Volume X, Issue IV Summer 2007

Official Publication of the
State Bar of Michigan Children's Law Section

The Michigan Child Welfare Law Journal

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Published by: MSU Chance at Childhood Program ● MSU School of Social Work ● MSU College of Law
with funding from the Governor's Task Force on Children's Justice and the Children's Law Section of the State Bar of Michigan

Editor's Note—Summer 2007

This issue of the *Michigan Child Welfare Law Journal* focuses on special education and school-related matters. However, we have also included Judge Tacoma's follow-up to articles that appeared in the last issue of the *Journal*. You will recall that in our previous issue, Judge Tacoma discussed a variety of consequences of the Binsfeld legislation. Frank Vandervort presented a counterpoint to some of the arguments Judge Tacoma made. In this issue, Judge Tacoma, in turn, responds, continuing the healthy discussion of these complex issues.

The other articles in this issue cover a variety of topics. In "Education for Children with Disabilities Receiving Child Welfare Services" (McWilliams), the author notes that many children who receive child welfare services have disabilities and need supports, accommodations, and services to allow them to succeed in school. Studies estimate that as many as 30-40 percent of children and youth with disabilities in foster care may qualify for special education services. Educational success for a child with a disability depends on the relationship between the child, the parent, and the educator. This article summarizes the federal and state laws designed to serve children with disabilities in school and suggests some responses to common problems facing these children.

In "The Evolving Educational Placement of Children With Special Needs" (Meyers), the author writes that the Individuals with Disabilities Education Act (IDEA) has not been successfully implemented. Meeting the provisions of the law as well as the intention of the law is a complex process that is constantly evolving. This paper addresses the interplay between IDEA's directives of attaining the "maximum potential" of the individual and the rules regarding "least restrictive environment" and nondiscriminatory evaluation.

In "The New Science-Based System for Early Intervention and Education of Children with Specific Learning Disabilities" (Kraizman), the author stresses that delays in identifying students with specific learning disabilities have prevented the majority of these students from ever closing the achievement gap with their classmates. Delays in early identification place such students in situations where they constantly struggle in school. The author argues that early intervention is the key to preventing a child's failure before it occurs.

Finally, in "Moving Beyond Zero Tolerance: Restoring & Rebuilding School Discipline Policy" (Biedermann, Choi, & Waszczak), the authors contend that zero tolerance policies have a negative effect on students, especially on young people of African-American and Latino descent. The authors examine the history of the term "zero tolerance," the content of zero tolerance school discipline policies at the federal, state and local levels, and statistics and outcomes related to these policies. The authors specifically recommend that authorities scale back zero tolerance discipline policies to apply to only guns and explosives, as originally intended.

I hope you find this issue interesting and useful. As always, the editorial board welcomes your feedback on this and future issues to ensure that the *Michigan Child Welfare Law Journal* is of value to you.

Editorial and Review Board

Message from the Chair

The state's citizen-volunteer staffed Foster Care Review Board released its 2006 annual report recently, and it details a sad state of affairs, indeed. Anyone involved in Michigan's child welfare system should read it and take heed. The report is available at the Michigan Supreme Court's website, *http://courts.michigan.gov/scao/resources/publications/reports/fcrb/fcrb_ar06.pdf.*

The Board identified problems ranging from inadequate maturity and training levels of foster care workers, to the high-stress environment leading to high turnover of foster care workers, to "grossly inadequate" compensation of those workers.

The Board also identified problems with the lawyers who represent children. It noted that despite the requirement that lawyers meet with their child clients before hearings, many judges aren't asking about whether that requirement has been fulfilled. Many counties aren't requiring the affidavit as a condition of payment. In addition, the Board identified two other major areas of concern: inadequate compensation and crushing caseloads, especially in high-volume, urban communities.

As a result, the Board recommends the following:

1) We recommend that the State Court Administrative Office work with the State Bar of Michigan to develop best-practice strategies to help ensure that children receive quality representation by their court-appointed L-GAL.
2) We recommend that the State Court Administrative Office monitor local court compliance with MCR 3.915(B)(2)(a) that requires the court to inquire, on the record, whether L-GALs have met with their child clients as required by statute, as well as compliance with the requirement that L-GALs complete and sign the "Affidavit of Services Performed by the Lawyer-Guardian Ad Litem."
3) We recommend that the Michigan Legislature initiate a compensation study in collaboration with the Michigan Association of Counties and the State Bar of Michigan to establish what would be fair compensation for attorneys representing children in abuse and neglect cases, and how those costs should be met. We further recommend that the legislature and counties establish a range of compensation commensurate with duties required by MCL 712A.17d, which we hope will increase the pool of attorneys interested in this work, and reduce caseloads in larger counties.
4) If adequate compensation levels cannot be established statewide for L-GALs, we recommend that the legislature consider establishing a system to allow for non-attorney, court-appointed guardian ad litems. Other states have implemented this idea, which has proven to be a low-cost, effective means of representing and advocating for children.
5) We recommend that the State Court Administrative Office establish mandatory training and/or experience guidelines attorneys must meet to be appointed as L-GALs for children in abuse and neglect proceedings.

Michigan Foster Care Review Board, *2006 Annual Report* 12, available at *http://courts.michigan.gov/scao/resources/publications/reports/fcrb/fcrb_ar06.pdf,* last visited July 14, 2007.

On a personal level, I generally agree with all but recommendation #4, and the Children's Law Section has consistently advocated against the use of volunteer, non-lawyer guardians ad litem, though well intentioned, as not working in the child's best interest. In addition, leaving a child unrepresented by trained counsel would represent a step backwards in our work for children.

I strongly urge all in Michigan's child welfare system to join together to achieve what is truly in all of Michigan's children's best interests—permanent homes in safe, loving environments. We can best achieve this through well-trained, committed, and relaxed foster care workers and attorneys. Reducing case loads, increasing training opportunities, and increasing compensation should help us all to achieve this goal. ◎

The Road is Long, with Many a Winding Turn

(But you can't return to a place that you've never left)

A Reply to Mr. Vandervort's Response

by Hon. Kenneth L. Tacoma

"The only reason a juvenile court terminates parental rights is to free the child for adoption. If the child is not adoptable, termination merely renders the child a legal orphan." *In re J.I.,* 108 Cal. App. 4th 903, 915 (2003).

When I wrote and presented for publication *Lost and Alone on Some Forgotten Highway*, I had hoped to generate discussion in the legal community, and, frankly, had hoped for knowledgeable criticism pointing out where I was wrong in my assessment of where we are, because, as I noted, I have seen the pain inflicted on some very vulnerable young people. Unfortunately, Mr. Vandervort's *Response* does not fall into this category. Because of the manner of his presentation, I feel I have to reply. Mr. Vandervort appears to be a fine lawyer, but his offering reminds me of the advice I was given by a senior partner many years ago when starting my practice: "If you don't have the law, talk about the facts. If you don't have the facts, talk about the law. If you don't have either the law or the facts, talk about something else."[1] Mr. Vandervort adopts this technique very well as he talks about many things, but very little about the substance of the problem I posit, or how that problem can be solved.

His misdirection starts from the beginning. He chides me for not talking (much) about "limbo" or "drift." Well, I don't talk much about "absent fathers" or "intractable drug abuse" either, although these issues are also huge problems in child abuse and neglect cases. I talked about the deluge of termination of parental rights cases and the resulting explosion in the number of State-created orphans. He wrongly implies that somehow drift and limbo are no longer problems even in the general class of child abuse and neglect cases. Mr. Vandervort assumes, *without a shred of empirical evidence cited to support his planted axiom*, that drift and limbo have been reduced by ASFA and Binsfeld (or the precursor legislation he now adds to the discussion). From my own anecdotal observations, I think even the temporary wards in foster care are still shifting and drifting in limbo.

Finally, he leads his critique based on an argument rooted in limbo, while ignoring the group of children who *are* the focus of my article who are caught in the worst possible limbo. They have all family ties cut off and no hope of adoption, no past and no future. As for drift, I note in passing in my original article that the lives of the permanent wards who are not adopted are likely to be even less stable than the lives of temporary wards. State-created orphans also drift and shift—from one attempted pre-adoptive placement to another, or in the worst cases, from one institutional placement to another, until they age out of the system. Limbo and drift are still occurring in a very big way; it's just that the legal status of the poor people shifting and drifting has changed. In sum, I suspect if you ask one of these children if he is better off as a *permanent* State ward shifting and drifting than he was as a *temporary* ward living the same life, he really would think the law is an ass.[2]

Mr. Vandervort then digresses into a detailed history of the legislation of the last three decades in this area of the law. While in some respects a valuable summary, it is simply irrelevant to the discussion ***unless*** Mr. Vandervort is prepared to argue that these

policymakers did in fact anticipate that the legislation would result in a surge of unadoptable State-created orphans, but forged ahead anyway because they calculated that the tradeoff for some number of increased adoptions was worth the cost in increased unadopted permanent wards. If this is true, then he has undercut my argument that this surge in unadoptable State-created orphans was an unintended consequence and I concede the field. Once again, however, he cites no empirical evidence or legislative history to support that claim, and I very much doubt that these august policymakers sat down and said: "We can increase annual adoptions of abused and neglected kids by one if we are willing to accept four corresponding unplaced permanent wards as a result." If they did have the prescience to know this would happen (because this is what actually occurred between 1996 and 2004)[3], and went ahead anyway, then it was cold-blooded indeed. I'll let the reader conclude how likely it is that is how the scenario played out.

In the next section of his *Response*, Mr. Vandervort claims that I "misunderstand" or "misstate" the law.[4] As to the former claim, I have worked with the Michigan Juvenile Code in its various permutations since 1980 as a public defender, court referee, prosecuting attorney, and judge. Moreover, I have read every published Michigan case in the area.[5] As to the latter, I'm at a loss to understand what motive I would have to lie to people about what the law is to support an argument regarding an issue as esoteric as the status of unplaced State wards in child and abuse cases. But let's examine Mr. Vandervort's claims.

My interpretation of MCL 712A.19a.

He asserts I misunderstand the law because "(t)he operative provision of 19a is subparagraph 5." "Operative provision"? Says who and on what basis? Mr. Vandervort and by his fiat? The operative provision of 19a is subparagraph 6 because we mean only the group of children adjudicated as not safely returnable to their parents. Subparagraph 6 reads:

> If the court determines at a permanency planning hearing that the child should not be returned to his or her parent, the court shall order the agency to initiate proceedings to terminate parental rights to the child not later than 42 days after the permanency planning hearing, unless the court finds that initiating the termination of parental rights to the child is clearly not in the child's best interests.

After all, the premise of my whole discussion is what happens to children who cannot be returned to parents—that's the given. And for those children, unless the semantic haze of terms drawn from the field of computer science is obscuring something of which I am not aware, the statute has clearly made termination of parental rights the default option. The statute does not say the court "shall order the agency to determine the best permanency plan" for those children, nor does it say that the court "shall order the agency to consider what options can be found for the child." It says the court shall order the agency to commence termination proceedings. The court can refuse to do so, *but only if it has evidence to find the default option is clearly not in the child's best interests*. That opt-out language, however, simply reinforces that termination of parental rights is the default option.

Mr. Vandervort then contends that the "one-year rule" is not really a one year rule. Well, the rule ***is*** one year, whether or not it is followed. Many judges, myself included, work very hard to insure that the cases actually are handled within the time limits set out in the law. Even assuming it is routinely violated, I'm not sure of Mr. Vandervort's point. Is it that we need the one year rule because otherwise the courts are so inefficient that they take two or three years to complete a case under the one-year rule. and if we didn't have it the cases would go on for three or four years? Or is it that practitioners in the system ignore it because they feel it is inappropriate in some cases?

But once again, this is hugely irrelevant to the issue for two reasons: first and foremost, what difference does it make to an unadoptable ward whether he or she becomes a permanent State ward one, two, or four years into the system? Speed only matters if we can offer the child something better. And second, the one-year rule is only a problem because it is tied to the requirement that the case must go into termination mode at that time. I would be happy to retain the one-year rule if it were used for a realistic assessment of what to do with a child who cannot be safely returned, when options other than termination are on the table.

My interpretation of Section 19b(5) and *Trejo*

Mr. Vandervort brings up the *Trejo*[6] case to prove that the law really doesn't require termination as the

default position in these cases. He cherry-picks the citations that make it sound as if that is true. A lot of ink could be spilled analyzing just what *Trejo* means, but the opinion must be understood in the context of the primary issue: a frontal constitutional attack on the statute on due process grounds and the Michigan Supreme Court's effort to construe the statute in a manner which would preserve that constitutionality.[7] Without a doubt, *Trejo* did reject *Hall-Smith's* description of the statute as creating a "mandatory presumption" requiring termination if statutory grounds had been proven, and did this because the trial court could consider evidence introduced by any party to make a best interest determination, thus rejecting the constitutional challenge because it had been based on the argument that the parents had a duty to produce evidence against termination. *But* Trejo *clearly did not reject the idea that termination is the default position!* If Mr. Vandervort had quoted the entire paragraph in which Justice Weaver summarized the majority opinion in section II, the reader would have seen the following:

> Subsection 19b(5) attempts to strike the difficult balance between the policy favoring the preservation of the family unit and that of protecting a child's right and need for security and permanency. While the operation of subsection 19b(5) imbues the court with some discretion, that discretion is significantly diminished from prior law, which permitted the court to not terminate, even where at least one ground for termination was established. *Once a ground for termination is established, the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests.*[8] (Emphasis added)

The last sentence honestly describes the preferred position in termination of parental rights cases under current Michigan law.

The problem, both practically and that tied the Michigan Supreme Court into knots in *Trejo*, is the convoluted formulation of subsection 19b(5) whereby it is necessary to prove a negative to avoid the termination result. It would be clearer, fairer, more sensible, and more conducive to the administration of justice if the statute just straightforwardly said: "If the State proves, by clear and convincing evidence, that a statutory basis for termination of parental rights exists, and that the termination is in the child's best interests, the court shall enter an order terminating parental rights."

Contrary to Mr. Vandervort's claims, this makes a huge, outcome-determining impact in the real world where these cases are tried. Consider this hypothetical, based on a not-uncommon situation playing out in Michigan courts everyday.

Siblings, a nine-year-old girl and a six-year-old boy, are the subject of a petition to terminate parental rights that is being tried. The fathers are absent and uninvolved. The mother is a drug abuser, whose history has led these poor children from one place to another and exposed them to numerous "boyfriends," at least one of whom had sexually abused the girl. Somehow, mother and children flew under the DHS radar until about a year ago, when the children were removed. Mother has blown out of treatment programs and flunked the case service plan. A psychological evaluation and parent-child assessment note that although the children are bonded *inter se* and with their mother, they are not healthy bonds. The girl has actually assumed the "mother" role of protector and caregiver in this family, both as to her little brother and her parent. The expert opinions both conclude that the prognosis for the mother to change is low. Thus, they have no reason to recommend against termination of her parental rights.[9]

Easy case, right? Clear and convincing evidence on statutory grounds, and I can't say, even by a preponderance of evidence, let alone clearly, that termination *isn't* in the children's best interest. *But*, some things leave me with a sinking feeling in my gut that this case is not going to turn out well. The children have been moved in foster care once at the foster parents' request, because the girl is destructive and exhibiting behavior problems. The current foster parents aren't talking about adoption, and the girl seems resistant to the idea in general. But this is far from enough evidence to stop the termination train. So I, like any responsible judge, do my duty and apply the law.

Fast forward six years. Adolescence has hit. Neither child has been adopted. The children are now separated. The girl is in a residential treatment center, and the boy is remaining in foster care but ready to follow his sister into the land of dual-wardship (open neglect/abuse and delinquency cases on the same child). Did termination of parental rights really help this situation? I can't see how things could possibly be worse.[10]

The fallacy in both the current statute and in Mr. Vandervort's argument is that termination of parental

rights is a *solution*. It is not. Adoption is a solution. So are permanent foster care agreements, guardianships, or (although a very poor one), continuing temporary wardship with out-of-home placement indefinitely. Termination of parental rights is simply a legal procedural step that serves to affect only one of the possible solutions—adoption. If adoption isn't almost certain to follow, why proceed to terminate parental rights? The reason, *sub silentio*, is that we want to punish the parents for their behavior toward the children.

Mr. Vandervort chases that rabbit quite far as well. At several points he takes pains to explain to me how much due process these parents have received, how entirely fair the system has been to them, how many chances they have blown, and how they don't deserve as much consideration as they have received. *And I agree with him wholeheartedly!* I don't care a fig about the parents' rights at this stage of proceedings, and I will gladly consign them to the seventh circle of the inferno for the way they have rejected the great gift of children who were entrusted by God or nature to their care. *But it's for the kids, Billy!* The *children* may be better off if we don't break the ties to these undeserving parents. The sword that terminates parental rights cuts both ways. Maybe we would look at this differently if we called these "termination of *children's* rights" cases. At the very least, the State should be able to offer them something better than what it took away.

