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ARTICLES

Zero Tolerance for Online Bullying Can Hamper Free Speech

By Frank D. LoMonte – September 28, 2012

America is at a “9/12 moment” in responding to the problem of online bullying—a time of incalculable grief in the face of tragedy in which no government response seems too hasty or extreme.

Heartbreaking headlines about young people hounded to suicide by online cruelty are provoking a wave of harsh punitive measures at the state and district levels. Statutes such as North Carolina’s School Violence Prevention Act of 2012, which criminalizes using photos of school personnel to mock or satirize them online, are rushing through state legislatures with little debate or opposition and with no apparent consideration of their constitutional implications.

In this panic-reaction climate, it is essential that advocates for children be prepared to defend victims of overzealous, zero-tolerance enforcement who may be suspended, expelled, or even criminally prosecuted for editorial commentary that is—or should be—protected by the First Amendment.

Defending the free expression rights of young people has never been more difficult. Courts traditionally hesitate to second-guess school administrators on disciplinary judgment calls, and school attorneys have successfully argued since the April 1999 Columbine shootings that even greater deference is warranted when dealing with students suspected of being unstable or violent.

Still, it is possible to challenge disciplinary excesses where a school’s response to unwelcome speech is unmoored to safety and appears instead to be an exercise in image control or in imposing subjective good-behavior standards on students’ personal, off-campus time.

School Punitive Authority Beyond the Schoolhouse Gate

In its seminal pronouncement on the First Amendment in public schools, Tinker v. Des Moines Independent Community School District, the Supreme Court decided in 1969 that schools may not punish students for peaceful protest activity, even on school grounds and during the school day.

Striking a balance between authority and autonomy in light of “the special characteristics of the school environment,” the Court decided that a school may not restrain student expression unless there is concrete evidence that the speech has provoked (or imminently will provoke) “material and substantial interference with schoolwork or discipline.”

In 2007, the Supreme Court created a narrow exception to Tinker in a case, Morse v. Frederick, that involved speech physically removed from campus (a pro-drug message on a banner that a student unfurled at a school-organized rally). The Court decided that student speech promoting the use of dangerous illegal drugs is so uniquely harmful that it is unprotected by the First Amendment even if no disruption ensues or is likely.
But the Court carefully avoided extending schools’ authority to purely off-campus behavior. Rather, the Court equated the rally to a field trip or other school outing—the event took place on a hill across from campus during school hours, under the supervision of school personnel, and categorized the student’s banner-waving as “school speech.”

In the absence of Supreme Court precedent, lower courts have struggled to arrive at a coherent legal framework under which to decide First Amendment cases involving off-campus speech.

There is a growing, but not unanimous, consensus that the *Tinker* legal standard applies equally to student speech regardless of where it occurs. Some courts have added an additional factor of foreseeability, but it is not clear whether it is sufficient that the student must foresee the disruptiveness of the speech or if simply foreseeing that the speech will reach a school audience is enough.

Two federal circuits, the Fourth and Eighth, have held outright that off-campus, online speech is punishable if the school can show that a *Tinker* level of disruption ensued or was likely. Those cases—*Kowalski v. Berkeley County Schools* (4th Cir. 2011) and *D.J.M. v. Hannibal Public School District* #60 (8th Cir. 2011)—involved perhaps the most unsympathetic speakers conceivable: a student who created a social-networking page ridiculing a classmate for having a venereal disease (*Kowalski*) and a student who chatted with classmates about his plans to acquire guns and shoot up the school (*D.J.M.*).

The Second Circuit flirted with the adoption of the *Tinker* standard in *Doninger v. Niehoff* (2d Cir. 2010), a case involving a student blogger who made uncivil remarks about administrators in the context of a school policy dispute in which she was involved.

While the *Doninger* court treated *Tinker* as the applicable legal standard at a preliminary stage of the case, it ultimately disposed of the case on the narrower grounds of qualified immunity for the defendant school principal without deciding whether the blog was entitled to the *Tinker* level of protection or something greater.

In a 2011 ruling, the *en banc* Third Circuit U.S. Court of Appeals declined to recognize *Tinker* as the appropriate standard governing speech on an off-campus, social-networking page. In *J.S. v. Blue Mountain School District*, the court struck down a Pennsylvania middle school’s suspension of a student who crudely ridiculed her principal in a mock profile page on MySpace.

While the court did not agree on a single rationale, five concurring judges expressed profound skepticism at the school’s argument that online speech is functionally on-campus and should receive no greater protection, saying, “Applying *Tinker* to off-campus speech would create a precedent with ominous implications. Doing so would empower schools to regulate students’ expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes a substantial disruption at school.”
The Supreme Court declined in 2012 to entertain petitions to review the J.S. and Kowalski cases. There do not currently appear to be any circuit-level rulings involving the online-speech scenario that are ripe for Supreme Court consideration in the coming term.

It is perilous to generalize from a handful of cases in the absence of Supreme Court guidance. Nonetheless, the takeaway from the first generation of student online-speech rulings appears to be twofold.

First, deference to schools’ punitive authority will, understandably, be at its highest when students’ speech portends violence, particularly violence directed against classmates. Second, deference to schools’ punitive authority will, properly, be at its lowest when speech targets public officials (such as principals) as opposed to vulnerable students.

Challenging School Discipline for Students’ Online Speech

There are powerful arguments against equating off-campus speech on the Internet with on-campus speech during school time. Except where bound by precedent, litigants should not lightly concede that the Tinker standard applies equally to all student speech regardless of location.

Tinker is a compromise struck in the unique setting of speech foisted on a captive audience of listeners who are statutorily compelled to attend. When a student speaks off campus to an online audience, the speech must be affirmatively sought out, and it can easily be avoided by clicking away.

When a student speaks on campus, the speech is intended exclusively for an audience of school listeners. Online speech is qualitatively different—it may be directed to a larger public audience. To require that students limit themselves at all times in all settings to speech that would be appropriate inside of a classroom is a radical proposition.

Because Tinker permits preemptive censorship before a disruption arises, schools can demand to preapprove written material students wish to distribute on campus. If an unmodified Tinker standard applies equally to off-campus speech, then a school could constitutionally require preapproval of letters to a local newspaper, interviews with a television station, speeches delivered to the school board, or any other off-campus expression.

A thoughtful court that is apprised of these far-reaching consequences will recognize Tinker as an insufficiently protective standard for speech outside of school.

Advocates should also carefully review the statutes and regulations under which students are punished. Having been hastily enacted in response to headline-grabbing cases, many state anti-bullying statutes encompass conduct well beyond what is punishable under any known constitutional standard.

For example, New Jersey’s Anti-Bullying Bill of Rights Act, which took effect at the start of the 2011–2012 school year, defines bullying as including acts based on any actual or perceived characteristic of a student that would reasonably be expected to cause the student emotional...
harm. The law requires neither that the harm be severe nor that there be any connection between the harmful activity and school.

This definition would include, by way of illustration, an off-campus chat message in which a boyfriend tells his girlfriend, “I’m breaking up with you because you are pregnant.” While that is dreadful behavior, it almost certainly is outside the constitutional jurisdiction of a public school to punish.

