavior is a manifestation of disability, the school system may not suspend for more than ten days or expel, and any change in placement may be accomplished only by following all of the usual procedures and procedural safeguards under the Individuals with Disabilities Education Act. [/40/](#) These include the right of parents to object, request a due process hearing, and invoke "stay put" rights in order to stop the placement change pending resolution of the dispute. [/41/](#)

In contrast, if a child is involved in one of the kinds of drug- or weapon-related incidents described above, school officials may, acting by themselves and over parental objection, temporarily place the child in an appropriate "interim alternative educational setting," notwithstanding that the behavior is a manifestation of the child's disability. [/42/](#) However, school officials may do so only if (1) keeping the child in his current placement is substantially likely to result in injury to the child or to others, and (2) this substantial likelihood remains even after the school system has made reasonable efforts, including the use of *p56* supplementary aids and services, to minimize the risk of harm in that placement. [/43/](#)

The placement in an interim alternative educational setting may last up to 45 calendar days, or for the same period that a child without disabilities would be subject to discipline, whichever is shorter. [/44/](#) The child must be returned to the child's prior placement at the end of this period or to another placement to which the child's parents agree. If the school system wishes to place the child in another placement not acceptable to the parents, the parents may object, file a complaint, and request an administrative due process hearing under the Individuals with Disabilities Education Act, thereby triggering the child's right to return to and remain in the prior placement until the dispute is resolved. [/45/](#) Should the school system believe that returning the child to that placement would be dangerous, it may request an expedited due process hearing and seek permission to keep the child in the interim alternative educational setting pending resolution of the dispute. [/46/](#) This should rarely be necessary or appropriate, however, as the initial 45-day placement period is ample time for schools to collaborate with parents to develop long-term strategies for addressing the child's educational (including behavioral) needs, including any changes in the services the child receives.

Consistent with the duty to provide a free appropriate public education to all students, the interim alternative educational setting must provide a free appropriate public education, as defined by the Individuals with Disabilities Education Act and including meeting the quality requirements described in section VIII.A below regarding the content of education during periods of disciplinary exclusion.

B. Under Section 504

Students who have disabilities and are involved in weapons incidents are treated no differently under section 504 from students who have disabilities and are accused of other discipline infractions. However, students involved with illegal drugs or alcohol are treated differently. School officials may discipline a student with a disability for "the use or possession of illegal drugs or alcohol" to the same extent that a nondisabled student would be disciplined if he "currently is engaging in the illegal use of drugs or in the use of alcohol." [/47/](#) Although such students ordinarily have a right to a hearing under other laws, they do not have a right to the kind of hearing ordinarily allowed students contesting a placement change under the section 504 regulations. [/48/](#) However, provided that they are also "children with disabilities" within the meaning of the Individuals with Disabilities Education Act, they retain all of the Act's rights and protections described in this article.

III. Students with Other Behavior That Schools Deem Dangerous

The Individuals with Disabilities Education Act permits a child whose behavior is a manifestation of disability to be placed in an appropriate "interim alternative educational setting" over parental objection for other, dangerous behavior under certain circumstances. This aspect of the law, however, does not allow school officials to take action on their own. Rather, they must request a due process hearing and seek an order from **p57** an Act's hearing officer placing the child in an interim alternative educational setting. [/49/](#) The hearing officer may order placement in such a setting for no more than 45 calendar days. [/50/](#)

The Act requires that the hearing officer, before ordering a child placed in an interim alternative educational setting,

- determine that the school system has proven by more than a preponderance of the evidence that keeping the child in the child's current placement is substantially likely to result in injury to the child or others;

- consider the appropriateness of the child's placement;
- consider whether the school system has made reasonable efforts, including through the use of supplementary aids and services, to minimize the risk of harm in the current placement; and
- determine that the interim alternative educational setting meets the Act's requirements. [/51/](#)

Where parents and school system disagree as to the child's placement at the end of the interim alternative placement of 45 or fewer days, the same Act rules, options, and procedures discussed in section III above in connection with weapon and drug incidents apply. [/52/](#)

Students with disabilities whose behavior schools deem dangerous are treated no differently under section 504 from students with disabilities who are accused of other discipline infractions.

IV. Manifestation Determinations

A manifestation review must be conducted and a manifestation determination made before a child with a disability may be excluded from the child's current educational placement for more than ten days. This requirement also applies where a shorter suspension is part of a pattern of exclusions that together exceed ten days in a school year. The review explores the relationship between the behavior at issue and the child's disability and educational program and services. The individualized education program team (which by definition includes the child's parents) and other "qualified personnel" conduct the review and make the manifestation determination. [/53/](#)

A. Under the Act

In performing its task, the group must consider all relevant information, including evaluation and diagnostic results (whether obtained by the school system or the parent), observations of the child, and the content, characteristics, and implementation of the child's individualized education program and placement. [/54/](#) The group may determine that the behavior was not a manifestation of disability only if

- in relationship to the behavior at issue the child's individualized education program and placement were appropriate, and all services were implemented consistent with the individualized education program; and

- the child's disability did not impair the child's ability to understand the impact and consequences of the behavior at issue; and
- the disability did not impair the child's ability to control the behavior. [/55/](#)

If the group finds that any of these criteria has not been met, it must find that the behavior was a manifestation of disability. [/56/](#) If the group discovers any **p58**deficiency in the child's individualized education program or placement, or in their implementation, it must take immediate steps to remedy the situation. [/57/](#)

Although the individualized education program team and "other qualified personnel" carry out the manifestation review and determination, neither the Individuals with Disabilities Education Act nor its regulations specify who these qualified professionals must be. [/58/](#) However, the inclusion of this provision in the law shows that Congress recognized that individualized education program teams alone did not have the expertise to determine the relationship between disability and behavior. The "qualified personnel" who supplement the individualized education program team must bring this expertise to the group and enable it to evaluate the factors listed above in regard to a particular child. At a minimum these qualified personnel, in order to do so, seemingly must include individuals with expertise in the child's disability or disabilities, including the potential developmental, cognitive, educational, and behavioral consequences; in interpreting and **p59** understanding the limits of existing evaluation data and other information about the child; in identifying and understanding what triggered the behavior, including expertise in functional behavior analysis; in appropriate behavioral supports and strategies for children with the child's particular disability, strengths, and needs; in assessing the appropriateness of the services being provided to the child, any issues regarding their implementation, and the impact on the child and the child's behavior; in any cultural or related issues or concerns; and, where the child has limited English proficiency, in any language issues that may be relevant to the behavior or incident at issue.