Back to our hypothetical. If the State had been required to prove both a statutory basis *and* that it was in the children's best interests to terminate by clear and convincing evidence, we might have at least had a chance for a less-bad result. Then the inquiry of what comes next in these children's lives would have been front and center. Also, although it does make it more difficult for the State to have termination of parental rights occur, I think this is fair and appropriate:

- The State has control of almost all the resources and information in this litigation, and the child typically has been under State supervision for the year preceding the trial. Access to what's going on in foster care, counseling, school, and all facets of the child's life is not available to the parents, or for that matter, the child's lawyer-guardian ad litem, except to the extent it is made available through formal discovery.
- The State has a compelling interest in achieving the best possible result, not only for humanitarian reasons, but because the State will pay, and pay dearly, in financial terms if a good permanency plan can't be fashioned.
- The best time to address this issue is on the front end, not after termination has occurred and the parents precluded by law from any possible ultimate resolution. In this regard, it is interesting to note that California, when faced with the problem of unadopted/unadoptable wards, has legislatively opted to try to turn the clock back with remedial legislation. Recent amendments to the California Welfare and Institutions Code now allow the reinstatement of parental rights in some cases where a child has remained unadopted for three or more years.[11] In my opinion, this is not the best way to approach the problem. (*Whoops, we made a mistake! Here's your kid back!*) It would be much better to do it right on the front end before the legal and the emotional ties (as dysfunctional as they may be) are severed.

My inclusion of Mandatory Petitions as a contributing factor

In this section, Mr. Vandervort credits me for being able to read and recite the law for what it is, and posits a fair argument on the issue as framed. I agree with him that the impact of mandatory petitions is marginal (although still a contributing factor), and, if this were the only contributing cause of our problem, I would not advocate that the law be changed.

I take issue, however, with the proposition that judges are "professionals" in the sense he implies for purposes of deciding about whether the State should involve itself with a case. Judges do not have independent, superior knowledge in the social sciences relevant to child welfare and family dynamics, although I admit that after hearing these cases long enough, certain ideas do become accepted maxims in a judge's mind. However, judges should always be cautious about extending that knowledge, as it really isn't our field.

I am frequently troubled by the portrayal of judges as "being there to help people" as though they are just frustrated social workers at heart. Judges are not there to help people in this sense. Judges should never forget that their primary function is to provide a fair and im-

partial forum (the ultimate, and in many ways exclusive, one in our society) for the resolution of disputes. Courts are not administrative agencies. And to the extent they allow expectations to be placed on them to jump into the fray and act for the good of one party or another like these agencies, their primary charge is diluted to the detriment of our constitutional system of limited government and ordered liberty. Compromises in this principle can lead to the collapse of due process of law, and result in grotesqueries such as occurred in *In re AMB*.[12] Judges should remain judges.

Suggestions for change[13]

At this point, I will do some cherry-picking of my own, ignoring issues upon which Mr. Vandervort and I agree,[14] those that I believe the disagreement is well based on common assumptions and fair argument,[15] and those issues that are unworthy of taking up the reader's time to snipe about[16]. On a number of points in this section, however, I need to reply, because he is playing the sleight-of-hand game.

First, he reiterates the claim, with no supporting data, that changing the law would lead to "even larger numbers of children stuck in an unending 'limbo' of the foster care system, 'drifting' from placement to placement, rootless and with no hope of ever having a family connection." I can't understand how or why he can make this claim. The only way the group of children we are talking about come into this system is by adjudication that they are abused or neglected and cannot safely be returned to their parents. They stay there until they are adopted or age out. It's a closed group. The same children will be in the system—they will just have different labels. Again, he gives no hint of why it is preferable to be a permanent unadoptable ward compared to a temporary unadoptable ward.

Next, he imputes to me an attitude of insufficient sensitivity to the evils of child neglect—even to the point that he puts in quotes the remark that "it's just neglect" as though it could be attributed to me, although I would never say that. I fully recognize that neglect is often worse than abuse, and in many cases is more difficult to deal with and has more soul-destroying consequences. Other than the gratuitous insult factor, this leads nowhere either. The only reason that I advocate for re-examining the reason these kids first came under the jurisdiction of the court is for its value in understanding where to go now that we have decided not to return them to the parents. Surely Mr. Vandervort will recognize the value of looking at the same evidence at different times for different purposes—we do it all the time in the law.

Regarding the best interest factors, many people whose opinions I respect also shared his fear that creating a statutory set of factors to consider would lead to a debacle in litigation like we have with the Child Custody Act factors and be fertile ground for appellate findings of error. No one would claim that time spent while a case is on appeal serves anybody's interest. I still think that these factors should be considered, and I stand behind the efficacy of them; I bow to the practical reality that enshrining them in a statute could make things worse. The challenge is how to get these considerations to be routinely raised by the lawyers, and as of this writing, I don't have a satisfactory answer.

When actually discussing with Mr. Vandervort the factors I suggest, I get the impression that he really does not have much of a substantive disagreement. When he begins discussing the age and probability of adoption factors I suggest, however, he just can't bear to give much ground, forcing him to take some level of "to heck with what you think—we are going to do this for your own good" approach to these children. I think this stance is going to soon leave him feeling pretty lonely. Consider:

- Recently enacted federal amendments to the Social Security Act require that in any permanency hearing held with respect to a child, the court conducting the hearing must consult, in an age-appropriate manner, with the child concerning the proposed plan.[17]
- Surveys of young people who are in or who have previously been in the foster care system are beginning to show that participation, or lack of opportunity to participate, in the court proceedings involving their lives is frequently near the top of the list as a perceived failing in current child protection procedure.[18]
- I recently attended a presentation by the supervising attorney from the Children's Law Center of Los Angeles in which she described the court procedures in the specialty courts for child protection proceedings in Los Angeles.

The participation by the children, including very young children, in court proceedings is not only encouraged, but nearly mandated.[19]

- These young people "talk with their feet" after aging out of the system. One study found over 44 percent end up living with biological parents or relatives at the time of contact a few years after aging out.[20]
- I think we are nearing a break-out point where we must actually start listening to the kids in the system and try seeing the case through the eyes of the child.

When discussing the economic factors, Mr. Vandervort outdoes himself in begging the question. He says: "First, in the vast majority of cases children will be better off financially if their natural parents' rights are terminated and they are adopted." So I must again point out: *We are discussing children who are not adoptable!* Beyond that, consider the stunning implications of that statement. I do not want to get into the ethical arguments about surrogate parenting, purchased children, or designer babies, but we should all be a little queasy when this attitude toward financial matters is taken.

Discussing financial impact is defensible when we stay in the group of likely unadoptable orphans; when we move to children generally, we are in deep water. He also makes a bald assertion that it is cheaper for the State to pay adoption subsidies than for foster care. Again, irrelevant because these kids are not adopted. And based on my information from review of the required disclosure reports in subsidized adoption cases, this is just not true anyway. The State adoption subsidies are generally the same as the foster care rates. On this irrelevant point, he might at least try supporting it with data.

Since he has raised the economic issues in this light, however, I think it is appropriate to return to a point I made in passing in my original article which warrants explication. Under the *Evink* [21] ruling, biological parents could arguably be required to pay support for their children even after parental rights are terminated, but I believe that is rarely, if ever, done. In fact, I have seen cases where the State uses the promise of relief from the child support obligation as an inducement to have parents release parental rights and avoid a termination trial. Notice, however, the pernicious effects of this practice, particularly with the children we are talking about who are not adopted and may end up in very expensive placements. The financial cost of the results of the neglectful and abusive parenting is shifted entirely from the parties directly responsible (the parents) to the taxpayers. Not only are the parents absolved of their responsibility for their actions, they are given a financial windfall in these termination cases where adoption never occurs.

Mr. Vandervort's recommendations

Mr. Vandervort prefers the status quo. His first suggestion basically boils down to "we should all do our jobs better," with which I agree. I also know that in the face of this problem, it is just too simplistic. My cynicism after 30 years in the legal profession and seeing the reality of practice leaves me with no confidence that this will impact the problem; we have to have real action, not stand in a circle, hold hands, and sing Kum-ba-yah.

Next, he wants community multidisciplinary teams, again a good idea, but again, without a statutory basis for structure and financing, just a pipe dream. He solves this problem by saying that court should take the lead in developing and insisting upon their use. I've already noted my objection to extending courts beyond their proper roles and the dangers of thinking judges should get on their white horses and ride out to root out injustice wherever it might be found because we can do it so much better than people in administrative or police agencies. More seriously, what right has a judge to go into his or her community and insist that many (remember, these are *multi*disciplinary teams) diverse people and organizations expend their resources in the way the judge sees fit? Contrary to what lawyers might feel in the face of black-robe disease, nobody made us kings. Judges may and certainly should encourage all segments of the community to recognize and devote resources to community problems, but the ultimate responsibility for allocation of community resources lies in the other branches of government.

His third and forth recommendations are excellent. In fact, both would generally fall under the rubric of what we call "concurrent planning;" from the time the allegations of abuse or neglect in a child protection case are adjudicated to be true, we look at the pos-

sibility of a permanency plan that does not necessarily involve reunification with the parents. That is, rather than having reunification as the default and required option for some period of time until the parent fails, from the very beginning of the time the child is under the jurisdiction of the court we look at other possible long-term plans concurrently. Many states have this written into their statutes; Michigan should as well.[22] But again, if he has taken legislative changes off the table, we can only implement concurrent planning on a piecemeal basis, at best.

But in the end, Mr. Vandervort slides off the horse again and begs the question with his last suggestion. We are talking about the group of children who cannot be safely returned home by definition; what good does it do to talk about a solution that is outside the scope of possibility? I applaud his call for creativity to maintain in-home placement, but the question on the floor is what to do when we can't do this.

In short, Mr. Vandervort fails to address these two essential points:

1. In cases where we terminate parental rights without adoption in place or likely to occur, we create orphans who face a terrible plight.

2. The number of young people in this situation has exploded nationally since ASFA, and in Michigan, because of Binsfeld and its more restrictive strictures, the situation is even worse.[23]

The research upon which I based my article was done in 2004 and 2005. Upon reading Mr. Vandervort's article, I contacted DHS to get some updated figures. Among other things, I was informed that 462 young people had aged out of the system in 2005 and another 536 in 2006. It appears, then, that we are aging out young people at the rate of roughly 500 per year.[24] Added to the current unadopted permanent wards we now have and those known to have already aged out of the system, we have over 6,000 State-created orphans with no end in sight to the growth. To put one's head in the sand and ignore over 6,000 people whose legal family ties have been severed and are now growing up or have grown up as State-created orphans, and refuse to address the problem in any way except with palliatives, is, in my opinion, irresponsible.

Mr. Vandervort clearly has the knowledge and skills to advance the discussion. He offers some positive suggestions. But for the most part his *Response* is simply a hidebound polemic defending a new legal status quo which has not only failed in its proclaimed *raison d'etre*, but left in its wake, as an unintended consequence, a generation lost in space.[25]

Endnotes

1. Lois H. Herrinton, circa. 1980.

2. Indeed, there is something Dickensian about this whole discussion. Were I able to draw, I have in my mind's eye a cartoon, in which a man in a greatcoat and top hat leads a boy toward an orphanage, and when approaching, leans over to ask the lad how things are in his life. The waif chirps: "Oh, much better, Sir! I used to be a temporary ward, but the court has terminated my parents' rights, so now I'm a permanent ward!"

3. The number of adoptions from the pool of State wards in 1996 was 2,189, and in 2004 it had risen to 2,684—an increase of 495 adoptions. During that same time period, the total number of unplaced State wards went from 1,627 to 3,543—an increase of 1,916; hence my 1 to 4 ratio. The source of this data is DHS information specifically attributed in my original article.

4. Since my days as undergraduate, I have found this variation of *ad hominem* argument to be a tawdry technique—instead of engaging the debate on the terms set out, its practitioners assume an air of arrogant condescension, sniffing that if only their opponent were as *sophisticated*, as *educated*, or (God forgive us for the current debasement of a formerly very nice noun) as *nuanced* as he or she is, the opponent surely wouldn't have taken the position he or she argues.

5. I will not claim to have read all of the unpublished cases. I receive the State Bar e-Journal daily and review the digests of the cases released through that medium, and by my estimate, the average number of termination of parental rights cases is just over two per day, with, by my informal reckoning, a high of 10 TPR case releases reached on January 13, 2006. Since almost all of these TPR cases are unpublished/affirmed, I only read those cases which are reversed on appeal.

6. *In re Trejo Minors*, 612 N.W.2d 407 (Mich. 2000).

7. It is interesting to speculate as to what would have happened had the appellant prevailed in *Trejo*. Had the Supreme Court held that this provision was unconstitutional, then one may presume that the issue would have been returned to the legislature for attention. It is within the realm of reasonable speculation to believe that the legislative response might have been to amend the legislation to provide roughly for what I am advocating; i.e., that the statute would require the State to prove not only the statutory grounds, but that it was

in the best interests of the child, before termination of parental rights would occur. If what I postulate is accurate, this might have then resulted in the number of pointless terminations beginning to fall, and the reason for my original article would have disappeared. This would have spared the long-suffering reader my original article, Mr. Vandervort's *Response*, this *Reply*, and as we may surely expect, Mr. Vandervort's response to my reply.

8. *Id.* at 414. Please also read footnote 12 on that page where the Court clarifies the point that DHS need prove nothing more than the statutory grounds: "We also reject *In re Boursaw's* dicta that after a parent presents any best interest evidence, the petitioner must 'again meet its burden of proof with regard to the matter.' *Id.* We reiterate, the petitioner carries its burden of proof, and need prove nothing more, once one or more grounds for termination are found."

9. I note that the language of the statute has seeped into the field of psychology and its cognate practice fields. The recommendations in these reports are worded in the negative as well, such as: "Based on the available information about mother, I have no reason to recommend against termination of her parental rights." Although it may have occurred, I can't recall any reports in the last several years that state the proposition in the affirmative; i.e., "I conclude based on the information that I have, termination of parental rights is in the child's best interests."

10. I'll anticipate an argument here, based on the practice of Mr. Vandervort in his *Response*. A worse result would be that the children were dead, and that death occurred because they were returned to their mother. So again, contrary to what Mr. Vandervort over and over wants to attribute to me, *I am not advocating for a return of children to unfit parents!* Even if we hold all of the other bad results in my hypothetical constant, at least at the end of the day the kids would have a legal relationship to parents, which is something (one really big thing), whereas in the pointless termination situation, they have nothing.

11. The legislation was proposed by Assembly member Mark Leno in 2005 as AB 519 with the full support of children's rights groups in California. These amendments are codified as California Welfare and Institutions Code 366.26(i)(2).

12. *In re AMB*, 640 N.W.2d 262 (Mich. App. 2001).

13. Mr. Vandervort prefaces his critique with the statement: "I agree with some of his suggestions; others are unwise." This statement implies a level of hubris I'm certain he doesn't intend. Rather, it is another example of his tendency toward linguistic slide, this time from the subjective to the objective point of view. Had he said: "With some I agree, others I disagree" or "Some are wise, some unwise" he would have avoided the powerful-and-all-knowing-Wizard-of-Oz tone his actual statement exudes.

14. For example, his observation that no statute, policy, or practice will solve all our problems (page 49). There are no panaceas in child welfare law—we simply want to pick the least bad alternatives.

15. For example, he "finds my reference to the common law's infancy rule in criminal cases entirely unpersuasive in this context," although he doesn't say why (page 52). Fine—I guess reasonable people can fairly disagree about this with or without reasons.

16. OK, I can't resist. Mr. Vandervort says that the Department of Human Services and courts make poor parents (page 51). As much as I may have felt I wanted to, I have never taken a child home after a hearing, nor am I aware of any social worker ever doing so. Institutions never parent these kids; as agents of these institutions, we simply delegate that responsibility to other people (generally foster parents). That logically leads into a whole different discussion—the selection, licensing, and payment of foster parents—which is another problem altogether.

17. Child and Family Services Improvement Act of 2006, Pub.L. 109-288. Now codified at 42 U.S.C. 675(5)(c)(iii) (2007).

18. See, for example, *My Voice, My Life, My Future—Foster Youth Participation in Court: A National Survey*, part of the Home at Last project by the Pew Commission on Children in Foster Care, available at http://fostercarehomeatlast.org/reports/MyVoice.pdf (last visited June 26, 2006).

19. Presentation of Diane Iglesias at the 5th Annual Conference of the Children's Law Section of the State Bar of Michigan. When pressed, Ms. Iglesias stated that children as young as three or four are encouraged to be present at certain of the hearings.

20. See Patrick J. Fowler and Paul A. Toro, *Youth Aging Out of Foster Care in Southeast Michigan: A Follow-up Study, Final Report, October 2006.* Actually, I'm very surprised this number isn't much higher, as based on my anecdotal observation I would have guess it to be closer to 75%.

21. *Evink v. Evink,* 542 N.W. 2d 328 (Mich. App. 1995); lv. den. 453 Mich 874(1996).

