IMPLICATIONS OF THE PARENTAL RIGHT TO UNILATERALLY REVOKE CONSENT OF SERVICES ON THE RIGHTS OF A CHILD WITH LEARNING DISABILITIES UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Sanu Dev

INTRODUCTION

The Supreme Court and Congress have recognized the importance of education in American society as early as the 1950s when the Court in *Brown v. Board of Education* declared education to be "perhaps the most important function of state and local governments."[1] While education has traditionally been under the control of local governments, the federal government has an invested interest in ensuring that children mature into functioning adults who contribute positively to society at large. In 1975, Congress enacted the Education for All Handicapped Children Act "to ensure that all children with disabilities have available to them a free appropriate public education [(FAPE)] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living" and "to ensure that the rights of children with disabilities and parents of such children are protected."[2] In 1990, Congress renamed this act as

[1] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[2] 20 U.S.C.A. §1400(d)(1)(A)-(B) (West, Westlaw through P.L. 111-349). The Supreme Court has noted that "appropriate" in FAPE does not mean that the student is entitled to the best possible services. Bd. of Educ. v. Rowley, 458 U.S. 176, 197 n.21 (1982); *see also* Loren F. *ex rel.* Fisher v. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 1312 n.1 (11th Cir. 2003); Barnett *ex rel.* Barnett v. Fairfax

the Individuals with Disabilities Education Act (IDEA), but the substance of the original act remained unchanged.[3] The Office of Special Education and Rehabilitative Services (OSERS), a component of the U.S. Department of Education, administers the IDEA, providing federal funds to school districts in order to provide educational and related services to students with disabilities.[4]

In addition to these services, children with disabilities are afforded special rights related to disciplinary action taken against them by a school district. A student who is suspended from school for more than ten days for misconduct is entitled to a manifestation determination hearing, in which the student's special education team determines whether the student's misconduct was caused by his disability.[5] If it is determined that a student's misconduct was due to his disability, the school may not suspend the student.[6] In contrast, if the child's

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Cnty. Sch. Bd., 927 F.2d 146, 154 (4th Cir. 1991) (holding that a local educational agency must balance the special needs of the child with a disability with the economic needs of the agency). In theory, individualized education programs should be determined by what services are appropriate for that specific child without reference to the needs of other children. However, because school districts have budgetary constraints, limited service providers, and limited staff members, they must make economic tradeoffs when determining FAPE. David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 197-98.

[3] *Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, U.S. DEP'T OF EDUC., http://www2.ed.gov/policy/speced/leg/idea/history.html (last modified July 19, 2007).

[4] *Protecting Students with Disabilities*, U.S. DEP'T OF EDUC., http://www.ed.gov/about/offices/list/ocr/504faq.html (last modified Mar. 27, 2009) [hereinafter *Protecting Students*].

[5] 20 U.S.C.A. § 1415(k)(1)(E)(i) (West, Westlaw through P.L. 111-349). Factors considered by the IEP team include: 1) evaluation and diagnostic results; 2) observations of the child; 3) the child's IEP and placement; and 4) parental input. *See id.* Moreover, the IEP team must determine with regard to the child's misconduct the following, whether: 1) the child's IEP was appropriate and his special education and related services were provided consistent with his IEP; 2) the disability impaired the child's ability to understand the consequences of his conduct; and 3) the disability impeded the child's ability to control his behavior. *See id.*

[6] 20 U.S.C.A. § 1415(k)(1)(F)(iii).

misbehavior was not a manifestation of his disability, the school may discipline the child in the same manner as a student who does not have a disability.[7]

Furthermore, students with disabilities are entitled to civil rights that are protected under Section 504 of the Rehabilitation Act of 1973 (Section 504), which prohibits any entity receiving Federal financial assistance from discriminating against any individual on the basis of disability.[8] The Office for Civil Rights (OCR), part of the U.S. Department of Education, enforces this right.[9] OCR does not review the appropriateness of a student's educational and related services, but it ensures that school districts follow "the procedural requirements of Section 504 relating to identification and location of students with disabilities, evaluation of such students, and due process."[10] Therefore, when a school district fails to hold a manifestation determination for a student with a disability who is subject to suspension for more than ten days, it violates Section 504.

In December 2008, OSERS announced new regulations for Part B of the IDEA, including the unilateral right of parents to revoke consent for the continued provision of special education and related services for their child.[11] Parents often choose to terminate services provided by the school district

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[7] 20 U.S.C.A. § 1415(k)(1)(C).

[8] 29 U.S.C.A. § 794(a) (West, Westlaw through P.L. 111-349). Pertinent language from the statute reads:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .

Id. An eligible individual is one who 1) has a physical or mental impairment which substantially limits one or more of such person's major life activities; 2) has a record of such impairment; or 3) is regarded as having such as impairment. 42 U.S.C.A. § 12102(1) (West, Westlaw through P.L. 112-9).

[9] *Protecting Students*, *supra* note 4.

[10] *Id.*

[11] 34 C.F.R. § 300.300(b)(4) (2008).

because they believe that alternative services outside of the school district more adequately provide for their child's needs or believe that such services are unnecessary. According to the regulations, once a parent revokes consent to services provided by the school district, the school no longer has a responsibility to provide special services for their child.[12]

Furthermore, once a parent revokes consent to special education services for their child, the school district classifies the child as a student without disabilities.[13] As a student without disabilities, the child no longer benefits from the protections provided by Section 504, which protects students from discrimination on the basis of disability. In particular, when this student who is now classified as a student without disabilities faces disciplinary infractions, the school district is no longer required to hold a manifestation determination hearing to evaluate whether the student's misconduct was caused by his disability, which would excuse a disabled student from suspension. Additionally, these formerly classified disabled students now may be disciplined in the same manner as students who are not disabled. However, for students who are actually disabled, subjecting them to the same disciplinary action as other "non-disabled" students will exclude them from education because school districts can suspend them indefinitely. Therefore, when a parent exercises his right to revoke consent, he is essentially removing the child's protections afforded under Section 504.

This Note argues that a parent's revocation of consent to educational and related services for a child is insufficient to remove a school district's knowledge of a child's disability because doing so will infringe on a child's right to a minimally adequate education. Simply renaming a student who once

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[12] *Id.*

[13] Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 73 Fed. Reg. 27,690 (proposed May 13, 2008) (to be codified at 34 C.F.R. pt. 300) (explaining that the new regulation 34 C.F.R. § 300.300(b)(4) would be combined with 34 C.F.R. § 300.300(b)(3), which provides that if a parent of a child fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services, the school district may not use the Procedural Safeguards and Due Process Procedures to provide educational and related services to the child).

received disability related services to a student who is not disabled promotes bad public policy because it works against the goal of ensuring that children remain in school. When a school district has provided special education services to the child, it essentially acknowledges that the child was a student with disabilities. Once a parent revokes consent to services, the school district should continue to recognize the student as a child with disabilities for disciplinary purposes. In a society that has come a long way in encouraging full community participation by the disabled, subjecting students with disabilities to harsh disciplinary consequences runs against public policy.

Part II provides background to the IDEA and Section 504, the two most important policies in special education. Part III examines when a school district has knowledge of a child's disability for IDEA and Section 504 purposes. Part IV addresses disciplinary concerns regarding students with disabilities and the consequences of the unilateral parental right to revoke consent to services on these children. Part V examines the interplay among children's rights, parental rights, and state's interests. Part VI concludes with recommendations to modify the IDEA and to improve the quality of education provided to students with learning disabilities.

