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Trauma, Resilience, and the Impact on Learning

By Eliza M. Hirst – July 2, 2019

Quinn: “Quinn” was a little, 45-pound, 7-year-old, second grader in foster care (with great dimples when he smiled!). He was a pencil tapper while he worked but distracted other students with his pencil-tapping noise. The teacher warned him to stop, but he persisted. The teacher went over and placed his hand on Quinn’s shoulder. Quinn reflexively punched the teacher, ran out of the room, and destroyed another classroom. The school was prepared to expel Quinn for “assaulting” the teacher and destroying property. The principal deemed Quinn a danger to staff and students. What the school did not know was that Quinn had been physically and sexually abused by every caregiver until he entered foster care. When Quinn was touched by the teacher, Quinn’s brain could not register if that was a safe touch or a bad touch.

As Quinn’s attorney, I was prepared to fight to keep Quinn in his regular school. I knew that Quinn would have more difficulty if he were placed in an alternative setting. Instead of seeing Quinn as a “danger,” I wanted the school to consider that Quinn was a great kid but needed to feel safe and supported. I worked with the school to maintain his placement (with some strongly worded legal encouragement regarding Quinn’s educational right to be in the least restrictive setting). In lieu of an expulsion proceeding, the school agreed to conduct a functional behavior assessment and developed a behavior support plan to give him another chance. Quinn remained in the school building, and the teachers received additional training on how to help Quinn feel safe. In addition, Quinn’s foster family ultimately became a long-term adoptive resource.

Lina: “Lina” was an eighth-grade student in foster care who had a connection to her grandmother, but her parents were not involved in her life. One of her projects was to do a family tree. Lina struggled with the project, and during class, another student called her a “dirty foster kid.” Lina punched the student and received a three-day suspension. (Fortunately, the other student was disciplined too). As Lina’s attorney, I had Lina’s permission to have contact with the assistant principal and the guidance counselor prior to the incident. I had a good working relationship with them and kept them apprised of issues related to Lina’s permanency plan. Although Lina served her suspension, the staff understood why Lina reacted the way she did. They brought her back for a transition meeting and asked her if she wanted to have a meeting with the other student or whether she preferred to have her schedule change to avoid that student (or both).
chose to have her schedule changed because she had already had a number of run-ins with that student. She was given additional supports in school to help ensure that she felt safe. Lina was ultimately placed with her grandmother under guardianship.

**Time to Shift Our Lens to Understand the B.S.**
It is often quick and easy for schools to look at students like Quinn and Lina as “behavioral problems.” But I was able to help change the educational trajectory for Quinn and Lina with legal advocacy and an understanding of trauma. When a child’s attorney forges a strong connection with the child and understands the brain science behind the impact of trauma, the child will often have a better chance at obtaining educational success and permanency. To do this, it is important to believe the B.S.! The B.S., or brain science, provides a compelling explanation regarding the profound neurological and physiological changes to the brains and bodies of children who experience adversity from complex trauma and toxic stress. Complex trauma and toxic stress often entail a child experiencing profound, repeated, or prolonged adverse experiences. Children who experience complex trauma are more likely to struggle with self-regulation and academic success. As a result, children’s attorneys need to understand the impact of trauma on the brain and behavior in order to be effective advocates for children in the foster care system, both in the courtroom and the classroom.

**Adverse childhood experiences.** Trauma often causes significant neurological and physiological changes to children’s growing brains and bodies. The science regarding such changes is robust and compelling. In the 1990s, the Centers for Disease Control and Kaiser Permanente published the Adverse Childhood Experiences (ACEs) Study. Centers for Disease Control & Prevention, [Adverse Childhood Experiences (ACEs)](https://www.cdc.gov/violenceprevention/aces/index.html). The original ACE study surveyed 17,500 adults on their experience with early adversity. The results demonstrated that ACEs are incredibly common and have a strong correlation to significant health and behavioral outcomes for both children and adults. In the original study, having a high ACE score had a strong correlation to increased risks of depression, cancer, stroke, and risk-taking behaviors. As shown in the graph below, the original 10 ACEs were physical, emotional, and sexual abuse; physical and emotional neglect; and household challenges: parental separation, incarceration, domestic violence, substance abuse, and parental mental illness. Notably, this original study showing the prevalence of ACEs was conducted primarily among Caucasian, college-educated individuals who had private health insurance.
In 2013, Philadelphia’s Public Health Management Corporation published an urban ACE survey of 1,700 adults that included additional questions regarding experiences with community violence, bullying, discrimination, and foster care and found the same high-risk correlation. Institute for Safe Families, Findings from the Philadelphia Urban ACE Survey (Sept. 18, 2013). The Philadelphia urban ACE study surveyed a significant percentage of minorities and individuals on Medicaid. The study is generally more aligned with the population of children and families enmeshed in the child welfare system, and it provides an even more compelling correlation between trauma, toxic stress, and neurobiological changes from toxic stress.
An even more recent analysis of states by Child Trends showed that nearly half of all youth in the United States have experienced at least one ACE and almost a fifth have experienced two or more ACEs by the time they are 18. Vanessa Sacks & David Murphey, *The Prevalence of Adverse Childhood Experiences, Nationally, by State, and by Race or Ethnicity.* The recent data also indicate that children of color (African American, Latino, and Native American) are more likely to experience higher ACE scores than Caucasian children. It is not surprising that ACEs are often more profound and numerous for children involved in the child welfare system and may cause significant neurological and developmental changes to children’s brains, including delayed brain development and educational challenges. B. Fortson, J. Klevens, M. Merrick, L. Gilbert & S. Alexander, National Center for Injury Prevention & Control, Centers for Disease Control & Prevention, *Preventing Child Abuse and Neglect: A Technical Package for Policy, Norm, and Programmatic Activities* (2016).

If we apply the correlations found in the Philadelphia Urban ACE Survey and the Child Trend data, we can deduce that children involved in the child welfare system will likely have a minimum of two ACEs: the event that triggered removal from their families and the subsequent placement into foster care itself. But it is not uncommon for many children in the child welfare system to have even higher ACEs. For example, many of my child clients have eight or more ACEs because, prior to entering foster care, they
experienced sexual abuse, physical abuse, emotional and physical neglect, community violence, an incarcerated parent, and a parent diagnosed with mental illness and substance abuse.

The impact of trauma and toxic stress on cognitive and social functioning. How does this impact school-aged youth? Oftentimes, children with complex trauma and toxic stress look at the world as a dangerous place. The neurobiology for many children indicates that they have an overactive fear response system and are more likely to enter a state of fight, flight, or freeze. B.A. van der Kolk, “The neurobiology of childhood trauma and abuse,” 12 Child & Adolescent Psychiatric Clinics of N. Am., 293–317 (2003). In addition to an overactive fear response system in the brain, trauma is stored at a cellular level, so a sight, smell, touch, or sound can trigger a traumatic reaction. Because school is often an inherently stressful and chaotic environment, almost anything can trigger kids. For that reason, complex trauma and toxic stress often cause significant cognitive impacts such as slowed language and speech development, attention problems, and poor verbal memory or recall. Maura McInerney & Amy McLindon, Unlocking the Door to Learning: Trauma-Informed Classrooms and Transformational Schools (Dec. 2014). Trauma and toxic stress may also overload a child’s ability to navigate social and emotional learning and create difficulty taking someone else’s perspective and difficulty navigating social relationships, as well as emotional dysregulation. Such experiences often leave traumatized children to be mistrustful and guarded with others. Furthermore, trauma and toxic stress have profound impacts on behavior and physiology, including somatic complaints, impulsivity, aggression, defiance, and withdrawal. See Justice Consortium Attorney Workgroup Subcomm., National Child Traumatic Stress Network, Trauma: What Child Welfare Attorneys Should Know (2017).