22. This is a recommendation to the legislature being considered by Justice Corrigan's Permanency Options Workgroup.

23. I have alluded to the California experience and that state's response at a couple of points in this *Reply*. Policymakers in California felt compelled to act in their situation, but a "quick and dirty" look at their statistics leads me to believe that Michigan's situation proportionately is much worse. In advocating for the passage of AB 519 (now California Welfare and Institutions Code 366.26(i)(2)), the Children's Law Center of Los Angeles reported 5,846 State-created orphans in 2003, out of a total population of people under 18 of 9,471,801. In Michigan in 2003, we had 3,736 State-created orphans who were either unadopted or unadoptable, out of an under-18 population of 2,543,765. In other words, the California youth population is approximately 3.5 times as large as Michigan's, but their permanent ward population is less than twice that of Michigan—we appear to proportionately have a much bigger problem.

24. One of my points in my original article was that the number of unadoptable orphans in Michigan had remained relatively stable in the 600 to 800 range in the decade between 1986 and 1996. While there is no available data to know how many young people were aging out of the system at that time, we can make a reasonable estimate. If we arbitrarily assume the average age of the unadoptable wards entering the system was eight years old, then dividing the total by the 10 years the average child spent in the system would yield an age-out rate of between 60 and 80 young people per year. Using these admittedly imperfect assumptions, we are six or eight times worse off now than then.

25. With final apologies to John Denver, the Hollies, and now Don McLean, I offer as justification for my behavior this gem from Kris Kristofferson: "We're in this gig together, so let's settle down and steal each other's songs."

Education for Children with Disabilities

Receiving Child Welfare Services

by Mark McWilliams[1]

Many children who receive child welfare services have disabilities and need supports, accommodations, and services to allow them to succeed in school. Studies estimate that as many as 30-40 percent of children and youth with disabilities in foster care may qualify for special education services.[2] The 2002 federal Child and Family Service Review found that Michigan still has a long way to go to ensure that these children receive appropriate services to meet their educational needs.[3]

Educational success for a child with a disability depends on the relationship between the child, the parent, and the educator. Knowledge of the rights and services available to children with disabilities is important, however, to set the stage for the discussion. This article summarizes the federal and state laws designed to serve children with disabilities in school and suggests some responses to common problems facing these children.

The Three Books of Rights

Until the 1970s, students with disabilities were often not allowed to attend public school. Congress and state legislatures passed several laws to address this historical exclusion. These laws include the Michigan Mandatory Special Education Act, Section 504 of the Rehabilitation Act, and the Individuals with Disabilities Education Act (IDEA).[4]

The 1971 Michigan Mandatory Special Education Act (MMSEA) preceded federal special education law.[5] The MMSEA states that schools must provide an education designed to develop the maximum potential of every eligible student with a disability. The State Board of Education has written rules implementing this Act. These rules, usually referred to as the Special Education Rules, are found in the Michigan Administrative Code.[6]

Section 504 of the federal Rehabilitation Act of 1973 states that any program or activity receiving federal financial assistance shall not discriminate against an otherwise qualified individual solely because of the person's disability.[7] Section 504 and its regulations require that school districts take affirmative steps to identify qualified students with disabilities and to provide services and accommodations that allow the students to fully participate in district programs and activities.[8]

In 1975, Congress enacted the Individuals with Disabilities Education Act (IDEA). IDEA directs each state to provide the necessary programs and services to ensure that students with disabilities receive an appropriate education. It also provides a variety of procedures that students and their parents can use to safeguard their rights. In return, the states receive federal funds for special education. IDEA was last amended in 2004, and regulations implementing the amendments became final in October 2006.[9]

Although the laws overlap in many ways, they contain important differences that affect the rights of children with disabilities. For example, both IDEA and state law contain many of the basic special education rights and principles, but only Michigan law speaks to issues such as residency and program requirements.[10] Unlike federal law, Michigan law extends eligibility for special education from birth to age 26.[11] Section 504 extends eligibility beyond the traditional special education categories to include children who have other disabilities that substantially limit major life activities.[12] In order to advocate most effectively for rights and services that children with disabilities need to succeed in school, one must be familiar with and have access to all three laws.[13]

The Six Principles of Education for Students with Disabilities

Special education advocacy is complex and ever-changing, so it is critical to understand the basic principles governing rights and services.

Access for All. Federal and state special education laws are first and foremost about access, assuring that all children, including children receiving child welfare services and children in foster care, have the right to attend school.[14] Schools have a "child find" responsibility to identify children who might be eligible for services.[15] "Access" includes access to non-academic and extracurricular events.[16] "All" includes children who are expelled.[17]

To be eligible for special education under IDEA or Michigan rules, a child must fit into one of 13 categories of disability which affect education. The categories are cognitive impairment, emotional impairment, hearing impairment, visual impairment, deaf-blindness, physical impairment, other health impairment, speech and language impairment, early childhood developmental delay, specific learning disability, severe multiple impairment, autism spectrum disorder, and traumatic brain injury.[18] To be eligible under Section 504, a child's disability must substantially limit a major life activity (such as self-care, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working) and affect education.[19]

Multidisciplinary Evaluation. Schools must evaluate children in all suspected areas of disability to address eligibility and educational needs.[20]

The evaluation process has several steps. The first step is a written request for services from a parent or school. The school has 10 calendar days from date of receipt to prepare a multidisciplinary evaluation plan and obtain parental consent.[21] Once consent is obtained, the school has 30 school days to conduct the evaluation and meet to review the results.[22]

Individualized Planning. The Individualized Education Program (IEP) or Section 504 plan describes special education services and supports necessary to allow a student to have access to the general curriculum based on individual needs.[23] IEP or 504 team members include the parent, teachers, administrator, assessor, student, and others. The critical parts of the IEP are the present level of academic achievement and functional performance (PLAAFP), measurable annual goals, instruction and services to meet goals, a start date for services and supports, inclusion in general education, and participation in statewide assessments.

Free Appropriate Public Education. A free appropriate public education (FAPE) is free, planned using the IEP process, and reasonably calculated to confer educational benefit.[24] FAPE must be provided by highly qualified teachers, including teachers with content credentials in most cases.[25] FAPE does not confer a right to the best possible education, nor does it give parents a choice of teacher, building, or teaching method.

Least Restrictive Environment. Students with disabilities must be allowed to go to school with their non-disabled peers "to the maximum extent appropriate." Students with disabilities may be segregated only when the nature or severity of their disabilities prevents education in a general education program, even with aids and supports.[26]

Participation/Due Process. Parents and students have the right to "meaningful participation" in the educational planning process and have recourse if they disagree with school actions.[27] The avenues of recourse include a right to notice of pending action, an opportunity to inspect records, a due process hearing, a compliance or civil rights complaint, an independent educational evaluation, and mediation.

Common Advocacy Problems and Solutions

The high-stakes nature of educating children with disabilities makes disputes inevitable. Children receiving child welfare services are especially vulnerable. According to the 2002 federal Child and Family Services Review:

> Stakeholders . . . noted that the [Department of Human Services] has had to advocate extensively to ensure that children in foster care get Individualized Education Plans (IEPs) when necessary. In one instance, [DHS] had to file suit against the school district to get an IEP for a child.[28]

Advocates can make a big difference by working with educators to secure appropriate school services and supports for children with disabilities.

Disputes over eligibility and evaluation. Here are some common problems and solutions related to eligibility and evaluation:

> *"The school says, as a child welfare service provider, I cannot request or consent to an evaluation."*

Children with disabilities receiving child welfare services often lack consistent educational advocates. Sometimes this happens because of a lack of clarity

regarding the respective roles and responsibilities of foster parents, biological parents, and service providers.[29] For this reason, it is critical that either a "parent" or a "surrogate parent" be identified as soon as possible to assist a child in obtaining necessary services.

Only a "parent" as defined by IDEA may request and consent to an evaluation. A "parent" includes a biological or adoptive parent, guardian (but not the state if the child is a state ward), foster parent (unless state law prohibits foster parents from serving in this role), a person standing in the place of a parent (such as a caregiver relative), or a surrogate parent.[30] A guardian ad litem (GAL) does not meet the definition of guardian unless the GAL has general powers beyond the court case or has specific educational decision-making authority granted by the court.[31]

A surrogate parent is appointed by the school or by the court (in the case of a child under court supervision) when a parent cannot be identified or found. Public child welfare workers may not serve as parents or be appointed as surrogate parents. Private workers may be appointed to serve as surrogate parents, provided they do not have a conflict of interest and have knowledge on educational rights.[32]

In order to resolve this problem, the family court may be called upon to (1) appoint a surrogate parent if no parent can be found, or (2) make a determination among parents as to who has educational decision-making authority. The sooner this happens, the more quickly an evaluation for special education eligibility can be arranged.

"The school says my doctor's letter is not enough."

This problem surprises many clinicians and professionals from other systems such as child welfare or mental health, who make diagnoses and recommendations and expect them to automatically result in special education eligibility. Most special education categories are defined legally, not clinically, and even disabilities that fit special education eligibility criteria must have a demonstrated impact on education.[33] Here are some examples:

- A physician may diagnose a child with attention deficit disorder (ADD) or bipolar disorder and order medication or counseling. This diagnosis might not influence an IEP team because neither ADD nor bipolar disorder is a specific category of eligibility (they might or might not fit under the "other health impaired" category[34]), or, even with the disability, there has been no demonstrated effect on education.
- A counselor may report that a child has significant mental health and emotional needs and conclude that the child should receive special education services as a child with an emotional impairment. An IEP team might disagree because an emotional impairment includes only certain types of problems (such as the inability to build or maintain interpersonal relationships) and excludes others (such as most conduct disorders).[35]
- A psychologist may report that a child has dyslexia and recommend special education to address this "learning disability." An IEP team would not agree because the law defines "learning disability" as a condition that depends on the response to intervention, not a clinical diagnosis.[36]

To resolve this problem, ask the clinician or evaluator to explain if and how a child's diagnosis fits into a special education classification when making any diagnosis or recommendation.

Children who receive child welfare services face an additional barrier because many of the eligibility categories include exceptions for limitations caused by "environmental factors" which may be interpreted to include an abuse or neglect history at home. To address this barrier, make sure the treating professional delineates any disabilities caused by environmental factors from other disabilities in making recommendations and findings.

"I don't agree with what the school district's evaluator said."

It is important to identify the reason for disagreement with the evaluation. Standardized tests often may not be replicated immediately because of various "practice effects" associated with some. In those cases, ask a clinician with comparable qualifications to review the testing.

More commonly, however, there may be disagreement with the interpretation of test results, observations, record review, or conclusions reached by evaluators. The easiest way to resolve this problem

is to ask the evaluator to explain his or her findings. The IEP team must include a person who is knowledgeable about any evaluations conducted and can answer questions about them.[37]

If, after the explanation, there is still disagreement with the evaluation, a parent may request an independent evaluation. Under IDEA and state rules, this evaluation is at the school's expense. The school may set reasonable cost and qualification limitations on the choice of evaluator and may request a due process hearing to defend its evaluation.[38]

"The school said my child is not eligible."

Sometimes a school district may only look at one or a few eligibility categories, such as specific learning disability. The district may do this because specific learning disability is the largest category of eligibility. In some isolated instances, a school district may even attempt to make an eligibility determination without an evaluation and discourage a parent from requesting an evaluation.

The law assures the right to seek an evaluation in all suspected areas of disability and does not allow school districts to prescreen applicants.[39] To resolve this problem, ask the school district to evaluate for eligibility for all suspected areas of disability under IDEA, state law, and Section 504.

"The school says I should not ask for special education eligibility because my child would have to go to a special education class or school."

Some schools think that special education is a place and that eligibility for special education automatically requires moving a child into a special education program. Sometimes these assumptions are driven by how special education services are funded, a practice that violates IDEA.[40] Other times, they are driven by misperceptions about the nature of special education services and supports.[41]

To resolve this problem, ask for an evaluation, then advocate for individualized support. Consider beginning the discussion by assuming that the child will attend school in general education with supports, then move to more restrictive placements only if absolutely necessary.

"The school never acted on my verbal evaluation request."

In most cases, timelines don't begin until the school receives a written request to do something.[42] This creates particular problems for children in foster care who move from one district to another, as any delay in acting upon an evaluation request may result in no services or supports being provided. If communicating with the district in writing creates an overly formal relationship, one way to address this problem is to call the district, make the request, and then follow up with a letter or note.

Problems with IEP process and implementation. Here are some common problems and solutions related to IEP process and implementation:

"I'm not sure how to prepare for the meeting."

To prepare for the IEP meeting, get a blank IEP form to review. You can get a blank form from the district or view a copy of the state's form on the Michigan Department of Education website, www.michigan.gov/mde. Then, review the child's last IEP and the most recent evaluations, consulting with clinicians or other evaluators when necessary. Write out any questions or concerns before the IEP team meeting, and ask the district to attach your document to the IEP. Understand the range of supports and related services, the amount of time services will be provided, whether they will be in group or individual settings, and what classroom they will be in. Take someone with you to take notes and provide support. At the end of the meeting, if you're not sure about what is in the document, take it back to your home or office and review it.

"The school won't implement my child's IEP when I move into a new district."

Children and youth with disabilities in foster care do not always receive timely testing and services due to their frequent placement changes. Some studies suggest that school placements are delayed by two to four weeks due to problems in the transfer of the student's educational records.[43]

When a child with an IEP moves into a new district, the new district must do one of two things: (1) implement the IEP as written with similar or comparable services; or (2) convene a new IEP team meeting and write a new IEP.[44] As a practical matter, transfers often slow down services because of delays in transmitting records. To help resolve this problem, work with the parent to request an inspection of the child's file and obtain a copy of the child's current IEP and most recent evaluation report.[45]

"The school won't give my child the services or supports she needs."

One of the most commonly-overlooked problems with IEPs is the failure to include robust, up-to-date, and measurable goals. For children with disabilities in foster care, frequent placement changes complicate goal-setting because of problems in receiving credit for prior work and adjusting to different schools with different academic programs and standards.[46]

Services and supports must be designed to meet an IEP goal. IEP goals are in turn derived from the present level of academic achievement and functional performance (PLAAFP) and, to some extent, are tied to the general curriculum standards set by the state that apply to all students.

To address this problem, check the IEP goals to make sure they are current, robust, and measurable. Check the Michigan Department of Education's grade level content expectations for various subjects and grade levels at www.michigan.gov/mde to see if a goal is strong enough. To be sure that a goal is measurable, apply the "stranger test," i.e., whether a total stranger would be able to tell, based on performance, that the child is making progress. The goals and objectives should not be written using words like "improve" or "increase."

"I don't agree with the way the school is teaching my child."

This problem may show up because the school is not using a preferred teaching method, or because the child is not learning under the current method. Methodology is the school's choice, but it must be reasonably calculated to help a child learn based on his or her individual needs and must be, to the extent practicable, based on peer-reviewed research.[47] Progress should be more than minimal.[48] To resolve this problem, schedule regular reviews to discuss progress, and insist on different methods if current ones don't work.

"The school will not write a service or accommodation into an IEP."

When a service is included in an IEP, the parent has an enforceable claim to receive the service. A few school districts mistakenly believe that refusing to write a service into an IEP relieves them of responsibility for providing the service. Such a practice is contrary to federal law.[49] If persuasion doesn't work, use the complaint process discussed in the following section to argue that the school is not following the IEP process.

"The school is not providing a service in my child's IEP."

Usually this problem comes from a lack of staff or from not providing information to staff about the child's service and program needs. Although these reasons may be honest explanations for the failure to provide IEP services, neither of them can excuse the school from providing the services.[50]

To resolve this problem, try some informal methods of resolving the problem before filing a formal complaint. Start by talking to someone who has the authority to change the situation. Remember that while many people on the general education staff (such as school principals and counselors) deal with special education issues and students, they may not have the expertise or authority necessary to resolve complaint issues and occasionally do not recognize them.

Next, try to contact the school district's special education director, supervisor, or coordinator to discuss the problem. If the problem is not resolved, contact the person at the Intermediate School District (ISD) or the Michigan Department of Education (MDE) responsible for investigating complaints.[51] This will likely be either the person in charge of compliance and monitoring or in some cases the ISD special education director.

If a formal complaint is necessary, send a copy to the local school district as well as to either the ISD or MDE. The complaint must be written and signed, but can be filed by anyone, and can address the needs of more than one (or even all) students.[52] The complaint must include a statement of why the district broke the law and what should happen to resolve the problem. Occasionally, when a formal complaint is filed, the

investigator will ask if they can try to resolve the complaint informally. This may be a good idea, but consider whether resolving the complaint informally will provide the same outcome for the student within the same timelines.[53]

Complaints about problems with a Section 504 plan should be filed with the U.S. Office for Civil Rights. Unlike IDEA complaints, there are no formal timelines on investigation of such complaints.[54]

Problems with discipline. Children and youth in foster care have higher incidences of school discipline, suspension, and expulsion.[55] In Michigan, schools have broad discretion to expel students for disruptive behavior or code of conduct violations.[56] A school must expel students for use of weapons, arson, criminal sexual conduct, or physical assault.[57] The U.S. Constitution assures some basic procedural rights to notice and hearing before a child may be expelled for more than 10 days.[58]

Students with disabilities can be expelled but have additional procedural protections. They cannot be expelled for disability-related behavior or for behavior that results from the failure to implement their IEPs except by court order.[59] Students who are not eligible at the time of an incident can also be protected if there is a pending evaluation request or if a school official has actual written notice of the disability.[60]

The question of whether or not behavior is caused by a disability or by the failure to implement an IEP is answered in a specialized IEP process called a manifestation review. The manifestation review is conducted by members of the IEP team and must be based on relevant information.[61]

If a parent does not challenge a manifestation review finding, the student is treated like anyone else. To challenge the finding, a parent must disagree and request a hearing by filing a due process hearing notice.[62] Requesting a hearing invokes "stay-put" (the student stays in the prior setting or a comparable alternative setting until the hearing is over).[63] Hearings requested in manifestation reviews are expedited (30 school days).

