MINUTES OF THE MEETING OF THE HOUSE EDUCATION COMMITTEE
January 23, 1981

The Education Committee convened in Room 129 of the State Capitol, at 12:30 p.m., on January 23, 1981, with Chairman Eudaily presiding and all members present except Rep. Donaldson, who was excused.

Chairman Eudaily opened the meeting to a hearing on the following bills: HBs 186, 178 and 272.

HOUSE BILL 186

REPRESENTATIVE CALVIN WINSLOW, District 65, chief sponsor, said he was present to represent an important measure in his district and he was sure other districts. The bill would close schools on state and national election days so senior citizens would have room to park and so be able to enter the polling places to vote and not have to vote absentee. Making these days a holiday he felt would impress their importance on our children.

DAVID L. HALLAND, Yellowstone County, spoke in support. He said there were a number of good reasons for closing the schools at these times. Included were: makes parking available for handicapped as well as older people; eliminates congestion in the halls; possibility that it is safer for children as they wouldn't be contending with all the cars. He said 20-1-305 already provides for school holidays for state and national election days if it interferes with the election process. But who is to make the decision - this would eliminate someone having to decide. He felt the election process would be more available.

JESS LONG, School Administrators of Montana, spoke in opposition. He said this also creates problems for the schools by having the day designated as a holiday as it extends the school year by one more day. Even if the school was closed as a holiday they would have to have the school open and serviced and this would be a cost to the district. He felt we might be depriving our school children of a worthwhile lesson in democracy which would be occurring right under their noses. He feared it also might encourage parents to use the day for a vacation and not be around to vote.

Rep. Winslow in closing said the legislature is charged with making voting as acceptable and convenient as possible and if there are barriers something should be done about it.

Questions were asked by the committee. Rep. Hannah raised a question about the janitorial cost, saying in Billings the janitorial staff works school holidays. Chairman Eudaily mentioned this bill doesn't guarantee that the trustees need to let us use their buildngs. Mr. Halland agreed. Chairman Eudaily also asked if they didn't feel this could be a good learning experience for the children. Mr. Halland said there would be other less congested elections where they could have this experience. He felt all they saw of state and national elections were long lines. Rep. Williams

asked how this is handled in other states. Mr. Halland said a number of states do declare it a holiday.

HOUSE BILL 178

REPRESENTATIVE JACK MOORE, District 41, chief sponsor, said this bill is to approve and adopt the compact for education. He said Montana is the only state which does not belong to the compact and we have been treated like a step-child as they have furnished us with information. He went through and discussed the parts of the bill. He said each state commission will be comprised of seven members: the governor, two representatives and four people serving at the pleasure of the governor. Each state in the compact has one vote. He said a fiscal note is needed as the membership dues are $16,875 for 1982 and $19,900 for 1983. This will require a separate appropriation. The price of the membership differs for each state as it depends on population. California pays $58,000. He felt the cost was low for the benefits received.

IRVING E. DAYTON, Deputy Commissioner for Academic Affairs, University System, spoke in support. He said Mr. Richardson, the Commissioner of Higher Education, supports the bill. He said we have been receiving help from this group. A number of pieces of model legislation used in developing Montana law have come from here. He said we are able to attend the meetings sponsored and so can continue to freeload but then we don't get to help develop policy and since each state gets one vote we would have a disproportionate advantage.

NANCY WALTER, Montana Education Association, recommended a do pass. She said from her own experience she knows the statistical data is very comprehensive and accurate. She mentioned two types: classroom testing and research on handicapped legislation. She said mainstreaming of the handicapped came about through this. She said this compact does deliver what it promises and she recommended a do pass.

Opponents

ROSE MARY RODGERS, Helena, representing self, spoke in opposition and a copy of her testimony is EXHIBIT 1 and part of the minutes.

BEVERLY GLUECKERT, Helena, representing self, spoke in opposition and a copy of her testimony is EXHIBIT 2 and part of the minutes.

Questions were asked by the committee. Rep. Azzara said the bill contains language on page 14, subsection 2 that the Supt. of Public Instruction should be a member. He felt it should read "may."

Rep. Williams asked why the school administrators didn't testify. Mr. Jess Long said they discussed this but didn't come to a consensus. He said speaking as a citizen and a retired educator this is the kind of regional knowledge we need to solve some of our problems.

Rep. Vincent asked concerning travel money to attend the various meetings. Rep. Moore said they have requested $3,500 for 1982 for travel and a like amount for 1983. Including membership dues this would amount to $20,375 for 1982 and $23,900 for 1983 and it would be a separate appropriation bill each session; HB 178 would be a lasting bill through several sessions. Rep. Hannah asked if these membership dues could increase a great extent after we became a member and Rep. Dussault said as long as it is taken through the normal appropriation process this would not be a problem. Rep. Meyer asked what we are getting for the $40,000 that we can't get right now. Rep. Moore commented that we were receiving information but not participating and why should this continue.

Rep. Williams asked for Rep. Dussault's opinion and with the permission of the Chair she responded that she felt there were many benefits to be gained. She said Montana is receiving the benefits of the research now and she didn't feel anybody would disagree that it is excellent and not duplicated by any other group. She said a number of the leadership attended a regional seminar after the last session with leadership moneys from the legislative budget, and the entire two days were devoted to the discussion of declining enrollments. She said it had better data than she had ever seen and we would be real short sighted if we didn't enter into this.

Rep. Lory asked of Mr. Dayton why it is important in Montana to have a voting position. Mr. Dayton said Montana would get one vote and consequently be in a position to influence the problems that are addressed. We would be in a leverage position as all states get just one vote.

HOUSE BILL 272

REPRESENTATIVE ROBERT ANDERSON, District 16, said this bill is to clarify the suspension privileges of our school principals. The bill is trying to define the relationship between a district superintendent and a principal. He said principals are suspending pupils right now but the letter of the law may not give them that right.

KEITH L. ALLRED, Kalispell, spoke in support. He said they have been practicing having principals do the expulsions but in looking at the law it appears only the district superintendents can suspend. He said suspension is a reasonalbe way to control students. He said in the larger schools it would be an impossible task for the superintendents. He said the law says the board must meet as soon as possible to consider the suspension - could be a real problem to have board members in that often.

RAYMOND HAUGEN, Kalispell, Evergreen, spoke in support.

JESS LONG, School Administrators of Montana, spoke in support and said the law should be clarified. He said the principal is the

logical one to do the suspending and at this point it is determined he is acting illegally in many cases.

CHAD SMITH, Montana School Board Association, said this should be addressed by legislation. He said there is inconsistency about who has the power to suspend. He said an important statute not mentioned is 20-4-402 which states the duties of the district superintendent - number 6 of that gives him general supervision and the authority to suspend. Statute 20-4-403 deals with the duties of the principals. These are specific statutes dealing with the powers of suspension. He said another problem is in 20-4-402 which is totally impractical. He said you can't get the trustees together in less than 48 hours and the suspension may not continue through that time. He didn't know if that could be addressed in this bill but number 6 of 20-4-402 should be eliminated.

Rep. Anderson in closing said he was embarrassed to bring a bill that needs working on. He said they have a group of amendments that would do what they are intending to do (EXHIBIT 4). Rep. Lory asked what recourse he would have if the principal butts him out of school. Rep. Anderson said he could ask for his case to be considered by the trustees. Rep. Andreason asked Mr. Smith what his recommendations were. Mr. Smith said to put in that the trustees may consider any suspension imposed by principals. Andreason suggested the words "subject to the review of the Board of Trustees." Rep. Vincent asked if Vice-Principals have been overstepping their authority when they suspend. Mr. Smith said vice and assistant have been interpreted to have the powers of the principal or superintendent.

Rep. Hanson asked of Mr. Smith if the school board is not required to write policies that deal with this. He said their interpretation is that the people that have the power to do these things are set forth in the statutes. Rep. Hanson said the policy of the school has to be set out as to when the student is going to be suspended. He said the board, if they wish to be informed, must include that in their policy. He felt it was a matter of supervising their employees. Mr. Smith said 20-5-202 would cover the situation while lines 6 to 10 on page 3 of the bill speak generally. He said the specific controls the general in the rule books. But he said if it is a problem in one statute, it will be a problem in another.

Chairman Eudaily closed the hearing on the bills and opened the meeting to Executive Session on the following bill.

EXECUTIVE SESSION

HOUSE BILL 170 Rep. Azzara moved do not pass. Rep. Teague asked of the possibility of having the bill passed for the day one more time to get an amendment prepared. Rep. Dussault asked what the amendment would pertain to.

Rep. Teague said he planned to follow the intent of the bill and have it if a person who is considered a resident before departing from the state and whose parents continue to reside in the state, may on returning to the state be considered a resident. Rep. Dussault said if a person establishes residency in another state they should not be a resident here. Rep. Teague said it was a basic philosophy - returning to the home state and we want to encourage the student to return to Montana. Rep. Azzara suggested modifying the residency part. Rep. Hannah felt it was a bad bill. He said Mr. Richardson indicated there are 20 extenuating circumstances - he didn't feel the problem was big enough to address with legislation. Rep. Lory pointed out that a would-be student could maintain residency here even if gone for quite a while. Rep. Andreason reminded them of the problem with section 4 that is considered unconstitutional. Rep. Yardley said he had studied the title of the bill and couldn't see how it could be addressed in this bill. Rep. Dussault said a committee bill would be more straightforward than to raise an equal protection question by saying a person with parents living in Montana has less residency requirements than one whose parents don't live here. Rep. Teague withdrew his motion. The original motion of DO NOT PASS carried with Rep. Teague voting no.

Meeting adjourned at 2:05.