Given the neurobiological changes that occur from trauma, it is not surprising that children in foster care historically have some of the worst school performance outcomes. Children in foster care are twice as likely to be absent from school. Legal Center on Foster Care & Education, Fostering Success in Education: National Factsheet on the Educational Outcomes of Children in Foster Care (Apr. 2018) (“Download the factsheet” link under Research & Statistics). They are twice as likely to be suspended, and three times as likely to be expelled. They are 35 to 47 percent more likely to be placed in special education. Only about 65 percent of youth in foster care graduate from high school, and only between 3 percent and 10 percent graduate from college. The academic data paint a bleak picture of educational success as a result of the significant impacts of trauma and toxic stress.
How do we help our children succeed in school settings? Individual and systemic approaches. Piecing together the brain science and the data on academic performance for youth in foster care should spark an urgency for us to do more to help our clients. To reverse what seems like such an intractable problem, the Delaware Office of the Child Advocate (OCA) undertook a campaign to train professionals on trauma, address systemic barriers to education, and build resilience in our child clients. We advocate on an individual and systemic level by applying brain science to create strategies to build resilience and suggestions to help keep kids connected in school. The results we have achieved prove that this is not an insurmountable challenge but, instead, with awareness and effective strategies, this is something that we can address and change.

Lessons Learned from Individual Strategies

After reading, researching, collaborating with professionals, and trial and error with various clients, the OCA distilled some major strategies to help educators, judges, and professionals understand what often happens to kids who experience significant trauma and what we can do to help our clients begin to heal.

1. Treat trauma as a universal precaution. Data show that 50 percent of all kids have experienced ACEs and 50 percent of all kids who attend public school live in poverty. See Lyndsey Layton, “Majority of U.S. Public School Students Are in Poverty,” Wash. Post, Jan. 16, 2015. As a result, it is fair to assume that most children both in and out of the child welfare system have experienced some type of early childhood adversity.

Just as doctors and nurses wear latex gloves to administer immunizations or draw blood—no matter what the patient’s health history—all of us should treat trauma as a universal precaution. Assume that the kids we represent have experienced trauma. Having an awareness and understanding of the changes to the brain and how trauma manifests can be very powerful. Such a view helps us change our lens from looking at behavior as pathological or “bad.” Instead, considering trauma as a universal precaution allows us to ask the question “what can I do to help support this child?” By shifting the narrative from what is wrong with the child (and, by extension, the families), we stop blaming the child for negative behaviors. Instead, we can transform our view of children and their families, and focus on what we can do to build resilience in the child (or family).

2. Ask before you touch a child. Hugs, high fives, fist bumps, elbow taps, and handshakes are all great ways to build rapport with child clients. However, many children in foster care have experienced physical abuse, sexual abuse, neglect, or other adversity. Many kids do not look at the world and the adults who are there to “help” as
safe. From their view, adults may have let them down repeatedly, so few adults are trustworthy. Before we can build resilient children, we need them to feel safe. Kids who have experienced abuse, neglect, or other adversity may be hyper-vigilant and chronically ready to move toward “fight or flight” as a matter of survival. Like my client Quinn, many kids do not know if a touch from an adult (or anyone) is a safe touch or a dangerous touch.

Asking the child if you can give a hug or high five gives the child a choice and an opportunity to consider the options. It gives the child control over his or her body. It is also a powerful way to build rapport with a child. Over time, asking permission before entering a child's personal space enables the child to assess whether he or she feels safe. In Quinn’s case, the teacher could have asked Quinn if he could touch his shoulder to divert him from tapping. (The teacher could have even potentially prevented the whole incident by placing felt on the desk so that Quinn could tap and move without distracting others, which would be a more trauma-informed response). Asking for permission builds confidence and self-determination for many kids who often feel they have no control over their lives.

3. Be consistent, and do not make promises you cannot keep. A famous social science study developed in the 1960s by Stanford psychologist Walter Mischel, called the “marshmallow test,” demonstrated that children who delay gratification (by waiting to consume marshmallows) did very well academically and professionally. The concept of the study was for a researcher to offer a child a marshmallow right away or two marshmallows if the child waited for a period of time. The intent of the study was to show whether children can set goals and delay gratification. However, children who experience trauma do not typically do well on such tests to delay gratification—perhaps because they do not find adults trustworthy, they are food-insecure, they are impulsive, or perhaps another reason. When most of the adults in a child’s life fail to keep their promises, it is no surprise that such kids would do poorly on a marshmallow-type test. However, a more recent study conducted by the University of Rochester modified the original marshmallow study and had the researcher build rapport with the child before making such a promise. Once the child spent time with the researcher, the child was more likely to delay gratification and trust the adult to keep the promise of an additional marshmallow. Celeste Kidd, Holly Palmeri & Richard N. Aslin, “Rational Snacking: Young Children’s Decision-Making on the Marshmallow Task Is Moderated by Beliefs about Environmental Reliability,” 126 Cognition 109–14 (Jan. 2013). As a result, the connection and rapport with the adult end up being the key ingredient to enable a child to feel more secure and consequently able to make better choices.
Building rapport and a relationship is a central component to effective representation of children. To build rapport, it is important to show your trustworthiness by being consistent and by making promises only when you can keep them. For example, I had a 12-year-old client, “Jay,” who was extremely guarded with me when I first met him. It took him months to start talking with me, despite my visiting him every month whether at his foster placement, school, or the Boys and Girls Club. One month, I promised him I would take him out for fast food (which he loved!) on a particular Thursday. It turned out there was a blizzard on that Thursday and I was not able to meet with him because of the massive storm. The next time I saw Jay, a few weeks later, he was extremely angry with me because I broke my promise (no matter how legitimate my reason was). It took a while to rebuild my relationship with Jay and to garner his trust again. Jay, and kids just like him, do not trust easily.

Once you have earned a child’s trust, you must maintain it. For that reason, you need to be consistent and keep your promises and, by extension, only make promises you know you can honor. Now when I meet Jay (or any client), I say, “I will come visit you in a couple of weeks.” That gives me plenty of time to honor my promise. Keeping promises not only builds rapport with clients—it also builds resilience for kids who have experienced trauma by building a safe relationship with a trusted adult. See Bari Walsh, “The Science of Resilience: Why Some Children Can Thrive Despite Adversity,” Usable Knowledge, Mar. 23, 2015 (quoting Jack Shonkoff, director of the Center on the Developing Child at Harvard: “Resilience depends on supportive, responsive relationships and mastering a set of capabilities that can help us respond and adapt to adversity in healthy ways.”).

4. Teach kids to make things right. It is normal for kids to make mistakes—that is how they learn. However, the difference for children in foster care is that oftentimes their mistakes have huge consequences. Their mistakes may disrupt a foster placement or a school placement, or create an entanglement with the juvenile justice system without an opportunity to make things right and learn from their mistakes.

For example, I had a client, “T,” who had a long rap sheet for juvenile adjudications related to her aggressive and impulsive behavior. T had an extensive trauma history, and I was one of the few adults she trusted because I showed up to support her every time she was charged. After each juvenile delinquency charge, T and I would talk. I would always ask her two questions: “What could you have done differently?” “What could you do to make it right?” We talked about the importance of using coping skills and the power of apologizing. When T aged out of foster care with very few connections, I worried about her ability to stay out of the adult criminal justice system. She came to see me often after she aged out. One day, she came to my office when she was 19 and
she told me she made a huge mistake and almost assaulted someone. However, she was able to start breathing and apologize to the person. I was so proud of her for regulating her emotions (and not incurring a new adult criminal charge)!

Just as in T’s case, sometimes helping our clients learn to make things right can take years of trust and relationship building. Most of our clients never get the chance to figure out how to change their behavior, and the consequences often escalate. Instead of holding our clients accountable while simultaneously giving them the opportunity to learn how to replace a negative behavior with something more constructive, we are often fighting upstream to either keep them out of a residential treatment center or avoid a change of placement. Advocating for an opportunity to apologize (in writing or in person) can sometimes make a difference between whether child clients return to a foster placement or a school, or whether they incur criminal charges. Although some placement changes may be unavoidable, helping our kids understand the power of an apology is an important life skill that will unlock so many opportunities on their path to permanency and beyond.