B. Under Section 504

The Office for Civil Rights required manifestation determinations as a section 504 matter long before they became a part of the Individuals with Disabilities Education Act. In order to comply with section 504, a group of people knowledgeable about the student, the meaning of the evaluation data, and the placement options must determine whether the behavior in question is related to the student's disability and whether the student was appropriately placed and

served at the time of the incident. [/59/](#) These professionals must base their determination upon the kind of current information-including psychological evaluation data related to behavior-that competent professionals would require. [/60/](#)

The Act's provisions concerning the factors to be considered in making manifestation determinations, while relevant, do not limit the inquiry under section 504, and parents and advocates should *p60* remain aware of the many ways in which disability and behavior may be related. [/61/](#)

V. Content of Education During Disciplinary Exclusion

Schools often provide woefully inadequate education, if any, during periods of disciplinary exclusion. Advocates familiar with the substantive and procedural aspects of a free appropriate public education can protect clients from such deprivation.

A. Meaning and Content of a Free Appropriate Public Education

All children who have disabilities-including those who have disabilities and have been suspended or expelled from school-are entitled to a free appropriate public education. [/62/](#) The term "free appropriate public education" has a technical legal meaning. As defined in the Individuals with Disabilities Education Act, it means special education and related services that are provided at public expense, under public supervision, at no charge; meet the standards of the state educational agency; include an appropriate preschool, elementary, or secondary education in the state involved; and are provided in accordance with an individualized education program that meets the Act's requirements. [/63/](#) It also includes meaningful opportunities to learn in the general curriculum, that is, the curriculum adopted for all students. [/64/](#) Furthermore, as the Supreme Court held in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, a free appropriate public education requires that the individualized education program be developed in accordance with the procedures-including those governing educational decision making and the resolution of disputes between parents and school systems-set forth in the Act. [/65/](#)

The education provided to children excluded from their usual educational placement for discipline reasons must meet all of these criteria. Compliance with these criteria should ensure that these children receive a full, high-quality education, with qualified instructors, in a school setting. For example, the mandate that a free appropriate public education include an appropriate

elementary or secondary education in the state involved-with meaningful opportunities to learn in the general curriculum-means that children must be offered the entire curriculum, not simply the isolated "special education" services listed in their individualized education programs, such as speech and language therapy or reading skills assistance. This is virtually impossible to accomplish through home tutoring or limited numbers of weekly hours of instruction.

In addition to these general rules regarding the content of a free appropriate public education, the Individuals with Disabilities Education Act speaks in detail **p61** to the situation of children excluded from their usual placements and placed in an "interim alternative educational setting"-because of either involvement in certain kinds of incidents involving weapons or illegal drugs or because a hearing officer has so ordered after finding that keeping the child in the child's current placement would be dangerous. The selected interim alternative educational setting must enable the child to continue to participate in the general curriculum and to receive the services and modifications, including those described in the individualized education program, to meet individualized education program goals; and it must include services and modifications designed to address the behavior that prompted placement in the interim alternative educational setting so that it does not recur. [/66/](#) These details elucidate, but are not a substitute for, some of the general statutory rules regarding a free appropriate public education. We must keep in mind that these requirements would be components of a free appropriate public education even if they were not expressly listed in connection with interim alternative educational settings. Therefore, they are required for all children excluded from their usual educational placement for discipline reasons-even if the children are not placed in an interim alternative educational setting and even if the behavior for which they are being suspended, expelled, or otherwise excluded is not a manifestation of disability. On a related note, the regulations of the Individuals with Disabilities Education Act further clarify that the education provided to a child during short-term suspensions, or to a child who is permissibly suspended or expelled for longer periods because the child's behavior is not related to disability, must enable the child to progress appropriately in the general curriculum and advance toward achievement of individualized education program goals. [/67/](#)

B. Educational Decision Makers Under the Individuals with Disabilities Education Act

When a child is to be placed in an interim alternative educational setting due to an incident involving weapons or illegal drugs, the individualized education

program team, which includes the parent, chooses the setting. [/68/](#) Similarly, and consistent with the general requirements of the Individuals with Disabilities Education Act regarding the development and revision of the individualized education program, the individualized education program team is responsible for planning services for children subjected to long-term suspension or expulsion because their behavior has been found to be unrelated to disability. [/69/](#) The individualized education program team also plans services for a child subjected to a series of short-term suspensions of ten or fewer days that, because they exceed ten days in total and create a pattern of exclusion, are to be treated as a long-term suspension. [/70/](#)

In cases where, to address dangerous behavior, a child is to be placed in an interim alternative educational setting by order of a hearing officer, the hearing officer must approve the setting after determining that it meets the statutory requirements of the Individuals with Disabilities Education Act. [/71/](#) Ordinarily schools seeking such an order propose a particular placement as the interim alternative educational setting. As the Act mandates that parents be "members of any group that makes decisions on the educational placement of their child," provisions must be made to include parents when schools develop these proposals. [/72/](#) The Act's regulations confuse the issue, however, by including language that refers to hearing **p62** officers determining whether "the interim alternative educational setting that is proposed by school personnel who have consulted with the child's special education teacher" meets legal requirements. [/73/](#) The regulations thus erroneously imply that the usual process under the Act for developing placement proposals does not apply in this situation. The regulations also state that "school personnel, in consultation with the child's special education teacher," determine services to be received during short-term suspension periods that are not part of a pattern of exclusion. [/74/](#) Thus the regulations appear to attempt to excuse schools from following usual procedures under the Act in regard to these two groups of children, notwithstanding the Supreme Court's ruling in *Rowley* that compliance with the Act's procedures is a critical aspect of a free appropriate public education. [/75/](#)

C. Exclusion Under Section 504

As explained in sections II and IV above, section 504 permits suspension and expulsion without services for behavior unrelated to disability, and for certain behavior involving illegal drugs or alcohol (except in those states where judicial decisions have held otherwise), provided that students without disabilities are excluded without services for comparable behavior.

