Will We See Improvement? The **Individuals with Disabilities Improvement Act of 2004** by Linda Boyd

The **Individuals with Disabilities Education Act** ("IDEA"), federal law designed to provide educational rights for children with disabilities (known as “special education”) has recently been reauthorized as the **Individual with Disabilities Education Improvement Act of 2004** ("IDEIA"). To avoid confusion, I will refer to the recently reauthorized Act as “IDEA 2004,” which became fully effective on July 1, 2005. When this law was last reauthorized in 1997, advocates for children with disabilities approved of the increased protections of the rights of parents and children. Many educational advocates see IDEA 2004 as a reversal of those increased protections. In this article, I intend to highlight the most significant changes in the law and address the impact those changes may have in ensuring that children with disabilities receive a free appropriate public education ("FAPE"), which is the foundational premise of special education.

**Congressional Findings and Purposes**

Originally, Congress found this law necessary because of the frequent institutionalization or lack of education for children with disabilities. The initial law was designed to simply get children with disabilities through the door of the schoolhouse. Protections have increased over the years to ensure that once these children are inside, they might be offered a “basic floor of opportunity” to learn something. Some of the most important new language found in IDEA 2004 occurs in Section 1400 of the Congressional “Findings and Purposes.” Section 1400(c)(4)(A) appears to heighten a Local Education Agency’s

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Roper v. Simmons and Its Application to the Daily Representation of Juveniles by Hillary Harrison Gulden

Roger v. Simmons was an incredible victory for juveniles. Thousands of children’s attorneys took a sigh of relief upon discovering that seventy-two (72) juveniles on death row no longer faced that cruel fate. However, the Supreme Court’s decision in Simmons affects many aspects of juvenile advocacy beyond capital punishment. The Children’s Rights Litigation Committee of the Section of Litigation along with the Continuing Legal Education Committee of the American Bar Association co-sponsored a Teleconference on June 22, 2005 ("Teleconference") wherein experts on Simmons explained some of the ways this case may be used in the daily representation of children. The majority opinion in Simmons covers three major areas: evolving standards of decency (or national consensus), international law, and adolescent development.

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From the Chairs

The Children’s Rights Litigation Committee (CRLC) is committed to the vision that children need and deserve high quality legal representation. Utilizing the Litigation Section’s greatest resource, well-trained, superb lawyers, the committee works toward the creation of pro bono children’s law projects across the country. The Committee also continues to provide materials and programs to increase the quality of representation for children. Following are a few of the recent activities of the committee. We hope that one or more will interest you and possibly serve to provoke more pro bono efforts for children in your area.

As always, please feel free to contact us to discuss how to get involved in the Committee.

The committee recently sponsored a national teleconference on Roper v. Simmons, the Supreme Court case which ruled that the juvenile death penalty is unconstitutional. 301 people registered for this teleconference, a taped copy of which is now offered on-line on the committee’s web site (See page 1 for a summary of the call).

Our education subcommittee coordinated an excellent conference call for our members on the newly re-authorized Individuals with Disability Education Act. 59 people called in to hear the panel of national experts (see page 7 for an article describing this call).

CRLC is putting together a law student mentor initiative in which our law student members will be paired with experienced children's lawyers or judges in order to discuss a career in child advocacy. Our law student subcommittee is taking the lead on this project. Please contact our Committee Directory if you would like to receive or act as a mentor.

We provided a scholarship for an attorney who attended Training the Lawyer to Represent the Whole Child, a training program that we designed with the National Institute of Trial Attorneys (NITA), this past June at Hofstra University. This training will take place in 2006 in Minnesota.

The committee co-sponsored the ABA Children's Law Breakfast, August 6, 2005 at the ABA Annual Meeting in Chicago. This was an opportunity for children's lawyers throughout the ABA to gather and share information about their work.

The Committee presented “Litigating a Complex Child Abuse Case” at the 28th Annual National Association of Counsel for Children Conference, August 28, 2005 in Los Angeles. This program was a skills session that focused on a termination of parental rights case involving munchausen by proxy.

We continue to follow up on the Report on the Legal Needs of Harris County Children in Houston, TX. Three substantive projects have begun as a result of our work in Houston; projects which will provide legal services to children who were

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**Roper v. Simmons (continued from page 1)**

The History of the Case

Christopher Simmons was convicted of abducting and killing Shirley Crook when he was seventeen (17). He was sentenced to death. The *Simmons* case challenged the United States Supreme Court to review their decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989), which held that the juvenile death penalty was constitutional, in light of *Atkins v. Virginia*, 536 U.S. 304 (2002) which ruled that the Eighth Amendment prohibits the execution of a mentally retarded person. *Atkins* overruled *Penry v. Lynaugh*, 492 U.S. 378 (1989), a decision issued the same day as *Stanford*. The crux of the *Atkins* case, which Simmons’ counsel relied upon, was the Court’s determination that mental retardation diminishes culpability.

The Analysis

*Simmons* marks the beginning of a legal epiphany regarding the fundamental structure and function of the adolescent brain. The majority recognized three general differences between juveniles and adults: a lack of maturity and an underdeveloped sense of responsibility lead to impetuous and ill-considered actions and decisions; juveniles are more vulnerable to outside pressures; and the character of a juvenile is not yet fully formed.

These findings of the Court were based on the *amicus curiae* brief of the American Medical Association (AMA), American Psychiatric Association, et al, which provided a clear, concise statement to the Supreme Court of the recent discoveries in adolescent brain development. There was no evidence presented at the trial level relating to brain development of adolescents.