Because we know that kids who experience trauma are more likely to be impulsive based on a heightened fear response center in the brain, we have an important opportunity to empower our clients to make amends. Advocates can use this information to argue that accountability can come in the form of receiving opportunities to make things right rather than receiving harsh punishments. Collaborative problem solving and restorative practices are compelling models that demonstrate how to reconcile difficult relationships in a constructive way to hold wrongdoers responsible, help repair relationships, and give children insight into their behaviors and actions. See Massachusetts General Hospital, Dep’t of Psychiatry, Think:Kids, Rethinking Challenging Kids. Enabling our clients to repair relationships still holds them accountable for their actions, but it gives them an opportunity to learn how to approach people and situations differently next time. Repairing a difficult situation also has two powerful benefits for our clients. First, we can help them learn to strengthen existing relationships with adults and peers. More importantly, we have the potential to help intercept future impulsivity by asking our clients to think about ways to deescalate or change their behavior the next time they have a difficult interaction. Consequently, what I call “reconciliation advocacy” can have a lasting impact on our clients’ current and future relationships.

5. Don’t take it personally. Just like adults, kids do not always know all of their triggers. As mentioned above, trauma is stored at a cellular level, so a sight, smell, touch, or sound can trigger a reaction, and it is important that we not take a reaction personally. This is good advice for children’s attorneys as much as it is for any person who works
with children. I once had a client psychiatrically hospitalized following a pizza party at his school. A month prior to the party, “John” came into foster care following an extreme domestic violence incident between his parents. Shortly before the incident, John’s mom picked up a pizza on the ride home from school. The teacher did not know the reason John entered foster care and that the pizza would be a trigger to John. The teacher was upset at the thought that he had triggered John. I explained that the pizza might have been a trigger for John, and it was not the teacher’s fault. The important point was for the teacher to keep checking in with John when he returned to school to build a relationship.

It is important for us to understand that our kids are likely to have bad moments—or bad days. They might cuss us out. They might feel triggered by something we do or say. But we cannot take their bad moments personally and it is critical that we stay calm. The calmer we are with our clients, the more we can help them regulate their often overstimulated fear response center. Consequently, both the attorney and the client benefit—the attorney can model good behavior, and the client can learn some calming strategies.

**Systemic Advocacy**

After attending numerous discipline meetings in schools for my clients, it seemed an appropriate time to expand our systemic advocacy so that educators, judges, and others could learn about the profound impacts of trauma and toxic stress. In January 2016, the OCA received a Casey Family Programs grant to improve education outcomes for youth in foster care. The OCA targeted strategies and trainings to address the social and emotional needs of “systems-involved youth” and efforts to improve interagency cooperation and coordination of educational services for all systems-involved youth. As a result, I helped to develop the Delaware Compassionate Schools Learning Collaborative.

The Compassionate Schools Learning Collaborative team provides trainings to schools and community partners with the goal of improving education outcomes for youth in foster care, youth at risk, and systems-involved youth. The trainings include (1) Trauma, Toxic Stress, and the Impact on Learning, (2) How to Support Youth Following a Child Abuse Hotline Report, (3) Self-Care for Educators, and (4) Strategies to Build Resilience in Students Who Have Experienced Trauma. Over the past three years, the Compassionate Schools Learning Collaborative has trained more than 8,000 educators on trauma and our various other trainings. Delaware educators, school superintendents, all of our family court judges, attorneys, and other professionals have received training on trauma. Since our initial inception, on October 17, 2018, the governor signed Executive Order 24, a proclamation making Delaware a “trauma-informed state.” The order calls upon all state agencies to develop strategic plans to become trauma-informed and consider how to support individuals and families who have experienced
trauma. The OCA has also worked collaboratively with Delaware’s first spouse’s First Chance initiative, which has a focus on supporting youth and families who have experienced trauma. We have aligned our strategies and efforts to support the work of the First Chance initiative and to make this a large-scale sustainable endeavor.

**Outcomes Data**

The trainings and presentations on trauma with the Delaware school superintendents, special education professionals, school nurses, and other educators have had a direct impact on helping schools understand the devastating impact that out-of-school suspensions can have on youth in foster care and other systems-involved youth. Since the inception of this work, the data show a dramatic decrease in out-of-school suspensions. Before, youth in foster care were suspended at 1.5 times the rate of the general student population. Now they are suspended at about the same rate as the general population.

The OCA’s management of the Casey Family Programs grant ended in December 2018, but we remain involved in the exciting work to make systems more trauma-informed. Our most significant achievement, however, is that the Delaware child welfare system now places educational outcomes at the forefront of child well-being measurements for youth in foster care.

**Conclusion**

We have to remember that even when we are sensitive and trauma-aware, we may not always know what might have a positive or negative impact for our child clients. But we can do four
things to help our clients. First, always remind people to treat trauma as a universal precaution. Second, we have to figure out what we can do to support our clients, make them feel safe, and help others see the strengths in our clients—it is a big part of our job to humanize our clients and we often have more information on our clients’ trauma history, if we are able to reveal that within the confines of our confidential relationship. Third, we have to make sure that no one blames our clients for predictable reactions to trauma that are often out of their control. Finally, we have to be good role models for self-regulation—being patient and practicing mindfulness and self-care are all important ways to sustain working as a child’s attorney. Most importantly, modeling these tools may also help our clients figure out ways to calm themselves.

Once we understand the brain science behind trauma, we can help our child clients become resilient. In doing so, we can help change the narrative for our clients from “what is wrong with these kids?” to “what happened to these kids?” and “what is right with them?” and “how can we support them?” See National Ass’n of State Mental Health Program Directors, NASMHPD’s Center for Innovation in Behavioral Health Policy and Practice.

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Incorporating an Individualized Education Plan into Your Client’s Defense

**By Cristina F. Freitas, Debbie F. Freitas, and Alexandra G. Roark – July 2, 2019**

For many juvenile court practitioners, attending special education meetings and modifying a child client’s individualized education plan (IEP) is a routine activity that is seen as a distinct and separate piece from practitioners’ courtroom advocacy for their clients. No doubt, representation at the special education table is both a necessary and essential part of our roles as lawyers for children. However, whether you are able to advocate for your client at an IEP meeting or not, in an increasingly busy and data-driven juvenile court, incorporating your client’s IEP into your courtroom advocacy can provide an individualized and sophisticated defense. Indeed, since youth spend a majority of their day in school, school staff become the de facto experts on the youth in a way that other professionals, such as probation officers or child welfare caseworkers, simply cannot. By harnessing this specialized knowledge, we can offer an individualized and informed defense specifically tailored to accommodate and leverage the youth’s disabilities.

On many levels, the goals of an IEP serve many of the same needs we have in providing zealous courtroom advocacy for our child clients. IEPs set reasonable goals for the child on an annual basis, which pre-identify the youth’s abilities and functioning levels. IEPs also pre-identify what types of services or accommodations are necessary for the youth to meaningfully engage with written and verbal information, and they often include achievement testing scores and data that can be a red flag for competency and other issues. IEPs can show a youth’s ability to comply and engage in services, and because they cover three environments (the general education curriculum, extracurricular activities, and nonacademic activities), they can help identify how a particular disability manifests itself at school and in the community. All of this information can not only guide our interactions with child clients—it can be part of a defense in some of our most common juvenile court cases.

**Status Offense Cases**

Status offense cases pose a particularly difficult conundrum in the juvenile court. Status offense cases refer to those types of cases that implicate a youth’s behaviors or choices only because of the youth’s age. For example, status offense cases often include truancy petitions, where a child failed to attend school in conformity with the state’s compulsory attendance law, or petitions that allege a child has run away repeatedly from his or her parent. These cases, by their very nature, are problematic because they would not be the source of a court encounter but for the child’s minority status in that these behaviors are not illegal if engaged in by adults.
Their problematic nature is often compounded when a youth’s disability and how that disability manifests itself are not adequately understood or considered. Among the most common status offense cases are cases that are based on a youth not following the lawful commands of a parent or guardian and are typically interpreted as stubborn adolescent behavior.

Indeed, while many people at first glance interpret difficult adolescent behaviors as signs of stubbornness, defiance, or aggression, IEPs can often offer greater insight into why a youth is experiencing these behaviors and can offer a zealous defense against a status offense case. This is because status offenses, like the criminal offenses, which they evolved from decades ago, are generally not strict liability offenses. In other words, in every status offense case, there is some sort of willfulness or purposeful conduct requirement. See *Millis Pub. Sch. v. M.P.*, 478 Mass. 767 (2018), and *Matter of the Welfare of B.K.J.*, 451 N.W.2d 241, 243 (Minn. Ct. App. 1990). To attorneys for children, this is intuitive when viewed in the context of other cases, such as truancy. For instance, we don’t necessarily want to bring within the jurisdiction of the juvenile court youth who are missing school because of medical illnesses or appointments merely because they have exceeded a certain number of school days. The crucial question in truancy cases therefore transforms itself from why the child is missing this many school days to why the child is acting this way, which is often shorthand for the legal question of whether it is willful. After all, the status offense laws were created not to punish sick children who have to attend multiple medical appointments or are homebound for significant amounts of time due to debilitating illnesses, but to get to the children who are on the street during school hours or playing hooky and to reach them before they enter the delinquency system.

