Recent Wins in Juvenile Justice Provide New Advocacy Opportunities

by Jennifer Lutz, Lisa Pilnik, and Heather Renwick

“Research suggests that solitary confinement has the potential to lead to devastating, lasting psychological consequences. It has been linked to depression, alienation, withdrawal, a reduced ability to interact with others and the potential for violent behavior. Some studies indicate that it can worsen existing mental illnesses and even trigger new ones. Prisoners in solitary are more likely to commit suicide, especially juveniles and people with mental illnesses.”


“Miller did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility... Miller’s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution.”


I
In January, the Supreme Court issued an important ruling on life without parole sentences for children and President Obama adopted Department of Justice recommendations forbidding solitary confinement for juveniles in federal prisons. These victories for young people are the latest in a recent wave of good news for kids involved with the justice system. With a growing national consensus that “children are different” and strong bipartisan support for juvenile and criminal justice reform, we are poised for even greater progress for justice-involved young people.

Any stay in juvenile detention, adult jail, or prison has profound effects, including increased risk of mental and physical health problems, poor educational, and career outcomes and negative impacts on families and communities. But solitary confinement is particularly dangerous—as President Obama said, solitary confinement has been linked to mental health issues, including suicide.

The Supreme Court decision, Montgomery v. Louisiana, took a previous Supreme Court decision, Miller v. Alabama (which said that life without parole was only appropriate for crimes committed by juveniles in the rarest cases), a step further by determining that Miller was retroactively effective. This means thousands of people in states that were not already re-examining cases decided before Miller are now eligible to have their cases reviewed.

Both of these developments are major wins for child advocates, and each has specific implications for courtroom advocacy in juvenile delinquency cases. They also represent a larger sea change in how the nation, and its government, understand and respond to young people who come into contact with the courts.

Solitary Confinement is Not Appropriate for Young People

As President Obama noted in his op-ed in the Washington Post on January 25, solitary confinement has devastating and permanent effects on youth. President Obama began with the story of 16-year-old Kalief Browder, who

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CASE LAW UPDATE

Cyberstalking Conviction Requires that Statements Constitute “True Threat” to Lose Protected Speech Status


Juvenile defendant’s blog posts stating that she still wanted to punch the alleged victim in the throat and containing a hashtag stating that victim “must die” did not constitute a true threat. The posts therefore did not lose their status as protected speech, as required for a cyberstalking conviction. Her conviction was reversed and the case remanded for dismissal with prejudice.

J.K. was adjudicated guilty in juvenile court of cyberstalking based on two tweets she sent from her personal Twitter account. She appealed, arguing the evidence was insufficient to establish she acted with the intent to “harass, intimidate, torment, or embarrass” another person or that her tweets constituted “true threats.”

When J.K. was in eighth grade, a classmate, S.G., told a teacher another student was behaving oddly. As a result, the other student and J.K. were both suspended from school. J.K. and S.G. had no other interaction until two years later when both were sophomores in high school. When J.K. saw S.G. in class, she was reminded of the incident two years before. She quickly posted two short messages (tweets) using Twitter. The first read, “I still want to punch you in the throat even tho it was 2 years ago,” and the second read, “#[S.G.]mustdie.”

S.G. testified that she felt angry and embarrassed when she learned of the tweets from another student, but she was not frightened because she did not think J.K. would actually hurt her. She did, however, inform school administrators, who involved the school resource officer.

As a result, charges were brought and J.K. was adjudicated guilty on one count of cyberstalking. The trial court found J.K. acted with the intent to embarrass, harass, and torment S.G. and her account of whether she had considered the potential effect of the tweets was not credible. The court concluded the tweets constituted a true threat.

When a threat to commit bodily harm is an element of a crime, the prosecution must prove the alleged threat was a true threat, so the criminal statute cannot be used to criminalize pure speech and impinge on First Amendment rights. True threats are not protected speech. Jokes, idle talk, or hyperbole are not true threats even when they are worded as threats.

The test for determining whether a threat is a true threat focuses on the speaker: whether a reasonable person in the speaker’s position would foresee the threat would be interpreted as a serious expression of intent to inflict the harm threatened. The nature of a threat depends on all the facts and circumstances and should not be limited to the literal translation of the communicated words. This analysis includes the identity of the speaker, the composition of the audience, the medium used to communicate the alleged threat, and the greater environment in which the alleged threat was made.

In this case, the combined high school and social media context supports the conclusion that J.K.’s tweets did not constitute true threats. Because her tweets were not a true threat, they did not lose their status as protected speech. Although S.G. testified that she felt upset, angry, and embarrassed, she explicitly denied feeling scared. The threats were made on a popular social media platform and were hyperbolic expressions of frustration, which was how they were received.
Service by Publication Not Sufficient Notice in Termination of Parental Rights Proceeding

In re A.M.S., 2016 WL 324607 (Mont.).

Mother and maternal grandfather filed a joint petition for termination of father’s parental rights to three children and adoption by grandfather. Father appealed the trial court’s default judgment terminating his parental rights and ordering adoption. The Montana Supreme Court found that service by publication could not be ordered by the clerk of court and such service did not put the father on notice that his parental rights would be terminated.

The parents of three minor children divorced, and the mother and children lived with the maternal grandfather in Billings, MT, while the father resided in Los Angeles, CA. Mother and grandfather filed a joint petition for termination of father’s parental rights and for grandfather to adopt the children. Under the petition, mother would keep her parental rights. The trial court issued a summons for father on the same day the petition was filed.

After trying to serve father, whose exact whereabouts in California were not known, mother’s and grandfather’s counsel submitted an affidavit stating father could not be found and requesting that the court order publication of summons. Shortly thereafter, the clerk of court entered an order directing that service of the summons be made by publication in the Billings Times newspaper. Father did not respond to the summons, and several months later, mother and grandfather filed a motion for entry of default, which the clerk of court entered.

When the trial court held a hearing several months later, grandfather and mother testified and submitted one exhibit that included: a letter from grandfather’s and mother’s counsel to a California-based process server, a letter about the proceedings to father at a Billings address, an e-mail to father about the proceedings, and a number of pictures of father from various social media sites. At the close of the hearing, the court issued combined orders terminating father’s parental rights and granting adoption decrees for each of the children.

The Montana Supreme Court found that service by publication could not be ordered by the clerk of court because the governing statute provides for alternate service “in any manner that the court may direct.” The trial court was required to direct the manner of service.

Furthermore, service by publication in the proceeding to terminate father’s parental rights was insufficient. Even though the publication informed him that a default judgment would be entered against him, it did not specify what relief was requested and did not put the father on notice that his parental rights would be terminated.

