

2010

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Recommended Citation

Kristina Menzel, *The School-to-Prison Pipeline: How Schools Are Failing to Properly Identify and Service Their Special Education Students and How One Probation Department Has Responded to the Crisis*, 15 Pub. Interest L. Rptr. 198 (2010).

Available at: <http://lawcommons.luc.edu/pilr/vol15/iss3/5>

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THE SCHOOL-TO-PRISON PIPELINE: HOW SCHOOLS ARE FAILING TO PROPERLY IDENTIFY AND SERVICE THEIR SPECIAL EDUCATION STUDENTS AND HOW ONE PROBATION DEPARTMENT HAS RESPONDED TO THE CRISIS

by KRISTINA MENZEL

Under the Individuals with Disabilities Education Act (IDEA),¹ schools are required to identify and provide services for students with special

education needs.² This includes those mentally ill students whose mental illness interferes with their ability to get a “free, appropriate, public education.”³

Unfortunately, these needs are not always met by the schools, leading to the significant number of mentally ill minors ending up in the Juvenile Justice System.⁴ To reverse this trend, resources must be made available to ensure that every student has the necessary resources. Changes also need to be made to the IDEA to better encompass the range of mentally ill students needing services. Finally, the Juvenile Justice System needs to better take into consideration instances where conduct was a manifestation of a disability that was not properly serviced. Once a student has become involved in the Juvenile Justice System, programs should be established to help ensure that proper services are in place so that future incidents can be avoided. The Cook County Juvenile Probation Department has started a division, the Educational Advocacy Division, to address issues with improperly serviced students once they are placed on probation.⁵

If all these things are done then perhaps we can begin to see a return on the investment we make in our special needs children. We’ve seen that it can work; we just have to take one child at a time.

THE PIPELINE

“Detecting mental health problems among children may well be the first step to preventing or mitigating violence at school.”⁶ In their 2006 National Report on Juvenile Offenders and Victims, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) noted that “school crime was common in 2003 – 1 in 8 students were in a fight [and] 1 in 3 had property stolen or damaged.”⁷ Although limited studies have been conducted regarding the link between violence and mental health disorders in youth, there is some evidence to suggest this relationship, especially if substance abuse is involved or the youths have not been receiving any treatment for their mental illness.⁸

In their Amicus Brief to the Seventh Circuit Court of Appeals for the case *Jamie S. v. Milwaukee Public Schools*, the ACLU noted that “the school-to-prison pipeline” is the product of, among other factors, “the practices and policies of school districts” that result in the criminalization of in-school behaviors.⁹ They further note that “another manifestation of the school-to-prison

pipeline is that students are being arrested and funneled into the juvenile justice and criminal justice systems for minor incidents at school”¹⁰ and that “the reality is that a large number of the incidents now resulting in long-term suspensions are for adolescent behaviors that could be – and once were – handled by a trip to a principal’s office or a call home to a parent.”¹¹ Unfortunately, if the student is already court involved, a suspension, even without a referral to court, “may violate a student’s court agreement and may lead to . . . punishments that push the student deeper into the Juvenile Justice System.”¹²

The unfortunate fact is that many of these students suffer from mental illness. “One in ten children and adolescents suffer mental illness severe enough to cause some level of impairment. . . yet fewer than one in five of these children receive necessary treatment.”¹³ In its 2008 Annual Report, the Federal Advisory Committee on Juvenile Justice noted that “as many as 70 percent of youth in the juvenile justice system have diagnosable mental health conditions,” yet the overall rates of mental illness in the general adolescent population is only in the range of 11-19 percent.¹⁴ In addition, “recent studies show that up to 85 [percent] of children in juvenile correction facilities have disabilities that make them eligible for special education services, yet only 37 [percent] had been receiving any kind of services in their home school.”¹⁵

THE IDEA

In 1975, Congress passed the Education for All Handicapped Children Act of 1975 (EAHCA) in an attempt to insure that all children, regardless of any disabilities, would receive a “free, appropriate, public education.”¹⁶ Congress passed the EAHCA recognizing that, at the time, more than half of the children in the United States with disabilities were not receiving an appropriate education, and emotionally disabled students were the least served of all.¹⁷ The purpose behind the EAHCA and its progeny, the IDEA, is to ensure that special needs students get an education that meets their *individual* needs.¹⁸