In some situations involving weapons, drugs, or incidents causing serious bodily injury, the school district can move the child to an interim setting (whether or not a hearing is requested) while the manifestation issues are resolved. An interim setting can also be ordered by a hearing officer or by a court, or can be set by agreement. Interim settings are limited to 45 school days unless extended by the parties.[64]

School districts are still responsible for providing FAPE, even to students who are expelled or in alternative settings. This may be a lesser version of FAPE.[65]

Here are some common problems and solutions related to discipline:

"My child is starting to have behavior problems, and the school keeps suspending him."

Behavior issues may not be reflected in the PLAAFP, or there may not be IEP goals for behavior, or there may not be an appropriate behavior assessment or plan. To resolve this problem, ask for an IEP meeting or for a functional assessment of behavior and behavior support plan before the problem gets worse. It's especially important to resolve behavior issues early, because the 2004 changes in the law make it much more difficult to challenge the adequacy of a program in a manifestation review.

"The school will not write behavior goals unless the child is labeled as emotionally impaired."

This myth is an extension of the mistaken belief that a school must only meet a child's needs that come from the category of eligibility under which the child falls. According to the commentary accompanying the new regulations, "Special education and related services are based on the identified needs of the child and not on the disability category in which the child is classified."[66] To resolve this problem, ask the IEP team to describe present levels of performance in all areas of disability and write goals that completely identify the child's needs.

"The school is trying to expel my child and wants me to sign a manifestation review in agreement."

Once a parent signs a manifestation review in agreement, or refuses to sign at all, or refuses to participate in the review, the child may be treated like any other child and is subject to being expelled. As difficult as it may be, the only action that protects a child's rights in this situation is to show up at the meeting, disagree, and request a due process hearing. In most cases, the goal is to enter negotiations with the school district over an appropriate program as an alternative to expulsion. In these cases, take care not to unwittingly agree to an interim placement that might prove to be inadequate or last longer than intended.

Conclusion

Education advocacy is challenging but rewarding. School is a place where children with disabilities receiving child welfare services can maintain constancy and receive individualized attention and support. It also presents advocates with an opportunity to prevent future problems and help children succeed.

Most educators enter into and remain in the school system to help children learn. Through selective use of the rights and service protections provided in state and federal law, combined with a generous and empathetic appeal to the educator's nature and skill, advocates from the child welfare system can have a great impact on the well-being and future success of children.

Endnotes

1 Director of Education Advocacy, Michigan Protection and Advocacy Service, Inc. (MPAS), Lansing, Michigan. MPAS is the federally-mandated protection and advocacy agency serving persons with disabilities in Michigan. The author thanks all MPAS staff for their assistance in compiling the materials for this article, many of which appear in longer form in the MPAS *Special Education Advocate's Manual* and other MPAS publications. For more information on MPAS services, please call (800) 288-5923 or access the MPAS website at www.mpas.org.

2 United Cerebral Palsy and Children's Rights, *Forgotten Children: A Case for Action for Children and Youth with Disabilities in Foster Care* 7 (2006).

3 U.S. Dept. of Health & Human Svcs., Administration on Children and Families, *Michigan Child and Family Services Review* (CFSR) 55 (2002).

4 This article does not discuss the constitutional basis for equal access to education, though several cases predating IDEA, Section 504, and state law suggested that equal access to education is a fundamental element of due process and equal protection. See *Pennsylvania Ass'n for Retarded Citizens v. Commonwealth of Pennsylvania,* 334 F. Supp. 1257 (E.D. Pa. 1971); *Mills v. Bd. of Educ. of the Dist. of Columbia,* 348 F. Supp. 866 (D.C. 1972); *Harrison v State of Michigan,* 350 F. Supp. 846 (E.D. Mich. 1972).

5 Mich. Comp. Laws Ann. §§ 380.1701, 380.1703 (West 1997).

6 Mich. Admin. Code R. 340.1701 *et seq.* A quick way to distinguish between federal and state rules is to look for the "R" before the rule number. Most IEP forms make reference to the state rules in identifying eligibility categories and services.

7 29 U.S.C. § 794 (2007).

8 34 C.F.R. Part 104 (2007). The protections in Section 504 largely parallel those in the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*

9 In addition to providing interpretation of the IDEA statutory changes, the regulation notice included a lengthy preamble that included interpretations of other sections of the law. The regulatory action, in a particularly unhelpful move, also renumbered all of the regulations. See 71 Fed.Reg. 46540 (Aug. 14, 2006).

10 Mich. Admin. Code R. 340.1732–1758.

11 Mich. Comp. Laws. Ann. § 380.1701.

12 34 C.F.R. § 104.3 (2007). See text accompanying note 19 *infra*.

13 The U.S. Government Printing Office website offers access to the federal rules implementing IDEA and Section 504; see http://www.gpoaccess.gov/cfr. The state Center for Educational Networking website provides free and easy access to the Michigan rules; see http://www.cenmi.org/.

14 34 C.F.R. § 300.1 (2007). "All" includes children in any setting, including school, home, hospital, prison, or jail.

15 34 C.F.R. § 300.111 (2007).

16 34 C.F.R. § 300.107 (2007).

17 34 C.F.R. § 300.101(a) (2007).

18 34 C.F.R. § 300.8 (2007); Mich. Admin. Code. R. 340.1705–1717.

19 34 C.F.R. § 104.3 (2007).

20 34 C.F.R. § 300.301 (2007).

21 Mich. Admin. Code R. 340.1721.

22 Mich. Admin. Code R. 340.1721c.

23 34 C.F.R. §§ 104.33, 300.320 (2007).

24 34 C.F.R. § 300.101 (2007); see also *Bd. of Educ. of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176 (1982).

25 34 C.F.R. § 300.18 (2007).

26 34 C.F.R. § 300.114 (2007).

27 See generally 34 C.F.R. §§ 104.36, 300.500 – 537 (2007).

28 CFSR, *supra* n. 3, at 56.

29 *Forgotten Children, supra* n. 2, at 7.

30 34 C.F.R. § 300.30 (2007).

31 71 Fed. Reg. 46,566.

32 34 C.F.R. § 300.519 (2007). Query whether or not the Michigan Children's Institute, with its close relationship to the Department of Human Services under state law, can serve as a guardian or surrogate for the narrow purpose of consenting to special education evaluations or services.

33 The good news is that "educational impact" means more than impact on academic achievement; it also includes functional performance. See 34 C.F.R. § 300.320 (2007). A student who is getting good grades may still need special education services to address other problems the student is having in school, such as behavior or mobility, or to gain access to non-academic and extracurricular activities.

34 "Other health impairment" is a chronic or acute health problem limiting a student's strength, vitality, or alertness, and adversely affects educational performance. See 34 C.F.R. § 300.8(c)(9) (2007); Mich. Admin. Code R. 340.1709a.

35 34 C.F.R. § 300.8(c)(4) (2007); Mich. Admin. Code R. 340.1706.

36 34 C.F.R. § 300.8(c)(10) (2007); Mich. Admin. Code R. 340.1713. The state's definition of "learning disability" is no longer consistent with the federal definition and will likely be changed by state rule-making expected in fall 2007.

37 34 C.F.R. §300.321(a)(5)(2007).

38 34 C.F.R. § 300.502 (2007).

39 Under IDEA 2004, states can no longer require school districts to use the severe discrepancy between achievement and intellectual ability as a basis for eligibility under the category of specific learning disability. States must permit the use of a process based on the child's response to scientific, research-based intervention and may permit the use of other alternative research-based procedures. 34 C.F.R. §300.307(a) (2007). The determination of eligibility must still be made by team members, which include the parent, the regular teacher or a classroom teacher qualified to teach the child, and one person qualified to conduct diagnostic testing. 34 C.F.R. §300.308 (2007).

The new standard, known as the "response to intervention" approach to identifying students with learning disabilities, may also benefit other students, including students with other disabilities. In a recent article, the National Association of State Directors of Special Education stated that "[response to intervention] is pertinent to students with other disabilities, particularly those with high-incidence disabilities such as mild cognitive deficit and emotional-behavioral disorders, and the many children with various combinations of at-risk characteristics."

Parts of IDEA 2004 in fact encourage schools to engage in "preventive" interventions as the NASDSE approach suggests. Some schools may, however, erroneously interpret this language to mean that students who may have other disabilities must use response to intervention approaches before seeking eligibility for special education, thus delaying evaluations. IDEA does not require use of the response to intervention approach when serving students who may have other disabilities and does not authorize school districts to delay evaluations.

40 34 C.F.R. § 300.114(b) (2007).

41 IDEA requires that a school district provide a full "continuum of alternative placements" and make available supplementary services in regular education classrooms. 34 C.F.R. § 300.114 (2007).

42 Mich. Admin. Code R. 340.1721.

43 *Forgotten Children, supra* n.2, at 7.

44 34 C.F.R. § 300.323(e) (2007). If a child is being evaluated for eligibility when the child moves, IDEA was recently amended to give the new district a reasonable time to complete the evaluation. 34 C.F.R. § 300.301(d)(2)(2007).

45 Federal law requires school districts to allow parental inspection of records and provides for a copy of the IEP and evaluation report. "Inspection" includes access by an authorized representative. A school may charge a nominal fee for copying, typically $.25 per page. 34 C.F.R. § 300.613 (2007).

46 *Forgotten Children, supra* n. 2, at 7.

47 34 C.F.R. § 300.320(a)(4) (2007).

48 *Deal v. Hamilton County Bd. of Educ.,* 392 F.3d 840 (6th Cir. 2004) held:

A school district unquestionably may consider cost in determining appropriate services for a child. The school district is required, however, to base its placement decision on the child's IEP, rather than on the mere fact of a pre-existing investment. In other words, the school district may not . . . decide that because it has spent a lot of money on a program, that program is always going to be appropriate for educating children with a specific disability, *regardless of any evidence to the contrary of the individualized needs of a particular child.* A placement decision may only be considered to have been based on the child's IEP when the child's individual

characteristics, including demonstrated response to particular types of educational programs, are taken into account. A "one size fits all" approach to special education will not be countenanced by the IDEA.

49 34 C.F.R. § 300.320(a)(4) (2007).

50 Mich. Admin. Code R. 340.1722a.

51 As of this writing, the complaint process is undergoing revision. Contact MPAS or the Michigan Department of Education for up-to-date information on how and where to file complaints.

52 34 C.F.R. §§ 300.151-153 (2007).

53 Complaints must be resolved within 60 days unless "exceptional circumstances" are found and documented. 34 C.F.R. § 300.151 (2007). One also must consider the time limit on complaining about issues. Under the new regulations, complaints must be filed within 1 year of the incident. 34 C.F.R. § 300.153(c) (2007).

54 34 C.F.R. § 104.6 (2007).

55 *Forgotten Children, supra* n. 2, at 5.

56 Mich. Comp. Laws Ann. § 380.1311(1) (West 2005).

57 Mich. Comp. Laws Ann. §§ 380.1310, 1311a (West 2005).

58 *Goss v. Lopez*, 419 U.S. 565 (1975). The "hearing" is usually before the school board.

59 34 C.F.R. § 300.530(e) (2007).

60 34 C.F.R. § 300.534 (2007).

61 34 C.F.R. § 300.530(e) (2007).

62 34 C.F.R. § 300.532(a) (2007). For the contents of a due process hearing notice, see 34 C.F.R. §§ 300.507, 508(a-b) (2007). The notice, a new requirement from the 2004 amendments to IDEA, is a critical document because: (1) the hearing process cannot start without it; (2) failure to be specific enough can cause claims to be dismissed; and (3) the claimant will be limited to the issues raised in the notice when actually conducting the hearing.

63 34 C.F.R. § 300.533 (2007).

64 34 C.F.R. § 300.530(g) (2007). "Serious bodily injury" is defined in the federal criminal law.

65 34 C.F.R. § 300.530(d) (2007). The adequacy of FAPE in an interim or post-expulsion setting can be challenged through a hearing or complaint.

66 71 Fed.Reg. 46549 (August 14, 2006) (comment to 34 C.F.R. § 300.8).

The Evolving Educational Placement of Children with Special Needs

by David C. Meyers, Ed.D

A History of Segregation

In 1975, Congress enacted the federal special education law that directed the education of students with disabilities in schools. When amended in 1990, the law was renamed the Individuals with Disabilities Education Act (IDEA). During subsequent reauthorizations, including the most recent in 2004, it has become clear that success in fulfilling the law has been impeded. (Turnbull et. al., 2002). Meeting the provisions of the law as well as the intention of the law is a complex process that is constantly evolving.

This paper will address the interplay between the directives of attaining the "maximum potential" of the individual and the rules regarding "least restrictive environment" (LRE), and nondiscriminatory evaluation (Title I [C], 631-a-3). Maximum potential is the highest level at which a student may function according to the student's ability, and least restrictive environment is a process in which schools are obligated to educate students with disabilities along side of students without disabilities to the maximum extent appropriate for the students with disabilities (Turnbull et. al., 2002).

Even before 1975, there was some attempt to educate children with disabilities. This often occurred in unregulated, highly segregated settings, hence the term "retard room," a moniker that survives after 30 years. Congress was aware that there had been a long history of segregating students with disabilities from students who did not have disabilities. (20 U.S.C. sec. 1400 (c) (2)). The federal mandates, therefore, prescribed uniformity and comprehensiveness, along with the safeguarding of parental and student rights.

The law was hailed as an advancement for children with disabilities who were not experiencing the proper educational opportunities. General education systems also viewed the law as a great relief as funds were allocated to develop curriculum, train specialized teachers, and provide support staff. The pendulum swung rapidly from housing many children in general education where they received no special services to extensive placement in newly created programs. Least restrictive environment was subsequently implemented through mainstreaming, integration, and inclusion. (Turnbull, et. al. 2002).

Mainstreaming

The first attempt to address IDEA involved the process of mainstreaming. This was implemented by having students with disabilities participate in the nonacademic portions of the general education program such as art, music, and physical education with non-disabled students. (Idol, 1997). Most students were enrolled in self-contained special education classes, visiting general education classes for a relatively small portion of time. (Grosenick & Reynolds, 1978).

It was soon determined that the situation was not reflecting the intent of the law. Any kind of segregation in education simply runs against the grain of the United States Constitution, which requires equal treatment of all people who are in equal or highly similar circumstances, and prohibits discrimination based on disability. (Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 [2007]; Rehabilitation Act, 29 U. S. C. § 794 [2007]). Many general education teachers, relieved by the opportunities of alternate placement, quickly "washed their hands" of the students with disabilities. Recusing themselves of responsibility, the children were the sole responsibility of special education teachers in a noncollaborative arrangement that was, in itself, discriminatory.

Segregation further occurred when children in special education classrooms ate separately in lunch rooms, had lockers clustered together instead of interspersed with their nondisabled peers, and had separate physical education programs. Often when they arrived in a general education classroom for mainstreaming,

there was no available seating and no appropriate curriculum. The children sometimes were placed in non-standard seating, perhaps to the side or the back of the room, and given "busy work." Children with special needs quickly became outcasts in the general education setting and formed alternative identities with both their disabled peers and in their special education classrooms where they found acceptance, comfort, and familiarity. Integrating into general education classes was unpleasant and frequently avoided.

Inclusion

According to IDEA, "Students with disabilities will be more likely to have equal opportunity and to achieve the national policy goals of equal opportunity, independence, inclusion and productivity if they participate in the general curriculum to the maximum extent appropriate for them." 20 U. S. C. § 1400 (c)(5)(c)(a). Furthermore, research indicated that with adequate support, students with disabilities demonstrated high levels of social interaction with typical peers in inclusive settings. (Fryxell & Kennedy, 1995; Kennedy, Shukla & Fryxell, 1997; J. McDonnell, Hardman, Hightower, Kiefer-O'Donnell, 1991).

Advocates, understanding these principles and seeking change, supported reintegrating students with disabilities into general education classrooms with supplementary aides and services from the very start of their educations. (Lipsky & Gartner, 1989; S. Taylor, 1988). Thus, the movement toward inclusion of special education children in general education classrooms continued.