II. THE SPECIAL EDUCATION FRAMEWORK

A. INDIVIDUALS WITH DISABILITIES EDUCATION ACT (THE IDEA)

The purpose of the IDEA is to promote the inclusion of children with disabilities in public schools.[14] Approximately half of the United States' disabled children were not receiving adequate learning services prior to the IDEA.[15] In fact, one in eight of these children did not even have access to a public school education, and many schools administered special classes that, in effect, forced these disabled students to drop out

[14] 20 U.S.C.A. §1400(d)(1) (West, Westlaw through P.L. 111-349).

[15] Honig v. Doe, 484 U.S. 305, 309 (1988).

altogether.[16] Historically, these children were excluded because public schools were not adequately equipped with the tools and funding to properly teach students with disabilities.[17] Essentially, it was more burdensome for public schools to teach students with disabilities. Many states had enacted laws that barred mentally challenged children from public schools.[18] Furthermore, school districts had excluded students with disabilities by discriminating against them with regard to disciplinary procedures. For instance, school districts would impose longer suspensions on students with disabilities than students without disabilities for similar disciplinary infractions.[19] Moreover, these disabled children were excluded from school without consultation or notice to their parents.[20]

Congress has defined a child with a disability as one "with mental retardation, hearing impairments (including deafness),

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[16] *Id.*

[17] *Id.* One congressional study revealed that more than half of the Nation's eight million disabled children were not receiving appropriate educational services. H.R. REP. NO. 94-332, at 2 (1975). Approximately, one out of every eight of these children was excluded from the public school system altogether. *See id.* "[M]any others were simply 'warehoused' in special classes or were neglectfully shepherded through the system until they were old enough to drop out." *Honig*, 484 U.S. at 309 (citing H.R. REP. NO. 94-332, at 2 (1975).

[18] Martin A. Kotler, *The Individuals With Disabilities Education Act: A Parent's Perspective and Proposal for Change*, 27 U. MICH. J.L. REFORM 331, 343 (1994). Schools had utilized poorly designed testing procedures to determine whether a child was disabled. *Id.* at 344. Abuse in the use of testing often resulted in misidentifying children as disabled, in which case statutes prohibited them from enrolling in public schools. *Id.* However, in *Pennsylvania Association for Retarded Children v. Pennsylvania*, the Court held that a state could not deny a public education to retarded children. Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 302 (E.D. Pa. 1972).

[19] *See* Mills v. Bd. of Educ. of Dist. of Columbia, 348 F. Supp. 866, 869-70 (D.D.C. 1972) (noting that plaintiffs in a suit against the District of Columbia public schools were excluded from school for vague disciplinary reasons).

[20] *See Honig*, 484 U.S. at 324 (citing *Mills*, 348 F. Supp. at 869-70) (noting that Congress was inspired to enact the Education of the Handicapped Act after the *Mills* Court found that handicapped students were excluded without being offered alternative education or parental notice).

speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities."[21] Through the "child find" process, students with disabilities are identified, located, and then evaluated for IDEA services.[22] In 1997, Congress amended the IDEA to include additional handicapping conditions that would qualify students as learning disabled.[23] As more students were classified as disabled, the number of students eligible for special education and related services increased. Students with physical disabilities are not entitled to rights under the IDEA.[24] Generally, a student is classified as learning disabled when his intellectual ability does not match his academic achievement.[25] Once a school district identifies a student as learning disabled, the student is entitled to special education and related services under the IDEA.

The IDEA encourages parents and members of the school district to work cooperatively to provide for the special needs of students with disabilities by including parents in the decision-making process. For instance, once a school district determines that a student qualifies as a student with a disability, special education services are designed and implemented through an

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[21] 20 U.S.C.A. § 1401(3)(A)(i) (West, Westlaw through P.L. 112-9).

[22] 20 U.S.C.A. § 1412(a)(3)(A) (West, Westlaw through P.L. 111-349) (providing that the state must identify and evaluate children to determine whether they have a disability, and if so, the state must provide special education and related services); *see also* 20 U.S.C.A. § 1412(a)(2) (providing that states must give "full educational opportunities" for all children with disabilities).

[23] *See* Individuals with Disabilities Act Amendments of 1997, Pub. L. No. 105-17, § 602, 111 Stat. 37, 43-46 (1997) (codified as amended at 20 U.S.C. § 1401).

[24] Mark F. Kowal, *A Call to the Courts to Narrow the Scope of the Definition of Learning Disability Within the Americans with Disabilities in Education Act*, 6 RUTGERS J.L. & PUB. POL'Y 819, 827 (2009).

[25] *Id.* School districts can more thoroughly evaluate whether a child actually possesses disability under 20 U.S.C.A. § 1401(3)(A)(ii) rather than 20 U.S.C.A. § 1401(3)(A)(i). *Id.* at 853.

Individualized Education Program (IEP).[26] The IDEA defines an IEP as a "written statement for each child with a disability," and it describes the student's current achievement level, specifies the student's goals, and the most appropriate educational environment for the student.[27] Members of an IEP team, consisting of the child's parents, child's regular teacher, child's special education teacher, and school administrators, work together to design an appropriate education plan for the child.[28]

The IEP team must consider placing a student with disabilities in the same setting as non-disabled students, if possible.[29] Placing students with disabilities in mainstream classes is in line with current educational reasoning that these students will gain mental and social benefits by interacting with their peers.[30] The IEP provides information on the specific special education services that the child will now receive.[31]

When conflicts arise between the parents and the school district regarding educational placements, parents may file an internal complaint with the school district to review the problem.[32] The school district and parents may attend mediation, and if successful, the parties will develop and sign a resolution.[33] If the parents are still unsatisfied, they can file for

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[26] 20 U.S.C.A. § 1414 (West, Westlaw through P.L. 111-349); 34 C.F.R. § 300.320 (2011).

[27] 20 U.S.C.A. § 1414(d)(1)(A)(i); *see also* Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education,* 117 YALE L.J. 1802, 1817 (2008).

[28] *See* 20 U.S.C.A. § 1414(d)(1); 34 C.F.R. § 300.321 (2011).

[29] *See* 20 U.S.C.A. § 1412(a)(5)(A) (West, Westlaw through P.L. 111-349).

[30] Justin J. Farrell, Note, *Protecting the Legal Interests of Children When Shocking, Restraining, and Secluding are the Means to an Educational End*, 83 ST. JOHN'S L. REV. 395, 406 (2009) (discussing the underlying legal principles of the administrative process under the IDEA).

[31] 20 U.S.C.A. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320 (2011).

[32] 20 U.S.C.A. § 1415(c)(2)(B)(i)(I) (West, Westlaw through P.L. 111-349).

[33] 20 U.S.C.A. § 1415(e)(2).

a due process hearing, in which an impartial hearing officer will determine the best course of action.[34] Mediations are not required, and parents may skip directly to a due process hearing, if desired.[35] During this entire process, parents are given procedural safeguards, such as the right to be represented by counsel,[36] the right to access the student's evaluations,[37] and the right to call and cross-examine witnesses.[38] If either party is dissatisfied with the result of a due process hearing, they may appeal to the state education agency and further appeal by filing a lawsuit in federal district court.[39]

B. SECTION 504 OF THE REHABILITATION ACT OF 1973 (SECTION 504)

The push for anti-discrimination legislation for persons with physical and mental disabilities emerged as other historically-discriminated-against groups, such as African Americans, demanded equal involvement in mainstream social institutions.[40] In fact, disability advocates modeled their language after the black civil rights movement, arguing for greater access to the labor market and government-supported services.[41] In particular, they fought to reduce the barriers to certain benefits: those that are now considered rights, such as health care, education, labor, and public assistance.[42]

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[34] 20 U.S.C.A. § 1415(f)(1)(A); 34 C.F.R. § 300.511 (2011).