The scientific research using magnetic resonance imaging (MRI) is still young, yet it provides good evidence for advocates to argue that children do have diminished capacity to formulate intent and, therefore, are less culpable than their adult counterparts for similar crimes. Relying on the scientific studies presented in the *amicus* brief of the AMA, the Court in *Simmons* determined that in fact juveniles’ have diminished culpability. Further, the majority states that this diminished culpability undermines the two justifications for the death penalty – retribution and deterrence.

Application to Delinquency Cases

Essentially new research provides conclusive evidence that supports the argument that juveniles under the age of eighteen (18) are less culpable for their actions than are adults. Psychosocial maturity does not occur until the age of nineteen (19) at which time some experts say it levels (other experts would say the brain

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**From the Chairs (continued from page 2)**

previously going unrepresented. The Houston Volunteer Lawyers Project is considering hiring a part-time children's law coordinator to work on these projects and potentially begin other projects to meet recommendations of the Report. Our committee continues to provide mentorship to Children’s Legal Services of Houston (CLSH), a project begun in 2004 by Barbara Stalder, an Equal Justice Works Fellow. CLSH was recently awarded a 2005 ABA Child Custody & Adoption *Pro Bono* Project grant in the amount of $15,000 in order to begin representing children in child custody cases.

Plans are well underway for an exciting 2005-2006 year. We hope to put together a training video on interviewing children, present more trainings and continue our work with lawyers who are starting or expanding a children’s law project. We would welcome your input and help as we continue to strive for high quality legal representation for every child who needs assistance.

Please contact our committee director, Cathy Krebs, or either of us for more information.

Ann Barker is returning to private practice and will focus on family representation and mediation.

Angela Vigil is the North American Director of *Pro Bono* and Public Service for Baker & McKenzie LLP. Her full-time pro bono practice includes representation of children in juvenile justice, appeals, family law, education law and various civil matters.
continues to develop into the 20s).\(^7\) “In short, teenagers are prone to making bad judgments.” \(^8\)

Adolescents have the ability to distinguish right from wrong. They also have the ability to perform cost-benefit analysis. However, there are “deficiencies in the way adolescents think,” which create inaccuracies in their ability to “perceive and weigh risks and benefits.” \(^9\) Adolescents place greater emphasis on immediate and short-term consequences. Additionally, juveniles tend to concentrate their thoughts and actions towards opportunities for gains rather than limiting exposure for losses resulting in more risky conclusions and actions. \(^10\) Teenagers who have suffered “brain trauma, a dysfunctional family life, violence, or abuse cannot be presumed to operate even at standard levels for adolescents.” \(^11\)

To best comprehend the physiological evidence for these conclusions, there are six terms that must be understood:

**Amygdala:** Existing within the limbic system (emotional center of the brain), this “almond-shaped mass of gray matter in the anterior portion of the frontal lobe” \(^12\) is associated with “aggressive and impulsive behavior. . . It dictates instinctive gut reactions, including fight or flight responses.” \(^13\)

**Frontal Lobe:** The part of the brain “lying directly behind the forehead” \(^14\) which through the neocortex and prefrontal cortex govern the executive functions such as “response inhibition, emotional regulation, planning and organization.” \(^15\)

**Neocortex:** Higher level thought function such as “perception, thinking, and reasoning.”

**Prefrontal Cortex:** “[A]ssociated with a variety of cognitive abilities, including decision making, risk assessment, ability to judge future consequences, evaluating reward and punishment, behavioral inhibition, impulse control, deception, responses to positive and negative feedback, and making moral judgments.” \(^16\)

**Myelination:** “The process by which the brain’s axons are coated with a fatty white substance called myelin [also referred to as ‘white matter’].” \(^17\) The myelin coat assists the axons to carry electrical impulses that contain information across long distances by insulating the pathway, speeding the neural signal along. \(^18\) Myelination is an indication of brain maturity.

**Pruning:** Another indication of brain maturity, “brain cells that are not used shrivel off, thereby increasing the efficiency of the neural system,” \(^19\) resulting in a reduction of gray matter.

With the common use of magnetic resonance imaging (MRI) studies, researchers are able to glean three-dimensional images of the brain without the use of radiation. MRI technology, while expensive, permits scientists to study children over many years. \(^20\) For instance, ninety percent (90%) of the brain reaches adult size by the age of six (6). A growth spurt in the gray matter occurs later on prior to puberty, particularly in the frontal lobe. \(^21\) Pruning begins around the age of eleven (11) in girls and age twelve (12) in boys and continues on into the early or mid-twenties, particularly in the prefrontal cortex. Myelination also increases during adolescence and continues into adulthood occurring last in the frontal lobe. The myelination process may continue until roughly age forty-five (45). \(^22\)

Essentially, research has discovered that the frontal lobes are the last regions within which myelination and pruning are complete, leaving the prefrontal cortex which governs an individual’s social responses and behaviors immature until the early twenties. During the teleconference Dr. Mark Wellek quoted his colleague, Dr. Ruben Gur from the University of Pennsylvania as saying “When you are in a room and you feel threatened, the amygdala tells you to hit the person who insulted you whereas the prefrontal cortex tells you that you are at a cocktail party and therefore, should insult them back”. Dr. Wellek explained that the immaturity of children’s frontal lobe gives the insight that children know the difference between right and wrong, but do not yet have the brain structure to apply that information.
Roper v. Simmons (continued from page 4)

Dr. Wellek went on to explain that there is a difference between the structural brain and the functional brain. When a caller inquired more, Dr. Wellek expounded that the new research reveals the adolescent’s ability to make choices in the prefrontal cortex. In a calm environment an adult can assist a teenager in evaluating consequences, however, under stress a teenager will act on instinct and disregard potential consequences. The hormones in adolescents increase the size of the impulse part of the brain. This in combination with an immature prefrontal cortex means that instead of insulting someone at a cocktail party the adolescent is more apt to just hit them, as their amygdala is in control.