In 1990, the Education for All Handicapped Children Act of 1974 (EAHCA) was amended to become the IDEA.¹⁹ The IDEA provides that a school must provide services to a student who has an “emotional disturbance” which is defined as:

a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. § 300.8 (b)(4) 24.²⁰

Unfortunately, this description does not indicate exactly how severe the symptoms must be, how much they must interfere with a child's educational performance or how long the symptoms must be in evidence, thus lending them to subjective interpretation.²¹ It also does not address the fact that the causes and manifestations of an emotional disturbance can differ greatly from child to child, thus making even the most well-intentioned evaluator confused as to whether a given child fits into the definition.²²

A further problem with the IDEA's definition of an emotional disturbance is that it excludes children that are considered socially maladjusted.²³ "There is no federal regulation that defines social maladjustment, however, it has been described as a 'persistent pattern of violating societal norms with lots of truancy, substance and sex abuse, i.e., a perpetual struggle with authority, easily frustrated, impulsive, and manipulative.'²⁴ This is considered to be an attempt to exclude so-called "voluntary behavior."²⁵

Recent research into adolescent brain development, however, makes it clear that trauma can have a lasting effect on the development of the teen brain.²⁶ "Persistent trauma results in a state of hyper vigilance, anxiety and impulsivity."²⁷ This can affect behavior and, as trauma can be as simple as being raised in poverty or consistently witnessing violence either inside or outside the home, it raises the question as to whether even the behavior of so-called "socially maladjusted" children is truly voluntary. Also, "conduct that is disruptive and anti-social can easily be characterized as the product of intentional choice and poor character rather than the manifestation of a mental impairment."²⁸

Even when students with emotional disabilities are properly identified as such, there is no guarantee that they will receive the appropriate services. Once a

student is identified as having an emotional disorder, the IDEA requires the school to meet with the parents, the child, the child's teacher, and other "experts" to determine what services are needed to provide the minor with an appropriate education.²⁹ From this meeting, an Individualized Education Plan (IEP) is formulated.³⁰ The IEP "sets forth a written statement that includes a child's current educational status, educational goals and the steps to achieve those goals."³¹ Additionally, "if the child's behavior impedes the child's learning or that of others, the IEP must include 'strategies, including positive behavioral interventions, strategies and supports to address that behavior.'"³²

The IDEA also requires schools to consider whether supplemental aids or services or the provision of 'related services' may alleviate problems, including behavioral problems, such that the child will benefit from his program or will be able to be educated with non-disabled peers. 20 U.S.C. § 1412(a)(5); 34 C.F.R. §300.114(a)(2)(ii). The expansive provision regarding related services includes family counseling, psychological services, social work services, therapeutic recreation services, and medical and psychological evaluations. 38 U.S.C. § 1401(17); 34C.F.R. § 300.13.³³

Once a student is identified as a special education student, however, the discipline procedures the school must follow for any rule infractions become more complicated.³⁴ The school must determine if the infraction was a "manifestation of the student's disability."³⁵

The IDEA states that this determination must be conducted by the IEP team and other qualified personnel. In making the manifestation determination, the team must consider evaluative, diagnostic and other relevant information (including information provided by the parent or child), observations of the student and the student's IEP and placement. In deciding whether the misconduct is a manifestation of the disability, the team must determine if the student's disability impaired his or her ability to understand the impact and consequences of the misbehavior and if the disability impaired the student's ability to control the behavior.³⁶

In addition,

The team must find that the behavior was a manifestation of disability if:

- in relation to the behavior the child's IEP or placement was inappropriate; OR
- in relation to the behavior, special education services, supplementary aids and services, and behavior intervention strategies were not implemented in a manner consistent with the child's IEP and placement; OR

- the child's disability impaired the ability to understand the impact and consequences of the behavior; OR
- the child's disability impaired the ability to control the behavior. 20 U.S.C. § 1415(k)(4)(C).³⁷

If the infraction was not a manifestation of the student's disability, the student can be disciplined like any other student.³⁸ If, however, the behavior is found to be a manifestation of the student's disability, the student cannot be expelled.³⁹ Additionally, since the 1997 amendments to the IDEA, a school may not directly petition the courts to find a minor delinquent in order to avoid its responsibilities.⁴⁰ However, the IDEA specifically states that it does not prohibit a school from reporting a crime to the proper authorities, although the school must then furnish the authorities with the student's special education and disciplinary records.⁴¹ However, "the legislative history explains that schools may not report crimes even to 'appropriate' authorities when doing so would circumvent the schools obligations under the IDEA."⁴² Once the authorities are called, however, the IDEA also specifically indicates that these requirements are not meant to impede either law enforcement or the judiciary from performing their duties.⁴³

So what happens when the student's criminal behavior is a manifestation of the student's disability, but could have been prevented if the proper services had been in place?

