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# Not a Bad IDEA: Discipline and Due Process Get a Fair Hearing

By Stephen Rosenbaum

In the Individuals with Disabilities Education Act of 1997 (IDEA), Congress has combined educational common sense with due process protection. The great public debate that pitted school administrators against students and families was over procedures for suspending and expelling kids labeled as "dangerous" or "disruptive." In zealous pursuit of policies proclaiming "zero tolerance" of weapons and drugs, many school leaders had lost sight of their mission as educators. In the end, the congressional reauthorization of IDEA strikes a balance between maintaining safe schools and safeguarding the education of students with learning disabilities, emotional disturbances, mental retardation, and other disabilities (20 U.S.C. § 1415(k)). In an exhaustive rulemaking process, the U.S. Department of Education spent almost two years reviewing public comments on discipline and other aspects of IDEA. A final rule was issued in March 1999 (64 Fed. Reg. 12,406).

Too many of these disabled youngsters are being shifted from classrooms to juvenile courtrooms, moving further and further from the "least restrictive environment" that is the cornerstone of special education pedagogy and law. The right of access to a free and appropriate public education is meaningless for children with behavior problems if that access is not accompanied by a program for managing their behavior. The IDEA amendments highlight the duty of school authorities to address problem behavior as both an educational matter and a strategy for preventing discipline. Research has shown, says the Office of Special Education Programs, the Education Department's disability programs office, that if teachers and aides have the knowledge and expertise to apply appropriate behavioral interventions, future behavior problems can be greatly reduced if not altogether avoided.

For the first time, the revised statute and regulations set out strict procedures for removing special education students from schools and ensuring that any discipline is for conduct unrelated to a student's disability. In this,

the legal scheme reflects earlier Supreme Court law on the due process rights of special education students (*Hanig v. Doe*, 484 U.S. 305 (1988)) and administrative interpretations by the federal education department on the need for continued schooling for expelled students.

The amendments define an array of disciplinary actions that constitute a "change in placement." It is this change in placement that sets into motion the student's right to notice, counsel, and a hearing. A placement change may range from an entirely new setting to an interim alternative to suspensions of ten days or less. When the placement change is for more than ten days, a meeting of the individual educational plan team is to be held. School officials must make a meaningful attempt to involve parents in the process of determining a new setting where a student can continue his or her education, after reviewing alternatives and data used to evaluate various alternatives.

Before selecting a new placement, however, the team must make a "manifest determination," of whether the youngster's misconduct is a manifestation of his or her disability? If the behavior is determined to be a manifestation of disability, the student can be neither suspended for more than ten days nor expelled, but may be assigned a new educational placement. Where disability plays no role in the misconduct, the student stands in the shoes of a nondisabled peer and is subject to the usual disciplinary consequences.

The team's determination is no easy matter, as it must sift through evaluation and diagnostic results, information furnished by the parents, and the young person's observations. The team must make a finding of disability manifestation if the student's disability impaired his or her ability to control behavior or understand the impact and consequences of that behavior. Significantly, the team must also find manifestation where behavior intervention strategies were not properly implemented or where the student's educational plan or placement was inappropriate vis-à-vis his or her behavior. A youngster not

previously identified as eligible for special education may also be afforded these procedural protections if the school had knowledge before the misconduct of possible eligibility for services under IDEA.

Where misconduct involves dangerous weapons or illegal drugs, administrators have more liberty to remove students if there is a risk to public safety and no effective means of minimizing that risk in the current educational setting. In instances of other dangerous behavior—whether disability-related or not—school authorities can petition an administrative hearing officer for a time-limited alternative placement. Again, the interim placement may be ordered only where there is a risk of injury to the child or others, and where the district has attempted to minimize that risk. As the Office of Special Education Programs has observed, these formal processes come into play only where schools and parents are unable to reach an agreement about how to respond to a student's behavior.

These procedures reflect not only the due process protections that have become a fixture of the schoolhouse in recent decades, but a strong incentive for educators to use behavioral intervention strategies and other "supplementary aids and services" before kicking kids outside the schoolhouse gate.

Strengthening and clarifying educational and legislative objectives is only the first step in implementing a refurbished IDEA. Keeping young people in school will require the vigilance of parents, teachers, lawyers, and other advocates.

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suggestions that policymakers, legislatures, and other institutions can act upon.