Because it cannot be assumed that all judges and jurors are fluent with the workings of electronic media, attorneys should familiarize themselves with the applicable platform and be prepared to explain how it works. There is a tendency to regard all electronically transmitted communications as potentially viral speech accessible to a worldwide audience for eternity—even if actual viewership is in the single digits.

For example, if a student’s account on Twitter is set to “protected,” then the student’s tweet posts are viewable only by readers the student has approved. A nonpublic Twitter posting may reach an audience no larger than the student’s own cafeteria table, and its ability to disrupt school may be no greater than that of a cartoon scrawled on notebook paper.

**Case Study: T.V. v. Smith-Green Community School Corp.**

Even if *Tinker* does supply the standard for determining when online speech is constitutionally unprotected, that is just the starting point. Where speech merely provokes conversation on campus and nothing more, the reaction will not rise to the level of a punishable disruption.

That was the case in *T.V. v. Smith-Green Community School Corp*. Two Indiana high-school volleyball teammates were disciplined for the content of a comical slumber-party video they shared with their Facebook friends. In the video, the (fully clothed) girls goosed each other playfully with penis-shaped lollipops. The mother of another volleyball player complained to the school that the girls’ behavior was causing dissension on the team.

A U.S. district judge overturned the punishment, finding that the school had overstepped its First Amendment boundaries.

The court assumed without deciding that the online video was subject to school authority under the *Tinker* standard, but found that the alleged level of disruption—basically nothing more than gossip and chatter—did not cross the threshold of “substantial” or “material.”

Significantly, the court in *Smith-Green* rejected the notion that punishment is insufficiently severe to rise to the level of a First Amendment violation if it “only” deprives a student of eligibility for extracurricular activities:

> That there is no constitutional right to participate in athletics or other extracurricular activities may be pertinent to an analysis of other sorts of constitutional claims . . . but as *Tinker* itself notes, not to a freedom of expression claim.
In non-school contexts, the Supreme Court has made clear that government punishment can violate the First Amendment even if it does not deprive a speaker of a constitutionally protected interest. It is sufficient that the punishment is meant to deter further acts of lawful expression and would in fact deter a speaker of reasonable fortitude.

When the speaker is a student, however, some courts have given decisive weight to the relative leniency of the punishment. Schools have been afforded essentially unreviewable discretion to impose minor penalties such as disqualification from a class office (the Second Circuit’s Doninger ruling), from cheerleading (Doe v. Silsbee Independent School District, 5th Cir. 2010), or from an athletic team (Lowery v. Euverard, 6th Cir. 2007).

But in July 2012, a New Jersey appellate court found that, under state law, a school could not require a student to sign a blanket waiver of rights as a precondition for taking part in extracurricular activities.

In G.D.M. and T.A.M. v. Board of Education of Ramapo Indian Hills Regional School District, the Superior Court Appellate Division ruled that New Jersey law limited schools to punishing only behavior that “materially and substantially interferes with” school operations. Because the school was asking students to accept punishment for any unlawful off-campus behavior—even speeding or jaywalking—the requirement went beyond the school’s statutory authority.

The G.D.M. outcome reemphasizes the importance for litigants of considering the state-law basis for school disciplinary authority as well as any constitutional claims.

A challenge to the withdrawal of extracurricular participation will fare best if there is legal authority in the state that sports and clubs are a part of the bundle of free public education to which students are constitutionally entitled. Even if no such authority exists, the deprivation should still be actionable if it is intended to deter the exercise of First Amendment rights and would be reasonably expected to do so.

**Non-First Amendment Bases for Challenge**

While the First Amendment is the obvious resort when a student is punished for the content of speech, alternative legal theories at times offer a more promising avenue for relief. Even where speech is of minimal societal value, making a free-speech claim unpalatable, courts that hesitate to protect low-value speech may still be willing to protect the integrity of the disciplinary process.

Discipline is unlawful under the Due Process Clause if the applicable statute or regulation failed to give warning that the behavior was punishable. Under the Due Process Clause, courts have struck down disciplinary action against students under school regulations penalizing the abuse of school personnel (Killion v. Franklin Regional School District (W.D. Pa. 2001)), the wearing of distracting clothing (Miller v. Penn Manor School District (E.D. Pa. 2008)), or behaving with ill will (Sypniewski v. Warren Hills Regional Board of Education (3d Cir. 2002)) where those terms were not carefully defined so as to delimit the boundaries of punishable conduct.
Some state constitutions—for example, those in Arizona, Texas, Oregon, and Vermont—are even more protective of free expression than the U.S. Constitution. Wherever a state has a free-speech clause in its constitution, a federal First Amendment claim should be accompanied by a state claim.

Finally, laws singling out only students for punishment of their off-campus speech may be vulnerable to challenge on equal-protection grounds. This is a point alluded to by Judge Smith’s five-judge concurrence in the Third Circuit’s J.S. decision:

Adults often say things that give rise to disruptions in public schools. Those who championed desegregation in the 1950s and 60s caused more than a minor disturbance in the southern schools. Of course, the prospect of using Tinker to silence such speakers is absurd.

A statute constraining only students’ off-campus expression—such as North Carolina’s 2012 criminal prohibition against posting photos of school personnel online with an intent to torment them—is likely violative of equal protection because a nonstudent can engage in the identical behavior in the identical setting without penalty. While this theory has yet to be tested in a published judicial opinion, Smith’s reasoning in J.S. suggests at least some judges will receptively entertain it.

**Case Study: J.C. v. Beverly Hills Unified School District**

In 2009, a California high-school student successfully challenged her two-day suspension over a YouTube video that was created and posted outside of school. The student, “J.C.,” shot a video of several friends at a restaurant, swapping crude insults about a classmate, then uploaded the recording to YouTube—and called the classmate at home to make sure that she saw it.

The mocked student and her mother complained to the principal at Beverly Vista High School, who suspended those responsible under school district regulations prohibiting “behavior which disrupts school activities” and the use of “vulgar, obscene or insulting language.”

In **J.C. v. Beverly Hills Unified School District**, a federal district court for the Central District of California ruled in the student’s favor on both First Amendment and due-process grounds.

On the due-process theory, the court found that a reasonable person would understand the prohibitions against disruptive behavior and insulting language to apply only during school activities and not on personal time. Fortifying that common understanding was the school district’s own rulebook, which provided in part, “A pupil should not be suspended or expelled . . . unless that act is related to school activity or school attendance occurring within a school under the jurisdiction of the superintendent of the school district or principal.”

Neglecting to raise a due-process claim at the earliest opportunity can result in a damaging waiver. In the Third Circuit’s J.S. case, the student was disciplined under a regulation plainly inapplicable to her behavior—unauthorized use of school computers on school grounds—because the district had no regulation making off-campus speech punishable. But because
counsel failed to plead a due-process theory, this “elephant in the room” went overlooked, and an easy constitutional case became a wrenching one.

**Conclusion**

Justice Brennan famously observed in *NAACP v. Button* that “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” The courts too often invert that presumption when the speaker is a student and the government agency is a school. The speaker and not the censor must always be given the benefit of the doubt in uncertain cases, or else speakers will self-censor so as not to cross an indistinct boundary line.

There is a growing recognition that promoting student participation in the dialogue about school policy is an essential part of developing engaged citizens. As Justice O’Connor’s Campaign for the Civic Mission of Schools recommended in its September 2010 report, *Guardian of Democracy*, “Schools should encourage student participation in school governance.”