THE COOK COUNTY JUVENILE PROBATION'S EDUCATIONAL ADVOCACY DIVISION

In 2005, the Cook County Juvenile Probation Department, which covers the city of Chicago and suburban Cook County, began a pilot program called the Educational Advocacy Program. Since then the program has evolved into a regular division of the Juvenile Probation Department, which is tasked with handling the special education needs of the minors placed on probation or housed in the Cook County Juvenile Temporary Detention Center.

The Educational Advocacy Division consists of probation officers that are specially trained in both educational matters and the needs of special education students.⁴⁴ Their job largely consists of advocating on behalf of their clients in the Chicago Public School System.⁴⁵ Cases are generally referred to the Educational Advocacy Division by the court when a minor is placed on probation

and there appear to be special education issues or at the request of one of the parties. A referral can also come from an attorney or the client's regular probation officer. When they first get a new case, a few each week, they must get consents for disclosure of confidential school information signed and then they go to the schools.⁴⁶ Approximately 90 percent of their clients have already been determined to be in need of special education services, but often the schools are unaware of this fact, which can be due to school overcrowding or the failure of records to follow a student from school to school.⁴⁷ The officer must then track down all of the student's prior records and prior IEP's before they can even begin advocating for services for their clients.⁴⁸ This can be quite time consuming as many students have moved repeatedly and often the records from prior schools never made it to the new school.⁴⁹

The typical client is 15 to 16-years-old with a first grade reading level, or lower.⁵⁰ Often the clients are not attending school and are gang involved because they have become tired of the frustration they experience in school when they do not receive the proper services and have difficulty learning. They are also often embarrassed by their disability and in the gang no one makes fun of their disability.⁵¹ When the client has a current IEP, they are generic and vague and often the schools are not providing the services indicated.⁵² Another frustration for the officers is that as soon as school officials discover Educational Advocacy's involvement with the client, their first concern usually is as to why the minor is on probation and why the officer is at the school, not what the student's educational needs are.⁵³

Once the officers begin to look at the clients' records, they find that IEP's have been followed less than 5 percent of the time. The officers must be smart and specific about their requests for services and experts as the clients mean a lot for work for the schools and an increased burden on already over-stretched resources. The officers attempt to work with the school to get a new IEP if one has not been done recently, and to make sure the appropriate services are in place. Unfortunately, the schools are often resistant because they see the clients as troublemakers and do not wish to waste resources on them.⁵⁴ If it becomes necessary, the officers have pro-bono attorneys willing to help the clients with due-process hearings where the IEP's can be challenged.⁵⁵

The officers often face an uphill battle. Schools are over-crowded and see the probation officers as a way of getting rid of "problem students." When minors who are already on probation get in more trouble, it is the police the schools

call first, not the probation officers and the records the IDEA requires the schools to tender to the appropriate authorities are almost never tendered to the police.⁵⁶ This may be due to the schools not being aware at first that they are dealing with a special education student, due to the large number of students they service, or it may be due to a lack of awareness that they are required to tender this information. Added to these difficulties is the fact that many Chicago Public Schools use Chicago police officers as security guards and it is unclear whether or not these officers have any special training, especially as to dealing with emotionally disturbed children.

When Educational Advocacy probation officers are able to get individualized and tailored services in place, they often feel they make a real difference.⁵⁷ They see that when students are properly assisted they become motivated to stay in school and they get in less trouble.⁵⁸

CONCLUSION

If we are to have any hope of ending the school-to-prison pipeline, we must look to the needs of our special education students. Resources have to be made available to ensure that every student has whatever services are necessary to afford an equal, and safe, opportunity to a free, appropriate education. This will require a fresh perspective in the schools and a willingness to take a new look at old policies of discipline. Teachers and staff need to be properly trained to understand how to appropriately handle their students with emotional disabilities. The IDEA needs to be amended to remove the current limitations as the “social maladjustment” so it can be brought more in line with current research on the adolescent brain. Schools need to make sure that they are aware of which students are special education and that any crimes committed by them on school grounds are handled appropriately, with the proper information given to the authorities if they are, in fact, needed. The juvenile justice system needs to adjust to consider instances where such conduct was a manifestation of a disability that was not properly serviced.