While this line of thinking is instinctive for truancy cases, the crucial question of why the child is acting this way or whether it is willful is just as applicable a framework for other types of status offense cases, such as stubbornness petitions. Indeed, behavior that is in conformity with a diagnosis is not willful or purposeful conduct and, as such, cannot be the source of a stubbornness petition. Viewed in this light, IEPs, which often detail not only the disability but also how that disability manifests itself in certain situations, offer a crucial piece of the puzzle in these types of cases. For instance, an IEP that documents a diagnosis of intermittent explosive disorder can explain why a parent and child often get into intense arguments over trivial things, because intermittent explosive disorder is characterized by explosive outbursts of anger that are disproportionate to the situation at hand. Likewise, an IEP that documents a diagnosis of attention deficit hyperactivity disorder (ADHD) can explain why a parent is alleging that the child doesn’t listen to him or her or engages in risky behavior, because ADHD is characterized by limited ability to pay attention and impulsiveness.

While the parent and, frequently, the courts attempt to characterize these behaviors as stubbornness or defiance on the part of the youth, the IEP makes clear that these allegations...
are really just a layperson’s observations of the clinical manifestations of a youth’s disabilities. If these behaviors are a manifestation of the youth’s disability, then they are not willful, which is a fundamental requirement in status offense cases, lest they become strict liability crimes. Further, a parent’s commands cannot be lawful and reasonable, as status offense cases require, when the parent is essentially commanding the youth to stop the behavior that is a manifestation of his or her disability. Finally, the IEP assists the child’s lawyer in placing the onus on the correct party because failure to understand a child’s documented diagnosis is a hallmark of parental limitations, not a status offense for the child. The IEP can also bolster the argument that the status offense case is pointless because there is no helpful service that the court can offer the family. The IEP clearly lists the services to which the child is entitled and the accommodations necessary for the youth to make progress with the disability. The remedial measures most courts have the power to put into place in status offense cases, such as a change in custody, can actually make the youth’s situation worse by placing the youth in a congregate care placement that is ill suited to support his or her diagnosis and can trigger juvenile justice involvement, as well as ultimately create educational instability in a youth who may have been previously engaged in school. Finally, even a correct status offense adjudication is not without consequences for the youth because exposure to the juvenile court system, in and of itself, increases recidivism.

**Delinquency Cases**

Although perhaps not traditionally part of the necessary discovery in a delinquency case, a good understanding of the youth’s IEP can be critical in several stages of a delinquency case, including the probable cause stage and in violation proceedings.

**1. Probable cause determinations.** Probable cause determinations are arguably the most important step in a delinquency case, a distinct place in time to stop any further criminal proceedings against the youth, yet many times, these decisions are made blindly by prosecutors. This isn’t for lack of any authority on the topic. The federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(k)(6)(B) (2012), clearly states that schools have a statutory duty to disclose information regarding a student’s IEP to the prosecutor in order for the prosecutor to make an informed and individualized decision on whether to pursue a charge against a youth based on the circumstances. When behaviors that could reach the delinquency realm also appear to be manifestations of the child’s disability, the IEP is particularly important in allowing the prosecutor to exercise sound judgement in deciding whether to allow the school to deal with the issue in a disability-focused way or whether to transfer the incident to the juvenile justice system for prosecution.
While ideally the school would provide this information to the court and the prosecutor for school-based offenses that lead to prosecution, it may be advantageous to your client for you to inform the court and the prosecutor about the youth’s IEP and to help decipher what could be seen as prosecuting the youth based on a manifestation of his or her disability. Related to this, there may also be other factors that the police complaint for a given offense may not fully explain, such as the fact that the behavior occurred at a specialized school or residential placement. When a youth is in a specialized placement as a result of his or her disability, should that youth be criminally prosecuted when that youth’s behavior at the specialized placement is a manifestation of that disability? In other words, should a youth be prosecuted for the very behavior for which he or she is receiving treatment? The Massachusetts Appeals Court took that question up in Commonwealth v. Orville O., 85 Mass. App. Ct. 1126 (2014) (order pursuant to Massachusetts Appeals Court Rule 1:28), in the context of a prosecution of a youth charged with annoying and accosting statements against staff. The court lamented in Orville O. that

[w]e infer from the nature of the facility [a residential facility for developmentally disabled or emotionally disturbed youth] that residents, such as the juvenile, are chosen precisely because of their propensity to engage in the sort of conduct and speech attributed to the juvenile. We also infer a concomitant need for guidance and correction in the juvenile’s social interactions with peers and adult members of the community. In such a setting, a counselor who presumably is trained to carry out the facility’s mission cannot reasonably take offense if a juvenile falters in conforming his language to the expected norms. . . . [W]e conclude that the Commonwealth failed to prove that this language would have been offensive to a “reasonable” person in the circumstances at issue here.

The reasoning behind this decision is applicable to many more scenarios facing our children in special education placements who are charged for school-based offenses, and the IEP should be central to the inquiry as to whether to prosecute the youth. Although more recently the court has stepped back from granting judges the power to dismiss cases such as these prior to arraignment, it has consistently implored the prosecutor to exercise judgement in determining if prosecution of the child is in the child’s best interest.

2. Violations of probation or conditions of release. A youth’s IEP can also prove crucial in defending against an alleged violation of pretrial conditions of release or violations of probation in delinquency cases. For any youth who is involved with the delinquency
system where there are conditions of release or probation put in place, there are frequently alleged violations of those conditions or probation. These proceedings are high stakes in that the youth’s freedom can be revoked in the pretrial stages and the youth can be detained for months prior to trial based on a lesser quantum of evidence than at the actual trial. When conditions are imposed as part of a probation disposition to a delinquency case, the youth can be saddled with even more burdensome conditions or even imposition of a sentence after a probation violation hearing. Many youth fail in these two contexts because the conditions the court has ordered are often too onerous or, frankly, too numerous to remember or inapposite to what we know about the adolescent brain. Further, many times, the court creates a list of conditions in addition to the standard conditions that are not individualized to the particular youth’s intelligence, comprehension level, actual needs, and maturational level. This sets the youth up for failure, especially when the court insists on absolute compliance with conditions. When all of this information is combined with the low burden of proof associated with these violation hearings, the risk that our youth clients will end up in detention and further penetrate into the juvenile justice system is serious.

In this scenario, having intricate knowledge about the youth’s IEP, disability, and accommodations can mean the difference between long-term detention in the juvenile justice system and the youth being free in his or her community. Specifically, the youth’s IEP can be used to discern whether the juvenile was actually complying with the conditions of release to the best of his or her ability, which is the heart of any violation. The IEP is a great data source to bring up at a violation of probation hearing, even if untraditional. After all, because the juvenile spends most of his or her day every weekday at school, who could be a better expert about the child than the school?

The IEP can provide valuable insight into the youth in several ways. First, the defense lawyer can use the IEP just as in the status offense context described above, to challenge the juvenile’s willfulness in violating the condition. In this context, the defense lawyer can use the achievement testing included in most IEPs to argue that the youth simply did not grasp all of the conditions. For example, if the IEP lists the youth’s comprehension testing results in the eighth percentile, how will the probation officer prove that the youth comprehended the particular condition? Any information in the IEP from full-scale intelligence quotient testing can reveal serious deficits in the area of memory that are directly relevant to the question of whether any alleged violation of a condition was willful. While the juvenile court might ordinarily interpret the lack of compliance with conditions as defiance or even typical adolescent behavior, where the attorney has lodged his or her argument in the youth’s IEP, this argument is sourced directly from unique and specific data regarding this juvenile, data that were created
prior to the violation and that therefore have a high degree of trustworthiness—not an excuse, but an explanation of the youth’s behavior.