A heavy hand of school censorship is inconsistent with training inquisitive citizens to take ownership of their democracy. Given how avidly many school administrators censor on-campus speech by students engaging in legitimate editorial commentary or whistleblowing activity, giving them equivalent control over off-campus speech carries grave risks.

It may be tolerable in the name of good order for a principal to prevent a student from marching down the hallways during school hours, picketing for the removal of an abusive coach, but off-campus, on personal time, the student must necessarily have the benefit of Justice Brennan’s “breathing space” to be certain that his or her protest is constitutionally protected against reprisal—even if the speech causes a strong reaction, as sometimes is entirely appropriate.

Just as we learned after the September 11 terrorist attacks that it is possible to sacrifice too many civil liberties in the pursuit of murderous terrorists, the realization will dawn that panicky legislative responses to cyberbullying can damage as many young lives as they benefit. It is the responsibility of the children’s rights bar to resist a generation of false-positive “zero tolerance for unkindness” overreactions that place ceilings on the futures of creative young people who should know no limits.

**Keywords**: litigation, children’s rights, First Amendment, censorship, online speech

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Representing Court-Involved Youth in Education Cases

By Rachel Shapiro and Margie Wakelin – September 28, 2012

By the time Sherri was referred to Equip for Equality (EFE) in Chicago, Illinois, she was 17 years old and about to enter ninth grade for the second time. Despite many at-risk factors, no one at Chicago Public Schools had ever thought to evaluate Sherri for special-education services. Sherri’s grandmother adopted her at age two due to her biological mother’s issues with addiction. When Sherri was 14 and in sixth grade for the second time, she started dating an older man who was selling drugs. After a dispute, her boyfriend shot her, and she entered a safe house for protection until he was sent to corrections. Sherri continued to attend sixth grade without passing. After her third unsuccessful year in sixth grade, she was promoted to high school. Sherri knew that she did not have the requisite skills for high school, which she admitted to her guidance counselor when requesting extra help with her classes. Her guidance counselor did not offer any tutoring or other assistance, and Sherri began skipping classes. As weeks went on, she stopped attending school. When she did show up, she felt alienated and talked back to her teachers or fought with other students. Despite Sherri’s sustained failure in school and the trauma that she had encountered, no one—not her teachers, not her school administrators, not her counselors—thought to refer her for an evaluation to determine whether she was a student with an emotional or a learning disability. It was only when her probation officer referred her case to EFE that Sherri’s education started to turn around. EFE advocated for the school to evaluate Sherri, and she began receiving instruction tailored to her needs. Now, she is finally making progress in school, and she knows that her teachers support her.

For attorneys who work with court-involved youth, Sherri’s story is not extraordinary. As many as 90 percent of youth in the juvenile-justice system meet the criteria for one or more mental-health disorders on entry. Katherine A. Larson, Off. of Juv. Just. and Delinq. Prevention, Best Practices for Serving Court Involved Youth with Learning, Attention and Behavioral Disabilities 3 (2002). When compared to their peers, court-involved youth have less-developed cognitive social problem-solving skills and, consequently, are more likely to have behavioral and learning difficulties in school. Id. In addition, it is common for court-involved youth to experience high levels of absenteeism, similar to Sherri, as it is one of the greatest predictors of repeated involvement in the juvenile-justice system. U.S. Dep’t of Just., Off. of Juv. Just. and Delinq. Prevention, Highlights from Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders 3 (2011).

Although prevalence rates vary widely, some researchers estimate that greater than 75 percent of the juvenile-justice population has disabilities. Ann Cameron Caldwell, “Attitudes of Juvenile Justice Staff Towards Intellectual, Psychiatric, and Physical Disabilities,” 45 Intell. and Dev’l Disabilities 77 (2007). Based on a national survey of heads of juvenile correctional departments, 33.4 percent of incarcerated youth received special-education services with prevalence ratings ranging from 9.1 percent to 77.5 percent, depending on the state. Dalun Zhang et al., “Adolescents with Disabilities in the Juvenile Justice System: Patterns of Recidivism,” 77
Council for Exceptional Child. 283 (2011). Within the population receiving special-education services, nearly 50 percent have emotional disorders (EDs), 40 percent have learning disorders (LDs), and 10 percent have intellectual disabilities. Caldwell, at 77. Youth with ED are disproportionately represented among court-involved youth. According to the Department of Education, youth with ED represent 8.2 percent of students with disabilities in school settings, yet they represent 47.7 percent of students in correctional facilities. Zhang, at 284. Still more court-involved youth may have disabilities, but those youth have not been identified or evaluated, and they haven’t started to receive special-education services.

Due to the high prevalence of court-involved youth with disabilities with unmet educational needs, EFE began a partnership with Cook County Juvenile Court in 2006 to assist Cook County’s court-involved youth with disabilities by reducing recidivism rates, increasing educational opportunities, and protecting legal rights. Working directly with staff from Cook County Juvenile Court, EFE represents court-involved youth with disabilities in school meetings, mediations, expulsion hearings, and due-process hearings. EFE accepts referrals from probation officers, public defenders, judges, and other court personnel who suspect that a student in the delinquency system has unmet or undiagnosed special-educational needs. Throughout the last six years, EFE has successfully represented hundreds of court-involved youth to ensure that they receive an appropriate education.

EFE’s success demonstrates the potential for using legal advocacy to transform educational outcomes for court-involved youth across the country. Like Sherri, court-involved youth need attorneys who can advocate for their educational rights. There are many federal and state laws that entitle youth with sustained difficulties in school, whether academic or behavioral, to greater assistance and protection. Unfortunately, in schools across the country, especially those with high rates of court-involved youth, these laws are not followed. By understanding how the laws can be effectively employed on behalf of youth, attorneys can transform youths’ educational experience.

The Individuals with Disabilities Education Act
The Individuals with Disabilities Education Act (IDEA), 20 U.S.C § 1400 et seq, is one of the most powerful federal laws someone can use to advocate for appropriate educational services for court-involved students. Under the IDEA, a student who is identified as having a disability is entitled to a free, appropriate public education or specialized instruction that would allow him or her to make progress in school. Not surprisingly, many court-involved students are eligible under the IDEA due to EDs such as bipolar disorder, depression, or posttraumatic stress disorder. Additionally, many court-involved students have LDs that adversely affect their ability to be successful in school. The cornerstone of the IDEA is the Individualized Education Program (IEP), which includes measurable annual goals for the student; accommodations and modifications for tests, assignments, and class performance; and related services, including counseling. 20 U.S.C. § 1414(d). For eligible students, the IDEA mandates that schools provide them with protections related to suspension and expulsion, attendance, and school failure. Consequently, the IDEA is a valuable tool for attorneys working with court-involved students.
Child-Find Violations

While many court-involved students already have IEPs and are eligible for full protections under the IDEA, many others, like Sherri, have not yet been found eligible, despite clear risk factors. This may indicate a violation of the IDEA, which can be used to obtain legal protections for a student who is not yet eligible for special-education services. Under the child-find provisions of the IDEA, a school district is obligated to implement procedures to locate, identify, and evaluate all students who may be suspected of having a disability. 20 U.S.C. § 1414(a). For example, a school district should train its teachers to identify signs that a student may be in need of special education. Those students are supposed to be referred to a team to determine whether an evaluation is warranted. A violation of child find occurs when a school district does not implement these required procedures and a student with clear signs of school difficulties is not evaluated. In the event of a child-find violation, the student is entitled to educational services that will put him or her in the position he or she would have been had the violation not occurred.