VI. Challenging Discipline Decisions

When parents wish to challenge a discipline decision, they face a possibly daunting process. In order to assist these parents, advocates need to understand parents' hearing rights and children's right to "stay put" during such disputes.

Parents who disagree with discipline decisions have the right to a due process hearing. A parent may request a hearing to challenge a manifestation determination, placement in an interim alternative educational setting by either school personnel or a hearing officer, any other placement decision, the nature or quality of education and services a child receives during periods of exclusion, or any other matter concerning the provision of a free appropriate public education. [/76/](#) If the parent's complaint concerns the manifestation determination or placement, an expedited hearing must be held. [/77/](#) While the Individuals with Disabilities Education Act clearly entitles parents to an "expedited" hearing-albeit without specifying a time frame-the regulations eviscerate this right in stating that an "expedited" hearing must result in a written decision being mailed within 45 days of receipt of the hearing request. [/78/](#) This is the same time frame that applies to routine hearings. [/79/](#)

Parents who do not prevail in the hearing may appeal to the state educational agency if they live in a state with a two-tiered administrative due process hearing system, or they may file a lawsuit in state or federal district court. [/80/](#) An appeal or civil action may continue to be appropriate even after the interim alternative placement or other disciplinary period ends. For example, a child might have claims for compensatory education or damages arising from a school's failure to provide appropriate-or any-services during the disciplinary removal.

Ordinarily, when a parent files a complaint and requests a due process hearing, the child has the right to "stay put" or remain in the current educational placement until the dispute is resolved, unless the state or local educational agency and the parents agree otherwise. [/81/](#) The same is true when a parent **p63** requests a hearing to challenge a change in placement proposed or made for discipline reasons. [/82/](#)

The 1997 amendments to the Individuals with Disabilities Education Act, however, created a limited exception to this rule. When the hearing request challenges the manifestation determination or the interim alternative educational setting (whether that placement was made by school officials following an incident involving weapons or drugs, or ordered by another hearing officer to address dangerous behavior), the child remains in the interim

alternative educational setting until the decision is issued or until the interim alternative placement expires, whichever comes first, unless the parent and the state or the local educational agency agree otherwise. [/83/](#)

The section 504 regulations entitle a student to an impartial hearing with opportunity for participation by the student's parents and representation by counsel on any discipline matters implicating identification as an individual with a disability, evaluation, or placement. [/84/](#) The scope of this right includes challenges to the evaluation results, the manifestation determination, any resulting placement decision, or any other actions regarding the identification, evaluation, or educational placement of the student. As noted in section IV above, certain students involved in the possession or use of illegal drugs or alcohol may lose this hearing right. [/85/](#)

The section 504 regulations have no "stay put" provision. However, obtaining a temporary restraining order or preliminary injunction or both requiring a child's reinstatement in school should be possible by filing an action in court and meeting the usual criteria for preliminary relief.

VII. Students Not Previously Identified as Having a Disability

Students' rights to be protected against inappropriate discipline do not necessarily hinge on whether their school systems have defined them as children with disabilities. In order optimally to help students who have not yet been identified as such, advocates should become familiar with the various provisions regarding these students' rights in the Individuals with Disabilities Education Act, its regulations, and section 504.

Students who are or may be "children with disabilities" within the meaning of the Act may be fully protected against suspension and expulsion even if the school system has not yet identified them as such. A student may assert the protections under the Act if the school system "had knowledge" that the student was a child with a disability before the behavior in question occurred. [/86/](#) Under the statute itself the school system is deemed to have had such knowledge if :

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- the parent 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 school system personnel that the child needs special education and related services; or

- the child's behavior or performance demonstrates the need for such services; or
- the parent has requested an evaluation; or
- the child's teacher or other school system personnel has expressed concern about the child's behavior or performance "to the director of special education . . . or to other personnel of the agency." [/87/](#)

The regulations on this topic curtail these students' statutory rights; they impose additional restrictions on the circumstances under which a school system can be deemed to have had knowledge that a student has a disability. First, if the basis of holding the school system responsible is that the child's teacher or other staff expressed concern about the child's behavior or performance, the concern, if not expressed to the director of special education, must have been raised in accordance with the "child find" or special education referral systems. [/88/](#) Second, the regulations create two exceptions to the rule that schools are considered to have had knowledge that a child has a disability under any of the circumstances listed in the statute. Under the regulations the school system is not considered to have had knowledge that the child is a child with a disability if, after receiving any of the pieces of information in the above bulleted list, the system either conducted an evaluation meeting all requirements of the Individuals with Disabilities Education Act and found that the child was not eligible for services or determined that an evaluation was not necessary and, in either case, gave the parents written notice of its decision that met all notice requirements of the Act. [/89/](#)

If the school district did not "have knowledge," the child may be subjected to the same disciplinary measures to which nondisabled children are subjected. [/90/](#) However, if the parent or anyone else requests an evaluation, it must be expedited and a free appropriate public education-including all discipline protections-must be provided if the child is found to be a child with a disability under the Act. [/91/](#) Pending the results of the evaluation, the child remains in the "educational placement determined by school authorities." [/92/](#) The statute's use of the phrase "educational placement" should mean that educational services must be provided during this period even if the child has been suspended or expelled from school. In contrast, the regulations state that the "educational placement" determined by school authorities may include no education whatsoever, that is, suspension or expulsion without educational services. [/93/](#)

Any student who is or may be an "individual with a disability" within the meaning of section 504 is fully protected against improper suspension and expulsion regardless of whether the school **p65** district has yet identified the

student as such. [/94/](#) Generally, before a school may be found to have violated a student's rights under section 504, the school must be found to have had some reason to believe that the child may have a disability. [/95/](#) However, the Individuals with Disabilities Education Act's limits on the circumstances under which schools are deemed to have knowledge of a child's disability do not apply.