[35] 20 U.S.C.A. § 1415(e)(2)(A)(i), (f)(1)(A).

[36] 20 U.S.C.A. § 1415(h)(1).

[37] 20 U.S.C.A. § 1415(f)(2)(A).

[38] 20 U.S.C.A. § 1415(h)(2).

[39] 20 U.S.C.A. § 1415(i)(2).

[40] RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 41 (1984).

[41] *Id.*

[42] *Id.* at 42.

Serious discussion in formulating anti-discrimination legislation for persons with disabilities began in the early 1970s, and early proposals of the bill used language addressing the importance of including children with disabilities in the school system.[43] As Senator Hubert Humphrey stated when he introduced a bill to protect the civil rights of the handicapped:

> [Disabled] people have the right to live, to work to the best of their ability – to know the dignity to which every human being is entitled. But too often we keep children, who we regard as "different" or a "disturbing influence," out of our schools and community activities altogether, rather than help them develop their abilities in special classes and programs. Millions of young persons and adults who want to learn a trade, work like other people, and establish their self-worth through a paycheck are barred from our vocational training programs and from countless jobs they could perform well.[44]

Congress enacted anti-discrimination legislation under Section 504 of Rehabilitation Act of 1973 (Section 504), which prohibits any entity receiving Federal financial assistance from discriminating against any individual on the basis of disability.[45]

III. KNOWLEDGE OF A STUDENT'S DISABILITY UNDER THE IDEA AND SECTION 504

Part III discusses instances in which a school district has been deemed to have knowledge of a student's disability, even when the school district had not formerly classified the student as such for purposes of the IDEA. In these situations, the school district is obligated to provide the students Section 504 anti-discriminatory protections. Similarly, school districts should be

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[43] *Id.* at 43.

[44] *Id.* (quoting 118 CONG. REC. 525 (1972) (statement of Sen. Hubert Humphrey)).

[45] Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified as amended 29 U.S.C. § 794(a)).

deemed to have knowledge of the disability of students who were previously identified as students with disabilities, at the time when their parents revoke consent to services.

A child's IEP team exerts tremendous effort to develop a program most conducive for learning. Moreover, a school district uses many valuable resources to provide for a disabled student's needs. For instance, a student with disabilities requires a regular education teacher and a special education teacher who has directly worked with the child.[46] Additionally, the school district must include a district member who has knowledge about the special education resources available for the student as a part of the child's IEP team.[47] Finally, the school district must evaluate a student's IEP yearly to ensure that his special education needs are being met.[48]

The IEP development process demonstrates a school district's knowledge of a student's disability. Not only are teachers aware of the student's unique learning situation, but school administrators also have knowledge of the disability. Moreover, when the school district reevaluates the student's IEP annually, they acknowledge that the student may require supplemental services not afforded to students who are not classified as disabled.

A student who has not yet been determined eligible for disability services may be afforded the same protections as a student with disabilities for misconduct related to his disability if the school district had knowledge of the student's disability.[49] A school district is deemed to have knowledge of a student's disability in the following circumstances: 1) the parents communicated in writing to a supervisory or administrative staff member, or a teacher of the school regarding the need to provide special education services to their child; 2) the parent requested for an initial evaluation to determine whether the child qualifies for disability services; or 3) a teacher or other

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[46] Phillips, *supra* note 27, at 1817.

[47] *Id.*

[48] *Id.*

[49] 34 C.F.R. § 300.534(a) (2011). For this regulation to apply, the child must have the disability before the occurrence of his misconduct. *Id.*

school district personnel expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the school district or to other district supervisory personnel.[50] On the other hand, a school district is deemed to have no knowledge that a student has a disability if 1) the parents have not allowed the student to be evaluated for eligibility for special education services; 2) the parents have refused special education services; 3) the school district already evaluated the student and determined that he was not eligible for special education services.[51] If the school district lacks knowledge of the child's disability, it may discipline him as a student without disabilities.[52]

The Code of Federal Regulations provides guidance for defining physical or mental impairments. For instance, the Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance Regulation defines a handicapped person as one who "(i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[53] Accordingly, a student who was once receiving disability services under IDEA would have documentation recording the student's physical or mental impairment. Therefore, previous documentation of a student's entitlement to disability services is sufficient to show that a school district had knowledge of the student's disability for Section 504 issues.

Physical or mental impairment means any mental or psychological disorder, such as mental retardation, emotional or mental illness, and specific learning disabilities.[54] A record of an impairment means that the person has a history of, or has been misclassified as having, a mental or physical impairment

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[50] 34 C.F.R. § 300.534(b)(1)-(3).

[51] 34 C.F.R. § 300.534(c).

[52] 34 C.F.R. § 300.534(d)(1).

[53] 45 C.F.R. § 84.3(j)(1) (2011).

[54] 45 C.F.R. § 84.3(j)(2)(i)(B).

that substantially limits one or more major life activities.[55] Examining a student's IEP records would reveal the nature of a student's specific learning disabilities. Furthermore, a person is regarded as having an impairment when: (A) he has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; or (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment.[56] Therefore, when a school district identifies a child as a student with a learning disability and provides services, it acknowledges the student's impairment.

A child who has not yet been classified as a student with disabilities is entitled to the IDEA's disciplinary protections if she can show that the school district had sufficient knowledge that the child had a qualifying impairment.[57] In *S.W. v. Holbrook Public Schools*,[58] a ninth-grade student alleged that her school district violated her due process rights under the IDEA when it failed to conduct a manifestation determination hearing when she was expelled for selling drugs to another student while her determination for whether she had a disability was pending.[59] When she first enrolled at the school, the school noted from her health record that she was taking medication at home to treat her attention deficit disorder.[60] The next year in school, she failed all of her classes.[61] While staff members held a meeting to discuss her educational problems, they did not refer her for a disability evaluation.[62] The court found that this

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[55] 45 C.F.R. § 84.3(j)(2)(iii).

[56] 45 C.F.R. § 84.3(j)(2)(iv).

[57] *See* 34 C.F.R. § 300.534(a) (2011).

[58] S.W. v. Holbrook Pub. Sch., 221 F. Supp. 2d 222 (D. Mass. 2002).

[59] *Id.* at 223.

[60] *Id.*

[61] *Id.*

[62] *Id.*

information was sufficient to put the school on notice that the student had a disability, therefore entitling her to the protections of the IDEA and Section 504.[63]

A school district may be deemed to have knowledge of a students' disability if parents request a disability evaluation and raise concerns about his poor academic performance. In *J.C. v. Regional School District No. 10*,[64] a parent requested that her seventh-grade son be evaluated for special disability related services, but the school district did not evaluate the student until he was in the ninth grade and determined that the student did not qualify for special education.[65] When he was in the tenth grade, the student was suspended and faced expulsion for vandalizing a seat on his school bus with a sharp instrument.[66] Approximately a month after the incident, the parents requested another evaluation, and this time the school district determined that the student had a slight disability.[67]

The *J.C.* court provided little reasoning in determining that the school district had knowledge of the student's disability. In this case, it seems as though dissatisfied parents neglected to request a reevaluation of their child and instead, resorted to requesting an evaluation after the child misbehaved. Holding a school district accountable for having knowledge of a student's disability for each time they evaluate and reject a student for disabilities services would amount to an unreasonable burden. However, in this case, it appears that the school district negligently misidentified the student as one without disabilities, and therefore, it *should* have known about the student's disability rather than actual knowledge. The "should have known" nuance to this case distinguishes it from other instances of when a school district rejects a student for disability services after an evaluation.