In case service on the father was perfected on remand, the court also addressed the father’s contention that the mother and grandfather lacked standing to petition for termination of his parental rights and grandfather could not petition for adoption. The court concluded that mother had standing as the custodian of the children and because the children were the subject of proper adoption proceedings. In addition, maternal grandfather could be treated as a stepparent if good cause to do so was shown and he met the statutory qualifications for adoption.

Party Seeking ICWA-Noncompliant Child Placement Must Show Need by Clear and Convincing Evidence

In re M.K.T., 2016 WL 236297 (Okla.).

Child whose father was enrolled in the Cherokee Nation was placed with an ICWA-noncompliant family despite efforts by the tribe to provide temporary ICWA-compliant foster care. The trial court could consider harm to the child resulting from the tribe’s request to move the child to an ICWA-compliant home. The proper standard for a party showing a need for an ICWA-noncompliant child placement is clear and convincing evidence.

The child welfare agency placed three minor children in emergency protective custody in different homes and petitioned to adjudicate the children as deprived due to neglect, lack of supervision, and exposure to substance abuse. The natural mother is a non-Indian, while the natural father was enrolled in the Cherokee Nation. The child in this case was placed with a foster placement that was not compliant with ICWA.

At the request of the Cherokee Nation, the trial court ordered transfer of the child from her foster home to a home compliant with the Indian Child Welfare Act (ICWA). The child welfare agency, natural father, natural mother, child, and foster mother appealed and the appellate court reversed the order. The Cherokee Nation appealed the reversal.

The Oklahoma Supreme Court held the proper standard for a party showing a need for an ICWA-noncompliant child placement is clear and convincing evidence. The court found the evidence presented by the agency and parents was sufficient to show a continued temporary ICWA-noncompliant placement was in the best interests of the child. The ICWA-compliant family originally selected by the Cherokee Nation would not have been considered for foster placement because they had expressed a preference for an adoption-only placement. At that time...
Alaska
TERMINATION OF PARENTAL RIGHTS, INDIAN CHILD WELFARE ACT
Father appealed termination of his parental rights to children who were Indian children under Indian Child Welfare Act (ICWA). Witness was not required to be member of tribe or have experience or expertise providing tribal services to qualify as expert witness under ICWA when basis for termination did not implicate cultural bias. Expert witness’s testimony was based on sufficient case-specific facts, including father’s problems with anger and domestic violence, and risk that abuse would continue. There was no contrary evidence that the witness disregarded.

Arkansas
DEPENDENCY, REVIEW HEARINGS
Following review hearing, trial court granted permanent custody of mother’s three children to two separate sets of relatives and closed case. State statute specifies what must be addressed at each review hearing. Appellate review of trial court record confirmed there were no findings based on evidence presented at review hearing regarding best interest of children, thus granting custody without such evidence was reversible error.

California
TERMINATION OF PARENTAL RIGHTS, INDIAN CHILD WELFARE ACT
Parents appealed termination of parental rights to child. While appeal was pending, juvenile court issued postjudgment order finding child welfare agency complied with Indian Child Welfare Act (ICWA). Appellate court would not augment record on appeal with events occurring in postjudgment hearings six months after termination order. Juvenile court lacked jurisdiction to rule on ICWA issue after it terminated parents’ rights.

Connecticut
In re Jacklyn H., 2016 WL 301077 (Conn. App. Ct.).
DEPENDENCY, CONFIDENTIALITY
Statute allowing disclosure of records of dependency cases to employees of judicial branch did not provide employee of juvenile probation department unlimited access to court-ordered psychological evaluation report prepared during parental neglect proceedings without prior notice and hearing. Trial court was required to conduct full hearing before disclosing report to daughter’s juvenile probation officer.

Florida
In re S.M., 2016 WL 275273 (Fla. Dist. Ct. App.).
TERMINATION OF PARENTAL RIGHTS, CONSENT
Trial court terminated incarcerated father’s parental rights and denied his motion to set aside father’s implied consent to termination that resulted from his failure to appear at adjudicatory hearing. Public policy favors adjudication on merits over entry of default. Properly filed motion to vacate consent to termination of parental rights by default should be liberally granted. Father consistently asserted he did not abandon children and that mother kept children from him so that he could not provide support or forge meaningful relationship with them.

Kentucky
TERMINATION OF PARENTAL RIGHTS, EFFECTIVE ASSISTANCE OF COUNSEL
Mother and father were entitled to new termination of parental rights hearing after they were denied effective assistance of counsel. Child was abused while under care of mother and father. Child welfare agency believed termination was only option due to lack of identity of perpetrator of child’s abuse. Counsel had conflict of interest from which prejudice was presumed based on his representation of both mother and father.

Maine
In re Aiden, 2016 WL 61058 (Maine).
TERMINATION OF PARENTAL RIGHTS, MENTAL HEALTH
Mother and father appealed termination of their parental rights to children. Father failed to make good faith effort to rehabilitate and reuniﬁy with his three children. Even though there was no expert testimony regarding mother’s mental health diagnoses, mother testified to her own diagnoses and she was inconsistent in her medicine management and treatment. Appellate court denied parents’ appeal and afﬁrmed termination order.

In re C.P., 2016 WL 308874 (Maine).
TERMINATION OF PARENTAL RIGHTS, DUE PROCESS
Parents’ due process rights were not violated in termination of parental rights proceeding when trial court adopted order drafted by child welfare agency’s counsel verbatim. Court considered three days of testimony, ﬁndings entered were fully supported in record, mother did not attend trial, and father conceded his unﬁtness. Further, careful analysis by successor judge who entered amended judgment reafﬁrming termination minimized any prejudice that could have arisen from mechanism used to generate initial judgment.

Massachusetts
In re Douglas, 2016 WL 617432 (Mass.).
TERMINATION OF PARENTAL RIGHTS, VISITATION
Trial court acted within its discretion in denying visitation following termination of mother’s and father’s parental rights. Mother continually failed to maintain appropriate boundaries with one child and lacked signiﬁcant bond with her other ﬁve children. One child had never met father, another had last seen father as an infant, and father’s last visit with another child was almost one year before trial.

Missouri
In re E.G.G., 2016 WL 364265 (Mo. Ct. App.).
TERMINATION OF PARENTAL RIGHTS, SEXUAL ABUSE
Evidence was sufﬁcient to support ﬁnding of signiﬁcant likelihood of future harm to children if father’s parental rights were not terminated. Father was incarcerated for sexually abusing his daughters. Both children exhibited acting-out behaviors and had sleep issues. One child asked to have her last name changed to avoid embarrassment. Father was prohibited from any contact with children, and testimony established that children would be relieved if they knew father was permanently out of their lives.