If all these things are done, then perhaps we can begin to see a return on the investment we make in our special needs children. We’ve seen that it can work; we just have to take one child at a time.

NOTES

1 20 U.S.C § 1414 et seq.

2 Kimberly Mount, *Student Comment: Children's Mental Health Disabilities and Discipline: Protecting Children's Rights While Maintaining Safe Schools*, 3 BARRY L. REV. 103, 105 (2002).

3 *Id.*

4 The opinions expressed in this article are my own and do not reflect the opinion of my employer.

5 Interview with Bridgette Anderson, Sylvia Rivera & Rosalinda Banuelos, Probations Officers, Cook County Juvenile Probation Dep't, Educ. Advocacy Div., in Chicago, Ill. (Mar. 22, 2010).

6 Mount, *supra* note 2, at 103.

7 OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 73 (2006), *available at* <http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf>.

8 Mount, *supra* note 2, at 107.

9 Brief for ACLU, et al. as Amici Curiae Supporting Petitioner at 6-7, *Jamie S. v. Milwaukee Public Schools*, No. 09-2741 (7th Cir. June 09, 2009).

10 *Id.* at 7.

11 *Id.* at 8.

12 *Id.* at 10.

13 Mount, *supra* note 2, at 103.

14 FED. ADVISORY COMM. ON JUVENILE JUSTICE, ANNUAL REPORT 2008 at 35 (2008), *available at* www.facjj.org/annualreports/FACJJ%20Annual%20Report%2008.pdf.

15 *Id.* at 3.

16 Mount, *supra* note 2, at 105.

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* at 113-14.

21 Brief for ACLU, *supra* note 9, at 16.

22 *Id.*

23 Mount, *supra* note 2, at 114.

24 *Id.*

25 *Id.*

26 THE INT'L JUSTICE PROJECT, BRAIN DEVELOPMENT, CULPABILITY AND THE DEATH PENALTY, <http://www.internationaljusticeproject.org/pdfs/juvBrainDev.pdf> (last visited Mar. 5, 2010).

27 *Id.*

28 Brief for ACLU, *supra* note 9, at 16.

29 THE UNIV. OF THE D.C. SCH. OF LAW JUVENILE LAW CLINIC, SPECIAL EDUCATION ADVOCACY UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FOR CHILDREN IN THE JUVENILE DELINQUENCY SYSTEM 4-15 (Joseph B. Tulman & Joyce A. McGee ed., 1998), *available at* http://www.law.udc.edu/resource/resmgr/facultydocs/tulman_special_ed_manual.pdf.

30 Mount, *supra* note 2, at 106.

31 *Id.*

- 32 SPECIAL EDUCATION ADVOCACY, *supra* note 29, at 4-6 (quoting 20 U.S.C. § 1414 (d)(3)(B)).
- 33 Brief for ACLU, *supra* note 9, at 22.
- 34 SPECIAL EDUCATION ADVOCACY, *supra* note 29, at 4-15.
- 35 *Id.*
- 36 Allan G. Osborne, Jr., *Discipline of Special Education Students under the Individuals with Disabilities Education Act*, 29 FORDHAM URB. L. J. 513, 530 (2001).
- 37 SPECIAL EDUCATION ADVOCACY, *supra* note 29, at 4-16.
- 38 Mount, *supra* note 2, at 118.
- 39 Mount, *supra* note 2, at 117.
- 40 SPECIAL EDUCATION ADVOCACY, *supra* note 29, at 4-16.
- 41 *Id.*
- 42 *Id.* at 4-25.
- 43 *Id.* at 4-16.
- 44 Interview with Bridgette Anderson, Sylvia Rivera & Rosalinda Banuelos, *supra* note 5.
- 45 *Id.*
- 46 *Id.*
- 47 *Id.*
- 48 *Id.*
- 49 *Id.*
- 50 *Id.*
- 51 *Id.*
- 52 *Id.*
- 53 *Id.*
- 54 *Id.*
- 55 *Id.*
- 56 *Id.*
- 57 *Id.*
- 58 *Id.*