Sherri’s case demonstrates the impact of child-find violations, the potential for legal advocacy, and the resultant educational success. Sherri’s family history, traumatic events, and repeated failure of the sixth grade are all factors that warrant an evaluation for special education. Warning bells should have been sounding in Sherri’s school when she failed sixth grade for the second time. However, she was not referred for an evaluation to determine if she was eligible for special education. As an attorney representing Sherri, you could raise these issues in a letter to her school district to request her immediate evaluation, as well as advocate for Sherri to receive tutoring and counseling outside of the typical school day to compensate for the child-find violation.

Child-find violations also provide powerful justification to prevent students not yet identified for special education from being expelled. If a student’s history demonstrates that the school should have evaluated your client, you could advocate for dismissal of the expulsion hearing as a remedy for the child-find violation, arguing that your client may not have committed the discipline violation if he or she had received special-education services.

Evaluation and Eligibility

If your client exhibits signs of a disability, the most important first step is to advocate for an evaluation to determine whether he or she is eligible for an IEP. With an IEP, a student is eligible for many supports and services to address issues common for court-involved students: a plan to address problematic behavior, support for attendance issues, measurable goals for literacy instruction, and counseling to address trauma. To begin the evaluation process, you may write a letter to the school’s principal or case manager, requesting an evaluation and explaining your client’s difficulties at school. See 20 U.S.C. § 1414(a)(1)(B). If your client has been diagnosed with an ED or LD, this should be included in the request. Once the school receives the evaluation request, it must either obtain consent from the parent/guardian for the evaluation or deny the evaluation request in writing with an explanation of the denial.

Although parental consent is always required for the initial evaluation, states and school districts vary in their methods for obtaining this consent. See 20 U.S.C. § 1414(a)(1)(D)(i)(I). In Illinois,
schools obtain consent for the evaluation at a meeting in which a team of school professionals and the parent discuss the current areas of concern and the domains in which the student must be evaluated. At this meeting, you should ensure that a comprehensive evaluation is conducted and that it includes assessments in all areas of concern. For court-involved students, it is common to conduct evaluations to determine cognitive ability, academic achievement, social-emotional development, health status, hearing, and vision. If a student has communication difficulties or gross or fine motor concerns, he or she should be given a speech-language, physical therapy, or occupational therapy assessment. It is critical that the team include qualified professional staff to identify needed evaluations, including a school psychologist, who can answer questions about the areas in which the student will be evaluated.

Once parental consent is obtained, the school must complete the evaluation within the specified state-law timeline, which may vary from the 60 days directed by the IDEA. See 20 U.S.C. § 1414(a)(1)(C). Your advocacy is critical at the meeting, during which the evaluations are discussed and the team determines that the student is eligible for an IEP. To maximize effectiveness, you should request the evaluation reports prior to the meeting and review them with the parent/guardian and prepare questions about components of the reports that are unclear or require further explanation. At the meeting, the team will consider the evaluation reports and answer two driving questions: Do the evaluations indicate that the student has a disability? Does the student, because of the disability, require specialized instruction and related services? If the team affirms both of these questions, your client will be eligible for special education, and the IEP team must create an IEP to address his or her disability.

**IEP Revisions**

Even with an IEP, a student may still experience school failure. It is essential to monitor both compliance with the IEP and whether the IEP addresses your client’s needs and improves your client’s performance in school. There are several common problems for court-involved students that indicate that the student’s IEP is not appropriate and in need of revision. You can advocate for appropriate special-education services in the IEP revision.

The most obvious indicator that your client does not have an appropriate IEP is a report card with failing grades. An IEP is supposed to provide multiple levels of support, from specialized instruction to accommodations, to prevent the student from experiencing academic failure. Whether the reason for the failing grades is failing to complete homework or not studying for tests, you can advocate for the IEP team to develop a plan to address the problem so that your client does not fail. For example, if your client is not completing homework, he or she may need to meet with his or her teacher to complete assignments. Similarly, if he or she is not studying for tests, he or she may need direct instruction about how to do so. In the event that your client has failing grades, you should request an IEP meeting to revise his or her IEP to address the difficulties.

If your client is being suspended repeatedly for misbehavior, in school or out of school, it may be a sign that his or her IEP is not appropriate. Similar to the way it deals with failing grades, it is important for the IEP team to determine the cause for the misbehavior and develop a plan to
address it. See 20 U.S.C. § 1414(d)(3)(B)(i). Often, misbehavior may be symptomatic of an inappropriate class placement, and it may indicate that your client needs additional academic support or a smaller class setting. Other times, a pattern of behavior results from inappropriate adult responses that can be altered to prevent the future escalation of behavior. If the IEP team is not clear about the source of the behavior, you should advocate for a behavior analyst to conduct observations of your client and assist the IEP team to develop a new plan.

Similar to a pattern of misbehavior, a pattern of absenteeism may also be a sign of an inappropriate IEP. IEP teams must determine the cause of the absenteeism, as it may be rooted in an inappropriate school placement or lack of support for your client. For example, in Sherri’s case, she stopped attending school because she did not understand her work and she was not getting support, despite her repeated requests. You can advocate for the IEP team to develop a plan to address your client’s attendance, including measurable goals and incentives for improved attendance, as well as added support to address academic difficulties.

**Representing a Student at a School Expulsion Hearing**

Despite Sherri’s repeated misbehavior at school, Sherri was fortunate that her school never referred her for expulsion. Other students are not so fortunate. Often, a student’s initial contact with juvenile court begins with an incident that occurs at school. The school calls the police, and the student is arrested. While the student has a public defender for the delinquency charge, the student may face expulsion from school due to the incident and often does not have legal representation for the expulsion hearing. Representation at expulsion hearings can make a critical difference in the educational experience of court-involved students.

Although students with disabilities can be expelled, there are certain protections that they must be provided prior to and during any expulsion. First, a school must hold a meeting called a manifestation determination review (MDR) to discuss whether the student’s behavior was a manifestation of his or her disability. A student’s behavior is a manifestation of his or her disability if it was “caused by, or had a direct and substantial relationship to” his or her disability or it was “the direct result of the [school district’s] failure to implement” his or her IEP. 20 U.S.C. § 1415(k)(1)(E).

If the student’s behavior was a manifestation of his or her disability, then the school cannot move forward with an expulsion hearing and must allow him or her to remain at school. Even if the student’s behavior was not a manifestation of his or her disability, the school must still hold an expulsion hearing before expelling him or her.

Second, if the school ultimately expels the student, he or she must still receive services “to participate in the general education curriculum, although in another setting and to progress toward meeting the goals set out in [his or her] IEP.” 20 U.S.C. § 1415(k)(1)(D). Therefore, even if a student with a disability is expelled, he or she will still be participating in some type of school program, which will likely be an alternative school.