In some settings, a radical shift occurred. Instead of the child with disabilities seeking out the special education teacher in an alternative setting, the teacher sought out the student. Special education teachers began entering general classrooms in a collaborative model of team teaching. In instances when sharing the full responsibilities of teaching the curriculum did not occur, the special education teacher acted as a resource to children with disabilities by reteaching, rephrasing, and extra guidance.

The residual effect of this process was also a benefit to the general education student. According to Hollowood, Salisbury, Rainforth, & Palombaro, (1994) and J. McDonnell, Thorson, McQuivey, & Kiefer-O'Donnell (1997), the presence of students with disabilities did not compromise the performance of typically developing students but reinforced that development. The special education or resource teacher, involving other students in tutorial groups, could assist general education students that needed help but were not officially assigned to that teacher.

Inclusion regarded students with disabilities as authentic members of general education programs, necessitating that special education supports exist within the general education classroom. (Sailor, 1991). But not all attempts to achieve that level of inclusion have been accomplished. In some inclusion models, children continued to leave the general education classroom for special assistance even though they were still expected to make progress in the general education curriculum. This was considered to be a preferable arrangement for students who lagged so far behind the expectations of their age group that exposure to grade level materials made little sense.

In those cases, features of special education instruction were expected to produce outcomes that were not unique to the special education setting. The importance of the setting was considered to be less important than what happened in that setting (Kavale & Forness, 1999). Inclusion in those settings was seen as a value that was manifested in the way teachers planned, promoted, and conceptualized the education and development of their students. In inclusive programs, the diverse needs of all children were to be accommodated to the maximum extent possible within the general education curriculum. (Salisbury, 1991).

As a result, a shift in group identity occurred. Spending more time in a general education setting allowed the child with disabilities to form a primary identity with children without disabilities. At the same time, the exposure of the general education population to children with disabilities fostered greater acceptance. Even though core curriculum might be offered in an alternative setting, the fact that the child started the day in the general education classroom, participated in opening exercises, had a permanent seat, and had a locker with other children in the classroom all served to connect the child with disabilities to that classroom.

This sense of belonging was further reinforced when the child with disabilities participated in general physical education, art, music, etc., even if the course content was modified. A sense of accomplishment was also reported when children with disabilities had both attainable and authentic work to do in the general

education classroom that was related to the general education curriculum, even if that work was accommodated to meet the student's level of capability.

Collaboration

While the concept of inclusion became more widely accepted and practiced, the need for additional school-wide reform was introduced. As general education and special education teachers shared the responsibility for meeting the needs of all children, general and special educators also needed to realize they had to work together as co-equal partners. (Villa, Thousand, Meyers, & Nevin, 1996). It was determined that special educators must be part of the ongoing dialogue in general education.

As a result, there was reform of curriculum, school organization, and professional development. Both general and special educators were now expected to be part of a team that re-created schools so that all children, including those with disabilities, might succeed. (Zigmund & Baker, 1995). The writings of Friend and Cook, (1996), Corrigan and Bishop (1997), Walther-Thomas (1997), and Walther-Thomas, Korinek, McLaughlin and Williams (2000) all stated that regularizing the practice of teaching for student diversity rather than teaching for homogenous groups must be anticipated as an expected change in a school's culture. It was hoped that the teaching process would be arranged so that educators supported each other to meet students' needs through joint efforts. Collaboration has been regarded as a crucial element in the progress of meeting the needs of all students. In the next generation of inclusive classrooms, a flexible approach to groups that enables teachers to meet with students who need remediation as well as those who need enrichment must occur. (Pugach and Wesson, 1995).

Higher Standards

A confluence of factors has more recently occurred to stimulate greater collaboration between general education and special education. One of the principal components has been the No Child Left Behind Act of 2001 in which the federal government mandated that all schools in the nation provide the education that children need. Pub. Law No. 107-110. Basic tenets have included research-based instruction, a systematic evaluation system, and interventions to meet the needs of all children. In meeting these mandates, the best outcomes have resulted from layered interventions that enhance classroom instruction and add supplemental small group instruction for those who struggle. (Mathes, et. al., in press).

Regardless of the specific educational program in use, it has been established that a successful curriculum provides instruction that connects meaningfully to supplemental materials. In-class grouping strategies, including small group instruction, have been developed to meet the needs of all students. Student placement in those groups has been flexible, with placement and movement based on ongoing assessment. Effective classroom management and increased time on task have also been components of collaborative strategies for improvement. (U.S. Dept. of Education, 2002).

As the need to create flexible, tailored, and appropriate programs has grown, the requirements of collaboration between general education and special education have been further emphasized. At the same time, the distinctions between general education and special education have been somewhat blurred as these new mandates have correlated with IDEA's least restrictive consideration and have been directed to children with special needs as well as the general education population.

One way in which the State of Michigan has responded to these mandates is through the Michigan Integrated Behavior and Learning Support Initiative (MiBLSi), a Mandated Activities Project under IDEA. Schools apply for MiBLSi participation, and are eligible for assistance based on a variety of risk factors.

MiBLISi has helped schools develop support systems and sustain implementation of data-driven, problem solving models to help students become more successful. (Goodman, 2006). The MiBLSi project has addressed the ever-increasing demands of the federal government by identifying where the most support is needed in the school and allocating resources for those activities.

> Identifying the level of support needed for an individual student has depended upon frequent and ongoing measures of student performance. The most commonly used assessment system currently implemented in Michigan is the Dynamic Indicators of Basic Early Literacy Skills (DIBELS). This is a set of standardized, individually administered measures of early literacy development. DIBELS has been designed to be short fluency measures used in regularly moni-

toring the development of pre-reading and early reading skills. (DIBELS, 2006).

As the academic needs of students have intensified, so too has the need for more comprehensive understanding of the conditions under which students are unsuccessful. (Goodman, 2006). Goodman states that supports may include grade-level teams, student assistant teams, and child study teams. If a possibility exists that a student may not be successful, teams gather more information and develop more powerful intervention plans. The more needy the student, the more resources must be focused in ever-increasing attempts to reach a level of proficiency. These resources have included classroom adjustment, Title I services, special education input, and other interventions that may be developed, all offered in a cohesive continuum.

In light of intensified efforts at both the district and the building levels, there may be some question whether special education services will continue to be needed. In the past, students who had not been successful with the initial presentation of the general curriculum were examined to determine their eligibility for special education. Resorting to a rapid determination of eligibility, however, deemphasized the dynamic, active nature of the instruction. More intensive interventions have been developed to provide responsive strategies based on student performance and to promote increased successful outcomes in all children—those in general education as well as those who might once have been more quickly placed in special education.

Even when an intervention has been linked to student need, and the student has lacked sufficient progress as indicated through progress monitoring assessments, efforts still do not cease. If a student has continued to struggle persistently with academic success, it is necessary to raise the intensity of the intervention through increased instructional time, increased teacher-directed explicit instruction using evidenced based programs, and increased opportunities for active engagement in the learning activity through smaller group sizes and increased learning trials. (Goodman, 2006). The intensity of the intervention may very well require special education staff input in a collaborative effort.

All of these efforts have been developed as part of a general education initiative to address the needs of all children, even before special education eligibility is established. Rather than collaborating at the instructional level for those children already found eligible for special education, collaboration between general education and special education staff should ideally begin at the testing/screening level and continue into intervention attempts. The identification process for special education then becomes part of the instructional program designed for all children.

Stages of Evaluation

One of the basic tenants of IDEA addressed through No Child Left Behind and MiBLISi is nondiscriminatory evaluation. Three levels of evaluation that have typically been used are screening, prereferral, and referral. (Turnbull et. al., 2002).

Screening involves all children. The process includes group intelligence and achievement tests, hearing and vision tests, and curriculum based measurements. This level of assessment takes place for all children at all times and in all places of the school environment. Most commonly, this assessment has been recognized as homework, chapter tests, report cards, etc. In addition to classroom work and authentic assessments, district initiatives such as DIBELS have also been included. These measurements have helped schools identify which students might need further testing in order to determine whether they might qualify for special education.

The second phase of assessment is the more structured prereferral process. This process has two purposes: providing necessary help to teachers who are experiencing challenges with individual students, and guarding against over-identifying or misidentifying students as having disabilities. General education and special education staff play a role in the prereferral process as they attempt to discover the child's weaknesses and errors, which will help define the further instructional options required.

During the prereferral process, with parental permission, additional testing may be done. Testing could consist of informal or standardized screening measurements. Specialists or professionals who already work with the student may be called upon to administer these measurements. Decisions regarding the student's need, the measurements to give, and the interventions to apply are usually done by a building team. In addition to the regular education teacher, a team of school personnel including master teachers,

grade level coordinators, or specialists such as speech therapists, social workers, special education teachers, and school psychologists might participate. In different schools, these teams might be called Child Study Teams, Teacher Assistant Teams, School Interventions Teams, etc. Teams meet at least monthly and sometimes even weekly.

As carefully as the child is examined, the prereferral process has resulted in some disturbing facts about the consequences of classification. Approximately 90 percent of referred students have been evaluated, and approximately three-fourths of those students evaluated have been found to be eligible for special education. (Ysseldyke, Vanderwood, & Shriner, 1997). Therefore, the prereferral process is a very important step that should not be taken lightly as the results can be substantial and long lasting.

The final stage of assessment is the formal evaluation process. At this level, the child is felt to meet the criteria of needing special education instruction which will require formal certification. This level of assessment is usually quite specialized and engages all the safeguards of IDEA. A formal referral is needed, including parental input. Evaluations by multidisciplinary teams are conducted according to the eligibility area suspected. The assessment results in an Individual Educational Plan (IEP) in which the team (including the parent or student) decides upon goals and special educational options for the student. At this level, all other options and interventions should have been exhausted.

Response to Intervention

Before (at the prereferral level), or even as part of, the formal assessment phase, the success of educational instruction and interventions should have been measured. This is becoming a standardized part of the identification process, especially for students who might have learning disabilities. Congress, in renewing IDEA in 2004, addressed this principle through the phrase, Response to Intervention (RtI).

IDEA 2004 significantly changed the landscape of special education determination (especially in the area of learning disabilities) when it directed that, effective July 1, 2005, school districts could no longer be *required* (emphasis added) to take into account whether a child has a severe discrepancy between achievement and intellectual ability when determining special education need and must be permitted to use a process based on the child's response to scientific, research-based intervention in determining eligibility. (Michigan Association of Administrators of Special Education [MAASE], 2007).

Response to Intervention has been described as a school-wide multi-tiered system of support that mandates high-quality instruction and interventions that are matched to student needs and are frequently monitored (Goodman, 2006). Results of monitoring are used to make decisions about the need for further research-based instruction and/or intervention in general education, in special education, or both. (National Center for Learning Disabilities, 2006).

The RtI process has the potential to limit the amount of academic failure that students experience and increase the accuracy of special education evaluations. Information and data gathered by an RtI process can lead to earlier identification of children who have true disabilities and are in need of special education services. (National Center for Learning Disabilities, 2006).

Collaboration between general education and special education is essential as the RtI model works in the context of general education, and as such, helps ensure that students make adequate yearly progress toward state outcomes. Such a system requires an integrated approach to service delivery that includes leadership, collaborative planning, and implementation by professionals across the education system. (National Association of State Directors of Special Education, 2005). Accountability for positive outcomes for all students is the shared responsibility of all personnel.

The individuals involved and the roles of those individuals vary with the intensity of student need. Knowledge and skill will determine an individual's role rather than professional title or assignment (MAASE, 2007). Possible members of the team conducting the RtI model investigation may include, but are not limited to, the parent, student, general education teacher, special education teacher, site-based administrator, literacy coach, school psychologist, social worker, counselor, other student service personnel, support agencies, occupational therapist, speech/language therapist, and district personnel. (Florida Department of Education Technical Assistance Paper, FY 2006-2008).

Conclusion

There is still the need for the specialized placement of certain students, and a full range of specialized services continues to be offered. Arriving at that place, however, is intended to become such a rich and varied experience that many children who were routinely placed in special education programs previously should have a variety of options that may now make that placement unnecessary. The correctional measures that have been and are being developed through No Child Left Behind and RtI result in simultaneous assessment and remediation that often make measures that are more restrictive unnecessary.

There is no doubt that if children have received effective instruction early and intensively, they can make measurable gains in general academic achievement. Indeed, in early intervention and prevention studies, early intervention with the lowest 20 percent of children in kindergarten and first grade reduced the percentage of students reading poorly to fewer than 6 percent, and this was accomplished with only enhanced classroom reading instruction. When supplemental reading instruction was provided in small groups, the percentage of children failing to read decreased to fewer than 2 percent. By reducing reading failure in the majority of students who would fail without proper early intervention, special education resources can now be deployed intensively and with greater provision to that 2-6 percent of the student population of struggling readers who did not respond to early intervention. (Lyon, 2002).

Clearly, collaboration is occurring between general education and special education in an unprecedented way. The positive results are many and varied. Instruction in general education has become more research based and effective. Ongoing review and assessment provide data that can be used to alter or vary instruction. The need for special education certification has started to diminish. General education teachers and special education teachers who once worked in their own domains are now starting to work together.

Unification of effort in a school system only makes sense, as the mandates of special education and the resulting costs are enormous. These necessary liabilities have never been adequately funded by the same agencies that have mandated them, leaving the general education system to endure the majority of special education costs. For example, in the Greenville (Michigan) public schools, only 28 percent of the 2006-2007 cost of special education was covered by funds earmarked for that purpose. The rest was drawn from the general budget. (VanHouten, 2007). In a traditional delivery system, that money would only be used on the small portion of the population with a special education certification. It might appear much more reasonable to pool resources and have all staff work with all children and then focus more attention on those few who require additional services after collaborative efforts have been exhausted.

Furthermore, as the collaboration between school staff members increases, so does creativity in the delivery system. When a school views its tiers of interventions as a continuum, not only do all students benefit, but those most needy receive specialized instruction more immediately (and in the company of their peers) rather than in traditional programs only designed for children with a special education certification. In many instances, a student may actually receive fewer services in a traditionally constructed, segregated, special education program than they would in a school system that is committed to a collaborative approach offering all services to all students (Vail, 2007).

It appears ironic that to implement the most fundamental tenants of IDEA (least restrictive environment, maximum potential, and nondiscriminatory evaluation), reform has been needed in general education. In the past 30 years, the educational delivery system has gone from excluding students with special needs to establishing programs that specialized in meeting the needs of children with special education certification. To receive those services, students were often placed in separate programs where, it was believed, specialized education could only take place. It was clear that these programs segregated students and, as a result, a variety of combinations involving times and locations were implemented, including mainstreaming and inclusion.

It was discovered, however, that children with special needs made the most progress when placed with children in the general education environment. As educational reform was discussed, it was acknowledged that more collaboration between general education and special education was needed. The concepts of RtI and No Child Left Behind forced all schools to examine their delivery systems. A continuum of services, specialized interventions, ongoing assessment, flexible grouping, and the cooperation of all school personnel are beginning to form a system in which

every child in school should be able to receive the services they need. Extra effort is no longer only put into those children with special education certification (although that certainly remains available).

Furthermore, remediation occurs through assessment, and children might actually receive more attention through the richness of the multiple resources of the supported general education program than they could through the segregated delivery system of special education. Therefore, it is predicted that special education enrollment should decrease in the future. As all school staff are learning to work with all school children, placement is no longer as important as instructional goals, and achievement is becoming a factor of collaboration rather than certification.

Implications

In view of the changing profile of educational delivery, medical and legal experts, collaborating with families and schools about the welfare of their patients and clients, should be aware of the following trends:

- The absence of special education placement does not necessarily constitute a denial of services.
- Before special education placement, the school should be able to present a variety of general education initiatives.
- Each school system should offer a continuum of services. These may not be universal. Communication with a school system is, therefore, essential.
- Schools should be able to produce an organized and progressive system of interventions used with different grade levels.
- Data should be collected on every student and should be available for review by the parent.
- Interventions should be research based and not simply "more of the same."
- The length of interventions and the definition of adequate growth have not been clearly defined by the State and may vary between students.
- Interventions should be formalized, and schools should be able to report the length, frequency, and nature of the intervention group.
- As new systems are being developed, most schools are addressing reading as a learning disability. Interventions for other subjects or disability areas are probably not as advanced.
- Students could be working with a resource teacher, as part of a collaboration plan, without being certified for special education.

About the Author

Dr. Meyers has attended Michigan State University and the University of Detroit. He did his doctoral studies at Western Michigan University where he is an adjunct faculty member. Dr. Meyers has been the school psychologist for Greenville Public Schools for more than 20 years. He also has a private practice in which he has contracted with Community Mental Health, substance abuse agencies, the Dept. of Human Services, and Friend of the Court offices where he has done family assessments and mediation. Dr. Meyers has been a member of the state Friend of the Court Advisory Committee, assisted the state in revising the Michigan Assessment Programs, and has served on the board of a women's abuse agency.