Nebraska
In re Miah T., 2016 WL 400169 (Neb. Ct. App.).
DEPENDENCY, DOMESTIC VIOLENCE
Juvenile court order requiring unmarried father to attend domestic violence intervention course and victims’ impact group before he would be considered as placement for child who had been removed from home.
from mother’s custody was reasonable. Although provisions were unrelated to circumstances that caused child to be adjudicated dependent, there was evidence that father might not be able to provide child with home free from domestic violence, including evidence of alteration with mother after juvenile court proceedings began.

**New Jersey**


In dependency proceeding against parents, trial court improperly shifted burden of persuasion to father to prove he did not cause injury to 25-day-old child in fall from bed. Mother always claimed she placed child on bed and left him there, and parents never wavered in their assertions that father was in another room when child cried out.

**New York**


After mother’s termination of her parental rights was reversed, juvenile court changed permanency plan to adoption, and mother appealed again. Appellate court found that permanency hearing lacked form and substance and trial court failed to found that permanency hearing lacked form and substance.

**New Jersey**


Court properly exercised its discretion in permitting child welfare agency officials to amend answer in § 1983 action to assert affirmative defense of qualified immunity in parents’ action alleging that officials’ emergency removal of children violated their constitutional rights. In emergency situations, where child is at imminent risk of harm, child may be removed from parent’s care without court authorization or parental consent.

**North Carolina**


Mother appealed termination of her parental rights to three children. Social worker’s hearsay testimony about information in child welfare agency report was admissible under business records exception to hearsay rule. Social worker was qualified to introduce report because she was an author of report, and majority of report contents had been admitted in prior hearings.

**South Dakota**


When indicting defendant on six counts of first-degree child rape and six counts sexual contact with a minor, prosecution was not required under double jeopardy principles to elect specific acts to coincide with each count. Defendant was not punished twice for same crime in convictions on three counts of first-degree child rape arising from incidents at residence where he lived with victim and victim’s mother. Evidence supported defendant’s conviction on each count because showing was made that each type of act occurred twice or more.

**Texas**

*In re B.J.C.*, 2016 WL 444612 (Tex. App.). TERMINATION OF PARENTAL RIGHTS, MENTAL DEFICIENCY

Mother suffered from permanent cognitive deficiencies that rendered her unable to provide for physical, emotional, and mental needs of children. Deficiencies persisted over seven years children were in and out of child welfare agency’s care despite financial, psychological, and educational assistance to mother. Mother failed to progress and show she could independently parent children or obtain assistance of responsible adult.

**Vermont**

*In re T.M.*, 2016 WL 556196 (Vt.). TERMINATION OF PARENTAL RIGHTS, CONCURRENT GOALS

Father appealed termination of his parental rights to two children. Child welfare agency failed to meet threshold burden of demonstrating by clear and convincing evidence that sufficient changed circumstances existed to modify previous disposition order establishing concurrent goals of reunification and adoption. Father’s use of undetermined amount of marijuana was insufficient to show such substantial departure from case plan goals that it amounted to stagnation, and he continued to play constructive role in children’s lives.

**Virginia**

*Vasquez v. Commonwealth*, 2016 WL 550280 (Va.). DELINQUENCY, LIFE WITHOUT PAROLE

Sixteen-year-old defendant broke into townhouse of college student, raped her at knifepoint, and threatened to kill her if she resisted. He was convicted of 18 felonies. On appeal, defendant claimed aggregate term-of-years sentences imposed by court violated Eighth Amendment’s prohibition of cruel and unusual punishment. Prohibition against life-without-parole sentences for juveniles who were not convicted of homicide does not extend to non-life sentences that, when aggregated, exceed juveniles’ normal life expectancies.

**Washington**


Father failed to show extraordinary circumstances justified extension of time to file untimely appeal of dependency and disposition order. Standard that applies to appeal of criminal conviction does not apply to parent’s motion to extend time to file untimely appeal of dependency and disposition order. Unlike state constitutional right of criminal defendant to appeal conviction, there is no state constitutional right to appeal dependency and disposition order.

**Wyoming**

*Griggs v. State*, 2016 WL 393165 (Wyo.). ABUSE, HEARSAY

Defendant was convicted of four counts of first-degree sexual abuse involving two minors who disclosed abuse to their foster mother. Her testimony about statements made by victims was offered to prove truth of matters asserted, not merely to explain effect on hearer, and was therefore hearsay. Testimony about victims’ reports of abuse was very detailed, including statements about specific sexual acts and identification of defendant as perpetrator, and none of those details were necessary to explain what foster mother or others did next.
State Efforts to Limit Solitary Confinement for Juveniles

- The Massachusetts Department of Youth Services rarely uses solitary confinement for more than two hours.¹
- The Ohio Department of Youth Services has reduced solitary confinement to an average of 2.83 hours.²
- Pennsylvania permits seclusion only to prevent a child from injuring himself or others, and seclusion may not last longer than four hours unless extended by permission of a licensed clinician. A facility may not employ seclusion for longer than eight hours in any 48-hour period without a court order. Mississippi no longer uses solitary confinement in its facility that houses youth charged as adults.³
- Nebraska, Virginia, and California are all considering legislation limiting solitary confinement for youth.⁴

Sources:
¹Presentation of Nancy Carter, Director of Residential Operations, Massachusetts Department of Youth Services, Juvenile Detention Alternatives Initiative Intersite Conference, April 18, 2013.

(Cont’d from front page)

Kalief’s experiences at Rikers and committing suicide at age 22.

President Obama also made it clear that solitary confinement does not make facilities safer or deter dangerous behavior.⁵ The President banned solitary confinement for juveniles in federal custody, and enacted several reforms related to solitary confinement in federal facilities based on recommendations from the Department of Justice. Although it may be referred to by various names—segregation, separation, exclusion, seclusion, or room confinement—solitary confinement is a widespread practice, affecting thousands of youth in the justice system. In light of widespread opposition to using solitary confinement on young people, advocates in these systems may have new tools at their disposal to help clients.

Even short periods of solitary confinement can have serious, life-threatening effects on youth, including trauma, psychosis, depression, anxiety, increased risk of suicide and self-harm, and increases in problematic behavior. Many youth in solitary do not receive appropriate education, mental health services, or drug treatment. Facilities often use solitary confinement for vulnerable youth with unaddressed mental health, behavioral, or developmental needs. Research shows that more than half of all suicides in juvenile facilities occurred while young people were held in isolation.³

Both the President’s ban and the Department of Justice’s Report and Recommendations Concerning the Use of Restrictive Housing highlight a growing national consensus that we must eliminate solitary confinement for children, and that such a result is possible. Recently, a bipartisan group of senators introduced federal legislation limiting use of solitary confinement for youth in federal custody to situations in which the youth poses a serious and immediate threat of physical harm, and then only for periods of no more than three hours.⁶ Leading professional standards, including those developed by advocates⁷ and correctional administrators,⁸ provide that isolation or confinement of a youth to his or her room should be used only to protect the youth from harming himself or others and, if used, should be supervised and last only until the youth is no longer an immediate threat.

