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At a time when more police are working in schools and student misconduct is the subject of rising fear and punitive response, it is increasingly apparent that children will be brought into juvenile court for behavior that occurs in school. While administrators who file charges against their students are intent on ridding their schools of weapons, drugs and violence, it is important to remember that the schools remain an integral component of any successful intervention in the life of a delinquent child. In other words, while schools are often the reason that many young people are brought to court, schools also provide the means for children to get back out. For no population of students is this more true than those with learning and other disabilities.

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This fact sheet provides some information about students with disabilities. It discusses their prevalence within the juvenile justice system, outlines the law that governs the services they receive from public schools, and points out some areas of concern that lawyers, judges, court personnel, and mental health professionals should keep in mind.

LEARNING DISABILITIES AMONG JUVENILE OFFENDERS

Studies confirm the relationship between learning disabilities and delinquency. A recent study conducted by the Virginia Department of Juvenile Justice demonstrated the high incidence of special education eligibility among incarcerated juveniles (McGarvey & Waite, 2000). Specifically, the study found that more than 40% of the children evaluated at the Reception and Diagnostic Center were eligible to receive special education services. This compares to the approximately 10% incidence in the general population. The study also found that approximately 50% of the children in the facility scored at least six years below their chronological age on language achievement scores.

While this study does not prove that learning disabilities cause delinquent behavior, other studies have demonstrated that children with disabilities are more likely than their non-disabled peers to engage in delinquent or criminal behavior. According to a Department of Education Study, approximately one-third of children with disabilities will be arrested within three to five years of graduating from high school. Of these, more than fifty percent of those labeled as emotionally disturbed will be arrested.

What these and other studies indicate is that it is worth paying special attention to this population of children. Juvenile justice professionals need to learn about how the law provides special assistance to children with disabilities, and also to be mindful of the ways in which the law and the juvenile justice system tend to overlook the unique needs and problems of these children.

SPECIAL EDUCATION LAW

This section will briefly discuss the background and structure governing special education law, and then focus on three primary aspects of special education: (1) eligibility; (2) programming; and (3) discipline.

Background and Structure

The educational rights of children with disabilities are created and protected by a federal law, the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. § 1400 *et*

seq. ¹ Congress passed this law in recognition of, and as an attempt to address, a long history of schools excluding disabled children from the classroom and segregating these children from their non-disabled peers.

Among IDEA's many purposes are to ensure "that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet each child's unique needs," 20 U.S.C. § 1400(d)(1)(A), and "that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1)(B).

To achieve these goals, IDEA "confers upon disabled students an enforceable substantive right to public education in participating states, and conditions federal financial assistance upon a state's compliance with the substantive and procedural goals of the Act." *Honig v. Doe*, 484 U.S. 305, 310 (1988). See also 20 U.S.C. § 1412. It also creates a comprehensive procedural and administrative scheme that governs and defines the relationship between public schools and disabled students and their parents.

To comply with the statutory scheme, each state must develop its own set of rules and procedures that provide at least as much protection as the federal laws and regulations governing special education.² In addition, IDEA creates an administrative hearing system in which parents, who disagree with schools about the identification, education or treatment of their disabled children, have the right to contest a school's decision before an Administrative Law Judge. This hearing is called a Due Process Hearing. Unfavorable administrative decisions can be appealed by either party to federal or state court. To encourage lawyers to represent parents and children in special education proceedings, IDEA permits courts to award attorneys fees when the parent is the prevailing party.

Eligibility

A common misconception is that IDEA protects all children with all disabilities. This is not the case. Instead, the law contains a specific list of recognized disabilities and criteria that students must meet in order to receive special education services. A psychiatric diagnosis, by itself, is not enough to guarantee services for a child.

To receive special education services, a student must first be formally evaluated by school personnel. The evaluation process is triggered by the request of either the parent or a school employee (with the consent of the parent). See 20 U.S.C.A. § 1414(a). School personnel will evaluate the child in a variety of different capacities and then meet to determine if the child, based on the accumulated information, fits within one of the

¹ When first passed, the law was known as the Education for All Handicapped Children Act of 1975.