VIII. School-Filed Crime Reports and Delinquency Petitions

Faced with limits on their ability to exclude students directly, many schools turn to the juvenile courts or the police; the schools file delinquency petitions or crime reports based upon in-school behavior. Often this behavior is related to disability or to the consequences of the school system's past or present failure to provide appropriate education and related services or both. Two recent legal developments are particularly relevant to this issue. The first is a favorable 1997 decision by the U.S. Court of Appeals for the Sixth Circuit in *Morgan v. Chris L.* [/96/](#) The second is a new provision added to the Individuals with Disabilities Education Act later in 1997; the provision addresses school reporting of "crimes" committed by students with disabilities. [/97/](#)

A. Morgan v. Chris L.

Morgan v. Chris L. dealt with a school-filed delinquency petition against Chris L., a student who had attention-deficit/hyperactivity disorder and was accused of kicking a lavatory water pipe. Chris L. had a long history of academic and behavioral difficulties. Even after school staff recommended private counseling and private evaluation for possible attention-deficit/hyperactivity disorder, school personnel, rather than providing appropriate special education and related services, continued to treat Chris L.'s difficulties as a discipline problem. A special education evaluation requested by his parents was pending at the time of the alleged incident.

Following an administrative due process hearing under the Individuals with Disabilities Education Act, the hearing officer ruled that the school system violated the Act by failing to evaluate Chris L. timely and by attempting to use the juvenile court process to change his educational placement without following **p66** the Act's procedural safeguards. The hearing officer ordered the school system to seek dismissal of its juvenile petition. The school system appealed to federal district court, which upheld the hearing officer's decision and order. [/98/](#)

The school system then appealed to the Sixth Circuit, which upheld the hearing officer and district court decisions. The Sixth Circuit found that the school system breached its duty under the Act to identify, evaluate, and provide Chris L. with a free appropriate public education; unlawfully attempted to secure a program for Chris L. from the juvenile court instead of providing services itself; and, by filing the petition, improperly sought to change Chris L.'s educational placement without following the Act's change-in-placement procedures. The Sixth Circuit, like the district court and hearing officer, expressly held that the filing of the delinquency petition constituted a change in educational placement and entitled Chris L. to the Act's procedural protections, including the convening of an individualized education program team meeting before such a proposed placement change. [/99/](#)

B. 1997 Amendments

The 1997 amendments to the Individuals with Disabilities Education Act added to the statute for the first time language addressing the reporting of "crimes" allegedly committed by students with disabilities. This provision, entitled "Referral to and Action by Law Enforcement and Judicial Authorities," states, "Nothing in this part shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities." [/100/](#) The legislative history explains that schools may not report crimes to even "appropriate authorities" where doing so would circumvent the school's obligations to the child under the Act. [/101/](#)

The terms "reporting" and "appropriate authorities" are not defined in the statute and therefore must be given their ordinary meaning. Properly interpreted, the new language limits schools to notifying law enforcement agencies (e.g., police) of crimes and does not authorize notifying the judicial branch through the filing of delinquency petitions or other means. [/102/](#)

Because juvenile courts are not "appropriate authorities" to whom crimes may be reported, this provision of the Individuals with Disabilities Education Act has no bearing on the rulings and decisions in *Morgan v. Chris L.* This would be the case even if "appropriate authorities" might be construed to include juvenile courts. The statute states simply that "[n]othing in this part shall be construed to prohibit an agency from" doing certain things." [/103/](#) It says nothing about whether the Act may be construed to require schools to take certain steps, or abide by certain procedures, before doing so. *Morgan v. Chris L.* does not prohibit schools from ever filing petitions; it merely requires that change-in-placement procedures be followed first. [/104/](#) The legislative history of the 1997 amendments to the Act clarifies that reporting "crimes" to even

"appropriate" authorities is impossible where doing so would circumvent the school's obligation to the student under the Act. This is consistent with Morgan v. Chris L.'s further ruling that the delinquency petition in that case was improper in light of the school system's violations of the student's substantive rights under the Act to be evaluated and to receive a free appropriate public education. [/105/](#)

As amended in 1997, the Individuals with Disabilities Education Act provides that when a school reports a crime alleged to have been committed by a child with a disability the school must send copies of the child's special education and disciplinary records to the "appropriate authorities" to whom it reports the alleged crime.[/106/](#) However, *p67* schools may transmit these records only to the extent permitted by the Family Educational Rights and Privacy Act. [/107/](#) That Act ordinarily prohibits disclosure of education records without the prior written consent of the parent or of a student 18 years of age or older. [/108/](#) The exceptional circumstances under which the Family Educational Rights and Privacy Act allows protected education records to be disclosed without prior written consent are very narrow. They include disclosure to comply with a court order or lawfully issued subpoena-provided that parents and students are notified in advance-and disclosure "to appropriate parties" in connection with a health or safety emergency "if knowledge of the information is necessary to protect the health or safety of the student or other individuals." [/109/](#) The latter exception is to be strictly construed. [/110/](#) No broad exception for crime reports exists. [/111/](#)

The Family Educational Rights and Privacy Act was amended in 1994 to address the limited circumstances under which school systems may disclose information from education records to juvenile authorities. Education records or the personally identifiable information they contain may be released to state and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to a state statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and its ability effectively to serve the student in question. If the relevant state statute was adopted after November 19, 1974, then reporting or disclosure is permissible only if it concerns the juvenile justice system's ability effectively to serve the student prior to adjudication and if the officials or authorities to whom the information is released certify in writing to the school system that the information will not be disclosed to any other party without the prior written consent of the student's parent, except as provided under state law. [/112/](#)

XII. Conclusion

The Individuals with Disabilities Education Act, its regulations, and section 504 provide children with disabilities with protections against inappropriate school discipline, including disciplinary exclusion from education. In representing students with disabilities who are subject to inappropriate school discipline, advocates should recognize that, under these laws, schools are obligated to treat behavioral manifestations as education issues by responding to them with appropriate services and supports and that children who have disabilities and are suspended or expelled from school must be provided with a free appropriate public education. Although suspension and expulsion of these students will undoubtedly continue, advocates can use these laws to protect the educational rights of children with disabilities.