Respectfully submitted,

Ralph S. Eudaily

RALPH S. EUDAILY, CHAIRMAN

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Additional material was sent by CHIN on HB 272 after the hearing to be distributed to the committee members. A copy is attached to these minutes of the following:

A memorandum from Daniel Yohalem to Persons Interested in School Discipline and Special Education - EXHIBIT 4.

A letter and attachments from Taylor D. August, Director, Region VI of the Dept. of Health, Education & Welfare - EX. 5.

An Advocacy Incorporated paper on "Right To Education Under Public Law 94-142" - EXHIBIT 6.

An Advocacy Incorporated paper on "Memorandum on Discipline Procedures for Handicapped Students Prepared by Sandy Adams Staff Attorney, Sept. 1979 - EXHIBIT 7.

Ex. 1

"21 HB 178 - As an educator, parent and taxpayer I see this bill as very bureaucratic in nature - With less enrollment in education why not less appointments? It appears with more layers (Commissions etc) the taxpayer will have less access in finding where problems exist. I am particularly disturbed about the Governor appointing the Supt. of Public Instruction. In other words, parents and taxpayers lose further control. It ~~appears~~ seems it is adding unneeded appointees at a time when we should be initially concerned with cutting down bureaucracy & simplifying government. Ambiguous in nature it must be unwieldy.

Rose Mary Rodgers
1517 Alderson
Helena, Mont.

P.S. What will it cost? (19,900 - Mgs. 58,000 Cally) - open ended

National affiliation certainly does reduce local control
ile layers of bureaucracy established policy with too many
e - elected appointments. We know quality of education has

1539 Clayton St.
Helena, Mt. 59601
January 23, 1981

Members of Committee considering H.B. 178:

Are you representatives really listening to the people?

This bill does not reflect grassroots feeling, indeed, the opposite. Montanans are tired of endless bureaucracy which this bill would provide and continue. We want to run our own schools.

Taxpayers and parents are crying for local control of their schools, this would lessen our control which is diminished now.

The broad wording of the bill has in my opinion wide ramifications and is in itself commended, much verbage but leaves many questions.

Systems, institutions, commissions, Government have for too long had charge of education and as a result there has been a long, loud cry for government decentral and putting education back into the hands of the local schools, parents taxpayers. Why haven't you heard us? What must happen before you get the message? We don't want nor need this type of legislation.

Nationally, there is much hope that the Dept. of Education will soon be dissolved. President, before election, proposed this, and I wondering if this legislation was drawn up to President Reagan's stand, and in fact is to continue government intrusion.

Beverly Klucker

Ex. 3

COMPACT FOR EDUCATION

Article I.
PURPOSE AND POLICY.

A. It is the purpose of this compact to:

1. Establish and maintain close cooperation and understanding among executive, legislative, professional educational and lay leadership on a nationwide basis at the State and local levels.
2. Provide a forum for the discussion, development, crystallization and recommendation of public policy alternatives in the field of education.
3. Provide a clearinghouse of information on matters relating to educational problems and how they are being met in different places throughout the Nation, so that the executive and legislative branches of State Government and of local communities may have ready access to the experience and record of the entire country, and so that both lay and professional groups in the field of education may have additional avenues for the sharing of experience and the interchange of ideas in the formation of public policy in education.
4. Facilitate the improvement of State and local educational systems so that all of them will be able to meet adequate and desirable goals in a society which requires continuous qualitative and quantitative advance in educational opportunities, methods and facilities.

B. It is the policy of this compact to encourage and promote local and State initiative in the development, maintenance, improvement and administration of educational systems and institutions in a manner which will accord with the needs and advantages of diversity among localities and States.

C. The party States recognize that each of them has an interest in the quality and quantity of education furnished in each of the other States, as well as in the excellence of its own educational systems and institutions, because of the highly mobile character of individuals within the Nation, and because the products and services contributing to the health, welfare and economic advancement of each State are supplied in significant part by persons educated in other States.

Article II.
STATE DEFINED.

As used in this compact, "State" means a State, territory or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

Article III.
THE COMMISSION.

A. The Education Commission of the States, hereinafter called "the Commission," is hereby established. The Commission shall consist of seven members representing each party State. One of such members shall be the Governor; two shall be members of the State legislature selected by its respective houses and serving in such manner as the legislature may determine; and four shall be appointed by and serve at the pleasure of the Governor, unless the laws of the State otherwise provide. If the laws of a State prevent legislators from serving on the Commission, six members shall be appointed and serve at the pleasure of the Governor, unless the laws of the State otherwise provide. In addition to any other principles or requirements which a state may establish for the appointment and service of its members of the Commission, the guiding principle for the composition of the membership on the Commission from each party State shall be that the members representing such State shall, by virtue of their training, experience, knowledge or affiliations, be in a position collectively to reflect broadly the interests of the State Government, higher education, the State education system, local education, lay and professional, public and nonpublic educational leadership. Of those appointees, one shall be the head of a state agency or institution, designated by the Governor, having responsibility for one or more programs of public education. In addition to the members of the Commission representing the party States, there may be not to exceed ten nonvoting commissioners selected by the steering committee for terms of one year. Such commissioners shall represent leading national organizations of professional educators or persons concerned with educational administration.

B. The members of the Commission shall be entitled to one vote each on the Commission. No action of the Commission shall be binding unless taken at a meeting at which a majority of the total number of votes on the Commission are cast in favor thereof. Action of the Commission shall be only at a meeting at which a majority of the Commissioners are present. The Commission shall meet at least once a year. In its bylaws, and subject to such directions and limitations as may be contained therein, the Commission may delegate the exercise of any of its powers to the steering committee or the executive director, except for the power to approve budgets or requests for appropriations, the power to make policy recommendations pursuant to Article IV and adoption of the annual report pursuant to Article III(j).

C. The Commission shall have a seal.

D. The Commission shall elect annually, from among its members, a chairman, who shall be a Governor, a vice chairman and a treasurer. The Commission shall provide for the appointment of an executive director. Such executive director shall serve at the pleasure of the Commission, and together with the treasurer and such other personnel as the Commission may deem appropriate shall be bonded in such amount as the Commission shall determine. The executive director shall be secretary.

E. Irrespective of the civil service, personnel or other merit system laws of any of the party States, the executive director subject to the approval of the steering committee, shall appoint, remove or discharge such personnel as may be necessary for the performance of the functions of the Commission, and shall fix the duties and compensation of such personnel. The Commission in its bylaws shall provide for the personnel policies and programs of the Commission.

F. The Commission may borrow, accept or contract for the services of personnel from any party jurisdiction, the United States, or any subdivision or agency of the aforementioned governments, or from any agency of two or more of the party jurisdictions or their subdivisions.

G. The Commission may accept for any of its purposes and functions under this compact any and all donations, and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any State, the United States, or any other governmental agency, or from any person, firm, association, foundation, or corporation, and may receive, utilize and dispose of the same. Any donation or grant accepted by the Commission pursuant to this paragraph or services borrowed pursuant to paragraph (f) of this Article shall be reported in the annual report of the Commission. Such report shall include the nature, amount and conditions, if any, of the donation, grant, or services borrowed, and the identity of the donor or lender.

H. The Commission may establish and maintain such facilities as may be necessary for the transacting of its business. The Commission may acquire, hold, and convey real and personal property and any interest therein.

I. The Commission shall adopt bylaws for the conduct of its business and shall have the power to amend and rescind these bylaws. The Commission shall publish its bylaws in convenient form and shall file a copy thereof and a copy of any amendment thereto, with the appropriate agency or officer in each of the party States.

J. The Commission annually shall make to the Governor and legislature of each party State a report covering the activities of the Commission for the preceding year. The Commission may make such additional reports as it may deem desirable.

Article IV.
POWERS.

In addition to authority conferred on the Commission by other provisions of the compact, the Commission shall have authority to:

1. Collect, correlate, analyze and interpret information and data concerning educational needs and resources.

2. Encourage and foster research in all aspects of education, but with special reference to the desirable scope of instruction, organization, administration, and instructional methods and standards employed or suitable for employment in public educational systems.
3. Develop proposals for adequate financing of education as a whole and at each of its many levels.
4. Conduct or participate in research of the types referred to in this Article in any instance where the Commission finds that such research is necessary for the advancement of the purposes and policies of this compact, utilizing fully the resources of national associations, regional compact organizations for higher education, and other agencies and institutions, both public and private.
5. Formulate suggested policies and plans for the improvement of public education as a whole, or for any segment thereof, and make recommendations with respect thereto available to the appropriate governmental units, agencies and public officials.
6. Do such other things as may be necessary or incidental to the administration of any of its authority or functions pursuant to this compact.

Article V.
COOPERATION WITH FEDERAL GOVERNMENT.

A. If the laws of the United States specifically so provide, or if administrative provision is made therefor within the Federal Government, the United States may be represented on the Commission by not to exceed ten representatives. Any such representative or representatives of the United States shall be appointed and serve in such manner as may be provided by or pursuant to Federal law, and may be drawn from any one or more branches of the Federal Government, but no such representative shall have a vote on the Commission.

B. The Commission may provide information and make recommendations to any executive or legislative agency or officer of the Federal Government concerning the common educational policies of the States, and may advise with any such agencies or officers concerning any matter of mutual interest.

Article VI.
COMMITTEES.