This research could be utilized in many delinquency cases, advocates need only find a qualified expert to explain the research to the court. Dr. Wellek advised that attorneys should not limit themselves to forensic experts. The National Juvenile Defender Center or their regional offices can assist attorneys in finding experts for specific cases (njdc.info).

During the teleconference Attorney Simmie Baer offered a new perspective on delinquency cases where the State has to prove the element of recklessness. She has developed the argument of a “reasonable adolescent standard” or a “reasonable culpability standard.” By arguing a lower standard it can help to minimize the expense of having to hire an expert. If the elements of the crime involve negligence, recklessness, knowing and intentional, Simmons provides precedence on a permanent state of recklessness of children. Specifically Attorney Baer refers to page 1195 of the decision where the Court specifically states, “The personality traits of juveniles are more transitory, less fixed [than adults].” (to illustrate that a juvenile’s ‘recklessness’ is different from that of an adult). This argument requires an adolescent development analysis which includes trauma, disability, and maturity. She further recommended that the more serious the case, the earlier the expert should be brought on board.

International Law

“It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom.” Roper v. Simmons at 1187.

The Court in Simmons follows a trend that has been evolving in recent Supreme Court decisions finding international law persuasive. During the Teleconference Attorney Steven Harper provided an excellent summary of some treaties and laws that advocates may avail themselves of in a variety of situations, particularly in arguing that certain punishments for delinquents violate fundamental international legal practices or jus cogens.

Based on the body of international law that exists against the sentence of life without possibility of parole for juveniles, this argument can be made in a variety of cases.

The Vienna Convention on Law of Treaties provides that signatory states cannot act contrary to the treaty they agree to. This poses problems for the United States because the International Covenant on Civil and Political Rights (ICCPR) was signed and ratified in 1992. Article 10, § 3 of the ICCPR provides: “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status” (emphasis added). The ICCPR further states in Article 14 § 4 that, “In the case of juvenile persons, the procedure shall be such as will take into account of their age and the desirability of promoting their rehabilitation.” By removing children from the traditional juvenile justice system, where the focus remained on support, treatment, and rehabilitation, and placing them into the criminal justice system where the focus is on deterrence and retribution, the United States is in violation of the ICCPR and the Vienna Convention on the Law of Treaties.

The United Nations Convention of the Rights of the Child (CRC) has been ratified by one hundred ninety two (192) countries; all countries, in fact except for the United States of America and Somalia. However, since former President William Clinton signed the treaty, there remain highly technical legal arguments under international law that might apply the CRC within the lower courts regardless of the ratification.

The CRC provides bare minimum rules that member states of the United Nations can use as guidelines in the care and well being of the world’s children. Some pro-
visions call for a child’s right of expression, good health care, and access to families. Specifically Articles 37 and 40 pertain to juvenile justice matters. Article 37(a) was cited in several amicus briefs filed in the Simmons case, as it specifically prohibits the juvenile death penalty (defining juveniles as being under the age of eighteen (18) years). The Supreme Court was moved by international statistics on the application of the juvenile death penalty and how that reflected on the American society. Based on that logic, practitioners might be able use the CRC along with gathered statistics to argue that certain punishments or placements are unacceptable based on President Clinton’s signing of the CRC. To illuminate the power of the CRC text, here are some excerpts from Articles 37 and 40:

Article 37(a) of the CRC provides in part that, “Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen (18) years of age.”

Article 37(b) goes further by stating, “The arrest, detention, or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”

Article 37(c), “[E]very child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.”

Conclusion

Attorney Baer summarized Simmons’s relevance when she stated that it gives us a new definition of “youth” and “adolescence.” It places reliance on science which has revealed that children are less culpable. Dr. Wellek added, that “we have to arm the judges and give them the justification to agree with us.” Attorney Baer agreed, “Our responsibility is to educate ourselves, [and] our judges.”

To hear this Teleconference in its entirety and view the accompanying materials please visit www.abanet.org/litigation/committee/childrens_l/ The Teleconference is free and CLE credit is given to those from states which allow it.

If you have used any arguments based on Simmons in your practice, please contact me and let me know the approach and result.