In addition to the Justice Department, professional organizations, including the American Academy of Adolescent and Child Psychiatry, the American Psychiatric Association, the American Public Health Association, and the American Bar Association, all support ending use of solitary confinement for youth. Many states have also taken legislative or policy action to eliminate the use of solitary confinement for youth, including Ohio, Massachusetts, Indiana, Pennsylvania, Mississippi, California, Nebraska, and Virginia (see State Efforts to Limit Solitary Confinement for Juveniles).

Practice Tips

Attorneys representing young clients can incorporate these national developments into practice in several ways:

Identify youth who are in solitary confinement. One of the most basic steps is to learn if clients are being subjected to solitary. Advocates should regularly visit their clients at facilities and ask about conditions of confinement. Attorneys should recognize that young people may not readily volunteer information about being in solitary, or even refer to it as “solitary confinement.” Advocates can also ask courts to order facilities to provide regular information about a youth’s progress, including information about any use of isolation. If the facility does not comply, advocates can seek judicial enforcement of the disposition order by filing a motion for a post-disposition review.
Apply laws, regulations and policies. Another strategy for advocates is to understand and apply the applicable statutes, regulations, and policies that govern solitary confinement in facilities that house youth. If an agency or facility violates its own policy on the use of solitary confinement, advocates can seek relief by contacting the agency or facility directly, or filing a motion before the court. Likewise, since solitary confinement disrupts treatment and education, attorneys can hold facilities accountable for denying youth these basic rights.

Seek assistance from federal agencies. Advocates can also contact outside agencies to address solitary confinement. Advocates can contact the Special Litigation Division of the U.S. Department of Justice or the Office of Civil Rights of the U.S. Department of Education, especially as youth in solitary confinement are denied education or treatment. Another source of assistance is Protection and Advocacy (P & A) programs, which are mandated and funded by federal law. P & A programs exist in every state to provide representation and protect the rights of people with disabilities, which includes many youth held in solitary confinement. Attorneys can find their local P & A program through the National Disability Rights Network.

Montgomery v. Louisiana Affirms Life without Parole for Children Must Be Rare

The Supreme Court has affirmed what children’s rights advocates already know: children are fundamentally different from adults. Four times in just over a decade, the U.S. Supreme Court has held that children are constitutionally different from adults for sentencing purposes in light of children’s diminished culpability and heightened capacity for change. The most recent of the Court’s youth sentencing decisions—Montgomery v. Louisiana—held as retroactive its 2012 decision in Miller v. Alabama, which banned mandatory life without parole sentences for children as cruel and unusual punishment under the Eighth Amendment. Montgomery means thousands of people sentenced to life without parole as children are now eligible to be resentenced. And because Montgomery is clear that “the penological justifications for life without parole collapse in light of the distinctive attributes of youth,” life without parole must be reserved for the rare—if not impossible—circumstance in which a child’s crime reflects “permanent incorrigibility.” Montgomery creates a strong presumption against life without parole for children, even children who commit serious crimes.

Henry Montgomery, the petitioner in Montgomery, has spent more than 50 years in prison for a crime he committed at age 17. Yet at trial, because his life without parole sentence was statutorily mandated, he was precluded from presenting mitigating evidence to the sentencing court that his crime reflected “transient immaturity.” Therefore his punishment was “disproportionate under the Eighth Amendment.”

As the Court highlighted in its opinion, mitigating “evidence might have included Montgomery’s young age at the time of the crime; expert testimony regarding his limited capacity for foresight, self-discipline, and judgment; and his potential for rehabilitation.” Mitigating evidence is central to a sentencing court’s analysis of the constitutionality of a life without parole sentence imposed for an offense committed by a child, because a “lifetime in prison is a disproportionately sentence for all but the rarest of children.”

Specialized Representation Needed for Children Facing Life in Prison

Montgomery stresses Miller’s call for specialized representation of children facing life in prison. Last year, the Campaign for the Fair Sentencing of Youth published the Trial Defense Guidelines: Representing a Child Client Facing Life in Prison (“Guidelines”). The Guidelines draw from the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases in the capital punishment context and the NJDC National Juvenile Defense Standards in the juvenile court context. The Guidelines, endorsed by over 50 national and state organizations, are rooted in the understanding that representing a child in adult court facing a life sentence is a specialized practice.

Representing a child facing life in prison requires experience investigating and presenting mitigating evidence at sentencing, and experience working with child clients. The Guidelines outline a team approach, calling for a minimum of four qualified defense team members: two attorneys, one investigator, and one mitigation specialist. At least one
attorney must have relevant substantive experience representing child clients, and at least one attorney must have experience investigating and presenting sentencing mitigation evidence.

Any attorney who represents a client facing life in prison for a crime committed as a child should assemble a qualified team, consistent with the Guidelines, to conduct a robust mitigation investigation into who that child was at the time of the crime. The mitigation investigation will serve as the factual foundation for why the client’s crime reflects transient immaturity and therefore the imposition of life without parole would violate the Eighth Amendment under Miller and Montgomery. Trial proceedings must “take into account how children are different, and how those differences counsel against irrevocably sentencing [children] to a lifetime in prison.”

Looking Forward

January’s developments are part of a larger wave of reform in how communities and the justice system view and treat young people, and a growing recognition that some past practices and policies were ineffective. There is cause for optimism in juvenile justice beyond the President’s action and the Supreme Court decision on Montgomery.

The U.S. Senate is now closer than it has been in almost a decade to reauthorizing (with much-needed updates) the federal Juvenile Justice and Delinquency Prevention Act (JJDPA), our nation’s flagship legislation that sets baseline—and some aspirational—standards for how all young people who come into contact with the justice system should be treated. Thanks to bipartisan leadership from Judiciary Committee Chairman Senator Charles Grassley (R-IA) and Ranking Member Senator Sheldon Whitehouse (D-RI), the JJDPA is closer than it has been in a long time to aligning itself with the most current science and knowledge about what works in juvenile justice.

There are other new, bold efforts afoot that respond to what’s happening in the field and across the country. For instance, the Office of Juvenile Justice and Delinquency Prevention recently launched the “Police and Youth Engagement: Supporting the Role of Law Enforcement in Juvenile Justice Reform” program (with the International Association of Chiefs of Police and the Coalition for Juvenile Justice). This program seeks to improve relations between young people and law enforcement.

In his editorial for the Washington Post, President Obama said the “United States is a nation of second chances, but the experience of solitary confinement too often undercuts that second chance.” Many child advocates would agree the President’s words could be applied to juvenile justice in general, along with many other exciting developments in the field, the recent wins for children can lead to second chances for many more young people in the juvenile justice system. While there is still much work to do, we hold great hope for what comes tomorrow.