A. To assist in the expeditious conduct of its business when the full Commission is not meeting, the Commission shall elect a steering committee of thirty-two members which, subject to the provisions of this compact and consistent with the policies of the Commission, shall be constituted and function as provided in the bylaws of the Commission. One-fourth of the voting membership of the steering committee shall consist of Governors, one-fourth shall consist of Legislators, and the remainder shall consist of other members of the Commission. A Federal representative on the Commission may serve with the steering committee, but without vote. The voting members of the steering committee shall serve for terms of two years, except that members elected to the first steering committee of the Commission shall be elected as follows: sixteen for one year and sixteen for two years. The chairman, vice

chairman, and treasurer of the Commission shall be members of the steering committee and, anything in this paragraph to the contrary notwithstanding, shall serve during their continuance in these offices. Vacancies in the steering committee shall not affect its authority to act, but the Commission at its next regularly ensuing meeting following the occurrence of any vacancy shall fill it for the unexpired term. No person shall serve more than two terms as a member of the steering committee; provided that service for a partial term of one year or less shall not be counted toward the two term limitation.

B. The Commission may establish advisory and technical committees composed of State, local, and Federal officials, and private persons to advise it with respect to any one or more of its functions. Any advisory or technical committee may, on request of the States concerned, be established to consider any matter of special concern to two or more of the party States.

C. The Commission may establish such additional committees as its bylaws may provide.

Article VII.
FINANCE.

A. The Commission shall advise the Governor or designated officer or officers of each party State of its budget and estimated expenditures for such period as may be required by the laws of that party State. Each of the Commission's budgets of estimated expenditures shall contain specific recommendations of the amount or amounts to be appropriated by each of the party States.

B. The total amount of appropriation requests under any budget shall be apportioned among the party States. In making such apportionment, the Commission shall devise and employ a formula which takes equitable account of the populations and per capita income levels of the party States.

C. The Commission shall not pledge the credit of any party States. The Commission may meet any of its obligations in whole or in part with funds available to it pursuant to Article III(g) of this compact, provided that the Commission takes specific action setting aside such funds prior to incurring an obligation to be met in whole or in part in such manner. Except where the Commission makes use of funds available to it pursuant to Article III(g) thereof, the Commission shall not incur any obligation prior to the allotment of funds by the party States adequate to meet the same.

D. The Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Commission shall be subject to the audit and accounting procedures established by its bylaws. However, all receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified public accountant, and the report of the audit shall be included in and become part of the annual reports of the Commission.

E. The accounts of the Commission shall be open at any reasonable time for inspection by duly constituted officers of the party States and by any persons authorized by the Commission.

F. Nothing contained herein shall be construed to prevent Commission compliance with laws relating to audit or inspection of accounts by or on behalf of any government contributing to the support of the Commission.

Article VIII.
ELIGIBLE PARTIES; ENTRY INTO AND WITHDRAWAL.

A. This compact shall have as eligible parties all States, Territories, and Possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico. In respect of any such jurisdiction not having a Governor, the term "Governor," as used in this compact, shall mean the closest equivalent official of such jurisdiction.

B. Any State or other eligible jurisdiction may enter into this compact and it shall become binding thereon when it has adopted the same: provided that in order to enter into initial effect, adoption by at least ten eligible party jurisdictions shall be required.

C. Adoption of the compact may be either by enactment thereof or by adherence thereto by the Governor; provided that in the absence of enactment, adherence by the Governor shall be sufficient to make his State a party only until December 31, 1967. During any period when a State is participating in this compact through gubernatorial action, the Governor shall appoint those persons who, in addition to himself, shall serve as the members of the Commission from his State, and shall provide to the Commission an equitable share of the financial support of the Commission from any source available to him.

D. Except for a withdrawal effective on December 31, 1967 in accordance with paragraph C of this Article, any party State may withdraw from this compact by enacting a statute repealing the same, but no such withdrawal shall take effect until one year after the Governor of the withdrawing State has given notice in writing of the withdrawal to the Governors of all other party States. No withdrawal shall affect any liability already incurred by or chargeable to a party State prior to the time of such withdrawal.

Article IX.
AMENDMENTS TO THE COMPACT.

This compact may be amended by a vote of two-thirds of the members of the Commission present and voting when ratified by the Legislatures of two-thirds of the party States.

Article X.
CONSTRUCTION AND SEVERABILITY.

This compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any State or of the United States, or the application thereof to any Government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any State participating therein, the compact shall remain in full force and effect as to the State affected as to all severable matters.

Suggested Enabling Act

This act is simply suggested as an aid to the States. A State may ignore it, alter it, or include it in any form it desires.

COMPACT FOR EDUCATION

Section 1.

The Compact for Education is hereby entered into and enacted into law with all jurisdictions legally joining therein, in the form substantially as follows:

INSERT EXACT TEXT OF COMPACT HERE

Section 2.

There is hereby established the (Name of State) Education Council composed of the members of the Education Commission of the States representing this State, and _____ other persons appointed by the Governor for terms of (three) years. Such other persons shall be selected so as to be broadly representative of professional and lay interest within this State having the responsibilities for, knowledge with respect to, and interest in educational matters. The Chairman shall be designated by the Governor from among its members. The Council shall meet on the call of its Chairman or at the request of a majority of its members, but in any event the Council shall meet not less than three times in each year. The Council may consider any and all matters relating to recommendations of the Education Commission of the States and the activities of the members in representing this State thereon.

Section 3.

Pursuant to Article III(i) of the Compact, the Commission shall file a copy of its bylaws and any amendment thereto with the (insert designation of appropriate state agency or official).

Section 4.

(Insert effective date.)

4/77

Ex. 4 JAN 26 1978

HB 272

CHILDREN'S DEFENSE FUND
of The WASHINGTON RESEARCH PROJECT, Inc.
1520 NEW HAMPSHIRE AVE., N.W.
WASHINGTON, D.C. 20036
(202) 483-1470

MEMORANDUM

January 19, 1978

TO: Persons Interested in School Discipline and Special Education

FROM: Daniel Yohalem DY

RE: P.L. 94-142 (The Education for All Handicapped Children Act) Wins Over School Disciplinary Procedures:

Stuart v. Nappi, et al., Civ. No. B-77-381 (D. Conn., January 4, 1978)--represented by John Dziamba, Connecticut Legal Services, Willimantic, Connecticut

This case represents a major breakthrough in the relationship between school disciplinary procedures and the new federal Education for All Handicapped Children Act and regulations (P.L. 94-142, 20 U.S.C. §§1401, et seq., and 45 C.F.R. Part 121a, 42 F.R. 42474, August 23, 1977). The plaintiff is a high school aged girl described by the school as having emotional and learning problems. She had been evaluated several years ago through the Connecticut special education evaluation procedure, found to have special education needs, and recommended to receive special education services. She received some SPED services over the past few years, but in the Spring of 1977 her annual re-assessment by the SPED evaluation team concluded that she needed an intensive learning disabilities program. However, such a program has not yet been provided her during the 1977-78 school year.

In September 1977, the plaintiff was involved in a school-wide disturbance at Danbury High School. For participating in this disturbance, she was immediately suspended for a period of ten days. The school also notified her that at the superintendent's urging a hearing would be held on November 30, 1977 to determine whether she would be permanently expelled from school. Two weeks before her November expulsion hearing, but after the initial suspension, plaintiff's attorney requested, pursuant to P.L. 94-142, a due process hearing to review the school's failure to provide her an appropriate special education program as recommended by the evaluation team. Thereafter, a complaint and motion for temporary restraining order (TRO) were filed in federal court, seeking to enjoin the school's expulsion hearing. Plaintiff claimed that P.L. 94-142 requires that she remain in her school program pending the outcome of the due process hearings and appeals, and that expulsion would be in violation of the federal

law. The court granted a TRO and, following a hearing in December, issued a preliminary injunction on January 4, 1978, requiring an immediate evaluation of the child's educational needs and enjoining the expulsion hearing.

The court's opinion, granting plaintiff a preliminary injunction, holds:

1. An expulsion from school would very likely cause her irreparable injury.

2. She has a right to an appropriate public education under P.L. 94-142.

3. a. Once a request is made for a hearing pursuant to P.L. 94-142 to challenge the appropriateness of an educational program, the federal law prohibits a change in educational placement without parental consent until the P.L. 94-142 procedures and any court review have been fully exhausted.

   b. An expulsion from school represents such an impermissible change in educational placement.

4. The P.L. 94-142 requirement that children be educated in the least restrictive setting means that, even after the procedures referred to above have been exhausted, a child who is handicapped cannot be expelled from school. These children have a federal right to be placed in an appropriate academic and social environment. While some disruptive or severely handicapped children may need programs located outside the regular class, expulsion is not an appropriate or permissible placement because it is not least restrictive.

5. Any transfer from the regular program to a more restrictive (or segregated/separated) environment must be done pursuant to the P.L. 94-142 process--i.e., by a professional evaluation team working closely with the child's parents and in conformance with the due process safeguards by which a parent can challenge an educational placement decision--not by an expulsion hearing.

6. The school is permitted to suspend a handicapped child, but only for up to ten days and only in emergency situations--i.e., where the child is dangerous to himself or others.

In short, the court has resolved a conflict between P.L. 94-142 and local disciplinary procedures in favor of the federal law. Though the plaintiff offered some expert testimony at the preliminary injunction hearing that her "anti-social" behavior was caused by her inappropriate educational program, the court did not rely on this nor limit P.L. 94-142's application to situations in which the action the school seeks to discipline is caused by a child's handicap. In a gesture toward the schools, the court concludes in its opinion:

> Handicapped children are neither immune from a school's disciplinary process nor are they entitled to participate in programs when their behavior impairs the education of other children in the program. First, school authorities can take swift disciplinary measures, such as suspension, against disruptive handicapped children. Secondly, [a school evaluation team] can request a change in the placement of handicapped children who have demonstrated that their present placement is inappropriate by disrupting the education of other children. The Handicapped Act thereby affords schools with both short-term and long-term methods of dealing with handicapped children who are behavioral problems.