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1 Issued March 1, 2005. Can be found at http://njdc.info/pdf/ SimmonsDecision.pdf
2 Lauren Adams, Northwestern University School of Law, Chicago, IL; Simmie Baer, Defender Association, Seattle, WA; Steve Harper, Miami-Dade Public Defender’s Office, Miami, FL; Danielle Spinelli, Wilmer Cutler Pickering Hale and Dorr, Washington, D.C.; Dr. Mark Wellek, Phoenix, AZ. 3 Roper v. Simmons at 1195.
4 All amicus briefs for the Simmons case can be found at http://www.abanet.org/crimjust/juvjus/juvdp.html
5 Simmons at 1186.
6 Id.
8 Id. at 5
9 Id. at 6 (citation omitted).
10 Id. at 6 (citation omitted)
11 Id. at 20
13 AMA Amicus Brief, supra note 4, at 12 - 13 (citations omitted).
15 AMA Amicus Brief, supra note 5, at 13 (citation omitted).
16 Id. at 13-14 (citations omitted).
17 Id. at 17 (citations omitted).
18 Id.
19 Id. at 18 (citations omitted).
20 American Bar Association, Juvenile Justice Center, “Cruel and Unusual Punishment: The Juvenile Death Penalty; Adolescence, Brain Development and Legal Culpability,” “Janu-
The Education Subcommittee Takes on Zero Tolerance by Rosa Hirji

Zero tolerance policies in schools punish children irrespective of age, history, and circumstances surrounding the event. Such policies have adverse long-term consequences on young lives, and disproportionately impact minority, poor, and disabled students. Continuing issues of school safety make clear that zero tolerance policies have not succeeded in addressing the underlying concerns. In recognition of this, a resolution of the ABA equates zero tolerance to mandatory sentencing in the criminal justice system. The Education Subcommittee is pursuing this agenda item of the ABA by pushing this critical topic once again to public discussion and debate. The Subcommittee has embarked on two major projects, addressing the impact of the Individuals with Disabilities in Education Improvement Act 2004 on the discipline of students with special needs, and developing a model school discipline code.

IDEA ’04 and School Discipline

The reauthorized Individuals with Disabilities in Education Improvement Act 2004 (“IDEA ’04”) and proposed regulations grant schools increased authority to discipline students with special education needs. Will these changes undermine the legislative intent of the IDEA to provide students with a free and appropriate education in the least restrictive environment? Is the movement for zero tolerance encroaching the protections formerly granted to children with disabilities against discriminatory punishment?

To debate these issues the subcommittee held a teleconference for CLRC members entitled, “IDEA ’04 and School Discipline: Is the use of zero tolerance and school removal appropriate in the discipline of students with special education needs?” on July 7, 2005. This was the second in a series of discussions begun in October 2004. The conference call engaged three experts, Jose L. Martin, Esq., of Richards Lindsay and Martin, Sherri S. Sobel, Referee, of the Los Angeles Country Juvenile Court, and Russell Skiba, Ph.D., from the Indiana University School of Education. A dynamic discussion ensued on the appropriateness of the new law, the legal and practical implications on school discipline, and the impact of public comment on the proposed regulations. These and other issues went beyond the confines of the law to the real world impact on students, parents, and school officials. More than 60 participants from around the country attended and members reported that it was informative, lively, and thought provoking.

The removal of discretionary power from school administrators in making decisions about punishment (continued on page 8)

Roper v. Simmons (continued from page 6)


22 Id.
23 Simmons at 1195 (citations omitted).
24 Attorney Baer also suggested using the Americans with Disability Act where juveniles with diagnosed behavior problems are being arrested and punished for the manifestation of those disabilities.
25 An excellent summary of international instruments affecting juveniles can be found at www.internationaljusticeproject.org/juvInstruments.cfm
26 Black’s Law Dictionary, Eighth Edition defines jus cogens on page 876 as “A mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted.” Jus cogens is frequently used in reference to such offenses as genocide. Steven Harper in the Teleconference argued that Article 37(a) of the Convention on the Rights of the Child falls into this definition as well.
The Education Subcommittee Takes on Zero Tolerance  (continued from page 7)

is at the heart of zero tolerance policies. According to Mr. Martin, the new federal law supercedes the Gun-Free Schools Act by allowing school administrators to consider “any unique circumstances on a case-by-case basis” in deciding whether to recommend long-term suspension or expulsion, and returns authority to the individuals who can purportedly prevent the inadvertent consequences of zero tolerance. Panelists debated the level of public support for zero tolerance policies and whether this pressure would prevent school principals from utilizing their new powers. Would parents have a difficult time challenging the misuse of this provision, since one comment was that it is a discretionary power that could not be raised at a due process hearing?

The new law severely limits the discretion given to Individualized Education Program (“IEP”) Teams. This affects their ability to find a “manifestation determination” which would stop a long-term removal, allows crucial team members to be excused from meetings, and allows decisions to be made without the input of the IEP team at a “resolution session.” Furthermore, the right of the student to remain in their school placement pending the resolution of an IEP disagreement is removed even if the student is not considered a threat to others. Referee Sobel pointed out that in divesting authority from the IEP team, the law takes away the ability of those individuals closest to the child such as the teacher, and parent to make the right decisions. In placing increased control with school administrators the law makes it more likely that administrators will continue to abide by their district’s zero tolerance policies and ignore individualized circumstances surrounding the student with special needs.

While supporters present zero tolerance as a fair approach to discipline, Professor Skiba explained that equitable decisions rather than uniform decisions are more conducive to maintaining the trust and authority of school officials, and prevent the disproportionate impact on minority students. A proactive approach that stresses consistent positive behavior management practices will reduce the need for aggressive discipline.

Participants were encouraged to contact the Department of Education to make comments on the proposed regulations. As a result of the conference, several members have expressed their commitment to be come more involved in the work of the Subcommittee. Another conference call to discuss concrete steps in this area is being planned.

Model School Discipline Code Project

The Subcommittee is partnering with the Chicago School Taskforce to develop a model school discipline code. The goals are to, “address the unintended effects of zero tolerance policies while maintaining a focus on school safety; to develop guidelines and alternatives for school districts that are interested in them; to educate and equip attorneys, child advocates, parents, students, etc. with school discipline information and strategies; and to make these guidelines accessible to all through wide dissemination of the model code”.