**Preparing for an Expulsion Hearing**

Expulsion hearing preparation is similar to trial preparation. While an expulsion hearing is
decidedly less formal than a trial, the hearing could have serious repercussions for your client. Prior to the hearing, you should meet with your client to obtain his or her version of the incident. Your client may have a very different version than the school staff, and, as your client’s attorney, it is important that you explore his or her point of view.

Sometimes your client may not understand which details are important to his or her defense. You should therefore ask your client to discuss what happened from the moment he or she walked into school on the day of the incident through the end of the school day to ensure that you have sufficient detail to appropriately determine the strategy for the expulsion hearing. Mitigating evidence may exist that you may never discover without asking your client to explain what happened throughout the entire day. For example, if your client faces expulsion for a physical altercation, it is important to know if the alleged victim in the incident harassed your client earlier in the day. You may also want to ask your client about his or her relationship with the alleged victim so that you can better understand what caused the physical altercation to occur.

It is important to carefully consider whether your client will testify at the expulsion hearing. Your client may offer powerful testimony about the incident and why he or she should remain in school. However, you need to be aware of whether there is a delinquency charge pending. Statements in an expulsion hearing could be used against your client in the delinquency case. If your client has a delinquency charge pending, you may want to request that the school district continue the expulsion hearing until after sentencing so that your client may testify without fear of incrimination.

When preparing for an expulsion hearing, you should review all relevant documents and ensure that your witnesses are adequately prepared. You need to review all school records to look for evidence of unrecognized special education needs as well as other potential evidence for the hearing. You should prepare a brief opening and closing statement and conduct direct examinations and cross-examinations as you would at trial. You should introduce mitigating evidence, when appropriate. Be prepared for school staff to question the level of formality that you are bringing to the hearing. Many schools hold expulsion hearings that last only a few minutes, and they are not accustomed to students being represented by attorneys. You can advise the hearing officer of the serious ramifications that the expulsion has for your client and the need to allow for a full examination of the evidence.

Settling an Expulsion Hearing
It may be possible to settle an expulsion hearing, so you should think creatively about potential solutions. For example, your client may not want to continue attending the school at which the incident occurred. If so, you might be able to settle the case with the school district by agreeing that he or she will attend a different school. In return, the school district should dismiss the referral for expulsion. Sometimes, school districts have programs that students can attend in lieu of expulsion (such as anger-management or drug-counseling programs). Some school districts can be adamant about proceeding to an expulsion hearing; nevertheless, exploring settlement is recommended. Your representation at an expulsion hearing ensures that relevant evidence
concerning your client is introduced. Your representation also increases your client’s chance of remaining in school and preventing further involvement in the juvenile-justice system.

Case Study: Coordinating with Court Personnel
Jack’s story exemplifies how coordination with court personnel can make a marked difference in a student’s education. Jack, a high-school freshman, was involved in a physical altercation at school, where the police were called and a delinquency case was initiated. He was expelled from school due to the incident and was not receiving any special-education services at the time that Jack’s probation officer referred him to EFE. Despite Jack’s guardian’s multiple requests for an evaluation, Jack’s diagnosis of ADHD, and behavioral and academic problems dating back to sixth grade, Jack’s schools had never initiated an evaluation. Jack had become involved with the juvenile-justice system at a young age and was already on probation for one case at the time that his probation officer referred him to EFE.

The successful representation of court-involved students like Jack requires coordination with juvenile-court personnel. In the course of EFE’s representation of Jack, EFE worked closely with Jack, his guardian, his probation officer, and his court-appointed therapist to identify the ways that Jack had been failed by his school and to determine the types of services that he needed to experience educational success. As a result of this coordination and attendance at several meetings by all of the individuals, Jack’s school agreed to re-enroll Jack in school and to evaluate him for special-education services. EFE then secured an appropriate behavior-intervention plan and IEP. This partnership was instrumental in securing Jack the appropriate services at school. EFE is currently appealing Jack’s expulsion in the hope of expunging the expulsion from his record.

Shortly after EFE began attending meetings at Jack’s school, Jack had his sentencing hearing. EFE consulted with Jack’s public defender to see how the EFE could assist in ensuring that the judge did not send Jack to the Department of Corrections. Based on feedback from the public defender, EFE drafted a letter to the judge, indicating its work with Jack and outlining the ways that Jack had contributed to developing an appropriate educational plan for himself. The judge agreed not to send Jack to the Department of Corrections, and Jack has been maintaining regular attendance and a strong effort at school now that he is receiving the appropriate academic and social-emotional support.

The type of coordination present in Jack’s case is vital to securing a successful outcome if you represent a court-involved student on an educational matter. For example, if you are representing a student at an expulsion hearing, you should coordinate with the public defender to ensure that you know the status of the delinquency case and that your representation does not harm the delinquency case. In addition, you may have access to school records that are helpful for the public defender, particularly if your client has a disability. It is helpful for the public defender to see records indicating that your client’s behavior on the date of the incident was disability-related. Having this information will help the public defender present your client’s case to the judge in a favorable light.
EFE has found court personnel receptive to coordinating and cooperating on our clients’ cases to ensure optimal outcomes in both educational cases and delinquency cases. Through the assistance of court personnel, you can gain access to information that is helpful to your representation in educational matters. Through your participation in the sentencing process (such as advocating in support of the student remaining at home so that new educational supports can be put into place), you can ensure the optimal outcome in delinquency cases.

**Keywords:** litigation, children’s rights, education, juvenile-justice system

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FASD: Identification and Advocacy

By Teresa J. Grogan – September 28, 2012

Children with brain impairments such as fetal alcohol spectrum disorders (FASDs) can sometimes find themselves in court as the respondents in juvenile delinquency cases, as the subject children in neglect and/or abuse, or fighting for services in educational settings. Without the proper diagnosis and treatment of an impairment or a disability, the court will not have the necessary information to issue the most productive disposition or to order the services that will meet the needs of the child. Many impairments and disabilities are easily recognized and diagnosed; FASDs are not. Therefore, the job of counsel with clients who may suffer from an FASD is to first identify the possibility of an FASD, obtain evaluations of clients to confirm or rule out that diagnosis, and then, after a positive diagnosis, advocate for the identified needs of that child.

On June 12, 2012, the American Bar Association’s Section of Litigation and the ABA Center for Continuing Legal Education cosponsored a live webinar teleconference entitled “Fetal Alcohol Spectrum Disorders (FASD): What You Need to Know to Help Your Clients,” which set out to assist counsel in all of the above areas. The information presented in that webinar is summarized below.

What Is FASD?
The only way a child can have an FASD is if the mother drank alcohol during pregnancy. Once the damage is done to the fetus, the effects are irreversible. Therefore, advocates in this area stress that no amount of alcohol consumption during pregnancy should be considered safe. The word “spectrum” is integral to an understanding of this issue because the effects present themselves in a variety of ways depending on the frequency, amount, and timing of the consumption of alcohol. There is a positive correlation between the amount of alcohol consumed and the detriment to the child. In addition, because different parts of the fetus are developing throughout pregnancy, drinking during different parts of the gestation period can have dramatically different effects.

FASD is actually an umbrella term that covers various diagnoses. Fetal Alcohol Syndrome (FAS) is the easiest to diagnose. It is also the rarest diagnosis, because a child must have measurable brain damage and growth within the bottom 10 percent, and he or she must also exhibit all three of the following facial characteristics: small eye openings, a smooth area below the nose and above the upper lip, and a thin upper lip. Partial FAS is the diagnosis if a child does not have one of the traits listed above.