Slip Opinion at 13. Of course, this is merely a politic way of saying that, under federal law, exclusion of handicapped children, for any reason, is prohibited.

DY/rl

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
REGIONAL OFFICE
1200 MAIN TOWER BUILDING
DALLAS, TEXAS 75202

Ex. 5

OFFICE FOR CIVIL RIGHTS

HB 272

August 19, 1980

Ref: 06791572

Rec. Jan 29, 1981

Ms. Regina Rogoff
Legal Aid Society of Central Texas
Brooks Perry Building
Eighth on Brazos
Austin, Texas 78701

Dear Ms. Rogoff:

Attached is a copy of a letter which has been mailed to the Austin Independent School District (ISD), Austin, Texas, outlining the findings of our investigation of the complaint filed by your agency against the School District. Upon request, you will be provided with a copy of all correspondence between the Austin ISD and this Office which pertains to our conclusion regarding your complaint.

Obligations of the Office for Civil Rights under the Freedom of Information Act require that we release this letter and other information about this case upon request by the public. In the event that OCR receives such a request, we will make every effort to protect information contained herein that identifies individuals or that, if released, would constitute an unwarranted invasion of privacy.

If you have any questions, please contact Dr. John A. Bell at 214/767-4005.

Sincerely,

for Taylor D. August
Director, Region VI

Enclosure

ATTTACHMENT A

STATEMENT OF FINDINGS

by the Office for Civil Rights
Department of Health, Education, and Welfare

Historical Background

The Office for Civil Rights (OCR) opened an investigation of the Austin ISD, Austin, Texas on August 21, 1979 in response to a complaint of discrimination in violation of Section 504 of the Rehabilitation Act of 1973. The complainants alleged that the District discriminated, on the basis of handicap, in the application of its suspension and expulsion policies and procedures relative to special education students. Specifically, the complainants alleged that the district applied long-term suspensions and expulsions to special education students as a class, and specifically to Joe Melendez, without first determining whether the behavior was related to the individual student's handicap.

After reviewing the data contained in the District's Forms OS/CR 101 and 102 dated November 20 and 8, 1979 respectively, OCR investigators informed District officials that more recent and specific information was needed in order to determine if a violation had occurred. This information was requested in OCR's letter of August 31, 1979 and collected during an on-site review conducted September 17-21, 1979.

Based on the information submitted by the District, OCR has concluded that the Austin ISD has violated the implementing regulations of Section 504 of the Rehabilitation Act of 1973 in the application of its suspension policies and procedures to special education students.

1. Allegation #1

Based on the information submitted, we have concluded that the Austin ISD violated Section 504 of the Rehabilitation Act of 1973 in the application of its long-term suspension policies and procedures to special education students during the 1978-79 school year and that this violation has not been corrected. Our conclusion is based on the following:

a. The number of special education students who were long-term suspended during the 1978-79 school year was disproportionate in relation to their representation in the total school population.

1) Two types of data were available regarding the proportionality of special education students in the Austin ISD during the 1978-79 school year. On Forms OS/CR 101 and 102 dated November, 1978, District officials indicated a total student enrollment of 58,655, of which 4,865, or 8.3% were enrolled in

special education classes. The District's Annual Special Education Statistical Report dated July 9, 1979 showed an unduplicated count of 6414 students who had received special education services during the 1978-79 school year. This comprises 10.1% of the total number of students enrolled in the Austin ISD during the 1978-79 school year which was 63,272.

2) During the 1978-79 school year, 348 students were long-termed suspended by the Austin ISD (long-term suspensions consist of suspensions of more than 10 days; the District does not employ the term "expulsion"). Of the total number suspended, 61 or 17.5% were enrolled in special education classes. The suspension of handicapped students was nearly twice the ratio of their representation in the total student enrollment. Eight of the 61 students received two long-term suspensions.

b. OCR reviewed the special education and disciplinary records of a sampling of the students who were long-term suspended during the 1978-79 school year. They indicate that the District failed to make a determination whether the students' behavior was related to, or an element of, their respective handicaps.

1) A random sampling of 15 special education students was selected from the 61 who received long-term suspensions. The sampling was made according to established statistical procedures. Most of the 15 students were classified as "Learning Disabled" or "Emotionally Disturbed". Reasons for suspensions varied widely (e.g., from non-attendance and violation of school rules to possession of marijuana).

2) A review of the disciplinary and special education records of the 15 students comprising the sampling indicates that, in no case, was a determination made whether the student's behavior was related to, or an element of his/her handicap prior to the administering of the long-term suspension. In addition, there is no indication that the students were provided with an alternate educational program during the long-term suspension period, although in some cases support services such as counseling were recommended.

c. The official disciplinary procedures in effect during the 1978-79 school year did not provide the necessary safeguards relative to the suspension of special education students even though they imposed an obligation on the part of the principal to consider the student's handicapping condition in relation to his/her behavior.

The District's "Procedures for Discipline with Special Education Students" #5143.03, were in effect during the 1978-79 school year. According to this policy document, "suspension from school, either short-term or long-term, is not considered to be a change in the student's educational program or placement, but is considered to be disciplinary action". The same document does stipulate the following however: "If long-term suspension is recommended, the local campus' principal shall consider the student's handicapping condition in relation to the student's behavior and determine whether a referral to the local ARD Committee should be made to consider a change in the student's educational placement."

d. The new student disciplinary procedures adopted by the Austin ISD in September, 1979, fail to correct the violations incurred by the District during the 1978-79 school year. These procedures are Administrative Regulation 5143.04 (Procedures for Teacher Recommendation for Removal of a Student from Class) and Administrative Regulation 5143.05 (Additional Procedures in Regard to Discipline of Identified Special Education Students). While Administrative Regulation 5143.05 offers more safeguards relative to the suspension of handicapped students than the previous year's Regulation, the procedures are inadequate to correct the violations cited for the following reasons:

1) Although the Regulation states that "the Campus Review Board (CRB) shall consider the student's handicap" before recommending a long-term suspension, there is no requirement that the CRB must determine whether the student's behavior is related to, or is an element of, his/her handicap or inappropriate placement.

2) The Central Admissions Review and Dismissal (CARD) Committee may recommend a change of educational placement for the student in lieu of applying a suspension. However, if a change in placement is not made and the superintendent affirms the recommendation to suspend, there is no provision for providing an alternative education.

3) The Regulation fails to restrict the imposition of multiple short-term suspensions for special education students whose behavior is related to, or an element of, their respective handicaps or inappropriate placement.

4) There is no provision for a follow-up of the 61 students who were long-term suspended in 1978-79 to ascertain if they have continued to have behavioral problems and, if so, whether these problems are related to their handicap.

2. Allegation #2

Based on the information submitted, we have concluded that the Austin ISD violated Section 504 of the Rehabilitation Act of 1973 in the application of its long-term suspension policies and procedures to Joe Melendez, a handicapped student, and that this violation has been corrected by the District. Our conclusion is based on the following:

a. Both Joe Melendez' learning problems and his aggressive behavior were initially noted in 1972-73 by his first grade teacher. Joe Melendez is a thirteen year old Mexican American student whose primary language, according to a bilingual examiner, is English although he has some knowledge of Spanish. He was first recommended for special education classes by his first grade teacher and his elementary school principal in 1972. The "Summary of Psychometric Study" from the Department of Special Education dated 12-8-72 notes that Joe was recommended for special education because of "his aggressive behavior, hyperactivity, memory, and inability to follow directions." As a result of the psychometric study, he was recommended for the LLD Resource room. Joe's classification continued to be "Learning Disabled" (LD) through the end of the 1978-79 school year with the additional subsequent diagnosis of "Speech Handicapped" (SH).

b. Although Joe Melendez' intelligence scores fell on successive administrations of the same instrument and his behavioral and attendance problems increased, District officials administered two-long term suspensions and multiple short-term suspensions without reevaluating him for possible emotional disorders.

1) Joe's full-scale intelligence quotient (FSIQ) scores on the Weschler Intelligence Scale for Children - Revised, are as follows: December 8, 1972, 98; March 26, 1976, 84; January 23, 1979, 78. In the most recent evaluation report the examiner noted the following: "There was a significant difference between the Performance Scale IQ score and the Verbal IQ score. Whereas four out of five performance scale subtests fell within the average range, most Verbal Scale Subtests fell within the borderline or mentally deficient ranges." The examiner also noted that "Joe is experiencing difficulty in virtually all courses."

2) Joe's attendance records during his two years at Martin Junior High School show that he was absent due to truancy and suspensions the majority of the time. In the January 27, 1978 recommendation for long-term suspension of Joe Melendez, it was noted that he had attended school 35 out of 88 days. In the April 5, 1979 long-term suspension recommendation it was noted that he had been absent 83 out of 131 days.

3) On January 11, 1978 a Campus Review Board Hearing was held on Joe Melendez to discuss the numerous referrals of Joe to the office. The referrals consisted primarily of non-attendance, refusal to work and disruptive behavior. The Board voted to long-term suspend Joe. The superintendent approved the suspension and stipulated that Joe's suspension would be from January 11, 1978 to February 7, 1978 if the family approved a transfer to Allan Junior High, or until March 6, 1978, if the family refused the transfer. The transfer was accepted, but was revoked by the receiving school on April 10, 1978 due to Joe's poor attendance.

4) A Campus Review Board (CRB) Hearing was held on Joe Melendez on March 21, 1979 to review eighteen charges which culminated in the charge of possession of marijuana on March 20, 1979. Joe was suspended for the remainder of the school year with the suspension upheld by the superintendent. Joe's Juvenile Probation Officer disagreed with the long-term suspension and requested immediate referral to Central Admission Review and Dismissal (CARD) for an appropriate placement. The CRB recommended that the Diagnostic Adjustment Center (DAC) be considered for placement for the 1979-80 school year.