Footnotes:

/1/ 20 U.S.C. §§ 1400 et seq.; 29 U.S.C. § 794.

/2/ 20 U.S.C. §§ 1400 et seq.

/3/ 34 C.F.R. §§ 300.1 et seq. (1999).

/4/ See, e.g., 20 U.S.C. § 1414(d)(3)(B) (if child's behavior impedes the child's learning or that of others, the individualized education program must include strategies and supports, including positive behavioral interventions, to address that behavior). See also *id.* §§ 1415(k)(1)(B), (k)(3). For a full discussion of schools' obligation to treat behavioral issues as educational concerns, see my **INCLUSION OF STUDENTS WITH DISABILITIES WHO ARE LABELED "DISRUPTIVE": ISSUE PAPERS FOR LEGAL ADVOCATES (1997)** (available from the Center for Law and Education, 1875 Connecticut Ave., Suite 510, Washington, DC 20009; 202.986.3000).

/5/ 20 U.S.C. § 1412(a)(1).

/6/ Students with disabilities enjoy all of the legal rights and protections in school discipline that are afforded students without disabilities (a matter beyond the scope of this article), in addition to those established by the Individuals with Disabilities Education Act and section 504 of the Rehabilitation Act of 1973. E.g., under the due process clause of the U.S. Constitution, all students facing suspension or expulsion are entitled to notice and an opportunity for a hearing. *Goss v. Lopez*, 419 U.S. 565 (1975).

/7/ 20 U.S.C. § 1412(a)(1)(A). Exceptions exist for children aged 3-5 and 18-21 if requiring a free appropriate public education would be inconsistent with state law or practice and for those aged 18-21 who are incarcerated in adult correctional facilities and who, in the educational placement before their incarceration in an adult facility, were not identified as being children with a disability under the Individuals with Disabilities Education Act and did not have an individualized education program. Id. § 1412(a)(1)(B). See also 34 C.F.R. § 300.122 (1999).

/8/ The definition of a free appropriate public education is set out at 20 U.S.C. § 1401(8).

/9/ 34 C.F.R. §§ 300.121(d)(1), 300.520(a)(1)(ii) (1999).

/10/ Id. § 300.121(d)(1) (1999).

/11/ 20 U.S.C. §§ 1415(k)(1)(A)(i), (k)(4)(A); 34 C.F.R. § 300.523(a) (1999).

/12/ 34 C.F.R. §§ 300.520(a)(1)(i), 300.519(a), 300.523(a) (1999).

/13/ See id. § 300.519 (1999).

/14/ Id. §§ 300.519, 300.523(a) (1999). The regulations neither include criteria for determining whether a "pattern" exists nor give examples. However, the U.S. Department of Education Office for Civil Rights has long applied a similar rule in enforcing section 504. The circumstances under which the Office for Civil Rights has found patterns of exclusion should be a guide in interpreting this provision of the Individuals with Disabilities Education Act regulations. In section II below I discuss examples of cases in which the Office for Civil Rights has found such patterns.

/15/ 20 U.S.C. § 1415(k)(4)(A)(i); 34 C.F.R. § 300.523(a)(1) (1999).

/16/ 20 U.S.C. § 1415(k)(4)(A); 34 C.F.R. § 300.523(a) (1999).

/17/ 20 U.S.C. § 1415(k)(5)(A); 34 C.F.R. § 300.524(a) (1999). If, after a finding of no manifestation, a child is to be subjected to the disciplinary procedures applicable to all children, the child's special education and disciplinary records must be sent to the person who will make the final decision concerning disciplinary action. 20 U.S.C. § 1415(k)(5)(B); 34 C.F.R. § 300.524(b) (1999).

/18/ See 20 U.S.C. § 1415(k)(5)(A); 34 C.F.R. § 300.524(a) (1999).

/19/ See 20 U.S.C. § 1414(d), 1414(f), 1415(b)(3), 1415(b)(4), 1415(c), 1415(d); 34 C.F.R. § 300.343-300.346, 300.501, 300.503-.504 (1999).

/20/ Available dispute resolution mechanisms include mediation, administrative due process hearings, civil actions in court, and complaints to the state educational agency. See 20 U.S.C. § 1415(e)-(i); 34 C.F.R. §§ 300.660-.662 (1999).

/21/ 20 U.S.C. § 1415(k)(1)(B)(i). Neither the statute nor the regulations define "functional behavior assessment." Experts in the field describe it as an approach that uses multiple strategies and techniques to understand the causes of behavior, i.e., the "functions" a particular behavior serves for the child engaging in it, and design interventions intended to address the problem behavior. Rather than simply focusing on the behavior itself, functional behavior assessment looks for the motivation behind the behavior, including the biological, social, affective, and environmental factors that trigger, sustain, or end it. See CENTER FOR EFFECTIVE COLLABORATION AND PRACTICE, ADDRESSING STUDENT PROBLEM BEHAVIOR: AN IEP TEAM'S INTRODUCTION TO FUNCTIONAL BEHAVIORAL ASSESSMENT AND BEHAVIOR INTERVENTION PLANS (Jan. 1998) (available from American Institutes for Research, 1000 Thomas Jefferson St. NW, Suite 400, Washington, DC 20007; 202.944.5400; 888.457.1551; www.air-dcorg/cecp).