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[63] *Id.* at 227.

[64] J.C. v. Reg'l Sch. Dist. No. 10, 115 F. Supp. 2d 297 (D. Conn. 2000).

[65] *Id.* at 298.

[66] *Id.*

[67] *Id.* at 299.

Furthermore, a medical diagnosis of a child's disability is not sufficient to demonstrate that a school district had knowledge of a student's disability that has not yet been classified. Parents in *Francis Howell R-III School District* claimed that their child's school district had knowledge of the child's disability because he was under a doctor's care for ADHD.[68] However, the parents never requested that the school district evaluate their child for disability related services.[69] Therefore, the court found that this level of information does not rise to the level of a school district's actual knowledge of a student's disability.[70]

Students who once received educational and related services by a school district are different than students who are not yet classified as students with disabilities. Students who once received services were, in fact, classified by the school district as a child eligible for educational and related services. The school district was obligated to develop an IEP with the child's teachers, administrators and parents to most appropriately suit the child's needs. The fact that the child received services means that parents consented to the schools district's classification of the child as a student with disabilities. When parents terminate the school district's services, the child's disability does not disappear, and the school district has extensive documentation supporting a showing of the child's disability. Therefore, when a parent decides to forgo disability services provided by the school district, a school district should not simply disregard an existing disability and should provide the student with disciplinary protections consistent with Section 504.

IV. THE CONSEQUENCES OF THE UNILATERAL PARENTAL RIGHT TO REVOKE CONSENT TO

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[68] Francis Howell R-III Sch. Dist., 37 IDELR 89 (SEA Mo. 2001).

[69] *Id.*

[70] *Id.*; *see also* Ann Majestic et al., *Disciplining the Violent Student with Disabilities*, *in* SCHOOL VIOLENCE: FROM DISCIPLINE TO DUE PROCESS 155, 167 (James C. Hanks ed., 2004).

SERVICES ON DISCIPLINING STUDENTS WITH DISABILITIES

The IDEA originally enacted in 1975 did not include specific provisions regarding disciplining students with disabilities.[71] The Supreme Court first addressed disciplinary issues under the IDEA in *Honig v. Doe* in 1988.[72] In *Honig*, two students challenged a school district's decision to suspend them indefinitely for disability-related misconduct without a due process hearing.[73] The Court recognized that Congress intended for parental involvement in developing their child's IEP and any changes in his placement thereafter.[74] *Honig* reasoned that suspending a student for more than ten days constitutes a change in placement and would deprive the student of his due process rights.[75] When a school district suspends a student for more than ten days, it unilaterally changes the student's IEP, which is an action prohibited by the IDEA. This "ten-day rule" allows school districts to address an immediate threat to the safety of others at the school and provides for a "cooling down" period in which the student's IEP can be reevaluated.[76]

When a school district removes a student from school for disciplinary reasons, this conduct may constitute a change in placement prohibited by the IDEA.[77] Generally, a suspension of more than ten consecutive days constitutes a change in

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[71] Allan G. Osborne, Jr. & Charles J. Russo, *Update on the Disciplinary Provisions of the 1997 and 2004 IDEA Amendments*, 244 Ed. Law Rep. 915, 915 (2009).

[72] Honig v. Doe, 484 U.S. 305, 308-09 (1988).

[73] *Id.* at 314-16.

[74] *Id.* at 311-12 (citing 20 U.S.C. §§ 1400(c), 1401, 1412(a), and 1415(b)).

[75] *Id.* at 326 n.8 (citing Mills v. Bd. of Educ. of Dist. of Columbia, 348 F. Supp. 866, 880 (D.D.C. 1972); *see also* Goss v. Lopez, 419 U.S. 565, 574-76 (1975)).

[76] *Honig*, 484 U.S. at 325-26.

[77] Majestic et al., *supra* note 70, at 158.

placement.[78] However, a pattern of exclusion from school amounting to over ten days during a single school year is sufficient to constitute a change in placement, as well.[79] Moreover, the court considers whether the suspensions or exclusions significantly interfere with the student's education or whether the school district significantly altered the delivery of educational services to the student.[80] Therefore, moving a student from one school to another may not be considered as a change in placement if the student is receiving the same disability services and his education is not significantly altered. The school district determines on a case-by-case basis whether a pattern of removals constitutes a change in placement.[81] If parents disagree with the district's determination, they may seek review through due process hearings.[82]

If the school district seeks to impose a suspension of ten days or more, expulsion, or a transfer to an interim alternative setting for up to forty-five days against the student, the school district must conduct functional behavior assessments (FBAs) and implement behavioral intervention plans (BIPs).[83] The IDEA requires FBAs and BIPs even if the school district determines that the student's misconduct was not a manifestation of his disability.[84]

"Special circumstances" allow a district to remove a student with disabilities from school for misconduct, regardless

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[78] 34 C.F.R. § 300.536(a)(1) (2011).

[79] 34 C.F.R. § 300.536(a)(2)(i). *See also* 34 C.F.R. §§ 300.536(a)(2)(ii)-(iii) (providing that a series of removals may constitute a pattern amounting to a change in placement because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals or because of other factors, such as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another).

[80] *See* Majestic et al., *supra* note 70, at 158-59.

[81] 34 C.F.R. § 300.536(b)(1).

[82] 34 C.F.R. § 300.536(b)(2).

[83] *See* 20 U.S.C.A. § 1415(k)(1) (West, Westlaw through P.L. 111-349).

[84] Osborne & Russo, *supra* note 71, at 916.

of whether the misconduct was related to his disabilities. These special circumstances include situations when the student:

> 1) carries a weapon to school, possesses a weapon at school or on school premises, or carries a weapon to or possesses a weapon at a school function under the jurisdiction of a state or local education agency;
>
> 2) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function under the jurisdiction of a state or local education agency; or
>
> 3) has inflicted serious bodily injury on another person while at school, on school premises, or at a school function under the jurisdiction of a state or local education agency.[85]

While a school district can remove a student with disabilities under special circumstances, it can only place a student with disabilities in an alternative educational placement up to forty-five days.[86]

A student with disabilities has a right to remain in his current educational setting while disputes regarding his placement are pending.[87] The purpose of the stay-put provision is to guarantee that students with disabilities still have educational learning opportunities while awaiting the outcome of potentially long conflicts regarding his disabilities, including those disputes related to disciplinary action taken again the student.[88] The stay-put provision enforces the spirit of the

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[85] Randy Chapman, *The Discipline Process for Students With Disabilities Under the IDEA*, COLO. LAW., July 2007, at 63, 64 (citing U.S.C. § 1415(k)(1)(G)(i)-(iii)).

[86] *Id.* at 64 (citations omitted).

[87] 20 U.S.C.A. § 1415(j).

[88] *See* Logsdon v. Bd. of Educ. of Pavilion Cent. Sch. Dist., 765 F. Supp. 66, 68 (W.D.N.Y. 1991).

IDEA of promoting inclusion of students with disabilities in public schools. Furthermore, the stay-put provision prevents school districts from systematically discriminating against students with disabilities by imposing unwarranted suspensions on the student to the degree that his absence from school severely inhibits his academic achievement.