5) There is no indication from his records that the school district provided Joe with an alternate educational program during either of his long-term suspensions.

The Austin ISD corrected the above cited violation at the beginning of the 1979-80 school year by reevaluating and reclassifying Joe Melendez and by providing him with a new educational placement.

An ARD meeting was held on May 22, 1979 and a psychiatric evaluation was recommended. The evaluation was made on June 12, 1979. The psychiatrist indicated in his evaluation that Joe was emotionally disturbed and that a new placement was appropriate. Based on this evaluation and on reports from Martin Junior High School, Joe was reclassified as "Learning Disabled and Emotionally Disturbed" (LD/ED). At the beginning of the 1979-80 school year, he was placed in the Diagnostic Adjustment Center with the sixth period to be spent at Martin Junior High School. A new IEP, approved by the parent's legal representatives, was approved on October 9, 1979.

ATTACHMENT B

Legal Basis for Finding of Non-compliance

I. Section 504 of the Rehabilitation Act of 1973

The following paragraphs of the implementing regulations, as amended, are pertinent to this complaint:

Section 104.33 Free appropriate public education.

(a) General. A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) Appropriate education. (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Section 104.34, 104.35, and 104.36.

(d) Compliance. A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practical time and in no event later than September 1, 1978.

Section 104.34 Educational setting

(a) Academic setting. A recipient to which this subpart applies shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent approriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(c) Free education-(1) General. For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on nonhandicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

Section 104.35 Evaluation and placement.

(a) Preplacement evaluation. A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

(c) Placement procedures. In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with Section 104.34.

(d) Reevaluation. A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

II. Related Court Cases

A. Stuart v. Nappi (C.A. No. B-77-381, D. Conn. 1978)

The plaintiff, a high school student with serious learning and emotional disabilities, was involved in school-wide disturbances at the high school. As a result of her participation in these disturbances, she received a ten-day suspension and was scheduled to appear at a disciplinary hearing wherein the Superintendent was going to recommend that she be expelled. The Court, in accordance with four specific rights granted to handicapped persons under Part B of EHA, granted a preliminary injunction enjoining the school board from holding a hearing to expel the student. The rights they articulated were:

1. The right to an appropriate public education.
2. The right to remain in her present placement until the resolution of her special complaint.
3. The right to an education in the least restrictive environment.
4. The right to have all changes in placement effectuated in accordance with prescribed procedures.

Relative to the above, the Court stated that "The right to an education in the least restrictive environment may be circumvented if schools are permitted to expel handicapped children. An expulsion has the effect not only of changing a student's placement, but also of restricting the availability of alternative placements."

B. Howard v. Friendswood (C.A. No. G-78-92, S.D. Texas, 1978)

The plaintiff, a high school special education student with minimal brain damage, a learning disability, and behavior problems was expelled from the District while obtaining treatment at a hospital in Galveston, Texas. The Court mandated issuance of a preliminary injunction requiring the school district to pay cost of the student's private schooling necessitated by his difficulties. It noted that "Douglas' difficulties were handled entirely and solely as disciplinary problems. No effort was made to determine whether or not his disciplinary problems were related to his diagnosed handicaps." The Court concluded that the plaintiff had been excluded from "participation in and denied the benefits of a free, appropriate education". It additionally concluded that the plaintiff had been denied "the rights to procedural and substantive due process required by the Constitution of the United States".

C. Doe v. Koger (C.A. No. S-79-14, N.D. Indiana, 1979)

The plaintiff, a mildly mentally handicapped student was suspended for disciplinary reasons with a recommendation from the principal that he be expelled for the remainder of the school year. He was formally expelled following a hearing. The resultant federal court action focused on class certification, exhaustion, statutory and constitutional issues. Under statutory issues, the Court agreed with HEW's interpretation of the Handicapped Act. According to this interpretation, schools are not to expel students whose handicaps cause them to be disruptive, rather schools are to appropriately place these students. The Court further commented that the Handicapped Act only prohibits the expulsion of handicapped children who are disruptive because of their handicap; if the reason is not the handicap, the child can be expelled. The Court further ruled that before a disruptive handicapped child can be expelled it must be determined whether the handicap is the cause of the child's propensity to disrupt.

ATTACHMENT C

Specific corrective steps are required from a District which has violated Section 504 of the Rehabilitation Act of 1973 by discriminating against handicapped persons. A remedial plan of action must be submitted which will address the violations cited. At a minimum, the plan must include the following components:

1. The District's Administrative Regulation 5143.05 must be revised in order to insure that handicapped students are not long-term suspended for behavior which is related to, or an element of, their handicap or which results from inappropriate placement. Procedures must be established for determining whether the handicap is the cause of a student's propensity to disrupt prior to the administration of the suspension.

2. Procedures must be established for providing students whose handicaps cause them to be disruptive with an appropriate alternative placement if they have been found to be seriously disruptive or dangerous to themselves or others.

3. The revised Regulation must limit the number of short-term suspensions administered during a school year so that a series of short-term suspensions may not be administered in lieu of long-term suspensions. Short-term suspensions which, when added together are the equivalent of a long-term suspension, must be prohibited.

4. A follow-up study must be made of the 61 handicapped students who received long-term suspensions in order to determine if their behavior was related to, or an element of, their respective handicaps. Should the behavior be related to the handicap, educational services must be offered to compensate for the time the student was suspended.

5. Notification must be made to all parents of special education students relative to the AISD's new disciplinary policy. Parents must be given notice of their right to a due process hearing should the District determine that the student's behavior is not related to his/her handicap and elect to suspend. The District must offer an alternative educational program pending the determination of the hearing and any appeals.

5. The AISD's plan of corrective action must include the revision of Administrative Regulation 5143.05. Timeframes for parental notification and completion of the follow-up study must be stipulated.

6. A progress report must be submitted to OCR relative to the results of the follow-up study. The report should stipulate the number of long-term suspended students whose behavioral problems have been determined to be related to their handicap or inappropriate placement. The type and duration of compensatory services to be offered must also be reported.

RIGHT TO EDUCATION UNDER PUBLIC LAW 94-142

I. THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT (P.L. 94-142)

"The purpose of this Act to assure that all handicapped children have available to them, . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children."

II. FREE APPROPRIATE PUBLIC EDUCATION (FAPE)

A. What is it?

Free Appropriate Public Education (FAPE) means special education and related services provided at public expense, and supervised by public agencies, such as the state education agency, the local independent school districts, and the state schools. Special education and related services must be provided to the child according to an Individualized Education Plan.

B. When is your child legally entitled to FAPE?

Under Texas law, children ages 3-21 are entitled to FAPE.

C. What is special education?

Special education is specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

D. What are related services?

Related services are transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education.

III. IDENTIFICATION OF CHILD

A. The process starts when the child is identified as possibly needing special education services.

B. When a child is identified as possibly needing special education services, the parents are entitled to NOTICE about:

1. all steps the school district may take in order to provide special education and related services to the child

2. a description of the legal rights involved in those steps

C. If the school proposes (or refuses) to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, the parent must receive notice that describes each procedure, test, record or report relied on by the school. This notice must also describe each alternative that was considered and explain why any alternative was rejected.

IV. EVALUATION

A. General Rule: Parents must give consent before the child may be evaluated.

1. CONSENT means giving permission in writing

2. Consent must be FREELY GIVEN

3. Exception to General Rule:

If the parents refuse to give their consent, the school district can request a hearing to see if the child should be evaluated without parental consent.

Parents have the right to go to this hearing and explain why they refused to give their consent.

Either party may appeal from the hearing.

If the school wins, the child may be evaluated without parental consent.
If the school loses, the child will not be evaluated.

B. What is an Assessment?

1. An assessment is an evaluation of the child's abilities and needs in all areas related to the suspected disability.

2. The assessment may include tests of the child's:

(a) health
(b) vision
(c) hearing
(d) social and emotional status
(e) general intelligence
(f) academic performance
(g) speech and language abilities
(h) motor abilities

3. The evaluation must be performed by a TEAM of professionals, at least one of whom has special knowledge in the area of the child's suspected disability.

4. Each test used in an evaluation:

(a) Must be given in the child's primary language

(b) Must not be racially or culturally discriminatory

(c) Must accurately measure what it is supposed to measure (for example, math achievement) and not the child's handicap (for example, inability to write with a pencil), unless the test is specifically designed to measure that handicap.

5. Under Texas law, the assessment must be completely redone at least every 3 years. Under federal law, the assessment must be done more often than this if conditions warrant or if the parent or teacher requests it.

6. Parents have a right to an independent evaluation of the child's abilities and needs from qualified professionals of their choice.

   (a) The school district must tell parents where they can obtain an independent evaluation.

   (b) This evaluation must be considered in any decision made in providing educational services to the child.

   (c) The school district must pay for the independent evaluation UNLESS the district:

      (1) Asks for a hearing, AND

      (2) It is found at the hearing that the school district's evaluation was appropriate.

7. Parents have the right to see records pertaining to the evaluation of the child.

8. Parents have the right to a hearing if they disagree with an evaluation of the child.

V. INDIVIDUALIZED EDUCATION PLAN (IEP)

A. An IEP is a statement of the special education and related services to be provided to the child.

B. An IEP is developed at a meeting attended by the parent or guardian, the child's teacher, and a representative of the school who supervises special education. (The child may also be present when this is thought to be appropriate.)

   1. The parents must be notified of the meeting early enough to insure that they will be able to attend.

   2. The time and place of the meeting must be mutually agreed upon by the parents and the school.

   3. Parents have the right to be told what options were discussed by school officials in planning the special education program for the child.