/22/ See 34 C.F.R. § 300.520(b) (1999).

/23/ 20 U.S.C. § 1415(k)(1)(B)(ii); 34 C.F.R. § 300.520(b)(ii) (1999).

/24/ 34 C.F.R. § 300.520(c) (1999).

/25/ Id.

/26/ Id. §§ 104.35, 104.36 (1999).

/27/ See, e.g., Memorandum from L.S. Daniels, Assistant Secretary for Civil Rights, to Office for Civil Rights Senior Staff (Oct. 28, 1988), reprinted in 307 EDUC. HANDICAPPED L. REP. 5 (1988) [hereinafter OCR Memo].

/28/ The Individuals with Disabilities Education Act does not necessarily require a reevaluation prior to a disciplinary change in placement. As virtually

all children covered by the Act are also protected by section 504, this section 504 right is an important supplement to rights under the Act. Parents and advocates should not hesitate to invoke the section 504 right.

/29/ OCR Memo, supra note 27.

/30/ *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982) (Clearinghouse No. 31,097); *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (decisions of the Fifth Circuit issues prior to October 1, 1981, are binding precedent in the Eleventh Circuit); *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981). See also OCR Memo, supra note 27.

/31/ OCR Memo, supra note 27.

/32/ See, e.g., Memorandum from L.S. Daniels, Assistant Secretary for Civil Rights, to J.L. High, Regional Civil Rights Director, Region IV (Feb. 24, 1989), reprinted in 307 EDUC. HANDICAPPED L. REP. 7 (1989).

/33/ See, e.g., *id.*; *Roane Co. (Tenn.) Sch. Dist.*, 27 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 853 (OCR 1997); *San Juan (Cal.) Unified School District*, 20 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 549 (OCR 1993).

/34/ See *Templeton (Cal.) Unified Sch. Dist.*, 17 EDUC. HANDICAPPED L. REP. 859 (OCR 1991); *San Juan (Cal.) Unified School District*, 20 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. at 549; *York (S.C.) Sch. Dist.*, 17 EDUC. HANDICAPPED L. REP. 475 (OCR 1990); *Roane County (Tenn.) Sch. Dist.*, 27 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. at 853; *Mobile County (Ala.) Sch. Dist.*, 19 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 519 (OCR 1992); *Niagara Falls City (N.Y.) Sch. Dist.*, 352 EDUC. HANDICAPPED L. REP. 472 (OCR 1987).

/35/ On section 504 see 29 U.S.C. § 794; 34 C.F.R. §§ 104.3(j), 104.4(b), 104.33, 104.35 (1999). On the Americans with Disabilities Act see 42 U.S.C. § 12132; 28 C.F.R. § 38.130(a), (b) (1999) (implementing the ADA). See also the following Office for Civil Rights complaint decisions: *Oakland (Cal.) Unified Sch. Dist.*, 20 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 1338 (OCR 1993) (taping closed student's mouth for excessive talking related to mental retardation); *School Admin. Unit No. 38 (N.H.)*, 19 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 186 (OCR 1992) (repeatedly sending child to principal's office for conduct related to attention deficit disorder and emotional disturbance); *Compliance Review of Riverview (Wash.) Sch.*

District, 311 EDUC. HANDICAPPED L. REP. 103 (OCR 1987) (student dropped from school rolls for disability-related tardiness); and Nash County (N.C.) Sch. Dist., 352 EDUC. HANDICAPPED L. REP. 37 (OCR 1985) (corporal punishment). See also *Thomas v. Davidson Academy*, 846 F. Supp. 611 (M.D. Tenn. 1994) (section 504 and the Americans with Disabilities Act require modifications of school-discipline policies to avoid discrimination).

/36/ See 20 U.S.C. § 1415(k)(1)(A)(ii), amended by the Educational Flexibility Partnership Act of 1999, Pub. L. No. 106-25, § 6, 113 Stat. 41, 49.

/37/ 18 U.S.C. § 930(g), incorporated by reference by 20 U.S.C. § 1415(k)(10)(D)

/38/ See 20 U.S.C. § 1415(k)(10)(A) (incorporating by reference portions of 21 U.S.C. § 812(c)).

/39/ *Id.* § 1415(k)(10)(B).

/40/ For a fuller discussion of required procedures and procedural safeguards under the Individuals with Disabilities Education Act, see my OVERVIEW: EDUCATION RIGHTS OF CHILDREN WITH DISABILITIES UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND SECTION 504 OF THE REHABILITATION ACT OF 1973 (1999) (available from the Center for Law and Education, 1875 Connecticut Ave., Suite 510, Washington, DC 20009; 202.986.3000).

/41/ *Honig v. Doe*, 484 U.S. 305 (1988) (Clearinghouse No. 42,583); 20 U.S.C. § 1415(j). The Individuals with Disabilities Education Act's "stay put" provision states that during the pendency of the Act's due process hearings, appeals, or civil actions, the child has the right to remain in the current educational placement unless the state or local education agency and the parents agree otherwise. *Id.* § 1415(j) (formerly 20 U.S.C. § 1415(e)(3)).

/42/ 20 U.S.C. § 1415(k)(1)(A)(ii), (k)(5)(A); 34 C.F.R. § 300.520(a)(2), 300.524(a) (1999).

/43/ See 20 U.S.C. § 1415(k)(6)(B)(ii), incorporating by reference § 1415(k)(2); 34 C.F.R. § 300.525(b)(2) (1999) (incorporating by reference § 300.521).

/44/ 20 U.S.C. § 1415(k)(1)(A)(ii); 34 C.F.R. § 300.9, 300.520(a)(2) (1999).

/45/ 20 U.S.C. § 1415(k)(7)(B); 34 C.F.R. § 300.526(b) (1999).