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Endnotes

1 Note: This article was adapted from: Pilnik, Lisa and Marie Williams “Yesterday Was a Huge Day for Youth Justice. Tomorrow Could Be Even Better.” Huffington Post, January 26, 2016.

2 Experience in youth corrections systems like Ohio, Indiana, Massachusetts, and Oregon shows reducing use of isolation improves the safety of facilities and decreases violence involving youth and staff. The director of the Ohio Department of Youth Services, which dramatically reduced use of solitary confinement in 2015, stated that solitary confinement “does not make facilities safer. It does not prevent violence or reduce assaults on staff and youth; instead, as the department’s data showed, it increases violence. Reed, Harvey J. “Ohio Implements Path to Safer Facilities.” Corrections Today (77):55, September/October 2015. 26.


10 Montgomery, 136 S. Ct. at 734 (internal citations omitted).

11 Id.

12 Id. (internal citations omitted).

13 Id. at 735.

14 Id. at 726.

15 Id. (internal citations omitted).


17 Miller, 132 S. Ct. at 2469.
It Doesn’t ‘Get Better’ for Some Bullied LGBT Youths

Since 2010, more than 613,000 people have pledged to combat bullying of lesbian, gay, bisexual and transgender (LGBT) teens as part of the “It Gets Better” campaign. And a new Northwestern Medicine study has found that most adolescents would agree that it does, in fact, get better. But not all.

Discrimination, harassment and assault of LGBT youths is still very much a problem for about a third of adolescents, the study found. What’s more, it’s often very severe, ongoing and leads to lasting mental health problems such as major depression and post-traumatic stress disorder (PTSD).

“We tend to think that society is evolving but we can’t just accept this narrative that ‘it gets better’ and think it gets better for everyone,” said Brian Mustanski, an associate professor in medical social sciences at Northwestern University Feinberg School of Medicine and director of the new Northwestern Institute for Sexual and Gender Minority Health and Well-being.

Mustanski was happy to see that the majority of the 248 youths in the study (84.6 percent) experienced decreasing levels of victimization over the four years. But 10.3 percent experienced significant increases in bullying, and 5.1 percent maintained high levels of victimization over the four years. Mustanski was struck by just how severe the treatment was.

“There are kids who I’m seeing doing really well, and they’re lucky enough to see that lessen over time, and then there are kids who are continuing to be highly victimized,” Mustanski said.

Accumulation of victimizations was the key difference in Mustanski’s study from previous research that focused on a single period of time. While a single incident can have an impact on a young person, Mustanski’s study found that an adolescent’s depression and PTSD was exacerbated when these assaults built up over time. And even youths who began high school getting severely bullied but were lucky enough to see that lessen over time were still at a higher risk for PTSD.

“The LGBT youths who were at the highest risk for mental health problems were those who experienced moderate harassment (i.e. having something thrown at them) that increased over time or adolescents who continually experienced high levels of victimization (i.e. physical or sexual assault) over the course of the four years. Accumulation of victimizations was the key difference in Mustanski’s study from previous research that focused on a single period of time. While a single incident can have an impact on a young person, Mustanski’s study found that an adolescent’s depression and PTSD was exacerbated when these assaults built up over time. And even youths who began high school getting severely bullied but were lucky enough to see that lessen over time were still at a higher risk for PTSD.

Alc confusion, the majority of targeted LGBT youths are doing well and are “resilient,” but for the group of adolescents getting severely victimized, something drastic needs to be done.

LGBT youth who was repeatedly assaulted for his sexual orientation over time.

“If that’s your experience for several years of high school, you can imagine how scarring that would be,” Mustanski said.

The study in 2007 began examining Chicago youths who identified as LGBT or reported having same-sex attraction. It assessed the teens’ mental health at baseline and in seven interviews over four years and found that females were more likely to be in the group that was getting victimized less over time than men. Boys experienced physical and verbal assault more than girls, Mustanski said.

“We were happy to see that for most kids, the levels of victimization were lower overall or decreasing over time. But we were struck by how severe it was for some of these kids who were getting highly victimized over their four years of high school,” Mustanski said.

Overall, he said it is important to note that the majority of targeted LGBT youths are doing well and are “resilient,” but for the group of adolescents getting severely victimized, something drastic needs to be done.

He hopes the study’s findings will help schools clearly see these patterns of LGBT bullying so they can intervene with policies and programs to help prevent the behavior and provide coping mechanisms for those who are being targeted.
Conflicted Over Confidentiality: Indiana Ethics Opinion Says Lawyers Not Always Obligated to Report Child Abuse

by David L. Hudson Jr.

Indiana law requires anyone “who has reason to believe” that a child is a victim of abuse or neglect to “immediately” make a report to the state department of child services or a local law enforcement agency. Failure to make such a report constitutes a Class B misdemeanor. Unlike similar laws in some other states, the Indiana statute does not specifically exempt lawyers from the reporting requirement.

Nevertheless, the Legal Ethics Committee of the Indiana State Bar Association has concluded that the obligation of lawyers to report cases of child abuse or neglect is not absolute. Instead, the committee says in its Opinion No. 2 of 2015 (http://ymcdn.com/sites/www.inbar.org/resource/resmgr/2015-ethics-op-2.pdf), a lawyer’s duty to report is limited by the lawyer’s obligation to protect client confidentiality. Rule 1.6 of the Indiana Rules of Professional Conduct states that a lawyer “shall not reveal information relating to the representation of a client unless the client gives informed consent” or one of a limited number of exceptions apply.

The Indiana rule on confidentiality closely tracks Rule 1.6 of the ABA Model Rules of Professional Conduct. The Model Rules are the basis for binding ethics rules in every state, although California follows a different format.

The key relevant exception in Rule 1.6 provides that “a lawyer may reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.” Accordingly, the Legal Ethics Committee states in its opinion, “lawyers must report information relating to child abuse or neglect if they believe it necessary ‘to prevent reasonably certain death or substantial bodily harm,’ regardless of the client’s wishes. However, a lawyer may not report information of lesser harm absent the client’s consent.”

“This issue presents a doubly difficult situation,” says Charles Geyh, who teaches professional responsibility at Indiana University’s Maurer School of Law in Bloomington. “First, it pits the public and their elected representatives against the bar by putting the bar in the awkward position of defending the sanctity of lawyer-client confidences in a context where there is likely to be little sympathy for preserving the confidences of child abusers and where the virtue of universal reporting seems obvious. Second, it pits the legislature, which regulates the general public and has imposed a universal duty to report, against the judiciary, which regulates the bar and has imposed significant duties on lawyers not to report.”

Experts disagree over whether the Indiana bar’s ethics opinion strikes an appropriate balance between the mandatory reporting statute and the duty of confidentiality under the professional conduct rules.