C. Parents have the right to get a copy of the child's IEP.

D. Parents have the right to see all records concerning the educational program and placement of the child.

E. Parents may ask for a hearing on any matter concerning the educational program or placement of the child.

VI. WHAT MUST BE IN AN IEP?

A. An IEP must contain a statement of the child's present levels of educational performance. Under Texas law, the IEP must also contain a statement of the child's educational needs.

B. An IEP must contain a statement of the goals which the IEP Committee feels can be reached by the child in one year, and a statement of the short term instructional objectives for the child.

C. An IEP must contain a statement of the specific special education and related services to be provided the child, and the extent to which the child will be able to participate in regular educational programs.

D. An IEP must contain a statement of the related services to be provided the child.

Related services are those developmental, corrective, and supportive services required to assist the handicapped child to benefit from special education. Under P.L. 94-142, related services may include the following:

1. speech pathology and audiology,
2. psychological services,
3. physical and occupational therapy,
4. recreation,
5. early identification and assessment of disabilities,
6. counseling services,
7. medical, diagnostic, and evaluation services,
8. parent counseling and training,
9. social work services in the school,
10. school health services,
11. transportation services, including specialized equipment such as special or adapted buses, lifts, and ramps, if required to provide special transportation for a handicapped child.

E. An IEP must show the date when the services will start and when they will end.

F. An IEP must contain a statement of the standard by which the child's program will be reviewed each year. (The review is necessary to see if the teaching techniques, are helping the child progress toward the goals that were set in the IEP.)

VII. PLACEMENT

A. Based on the child's IEP, the school district must consider a variety of possible educational placements. What must go into the decision?

1. The child has the right to be educated as much as possible with children who are not handicapped.

2. Basically, the child must be placed in the regular classroom with non-handicapped children if his educational needs can be met in the regular classroom with the use of supplementary aids, equipment, materials and services.

3. If the child cannot receive an appropriate education in the regular classroom with these supplementary aids, then the school must look to other educational placements, such as:

   -- a combination of regular classes and special education classes

   -- special educational classes in a separate classroom

   -- home instruction

   -- special schools or institutions

   -- residential placements

B. If the school district determines, in writing the child's IEP, that placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

C. If a handicapped child has available a free appropriate public education, and the parents choose to place the child in a private school or facility, the local school district is not required to pay for the child's education at the private school or facility.

D. Regardless of the placement, handicapped children have the right to participate in extracurricular activities (such as school clubs, athletic activities, and musical groups), meals, and recess on the same basis as non-handicapped children.

E. The parents must give written consent before the child is placed in a special education program.

F. The parents must be given notice from the school before there is a change in the child's program, such as when the school wants to move the child from one special education program to another, or move the child from a special education program to a regular education program.

G. The parent may ask for a hearing on any matter concerning the educational program or placement of the child.

VIII. EDUCATION RECORDS

The parents of a handicapped child have a right to:

A. Know what records involving the child are being collected, maintained, or used by the school district and where those records are located.

B. Inspect and review all records maintained on their child.

C. Make copies of the child's records at a reasonable cost.

D. Have someone at the child's school explain or interpret any item in the child's records.

E. Give consent before the child's records can be seen by someone not involved in the child's education.

F. Know who, other than the people involved in the child's education, has seen the child's records and why.

G. Ask for a change in the child's records because they think a statement is wrong or misleading:

1. There is the right to a hearing upon the parents' request if the school refuses to change the statement.

2. Parents have the right to add to the records a statement commenting on the information, or stating reasons why they disagree with the hearing if the decision in the hearing is that the statement in the child's records is accurate.

IX. HEARINGS AND APPEALS

The parent or the public education agency may ask for a hearing on any matter concerning the educational program or placement of the child. This hearing is called an "impartial due process hearing."

A. The impartial due process hearing must be held and a decision made not more than 45 days from the time the hearing is requested. Also, a decision must be made not more than 30 days from the request for appeal to the State Board of Education.

B. The chart below is an outline of the process and the timelines for each step, under rules of the Texas Education Agency.

Chart - Timelines for Each Step

The problem is identified

↓

within 15 days

↓

A written request for a due process hearing must be filed

↓

within 10 days

↓

15

25

An impartial hearing officer must conduct the hearing

↓

within 15 days

↓

The hearing officer must prepare his proposed decision and send it to the State Commissioner of Education with copies to the parent and local school board

↓

within 10 days

↓

The local school board must send a written notice to the Commissioner stating whether or not it accepts the hearing officer's proposal. The parent may also send a written notice to the Commissioner stating whether or not he agrees with the hearing officer's proposal.

↓

within 10 days

↓

The Commissioner must make a decision and send a written copy of his decision to the parent and to the local school board

↓

within 5 days

↓

The local school board or the parent may appeal the decision of the Commissioner to the State Board of Education

↓

within 30 days

↓

The State Board of Education must render a decision on the appeal and announce its decision at the same meeting

↓

within 10 days

↓

If the local school board or the parent wants to take the case to state court, a motion for rehearing must be filed with the State Board of Education

↓

within 30 days

The motion for rehearing is automatically overruled unless the State Board of Education has already ruled on the motion

C. At the impartial due process hearing, the parents and the school have the following rights:

1. To take to the hearing a lawyer and anyone with knowledge about the child's disability.

2. To take to the hearing other persons who can tell what they know about the problem.

3. To show the hearing officer evidence and documents to support positions taken in the hearing.

4. To ask questions of the teachers, diagnosticians, and administrators about the child or the provision of an appropriate education.

5. To give the hearing officer the names of people to be questioned at the hearing and to ask the hearing officer to make sure those people are present at the hearing.

6. To keep the hearing officer from considering anything that was not shown to the parties at least 5 days before the hearing.

7. To ask the hearing officer to order another evaluation for the child at public expense.

8. To get a written or tape recording of exactly what everyone said at the hearing.

9. To get a written copy of the hearing officer's decision and a statement of the facts that he relies on for his decision.

10. To have the child at the hearing, if the parent wants.

11. To have the hearing open to the public if the parents want; otherwise it will be private.

D. The decision of the Commissioner of TEA is final unless the parent or the school appeals.

E. If the parents do not agree with the decision of the Commissioner, they may appeal the decision to the State Board of Education.

F. The decision of the State Board of Education is final unless the parent or the school files a petition in court.

G. If the parents or the school do not agree with the decision of the State Board, either may file a petition in a District Court in Travis County or a Federal District Court.

H. Regardless of the kind of hearing that is offered, the child is to remain in his or her educational placement pending final resolution of the hearings and appeals procedures.

HB 272

Ex. 7

ADVOCACY, INCORPORATED

Advocating the Legal Rights of Developmentally Disabled Texans
Affiliated with the State Bar of Texas

Memorandum on Discipline Procedures for Handicapped Students
Prepared by Sandy Adams Staff Attorney
September 1979

This memorandum was prepared to aid an administrator of a school district that was modifying its procedures for the discipline of handicapped students.

While I am aware of no federal or state codified laws or regulations that require that specified procedures be followed in disciplining handicapped children, there is caselaw on the subject. In addition, HEW's regulations to Public Law 94-142 specify standards which must be met before a school district may impose disciplinary action on a handicapped student who has a complaint pending in an administrative or judicial forum. The Comments to HEW's Section 504 regulations also address how disruptive handicapped children should be handled. The cases and pertinent HEW regulations under Public Law 94-142 and Section 504 will be discussed below.

1. Cases Involving the Discipline of School Children

There are two major Supreme Court cases concerning the discipline of school children: Goss v. Lopez, which involved a 10-day suspension, and Ingraham v. Wright, which involved corporal punishment. The Supreme Court's rulings in these recent cases apply to all school children and therefore, apply to handicapped students.

In Goss v. Lopez, the Supreme Court characterized a 10-day suspension from school as "a serious event in the life of the suspended child." The Court said such suspensions had implications under the Fourteenth Amendment's Due Process Clause because of a child's "property interest" in his education and because of his "liberty interest" in his reputation with classmates and teachers and in his later opportunities for higher education and employment.

In discussing what "process" was "due," Justice White balanced the child's interest in avoiding an "unfair or mistaken exclusion from the educational process," which the Court deemed "not at all trivial," against the burden of imposing elaborate hearing requirements on the schools. The Court struck the balance by requiring, in suspensions of ten days or less that "the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."

Quite frankly, this is not much "due process"; but, might more due process be required for a handicapped child suspended for ten days or less? In balancing the student's interest in not being unfairly or mistakenly excluded from school against imposing burdensome hearings on the schools, the Court made some interesting comments on the fallibility of school disciplinarians:

> The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate,

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unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

It can be argued that the balance between the interest of the student in avoiding unfair and mistaken suspensions and the burden of hearings on schools should be struck closer to the student's interests when the student is handicapped. The following reasons can be advanced for requiring more due process than Goss affords when a handicapped child is suspended for ten days or less:

1. The risk of unfairly or mistakenly suspending a handicapped child is greater than the risk of inappropriately suspending a non-handicapped child. First, the disabled child's behavior may be caused by his handicap, an improper diagnosis, an inadequate evaluation, a faulty educational plan (IEP), or an inappropriate placement. The "due process" given suspended students under Goss is insufficient to prevent unfair or mistaken suspensions of handicapped students because it does not include an investigation into the child's handicap or into the adequacy of his diagnosis, evaluation, IEP, or placement. For these reasons, at least one federal court (in Howard S. v. Friendswood ISD) has said that failure to investigate how the problem behavior is related to the child's handicap violates the Fifth and Fourteenth Amendments to the Constitution, as well as Section 504.