Indeed, the accommodations section of an IEP may also have clues about how the conditions were a setup for failure, in addition to providing guidance on how future conditions should be crafted in order to avoid setting up the youth for failure again. For example, a common IEP accommodation includes presenting information on an uncluttered page. Because this accommodation is required in the school setting to ensure the youth can meaningfully access the material, it is directly on point for what accommodations are required in court for the youth to similarly engage with the material meaningfully. We know that typical court forms are anything but uncluttered. As a result, not only does the IEP provide a defense to lack of compliance with any particular condition, it can also provide a prescription for ensuring future compliance as long as the conditions are crafted in a disability-informed way. Another typical IEP accommodation requires that grade-level materials be read to the youth, but court conditions of release forms or probation forms are often not written to grade level for children, nor read to the youth, and this poses a serious problem for then holding the youth accountable for an alleged violation later.

Other parts of the youth’s IEP can also be useful in defending against an alleged violation of a condition. Many times, a youth will be charged with a violation for not following a condition 100 percent of the time, but there may be evidence in the IEP that the youth is not capable of 100 percent compliance with any specific task. Specifically, all IEPs include a measurable goals section that school personnel—as experts on the child—set for this youth annually. Those goals are aspirational in that there is no reason not to set especially high goals for the youth because there is no consequence for not achieving 100 percent compliance with those goals. Nonetheless, the goals are almost never set at 100 percent compliance, and this is because these goals have to take into account each individual youth’s current abilities. When the court looks at these measurable goals, which may be set at 75 percent of the time the youth will do X or the youth will take advantage of X opportunity two out of four times, then even 80 percent compliance with a court-imposed condition is certainly full compliance for this particular youth when viewed in context. In other words, even though 100 percent compliance with the court-imposed condition is lacking, it is nonetheless what full compliance looks like for this particular youth, according to his or her IEP goals.
Conclusion
By expanding your discovery practice to include your client’s IEP, you can harness and leverage an incredible amount of information about your client. That detailed and specific data regarding your client’s inherent abilities, baseline functioning, and necessary accommodations can translate into better representation at school meetings and in the courtroom alike.

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Alleging Retaliation on Behalf of Students with Disabilities

By Rosa K. Hirji – July 2, 2019

Parents of children with disabilities all too often face subtle and not so subtle retaliation from their children’s schools in response to their advocacy. Retaliation is a harmful act against a person that is made in response to that person’s grievance or participation in an activity that is protected by law. Anti-retaliation provisions in the law are generally tied to constitutional or statutory rights. The purpose of these provisions is to ensure that those who complain about discrimination or a violation of rights are not deterred for fear of retaliation. They seek to “prevent . . . interference with ‘unfettered access’” to statutory rights. Burlington v. White, 548 U.S. 53, 68 (2006). This article provides an overview of the legal framework and the evidence required in raising viable retaliation claims on behalf of children with disabilities in the educational context, with a particular spotlight on the Ninth Circuit.

Applicable Statutes
Section 504 of the Rehabilitation Act prohibits anyone from interfering with the exercise of rights granted by the law to individuals with disabilities. Section 504 incorporates the anti-retaliation provision of Title VI of the Civil Rights Act of 1964, which “prohibits recipients from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege . . . or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.” 34 C.F.R. §104.61 and 34 C.F.R. §100.7(e) [logins required]. The Americans with Disabilities Act (ADA) provides, “no person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by” the ADA. 42 U.S.C. § 12203(a). Because section 504 uses an anti-retaliation clause that is functionally identical to the ADA, they are generally analyzed together.

Non-disabled individuals who have “opposed any act or practice made unlawful” by Title II of the ADA have standing to sue under the anti-retaliation provisions of the ADA. Barker v. Riverside Cty. Office of Educ., 584 F.3d 821, 827 (9th Cir. 2009). Thus, teachers and parents who advocate for disabled students have standing to raise retaliation claims.

Rebuffing Parent Involvement and School Culture
Retaliatory action is defined broadly. “The law deliberately does not take a ‘laundry list’ approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit.” Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996).
Rebuffing parent involvement is a subtle form of retaliation that is not easy to discern or allege. Parent involvement and advocacy positively affects the educational outcome of disabled students. For this reason, parent participation in the decision-making process regarding a child’s educational program is a significant procedural right under the Individuals with Disabilities Education Act (IDEA). The purpose of legislating the role of parents in a child’s special education program is explicitly to “balance the natural advantage of districts.” *Schaffer v. Weast*, 546 U.S. 49 (2005). However, according to Dr. Peter Blanck, professor of disability and education policy at Syracuse University,

> a body of well-recognized research and practice shows that, despite the protections of the IDEA and other civil rights laws such as the ADA, the Rehabilitation Act, . . . parents of children with disabilities often do not feel, or deliberately are not made to feel, accepted and engaged in special education decision-making processes (e.g., in IEP [individual education plan] meetings, parent-teacher interactions).

Research shows that there are often significant disputes that arise from parent involvement. Studies cited by Dr. Blanck in his extensive report describe parents’ views of disenfranchisement in advocating for their child with a disability, their belief that they are not viewed as true partners in the education decision-making process, and their feeling that their relationship with the educators and professionals is adversarial and alienated. For example, school staff will frequently react to parent advocacy by avoiding further interaction with the parents in question. Moreover, parents who advocate for their children are often perceived by schools as bad or difficult parents, leading to feelings of helplessness or alienation.

Retaliation claims that involve a subjective interpretation of events are difficult to prove. For example, in a complaint to the Office for Civil Rights (OCR) of the Department of Education, the parent and student alleged that after they sent emails to the teacher about the student’s need for classroom-based accommodations, the teacher retaliated by subjecting the student to a series of questions in math class, causing the student to shut down due to feeling frustrated and embarrassed. *Seminole Cty. (FL) Sch. Dist.*, No. 68 IDELR 257 [login required] (OCR 2016). The OCR found that this constituted an adverse action because, even if the challenged action did not objectively or substantially restrict an individual’s educational opportunities, “the action could be considered ‘adverse’ if it could reasonably be considered to have acted as a deterrent to further protected activity or if the individual was, because of the challenged action, precluded from pursuing his discrimination claims.” *Id.* However, because the teacher articulated that her actions constituted a legitimate teaching methodology she regularly applied
to all students, the OCR found no retaliation, even though a few months after the incident, the school wrote into the IEP an accommodation to specify that the teaching technique at issue would not be used on the student.

According to Dr. Blanck, based on his research and the research of others, organizational culture in schools is paramount in promoting inclusive and nondiscriminatory environments for students with disabilities. A positive and effective school culture involves district and school leadership that inculcate positive, as opposed to negative, attitudes and behavior by teachers and staff. It also includes training programs, implementation of policies and practices, and ensuring teachers’ adherence to disability programs and accommodations. In these positive school cultures, teachers better understand their obligations under the law in serving students. To meet their obligations, teachers understand that they must promote effective partnerships with parents. This, in turn, reduces conflict.

Raising claims that seek change in school culture is an appropriate strategy to combat retaliation. For example, combining retaliation allegations with allegations related to policies and procedures can strengthen the retaliation claim and result in systemic solutions. In the Seminole case referenced above, even though the OCR ultimately determined that retaliation did not occur, it nonetheless found that the school district’s policies and procedures failed to comply with section 504. Specifically, it found that the district’s grievance procedures did not provide for adequate, reliable, and impartial handling of complaints; did not reference federal disability laws; and provided an inadequate and overly restrictive definition of “harassment.” The OCR ordered significant corrective action related to revising the grievance procedures and regular reporting to the OCR.

Alleging Retaliation
To state a prima facie case of retaliation under the ADA and section 504, an individual must show that (1) she engaged in a protected activity, (2) she suffered an adverse action, and (3) there was a causal link between the two. T.B. v. San Diego Unified Sch. Dist., 806 F.3d 451, 472 (9th Cir. 2015) (adopting the burden-shifting framework established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to retaliation claims under the ADA).