An excerpt from the statement of principals formulates the philosophy underlying the project;

The Model School Discipline Code (MSDC) begins by rejecting the zero tolerance philosophy and the attendant criminalization of youth. Instead, the MSDC promotes critical school safety by joining concepts of traditional accountability and restorative justice to provide individualized responses to youth misbehavior. The message of restorative justice is that when a student misbehaves, he or she incurs an obligation to restore those affected to the state of well-being that existed before the misbehavior. Restorative justice focuses on keeping the misbehaving youth in school while he or she is disciplined as opposed to making him or her leave the school community. The MSDC builds on research that demonstrates that when schools use disciplinary methods that teach accountability without alienating students, school safety is enhanced.

Subcommittee members are involved in collecting and analyzing discipline codes from schools and districts around the country in order to identify examples of (continued on page 9)
ABA GOES ON RECORD IN SUPPORT OF FOSTER CARE REFORMS
By Miriam Aroni Krinsky

“It’s time for successes to be the rule, not the exception.” William H. Gray, Pew Commission on Children in Foster Care

Dependency courts play a uniquely proactive role in the life of the nearly one million abused and neglected children in our nation’s foster care system. The decisions issued in these courtrooms have a lifelong impact on the children and families who come before them, not only in deciding whether children will be placed in the protection of foster care and in monitoring the subsequent treatment and oversight provided by that system, but more broadly in crafting the future adult path of the youth we all collectively agree to “parent.”

Yet courts that oversee foster care cases often lack the tools and information needed to best provide for the children in their care. Nancy S. Salyers, Former Presiding Judge of the Cook County, IL Juvenile Court’s Child Protection Division and Co-Director of Fostering Results, aptly identified the impossible task judges face when not armed with the critical information needed to attend to the needs of children who come before them: “Where could I start if I didn’t know how many children I had in the first place? How would I know if this method or this protocol was being successful in achieving an outcome if I weren’t able to track the children or track the outcome?”

This summer, the American Bar Association House of Delegates unanimously passed a resolution supporting a number of key reforms to the vital legal system and processes that address the issues affecting foster youth. The resolution -- authored by the Children’s Law Center of Los Angeles and the Los Angeles County Bar Association, and receiving the support of many other Sections and groups (including the Section of Litigation) -- sought to respond to thoughtful recommendations by the Pew Commission on Children in Foster Care.

In a report issued last year, the national, nonpartisan Pew Commission recognized the essential, yet often overlooked, role played by the legal process in this

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The Education Subcommittee Takes on Zero Tolerance (continued from page 8)

disciplinary practices that work and which provide alternatives to zero tolerance. Thus far, members have discovered a small, but growing movement towards using concepts of restorative justice in school disciplinary practices, and are in the process of incorporating this exciting trend into the model code. The investigation phase of the project includes the creation of nationwide focus groups (consisting of teachers, community members, parents, police officers, etc.) to review the code, present input, contact and liaison with other groups who work on these issues, and interview experts. One focus group based in Chicago has already embarked on this activity.

Through this process, members have made contacts with groups and individuals working on relevant issues at a local level. The subcommittee plans to actively reach out to the public in order to bring together the concrete successes of local communities in a model that can be functional, accessible, and far reaching in its approach to school discipline.

The Subcommittee’s activities are expected to form the foundation of a long term and extensive engagement with this crucial issue. Members interested in participating in this endeavor are strongly encouraged to join the subcommittee.

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1 American Bar Association Journal, 2000; Criminal Justice Section Report on Zero Tolerance, 2001; Children’s Law Committee Section of Litigation Newsletter, 2000.
2 In 2001 the ABA adopted a Resolution opposing Zero Tolerance policies that automatically mandate expulsion or court intervention (01M103B) 2/01.
Foster Care Reforms (continued from page 9)

arena. Pew Commission recommendations -- addressing both court oversight and federal financing of foster care -- may be viewed on their Web site at www.pewfostercare.org.

The ABA resolution focused on key areas of the Pew recommendations dealing with the performance of dependency courts. Significant changes called for in the resolution include legal representation of foster youth; participation of youth in court proceedings; adequate compensation and reasonable caseloads for children’s lawyers; attracting and retaining the most highly capable attorneys and bench officers; encouraging collaboration among the courts, child welfare agencies, and other organizations; and establishing “top down” leadership from Chief Justices and Judges.

The ABA resolution endorsed the following reforms to the dependency court system:

• Children in foster care should have the right to effective legal representation in the court process. They should also be notified of their own court proceedings and given a meaningful opportunity to participate in them.

• There should be reasonable compensation for children’s attorneys and the establishment of loan forgiveness programs for lawyers who specialize in this area to help attract the most highly qualified attorneys and judges to juvenile courts.

• Judges and attorneys need to have realistic caseloads if they are to consider the full ramifications of their decisions and effectively advocate on behalf of children.

• Courts must have the ability and technology to manage their cases, track children’s progress through the system, execute federal and state mandates, and implement best practices.

• Attorneys and judges who work in dependency courts should have access to adequate, ongoing training due to the extremely broad range of issues associated with ensuring the welfare of abused and neglected children.

• Barriers that preclude communication and sharing of information among courts, child welfare agencies, and other institutions should be identified and eliminated. Children must not be dealt with on a piecemeal basis.