2. Many handicapped children will be unable to effectively use the due process procedures available to them under Goss. Some will be unable to understand the charges and evidence against them; more will have difficulty presenting their side of the story. It is unlikely that many will have the sophistication and understanding to explain how their behavior might be related to their handicap, diagnosis, evaluation, IEP, or placement.

3. Providing more due process before suspending a handicapped child for 10 days or less may not impose much of an additional burden on school officials. ARD review of the child's behavior in relation to his handicap and program should really be routine when a disabled child evidences problems in school. (In Stuart v. Nappi, discussed below, the court found the disabled child entitled to a 94-142 due process hearing concerning the expulsion.) In addition, because school administrators have already provided due process hearings for handicapped children, hearings for suspended handicapped children would probably not greatly increase the burden of hearings on school officials.

Goss v. Lopez affords only limited due process to students suspended for 10 days or less, including notice of the charges and evidence against them and an opportunity to present their side of the story. It can be argued, in accord with the court's reasoning in Goss, that more due process is necessary when the student is handicapped.

St. Ann v. Palisi, a Fifth Circuit decision, provides good reasoning for the proposition that handicapped children should not be disciplined if their problem behavior is not their own fault. In St. Ann, two children were given an indefinite suspension under a school board regulation that permitted the punishing of students for the acts of their parents. The mother of the two children suspended had hit the school principal. The Fifth Circuit vacated the district court's dismissal of the case brought by the two children, noting:

> Freedom from punishment in the absence of personal guilt is a fundamental concept in the American scheme of justice. In order to intrude upon this fundamental liberty, governments must satisfy a substantial burden of justification . . . the school officials have failed to satisfy this burden . . .

Under the reasoning of St. Ann, handicapped children should not be punished for behavior for which they are not personally at fault. Because a disabled child is not to blame for his handicap or for an inappropriate diagnosis, evaluation, IEP, or placement, it is unfair to punish him when these factors cause his problem behavior. The ARD should review the child's situation to determine whether or not these factors are causing the behavior and what action should be taken. ARD review with the attendant right of parents to invoke an impartial due process hearing should help insure that disabled children are not unjustly punished for problem behavior.

Finally, Ingraham v. Wright is a recent Supreme Court decision concerning corporal punishment in the schools. The Court held in Ingraham that the Eighth Amendment's Cruel and Unusual Punishment Clause does not apply to corporal punishment in schools. In addition, the Court held that students were entitled to neither notice nor a hearing, even of the Goss v. Lopez variety, under the Due Process Clause of the Fourteenth Amendment prior to corporal punishment.

An argument can be made that a handicapped student should receive some due process before corporal punishment is imposed. In its analysis, the Court held that the Due Process Clause of the Fourteenth Amendment applied to corporal punishment in schools. The Court then turned to the question of what "process" was "due" students before receiving corporal punishment. The Court stated that if it were not for the common law privilege permitting teachers to inflict reasonable corporal punishment on children and the availability in most states of traditional civil and criminal remedies for abuse, strong procedural safeguards, such as criminal or juvenile court proceedings, would be required. The Court noted that three factors were important in evaluating whether or not the common law remedies for excessive corporal punishment gave sufficient "due process": (1) the private interest of the child; (2) the risk of erroneous inflictions of corporal punishment and the likely value of other procedural safeguards; and (3) the school district's interest in not being unduly burdened.

It can be argued that more due process should be given a handicapped child before imposing corporal punishment because the child's private interest and the risk of erroneous inflictions of corporal punishment are greater when the child is disabled. First, as a class, handicapped children are more likely to suffer physical harm from corporal punishment. Second, many handicapped children will not have the capacity to understand that they offended school rules and that the punishment is designed to stop their offending behavior. Third, there is a

greater risk of erroneous impositions of corporal punishment on handicapped children because the child's problem behavior may be related to his handicap or to an inappropriate diagnosis, evaluation, program (IEP) or placement. Finally, it would not be an unreasonable burden on school disciplinarians if they were required to inquire in advance into the appropriateness and safety of imposing corporal punishment on a handicapped child.

2. Cases Dealing Specifically with the Discipline of Handicapped School Children

Only a handful of federal court cases have involved the discipline of handicapped children in schools. Discussed below are three of the most important cases: Howard S. v. Friendswood ISD; Stuart v. Nappi; and Mattie T. v. Holladay. The precedental value of Mattie T. is limited because it is a consent judgment agreed upon by the parties and because the Court made no rulings in the case. Howard S. is a decision from the Federal District Court from the Southern District of Texas. Stuart v. Nappi is a federal district court decision from Connecticut.

In Howard S., the child was diagnosed as language-learning disabled and emotionally disturbed. Judge Cowan found that the district had constructively expelled the child when it declared him no longer a resident of the district when he was hospitalized in Galveston for emotional problems. The Court found that the child's behavior problems, consisting chiefly of truancy and hallwalking, were clearly foreseeable by the school as the child entered puberty and that the district's failure to provide the child a free, appropriate public education (FAPE) was a contributing and proximate cause of the child's emotional difficulties and emotional disturbance. The Court further found that the district "engaged in a calculated, deliberate effort to avoid and evade its legal responsibility" and had violated the child's rights under Section 504 and under the Fifth and Fourteenth Amendments by, among other things:

(1) failing to notify the Special Education Department when disciplinary problems arose;

(2) treating the child's difficulties solely as disciplinary problems;

(3) failing to determine if the child's disciplinary problems were related to his diagnosed handicaps; and

(4) failing to perform (1) through (3), despite the parents' efforts with school administrators.

Howard S. is a strong case for the proposition that before expelling a handicapped child, school disciplinarians should contact the Special Education Department and should inquire into the relationship between the child's problem behavior and his handicap and educational program. Otherwise, school administrators, like those at Friendswood ISD, may violate the disabled child's rights under Section 504 and under the Fifth and Fourteenth Amendments.

Stuart v. Nappi is another case addressing the rights of handicapped children in school disciplinary matters. The child was learning disabled and her problem behavior consisted chiefly of truancy and wandering the halls. She was suspended for 10 days after participating in a school-wide demonstration, but there was no showing that the child was a danger to herself or to other children. On a motion for a preliminary injunction to order the school board not to conduct a contemplated expulsion hearing, the Court held that it would be unjustifiable for the school to expel the child if it were subsequently shown at trial that the child had not been afforded an appropriate program or placement:

> The court cannot disregard the possibility that Danbury High School's handling of plaintiff may have contributed to her disruptive behavior. The existence of a causal relationship between plaintiff's academic

> program and her anti-social behavior was supported by expert testimony introduced at the preliminary injunction hearing. Cf. Frederick v. Thomas, 408 F. Supp. 832, 835 (E.D. Pa. 1976) (argument that inappropriate educational placement caused anti-social behavior is raised.) If a subsequent PPT [equivalent in function to the Texas ARD] were to conclude that plaintiff has not been given an appropriate special education placement, then the defendant's resort to its disciplinary process is unjustifiable.

The Court in Stuart also examined HEW's regulations to Public Law 94-142. The Court said that during the pendency of due process hearings and appeals involving a handicapped child, unless the child required removal from the school because he was endangering himself or others, expulsion would be a change in placement in violation of 45 C.F.R. 121a.513. The Court then found that expulsion also violates a child's right to be educated in the least restrictive environment:

> The right to an education in the least restrictive environment may be circumvented if schools are permitted to expel handicapped children. An expulsion has the effect not only of changing a student's placement, but also of restricting the availability of alternative placements. For example, plaintiff's expulsion may well exclude her from a placement that is appropriate for her academic and social development. This result flies in the face of the explicit mandate of the Handicapped Act which requires that all placement decisions be made in conformity with a child's right to an education in the least restrictive environment.

The Court also stated that the expulsion of a handicapped child is inconsistent with the procedures established under Public Law 94-142 for changing the placement of disruptive children. The Court found that Public Law 94-142 provided ample ways for school administrators to deal with disruptive handicapped children:

> Handicapped children are neither immune from a school's disciplinary process nor are they entitled to participate in programs when their behavior impairs the education of other children in the program. First, school authorities can take swift disciplinary measures, such as suspension, against disruptive handicapped children. Secondly, a PPT can request a change in the placement of handicapped children who have demonstrated that their present placement is inappropriate by disrupting the education of other children. The Handicapped Act thereby affords schools with both short-term and long-term methods of dealing with handicapped children who are behavioral problems.

In summary, Stuart v. Nappi stands for the following propositions;

(1) Absent the child's being a danger to himself or others, it is unjustifiable for a district to expel a disabled child where it can be shown that the failure of the district to provide an appropriate educational placement to the child caused the problem behavior.

(2) Pending the hearing and appeals process under Public Law 94-142, the expulsion of a handicapped child is a violation of HEW regulation 45 C.F.R. 121a.513, unless the child is endangering himself or others.

(3) Expulsion violates a handicapped child's right to be served in the least restrictive environment because it changes the student's placement to a more restrictive environment at home and because it restricts the availability of alternative placements.

(4) Expulsion is in violation of the due process procedures under HEW's regulations to Public Law 94-142 which provide a clear mechanism for transferring disruptive handicapped children to more restrictive placements when their behavior significantly impairs the education of other children. School administrators may suspend handicapped children who are disruptive, but the ARD must request a change in the child's placement if the child demonstrates that his current placement is inappropriate by disrupting the education of other children.

The third significant case dealing with the discipline of handicapped pupils is Mattie T. v. Holladay. There are no court rulings in Mattie T. because the parties agreed on a consent judgment. The consent decree, accepted and agreed to by Mississippi state special education officials and officials from seven school districts, included a provision regarding the removal of handicapped children from school:

19. The department shall promulgate the following new regulation:

"Children placed in a special education program (SPED) may be removed only under the following circumstances . . .