The Rules are the Rules
The opinion acknowledges the “conflict between the lawyer’s ethical duty to keep silent and the apparent statutory duty to speak.” But given the Indiana Supreme Court’s “authority over the legal profession, its Rules of Professional Conduct control over conflicting legislation.” To conclude otherwise, says the committee, would violate separation-of-powers provisions set forth in the state constitution.

Moreover, the opinion states, “requiring lawyers to protect their client’s confidences likewise protects the attorney-client relationship—at a time when it is most needed.” The committee notes that Comment 2 to Rule 1.6 describes confidentiality as “a fundamental principle in the client-lawyer relationship” that encourages a client “to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.”

But, “if attorneys are mandatory reporters, this ‘fundamental principle’ is undermined regardless of when the lawyer discloses the potential for reporting,” the opinion states.

The opinion also cites Comment 6 to Rule 1.6, which states that the rule “recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm.” This approach allows an attorney “to make a commonsense, reasonable determination of whether the children will be subject to ‘reasonably certain death or substantial bodily harm,’ and only disclose to prevent that harm.”
A Difficult Dilemma

Experts disagree over whether the Indiana bar’s ethics opinion strikes an appropriate balance between the mandatory reporting statute and the duty of confidentiality under the professional conduct rules.

“The ethics opinion strikes an appropriate balance, given the competing interests at stake,” Geyh says. “The opinion concludes that the statutory duty to report all child abuse applies to lawyers in those instances where supreme court-imposed ethics rules permit, but do not otherwise require, a lawyer to disclose—namely, where reasonably certain death or substantial bodily harm are at issue. The corollary conclusion, however, is that the statutory duty to report does not apply in instances where lawyer ethics rules flatly prohibit disclosure—namely, where lesser forms of abuse are at issue.”

Peter A. Joy, who teaches ethics at Washington University School of Law in St. Louis, comes to a different conclusion. “The opinion does not reach the correct result under either the plain language of the Indiana reporting law or the Indiana ethics rule on client confidentiality,” he says. “The committee surely thinks it has reached the right result, but it would be better to change the Indiana reporting statute and the confidentiality ethics rule than to strike some compromise that is not supported by the plain language of either the law or the ethics rule.”

The statute, Joy says, “requires anyone, including a lawyer, who has reason to believe that a child is a victim of abuse or neglect to make an immediate report to either the department of child services or a local law enforcement authority. Unlike reporting laws in many other states, Indiana does not exclude lawyers from mandatory reporting of suspected child abuse. The ethics opinion, though, states that a lawyer only has to follow the law and report child abuse or neglect necessary ‘to prevent reasonably certain death or substantial bodily harm,’ which is the standard in Indiana’s confidentiality rule for permissive reporting of a client’s confidence.”

Joy says this conflict between the statute and the ethics rules creates potential risks for lawyers. “Any lawyer in Indiana who relies on the ethics opinion and does not report suspected child abuse that the lawyer thinks is not threatening reasonably certain death or substantial bodily harm is running two risks if the nonreporting is discovered,” he says. “The first risk is that the lawyer has just violated the explicit language in the statute and would face criminal charges if a prosecutor so decided to prosecute. The ethics opinion does not and could not bar such a prosecution, and the opinion even states at the start that it ‘does not have the force of law.’

The second risk is that the lawyer could also face professional discipline if bar disciplinary counsel and the Indiana Supreme Court disagree with the ethics opinion. In my opinion, any lawyer in Indiana who relies on this ethics opinion would be going out on a limb if the lawyer does not report suspected child abuse or neglect.”

Geyh agrees that the Indiana opinion can create a difficult dilemma for lawyers. “The opinion does not make life easy for the lawyers involved,” he says. “A lot rides on the lawyer’s assessment of whether a given episode of abuse implicates ‘substantial’ bodily harm, and I don’t envy them that judgment call. But there is no easy resolution here—every option entails promoting one core value at the expense of another. This seems as reasonable a resolution as any.”

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How to Get Results on a State Taskforce: 
An Interview with Marissa McClellan
by Sally Small Inada

In the February issue, CLP looked at what practitioners might consider if they were asked to serve on a state taskforce. The article covered potential pros: good for career and agency—and cons: heavy time and work commitment. CLP now talks with Marisa K. McClellan, Solicitor, Dauphin County Children and Youth, about serving on Pennsylvania’s statewide taskforce to implement HB 4980, the Strengthening Families Act. This conversation highlights McClellan’s experiences, and skills required to produce results on a state taskforce.

Q&A Tell us about Pennsylvania’s taskforce.

This federal law, HB 4980, covers sex trafficking, reasonable and prudent parenting standards, and revisions to the permanency option APPLA—Another Planned Permanent Living Arrangement. The taskforce is looking at ways to better protect and monitor victims of sex trafficking that are part of the foster care system; provide older youth with a more “normal” experience in foster care by looking at such things as driving privileges and the ability to join in afterschool activities; and increase the age for APPLA.

Q&A What goes on during a typical meeting?

What’s interesting to me are the opinions. There are a lot of related but diverse views shared by attorneys, caseworkers, different agencies, police. It’s interesting to read the same document and get the huge variety of responses. People react according to their discipline. With attorneys, for example, parent attorneys are thinking of their clients, agency attorneys are thinking how to represent the agency, children’s attorneys think about the kids.

It’s important to have that diversity. DHS (Pennsylvania’s state department of human services) does a good job pulling the group together. If someone’s not included, we don’t know what we miss. It’s dangerous to not get all the possible views.

We get materials and documents before the meeting. I prep by reviewing the legislative bills, Power Points, drafts, and opinions. If I’m on a subgroup, we often have a phone conference or two between meetings. I also have to review the materials for the subgroup to make that call count. Most times the group has time set on the agenda for each workgroup to report back on their topic—that way the group hears what each group comes up with and how they got there.

DHS looks for parent attorneys who are actively involved in the field. For example, Philadelphia and Pittsburgh both have groups of attorneys who focus on child welfare cases. The important factor is making sure many views and professions are represented so there is better buy-in across the state so when it comes time for implementation, there is greater statewide support. Of course, not everyone agrees on everything but we try to come up with compromise and collaboration when possible.

Q&A Taskforce days can be intense and busy. You talked about being prepared; what else goes on?

We have to prepare and be ready—we are there for a whole day, but time is tight. We’re usually in a big room with 16-18 round tables, with anywhere from 40 to 80 people in that room, plus people calling in. We have to follow the agenda to get everything done.

Mornings will have reports and presentations, with open discussion to go over certain aspects. There’s a microphone on each table so we can give feedback. Phone people have to be assertive to get their comments heard.

Afternoons we break out into smaller groups, maybe we need to refine something from the morning. It can also be a new subgroup—we volunteer on topics of interest. If we can get it done in one meeting, we’ll report back at the end of the day.