Protected activity in the school environment comes in many forms, including pursuing one’s rights under the IDEA. Advocating for disabled students regarding issues related to their federal and state educational rights is a protected activity under those statutes. Lee v. Natomas Unified Sch. Dist., 93 F. Supp. 3d 1160, 1168 (E.D. Cal. 2015) (sending emails to school officials regarding noncompliance with the IEP and filing a complaint with the state department of education were protected). Similarly, requests for accommodation by parents are protected

An “adverse action” is one that “is reasonably likely to deter the charging party or others from engaging in protected activity.” *Ray v. Henderson*, 217 F.3d 1234, 1242–43 (9th Cir. 2000). The adverse action must be material. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006). It need not involve a tangible action, but any action that is likely to deter the individual from accessing remedial actions provided by the statute would be considered material. *Id.* For example, in a recent case brought by this author, a court denied a school district’s motion to dismiss a retaliation claim, even where the parents’ actions had already been found to have violated the state’s anti-harassment statute. *Silva v. Palmdale Sch. Dist.*, No. LA CV17-03138 JAK (AGRx) (C.D. Cal. 2017) (unpublished). *Silva* involved a teacher who filed for and obtained a restraining order against the parents of a disabled student. The defendant school district argued that the actions that resulted in a restraining order could not be protected activity because those very same actions had been found to violate state law. The district court disagreed, finding that the act of seeking a restraining order “is an act that would likely have dissuaded a person from making a complaint,” the plaintiffs had stated a plausible claim. *Silva*, slip op. at 7–8 (citing *Lee*, 93 F. Supp. 3d at 1168).

The adverse action must be causally related to the protected activity. The Ninth Circuit’s standard for a causal link is “but-for” causation. *T.B.*, 806 F.3d at 472–73 (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 339 (2013)). In *Nassar*, the U.S. Supreme Court made the causation standard more rigorous than the previous “motivating factor” test. Legal commentators have said that this case constituted a “backlash” and a dramatic departure from a general trend in the federal courts in favoring retaliation claims. Alex B. Long, “Retaliation Backlash,” 93 Wash. L. Rev. 715 (2018). Following *Nassar*, courts have held that, in the employment discrimination context, the “but-for” causation standard for retaliation requires the plaintiff to establish proof “that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions.” *T.B.*, 806 F.3d at 735 (citing *Nassar*). Courts are currently split on whether the *Nassar* but-for standard applies to ADA retaliation claims. The Third Circuit has held that a lesser burden would apply at the prima facie stage, where the plaintiff must produce evidence “sufficient to raise the inference that her protected activity was the likely reason for the adverse . . . action.” *Carvalho-Grevious v. Del. State Univ.*, 851 F.3d 249, 259 (3d Cir. 2017).

Temporal proximity can help establish causation where the adverse action comes closely after the protected activity. *A.C.*, 711 F.3d at 699. In *A.C.*, the Sixth Circuit found that parents met their prima facie burden at summary judgment (1) when they engaged in protected activity by making several requests for accommodations by email and meeting with the assistant principal;
(2) when the principal engaged in an adverse action by making a child abuse report of medical abuse, an act that would dissuade any reasonable parent from requesting accommodations because of the investigation and consequences involve; and (3) when they produced evidence that the report was made immediately after the parents’ meeting with school officials, and that many of the statements made by the principal and teachers in their report were false, resulting in an inference of causation. Id. at 700.

**Showing Pretext**

Demonstrating that the rationale provided for the retaliatory action is a pretext is the most difficult aspect of a retaliation claim. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to show a legitimate, nonretaliatory purpose for its acts. Alex G. v. Davis Joint Unified Sch. Dist., 387 F. Supp. 2d 1119, 1128 (E.D. Cal. 2005) (citations omitted). To overcome defendants’ legitimate, nondiscriminatory reason, plaintiffs must “show that the articulated reason is pretextual ‘either directly by persuading the court that a discriminatory reason more likely motivated the [school district] or indirectly by showing that the [school district’s] proffered explanation is unworthy of credence.’” Id. (citing Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1062 (9th Cir. 2002)).

Thus, in A.C., the Sixth Circuit found that while the school district’s rationale about fluctuating glucose levels at school carried the burden of articulating a nonretaliatory reason for filing a medical neglect claim with the state, the parents provided significant proof of pretext: They showed why the allegations of medical abuse were unfounded, showed evidence that some of the incidents in the report did not occur, and pointed to emails in which school officials expressed concern about parent advocacy and liability issues. A.C., 711 F.3d at 700.

Evidence of pretext is the most critical and difficult aspect of a retaliation claim. A review of a sample of complaints filed by parents in 2018 with the OCR reveals the following allegations of retaliatory action: making disciplinary referrals of the child, restricting parents’ communication with staff, removing provisions in the IEP, filing truancy charges, denying the student the ability to participate in prom, and failing to provide IEP-related services, among other things. In an overwhelming majority of these cases, while the OCR found that adverse action occurred, it ultimately also found a legitimate nonretaliatory reason for the actions with insufficient proof of pretext.

In a case that is currently being reviewed by the Ninth Circuit, the parent was unsuccessful before the lower court in arguing pretext when she claimed her behavior at school was not sufficiently “disruptive” to restrict her access to the school campus. Camfield v. Bd. of Redondo Beach Unified Sch. Dist., 2017 WL 3037780, at *5 (C.D. Cal. July 17, 2017) (currently under appeal). The district court held that there was no “right” of parents to unfettered access to the
school, and therefore the argument that the restriction was unwarranted was not sufficient to establish a pretext.

In a recent decision from the Sixth Circuit, the parents raised three theories to establish pretext: (1) the basis for the adverse action was factually false, (2) others were not subject to the adverse action even though they engaged in substantially identical conduct, and (3) the adverse action was not actually motivated by the proffered reason but that the sheer weight of circumstantial evidence showed a pretext or cover-up. *M.L. v. Williamson Cty. Bd. of Educ.*, 2019 WL 2244720 (6th Cir. May 24, 2019) (finding that that arguments of pretext were unsubstantiated by the evidence).

An excellent presentation on the ABA’s website reviews case authority and presents the following methods and evidence that have been used to prove pretext:

- A departure from usual business procedures or a suspect practice or procedure;
- The lack of fixed or reasonably objective standards for evaluation and/or discipline;
- Best or better practices that may have avoided discrimination;
- Implausible or fantastic justifications;
- Whether the version of events as related by one party is internally consistent and plausible, or whether numerous inconsistencies and conflicting documentary evidence render the story unreliable;
- Evidence of a general atmosphere of discrimination may also be considered: proof of historically-limiting opportunity, policies or past practices with respect to minority employment or harassment;
- Responses to the plaintiff’s “legitimate civil rights activities“;
- Statistical proof even if it is not dispositive of the claim in and of itself;
- Instances in which persons outside the protected class were treated better.


Alleging pretext requires an understanding of the various theories that have been entertained by courts, a review of what type of evidence was considered sufficient in those contexts, and careful, evidentiary analysis to support the claims. Most complaints of retaliation brought
before the OCR in 2018 failed even though there were findings of adverse action and an inference of a causal connection, because the parent failed to bring forth sufficient evidence to prove that the adverse action was pretextual.

Conclusion
Retaliatory conduct of teachers and school administrators can have lasting consequences on families. When schools inhibit parent advocacy, they risk not meeting the disability-related needs of the child, leading to lack of progress and, in some instances, medical and psychological harm. Actions that criminalize parent advocacy through truancy referrals, seeking civil restraining orders, filing false abuse or neglect claims, or taking other acts to “push out” the family from the school have reverberations in the community and dire consequences for the family. Public schools must accept and work with all children and all of their caregivers, regardless of how difficult it might be. Thus, severe actions against those they serve should be taken as a last possible resort and only after there is a review of all policies and procedures, teacher training, and a proactive attempt at parent engagement, and finally, only if it is for a legal, legitimate, and nonretaliatory reason.

Bringing forth viable and strong claims of retaliation will promote change because it will force schools to assess their behavior, return to parents and students the power to assert their rights, and inform and educate the courts and public that disability-based discrimination in public schools is a continuing problem. However, retaliation claims must be strictly alleged and meet the evidentiary standard to be successful.

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By Christal Cammock and Jennifer Baum – July 2, 2019

Today, U.S. children are typically vaccinated against 11 deadly, and formerly common, diseases: diphtheria, Hib disease, hepatitis B, measles, mumps, pertussis (whooping cough), polio, rubella, pneumococcal disease, tetanus, and varicella (chicken pox). But it wasn’t always so. Vaccines are a relatively recent development in medical history. The world’s first vaccine, for smallpox, was discovered in the late 1700s. A hundred years later, Louis Pasteur discovered the second vaccine, for rabies. By the mid-1900s, technological and medical advances drove more rapid vaccine development, and in 1963, the first measles vaccine was approved.