1. States should be held accountable for the dismal educational outcomes of children and youth with disabilities. Under the premise that behavior without consequences does not change, state and local education agencies should pay financial consequences for their behavior whenever the rights of students with disabilities and their parents are violated under the federal laws enacted to protect the students and to educate them.

2. A greater number of lay advocates, funded with public dollars, should be trained and made available to children and youth with disabilities

and their parents.

3. Law schools should provide their students with opportunities to become familiar with education disability laws and encourage the pursuit of expertise in this field.

4. The American Bar Association, through its Put Something Back Project, should provide students with disabilities and their parents with pro bono special education legal representation by providing their participating attorneys with opportunities to gain special education advocacy expertise.

5. IDEA should be amended to clarify if and when damages for violations of IDEA rights are available.

6. The president and Congress

should embrace and move forward the recommendations made by the NCD in *Back to School on Civil Rights: Advancing the Federal Commitment to Leave No Child Behind* in an effort to improve the educational outcomes of our children and youth with disabilities and to fulfill the spirit and intent of their twenty-five-year-old civil rights law.

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## Thanks to Two Friends of the Constitution

In the January 2, 2000, *New York Times Magazine*, Douglas Brinkley, a history professor at the University of New Orleans, wrote a brief tribute to three civil rights figures who died in 1999. He noted the well-deserved praise throughout last year for the generation of American soldiers who fought World War II, but observed that "members of the same generation who led the modern civil rights movement have yet to receive the same treatment, and portrayals of them still often give off a whiff of un-Americanism." Perhaps that inevitably will be the popular fate of those whose efforts are viewed primarily as trying to change the social order, rather than defend it. But it is important that the Section of Individual Rights and Responsibilities not neglect the deaths last year of two strongly independent judges, the memories of whom forever will be an incentive for the Section's work.

Former Supreme Court Justice Harry Blackmun died on March 4, 1999. When Justice Blackmun retired in April 1996, President Clinton said of him, "Justice has not only been his title, it has been his guiding light." And so it was, from the beginning to the end. Justice Blackmun's legacy will be anchored in *Roe v. Wade*, the decision he wrote in 1973, recognizing a woman's constitutional right to decide "whether or not to terminate her preg-

nancy." When the decision came under intense political and judicial attack, and its survival became unclear, Justice Blackmun told a group of law students that, even if it ultimately were rejected, "I'd still like to regard *Roe v. Wade* as a landmark in the progress of the emancipation of women."

At the end of his career on the Court, Justice Blackmun, who had voted to uphold the constitutionality of the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976), concluded that the Court's twenty-year effort since that decision to ensure the fairness of capital punishment within the constraints of the Constitution had failed. In his dissent in *Callins v. Texas*, 510 U.S. 1141 (1994), Justice Blackmun wrote, "[i]t seems that the decision whether a human being should live or die is so inherently subjective, rife with all of life's understandings, experiences, prejudices, and passions, that it inevitably defies the rationality and consistency required by the Constitution." Having reached that conclusion, he vowed that "from this day forward, I no longer shall tinker with the machinery of death."

Judge Frank M. Johnson, Jr., died on July 23, 1999. His career as a federal judge spanned more than four decades. During that period, he decided cases involving voting rights, employment discrimination, affirmative action, rights of the mentally ill, prison conditions,

and civil rights that literally changed the course of history in the South. His decisions led to the social ostracism of his family in Montgomery, Alabama, two cross-burnings on his lawn, the fire bombing of his mother's home, and death threats too numerous to count. But through it all, Judge Johnson remained true to his belief "that the American people revere the concept of justice, and their conscience tells them to obey the law once they understand what it is." Dr. Martin Luther King, Jr., called him a judge who had "given true meaning to the word 'justice.'"

In 1992, the Section awarded Judge Johnson the Thurgood Marshall Award in recognition of his extraordinary and courageous commitment to civil rights. In 1995, President Clinton awarded Judge Johnson the Presidential Medal of Honor, praising him for his "unwavering commitment to equality under the law [which] helped dismantle segregation and bring our nation closer to the ideals upon which it was founded."

The American Bar Association, the Section, and the American people owe Justice Blackmun and Judge Johnson our heartfelt gratitude for their integrity and for all they did to give substance to our ideals of equality and justice. They were true defenders of liberty and pursuers of justice.

—James E. Coleman, Jr.