² In order to comply with the 1997 amendments to IDEA, the Virginia Regulations governing special education are currently under revision. Therefore, all citations will be to federal law.

specified disability categories. The student's parent is a voting member of this eligibility committee. If she disagrees with the committee's conclusion, she has the right to an independent evaluation at the school's expense and, if there is still disagreement, the right to a due process hearing to determine whether the school made the appropriate decision.

It is important to remember that in addition to finding the presence of the disabling condition, the eligibility committee must also find that the condition adversely affects the child's educational performance. A short, and by no means comprehensive, list of eligible disabilities includes the following:³

- **Specific Learning Disability** — often demonstrated by showing that child's IQ scores are significantly higher (at least 15 points, or one standard deviation above) than child's achievement test scores; see 34 C.F.R. 300.7(b)(10).
- **Mental Retardation** — characterized by IQ scores that fall below 70, and adaptive behavior scores that put the child at a functioning level far below his chronological age; see 34 CFR 300.7(b)(6).
- **Emotional Disturbance** — requires some underlying emotional or psychological condition, such as depression, which persists over time and results in an inability to develop and maintain appropriate relationships, inappropriate behavior under normal circumstances, or pervasive unhappiness; see 34 CFR 300.7(b)(4);
- **Other Health Impaired** — for those children who have a chronic health problem such as asthma, epilepsy, attention deficit disorder, deafness; 34 CFR 300.7(b)(9).

Once the Eligibility Committee reviews all evaluations and concludes that the student is eligible for special education services, the school must create an Individualized Educational Program (IEP) for the student that guarantees that the child will receive a free and appropriate education in the least restrictive learning environment.

The Individualized Educational Program (IEP)

The IEP, which is the centerpiece of each disabled child's education, is developed by a team composed of the parent, regular and special education teachers, local educational agency representatives and, where appropriate, the disabled child. 20 U.S.C. § 1414(d)(1)(B). The role of the parents in the development of the IEP is fundamental. IDEA requires schools to make all education records available to parents, provide written notice to parents of all IEP meetings, include parents in the planning process, and obtain

³ For a full description of the various eligibility categories, see 34 CFR 300.7.

their written permission before implementing the student's IEP or any changes to the IEP. 20 U.S.C. § 1415(b).

The IEP must provide the student her legally guaranteed free and appropriate public education. It should contain, among other components, a statement of the child's current educational performance, annual goals for the child's educational performance, a description of the child's placement, services, and accommodations, and an explanation of the extent to which the student will not participate with non-disabled students in the regular class. 20 U.S.C. § 1414(d)(1)(A). Of particular relevance to children in the juvenile justice system, IEP's can include behavioral modification plans, counseling, tutoring, job coaching, supervised vocational placements, and alternative discipline plans.

The Supreme Court has concluded that a free appropriate public education is not one that maximizes the child's potential, but one which, at a minimum, guarantees the child the opportunity to advance in the general curriculum and receive some benefit from his education. *Board of Education of The Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 203-204 (1982).

A major goal of the IEP is to ensure that every disabled child is educated in the least restrictive environment -- participating states must ensure that "to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled." 20 U.S.C. § 1412(a)(4). Removal of children with disabilities from the regular educational environment should occur "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.*

Discipline of Special Education Students and the "Stay Put" Provision

In addition to requiring school systems to provide special education students with an appropriate education, IDEA also places strict limits on when, under what circumstances, and how severely, schools can discipline these students.

In general, schools have the right to suspend children with disabilities for up to ten days. 20 U.S.C.A. § 1415(k)(1)(A)(i). However, when the total number of days that a child has been suspended exceeds ten days, the school must hold a manifestation determination review. 20 U.S.C.A. § 1415 (k)(4). At this meeting, an IEP team must consider whether or not the child's behavior was a manifestation of his disability. The team can only determine that the behavior was *not* a manifestation of the disability if it finds that:

- (1) the IEP was appropriate and complied with;
- (2) the disability did not impair the student's ability to control behavior; and
- (3) the disability did not impair the student's ability to understand the consequences of her actions.