• Judicial leadership ought to play a critical role in facilitating reforms and providing support and oversight of dependency courts.

The resolution also urges Congress and state legislatures to support the dependency courts and the important work they perform through legislation and the provision of adequate resources for the legal process and all other parts of the system. The aim of the ABA measure is to create a juvenile court system staffed by respected and well-trained professionals who have sufficient resources, adequate information and enhanced support to attend to the needs of abused and neglected children.

The stakes, should these changes fail to be enacted, are enormous. As Pew Commission Vice Chairman, former Congressman William H. Gray, observed: “There are a half million human beings who could lose their potential. How many future doctors, how many teachers, how many lawyers, how many public servants are in that group? Because of instability, neglect, and abuse at the very beginning of life, because of no permanency and no family, we lose what they could become. That’s a loss you cannot measure.”

Miriam Aroni Krinsky is Executive Director of the Children’s Law Center of Los Angeles (CLC), a non-profit organization that serves as counsel for more than 20,000 abused and neglected children in the Los Angeles Dependency Court system. For more information about CLC or the Pew Commission work, please visit CLC’s Web site at www.clcla.org.

For assistance in starting a pro bono project within a law firm visit www.abanet.org/litigation/committee/childrens_l/ or call Catherine Krebs at 202 547 3060
Will We See Improvement (continued from page 1)

(“LEA”) responsibility to maximize a child’s potential to learn where it states:

However, the implementation of this title has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities, having high expectations for such children and ensuring their access to the general curriculum in the regular classroom, to the maximum extent possible, in order to meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and be prepared to lead productive and independent adult lives, to the maximum extent possible. (Emphasis mine)

Congress acknowledges the need for increased accountability with new language that leans toward maximizing a child’s potential by focusing more on proven research-based teaching methods; something many LEAs fail to implement. This language aligns IDEA 2004 with the mandates of the No Child Left Behind Act of 2002, enacted to improve the educational results of all public school children.

Meeting “developmental goals” is new language in this section that broadens and clarifies the scope of accountability for LEAs, especially in educating children with severe cognitive disabilities. For those children unable to achieve the success of their non-disabled peers, creating developmental goals allows them to maximize their potential to lead independent and productive adult lives, especially if provided necessary related services as mandated by IDEA 2004. Related services include such things as speech, occupational and physical therapy, counseling, and behavior intervention services. Before IDEA 2004, some LEAs would deny requested services as being based on a medical model (i.e., learning to tie your shoes is not necessary to becoming educated) versus an educational model (i.e. reading, writing, math). Under IDEA 2004, LEAs can be held more accountable for these services as assisting with achievement of developmental goals.

As a result of the above findings, Congress enhanced the purpose of the law to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living” (20 U.S.C. § 1400(d)(1)(A)). Preparing a student for “further education” is new language under IDEA 2004. In general, children who enter the special education system struggle to meet grade level standards and, ultimately, to attend college. Under IDEA 2004, there is increased accountability in order to make the potential for graduating with a diploma and going to college achievable.

Timelines

IDEA and IDEA 2004 contain some strict timelines for an LEA to follow to avoid “educational limbo” for a child with a disability. IDEA provided for a 50-day timeline for the school to complete assessments, write reports, and hold an IEP meeting to discuss the results and offer or deny special education and related services. IDEA 2004 increased the timeline to 60 days in an effort to accommodate LEAs who often struggle to meet the 50-day timeline (20 U.S.C. § 1414(a)(1)). The timeline only applies if the parent has been cooperative with the LEA in making the student available for the necessary assessments.

Foster Children

IDEA 2004 has expanded the definition of a parent to include foster parents for children in foster care (20 USC 1401(23)(A). Foster parents who previously encountered roadblocks to obtaining special education for their foster children due to lack of “parental authority” should have less trouble under IDEA 2004.

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Children with Specific Learning Disabilities

Previously, the IDEA required that a “severe discrepancy” be found between a student’s academic achievement and intellectual ability for the finding of a specific learning disability. Under IDEA 2004, LEAs are no longer mandated to use this model, but can choose to do so (See 20 U.S.C. § 1414(b)(6)). If the severe discrepancy model is not used, IDEA 2004 allows an LEA to use the “response to intervention” (“RTI”) process to determine the presence of a learning disability. The RTI process eliminates the “wait to fail” outcomes of the severe discrepancy model. Rather than waiting for a student to “fail” in certain educational areas by showing a severe discrepancy between intellectual ability and academic achievement, LEAs now can attempt to intervene with proven research-based methods when a student shows signs of a potential learning disability. The alternative process should be requested for students who show signs of a learning disability, but failed to qualify for special education previously. Unfortunately, there are no specific timelines attached to this process, making it difficult to know when to stop the attempted intervention in favor of finding the student eligible for special education.

Elimination of short-term objectives in the IEP

Under IDEA and IDEA 2004, specific goals related to a student’s unique needs must be written into the IEP. Previously, IDEA required that these goals be broken down into succinct short-term objectives for better tracking and accountability of a student’s progress. IDEA 2004 eliminated the required short-term objectives for students, except for those who are waived from taking state-wide assessments. Tracking student progress will be more difficult with the elimination of short-term objectives for many students receiving special education. The trade-off here is that LEAs are now required to include “functional” goals in the IEP, not just goals purely related to academics (20 U.S.C. § 1414(d)(1)(A)).