Regardless of the type of misconduct or degree of punishment, a school district must provide notice to a student's parents when it takes disciplinary action against a student with a disability.[89] A school district must notify the parents on the date in which the disciplinary decision is made.[90] Furthermore, school districts must inform parents of the procedural rights afforded to parents and students.[91] *Honig* explicitly endorsed Congress's intent: "Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school." [92] Congress denied school officials their former right to "self-help" and indicated that disabled students could be removed from school only with the permission of the parents or through a judicial process. [93] However, when a child is no longer classified as a student with disabilities, he is subjected to the same disciplinary procedures as non-disabled students. School administrators can indefinitely suspend these students without consideration of their actual disabilities. Frequent or lengthy suspensions would deprive these students of formal education, specifically a free appropriate public education. Simply revoking students from IEP services provided by the school district should not deprive the student of his right to remain in public school.

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[89] 20 U.S.C.A. § 1415(k)(1)(H).

[90] *Id.*

[91] *Id.*; 34 C.F.R. § 300.530(h) (2011).

[92] Honig v. Doe, 484 U.S. 305, 323 (1988).

[93] *Id.* at 323-24.

V. CHILDREN'S RIGHTS, PARENTAL RIGHTS, AND STATES' INTERESTS

Part V examines children's rights under the IDEA and focuses on children's rights to receive an education. While parents have a fundamental right to childrearing, the child's right to remain in school may trump the parental right to unilaterally revoke consent to special education services. Moreover, the parental right to unilaterally revoke consent may also conflict with states' interest in educating children.

A. CHILDREN'S RIGHTS UNDER THE IDEA

While the IDEA favors parental involvement and strengthening parental rights, the 1993 version of the IDEA regulations suggests that parental rights may be limited to situations where the exercise of a parental right inhibits a child's right to FAPE.[94] For instance, provisions of the 1993 regulations read as follows:

> If there is no State law requiring consent before a child with a disability is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in ss 300.506- 300.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent. If it does so and the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent . . .[95]

The 1993 IDEA regulations further provided:

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[94] Julie F. Mead & Mark A. Paige, *Parents as Advocates: Examining the History and Evolution of Parents' Rights to Advocate for Children with Disabilities Under the IDEA*, 34 J. LEGIS. 123, 134 (2008).

[95] 34 C.F.R. § 300.504(b)(3) (1993).

> [A] State may require parental consent for other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.[96]

The hallmark of the IDEA is to provide children between the ages of three and twenty-one with disabilities a FAPE in the least restrictive environment (LRE). Congress did not provide a definition of FAPE or LRE, and instead, it permitted local educational professionals to determine FAPE and LRE.[97] The Supreme Court first addressed the definition of FAPE in *Board of Education of Hendrick Hudson Central School District v. Rowley*,[98] in which it held that a school district meets FAPE when it "provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction."[99] Moreover, the Court stressed the procedural requirements that would include parents in the development of the child's IEP.[100]

Ensuring that students with disabilities are receiving an "appropriate" education in a LRE has remained problematic.[101]

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[96] 34 C.F.R. § 300.504(c) (1993).

[97] Kowal, *supra* note 24, at 829-30.

[98] Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

[99] *Id.* at 177 (Syllabus). The Court further explained:

> Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate grade levels used in the State's regular education, and must comport with the child's IEP, as formulated in accordance with the Act's requirements. If the child is being educated in regular classrooms, as here, the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Id.

[100] *See id.* at 207.

[101] Engel, *supra* note 2, at 176.

Congress provided little guidance on how to achieve these substantive goals, yet it delineated clear rules regarding procedure.[102] Congress may have given more control to local governments and school districts in determining substantive rights for students with disabilities rather than being controlled by the federal government.[103] Additionally, because every child's disability is unique, universal guidelines by statute would be ineffective.[104]

Most school districts have interpreted the IDEA to define LRE as the regular classroom setting, and the court interpreted the IDEA similarly in *Pennsylvania Association for Retarded Children v. Pennsylvania*.[105] As the student's educational placement is further removed from the mainstream classroom, he is in a more restrictive environment.[106] When parents believe that the school is not providing FAPE or LRE, they may litigate in court to determine what is an appropriate FAPE or LRE for the child.[107]

When a school discontinues special education services to a previously classified disabled student, this student may still misbehave. However, the student is now classified as non-disabled and can no longer invoke the protections provided by Section 504. For serious infractions, the school may choose to suspend the student, as provided by the school district's disciplinary policies, and repeat offenders may find themselves out of school for large periods of the school year. Extended absence from school will negatively affect the academic achievement of the student, and as the length of his absence increases, the further he will fall behind his peers. Suspensions may also negatively affect the student in the following ways:

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[102] *Id.*

[103] *See id.*

[104] *Id.* at 176-77.

[105] Pa. Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1260 (E.D. Pa. 1971).

[106] Kowal, *supra* note 24, at 831.

[107] *See id.* at 829-30.

> 1. It can teach the student that power is absolute and arbitrary.
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> 2. The student may feel helpless if due process has not happened.
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> 3. It has little positive educational value.
>
> 4. It gives students official approval to be out of school.
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> 5. The student often receives no educational program.
>
> 6. The student many have no supervision at home and may be "on the streets."[108]

Multiple or long-term suspensions exclude students with disabilities from an education, which is contradictory to goals of the IDEA.

Additionally, the parental right to unilaterally revoke consent to special education services may discourage school districts from including formerly classified students with disabilities in public schools. Providing FAPE through an IEP and educating children in LRE is a huge financial burden on school districts.[109] While some of this burden is alleviated when parents no longer desire for services provided by the school, other burdens may arise. For instance, an emotionally disturbed student who was once placed in a small classroom setting when he was formerly classified as a student with disabilities and now is placed in a mainstream classroom may misbehave and disrupt his peers. The teacher must allocate time and energy to discipline the student or report the incident to the principal. Moreover, other students' educational benefit is diminished because of this disruption. The school may rightfully believe that the disruptive student should be placed in a more restrictive classroom, yet it cannot act without re-

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[108] JAMES J. CREMINS, LEGAL AND POLITICAL ISSUES IN SPECIAL EDUCATION 70 (1983).

[109] *See* Kowal, *supra* note 24, at 831.

evaluating the student for a disability, which again requires parental consent. Additionally, reevaluation is an added cost to the school district. An alternative to reevaluation and receiving consent from the parent would be to remove the student from school by imposing long-term suspension or expulsions.

School districts expend extensive time, money, and resources to provide a FAPE, LRE, and an IEP for students with disabilities to ensure that they receive the same educational opportunities as students without disabilities. The purpose of the IDEA is to guarantee that students with disabilities have access to a public education. Once a parent revokes consent to special education services provided by the school, the student's disability does not vanish. Moreover, the school district should hardly deny the effort it exerted to previously ensure a public education to the student.

B. CHILDREN'S INTERESTS IN RECEIVING AN EDUCATION

In *San Antonio Independent School District v. Rodriguez*,[110] the Supreme Court first addressed whether education is a fundamental right.[111] The Court found that the Constitution does not establish education as a fundamental right but acknowledged the importance of education in the development of the United States as a prosperous country.[112]

[110] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[111] *Id.* at 17.