20 U.S.C. § 1415(k)(4)(C).

If the team cannot make each of these findings, the child must be returned to the school after ten days have lapsed. If the team determines that all necessary criteria are satisfied, it can remove the child from the school. However, even after removing a disabled child, the school still needs to convene an IEP team to develop an alternative educational program that provides the child with a free and appropriate public education and satisfies the original IEP requirements. 20 U.S.C.A. § 1415(k)(3), 20 U.S.C.A. § 1412(a)(1).

If the parent disagrees with the school's determination that there was no connection between the misconduct and the disability, the parent can challenge this decision in a due process hearing. IDEA commands that while the results of this challenge are pending, the child must remain in the current education placement (the placement prior to the imposition of discipline). 20 U.S.C.A. § 1415(j). This protection is also known as the “stay put” provision. Because the administrative proceedings can last months and, in some cases, years, a student will potentially stay put for a significant period of time – no small benefit. But as the Supreme Court has stated, “We think it clear . . . that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.” *Honig v. Doe*, 484 U.S. 305, 323 (1988).

There are exceptions to the stay put rule if the child brings a weapon or drugs to school. If this occurs, the school can place the child in an alternative education setting for 45 days pending resolution of the matter by a hearing officer. 20 U.S.C.A. 1415(k)(1)(A)(ii). In addition, if a hearing officer determines that the child is dangerous, the child can be sent to an alternative setting for up to 45 days, even after a parent invokes the stay put protection.

Either way, the fact that children remain in their educational placement pending the due process decision, or at the very least, continue to receive an appropriate education even after they have been “expelled,” demonstrates the impact and benefit of a special education classification.⁴ These benefits suggest the necessity of properly identifying all children eligible for special education.⁵ Proper identification is particularly critical during this time of “zero-tolerance” discipline policies, when schools are disciplining children for often minor offenses.⁶

⁴This is not to say that there are only benefits. Many parents and children reject the stigma associated with a special education classification, and fear that some children, particularly children of color, are overly identified as disabled. For example, in the 1997 amendments to IDEA, Congress found that, “More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.” 20 U.S.C. § 1400(c)(8)(B).

⁵Conversely, it also suggests that school systems might not want to identify problem children as eligible for special education services: once children are identified, the school cannot expel them.

⁶See, e.g., Brooks, Schiraldi, and Ziedenberg, *School House Hype: Two Years Later*, profiling expulsions and suspensions for seemingly minor rule violations such as accidentally hitting a cafeteria worker with a paper clip fired from a rubber band, or hitting a school driver with a peanut. The JustChildren Program has

AREAS OF SPECIAL CONCERN

The involvement of children with disabilities in the juvenile justice system poses unique challenges and problems to juvenile justice professionals who want to ensure that all children are treated equally and receive the full benefits and protections of the system and the law. What follows is a short list of concerns that merits particular attention.

"CHINS" Cases

Child in Need of Supervision (CHINS) cases, or truancy cases as they are more frequently described, are on the rise and are a predictor of future delinquency.⁷ Unfortunately, CHINS cases do not provide the opportunity they should for truly examining the needs of the child appearing before the court. Specifically, before a child can be found by the court to be a Child in Need of Supervision, the court must find that the school has done all that is legally required to provide the child with educational benefit.⁸ Too many lawyers, however, overlook this legal requirement and do not investigate whether or not the child is a special education student, or a student whose performance in school merits evaluation for potential eligibility. As a result, rather than examining the school's efforts (or failures) to provide the student with an appropriate education, the focus of the judicial process is often limited to the child's attendance at school. This limited focus minimizes the potential for the court to provide, and require, positive interventions in the child's life.

Any professional working with a child who has been referred to the court on a CHINS petition should always collect the student's educational records and review them for potential special education issues.

Delinquent Behavior in School

For many special education students, particularly those who carry the label "emotionally disturbed," delinquent behavior such as threatening comments, property destruction, and aggression towards others is often a manifestation of their disability. While administrators cannot expel students for this behavior, they often file charges against them.

represented children facing expulsion for minor charges, including a seventh grade girl receiving a note from another girl asking if she wanted to buy marijuana, or an eighth grade boy who, with his teacher's permission, brought his modeling kit, which included an exacto blade, to school.