High School Transition Services

Under IDEA and IDEA 2004, students in high school are entitled to high school transition services. The goal of these services is to assist the student in preparing for life outside of the public school system. Previously, transition plans did little to assist the student, leaving many unprepared to enter the adult world through the workforce or college. Under IDEA 2004, beginning at age 16, students with an IEP are entitled to a transition plan that requires appropriate “measurable” goals that are based on age appropriate assessments related to training, education, employment, and independent living skills.

Transition from Early Intervention Services and Placement.

Under IDEA and IDEA 2004, children with disabilities from birth to age 3 may qualify for “early intervention” services through a state-appointed agency when a child is found to be at risk for developmental delays (20 U.S.C. § 1432). Previously, once a child reached age 3, the child was transferred to a placement within the LEA. IDEA 2004 provides more flexibility in allowing a child to remain in the current placement until entering kindergarten (20 U.S.C. § 1419(f)(5)).

Discipline of Students in Special Education: Part I

The disciplinary rules for students with an IEP are more detailed than can be provided in this article. Stay tuned for more information on these details in the upcoming “Discipline of Students in Special Education: Part II” which will be in the winter edition of the CRLC newsletter. For now, one major change involves what is called the “stay put” rule. Previously, a student was allowed to “stay put” in his/her current placement pending the results of any disciplinary proceedings or a due process hearing, unless parents and school officials agreed to a change of placement. Under IDEA 2004, the LEA now has the authority to consider, on a case-by-case basis, any unique circumstances when determining if the child’s placement should be changed as a result of the violation of the code of student conduct (20 U.S.C. § 1415(k)(1)(A)). Concerns over this change include the possibility that students with behavior issues related to their disability could be uprooted and placed in classroom after classroom with little or no assistance in determining how to manage the behavior and allow the student to be productive.

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Will We See Improvements (continued from page 12)

Statute of Limitations.

Previously, the statute of limitations for filing for a due process hearing was 3 years. IDEA 2004 lessens the statute to 2 years. State law can differ and should be researched.

Exhaustion of Administrative Remedies

IDEA 2004 adds a new layer of administrative exhaustion. Previously, parties could proceed straight to hearing and have a decision within the mandated 45-day timeline. Taking a hearing off-calendar to accommodate mediation was optional. Under IDEA 2004, a new resolution session must be held within 15 days of the receipt of the request for a due process hearing unless waived by both parent and LEA. The resolution session is meant to provide for informal discussion between parents and pertinent members of the IEP team. The LEA cannot have an attorney present unless the parent brings an attorney and attorney fees cannot be collected for making this appearance. Resolution occurs through a written settlement agreement with a 3-day escape clause where either party can void the agreement.

Reimbursement of LEA Attorney Fees

Under IDEA and IDEA 2004, attorneys representing parents can collect attorney fees from the LEA as the prevailing party. Under IDEA 2004, LEAs can seek attorney fees from parents or parent attorneys as a prevailing party under the same circumstances as the current FRCP rule (20 U.S.C. § 1415(i)(3)(B)). Some parent attorneys fear that the addition of this rule will have a chilling effect on the availability of an already small group of attorneys who specialize in this field.

Conclusion

In conclusion, some experts in this field see some of these changes as harmful to students and believe they are a result of Congress bowing to the pressures of LEAs that are struggling to keep up with the law due to budget and personnel shortfalls. However, many of us who specialize in this field see new opportunities to use the new language to create better educational outcomes for children with disabilities. □

Until recently, Linda Boyd served as the managing attorney of a special education legal/advocacy clinic and managed federal grant programs for the Children’s Hospital Los Angeles USC University Center for Excellence in Developmental Disabilities. Ms. Boyd is in the process of moving to a private practice, located in Oxnard, CA.

1 See Board of Education v. Rowley, 458 U.S. 176. The “basic floor of opportunity” means that the student must be making progress by maintaining a “C” average or by making progress in meeting educational goals.
2 Usually referred to as “school district”
3 Meeting “their unique needs” is previous language and foundational for determining the need for related services. Services should be based on a child’s unique needs, not on a formula used for all children with similar disabilities.
4 IEP means “Individualized Education Program,” a document prepared by an IEP team (made up of school officials and parents) that maps out a child’s special education placement and services. The 60-day timeline begins once a parent consents to the LEA assessment plan.
5 A “specific learning disability” is one of several specific categories under which a student can qualify for special education and related services (20 U.S.C. § 1401(3)(A)).
6 See 20 U.S.C. § 1414(b)(6). The RTI method involves the use of scientific research-based interventions to assess whether a student’s progress improves without the need for special education. The LEA first must attempt to remediate the student with proven interventions before making a final eligibility determination.
7 See 20 U.S.C. § 1414(d)(1)(A). IDEA mandated a statement of “transition services needs” beginning at age 14. The age 14 mandate has been eliminated in favor of specific goals starting at age 16.
8 Basic rule: If the LEA can show that the request for hearing was frivolous, unreasonable or without foundation, or if the parent attorney is shown to have continued to litigate beyond what was needed or presented issues for an improper purpose.

Tools for Young Lawyers can be found on the Section of Litigation’s webpage devoted solely to young lawyers:
www.abanet.org/litigation/younglawyers
Hurricane Katrina Action Alerts

Volunteer to Represent Victims Within the Child Welfare System

Many victims have been displaced to locations across the country, and many of these are children separated from their parents or legal guardians. Some are children who were in the affected states' child welfare system. Regardless, many of these relocated children and families will undoubtedly need child welfare-related legal help at some point.