My main frustration is redundancies in the discussions. It’s understandable: people can’t be at all the meetings, so they miss one and then want to express their opinion on something already discussed. We have to keep updating—it feels like getting stuck in a rut and we risk losing momentum.

We meet one day a month, so for a taskforce lasting a year, that’s 12 days. I have to review materials at night, so probably two-five hours a month for review—maybe more if I’m on a subgroup. Often a subgroup needs more work than can be done in one day, so we meet by phone biweekly, review documents, discuss back and forth. I estimate I spend about 120 hours per taskforce.

Q&A What’s your main focus for your taskforce involvement?

I’m interested in all of the provisions,
but I volunteered for the normalcy provisions subgroup. I’m interested in how they’ll work in practice. (PA just began implementing the normalcy provisions in January 2016. Foster parents can take children on overnight trips or allow school activities that would previously need a judge’s permission.) Before if I couldn’t get a parent to allow their child to do an activity, we had to ask the judge: Can Susie go on this trip? Be in a school musical? Play soccer? Now the judge won’t hear about Susie’s activities.

I’m excited and nervous about the travel out of town on sport or band trips. It’s a big change. I’m used to arranging court orders if a child went out of town. One foster child is in a choir with the foster family; they went out of town every weekend to New York. So I’d go to the judge and get an order from November to March allowing weekend travel. Now that foster family can take the child without the court order.

I’m not worried about liability; it’s more of a habit of cluing the court in on everything via the orders. Actually maybe I am a little worried about liability, because before I knew we had the judge’s stamp of approval.

In some ways it’s freeing, in some ways—more work. By getting the orders we were always checking in with the kids and the court got a good idea how and what the children were doing. It goes to supporting child well-being. If we got orders for a lot of school activities, then children were engaging in school, keeping up with friends, likely adjusting fairly well. Now I’ll have to interview the foster parents more, write another report for the court summarizing children’s activities. There’s never been a new law that didn’t come with extra work.

You are there to provide results. Without results, we risk being seen as a waste of time and time is a luxury child welfare agencies don’t have.

Q&A

How did PA get ready to implement the normalcy provision?

Pennsylvania’s caseworkers had to be trained by December 2015 so they could begin putting the normalcy provisions into action in January 2016. The Child Welfare Resource Center provided the training. I think it took a couple months to set up, and was ready to go by November. It’s really good, I took it. It’s interactive, takes an hour on the computer (available at: www.pacwrc.pitt.edu/Curriculum/PL113-183.html).

Q&A

As a practitioner, do you come back (from the taskforce) and solicit colleagues’ opinions? How does your role as solicitor inform your work on the taskforce?

Absolutely I get feedback! I had big questions on successor guardianship (from another taskforce), what clearances are needed at the time the guardian is named? Who’s in charge? I kept interviewing our business manager about how the [successor guardian] process was handled and what the sticking points were. I’m always asking colleagues “Practice-wise, what do you think?” or “How is it going to help? How’s it going to impact practice?” I can be pretty assertive with my questions, but the county definitely derives a benefit. That’s probably why they send me.

Q&A

Do you have any advice for someone who is considering serving on a taskforce?

Look into and research the taskforce issue. Look at current case law and dig into what resources are out there. Realize that you go to assist, not just be educated. You give to the group. Our workgroups use expertise and experience to get results. For novices or new people, it can be a take vs. give experience and could weigh the group down. You are there to provide results. Without results, we risk being seen as a waste of time and time is a luxury child welfare agencies don’t have.

One way to get experience but not slow down a work group is to shadow a current member. Offer to do research or gradually take over some responsibilities when you’re up to speed.

Q&A

Any last thoughts?

Lots of people, even practitioners don’t know the state does this (taskforces). We collaborate—people from the trenches, getting together to solve problems and do it in a neat way.

Sally Small Inada, MA, is marketing and communications director at the ABA Center on Children and the Law, Washington, DC.

The ABA Center on Children and the Law is pleased to partner with several other Technical Assistance providers in Pennsylvania including the Pennsylvania Office of Child, Youth and Families, Child Welfare Resource Center, Statewide Adoption and Permanency Network, and the Administrative Office of PA Courts. As part of the collaboration, counties receive targeted services to help children and families in the child welfare system achieve better outcomes around safety, permanency and well-being.

This article was supported by the PA Permanency Barriers Project. For information about the project, visit: http://bit.ly/1PgLWjS
Do fast-track adoption policies speed adoption rates? A recent study by the Center for State Child Welfare Data, Chapin Hall at the University of Chicago finds they have little effect. The study is the first to examine if differences in state adoption policy explain differences in state adoption rates.

Fast-track adoption policies are used to speed permanency for children in foster care who cannot return home safely. Federal statute defines seven fast-track criteria that allow states to forgo working toward family reunification and move immediately to terminate a parent’s rights. An eighth criteria relating to time permits states to petition to terminate parental rights when a child has been in foster care for 15 of 22 months. States may also build on these fast-track criteria.

The Study
Using data from Chapin Hall’s Multistate Foster Care Data Archive, the researchers studied 214,286 children in 20 states who entered foster care between 2006 and 2007. Outcomes for these children were observed through December 31, 2011.

The states’ adoption policies were classified on two dimensions:
1. Strength of adoption policies—states with more fast-track exceptions, especially relating to parental fitness and safety, were deemed to have stronger adoption policies, while states with fewer fast-track criteria were deemed to have weaker adoption policies;
2. Approach to TPR timeframes—states were divided into those that used the federal 15/22 month provision, or those that allowed a shorter (faster) timeline than the federal guideline.

Fifteen of the 20 states had 11 or more “fast-track” exceptions in their state adoption policies. Five states had 18-20 “fast-track” exceptions listed. Most states used the 15/22 month federal guideline, while six states adopted a shorter timeframe.

Findings
The adoption rate of all children in the study was about one in five (19%), with variations across states in the speed and likelihood of adoption. The researchers found the states with more fast-track exceptions did not have faster adoptions than states with fewer exceptions. Along the same lines, states with shorter timeframes than the federal 15/22 month guideline did not finalize adoptions faster than states with longer timeframes.

The researchers said one reason for the findings relates to the role of terminating parental rights (TPR) in the adoption process. States must terminate parental rights before making a child available for adoption. They must also find adoptive homes for the children and take the necessary legal steps before completing to adoption process. Just speeding up the TPR process through “fast-track” exceptions and shorter timelines would not make the other preadoption activities more efficient, according to the researchers.

—Claire Chiamulera, CLP Editor


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**ABA CLE**

I’ve Got Your Back; You’ve Got My Ear: Suicide Prevention in the Legal Profession

Suicide and factors associated with suicide, like depression and substance abuse, pose a significant danger in the legal profession. This month’s ABA Free CLE Series seeks to educate attorneys, judges, and law students on how to recognize the warning signs of suicide, and effective ways to help colleagues who may be at risk for suicide. Participants will learn about the ethical responsibilities when, as a result of a mental health or an addiction problem, the performance of a colleague falls below the standards set by the Model Rules of Professional Conduct or applicable state rules. Participants will have the opportunity to ask questions of the presenters.