[112] *See id.* at 18. Mexican-American parents brought a class action lawsuit on behalf of schoolchildren belonging to minority groups or who live in property-poor school districts throughout the state of Texas. *Id.* at 4-5. The plaintiffs challenged that the Texas system of financing public school education according to local property tax base violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution. *Id.* at 5-6. The plaintiffs argued that due to their economic status, the revenue yielded from their property taxes in these poorer urban districts is not equal to the revenue yielded from wealthier districts. *See id.* at 15. Since wealthier districts have more money to spend on public education than poorer districts, students attending schools in poorer districts do not receive the same quality education as those students living in wealthier districts. *Id.* at 4-6. Essentially, the plaintiffs argued that the Texas finance system discriminated against them on the basis of wealth in violation of the Equal Protection Clause. *See id.*

The Court also noted that this state's education finance system did not deny education to its children, that each child had the "opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[113] Moreover, the Court left unanswered the inquiry of whether children are entitled to a narrower right to a "minimally adequate education."[114]

In *Plyler v. Doe*,[115] the Supreme Court reinforced the notion that access to a public education is an important right without declaring that education is a fundamental right. The Court struck down a state statute that withheld state funds from local school districts that enrolled undocumented children into their schools, reasoning that such a law violated the Equal Protection Clause of the Fourteenth Amendment.[116] While the Court still did not find education to be a fundamental right, it found that it was something more than a government benefit, noting "the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child."[117]

When students who were formerly characterized as disabled students no longer receive the protections provided by Section 504, their access to a minimally adequate education is impeded. Disciplinary policies, such as zero tolerance policies, will have profound effects on children who are no longer classified as a student with disabilities. To combat the threat of school shootings and violence, school districts have adopted zero tolerances policies that remove troublesome students from school.[118] Public school districts are inclined to follow zero tolerance policies because federal aid requires the expulsion of

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[113] *Id.* at 37.

[114] Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65, 91 (2003).

[115] Plyler v. Doe, 457 U.S. 202 (1982).

[116] *Id.* at 202 (Syllabus).

[117] *Id.* at 221.

[118] Blumenson & Nilsen, *supra* note 114, at 65-66.

students for weapons offenses, teachers want to remove troublemakers from their classrooms, and overall school performance on standardized tests may increase since students with disciplinary problem are often the most underachieving students.[119] Zero tolerance policies serve to create more conducive learning environments by removing disruptive students from the classroom, maintain safety at the school, and deter other students from misbehaving.[120]

While zero tolerance policies are intended to maximize the welfare of the students, they also produce serious long-term effects. Expelled students are more likely to hurt themselves or others than students who remain in school.[121] Expelled students break bonds with teachers and faculty members who are in the best positions to help them.[122] Moreover, students who lack a secondary education are more likely to engage in criminal behavior.[123] Expelled students may no longer be a problem for the school district, but these students, if they lack assistance and guidance for reform, will inevitably become the community's problem. Students who were formally characterized as students with disabilities are no less immune from the harsh realities of zero tolerance policies.

Every disciplinary action taken against a student will not result in expulsion. However, the discussion above illustrates the extreme consequences of zero tolerance policies on the child's right to an education. Exclusion and systematic suspensions can amount to a complete bar to the basic skills and opportunities to become a successful member of society.

While a school district finds a student with disciplinary problems unfit to remain in the classroom setting, it should not deprive him of an education by regularly suspending him or

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[119] *Id.* at 67-68.

[120] *See id.* at 75-76.

[121] *Id.* at 82.

[122] *Id.*

[123] *Id.* at 82-83; *see also* Amy P. Meek, Note, *School Discipline "As Part of the Teaching Process": Alternative and Compensatory Education Required by the State's Interest in Keeping Children in School*, 28 YALE L. & POL'Y REV. 155, 158 (2009).

expelling him from school altogether. Some states provide alternative education programs for students who have been excluded from school. Thirty-six states have such a program, and thirteen states have enacted laws requiring local school districts to create an alternative education program.[124] No federal law mandates the establishment of alternative education programs.[125] While alternative education programs are relatively new and lack sophistication, they address the concern of educating students deemed unfit to remain in a normal classroom setting.

However, alternative education programs may infringe on students' right to a minimally adequate education because these programs do not meet the same standards as regular public schools.[126] While the Supreme Court has yet to declare education as a fundamental right, states have created standards for grade advancement and graduation, which can be construed to define a minimally adequate education.[127] Most alternative program schools do not integrate state standards into their curricula, and states do not require them to do so.[128] In the few instances where an alternative education program records and reports standardized test scores, children attending these school are underachieving.[129]

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[124] Meek, *supra* note 123, at 158. For instance, North Carolina's 1999 alternative learning statute provides school districts with guidelines for creating programs for students subject to extended suspensions or expulsions. *Id.* at 161. Additionally, Georgia's A Plus Education Reform Act of 2000 created an official alternative education program and required school districts to implement disciplinary processes that would better address behavioral problems. *Id.* at 162. Connecticut enacted a law in 2007 requiring that all suspensions be served in-school unless the student is a significant danger to people or property. *Id.*

[125] *Id.* at 158.

[126] Emily Barbour, Note, *Separate and Invisible: Alternative Education Programs and Our Educational Rights*, 50 B.C. L. REV. 197, 224 (2009).

[127] *Id.*

[128] *Id.*

[129] *Id.* Standardized test results from 2004 of an alternative education program in Springfield, Massachusetts showed that one hundred percent of third graders were not proficient in reading, one hundred percent of sixth

General characteristics of alternative education programs reveal the disparity in the quality of education provided at these schools compared to regular schools. Alternative education programs serve more as behavior remediation centers than institutions that foster a learning environment.[130] Often times, these programs rely on strict social controls, such as continuous supervision over students, escorting students to restrooms, and using police patrols.[131] The length of a school day and week at an alternative school may be shorter than that of a regular school, which significantly affects the amount of material students learn.[132] If and when these students return to regular schools, they are often academically behind because they were never taught the material at the alternative school.[133] Furthermore, students transferred to an alternative education program relate poorly to the school because of the stigma incurred from being forced to transfer out of a regular school.[134]

Improving alternative education programs is necessary for children to gain a meaningful education at these schools. Providing students with credit-earning coursework may alleviate graduation problems if and when a student returns to a regular school.[135] Classrooms with low student-teacher ratios and placing students with similar disciplinary problems (e.g., violent students, emotionally disturbed students) in the same classroom may provide more benefit to students.

If students have a right to a minimally adequate education, then all students, including those who were formally

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graders were not proficient in math, and one hundred percent of tenth graders were not proficient in English. *Id.* These score were consistent with other alternative education programs in the state of Massachusetts in 2003, 2004, and 2005. *Id.*

[130] *Id.* at 202.

[131] *Id.*

[132] Barbour, *supra* note 126, at 202.

[133] *See id.* at 202-03.

[134] *Id.* at 231-32.

[135] *See id.* at 234.

characterized as students with disabilities, should be entitled to an evaluation to determine the most appropriate alternative education program to ensure that they continue to receive an education. Nonetheless, this right to an alternative education subsequent disciplinary action should be extended to all students, not just those who were once classified as disabled, because *all* students maintain an interest in receiving a minimally adequate education. However, these programs are most likely funded by the state or local government, as there is currently no federal funding allocated for establishing and maintaining alternative education programs. In contrast, the federal government distributes funds to state and local governments to provide services to students with disabilities through the IDEA.[136] Local governments without any outside financial assistance may not be able bear the burden of creating an alternative education program for students who have been suspended or excluded from a mainstream school. Expanding the IDEA to ensure that students formerly classified as disabled are appropriately educated in the event that they are suspended or expelled may impose huge financial burdens. Nevertheless, these alternative education programs may serve the best interests of all students, including those who were once characterized as having a disability, by providing them with an education.

C. PARENTAL RIGHTS UNDER THE IDEA

Procedural safeguards provided by the IDEA give parents the ability to check a school district's conduct. Under the IDEA, parents and school districts are supposed to work cooperatively to develop the most appropriate course of action for a student.[137] If a district fails to fulfill its obligations, parents may challenge the district's decisions or actions through due process hearings or litigation.[138] Although parents are the most valuable advocates for their children, their ability to secure the most appropriate services for their children is thwarted by their lack

136 *Protecting Students*, *supra* note 4.