The ABA has set up a Hurricane Katrina Volunteer Legal Assistance Database in which lawyers can indicate their willingness to volunteer and their specialty. One of the areas listed is ‘child welfare.’ To sign up visit: http://www.abanet.org/katrina/ and then click "I Would Like to Volunteer My Professional Legal Services". The ABA Center on Children and the Law will follow up with those lawyers who sign up.

Note that there are other areas of expertise listed, including education, immigration, family law and public benefits.

Juvenile Justice Project of Louisiana

The Juvenile Justice Project of Louisiana (JJPL) and Families and Friends of Louisiana's Incarcerated Children (FFLIC) are working to provide immediate hurricane relief assistance to families and children who have been displaced by the hurricane and who have connections to the juvenile justice community. This includes working to reunite families and children, trying to find appropriate placements for incarcerated youth set to be released who no longer have a home in New Orleans, and providing families with the assistance and advocacy tools necessary to secure temporary housing, federal and state financial support. In addition, they have set up two temporary satellite offices in other parts of Louisiana as well as a small office in Montgomery with the Southern Poverty Law Center in order to press local reform efforts and continue to push statewide reform. They hope to move back to New Orleans in the next few months.

For those of you interested in making a tax-exempt financial donation to JJPL and/or FFLIC, please feel free to designate on your checks whether you are making a donation to JJPL and FFLIC overall or specifically for the "FFLIC Hurricane Relief Fund" which goes to fund the immediate needs of displaced families and children with whom FFLIC is working (because FFLIC is a project of JJPL’s, all donations must be made out to JJPL, JJPL will then disperse donations accordingly). Either way, your support will absolutely be put to good use.

All cash donations made out to JJPL may be sent to Sonji Hart at: 392 Sisters Rd., Ponchatoula, Louisiana, 70454.
Announcements

♦ The Family Advocacy Program in Boston, MA will host two programs. The first “Medical-Legal Collaborations 101” will be held in Boston, Friday, October 28, 2005 from 8 a.m.—5 p.m. for newcomers to the medical-legal collaboration. The second, “Medical-Legal Collaboration—A National Summit,” will take place in San Francisco, CA, Friday, April 28, 2006 from 8 a.m.—5 p.m. for all active medical-legal collaboration sites across the country. For more information about either visit www.familyadvocacyprogram.org.

♦ The MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice has published “Clinical Evaluations for Juveniles’ Competence to Stand Trial: A Guide for Legal Professionals.” This guide is the end result of their Juvenile Competence to Stand Trial study and was developed with the assistance of judges and attorneys throughout the country. It can be ordered from Professional Resource Press by calling (800) 443-3364 or visit www.prpress.com/books/ej1.html

♦ The ABA Child Custody and Adoption Pro Bono Project, working with ABA CLE Now, has produced an online training program "Representing Children in Civil Domestic Violence Cases." This program is available free-of-charge on the ABA web site at http://www.abanet.org/cle/celenow/probonorepchildreg.html

♦ The Legal Assistance Partnership Project (LAPP), which pairs private firms with legal services agencies to bring impact litigation, recruited a private firm to handle the case of Doe v. Children of the World which was litigated in Essex County, New Jersey, Superior Court. In the first-known case of its kind, the plaintiffs challenged a private adoption agency’s refusal to provide services to the couple because one of them is HIV+. The couple already had successfully adopted one child through the agency and sought to open their home to a second child. The agency refused to consider their application when it learned that one of the partners was HIV+. The case was brought under federal and state laws prohibiting discrimination against people with disabilities, including HIV/AIDS. In the landmark settlement reached last month, the defendant agreed to publish a public apology, implement anti-discrimination policies and training, and compensate the couple for damages.

To learn more about LAPP visit http://www.abanet.org/litigation/lapp/

♦ Children in Georgia’s foster care system will live in safer, less crowded, and more stable conditions as part of a settlement agreement reached in a civil rights class action lawsuit brought against the state (Kenny A. v. Perdue, see Spring 2005 Edition of the CRLC newsletter). In June 2002, foster children, represented by Children’s Rights, Inc., a national organization that advocates for abused and neglected children, filed the lawsuit in the U.S. District Court for the Northern District of Georgia, alleging that Georgia’s Department of Family and Children Services (DFCS) violated the substantive due process rights of the 3,000 foster children in the custody of Fulton and DeKalb counties by failing to provide a safe and stable home environment for them. The plaintiffs also sued under federal and state laws. To remedy the deficiencies in the foster care system, Georgia agreed to: 1) reduce the number of cases assigned to each worker, 2) increase the sum it pays to foster parents, 3) find additional foster homes for children, 4) limit the number of children who live in emergency shelters, and 5) locate permanent homes for children who have bounced around the foster care system for a long time. [Children’s Rights, Press Release: Settlement of Class-Action Lawsuit Mandates Sweeping Reform of Foster Care in Atlanta, Georgia, July 5, 2005 (on file with the Brennan Center); Kenny A. v. Perdue, No. 1:02-cv-1686-MHS (N.D. Ga. July 5, 2005); also based on original reporting by Brennan Center staff. See also Legal Services E-lert of February 11, 2005.]

To find opportunities to volunteer to represent a child visit the ABA Directory of Pro Bono Children’s Law Programs at www.abanet.org/litigation/committee/childrens_l/publications.html
Visit the Children’s Rights Litigation Committee On-line at www.abanet.org.litigation/committee/childrens_l/