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The New Science-Based System for Early Intervention and Education of Children with Specific Learning Disabilities

by Sidney Kraizman, Esq.[1]

Part One: Identifying Students with Specific Learning Disabilities

The Delay in Identifying Students with Specific Learning Disabilities

The delay in identifying students with specific learning disabilities has prevented the majority of these students from ever closing the achievement gap with their classmates and has placed them in a situation where they have to constantly struggle in school and, along with their parents, struggle with homework. In 2006, Michigan students with specific learning disabilities totaled 92,635, or about 6 percent of all Michigan students.[2] Most are of average or superior intelligence. Attorney David Boies and financial wizard Charles Schwab, for example, are only two of the many prominent Americans with dyslexia, a learning disability in reading. Sadly, 24 percent of the students with learning disabilities drop out before graduation.[3]

What is a Specific Learning Disability?

The definition of specific learning disability is found in the regulations for the Individuals with Disabilities Education Act of 2004 at 34 C.F.R. § 300.8 (c) (10) (i-ii) (2006):

(i) General. Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(ii) Disorders not included. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

The "Wait to Fail Test"

The delay in identification of students with learning disabilities has resulted from using the IQ discrepancy criteria—a severe discrepancy between intellectual ability and academic achievement—to determine whether a student has a specific learning disability. For example, for students with dyslexia, a learning disability in reading, a majority of the students are "not identified until at least the third grade… it is not unusual for dyslexics to go unrecognized until adolescence or adulthood." Reading disability is estimated to comprise approximately 80 percent of all learning disabilities.[4]

The Office of Special Education and Rehabilitative Services (OSERS) of the United States Department of Education in the Notice of Proposed Rule Making on June 21, 2005, explained:

> There are many reasons why use of the IQ-discrepancy criterion is potentially harmful to students as it results in delaying intervention until the student's achievement is sufficiently low so

> that the discrepancy is achieved. For most students, identification as having a specific learning disability (SLD) occurs at an age when the academic problems are difficult to remediate with the most intense remedial efforts. (Torgeson et al., 2001). Not surprisingly, the 'wait to fail' model that exemplifies most current identification practices for students with SLD does not result in significant closing of the achievement gap for most students placed in special education. Many students placed in special education as SLD show minimal gains in achievement, and few actually leave special education. (Donovon & Cross, 2002).[5]

Response to Scientific Research Based Intervention

There is a better way: "response to scientific research-based intervention." The Office of Special Education and Rehabilitative Services states that: "Recent consensus reports . . . recommend abandoning the IQ-discrepancy model and recommend the use of response to intervention (RtI) models." (Donovan & Cross, 2002; Lyon et al., 2001; President's Commission on Excellence in Special Education, 2002; Stuebing et al., 2002).[6]

IDEA 2004 and the New Federal Regulations

On December 3, 2004, the president signed the Individuals with Disabilities Education Improvement Act (IDEA 2004) effective July 1, 2005. The final regulations to the IDEA were published in the federal register on August 14, 2006, and went into effect in October 2006.

In IDEA 2004 at § 614(b)(6), in determining whether a student has a severe learning disability, school districts "shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability . . . ." And school districts "may use a process that determines if the child responds to scientific, research-based intervention . . . ."

IDEA 2004 at § 613(f) (1) allows the school districts to use up to 15 percent of their IDEA 2004 funding

> to develop and implement coordinated, early intervening services…for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade 3) who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment.

The IDEA 2004 thus approves of "response to scientific, research-based intervention" to determine if a child has a specific learning disability, and it allows school districts to use up to 15 percent of the IDEA 2004 funding for that purpose.

What is Response to Scientific, Research-Based Intervention?

"Response to scientific, research based intervention," or RtI, is best understood as a preventative, early intervention strategy that focuses on improving outcomes in both general education and special education. The National Association of State Directors of Special Education and the Council of Administrators of Special Education in their 2006 *NASDE and CASE White Paper on RtI*, explained, "RtI—the practice of (1) providing high quality instruction/interventions matched to student needs and (2) using learning rates over time and level of performance to (3) make important educational decisions."

Early Intervention to Prevent Failure Versus Waiting for a Child to Fail

The RtI is an approach to be used first in general education. It is based on these two recommendations made by the President's Commission on Excellence in Special Education report, A New Era: Revitalizing Special Education for Children and Their Families:

- Consider children with disabilities as general education children first. In instruction, the systems must work together to provide effective teaching.
- Embrace a model of prevention, not a model of failure. The current model guiding special education focuses on waiting for a child to fail, not on early intervention to prevent failure. Reforms must move the system toward early identification and swift intervention, using scientifically based instruction and teaching methods.[7]

Monitoring the Proficiency Level and Rate of Reading in One Minute–

Dynamic Indicators of Basic Early Literary Skills

For monitoring the proficiency level and rate at which the students learn, the Dynamic Indicators of Basic Early Literary Skills (DIBELS) is an example of a comprehensive screening system used at the primary reading level. DIBELS is designed as a one-minute reading fluency measure used to monitor the development of pre-reading and early reading skills. Screening tests are usually administered three times per year to identify at-risk students, but DIBELS is a one minute test and can be used more frequently.[8] It is highly recommended by Dr. Sally Shaywitz, a leading authority on teaching children with dyslexia to read.[9] Dr. Shaywitz is a neuroscientist, a professor of pediatrics at Yale, co-director of the Yale Center for the Study of Learning and Attention, and a member of the National Reading Panel, mandated by Congress to determine the most effective reading programs.

Understanding RtI by the Often Used Three-Tier Model

In understanding Response to Scientific Research-Based Intervention (RtI), it is helpful to look at the Three-Tier Model that is frequently used with RtI and consider how it would apply to a reading program in kindergarten through the third grade. The Three-Tier Model on the attached page is taken from the 2006 *NASDE and CASE White Paper on RTl.*

In the pyramid of the three-tier model of RtI, the school district in tier one chooses a core reading program for its general education students that is a scientific research-based reading program that explicitly and systematically teaches phonemic awareness; phonics; vocabulary development; reading fluency, including oral reading skills; and reading comprehension strategies. Open Court Reading is one core reading program that is recommended by such leading authorities as Dr. Sally Shaywitz, M.D. and Dr. Denise Gibbs, Ed.D in their respective books.[10] [11] Approximately 80 percent of the students should achieve adequate proficiency in reading in tier one, according to the *NASDE and CASE White Paper on RtI*.[12]

In tier two, supplemental instruction is provided to the 20 percent of students that have a poor response to the instruction in tier one. This supplemental instruction is in addition to the core reading program used with all the students. Students that improve in critical reading skills are typically reintegrated back into tier one in the core reading program.[13]

In tier three, approximately 5 percent of the students receive "intensive individual interventions."[14] At tier three, the services that the student receives may include Title I programs, district remediation programs, or special education. For example, some students' lack of proficiency in reading may result from a lack of appropriate instruction in the past or the fact that the children are English-as-a-second-language students, who do not have a disability. However, in tier three, the group that determines eligibility for special education (what is commonly called the multidisciplinary team or MDT), may determine that some students have a specific learning disability or another disability under IDEA 2004 and need special education.[15] [16]

Progress in the Use of RtI in Michigan and a Proposed Michigan Special Education Rule

Through the sponsorship of the Michigan Department of Education, Office of Special Education and Early Intervention Services, more than 100 schools throughout Michigan began implementing a school-wide, multi-tiered RtI model as of August 2006.[17] The use of RtI is spreading quickly through our Michigan schools.

Our current Michigan Special Education Rule, Mich. Admin. Code r. 340.1713 (2006), contains the criteria of "severe discrepancy between achievement and intellectual ability," the old "wait to fail" test, to determine whether a child has a specific learning disability. This must change under the August 14, 2006 federal regulations to the IDEA 2004.

What Changes Must Michigan Make in its Special Education Rules for Determining Whether a Child Has a Specific Learning Disability?

The federal regulation to IDEA 2004, 34 C.F.R. §300.307 (2006) provides:

> (a) General. A state must adopt, consistent with §300.309, criteria for determining whether a child has a specific learning disability as defined in §300.8(c) (10). In addition, the criteria adopted by the:
>
> (1) Must not require the use of a severe discrepancy between intellectual ability and achievement (IQ-discrepancy)

for determining whether a child has a specific learning disability . . .

(2) Must permit the use of a process based on the child's response to scientific, research-based intervention; and

(3) May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability . . . .

(b) Consistency with State criteria. *A public agency (the school district) must use the State criteria adopted pursuant to paragraph (a)* of this section in determining whether a child has a specific learning disability. (Emphases added).

Under this federal regulation, the Michigan Department of Education must amend Special Education Rule R340.1713 to change the definition and determination of Specific Learning Disability (SLD). Under the federal regulation, Michigan cannot require school districts to use the IQ discrepancy, a.k.a "the wait to fail" test; Michigan must permit the school districts to use response to scientific research based intervention (RtI) and may permit other alternative research-based procedures in determining whether a child has a specific learning disability. [18]

Proposed Michigan Special Education Rule R340.1713 Specific Learning Disability Defined: Determination

On May 14, 2007, the Michigan Department of Education released this proposed new Michigan Special Education Rule, Mich. Admin. Code R340.1713 Specific Learning Disability defined: Determination. Significantly, proposed rule 340.1713 at section (2) strikes out the old IQ discrepancy (a.k.a "wait to fail") criteria; that will no longer be the determinative criteria.

Proposed Rule 340.1713 (3) provides:

In determining whether a student has a learning disability, the public agency *may use a process that determines if the student responds to scientific, research-based interventions* and is not required to consider whether a student has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

Thus, if the proposed Michigan rule is adopted, school districts could not use the old IQ discrepancy, aka "wait to fail," as the criteria for determining whether a student had a specific learning disability. Under the proposed rule, school districts could use a "process that determines if the student responds to scientific, research-based interventions (RtI)." However, as the Office of Special Education (OSEP) pointed out, the "RtI is one component of a comprehensive evaluation" under 34 C.F.R. §300.304(b) (1) and (2) (IDEA regulations) that requires "a variety of assessment tools and strategies and cannot rely on any single procedure as the sole criterion for determining eligibility for special education and related services."[19]

The public hearings were held in different locations in Michigan in June 2007.

New Criteria in the IDEA Regulations to Determine Whether a Student Has a Specific Learning Disability

The new regulations under the IDEA 2004 add new criteria to determine whether a student has a specific learning disability. In 34 C.F.R. §300.309, Determining the Existence of a Specific Learning Disability, the phrase "severe discrepancy between achievement and intellectual ability" has been deleted. New language, including *response to scientific, research-based intervention,* has been added and where significant is *italicized*.

34 C.F.R. §300.309 (a) states

The *group* . . . [what we call the multidisciplinary evaluation team or MET], may determine that a child has a specific learning disability, as defined in §300.8(c) (10) if—

(1) The child does not achieve adequately for the child's age *or meet State–approved grade-level standards* in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age *or State-approved grade-level standards* . . .
(i) Oral expression
(ii) Listening comprehension
(iii) Written expression
(iv) Basic reading skill
(v*) Reading fluency skills*
(vi) Mathematical calculation
(vii) Mathematics problem solving

> (2) (i) The child does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified in paragraph (a)(1) … when using a process based on the child's response to scientific, research-based intervention; or (ii) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with 300.304 and 300.305.

This alternative criteria under 34 C.F.R. §300.309 (a) (2) (ii) of "*a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards, or intellectual development . . .*" is so broad that it would likely trump the IQ-discrepancy test, even if a state chose to reenact it in its special education rules as an alternative test. In my opinion, this effectively eliminates the IQ-discrepancy test as determinative of whether a student has a specific learning disability; however, the IQ-discrepancy test may metamorphose into one of a variety of assessment tools that may well be helpful in some cases in determining whether a child has a specific learning disability and in determining the needs of the child, the appropriate special education, and related services that she should receive.

Response to scientific research-based intervention in the general education setting will result in many children not needing special education. But there will still be many children who need special education and related services for a specific learning disability.

Parental Consent to Evaluate for a Specific Learning Disability

Importantly, the school district must promptly request parental consent to evaluate the student for a suspected learning disability and to determine whether the student needs special education and related services where the student has been provided with appropriate instruction in regular education settings, delivered by qualified personnel, and there have been repeated assessments of achievement at reasonable intervals, if the child has not made "adequate progress after an appropriate period of time…." 34 C.F.R. §300.309(c)

The Multidisciplinary Evaluation Team (MET) and the Evaluation for a Specific Learning Disability

The group (the multidisciplinary evaluation team or MET) that determines if a child suspected of having a specific learning disability (SLD) does have a disability consists of: the child's parents; the child's regular teacher; if the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; for a child of less than school age, an individual qualified to teach a child of his or her age; and at least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or a remedial reading teacher. 34 C.F.R. §300.308.

The group (MET), in making its determination as to whether a child has a SLD, must have one member of the group observe the student's academic performance in the regular education classroom or use information from an earlier classroom observation and monitoring of the student's progress before referral for evaluation. 34 C.F.R. §300.310(b).

A student may not be determined to have a specific learning disability if the determinant factor was that the student suffered from "disteachia," and the student does not otherwise meet the criteria.

34 C.F.R. §300.306(b) provides

> A child must not be determined to be a child with a disability under this part:
> (1) if the determinant factor for that determination is: (i) Lack of appropriate Instruction in reading, including the essential components of reading instruction (as defined in §1208(3) of the ESEA) . . . . [which is the No Child Left Behind Act].

Under No Child Left Behind, the term "essential components of reading instruction" means explicit and systematic instruction in:

> (a) Phonemic awareness;
> (b) Phonics;
> (c) Vocabulary development;
> (d) Reading fluency, including oral reading skills; and
> (e) Reading comprehension strategies.

To be appropriate, a reading program must be a scientific, research- based reading program. Similarly, where the determinant factor is that a student has not received appropriate instruction in math or the student has limited English proficiency and does not otherwise meet the eligibility criteria, then the student will not qualify as having a specific learning disability.

To ensure that underachievement of a child suspected of having a specific learning disability is not due to a lack of appropriate instruction in reading or math, 34 C.F.R. §300.309(b) (1) (2) requires the group to consider data that:

> (1) the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and (2) data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents."

To determine that a child has a specific learning disability, the MET must exclude mental retardation, visual, hearing, or motor disability, cultural factors, environmental or economic disadvantage, and limited English proficiency as the primary cause of the problem. 34 C.F.R. §300.309 (a) (3).

To exclude mental retardation, the school psychologist will usually have to do an IQ or intelligence test with the student. The Wechsler Intelligence Scale for Children, 4th edition (WISC-IV) is one of the most widely used IQ tests in the United States, and it was the IQ test that I saw most often used in Michigan when I was a special education hearing officer.[20]

It is important to remember that the school district, in evaluating the student to determine whether he has a disability, must, under 34 C.F.R. 300.304(b) (1):

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent;

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

Importantly, assessments must be "selected and administered so as not to be discriminatory on a racial or cultural basis..." 34 C.F.R. 300.304c (1) (i).

Assessment Tools

This article earlier mentioned DIBELS, the one-minute fluency measure of pre-reading and early reading skills, and has mentioned the WISC. This article will not attempt to cover all of the assessments tools, but it will cover some.

Evaluation–Reading Tests

I have focused in this article on dyslexia. Research by Dr. Sally Shaywitz, M.D. using MRIs showed that skilled readers activated the occipital-temporal region in the back of the brain.

> In contrast, dyslexic readers show a fault in the system; under-activation of neural pathways in the back of the brain. Consequently, they have initial trouble analyzing words and transferring letters into sounds, and even as they mature, they remain slow and not fluent readers.[21]

The Woodcock-Johnson III and the Woodcock Reading Mastery Test, Revised Normative Update, will test both reading comprehension and decoding isolated words, by tests of reading real and nonsense words and reading comprehension.[22]

"Reading fluency skills" was added by the August 14, 2006 regulations at 34 C.F.R. §300.309 (a) (1) (v) as an area where a student may have a SLD. Dr. Shaywitz points out that students with dyslexia, even as they mature, will often remain slow and not fluent readers. As of the date of writing her book, Dr. Shaywitz found that the Gray Oral Reading Tests were the only ones that measure accuracy, rate, and comprehension as the student reads aloud. This is an important test of reading fluency skills.[23] The results of the DIBELS one-minute fluency test in regular education will also be an important assessment tool for fluency.

For a child suspected of having a SLD where the student participated in a RtI process, the eligibility-determination documentation must include information about the instructional strategies used and the student-centered data collected, it must show that the parents were notified about the state's policies as to instructional strategies and data collection, and it must detail the parents' right to request an evaluation. 34 C.F.R. §300.311.

The Individualized Education Program (IEP) Team, which includes the child's parents, is respon-

sible for determining that a student has a disability, within the meaning of the IDEA 2004, and needs special education and related services. The student's IEP Team is responsible for developing, revising, or reviewing the Individualized Education Program (IEP) for a child with a disability. 34 C.F.R. §300.23.

Part Two: Students With Learning Disabilities: Rights and Responsibilities

Are Those Students Determined by the Individualized Education Program (IEP) Team to Have a Specific Learning Disability and Eligible to Receive Special Education and Related Services Under IDEA 2004 Entitled to Scientific, Research-Based Interventions?