Before the measles vaccine became available, up to four million Americans contracted the disease every year. By 2004, that number was reduced to just 37 individuals. Measles was therefore declared “eliminated” in the United States years ago, but outbreaks still occur when travelers from other countries enter the United States and transmit the disease to unvaccinated individuals here. These outbreaks have led to fierce debate between supporters of the measles vaccine and those opposed to it. And those debates, in turn, have led to vaccine mandates and to challenges to those mandates. This article reviews some of that history.

Vaccination Laws Emerge

As vaccination developments evolved, the law did, too. Britain was the first country to mandate vaccines in 1853, requiring babies to be inoculated against smallpox. Two years later, Massachusetts became the first state to use its police powers to require smallpox vaccinations. When, some 50 years later during a smallpox outbreak, the vaccination requirement was challenged, the U.S. Supreme Court in *Jacobson v. Massachusetts* (1905) held that there is no constitutional right for every person to be free of every restraint; rather, all persons, as a condition of citizenry, could be subjected to some form of restraint for the public good. Accordingly, the country’s first objection to mandatory vaccination was defeated.

Almost two decades later, the Supreme Court in *Zucht v. King* (1922) upheld a Texas school exclusion law that denied school enrollment to unvaccinated children. And in 1944, the Supreme Court in *Prince v. Massachusetts* (1944) again made clear that the state’s interest in public safety takes priority over religious freedom and the right to family privacy. Thus, time and again, the use of a state’s police power to uphold public health has taken priority over the right to privacy or to religious freedom or to education. Accordingly, over the next several decades, because of the ease, speed, and deadly consequences of disease transmission in schools, every single state came to enact some form of mandatory vaccination requirement, along with a school exclusion sanction for unvaccinated children.
Exemptions to State Vaccination Laws

However, the power to mandate vaccines is not limitless. Every state, for instance, also permits one or more exemptions to mandatory vaccination of school children, though the numbers and types of exemptions are shrinking, and shrank further while this article was being written.

Medical exemptions. All states provide exemptions for medically fragile children. Each state defines its own criteria for satisfying this exemption, but all include the same general principles: exemptions for infants too young to receive the vaccine and for anyone with a weakened immune system for whom the vaccine would pose a known medical threat (such as a child undergoing chemotherapy). Typically, a medical exemption must be written by a doctor and may be either permanent or temporary, with temporary exemptions lasting no more than 12 months, at which time the exemption must be renewed, the vaccination obtained, or a school exclusion must take effect.

A medical exemption must conform to certain Centers for Disease Control guidelines and may include both contraindications (a condition that increases the risk for a serious adverse reaction) and precautions (a condition that might increase the risk of a serious adverse reaction, might cause “diagnostic confusion” in a patient, or might compromise the ability of the vaccine to produce immunity). Medical exemptions may also be obtained through blood titers showing immunity has been achieved by surviving the disease, such as a blood test showing chicken pox antibodies. (This is also sometimes known as demonstrating “serological immunity.”)

Recently, as states have moved to eliminate nonmedical exemptions or made them more difficult to obtain (see below), applications for medical exemptions have surged. In California, for instance, the elimination of “personal belief” exemptions in 2015 resulted in a spike in medical exemption applications thereafter.

Religious exemptions. Most states also provide a religious exemption, though five currently do not: California, Maine, Mississippi, West Virginia, and now New York, which eliminated religious exemptions this year in response to a massive measles outbreak believed to have originated in religious communities in Brooklyn and other New York counties. Numerous other states are following suit by considering legislative reforms to end their own religious exemptions.

The source of a religious exemption may not be easy to identify. A church that relies on faith healing, such as the First Church of Christ, Scientist (Christian Scientists), is one example of a clear religious objection to vaccination. A church that objects to a vaccine
component, such as the Jehovah’s Witnesses’ objection to vaccines made using blood products, is another, though this church reversed its historical objection to most vaccines and now permits them because most are not derived from human blood (excluding tetanus and rabies shots, which are manufactured using blood products). Islam and Judaism do not permit the consumption of pork, yet some vaccines are manufactured using porcine gelatin (including some types of measles, mumps, rubella, and flu vaccines), leading some adherents to argue that they may not take the vaccine. Jewish law, however, also requires prevention of harm to the body, especially during an epidemic, which is why Jewish leaders have come out in support of vaccination during the recent outbreaks in New York, despite their incorporation of porcine gelatin. Islamic leaders have similarly relied on the doctrine of necessity to urge the faithful to get vaccinated despite porcine gelatin, until an alternative can be developed. Thus, whether a religion does, in fact, oppose vaccinations is a highly fact-intensive question and may involve the type of vaccine, whether or not there is a current epidemic, and geography, as vaccines are manufactured somewhat differently from region to region.

In theory, a religious exemption permits an individual to decline mandatory vaccination due to a sincerely held religious belief; however, as described above, this right is not absolute and will yield to the interest of the state in preventing or controlling a public health emergency. The Supreme Court made clear over a century ago that not only may states require vaccinations as a condition of school attendance (public or private) but also in an emergency all individuals—and not just school children—may be subjected to compulsory vaccination. Requiring vaccinations does not violate the First Amendment plain and simple, and states are therefore not required to offer religious exemptions to vaccination at all.

But when a state does choose to offer a religious exemption, it must set out the criteria for an individual to satisfy. Some states rely merely on a signed form claiming a sincerely held religious belief, making it easier and cheaper for parents to avoid vaccination by signing a form, rather than comply with it by taking a child to the doctor. Other states might require a letter signed by a spiritual leader.

Recent objections to religious exemptions cite the lack of religious authority on which claims of religious opposition may be based (mistake) or concerns that some parents misuse claimed religious exemptions to cover up for non-religious objections (subterfuge).

**Philosophical exemptions.** Philosophical exemptions are also known as personal belief exemptions, and they are treated similarly to religious exemptions. About a third of
states currently provide for philosophical exemptions, though this number, too, is expected to decline due to recent outbreaks. This exemption is for individuals who hold a conscientious objection to vaccines, including moral, ethical, and personal beliefs.

Do Children Have the Right to Vaccinate?
The World Health Organization recently declared the anti-vaccination movement to be one of the 10 greatest current threats to global health. Given measles and mumps outbreaks across the country and vaccine debates playing out across social media and on the nightly news, teens are increasingly concerned about their own health care rights, including their right to be vaccinated. Teens also saw one of their own, Ohio high school senior Ethan Lindenberger, testify before Congress this past March about being unable to get vaccinated over his parents’ objections until he turned 18. While many states do at some point provide access to minors for treatment of certain stigmatizing medical needs such as drug treatment, contraception, sexually transmitted diseases, and mental health treatment (under the mature minor doctrine), most do not provide for the ability to obtain routine childhood vaccinations without parental consent.

Several states have taken notice. Backed by the local chapter of the American Academy of Pediatrics, a bill pending in New York would permit children to consent to vaccinations starting at 14 years of age. In Washington, D.C., another bill would allow a child of any age to consent to vaccinations provided the child is able to comprehend risks and benefits of getting the shots. In addition, emancipated minors may consent to their own health care.

Concerned children’s advocates can get involved in their own states to push for vaccination rights. Conscientious practitioners should always inquire whether their child clients want to see a health care professional but should now also offer assistance if there is a concern about vaccinations. And for those wanting more information, the Centers for Disease Control’s website is a treasure trove of news, statistics, and additional resources.

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PRACTICE POINTS

Five Tips for Advocating for the “Most Connected Placement”

By Virginia Corrigan, Brent Pattison, Jennifer Pokempner, and Jennifer Rodriguez – May 20, 2019

How can lawyers advocate to ensure that their clients are being placed not just in the “least restrictive” setting but in families where children are the most connected to people who love them and to their own communities? Here are five tips to get you started.