Alcohol-related neurodevelopmental disorder (ARND) is diagnosed if a child has suffered brain damage but does not exhibit any stunted growth or abnormal facial characteristics. This diagnosis is very difficult to obtain without evidence of an alcohol exposure history.
An FASD is not an inherited disorder. It can only occur if the mother ingests alcohol during pregnancy. However, addictive behavior can be inherited, and FASD sufferers are also more susceptible to addictive behavior. This tends to promote a cycle of babies born with an FASD to mothers who also have an FASD.

**Practice Points**

The key practice points to consider are how to identify the possibility that your client may have an FASD, how to get your client diagnosed properly, and how to advocate once a positive diagnosis is obtained. Special emphasis should be placed on identifying and diagnosing this condition as soon as possible because early diagnosis has been found to produce the best long-term results for children.

**How to Identify an FASD**

As previously stated, if a child has any or all of the physical characteristics described above, the explanation could be an FASD diagnosis. Beyond easily recognizable characteristics, the initial diagnosis of an FASD is difficult because there is no universal set of behaviors. This is due to the fact that the behavior the child exhibits depends on the part or parts of the brain developing at the time the alcohol consumption occurred. The materials included with the webinar contain an FASD Experts Screening Questionnaire, which lists some factors, including immaturity and naïveté; eagerness to please or stubborn resistance to the obvious; inability to provide a coherent, detailed narrative; inability to concentrate; apparent inability to remember what he or she is told from appointment to appointment; tendency to be led by more sophisticated peers; obliviousness to risk; impulsivity; and opportunistic behavior. The discussion during the webinar also identified behaviors such as difficulty planning, organizing, and prioritizing; lack of judgment, memory, and process speed; and failure to grasp abstract reasoning or figurative speech.

Practitioners should also watch for children who already have other diagnoses, as children with an FASD often have multiple diagnoses. Two of the most common are attention-deficit/hyperactivity disorder (ADHD) and oppositional defiant disorder (ODD).

Sometimes counsel will find that the child client is receiving treatment for a different diagnosis and that the treatment isn’t working. That may be due to the fact that the prior diagnosis is incorrect or incomplete. For example, a child with an FASD may exhibit many of the same behaviors as a child with autism, but the treatment for autism won’t have the desired effect on a child with an FASD.

Attorneys for children should also be aware that IQ can be a misleading factor. Many children who have an FASD can still have an IQ higher than 70.

In addition to looking for evidence of an FASD through your client’s own actions and history, many, if not most, children born with FASDs have mothers who are alcoholics. It is also worth noting that the mothers may have an FASD as well. Obtaining information about the mother’s alcohol history during pregnancy can be difficult because it inherently includes an element of blame. The webinar discussion included many concrete examples of how to approach a mother in an interview, including an emphasis on the fact that, by giving information, the mother can
ultimately help her child by providing the basis for a proper diagnosis and services for the child. Interviewing the mother will also be difficult in a child welfare case, as the mother’s counsel needs to be present and the information disclosed might be used against her in the case.

If a mother will not or cannot be interviewed, counsel should seek records that support evidence of alcohol exposure during gestation. Attorneys may also interview friends and family to find anecdotal information to support a diagnosis.

One scenario that could occur in the area of adoption results from parents adopting a child with an undiagnosed FASD. When the child exhibits difficult behaviors, the parents may be instructed with a standard set of parenting responses to those behaviors. Unfortunately, the standard responses are often ineffective for a child with an FASD. This may lead to the adoptive parents being labeled “bad parents.” More importantly, the adopted child is not being diagnosed and is therefore not receiving the proper services needed. Practitioners in this area should look for this set of circumstances and advocate for an evaluation to obtain a diagnosis and treatment.

**How to Advocate for an FASD Evaluation**

To secure support for testing and evaluating a child for an FASD, counsel may first have to educate the court or parties involved. One panelist indicated he includes a history of the syndrome in all of his written applications to the court.

Advocates must compile evidence of drinking during the gestation period. This evidence may come from interviews with the mother, interviews with friends and family, and medical, birth, or psychological records.

As indicated above, interviews with mothers could be very delicate. It may be advisable to have this interview conducted by a social worker or someone else with specialized experience. If the mother is represented by counsel, then, of course, counsel will need to be present for the interview. Interview pointers include the following:

- State that you are trying to get information that will help the mother’s child.
- Ask about the drinking habits of other family members first.
- Ask how much someone drinks, not if they drink.
- Break down the consumption questions into three time periods: before the mother was pregnant (with statements like “many people drink while they are pregnant because they don’t know they are pregnant”), before the mother learned she was pregnant, and after the mother learned she was pregnant.
- Get the interviewee’s definition of what a “drink” is, including what type of drink is consumed and how large she considers an average drink to be.
- Try not to ask yes/no questions.

**How to Advocate after a Positive Diagnosis**

Once again, education is important. The court should be provided information to allow for an understanding of the disorder as well as the fact that there is no cure.
Understanding FASDs and their effects on child clients, as well as the adults in their lives or even witnesses or victims who may be testifying in their cases, is incredibly relevant in the area of juvenile delinquency. Respondents may have arguments to suppress evidence or mitigate sentencing that need to be asserted on their behalf. In the context of delinquency, it is imperative to look at the child’s records and prior history with court involvement. The webinar discussion pointed out that prosecutors will most likely have your client’s past history and present it to the court with an eye toward seeking increased punishments and possibly requesting aggravated circumstances. Prior to that occurring, attorneys for delinquency clients must obtain and review the child’s records, taking into account the FASD diagnosis, to seek leniency and to support mitigating circumstances. Counsel should find the nexus between the FASD and the behavior of which the child was accused, both present and past. Attorneys are warned that failure to do so could amount to ineffective assistance of counsel.

In all practice areas, advocates should look at the state laws in the relevant jurisdiction. In some states, such as Minnesota and Alaska, FASDs are included in the definition of a “developmental disability.” Therefore, with the FASD diagnosis, you are legally entitled to the same level of services as for any other developmental disability, and you will have a basis to get those services provided to a client immediately. Other states do not include the specific terminology but do include brain injury or mental retardation in the definition of a developmental disability. Counsel can argue that an FASD diagnosis comes within this or similar terminology.

Once an entitlement or authorization to provide services exists, there are various kinds of services that may be requested. Overall, children with an FASD benefit from structure and strong support systems. They often thrive with simple, concrete rules. Some can benefit from medication. Services should foster identification of the child’s talents and then build on those talents and successes. For example, children with an FASD can be very talented in art or music. With the proper support and services, children can successfully graduate, work, and live independently, despite the diagnosis.

In any judgments or orders affecting children, counsel should consider including language indicating the child’s diagnosis, what that diagnosis means, and what the child is entitled to as a result of that diagnosis. Sometimes service providers for children do not receive adequate information to allow them to understand the diagnosis, the treatment, or both. Putting your client’s needs and entitlements in written documents that are sure to reach the providers helps to ensure proper treatment.

**Where Can You Turn If You Need Additional Help?**

The program faculty included various experts in this area with helpful suggestions of where to go for more assistance if and when you find yourself facing this issue in practice.