137 *See* Phillips, *supra* note 27, at 1821.

138 *See id.*

of knowledge.[139] For instance, parents may be not be able to translate their child's strengths and weaknesses according to diagnostic criteria used in special education.[140] Next, while parents may feel that a current educational placement is ineffective, they are unaware of alternative services for their child.[141] Finally, parents may lack knowledge of the procedural requirements that they must follow in order to challenge a school district's decisions.[142]

While parents receive some basic information regarding procedural safeguards under the IDEA, they usually do not receive any specific training regarding their legal rights provided by the IDEA because the IDEA does not mandate such training.[143] The procedural protections provided by the IDEA simply require school districts to contact parents and provide them with brochures before the child's evaluation or when the school changes the child's IEP.[144] However, often times, these documents are incomprehensible to an average parent.[145]

While the IDEA requires school districts to provide notice to parents when they modify a student's IEP, parents are not held to the same notice standard. In *Florence County School District Four v. Carter*, the Court found that parents were entitled to self-help when they were dissatisfied with the disability services provided to their child by the school district.[146] The parents in *Carter* disagreed with the school district's IEP determination and challenged the appropriateness of their child's IEP through due process hearings.[147] At the same

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[139] *Id.* at 1828.

[140] *Id.* at 1829.

[141] *Id.* at 1829-30.

[142] *See* Phillips, *supra* note 27, at 1832-34.

[143] *Id.* at 1804-05.

[144] *Id.* at 1805.

[145] *Id.*

[146] Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 9-10 (1993).

[147] *Id.* at 10.

time, they removed their child from the school and placed her in a private school that they believed would more adequately serve the needs of their child.[148] When the parents removed their child from school, they unilaterally changed her IEP in violation of the IDEA. However, the Court supported the parent's right to self help, reasoning that when cooperation between parents and school districts cease, parents must accept the school district's IEP choice even if it turns out later on that the parents were right or else pay for services themselves.[149] "For parents willing and able to make the latter choice, 'it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials.'"[150] However, when a court finds that a parent's unilateral removal of his or her child from his current placement is inappropriate, parents are not entitled to reimbursement.[151] The Court in *Carter* deferred to the parents' choice to challenging their child's IEP through the court system, but noted that an unsuccessful challenge would not result in compensation to the parents for changing the student's educational placement.

Congress emphasized the importance of parental involvement in the development of their child's IEP and educational services.[152] Parents, school administrators, and teachers work cooperatively to evaluate, establish, and assess a child's IEP.[153] The school may not unilaterally change the placement of a student with a disability, as the Court in *Honig* found that the IDEA favors the child's current placement.[154] Similarly, parents who disagree with their child's IEP may

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[148] *Id.*

[149] *Id.* at 12.

[150] *Id.* (quoting Sch. Comm'n of Town of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 370 (1985)).

[151] *See* Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 12 (1993).

[152] Honig v. Doe, 484 U.S. 305, 324-26 (1988).

[153] Phillips, *supra* note 27, at 1817.

[154] *Honig*, 484 U.S. at 324-26, 328.

challenge the placement by requesting a meeting with the IEP team or request due process hearings, all of which require a collaborative effort.[155] Under older versions of the IDEA, neither parents nor schools could act unilaterally, as this action would run against the spirit of the IDEA.

The 2008 IDEA regulations give increased rights to parents of students with disabilities over their children's educational placement while diminishing the school's right to educate children in its jurisdiction.[156] For the first time, parents may change their child's IEP without following the standard procedures when they unilaterally terminate special education services. That is, they simply can provide written notice to the school indicating that they no longer desire services provided by the school. In instances where the parents have seriously considered the appropriateness of their child's IEP or have exhausted all other remedies, this unilateral right is reasonable. However, in instances where parents simply disagree with the child's current placement, parents may abuse their unilateral right to terminate services. In these situations, where the school believes that termination of services is detrimental to the education of the student, the school is helpless.

D. BALANCING THE INTERESTS OF PARENTS AND CHILDREN

In 2007, in *Winkelman v. Parma City School District*,[157] the Supreme Court held that parents are afforded procedural and substantive rights under the IDEA.[158] Prior to *Winkelman*, parents could enforce only procedural rights under the IDEA. However, the Court here recognized that parents play a "significant role" in developing the child's IEP, which provides a

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[155] Phillips, *supra* note 27, at 1821.

[156] It is widely recognized that the State has a strong interest in educating its citizens to produce productive citizens and educated voters. *See, e.g.*, Blackwelder v. Safnauer, 689 F. Supp. 106, 130-31 (N.D.N.Y. 1988).

[157] Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007).

[158] *See id.* at 533.

child with a FAPE.[159] In essence, the *Winkelman* Court found that the interests of the child and parents are the same, and therefore, parents can act as pro se litigants on behalf of their children.[160] However, in his dissent, Justice Scalia argued that the interests of the child and parents are distinct.[161] Scalia pointed to language in IDEA that differentiates the rights between parents and children, such as the right to reimbursement, which allows *parents* to receive reimbursement from the school district in some instances when they enroll their children in private schools.[162] Moreover, he pointed to the parents' right to excuse an IEP team member from attending an IEP meeting.[163] The Court's decision in *Winkelman* may have entangled the rights of parents and students.[164]

The conflicting interests of parents and their children have arisen in settings beyond education. For instance, in abortion issues, the minor's choice may trump the parents' decision. In *Bellotti v. Baird*,[165] the Supreme Court held that a Massachusetts statute requiring a pregnant minor seeking an abortion to obtain the consent of her parents or to obtain judicial approval following notification to her parents was unconstitutional.[166] The Court heavily weighed the minor's maturity level and the reason for the abortion.[167]

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[159] *Id.* at 524 (quoting Schaffer v. Weast, 546 U.S. 49, 53 (2005)).

[160] *Id.* at 531 ("IDEA does not differentiate…between the rights accorded to children and the rights accorded to parents").

[161] *Id.* at 540-41 (Scalia, J., dissenting).

[162] Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 541 (2007) (Scalia, J., dissenting) (citing 20 U.S.C. § 1412(a)(10)(C)(ii) (2000 ed., Supp. IV)).

[163] *Id.* (Scalia, J., dissenting).

[164] Farrell, *supra* note 30, at 412.

[165] Bellotti v. Baird, 443 U.S. 622 (1979).

[166] *Id.* at 651.

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A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision,

Additionally, in some immigration cases, a court may consider the minor's interest with respect to the parents' interest. In *Polovchak v. Meese*,[168] a twelve-year old child wanted to remain in the United States while his parents returned to the U.S.S.R.[169] The Seventh Circuit recognized the liberty interest of the parents in child-rearing.[170] However, it rejected the district court's reasoning that the minor's interest "is by very nature considerably less than that of his parents."[171] Instead, the Seventh Circuit reasoned that the interests and rights of a minor increase with age.[172]

Another instance where the interests of parents and children may conflict involves juvenile adjudicative proceedings. While parents are permitted to make decisions on behalf of their children in most legal proceedings, they are generally not allowed to make legal decisions regarding adjudicative proceedings, such as plea bargains.[173] Although parents are permitted to assist their children in making such a decision, recent research suggests that the parents' legal advice is contrary to the best interest of the child.[174] For instance, parents may advise their child to waive their right to silence when the

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in consultation with her physician, independently of her parents' wishes; or 2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.

Id. at 643-44.

[168] Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985).

[169] *Id.* at 732.

[170] *See id.* at 734.

[171] Id. at 736.

[172] *Id.* at 736-37.