The August 14, 2006 federal regulations for the IDEA 2004 at 34 C.F.R. §300.320(a) define the Individualized Education Program or IEP for each child, and it must include:

> (1) A statement of the special education and related services and supplementary aids and services, *based on peer reviewed research to the extent practicable*, to be provided to the child or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child:
>
> (i) To advance appropriately toward attaining the annual goals;
>
> (ii) To be involved in and make progress in the general education curriculum. . . . and participate in extracurricular and other non-academic activities . . . .

There are reading programs based on peer reviewed research that the schools can use for children with specific learning disabilities (SLD).

How Can Parents Determine if Their Child is Making Adequate Progress, and if the Reading Program Used by the School with Their Child is Based on "Peer-Reviewed Research"?

To help a parent gauge whether his or her child is making adequate progress, the Michigan Department of Education has a website that will help; go to www.Michigan.gov/mde and click Curriculum & Instruction. Then click Grade Level Content Expectations. For example, in kindergarten, the grade level expectation for reading fluency includes automatically knowing the letters and their sounds and recognition of a few words.

If the parents of a child with a SLD see that their son is making little progress in reading, how can they determine whether the reading program used with their child is based on "peer-reviewed research?" The Florida Center for Reading Research at Florida State University reviews many reading programs. Go to its website, www.crr.org, and then type "alphabetized reports" in the search box.

Sam's Program, a Model that Works

In her book, *Overcoming Dyslexia*, in Chapter 18, "Sam's Program, a Model that Works," Dr. Shaywitz tells about Sam, a child with dyslexia, who is entering the fourth grade. His general education and special education teachers were teaching him using two different reading programs, which were popular in the New England area, but not supported by scientific evidence, and Sam was making little progress. Dr. Shaywitz chose "Language! A Literary Intervention Curriculum," which was based on peer-reviewed research, and Sam's school cooperated. The reading program included 90 minutes of combined reading and language arts daily in a small group of three students; fluency was practiced daily. Forty-five minutes four days a week was spent in a resource room where Sam pre-read his reading assignments in science and social studies with his teacher. At home, Sam practiced reading school materials aloud to his parents or tutor. Sam also used tapes or CDs of his textbooks from Recording for the Blind and Dyslexic to reread his books as he followed along with the discs. Nine months after starting the program, Sam increased his reading scores by almost two years.[24] That is how you close the gap. In addition to the reading program itself, Sam received intense individual and small group instruction and coordination with the parents' efforts at home.

Language! is also recommended by Dr. Denise Gibbs, in her book.[25]

The Florida Center for Reading Research reviewed the research that supports Language! The research included one study of a group of adjudicated juvenile delinquents who advanced an amazing three grade levels in six months!

There are other reading programs that are based on peer reviewed research, but the chapter about Sam's

Program really does provide a model that works. In my summary of this reading program, I have just hit the high points, Dr. Shaywitz's book is written for parents, and I would recommend that both parents and educators read the chapter and the book.

If, as in Sam's Case, a Student is Making Little Progress in Reading, What Should the Parent Do?

Start by talking to the teacher before the IEP Team meeting. Where the student has made little progress toward her goals in reading, it is appropriate that the IEP Team discuss reading programs that are based upon "peer-reviewed research." The IEP Team should write into the IEP the reading program and intensity, including whether it will be in a small group setting and the amount of time that will be used with the student, when that reading program is necessary to provide the student with a free appropriate public education.

When is it Appropriate for the IEP Team to Write a Particular Reading Program into the IEP?

At IEP Team meetings, it is not required that "all IEP Team meetings include a focused discussion on research-based methods . . . .[26] However, the longstanding position of the Office of Special Education and Rehabilitative Services of the United States Department of Education is that if a specific instructional method is needed to provide the student with a free appropriate public education, that instructional method must be discussed at the IEP Team meeting and incorporated into the IEP.[27] "For example, for a child with a learning disability who has not learned to read using traditional methods, an appropriate education may require some other instructional strategy." [28] When it is necessary, the IEP Team should write in the IEP a particular reading program based on peer-reviewed research and the amount of time and whether one-on-one or in a small group setting.

The courts have agreed on this position. For example, in *J.L. & M.L. and their minor daughter, K.L. v. Mercer Island School District,*[29] the high school student had a severe learning disability in reading and writing and made little progress on the goals in her IEP. The court, quoting The Office of Special Education and Rehabilitative Services, at Federal Register Vol. 64, No. 48, March 12, 1999, p. 12552, and citing the decision of the United States Court of Appeals for the Sixth Circuit in *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 862, 864 (6th Cir. 2004), held that the failure to delineate the "teaching methodologies and time allotments to various services" violated IDEA. The judge pointed out that the staff in the public school "escorted" the student through the system by reading to her and writing for her; by contrast, the student made "remarkable progress" in reading and writing at her private school.

Conclusions

Response to scientific research-based interventions (RtI) in general education and response to scientific research-based interventions as a process to determine whether a student has a specific learning disability and is eligible for special education are recommended by the Office of Special Education and Rehabilitation Services, the National Association of State Directors of Special Education, and the Council of Administrators of Special Education, and are promoted in the IDEA 2004 itself.

In general education, RtI gives those students that need additional help supplemental instruction with greater intensity in small groups to assist them to develop good reading skills and to close the gap with their peers. This improves the education of all of the students in the classroom. RtI is spreading throughout Michigan, and *parents and educators can help their own children and the schools by talking to the administrators and other teachers about RtI and how they can bring it to their schools.*

Many students with reading problems such as dyslexia will not need to be placed in special education, because they benefited from early intervention and RtI to improve their reading. But even with response to scientific research-based interventions, many children with more severe specific learning disabilities will need to receive special education services. *It is important that parents be aware of their right to send a written referral to the school district requesting that their child receive a comprehensive evaluation for identification or eligibility for special education services at any time during the RtI process.*

If a child with a specific learning disability is making little progress in reading, then the parent should talk to the teacher before the IEP. At the IEP Team meeting, when it is necessary, it is appropriate to discuss and write in the IEP the reading program based on peer-reviewed research that will be used with their child, and the intensity, the amount of time, and whether one

on one or in a small group. In general, these issues are resolved by discussion at the IEP Team meeting.

The parents and their learning-disabled child do have a right to a due process hearing. It is generally a wise course to try mediation before going to a due process hearing. Mediation has proved to be successful in Michigan with a resolution rate of approximately 90 percent.

The Michigan Department of Education has released the proposed Special Education Rule R340.1713 revising the special education rule for determining specific learning disabilities first by striking out the IQ-discrepancy criteria, the "wait to fail" test. Second, the proposed rule permits the school districts to use a "process that determines if the student responds to scientific, research based interventions" in determining whether the student has a specific learning disability. *It is important that parents of children with specific learning disabilities, the Learning Disabilities Association of Michigan, and forward-thinking educators participate in the Michigan special education rule-making process.* My recommendation is that they support the proposed rule R340.1713.

Endnotes

1 Mr. Kraizman is an attorney in private practice. His background is as follows: Hearing officer and a state review officer in special education due process hearings 1996-2006. President of the Michigan Chapter of the Alexander Graham Bell Association for the Deaf & Hard of Hearing (Michigan A.G. Bell) 1987-1988. Initiated and served as chair of the Michigan A.G. Bell summer camp program for children with hearing loss 1987-2007. Received award from the national Alexander Graham Bell Association for the Deaf and Hard of Hearing (A.G. Bell) for instituting the A.G. Bell recognition program for pioneering hospitals that began programs of universal newborn hearing screening. Currently, attorney consultant on the advisory council to the Early Hearing Detection and Intervention program of the Michigan Department of Community Health.

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Moving Beyond Zero Tolerance:

Restoring and Rebuilding School Discipline Policy

by Heidi Biedermann,[1] Buwon Choi, & Joanne Waszczak in collaboration with the Student Advocacy Center[2]

Introduction

Across the United States, "Zero Tolerance" has become the prevailing philosophy underlying school discipline policy. Over-reliance on Zero Tolerance is having negative effects on students, especially on young people of African-American and Latino descent. In this report, we examine the history of the term "zero tolerance;" the content of Zero Tolerance school discipline policies at the federal, state, and local levels; and statistics and outcomes related to these policies.

Zero Tolerance (ZT) policies in the U.S. are affecting youth beyond the individual, school, and community levels; the consequences to society are great when delinquent youth are suspended or expelled from school and thereby left without a safe, supervised, structured environment. ZT policies will succeed only if accompanied by clearly formulated and communicated rules and consequences, the development of alternative education opportunities for those students who are expelled, consistent data collection and accountability for all expulsions and suspensions, and the implementation of prevention and mediation programs.

One recommendation offered in this report is that federal, state, and local authorities scale back Zero Tolerance discipline policies to apply to only guns and explosives, as originally intended, and implement several alternative discipline policies to address less egregious discipline problems.

Zero Tolerance Policy: History and Definition

The term "Zero Tolerance" originated during the Reagan-Bush era War on Drugs. By adopting "tough on crime" policies, officials at all levels of government attempted "to send a message by punishing both major and minor incidents severely."[3] Although it is difficult to locate a widely agreed upon definition of the term, ZT first came to national attention in 1986 when San Diego-based U.S. Attorney Peter Nunez enacted a program entitled Zero Tolerance, which required authorities to impound seagoing vessels carrying any evidence of illegal drugs. From that point on, the term "Zero Tolerance" spread like wildfire; public officials applied it to policies governing everything from environmental pollution and skateboarding to homelessness and boom box noise ordinances.

Eventually, ZT made its way into President Clinton's Gun Free Schools Act of 1994.[4] Originally enacted as part of the Goals 2000: Educate America Act,[5] the law was reauthorized twice, first as part of Improving America's Schools Act of 1994,[6] and then as part of the No Child Left Behind (NCLB) Act of 2001 of the Elementary and Secondary Education Act of 1965 (ESEA).[7] This federal law required each state receiving ESEA funding to adopt, no later than October 20, 1995, a state law requiring local educational agencies to expel from school for a period of not less than one year any student who was determined to have brought a gun or explosives to school.

The Gun Free Schools Act stipulated that state law must allow the chief officer of the local education agency to modify the expulsion requirement on a case-by-case basis. Additionally, it required local education agencies to have a policy requiring referral of all weapons-related cases to the criminal justice or juvenile delinquency system. The federal government declared compliance with this law as a condition for the receipt of federal funding. Although the law states that "the Elementary and Secondary Education Act authorizes the secretary to waive the requirements of

the Gun Free Schools Act if that action will increase the quality of instruction for students or will improve the academic performance of students," it also says, "It is not anticipated that the requirements of the Gun Free Schools Act will be waived except in unusual circumstances."[8]

In the fall of 1996, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) distributed an action guide to help educators create safe and drug-free schools. In this guide, federal officials encouraged school administrators to communicate zero tolerance not only for weapons, violence, gangs, and use or sale of alcohol and drugs, but also for being truant or not wearing a uniform. Since most school administrators are interested in securing Safe and Drug Free Schools funding, they feel pressure to comply with these OJJDP recommendations.

Therefore, in the context of school settings, "Zero Tolerance" refers to "a variety of school disciplinary practices that mandate automatic suspension and/or expulsion from school for offenses perceived to be a threat to the safety of other children, school employees, or the school community itself" with the purpose of creating safe school environments.[9]

Effects of Zero Tolerance

The Scope

Zero Tolerance policies in the United States are affecting youth beyond the individual, school, and community levels; consequences to society are great when delinquent youth are suspended or expelled from school and thereby left without a safe, supervised, structured environment. Punitive measures alone cannot ensure that students will learn and be successful. Zero Tolerance policies will succeed only if accompanied by clearly formulated and communicated rules and consequences, the development of alternative education opportunities for those students who are expelled, consistent data collection and accountability for all expulsions and suspensions, and the implementation of prevention and mediation programs. Rather than exceed the federal Zero Tolerance requirement, state and school district officials should designate "funding for mediation, counseling, and conflict resolution programs" as alternative consequences to suspension or expulsion.[10] Addressing student issues successfully includes implementing consistent discipline strategies that do not derail students from their education track, but incorporate consequences and then attend to the problem.[11]

Assumptions Versus Facts

Zero Tolerance was intended to function as a violence prevention policy. It included recommendations for conflict resolution programs as an attempt to prevent students from resolving conflicts with firearms and allowed for "punitive and judicial" forms of discipline.[12] Since the initial enactment, amendments by states and school districts have altered the purpose and goals of Zero Tolerance. The Gun Free Schools Act was meant to give administrators discretion to decrease or increase expulsion time for violations, as appropriate; however, flexibility in the policy as well as states' rights to sovereignty have allowed for the development of harsher consequences, expanding Zero Tolerance policy to include additional violations.[13]

Sensationalized media coverage of school shootings leads many to believe that campuses are becoming increasingly violent even though this is not actually the case; school administrators are left responsible for managing perception, liability and risk. In an atmosphere of public panic about school shootings, many administrators have become ultraconservative about matters of school safety. However, outside of those instances, problems reported by principals have remained relatively similar over time. Interestingly, when surveyed about the most common problems in their schools, principals mainly noted tardiness, absenteeism, and fighting. More serious problems, such as gang affiliation, drug use, possession of weapons, and violence against teachers, were considered less common.[14]

ZT policies have allowed schools to suspend and expel students who may have special needs or require a specially structured educational setting. Such students typically have the following attributes:[15]

- Several referrals to the office for behavioral disruption;
- Chronic truancy;
- Academic struggles;
- Emotional difficulties;
- Weak social networks; and
- Previous contact with law enforcement.

At-risk or already troubled youth most need the structure and support of schools, but Zero Tolerance allows districts to put these youth on the streets without referrals to alternative education, outside services,

or follow-up which then further endangers the student and community. Zero tolerance for firearms may keep campuses safer, but expelling and suspending students for less harmful infractions puts both students and their communities at further risk.

Racial Inequities

Zero Tolerance discipline policy affects African-American and Latino youth disproportionately; they are more likely to be suspended and/or expelled than Caucasians. Latino and African-American youth often face disadvantages ranging from personal and family challenges to financially disinvested schools, under-resourced communities, a lack of organized after-school activities, and "poverty, racism, academic failure, and other realities."[16] In addition, racism and stereotyping can influence how adults discipline young people; stricter Zero Tolerance regulations are more prevalent in urban minority schools (Blumenson & Nilsen). "Racism rests just beneath the surface of zero-tolerance decisions."[17]

Locally, in Ann Arbor public schools for the 2004-2005 school year, according to data provided by the districts, African-American males comprised 7.6 percent of enrolled students, contributing to one "gun/knife" infraction, three "possession of other weapon" infractions, and one "use of leg tool" infraction. This population also accounted for three expulsions during that time. In comparison, the Caucasian male population consisted of 29.1 percent of the total enrolled students. They contributed to only one "possession of other weapon" infraction. In Ypsilanti for the 2004-2005 school year, African-American males comprised 30.1 percent of the enrolled student population. This group accounted for 854 regular education "out of school suspensions" and 1,941 "in-school suspensions." In comparison, the Caucasian male population comprised 19.1 percent of the enrolled student population. This group accounted for 153 regular education "out-of-school suspensions" and 402 "in-school suspensions."

The fact that a disproportionate number of minority students are suspended or expelled from schools "unfortunately reinforces the public perception that African-American and Latino youth are somehow more prone to engage in criminal and juvenile acts" (Dunbar & Villarruel, 2004).[18] For this reason, these trends must be monitored and investigated; it is vital to get a realistic picture of how Zero Tolerance policies are enacted and how those decisions play out in students' lives.

State and National Trends

The Michigan Nonprofit Association collected data in 1999-2000 from 255 local school districts and found that students were most likely to be expelled for physical assaults/fighting (without a weapon), weapon possession, verbal assault, and drug possession.[19] In addition, it found that African-American students were suspended at 2.5 times and Latino students at 1.4 times the rate of their Caucasian peers. In fact, "66 percent of students expelled in Michigan in 1990-2000 were African American, whereas only 28.5 percent were white."[20] Dixon found in 2000 that African-American students made up 17 percent of the public school population, but 34 percent of the suspensions.[21] Zero Tolerance policy in Michigan is inconsistent from district to district, is expanded by many districts, and is used unjustly to expel students for fights that could otherwise be handled through alternative discipline programs within the education system.

Nationally, the number of students expelled from schools has increased from 1.7 million in 1974 to 3.1 million in 2000.[22] However, "between the 1992 and 2002 school years, violent crimes at schools against students … dropped by 50 percent nationally."[23] It should be noted that the policy was enacted in 1994, after violent crimes in schools had already begun to drop, and so it is in question whether the policy was the direct cause of the drop. Nationally, most school arrests are for nonviolent crimes. These race and nonviolent crime disparities for suspensions and expulsions are visible state- and nation-wide.