(e) the child's behavior represents an immediate physical danger to him/herself or others or constitutes a clear emergency within the school such that removal fom school is essential. Such removal shall be for no more than 3 days and shall trigger a formal comprehensive review of the child's IEP. If there is disagreement as to the appropriate placement of the child, the child's parents shall be notified in writing of their right to a SPED impartial due process hearing. Serial 3-day removals from SPED are prohibited."

Although Mattie T. is of no precedental value, it does suggest a reasonable and workable procedure for handling disruptive handicapped children.

3. HEW Regulations Concerning the Discipline of Handicapped School Children

Although they do not specify procedures for disciplining handicapped pupils, HEW's regulations to Public Law 94-142 and Section 504 do address the discipline of handicapped students.

Comments to HEW's regulations to Public Law 94-142 and to Section 504 stress that if a handicapped child in the regular classroom is so disruptive that the education of other students is significantly impaired, then the needs of the handicapped child cannot be met in that environment. See Comments to 45 C.F.R. 121a.552 and the Comments to 45 C.F.R. 84.34 in Appendix A to HEW's Section 504 regulations at 42 Federal Register 22691 (1977). These Comments suggest that changing the child's placement should be considered when his behavior is so disruptive that other children cannot learn.

In addition, HEW's Comments to 45 C.F.R. 121a.513 address the disciplining of handicapped children whose complaints are pending in 94-142 hearings or appeals. Section 121a.513 provides that unless the school and parents agree otherwise, a child already in school must remain in his present educational placement pending administrative or judicial proceedings.

Where the complaint involves initial admission to public school the child, with the parents' consent, must be placed in the public school program pending resolution of the child's complaint. The Comment to 121a.513 provides:

> Comment. Section 121a.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

This Comment sets a standard for suspending or expelling a handicapped student who has a complaint pending against a school district. In order to remove a child already in school pending the hearing and appeals process, the child must be endangering himself or others. If he is not endangering himself or others, he cannot be removed from the classroom.

4. Some General Considerations for the Preparation of Discipline Procedures

A. Any other general policies that a school district may have which addresses the exclusion of a child from school in unusual circumstances, such as the student's being involved in felony criminal matters, should be carefully reviewed to determine if they are in accord with the case law and HEW regulations discussed above. For example, such policies may have serious and particularly adverse implications for mentally retarded juvenile offenders.

B. All forms of discipline, such as on-campus suspension, corporal punishment, and short-term and long-term suspension, should be viewed to determine if they constitute a change in the student's program or placement. Depending on its duration, a long-term suspension may amount to an expulsion under Stuart v. Nappi and Howard S.. If so, then imposing long-term suspension on handicapped children would not be in accord with the holding in Stuart v. Nappi that expulsion contravenes Public Law 94-142's due process and least restrictive environment requirements. If long-term suspension is tantamount to an expulsion under Howard S., then before imposing it, the disciplinarian should inform the Special Education Department and consider whether the child's handicapping condition or educational program caused the problem behavior. School administrators should also be cautioned that they should not treat the problem behavior of handicapped children as purely disciplinary matters and that they may deny a disabled child his rights if proper inquiries are not made into the relationship between the child's problem behavior and his handicap, diagnosis, evaluation, IEP, and placement. (See discussions of Stuart v. Nappi and Howard S. v. Friendswood ISD, above.)

C. The child's handicapping condition and instructional placement should be considered prior to imposing disciplinary action on a disabled child. If the disciplinarian is given the task of considering the child's handicapping condition and instructional arrangement in relation to the problem behavior and contemplated disciplinary action, the ARD Committee should first evaluate the relationship between the child's behavior and his handicaps, diagnosis, evaluation, IEP, and placement and advise the disciplinarian of their findings and recommendations. The ARD Committee is in the best position to evaluate these factors.

Using corporal punishment on handicapped children may be harmful. First, unbeknownst to the disciplinarian, the disabled child may have some special susceptibility to injury from corporal punishment. Many handicapped children may not understand that they are being punished for their improper behavior. Using corporal punishment on a disabled child who does not understand that he offended school rules and that the punishment is designed to stop that behavior may harm the child. It is recommended that if corporal punishment must be used at all with disabled children that it be used sparingly. In addition, someone knowledgeable about the child's handicaps and his ability to understand the punishment, such as the ARD Committee, should determine if corporal punishment is appropriate and likely to be effective with the child in question.

D. If problem behavior(s) appear to be recurring with a particular special education student, prior to considering any disciplinary action, the principal or disciplinarian should utilize the ARD Committee to consider preventive strategies.

E. If the school uses any kind of Campus Review Board to make decisions on discipline, it is important to completely define the full authority and functions of the Campus Review Board as well as its relationship to the principal and the ARD Committee. The Campus Review Board should have the benefit of the ARD Committee's understanding of the relationship between the child's behavior and his handicapping condition, diagnosis, evaluation, IEP, and educational placement.

F. Discipline procedures should address the use of serial suspensions. In the consent decree in Mattie T., the local and state school administrators agreed not to employ serial three day suspensions. Serial suspensions are often used to keep disruptive handicapped children out of school. Serial suspensions can be considered tantamount to a constructive expulsion of a handicapped child from the educational program to which he is legally entitled. Serial suspensions frequently indicate that something is wrong with the child's program. Under the rationales of Howard S. and Stuart v. Nappi, serial suspensions would probably violate the child's right to a free, appropriate public education in the least restrictive environment under Section 504, Public Law 94-142, and under the Fifth and Fourteenth Amendments to the Constitution. (See prior discussions of Howard S. and Stuart v. Nappi.)

G. It probably should not be left solely to the principal's discretion to invoke the expertise of the ARD Committee or Campus Review Board in making disciplinary decisions about handicapped children. In light of Judge Cowan's holding in Howard S. that Friendswood ISD violated the child's rights under Section 504 and under the Fifth and Fourteenth Amendments by failing to notify the Special Education Department when disciplinary problems arose, by failing to determine if the child's disciplinary problems were related to his diagnosed handicaps, and by treating the child's difficulties solely as disciplinary problems, procedures should require that the ARD Committee be very much involved in the decision to discipline a handicapped child. The Court's finding in Howard S. that the failure of Friendswood ISD to provide a FAPE was a contributing and proximate cause of the child's emotional difficulties and emotional disturbance should emphasize the need for ARD Committee involvement.

H. Finally, discipline procedures should address the special rules that apply under 45 C.F.R 121a.513 when the handicapped child has a complaint pending against the school district concerning his identification, evaluation, IEP, or placement. As noted before, in these circumstances, unless the parents and school agree otherwise, the child must remain in his current educational placement and may be removed from the class, according to the Comment to Section 121a.513, only if the child is endangering himself or others.

5. Sample Discipline Procedures for Handicapped Students

In order to insure that discipline of special education students is carried out properly, the following guidelines will govern the imposition of discipline on special education students:

a. If problem behavior(s) appear to be recurring with a particular special education student, prior to considering any disciplinary action, the principal shall request that the ARD Committee consider preventive strategies.

b. Prior to imposing a suspension of three days or less, or corporal punishment, the ARD Committee will meet and determine (1) whether or not the child's problem behavior is related to his handicap, or to an inappropriate diagnosis, evaluation, IEP, or placement; (2) whether or not the child understands that he offended school rules and that the punishment is designed to stop his offending behavior; and (3) whether or not the contemplated action will likely benefit or harm the child. The ARD Committee's determinations and any recommended changes in the child's diagnosis, evaluation, IEP, or placement will be documented in the child's educational records and copies will be forwarded to the disciplinarian and to the child's parents. The disciplinarian will then decide whether or not a suspension of three days or less or corporal punishment is appropriate, taking into account the ARD Committee's findings and recommendations. Serial suspensions are prohibited.

c. Prior to convening a Campus Review Board, the local campus' principal should follow the guidelines below:

(1) The principal should refer the matter to the ARD Committee for an evaluation of whether the child's problem behavior is related to his handicap, an improper diagnosis, evaluation, IEP, or to an inappropriate placement. The ARD Committee's assessment and its recommendations for any changes in the student's diagnosis, evaluation, IEP, or placement will be forwarded to the principal and to the child's parents.

(2) The principal should then consider the information obtained from the ARD Committee and (1) decide if the Campus Review Board should consider a recommendation for long-term suspension, and/or (2) decide if the student's case should be referred to the ARD Committee to consider changes in the child's diagnosis, evaluation, IEP, or placement.

d. If a Campus Review Board is held and a recommendation for long-term suspension is made to the principal, the principal should again consider the information provided by the ARD Committee and then decide if the recommendation for long-term suspension is appropriate or whether an alternative course of action should be taken to provide the student an opportunity to be more successful in school.

e. If serial suspensions or long-term suspension is imposed on a handicapped child, the parents may request an impartial due process hearing under Public Law 94-142.

f. If the handicapped child has a complaint pending against the school district concerning his identification, evaluation, IEP, placement, or the provision of a free, appropriate public education, unless the parents and school agree otherwise, the child must remain in his current educational placement and may be removed from the regular classroom only if he is endangering himself or others.

It is our understanding that the Office of Civil Rights (OCR) will soon issue binding regulations or policies concerning the discipline of handicapped students. We recommend that the school district's disciplinary policies be reviewed after OCR issues its regulations to insure that they comply with OCR's requirements.

VISITORS' REGISTER

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Mary Rodgers	Helena	Concerned Citizen		✓
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VISITORS' REGISTER

HOUSE EDUCATION COMMITTEE

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NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOS
	"			
J. Hagerman	Helena	AFSCME	186	
Jim Christie	"	OPI		

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