/46/ 20 U.S.C. § 1415(k)(7)(C); 34 C.F.R. § 300.526(b) (1999). In regard to due process hearings under the Individuals with Disabilities Education Act in general, see 20 U.S.C. § 1415(f)-(i); 34 C.F.R. § 300.507-.512 (1999).

/47/ 29 U.S.C. § 705(20)(C)(iv).

/48/ Id.

/49/ 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.521 (1999).

/50/ 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.521 (1999).

/51/ 20 U.S.C. § 1415(k)(2), (10)(C); 34 C.F.R. § 300.521 (1999).

/52/ See 20 U.S.C. § 1415(k)(7)(B).

/53/ Id. § 1415(k)(4)(B); 34 C.F.R. § 300.523(b) (1999).

/54/ 20 U.S.C. § 1415(k)(4)(C)(i); 34 C.F.R. § 300.523(c)(1) (1999).

/55/ 20 U.S.C. § 1415(k)(4)(C)(ii); 34 C.F.R. § 300.523(c)(2) (1999).

/56/ 34 C.F.R. § 300.523(d) (1999).

/57/ Id. § 300.532(f).

/58/ By statute the individualized education program team is composed of the child's parents; at least one of the child's regular education teachers; at least one of the child's special education teachers or providers; a representative of the school system who is knowledgeable about the general curriculum, is knowledgeable about the school system's resources, and is qualified to provide, or supervise the provision of, specially designed instruction to meet the needs of children with disabilities; an individual who is qualified to interpret the instructional implications of evaluation results; other individuals who have knowledge or special expertise regarding the child, at the discretion of the parent or school system; and, whenever appropriate, the student. See 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.343-.344 (1999).

/59/ William S. Hart (Cal.) Union Sch. Dist., 26 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 181 (OCR 1996); Memorandum from William Smith, Acting Assistant Secretary for Civil Rights, to Office for Civil Rights

Senior Staff (Nov. 13, 1989), reprinted in 16 EDUC. HANDICAPPED L. REP. 491, 493 (1989) [hereinafter OCR Memo II]. For cases recognizing that a school's failure to provide appropriate services may contribute to inappropriate behavior, see, e.g., *Chris D. v. Montgomery Bd. of Educ.*, 753 F. Supp. 922 (M.D. Ala. 1990) (school failed to offer appropriate educational program to emotionally disturbed student where, rather than employing strategies to teach him appropriate behavior with the goal of ultimately returning him to the regular education setting, the individualized education program merely described classroom rules and punishments and rewards for breaking them or following them; student had repeatedly been subject to disciplinary sanctions); *Stuart v. Nappi*, 443 F. Supp. 1235, 1241 (D. Conn. 1978) (Clearinghouse No. 23,220) (school's "handling of the plaintiff may have contributed to her disruptive behavior"); *Howard S. v. Friendswood Indep. Sch. Dist.*, 454 F. Supp. 634, 640 (S.D. Tex. 1978) (Clearinghouse No. 25,572) (finding that plaintiff, whom school officials sought to expel following a suicide attempt and hospitalization, "was not afforded a free, appropriate public education during the period from the time he enrolled in high school until December of 1976, [which] was . . . a contributing and proximate cause of his emotional difficulties and emotional disturbance"); *Frederick L. v. Thomas*, 408 F. Supp. 832, 835 (E.D. Penn. 1976) (Clearinghouse No. 16,905) (recognizing that an inappropriate educational placement can cause antisocial behavior); *Lamont X. v. Quisenberry*, 606 F. Supp. 809, 813 n.2 (S.D. Ohio 1984) ("we cannot help but be troubled by the decision to prosecute the minor plaintiffs for the August disturbances, particularly when prosecution was combined with removal from the classroom for several months. Plaintiffs' handicap by definition includes a likelihood for behavioral disturbances, and the fact that defendants chose criminal prosecution as an appropriate response to such behavior leads us to question whether the school may have simply decided that it was time to take harsh action in such instances as a policy matter, a result which we do not perceive as wholly in keeping with the spirit and purpose of the [statute now known as the Individuals with Disabilities Education Act]"). Cf. *Inquiry of Fields*, 211 EDUC. HANDICAPPED L. REP. 437 (Office of Special Educ. Programs, U.S. Dep't of Educ., 1987) (as an Individuals with Disabilities Education Act matter, the Office of Special Education Programs "would encourage States and localities to be alert to the possibility that repeated discipline problems may indicate that the services being provided to a particular child with a handicap should be reviewed or changed").

/60/ OCR Memo II, supra note 59.

/61/ See, e.g., *S-1 v. Turlington*, 635 F.2d at 346-47 ("a determination that a handicapped student knew the difference between right and wrong is not tantamount to a determination that his misconduct was or was not a manifestation of his handicap": e.g., "a child with low intellectual functioning who might respond to stress or respond to a threat in the only way [the child] feel[s] adequate, which may be verbal aggressive behavior," or an orthopedically disabled child might behave aggressively toward other children and provoke fights as a way of dealing with stress and feelings of physical vulnerability); *School Bd. of Prince William County v. Malone*, 762 F.2d 1210, 1216 (4th Cir. 1985) (student with specific learning disabilities acted as a go-between in drug deals for fellow students; district court had properly reasoned that "[a] direct result of Jerry's learning disability is a loss of self[-]image, an awareness of lack of peer approval occasioned by ridicule or teasing from his chronological age group.... These emotional disturbances make him particularly susceptible to peer pressure. Under these circumstances he leaps at a chance for peer approval"). See also OCR Memo II, *supra* note 59.

/62/ 20 U.S.C. § 1412(a)(1).

/63/ *Id.* § 1401(8).

/64/ See, e.g., *id.* §§ 1401(8)(B), (C), 1414(b)(2)(A), (c)(1)(iv), (d)(1)(A), (B), (d)(4); 34 C.F.R. § 300.26(b)(3), 300.344(a)(2), (4)(ii), 300.347; 300.532(b), 300.533(a)(2)(ii) (1999).