Counties have reported similarly striking data related to Zero Tolerance policies. Philadelphia County recorded 1,632 arrests in 1999-2000 and 2,194 in 2002-2003. In the Houston Independent School District, school-based arrests increased from 1,063 in 2001 to 4,002 in 2002. Most of these arrests—17 percent for school disruption and 26 percent for disorderly conduct—are disturbances that do not fall under the umbrella of national Zero Tolerance policy recommendations. Denver reported in 2003-2004 that 42 percent of the offenses most often referred to law enforcement were for "other violations of code of conduct." This category known as "other violation" gives principals and district staff additional latitude to decide what constitutes a violation and what the consequences should be. Between 2000 and 2004, referrals to Denver law enforcement increased from 818 to

1,401. In 2003, African-American students comprised 19 percent of Denver's student population but 28 percent of referrals to police. Finally, in Chicago in 2003, African-American students made up 77.4 percent of arrests even though they made up only 50.9 percent of the student population.[24]

Zero Tolerance policies are negatively affecting young people in the state of Michigan and throughout the nation. By exposing racial disparities in suspension and expulsion rates and the student outcomes that follow, communities can advocate for a restoration and rebuilding of school discipline policy.

Outcomes of Suspension and Expulsion

The enactment of Zero Tolerance policy decreases the likelihood of positive educational outcomes for students. Many of these students already struggle for stability and acceptance in the school environment; when they are removed from campus and sent home, they miss out on positive peer and adult interaction. "Further, Zero Tolerance policy actually increases disparities in the juvenile justice system as opposed to creating social and academic opportunities for youth to be contributing members of neighborhoods, communities, and society at large."[25] Denial of education as a result of unfair suspensions and expulsions results in referrals to inadequate alternative schools, lower test scores, higher dropout rates, and an increased distrust of school administrators and police who seem to target students because of their race or ethnicity and not their behavior.[26] Taking students out of school decreases their propensity to be positive contributors to society and in turn negatively affects their attitudes towards authority and their potential educational opportunities and achievements. Individuals, schools, and communities also feel these negative effects of over-reliance on Zero Tolerance policy. For example:

- Students miss valuable class time. Oftentimes, they fall behind and may require extra attention from the teacher, which can, in turn, affect the progress of the entire class.
- When teachers play the role of law enforcement, positive, effective teacher-student relationships are jeopardized.
- When a student is unfairly suspended or expelled, parents or guardians are unnecessarily pulled away from professional and personal responsibilities, which can damage employment status and family stability.
- Students are stigmatized, and their emotional development is often damaged.
- Students see the system operate unfairly and/or feel the effects of institutional racism.
- Students are prevented from participating in the life of their primary community—school.
- Students who are expelled are forced to work with their parents or guardians to find, advocate for admission to, and then adapt to a new school community.
- Students are more likely to drop out of school (again, sometimes referred to as "pushed out" of school), which makes them vulnerable to risky and negative behaviors that endanger them and their families and communities. [27]

When students drop out, their future educational and professional opportunities become more limited. Those who drop out are more likely to rely on public assistance, be unemployed, earn less than high school graduates, work in low-wage jobs, have health problems, and engage in criminal activities.[28] In the long run, ZT policies will destabilize Michigan's already-weak workforce and worsen its economic situation.

This accumulation of negative outcomes is unacceptable. "The intolerance resulting from Zero Tolerance fails to teach students traits such as understanding, kindness, generosity, benevolence, and justice…schools [should] allow students committing relatively minor infractions chances to 'grow beyond their transgressions' through a 'context of learning' that emphasizes fair treatment and opportunities to change for the better."[29] A special task force created by the American Psychological Association monitored the mental health effects of expulsions due to Zero Tolerance policy. It concluded that, instead of a decrease in problematic behaviors, expulsion from school may actually increase this threat. There is a rising call for techniques and programs that address negative and delinquent behavior without immediately resorting to suspension and expulsion. Good school discipline policy can support and protect students as well as their communities.

Recommendations

Certainly, school and district officials are charged with a serious responsibility to keep students safe and secure. Taxpayers expect educators to reduce the risk of school shootings and bombings, gang-related shootings and stabbings, and other violent incidents, and to

simultaneously ensure each and every student's right to an education. In a litigious society, educators stay ever-vigilant of liability issues, not only because they are concerned for the welfare of their students, their colleagues, and themselves, but also because they worry that parents and guardians might sue the district, the school, or the individual principals and teachers for negligence should a violent incident occur. At the same time, administrators must keep in mind that all students are entitled to due process.

We recommend that policymakers interpret Zero Tolerance policy as originally intended, that is, to expel students who bring firearms and explosives to school. In addition, we recommend that school administrators remove suspension and expulsion decision-making powers from the classroom and transfer them back to the hands of administrators. Specifically, teachers should not have pre-signed suspension forms in their classrooms; administrators should handle serious discipline issues. They should also provide additional professional development training to teachers to insure that they can use a wide array of tools to address and resolve behavior issues without wielding the power of suspension. Schools must make it a priority to give each student a fair suspension or expulsion hearing.

Maintaining a high level of vigilance does not necessitate living in a constant state of fear, and does not mandate that Zero Tolerance policies should apply to every infraction. Unfortunately, many administrators and teachers have been subtly and not so subtly coerced to apply Zero Tolerance ideology across the board. The reality is that there is room for critical thought as well as innovative disciplinary policy that will enhance students' abilities to manage their anger and make safe choices. Some local educational agencies and specific schools are challenging ideological thinking; they are abiding by Zero Tolerance policies for violence- and weapons-related offenses, and they are adopting alternative and graduated disciplinary systems for other offenses, so that the severity of the consequence is proportional to the seriousness of the infraction.[30]

Zero Tolerance policy is an appropriate prevention and suppression response to potential or actual lethal violence in schools. However, legislators and administrators should create long-term discipline strategies that are fundamentally different from the current criminal justice paradigm. By over-relying on Zero Tolerance policy as a catch-all policy without carefully considering the possible negative effects, schools ally themselves with the criminal justice system and create a schoolhouse-to-jailhouse pipeline.[31] This unfair process encourages rebellion and even violence among some students, and opens a gateway to the juvenile justice system for some students as well.[32]

According to a number of studies, deadly events such as those in Columbine High School and Ballou Senior High School in Washington, D.C. are often the result of incidents in which students who are prone to violence were teased to the breaking point. School safety implies more than just physical safety; it includes intellectual and emotional safety. When students can be assured that their feelings and thoughts are justified and when taught conflict resolution and anger management skills, a student's tendency toward violent behavior decreases.[33]

To operate truly safe schools, administrators must consider the emotional safety of students. This includes preventing students from getting bullied, teased, and drawn into fights, because these incidents can eventually lead to physical danger involving not only parties to the fight, but bystanders as well. If the policy fails to address such issues, Zero Tolerance can only be effective on a short-term basis.

Alternatives to Suspension or Expulsion

A popular paradigm for alternative discipline policy at some schools combines intervention and continuous prevention. By using conflict resolution strategies, educators are able to create an environment that fosters the development of resiliency. This helps students preserve relationships, control their behavior, and resolve conflicts peacefully. By scaling back to the original intent of the Zero Tolerance policy so that it applies only to weapon-related incidents, more funds and energy can go towards preventive and rehabilitative measures such as peer mediation programs and peer court and peer incident review panels.

Option #1: Peer mediation

A common option for alternative discipline policy is peer mediation programming that relies on a process whereby students of the same age group facilitate dispute resolution between two people or small groups. This process has proven effective in schools around the United States, changing the way students understand and resolve conflicts in their lives.[34] Throughout the process, students are taught strategies that increase self-esteem, listening skills, and critical thinking skills. During the process, peer mediators do not "make de-

cisions," but rather work towards facilitating a win-win resolution for both sides that will prevent further trouble. Attending mediation is voluntary for both parties, so there is little or no resistance towards the process, making it easier to resolve conflict. Also critically important is that the peer mediators reflect the school's population in terms of diversity by culture, gender, behavior, socio-economic status, and race. This builds participants' trust in the process and increases the range of perspectives that can be comfortably discussed during the process.

Option #2: Peer Court/Peer Incident Review Panel

Similar to the adult system, the in-school peer court or incident review panel follows a traditional court model with decision-making and review being heard by a judge, jury, offender, victim, etc. In a peer court or peer incident review panel, young people rather than adults fill these roles and, more importantly, determine the disposition. The main goal of the incident review panel is to hold young offenders accountable for their behavior, if determined guilty. A crucial component of the system is to determine a fair and appropriate consequence for the student who is responsible for the wrongful action. These two models provide the means for a student to defend him/herself for his/her actions and to potentially be validated by his/her peers.[35]

The theory behind youth participation in these models is that youth respond better to pro-social peers than to adult authority figures. The peer justice approach assumes that, similar to the way in which an association with delinquent peers is highly correlated with the onset of delinquent behavior, peer pressure from pro-social peers may push youth toward pro-social behavior.[36] Youth and adults should partner to develop and enact fair school discipline policies that include options such as peer court or peer incident review panels. As part of this process, they should consider instituting the following options:

- Developing discipline contracts to be signed by students, parents, and school staff that indicate the responsibilities of all involved to avoid further violations;
- Working with students to develop problem-solving plans that require them to specify what is needed to solve their problems;
- Offering in-school suspension that is accompanied by academic work, tutoring or community or school service;
- Making referrals to outside social services; and
- Following up with the intention of creating a clear understanding of expectations, providing a supportive environment, and facilitating return to the classroom.

Pros and Cons of Alternative Options #1 & #2

As each option has both strengths and weaknesses, it is important to be informed of both sides to assess program models effectively. Following is a chart of the pros and cons of the two alternative options mentioned above as strong candidates for Zero Tolerance policy.

Pros	Cons
All options aim toward keeping students in school while issues are being solved.[37]	Restorative justice processes generally require more time than the suspension or expulsion processes.
Student, family, teacher, and community input are all reflected, insuring that the decision is more fair and reasonable.	Implementing these models increases the workload for school staff; they need to complete training for the mediation and peer incident review process, and then, in turn, they need to train students each year.
Students develop professional skills that will benefit them later on including interpersonal and active listening skills. [38]	These programs require additional funds for set-up and operation.
These models reinforce positive peer pressure among adolescents; students tend to listen better and accept decisions when made by their peers.	
Implementation of restorative justice such as peer mediation and in-school suspension fit well with the developmental characteristics of adolescents who are shifting their alliances from adults to peers.[39]	
Students take ownership of the process, and during the process they learn to be responsible for their own behaviors and the resulting consequences.	

Other Alternatives

In-School Suspension

Most educators are familiar with the disciplinary option of in-school suspension. However, many schools do not use it and instead send suspended students home. In-school suspension usually precedes out-of school suspension and expulsion.

The current practice of in-school suspension is considered an effective method of student discipline that improves student behavior and keeps the student in the school building and off the street; however, there are a couple of barriers to its effective use. Sometimes, students are forced into isolation in a small "cell" under very strict behavior codes and supervision by teachers or authority figures.[40] Although it is common knowledge that reducing a teen's social interaction helps the teen adjust to achieve the desired behavior suggested by those in charge, another common reaction is that students act rebellious against too-strict supervision.[41] Students who are treated like criminals may become jaded and unmotivated to improve their behaviors.

To improve current in-school suspension practices, it is important to emphasize consequences, rather than punishments, and to ensure that the consequences are grounded in safe and effective behavior modification strategies. It is also possible to add productive elements like community service and tutoring components to in-school suspension practices. Reasonable and respectful expectations and consequences build positive relationships between students and educators and improve overall school climate.

Youth Participation

When young people participate in the development and enactment of school discipline policy, their buy-in is increased, and the policy is more effective. These decision-making experiences prepare youth to be thoughtful, involved citizens. Young people can be included in researching, critiquing, drafting, implementing, analyzing, evaluating, and changing policy. Youth participation is the philosophy on which peer mediation programs, peer courts, and peer incident review panels are based.

Many youth are calling for full and equal youth-adult partnerships in all facets of school policymaking. Powerful adults are echoing their demand. Michigan Governor Jennifer Granholm's 2005 Transition Team Report for DPS recommended youth participation in school policymaking: "Reach out to students. When students participate in the decision-making process, they are more likely to support the decisions that are made. Therefore, actively involve them in making decisions about school policies and programs that affect them."[42]

Conclusion

Although Zero Tolerance was originally intended to address weapons-related infractions and to function as a violence suppression measure, overuse of the policy has engendered negative outcomes for many students and communities. Over the past 12 years, many students have been suspended and expelled for non-weapons-related and non-violent behaviors, and have not been given any reasonable explanation or even a fair hearing. Moreover, many students who have been expelled have been "pushed out" of school because there is no school or district accountability for transferring these students to a new institution. As a result, rather than eliminating violence in the school, Zero Tolerance policy has become a short-term response to school violence that often increases the level of students' anger and resentment and does not necessarily prevent future violence on campus.

To prevent further damage as a result of this policy, we recommend that officials implement the policy for weapons-related offenses only. We also recommend that officials establish peer mediation programs and peer incident review panels as alternative discipline policies. Both programs have been shown to create safer school environments and to enhance the emotional well-being of students. These program models increase open communication, a respect for diversity, pro-social skill development, and youth participation. When adults help students learn to understand and control their thoughts, feelings, and behaviors, young people become more adept at choosing peaceful resolutions to conflicts with their peers and adults. ◎

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Author's Contact Information

Heidi Biedermann
E-mail: Heidinb@umich.edu
Phone: (616) 340-4914

Endnotes

1 Heidi Biedermann is a master's in social work student at the University of Michigan and will graduate in August 2007. She will then continue her advocacy for students and work on the Zero Tolerance Policy at the Student Advocacy Center in Ypsilanti, Michigan. Her future goal is to be an executive director of a human services organization and continue her work with youth.

2 The Student Advocacy Center of Michigan provided financial and in-kind support for the project.

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The Michigan Child Welfare Law Journal
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The editorial board of *The Michigan Child Welfare Law Journal* invites manuscripts regarding the impact of trauma on children. The *Journal* takes an interdisciplinary approach to child welfare, as broadly defined to encompass those areas of law that directly affect the interests of children. The editorial board's goal is to ensure that the *Journal* is of interest and value to all professionals working in the field of child welfare, including social workers, attorneys, psychologists, and medical professionals. The *Journal's* content focuses on practice issues, and the editorial board especially encourages contributions from active practitioners in the field of child welfare.

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Upcoming Training and Conferences

SCAO Family Services 2007 Child Welfare Training Schedule —updated 5/29/07

Training Date	Title (Bold font indicates that Child Welfare Services is administrator of training)	Location	Sponsor/contact	Eligible Participants
Sept. 11	Handling the Child Welfare Case-Applying the Law to Practice (L-GALs and Parents' Attorneys)	Radisson Hotel-Lansing	Sponsor: SCAO- Family Services Contact: Deborah Jensen, Children's Charter of the Courts	Lawyer-guardians ad litem, parents' attorneys, and referees conducting Child Protective Proceedings
Sept. 18-19	**Summer Series on Foster Youth in Transition to Adulthood: Striving to Make Permanency Permanent**	**Kellogg Center East Lansing**	**SCAO: Family Services Joy Thelen**	**Judges and referees; attorneys; children's protective services, DHS, and private agency foster care and adoptions workers; tribes; CASAs; and related child welfare professionals**
Oct. 22-23	U of M Medical School Child Abuse and Neglect Conference (SCAO-FS is a co-sponsor)	Plymouth	University of Michigan Medical School	Doctors and other medical personnel; law enforcement; judges; attorneys; children's protective services, DHS, and private agency foster care and adoptions workers; tribes; CASAs; and related child welfare professionals
Nov. 8 -9	Foster Care Review Board Annual Training-November 8th will focus on best interests considerations and will be open to a limited number of non-FCRB child welfare professionals	Frankenmuth	SCAO- Family Services Contact: Kathy Falconello	For both dates: FCRB members, program representatives For November 8th: invited guests, including judges, attorneys, and workers, including tribal child welfare professionals
Early November Tentative 3-4 regional trainings	Following the Guidelines for Achieving Permanency in Child Protective Proceedings: Training on the "Yellow Book" (SCAO-Family Services is a co-sponsor along with Children's Charter of the Courts and the Michigan Federation for Children and Families)	To be announced	Children's Charter: Deborah Jensen	DHS and private agency workers
Nov. 20	**Bridges Out of Poverty (Aha! Process program)**	**Kellogg Center East Lansing**	**SCAO: Family Services Joy Thelen**	**Judges and referees; attorneys; children's protective services, DHS, and private agency foster care and adoptions workers; tribes; CASAs; representatives of university schools of social work; and related child welfare professionals**
Nov.27 Tentative distance education	Effective Petition Drafting (SCAO Family Services is a co-sponsor)	DHS- Office of Training & Staff Development-Lansing Training Center	DHS- Child Welfare Institute	Children's protective services, DHS, and private agency foster care and adoptions workers; and tribal social services workers
Dec. 10	**Medical Issues in Child Maltreatment: Things Judges and Attorneys Want to Know but Never had a Chance to Ask**	**Hall of Justice Lansing**	**SCAO: Family Services Joy Thelen**	**Judges, referees, and attorneys practicing in child protective proceedings**

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