Register: [http://tinyurl.com/nu7t7pg](http://tinyurl.com/nu7t7pg)

Cost: Free for ABA Members. $195 for nonmembers.

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**Date:** March 21, 2016  
**Time:** 1:00 PM - 2:35 PM ET  
**Credits:** 1.50 Ethics/Professionalism CLE Credit Hours  
**Panelist(s):** Charles Stuart Mauney, Katherine Bender, Lynn S Garson  
**Moderator(s):** Terry L Harrell  
**ABA Sponsor(s):** Center for Professional Development, Center For Professional Responsibility, Commission on Lawyer Assistance Programs, Young Lawyers Division
School-to-Prison Pipeline Expands with Innovative Diversion Efforts

The school-to-prison pipeline that draws children out of public schools and into the criminal justice system has long been understood to disproportionately affect young people of color. A new study released February 5 at the American Bar Association Midyear Meeting also shows that schools are failing lesbian, gay, bisexual and transgender youth at a similarly disparate rate.

The preliminary report, prepared by the ABA Joint Task Force on Reversing the School-to-Prison Pipeline, says the impact of this problem—on both the individual students and society overall—are even greater than previously believed.

“We have seen a distinct shift over the past few decades in how school administrators and teachers discipline students who violate school rules,” said Jason P. Nance, a professor at the University of Florida College of Law and co-author of the report. “Years ago, they handled most of these incidents internally, but today it’s becoming more common for schools to refer students to law enforcement just for routine matters.”

According to U.S. Department of Education Civil Rights Office data for the 2011-12 school year cited in the study, schools referred about 260,000 students to law enforcement. In addition, about 92,000 students were arrested on school property during the day or at a school-sponsored event.

The number of student suspensions and expulsions also has dramatically increased in recent years. For that same period, about 3.35 million students were suspended at least one time and 130,000 students were expelled. As with referrals to law enforcement and arrests, a majority of these actions “resulted from only trivial infractions of school rules,” according to the report.

Nance told the story of a five-year-old girl who had thrown a temper tantrum during an exercise counting jelly beans and was taken to the school administrator’s office. Although she had settled down, the school called the police. Upon arrival, they handcuffed the girl, arrested her and put her in the back of a cruiser for three hours, even though her mother had arrived shortly after the incident.

“Years ago, they handled most of these incidents internally, but today it’s becoming more common for schools to refer students to law enforcement just for routine matters.”

Nance then pointed to a situation a few years later involving the arrest of 6-year-old girl who also had thrown a tantrum at a school event. The police had to put handcuffs around her biceps because her wrists were too small. She was transported to the county jail, where she was fingerprinted, photographed and charged with a felony and two misdemeanors.

“I don’t think we can underestimate what it means when a student is referred to the criminal justice system,” Nance said. “The long-term detrimental effects on youth include things like reinforcement of violent attitudes, and more limited educational, employment and military opportunities as a result of not finishing high school. This may be the least effective way to rehabilitate youth.”

On top of that, he said, “the costs are astounding. They average $148,000 per year per juvenile. Just compare that with the amount spent educating a child, which is about $12,000 a year.”

Beth Kransberger, a legal educator and education consultant who moderated a panel discussion of the report, said that while researchers have documented the racial disparities in the school-to-prison pipeline for decades, the pipeline’s impact on LGBT youth has only recently begun to draw attention. The report found that these students face similar disproportionate negative treatment and are more likely victimized.

“They are more likely to be confined instead of placed on probation or put into a diversion program,” the study said. “And they are less likely to have access to meaningful education to allow them to graduate from high school and prepare for higher education and work opportunities.”

LGBT youth are up to three times more likely to experience criminal justice and school sanctions than students who do not identify as such, according to research cited by Kransberger. In addition, one-third drop out of school to escape violence and harassment that administrators fail to address. She also wanted to make clear that higher rates of punishment did not correlate with higher rates of misbehavior among LGBT students.

Panelists agreed on the central role of the public school system in the pipeline to prison, a realization that came to attorney Maryann Kotler when she began handling cases involving youth offenders. The 24-year veteran of the San Diego Public Defender’s Office moved to the juvenile division after working with adults for six years.

“After transferring to the juvenile
division during the summer, I noticed that things were very slow,” Kotler said. “So I turned to one of the older attorneys and said, ‘Boy, it’s dead around here.’ And he replied with just two words: ‘School’s out.’

“That’s when I realized my case-load was consumed with charges for incidents that occurred at school,” she said, “from the typical playground fight to other low-level offenses.”

Kotler also said the charges were disproportionately filed against low-income students and students of color. “That was my introduction to the school-to-prison pipeline long before it had a name.”

Kotler is now actively working with police, prosecutors, probation officers and judges to try to reverse the flow. Among them is the San Diego district attorney, Bonnie Dumanis, herself a member of the LGBT community.

Their offices have begun several innovative diversion efforts, including an Alternative to Detention program. A Community Conferencing program brings all parties to an incident together to try to avoid a trial and the usual consequences. They also have launched what Kotler calls a road show—often including a judge—that visits schools to increase the all-around level of understanding.

“We’re certainly not perfect,” said Dumanis, “but we are chasing perfection.”

The task force plans to submit policy recommendations to the ABA House of Delegates’ Annual Meeting next August in San Francisco. Its preliminary proposals include a call for legal representation for students at the point of exclusion from school; development of training modules on implicit bias for all decision makers along the school-to-prison pipeline; elimination of zero-tolerance policies in schools; and support for eliminating criminalization of student behavior that does not endanger others.

Kransberger said it also was time for the legal profession to take a hard look at itself in the area of diversity and inclusion.

“We will be a majority country of color by 2043, which is sooner than the previous forecast of 2050,” she said. “And 2014 was the first year that a majority of children under five were children of color.”

As for the legal profession, Kransberger said, “After leveling off for a few years, we have actually gotten less diverse, with 11 percent lawyers of color.”

Janel George, senior education policy counsel of the NAACP Legal Defense and Education Fund, pointed out the role implicit bias plays all along the school-to-prison pipeline.

She reminded the town hall audience that Trayvon Martin was serving a school suspension at the time he was shot and killed while visiting his father in the gated community of his father’s fiancée.

The African-American teenager’s death sparked a national debate over racial profiling and the role of armed neighborhood watch members.

This article first appeared in Your ABA News Bulletin: Updates from the 2016 Midyear Meeting, February 10, 2016. © 2016, American Bar Association. All rights reserved.