Kathy Mitchell is the vice president of the [National Organization for Fetal Alcohol Syndrome](http://www.nfas.org) in Washington, D.C. Her organization maintains a national resource directory for information located at its website, which lists diagnostic centers, parent support information and resources, disability organization contact information, and support services and information for birth
mothers to assist with prevention. She suggested that if you do not find the information you need by accessing the website, practitioners should feel free to email the organization directly.

Hon. Anthony P. Wartnik (retired) is the legal director of FASD Experts in Mercer Island, Washington. That organization provides experts who are available to testify. That organization is responsible for the FASD Experts Screening Questionnaire referenced above.

The panel also included Dr. Pi Nan Chang, founder director emeritus of Pediatric Psychology from the Department of Pediatrics at the University of Minnesota and Billy Edwards from the Los Angeles County Deputy Public Defender in Los Angeles, California. Melodee Hanes, acting administrator of the Office of Juvenile Justice and Delinquency Prevention in Washington, D.C., served as the moderator.

Conclusion
In all areas of practice affecting children, failure to identify this possible diagnosis and follow through with testing and advocacy can lead to claims of ineffective assistance of counsel. More important, however, is that the failure to identify and address FASDs is also a failure to provide the afflicted children with the chance to receive the support systems they need to thrive to the best of their potential.

Synopsis of the Materials Included
- **FASD Legal Issues Case Law** by Anthony P. Wartnick, Judge (retired). Judge Wartnik summarized case law from across the country on FASD issues, including the right to a diagnosis, sentencing, confessions, testimony from people with an FASD diagnosis, competency, diminished capacity, the vulnerability of victims diagnosed with FASD, ineffective assistance, educational rights, child welfare, and SSI.
- **Changing Public Policy with the Juvenile Courts: What Works?** A brief outline/guide to what works in juvenile justice courts that includes the topics of assessment, education, and success.
- Report to the House of Delegates with the proposed resolution that was considered at the August 2012 ABA Annual Meeting.
- **Fetal Alcohol Spectrum Disorders: Competency-Based Curriculum Development Guide for Medical and Allied Health Education and Practice**, compiled by the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center on Birth Defects and Developmental Disabilities, FASD Regional Training Centers, and the National Organization on Fetal Alcohol Syndrome (NOFAS).
- FASD Birth Mother Interview. A 23-page FASD birth mother interview protocol.
- FASD Screening Questionnaire.
- One-page flyers from NOFAS, including **FASD Prevention, FASD: What Everyone Should Know, FASD: What the Foster Care System Should Know**, and **FASD: What the Justice System Should Know**.
- FASD Experts Screening Questionnaire.
- Presentation slides to accompany the webinar discussion.
Keywords: litigation, children’s rights, fetal alcohol spectrum disorders, fetal alcohol syndrome, partial fetal alcohol syndrome, alcohol-related neurodevelopmental disorders

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Girls in the Juvenile Justice System: The Case for Girls' Courts

By Sarah Klein – January 5, 2012

Historically speaking, the American juvenile justice system formed in a manner intended to cater predominantly to male offenders. In recent years, however, the number of girls arrested for violent and assaultive crimes seems to have increased dramatically. “Justice by Gender,” Crim. Just. Sec. Newsl., ABA and Nat’l Bar Ass’n, 2001. Whether this perceived increase is due to changes in the law, police arrest policies, court responses, or an actual increase in violence among females is a matter of great debate among academics and juvenile justice system stakeholders alike. Although some have begun to research the unique causes of female violence and alternatives to the current system, most individuals continue to skirt the issue while voyeuristically watching viral YouTube videos of “girl fights” and shaking their heads.

The same lack of action has paralyzed even those who recognize the seriousness of the issue. Many juvenile justice system stakeholders enmeshed in the system can tell horror stories about girl-fight cases they have seen. What starts out as name-calling and bad-mouthing progresses into all-out wars between groups of girls where they try to scar each other’s faces with knives and razor blades. Sometimes the girls’ mothers even get involved, fighting alongside their daughters.

The unique nature of these incidents and lack of appropriate training and resources make many juvenile justice system stakeholders feel frustrated and unequipped to properly and consistently manage these cases. Hon. Estelle B. Richman et al., Joint Position Statement on Juvenile Justice System Responsiveness to the Unique Needs of Girls, Pa. Commission on Crime and Delinquency (2009). The end result is often a quick dismissal or inadequate managing of these cases, leaving the core issues unresolved. Unfortunately, this results in the same girls coming back to court time and again for similar and escalating offenses, both as juveniles and as adult women. Even when these females do not formally re-enter the justice system, many do not lead productive, law-abiding lives. Without the proper resources, many get swept up in a lifestyle that puts them in danger of becoming a crime victim or domestic violence victim in the future. What we need to do is provide appropriate services that can assist these females in starting their adult lives on the right path. Ideally, we need to provide them with a fresh outlook and a skill set to deal with life’s issues, and a clean record to facilitate obtaining an education and gainful employment in the future. Furthermore, we need to prepare these females to successfully parent and raise the next generation of children and equip them with the tools to keep their future children out of trouble with the law. Margaret A. Zahn et al., “Causes and Correlates of Girls’ Delinquency,” Dep’t of Just., Off. of Juv. Just. and Delinq. Prevention (2010).

Obviously, violent, assaultive behavior is serious no matter the gender of the defendant; no one is advocating for the courts to go easy on violent females. What is really needed is a new approach to juvenile justice that accounts for females’ different paths to violence. The two most
important factors that separate violent female offenders from their male counterparts are (1) females’ higher rates of mental health issues, such as anger, depression, and suicidal thinking; and (2) the fact that female offenders more often have histories of victimization, violence, and abuse than males. Thus, if we want to understand and effectively treat females who have been arrested or convicted of assaultive and violent behavior, we need to adequately address these issues. Zahn et al, *supra*. We must also consider related factors, including the fact that females tend to be more prone to self-destructive behaviors in their offenses and that they experience different patterns of drug use and abuse. Another factor that needs to be considered is that females are usually affected differently by relationships than males are, whether those relationships are romantic, sexual, friendly, or familial. Females also experience very different societal reactions to their behavior. Combined, all of these factors produce a unique female experience that our current system is not equipped to properly address.

Fortunately, some districts in states such as Hawaii and California have begun to create “girls’ courts” designed to address these systemic inadequacies. Utilizing research from academic organizations, such as the Girls Study Group, and promoted by governmental proposals and demonstrations of support from groups, such as the Pennsylvania Commission on Crime and Delinquency’s Female Services Subcommittee, other districts are now beginning to formulate ideas for their own girls’ courts as well. While these courts are not entirely uniform in terms of the types of girls they serve, their programming, and the resulting outcomes, they all have a desire to create trauma-informed care environments that focus on providing rehabilitative services in addition to appropriate legal sanctions. Richman et al., *supra*. These types of courts also provide opportunities for girls to build self-confidence and self-efficacy and rebuild relationships with friends, family, significant others, and teachers. Zahn et al., *supra*.