⁷ See McGarvey and Waite (2000), finding that on average, 87% of incarcerated children were not regularly attending school in the year prior to their incarceration.

⁸ See § 16.1-228: "A child who, while subject to compulsory school attendance, is habitually and without justification absent from school, and (i) the child has been offered an adequate opportunity to receive the benefit of any and all education services and programs that are required to be provided by law and which meet the child's particular educational needs..."

While IDEA appears to allow schools to file charges against special education students for behavior that is a manifestation of their disabilities, there is more than the mere impression that schools, by taking this action, are using the court system to do what they cannot -- lock the child up and/or remove him or her from school.⁹

In addition, the courts often treat these students as they would any other student and punish them accordingly. Whether this is an appropriate response to behavior that professionals determine to be a manifestation of one's disability is an open question. However, it is something that should concern professionals who work with these children.

An equally troubling concern is that the administration of justice in juvenile court is seldom swift. The ultimate resolution of a case often takes place weeks, or even months, after the misconduct, and after the school and the student have successfully fashioned solutions for the problem behavior.¹⁰ Thus, while the school and the student may have re-established their relationship, when the court date comes this relationship will be recast as an adversarial one. Further, due to the court system's slow pace, the imposition of any punishment for behavior that occurred months before can appear gratuitous and unfair to children who have a compressed sense of cause and effect, feel that they have already been punished (in the school), and have moved on to other things. Such feelings are likely to erode and undermine any trust and confidence the student has with the system and her teachers.

Waiver of Miranda Warnings

It is likely that children with learning disabilities, processing difficulties, and attention deficits are less able than their non-disabled peers to knowingly and voluntarily waive their right to remain silent and confer with a lawyer before talking with the police. (Even children without disabilities experience significant difficulty in understanding and waiving these rights).¹¹ As such, it is incumbent upon lawyers who are preparing their suppression motions to obtain all school records and special education evaluations and reports. It is equally incumbent upon those who evaluate such children to gather and consider this information.

⁹ In one case, the school system found that the child's misconduct was a manifestation of his disability, thus precluding the school from expelling the child, but persuaded the juvenile court to enter a no-trespass order barring the child from entering onto school property!

¹⁰ Indeed, IDEA requires that within ten days of problem behavior an IEP team conduct a functional behavioral assessment and, as soon thereafter as possible, create a Behavior Intervention Plan. 20 U.S.C. § 1415(k)(1)(B).

¹¹ See Thomas Grisso, *Forensic Evaluations of Juveniles* (1998).

Competency to Stand Trial

With the passage of juvenile competency statutes, more lawyers and courts are inquiring into a child's competency to stand trial. Much like the Miranda issue, students with disabilities are less likely to be competent than students with no disabilities. Gathering and analyzing the school records of special education students is a critical step in making the determination of whether or not a child is competent. For example, much of the testing done to determine special education eligibility will indicate at what grade and age level the student is reading, writing, thinking, and performing other academic tasks.

Treatment by the Juvenile Justice System

Children with disabilities often have a more difficult time following directions, obeying rules, controlling their impulses, and understanding written expectations. Understanding that successfully completing probation, or securing release from a detention or correctional facility, requires the ability to do these things -- follow rules, control impulses, understand oral and written directions -- it is not surprising that the incidence of special education students among confined children is so high. Their disabilities make them more likely to violate conditions of their probation and risk confinement, and less likely to abide by the tightly regimented rules of many juvenile correctional facilities.

The education of judges, court and correctional personnel about learning disabilities, their causes and effects, and effective communication strategies, will allow these professionals to take account of these disabilities when providing treatment and when administering punishment and discipline.

CONCLUSION

As student misconduct in school is increasingly criminalized, more and more children with learning disabilities are entering the juvenile justice system. It is critical that all professionals within the system learn more about these children, and more about the opportunities and obstacles that their disabled condition presents. By taking full advantage of legal protections, and carefully considering the impact that disabilities have on an individual child's behavior, those who work with these children will be in a better position to ensure that the rehabilitative promise of the juvenile justice system is fulfilled, and that our correctional facilities do not become mere holding tanks where disabled children languish.

SUGGESTED READINGS

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