[173] Jodi L. Viljoen & Thomas Grisso, *Prospects for Remediating Juveniles' Adjudicative Incompetence*, 13 PSYCHOL. PUB. POL'Y & L. 87, 104 (2007).

[174] *Id.* at 105.

child would be better off exercising that right.[175] On the other hand, advice given by parents may be beneficial to the minor if he has "marginal capacities" to make autonomous decisions by considering, rather than acquiescing, to his parents' request.[176] One reason that parents may make poor decisions with respect to their children's legal rights is that they do not understand the language used in legal proceedings.[177]

The parental right to unilaterally revoke consent to services raises a conflict between the interests of a child to remain in school and receive an education and the parent's liberty interest in child-rearing. The consequences of revoking consent to services are severe if the child faces disciplinary action against him because the school district could potentially kick him out of his regular school. By revoking consent, parents remove a protection that the child may actually need in the future.

E. BALANCING THE INTERESTS OF STATES AND PARENTS

While the state has a strong interest in regulating education, the fundamental right of child rearing generally remains with the parents.[178] In *Pierce v. Society of the Sisters*,[179] the Supreme Court struck down a compulsory education act that required parents to send their children to public schools.[180] The child is not simply a "creature of the state," and the Court recognized the parents' fundamental interest in determining how to raise their child because they are the ones who nurture him and direct his future.[181] Under *Pierce*,

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[175] *Id.*

[176] *Id.*

[177] *Id.* at 106.

[178] *See* Kotler, *supra* note 18, at 360-61.

[179] Pierce v. Soc'y of the Sisters, 268 U.S. 510 (1925).

[180] *Id.* at 529-30.

[181] *Id.* at 535.

parents have the right to choose whether to send their children to a public or private school.[182]

Similarly, in *Wisconsin v. Yoder*,[183] the Court found that an Amish parent was not obligated to comply with a state compulsory education law because such a requirement would violate the Free Exercise clause of the First Amendment.[184] The parent in *Yoder* escaped the compulsory attendance policy by demonstrating that his children would receive a quality education through the traditional Amish vocational training.[185]

In contrast, in *Leebaert v. Harrington*, the Second Circuit upheld a statute requiring students to attend a health class that discussed drugs, alcohol, and peer resistance to social pressures despite a parent's choice to refuse his son from attending.[186] In *Pierce* and *Yoder*, the concern was the infringement of the parents' rights to choose an overall education program for the child, whereas in *Leebaert*, the issue was whether parents have a right to choose specific elements of their child's education. Here the court found that a parent's fundamental right to choose his or her child's upbringing does not rise to the level of determining which classes, as determined by a school's curriculum, a child may or may not attend.[187]

Consistent with *Pierce and Yoder*, a parent's right to unilaterally revoke consent comports with his or her right to

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[182] More recently, the Court expanded on the reasoning in *Pierce* to find that even a State's considered judgment about the preferable political and religious character of schoolteachers does not trump a parent's choice of private school. Troxel v. Granville, 530 U.S. 57, 78-79 (2000) (Souter, J., concurring).

[183] Wisconsin v. Yoder, 406 U.S. 205 (1972). The Court recognized that a state's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests, such as those specifically protected by the Free Exercise clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children, so long as they, in the words of *Pierce*, "prepare him for additional obligations." *Id.* at 233.

[184] *Id.* at 234.

[185] *Id.* at 224.

[186] Leebaert v. Harrington, 332 F.3d 134, 137-38 (2d Cir. 2003).

[187] *Id.* at 141-43.

determine his or her child's upbringing. However, the nature of the right to unilaterally revoke consent is unique because it was created under the IDEA with the intention that parents would work closely with the school district to determine the best course of action for their child.[188] Parents lacking familiarity with the special education system may make decisions that are not in the best interest of their child. The school district has professional training in areas, including special education, psychology, nursing, social work, and medicine,[189] while parents have particular knowledge of the child's idiosyncrasies. The determination of the school district or the parents alone does not ensure that the child's educational needs are being adequately met; yet together, they can represent the best interests of the child.

Parents who choose to exercise their unilateral right to revoke special education and related services may not be fully aware of the consequences of such a decision. They may not understand that their child will be classified as a student without disabilities for disciplinary purposes, even though the child is receiving special education services outside of the school district. If these students are excluded from their regular school, parents face problems of determining how to best educate the child. The parental right to unilaterally revoke consent to services may be a detriment to the child if the parent is not fully informed of the implications of exercising this right.

Parental training is one method by which parents can be more effective advocates for their special needs child by gaining more knowledge about special education. Some special education advocates suggest that parents follow training similar to that of an educator, which includes: 1) development of appropriate attitudes; 2) specific content training; 3) opportunities for parents to express and share feelings and perceptions; 4) opportunities to observe acceptable role models; 5) simulation activities; and 6) feedback.[190] The local school

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[188] *See* Engel, *supra* note 2, at 170 (noting that the decision-making process reflects the drafter's belief that the educational opportunities of students with disabilities are best protected in a controlled interaction between parents and educators).

[189] *Id.* at 188.

[190] CREMINS, *supra* note 108, at 85-86.

district should not provide parental training because a conflict of interest would develop between the school district and parents.[191] Instead, an independent agency could be established and funded by the state to provide parental training.[192] However, financial constraints may limit the state from establishing or maintaining these programs.

The IDEA emphasizes a process to which a school district must adhere when making a change in the educational setting of disabled students with IEPs. Even parents should be required to follow some procedural rules when revoking consent to services provided by the school district to ensure that they are making a well-informed decision in the best interests of the child.

VI. CONCLUSION

Although there is a strong presumption in strengthening the parental rights of educating their children, parents should not have the right to unilaterally revoke consent to services because exercise of this right goes against the purpose of the IDEA to encourage school districts and parents to work cooperatively to assist a child to excel in school. Instead, parents should be subjected to a notice requirement that informs the school district of their reason for terminating services. Just as a school must provide notice in a change of the child's IEP, the parents should be required to give notice to terminate special education services. Then, a hearing should be held to allow the school district to reevaluate the student to determine whether he actually still has a disability.

A parent's right to unilaterally revoke consent is unnecessary because the IDEA already provides sufficient procedural safeguards that permit parents to challenge the school district's decisions regarding their child in educational placement and disciplinary actions. The IDEA promotes a collaborative effort among parents, educators, and school administrators to provide the most appropriate placement for a child with learning disabilities. The parental right to unilaterally revoke consent to services inhibits the communication and cooperation of the child's IEP team.

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[191] *Id.* at 86.

[192] *Id.*

However, if parents have the right to unilaterally revoke consent, school districts should be required to protect formerly labeled disabled children against discrimination on the basis of disability pursuant to Section 504. While parental choice relieves a school district's obligation to provide services to the child, it should not relieve the school district's obligation to ensure that that all students remain in school and receive a minimally adequate education. Schools should classify students as either disabled or non-disabled for both IDEA and Section 504 purposes. When a parent revokes consent to special education services, the student is no longer a disabled child under IDEA. However, a different inquiry should be made to determine whether the child is a disabled student under Section 504.

When balancing the interests of the parent's interest in raising his or her child and the state's interest in educating a child, the state's interest prevails in the narrow context of students who were formerly classified as students with disabilities. Whether a child has a disability or not, that child should not be excluded from school because the potential cost to society is significant. As the IDEA provides due process rights and a reevaluation of his educational setting for students with disabilities when a school district must determine disciplinary action taken against him, non-disabled students (and those formerly identified as students with disabilities), should also be provided a similar safeguard to ensure that the child is being educated. While alternative education programs permit misbehaving children to continue their education, these programs do not always provide the same level of quality education that the children previously received.