As it stands, most existing juvenile courts and programs are not designed to provide these types of comprehensive services. Thus, implementing girls’ courts around the country will require significant collaboration among all types of stakeholders ranging from district attorneys, public defenders, departments of human services, courts, probation officers, non-profits, foundations, community-based services, and the federal government. Richman et al., *supra*. When these agencies collaborate, the result can be effective strength-based programming. Examples of some of the types of programs needed include conflict-resolution and mediation workshops, self-confidence and empowerment workshops, healthy relationship workshops, educational advocacy, mother-daughter counseling and retreats, nutrition education, mental-health treatment, drug-and-alcohol treatment, group community-service projects, job-skills and life-skills training, pregnancy prevention and parenting-skills education, domestic violence prevention workshops, and visits or video-conferences with adult women inmates. Zahn et al., *supra*; Richman et al., *supra*; ABA, *supra*; *Haw. Girls Ct.*.

Also vital to the success of girls’ courts is having an all or almost all-female staff (including lawyers, judges, therapists, mentors). By providing girls with adult models of healthy, law-abiding behavior, the hope is that participants will realize alternatives to their current behavior, and feel empowered to turn their own lives around.
Another unique factor to consider is the inclusion of female victims in girls’ court programming. Juvenile justice system stakeholders know that “girl fight” cases are more complicated than often is acknowledged and frequently retaliatory in nature. The identification and labeling of parties as “defendants” and “complainants” often masks the nuanced dynamics at play. Due to the convoluted nature of the issues that lead to these fights, in addition to the complications inherent in determining who is at fault, it is vital to include the victims in the process as much as possible.

A successful girls’ court should allow for and anticipate the arrest of all individuals involved in a mutual girl fight to more adequately manage these complicated incidents. In appropriate circumstances where there is a distinction between the defendant and juvenile female victim, girls’ courts should attempt to educate said victims by using a modified portion of the girls’ court programming.

While this may sound like a tall order, the task doesn’t have to be as daunting as you might think. In fact, many of these programs and services already exist in cities and states around the country and can be offered free of charge to appropriate participants; however, they are not currently being utilized to their full capacity. In many cases, existing services that are currently used to treat female offenders can simply be reorganized and revamped to provide the necessary types of programs.

For girls’ courts that allow girls to stay in their homes while receiving treatment, programming is often cheaper than placement in a juvenile detention facility. In addition, girls’ courts can streamline and minimize the work of the juvenile detention facility officers, since, in all likelihood, a limited number will focus solely on the girls’ court cases, freeing up the rest. The limited meeting days and times in court can also free up the court’s docket by removing complex, multi-defendant cases from other courtrooms. The small fee the defendants will likely be required to pay for the program (in addition to restitution) will also raise revenue that can be used to offset the cost of girls’ court programming. Additionally, group work components can be used to save the city or district money because it will not always have to pay for individual services for each defendant. Similarly, not every therapy session will necessarily require the presence of a therapist. Under the supervision of the probation department and other partner agencies, girls’ court participants can be taught to role-play and self-regulate by learning techniques for working through their own problems.

In addition, certain girls’ courts do not require teachers or police officers involved in the case to attend court hearings, which can save the city or district from paying excess wages to government employees who are unable to perform their regular jobs while in court. The most significant monetary savings will be long-term in that girls’ courts will hopefully prevent participants and their children from becoming involved in either the juvenile or criminal justice systems in the future. That said, the most important effects of girls’ courts will most likely not be monetary, but will instead concern the impact they will have on the lives of the participants. By helping these struggling, misguided females to develop self-confidence, learn how to resolve conflicts peacefully, and foster a positive peer culture, girls’ courts have the potential to help stop the destructive cycle of female violence for good.

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Keywords: juvenile justice, juvenile delinquency, girls’ court

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NEWS & DEVELOPMENTS

Report Describes Failures of Juvenile-Justice System

According to a new report, *Families Unlocking Futures: Solutions to the Crisis in Juvenile Justice*, the juvenile-justice system is more likely to ultimately land youth in prison than deter or redirect them from system involvement. It describes the growth of the prison system, zero-tolerance policies, and aggressive police tactics, along with the decline of social services and public education, explaining the disastrous effect on low-income and black communities. The report also includes ideas for solutions to these problems in a “Blueprint for Youth Justice Transformation.”

*Keywords*: litigation, children’s rights, juvenile-justice system, prison system

—Cathy Krebs, committee director, ABA Section of Litigation, Children’s Rights Committee, Washington, D.C.

IDEA Does Not Provide For a Right to Counsel

In *Clauson v. City of Springfield*, 848 F. Supp. 2d 63 (D.Mass. 2012), an attorney was appointed by a juvenile court to be both a *guardian ad litem* (GAL) and educational surrogate parent (ESP) for a special-education student in custody of the Department of Children and Families (DCF). The attorney eventually asked for the DCF to appoint an attorney who could file a hearing request before the Bureau of Special Education Appeals (BSEA) regarding the proposed individual education plan (IEP) and also represent the ESP at the hearing. The DCF refused, and the attorney filed the request himself (although apparently his request dealt with issues outside the IEP). He asserted that because the ESP has a right under the Individuals with Disabilities Education Act (IDEA) to be accompanied by an attorney at the hearing, the right obligated someone to pay for counsel as a matter of due process.

*Keywords*: litigation, children’s rights, right to counsel, Department of Children and Families

—John Pollock, coordinator, National Coalition for a Civil Right to Counsel

Recent Developments in Dependency Law

*Midwest Foster Care and Adoption Association v. Kinkade* (W.D. Mo. 2012) was brought by a Missouri foster parent association alleging that rates paid to its members are too low. The plaintiffs claimed that federal law requires states to make payments that meet foster parents’ costs in caring for foster children. The district court granted the state’s motion to dismiss, holding that private plaintiffs cannot enforce the relevant provisions of federal law.
In *Henry A. v. Willden* (9th Cir. 2012), the plaintiffs are foster children in Las Vegas suing county and state officials regarding the condition of their care. The complaint includes four federal statutory claims: Children are not provided case plans, officials do not maintain appropriate case records, children are not appointed *guardians ad litem* (GALs), and children under age three are not provided early intervention screens. The district court dismissed these claims, concluding that the statutory provisions at issue do not create federal rights and, thus, there is no valid cause of action for private plaintiffs.

In *In re C.M.* (N.H. 2012), Larry and Sonia M. are parents of two minor children, C.M. and A.M., who were subjects of petitions brought by the New Hampshire Division of Children, Youth, and Families seeking to remove the children from their parents and place them into state custody. Initially, both parents were assigned counsel. However, subsequent to a dispositional hearing, effective July 1, 2011, the New Hampshire legislature abolished the state statutory right to counsel for indigent parents facing allegations of abuse or neglect. The legislation was aimed at reducing the financial burden on the state posed by providing counsel to indigent parents at state expense.

In *In re Ethan C.* (Cal. 2012), a father transported his 18-month-old daughter in a car without putting her in a car seat. She was in her aunt’s lap on the way to the hospital to treat an injury to her arm. Another vehicle collided with their car, and the girl died. Two siblings were adjudicated dependent; the dependency court made findings under WIC § 300(f), saying, “The child’s parent or guardian caused the death of another child through abuse or neglect.”

**Keywords:** litigation, children’s rights, foster care, negligence, dependency court, parental rights, right to counsel

—Erik Pitchal, Boston, Massachusetts, and Bruce A. Boyer, clinical professor, director, Civitas ChildLaw Clinic, Chicago, Illinois