/65/ *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-7 (1982).

/66/ *Id.* § 1415(k)(3)(B); 34 C.F.R. § 300.522(b) (1999).

/67/ 34 C.F.R. § 300.121(d)(2) (1999).

/68/ 20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.522(a) (1999).

/69/ 34 C.F.R. § 300.121(d)(3)(ii) (1999).

/70/ See *id.* § 300.121(d)(3)(i).

/71/ 20 U.S.C. § 1415(k)(2)(D).

/72/ *Id.* § 1414(f).

/73/ 34 C.F.R. § 300.521(d) (1999).

/74/ Id. § 300.121(d)(3)(i).

/75/ See Rowley, 458 U.S. at 176.

/76/ 20 U.S.C. § 1415(b)(6), (f), (k)(6)(A)(i); 34 C.F.R. §§ 300.507(a)(1), 300.525(a)(1) (1999).

/77/ 20 U.S.C. § 1415(k)(6)(A)(ii); 34 C.F.R. § 300.525(a)(2) (1999).

/78/ 34 C.F.R. § 300.528(b)(1) (1999).

/79/ See id. § 300.511(a).

/80/ 20 U.S.C. § 1415(i)(1).

/81/ Id. § 1415(j).

/82/ Id.; Honig v. Doe, 484 U.S. 305 (1988). Honig held that a court of competent jurisdiction under certain limited circumstances might issue an injunction temporarily excluding a child from the child's current educational placement, over parental objection, for behavior substantially likely to result in injury to the child or to others. As discussed in section VIII.A supra, the 1997 amendments to the Individuals with Disabilities Education Act grant this authority to hearing officers.

/83/ 20 U.S.C. § 1415(k)(7)(A); 34 C.F.R. § 300.526(a) (1999).

/84/ 34 C.F.R. § 104.36 (1999).

/85/ 29 U.S.C. § 705(20)(C)(iv).

/86/ 20 U.S.C. § 1415(k)(8)(A); 34 C.F.R. § 300.527(a) (1999).

/87/ 20 U.S.C. § 1415(k)(8)(B); 34 C.F.R. § 300.527(b) (1999). Interestingly parents are expected to request an evaluation or express concerns about possible special education and related services needs even though-the child not yet involved in the Individuals with Disabilities Education Act system-the parents would not have any way of knowing about special education, related services, evaluation, the right to and meaning of a free appropriate public education, or other rights under the Act.

/88/ 34 C.F.R. § 300.527(b)(4) (1999). The Individuals with Disabilities Education Act requires states and school systems to operate a comprehensive system for identifying, locating, and evaluating all children in need of special education and related services. This system is known as "child find." See generally 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.125 (1999).

/89/ 34 C.F.R. § 300.527(c) (1999).

/90/ 20 U.S.C. § 1415(k)(8)(C)(i); 34 C.F.R. § 300.527(d)(1) (1999).

/91/ 20 U.S.C. § 1415(k)(8)(C)(ii); 34 C.F.R. § 300.527(d)(2)(i), (iii) (1999).

/92/ 20 U.S.C. § 1415(k)(8)(C)(ii).

/93/ 34 C.F.R. § 300.527(d)(2)(ii) (1999).

/94/ See, e.g., Templeton, 17 EDUC. HANDICAPPED L. REP. at 859; Prince George's County (Md.) Pub. Schs., 17 EDUC. HANDICAPPED L. REP. 875 (OCR 1991); Lumberton (Miss.) Pub. Sch. Dist., 18 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 33 (OCR 1991).

/95/ See, e.g., Mineral County (Nev.) Sch. Dist., 16 EDUC. HANDICAPPED L. REP. 668 (OCR 1990); Akron (Ohio) City Sch. Dist., 19 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 542 (OCR 1992); Napa Valley (Cal.) Unified Sch. Dist., 27 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 505 (OCR 1997).

/96/ Morgan v. Chris L., 106 F.3d 401 (6th Cir. 1997) (unpublished table decision), aff'g 927 F. Supp. 267 (E.D. Tenn. 1994), cert. denied, 520 U.S. 1271 (1999). The Sixth Circuit opinion appears at 25 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 227 (6th Cir. 1997).

/97/ 20 U.S.C. § 1415(k)(9).

/98/ See 927 F. Supp. at 272.

/99/ Chris L., 25 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 227, 230 (6th Cir. 1997).

/100/ 20 U.S.C. § 1415(k)(9)(A).

/101/ See 143 CONG. REC. S4403 (1997) (statement of Sen. Tom Harkin, cosponsor) ("The bill also authorizes . . . proper referrals to police and

appropriate authorities when disabled children commit crimes, so long as the referrals do not circumvent the school's responsibilities under [the Individuals with Disabilities Education Act].") [hereinafter Statement of Senator Harkin].

/102/ In regard to the judiciary, the 1997 amendments to the Individuals with Disabilities Education Act simply provide that nothing in the Act "shall be construed . . . to prevent . . . judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability." 20 U.S.C. § 1415(k)(9)(A).

/103/ 20 U.S.C. § 1415(k)(9)(A) (emphasis added).

/104/ Chris L., 25 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. at 230.

/105/ See Statement of Senator Harkin, *supra* note 101; Chris L., 25 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. at 230.

/106/ 20 U.S.C. § 1415(k)(9)(B); 34 C.F.R. § 300.529(b)(1) (1999).

/107/ 34 C.F.R. § 529(b)(2) (1999).

/108/ See 20 U.S.C. § 1232g(b), (d); 34 C.F.R. § 99.30 (1999).

/109/ 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. § 99.31(9) (1999).

/110/ 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. § 99.31(9) (1999).

/111/ For additional exceptions to Family Educational Rights and Privacy Act consent requirements, see 34 C.F.R. § 99.31 (1999).

/112/ See 20 U.S.C. § 1232g(b)(1)(E); 34 C.F.R. § 99.38 (1999).