1. Engage your client, their family, kin and community.
   A. Ask your client who they love. Who loves them? Who do they feel safe with? Do they have coaches, teachers, families of friends, or faith leaders who might be resources? Where do they want to be? Children and youth can provide some of the best information on possible placements with kin and other members of their community. Don’t focus on the “placement” but on identifying and nurturing the relationship. Ask your client’s family members and kin if and how they are able to be in your client’s life, whether though relationship or providing a home, and any needed supports to do so. Relationships often turn into families.
   B. Make it possible for your client, their family, and identified caring adults to be part of key meetings and hearings so they can be involved in planning and decision making.
   C. Ensure your client has many social and enrichment opportunities outside of the system to develop relationships with caring adults.

2. Use the law in motions, holding hearings, and appeals to support a disposition of the most connected placement and to oppose placement in group care.
   A. Does the placement meet your jurisdiction’s legal standard for a disposition and has the state met its burden of proof that a placement is the least restrictive setting?
   B. Make the state demonstrate that the proposed placement is the least restrictive placement under federal law and any state law provisions. Have less restrictive
settings been tried and exhausted? Has placement with family or foster been tried with supports in place to address specific challenges?

C. Have reasonable efforts been made to identify family, prevent placement, or finalize the permanency plan, which if provided could support the most connected placement?

D. Ensure that you are given an opportunity to weigh in on any placement decision by:

   i. enforcing any law or court rules that require that you are provided notice and an opportunity for a hearing prior to a placement change;

   ii. where such law does not exist, requesting an immediate hearing to challenge the placement based on principles described in (2a) and (2b); and

   iii. requesting an order that any placement changes will not occur without prior notice.

3. **Use the research to bolster and strengthen your argument that your client should be placed in a setting that is the “most connected.”** Cite research in your motions, arguments, and hearings that shows that:

   A. Separating children from their family causes harm—

      i. [*Separating Families May Cause Lifelong Health Damage*];

   B. There is almost no evidence that residential treatment is an effective treatment intervention;

   C. Any positive effects occur during short treatment stays in residential care and do not persist after transition out of residential treatment—

      i. [*American Academy of Child and Adolescent Psychiatry* (2010), and

      ii. [*Magellan Report* (2008)]; and

   D. There is expert consensus that placement in residential treatment and group care causes harm. Stays in residential treatment and group care can interfere with healthy development, exacerbate maladaptive behaviors, result in
victimization and abuse, decrease chances of permanency, and make youth vulnerable to harm both in the setting itself and after the youth transitions to another setting or out of care—

i. GAO Report (2007),

ii. American Journal of Orthopsychiatry (2014), and


4. Present evidence about how disruptive a more restrictive setting would be and offer concrete alternatives. Show how a group care placement will affect a child’s relationship with family, education, faith practice, and participation in extracurricular activities. Pack the courtroom with (or provide letters from) community and family members who support the most connected placement and present a service plan that could be provided to support the youth in a family. Support youth in educating the court about their perspective and wishes.

5. If a congregate care placement is approved, appeal the court order if you believe it is not supported by law or in the child’s best interest, and ensure there is a clear plan and time line to a transition to a family. Ensure plans are in place to maintain supportive connections; have all needs met, including educational needs; and provide access to age and developmentally appropriate activities, including social and extracurricular activities.

To learn more about advocating for the “most connected placements”, see:

- Is a “least restrictive” placement the best we can do for our children? (video)
- Advocating for the Most Connected Placement: A Guide to Reducing the Use of Group Care (toolkit)
- Juvenile Facilities Checklist for Defenders (toolkit)

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Government-Funded Discrimination in Foster Care Placement Decisions

By Jessalyn Schwartz – April 5, 2019

In January, the Department of Health and Human Services (HHS) granted a request by South Carolina Governor Henry McMaster, allowing for a waiver to Obama-era regulation barring discrimination on the basis of religion, sexual orientation, or gender identity for a federally-funded, faith-based foster care agency, Miracle Hill Ministries. The South Carolina request argued that the federal regulation found at 45 C.F.R. 75.300(c) limits the free exercise of religion of faith-based organizations in violation of the Religious Freedoms Restoration Act (RFRA). 45 C.F.R. 75.300(c) states as follows:

It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.

In a letter dated January 23, 2019, HHS granted the request for a waiver, stating that Miracle Hill’s “sincere religious exercise would be substantially burdened by the application of the religious non-discrimination requirement of 45 C.F.R. 75.300.” The letter further stated that a denial would not be in the least restrictive means of advancing the compelling government interest in discriminatory protection on the part of HHS and that there were nine other agencies available to serve potential foster parents. HHS allowed the conditional exception with respect to Miracle Hill and other subgrantees in the South Carolina foster care program using similar religious criteria in selecting prospective foster parents.

This is not the first time that Miracle Hill has made news due to discriminatory practices. In 2017, they came under fire for discriminating against potential foster parents who were Jewish, and Governor McMaster issued an executive order permitting such action on the basis of religion in 2018. Miracle Hill is responsible for up to 15 percent of the foster care placements in South Carolina, and it is of note that the state is experiencing a severe shortage in foster homes, with the population of foster youth rising from 3,100 in 2012 to 4,600 in 2018.

The first legal challenge to the exception was filed by the Americans United for Separation of Church and State who, with Catholic foster parent Aimee Maddonna, claim that the waiver is a license to discriminate and is violative of the Establishment Clause of the Constitution and
denies her equal protection. Maddonna applied to be a foster parent and, when she attempted to use her Catholic church as a reference, was told that only Christians attending the “right” type of Protestant church were acceptable foster parents for the agency. The suit alleges that the agency’s actions are “irrational and illegitimate” and that the state and federal governments are authorizing and funding religious discrimination.

The lawsuit also points out that the Miracle Hill manual even includes language against discrimination on the basis of race, color, national origin, sex, age, religion, political beliefs, or disability, showing that the agency is now going against its own policies in addition to the law. South Carolina law requires foster children receive religious teachings in accordance with the expressed wishes of their natural parents, and religious exemptions like this may allow for agencies to “effectively terminate biological parents’ rights to direct children’s religious upbringing” while in care. Miracle Hill also has explicit anti-LGBTQ policies in place and expect its placements to agree with those positions, which could be incredibly detrimental to LGBTQ youth who are overrepresented in foster care and in need of supportive placements.

While proponents of the exemption argue religious-based agencies are in danger of losing their license under the existing anti-discrimination regulations, critics of the waiver feel that this federally-funded agency has been granted the right to freely discriminate against foster parents. The Anti-Defamation League and other organizations in opposition feel this is a “dangerous precedent,” which would violate civil liberties, and Currey Cook of Lambda Legal argues that the contention that religious providers are being shut out of the foster care system is a “false narrative.” Legal scholars have opined that the idea of religious beliefs being allowed as an exemption from the law may have a broader impact and could allow discrimination in housing, employment, and education decisions in the future. Texas has already filed for a similar waiver and a 2020 HHS draft budget request, which is not yet public, is seeking the broad authority to include faith-based foster care and adoption groups in the federally-funded child welfare programs, which would cause federal tax dollars to be used to reject LGBTQ and non-Christians, among others, as foster placements.

In mid-February, 63 Congressional Democrats sent a letter to HHS Secretary Alex Azar against the waiver, stating that the agency wrongly used the RFRA as a justification to bypass non-discrimination protections in place. They argued that tax-payer funded child welfare agencies would be allowed to discriminate on religious grounds, ignoring the best interests of the vulnerable children and exacerbating the existing shortage of qualified foster care placements. Further, the representatives argued that the waivers are violative of the Constitution by allowing religion to be used to harm others and are a drastic shift from long-standing federal protections. The South Carolina waiver is also not the first instance of such discrimination, as it is important to recall that the ACLU filed a district court case against the Michigan Department
of Health and Human Services and the Michigan Child Services Agency in September 2017 on behalf of families turned away because of religious objections to same-sex relationships. Similarly, the argument in that case is that the practice is violative of the Equal Protection and Establishment Clauses of the Constitution.

Child welfare policy advocates and those engaged in direct representation of children should keep a close eye on these legal battles, as well as on the continuing 2020 budget debates which have amped up this week with the Trump Administration’s proposed cuts to many social welfare programs. It would not be surprising to see more states apply for similar waivers to South Carolina’s and it is important that the practices of religious-based agencies stay under scrutiny to ensure that discriminatory activities are not going unchecked.

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