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ARTICLES

A New Look at Section 504 and the ADA in Special Education Cases

By Mark C. Weber — May 23, 2011

School districts seem increasingly eager to decide that children are not eligible for services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400–82 (2011), and courts frequently uphold these decisions. *See, e.g., Anello v. Indian River Sch. Dist.*, 355 F. App'x 594 (3d Cir. 2009); *Brado v. West*, 2010 WL 333760 (D. Md. 2010). If eligibility under IDEA continues to be cut back, parents of children with disabilities are likely to bring more claims for services under section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794 (2011), and Title II of the Americans with Disabilities Act (ADA), 42 U.S.C.A. §§ 12131–50 (2011). Section 504 forbids disability discrimination by federal grantees, including local school districts; Title II forbids disability discrimination by state and local governments, again including school districts. The regulations promulgated to enforce section 504 require that all children with disabilities, as defined by section 504 and the ADA, be provided with free, appropriate public education as interpreted by the section 504 regulations. 34 C.F.R. § 104.33(a) (2011). That entitlement does not hinge on IDEA eligibility.

Section 504 and the ADA have often been viewed as supplemental causes of action in special education cases, used when a student who is also eligible for services under IDEA has a plausible claim for damages relief. The general consensus among courts is that the cause of action in IDEA does not allow claims for compensatory damages, but section 504 and Title II allow for compensatory damages in proper cases. Section 504 and the ADA remain underdeveloped as avenues of judicial relief in ordinary special education cases that do not demand compensatory damages.

This underdevelopment may end soon. At the same time that school districts are cutting back on who is protected under IDEA, a recent amendment to section 504 and the ADA has greatly expanded section 504/ADA coverage. The ADA Amendments Act, Pub. L. No. 110–325 (2008), overturns Supreme Court precedent that narrowed the coverage of the ADA and section 504. It provides that impairments are to be considered in their unmitigated state and widens the definition of major life activities set out in the statute's coverage provision.

The special education rights conferred by section 504 and the ADA are critical to children. Regulations enforcing section 504 impose on school districts an obligation to provide appropriate education that meets the needs of those children as adequately as it does the needs of children without disabilities. Other section 504 and ADA obligations include duties not to segregate, to provide procedural protections, and to afford special rights in the student disciplinary process.



Expanded Section 504 and ADA Coverage

Section 504 and the ADA define disability as a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. 29 U.S.C.A. § 705(9)(B) (2011), 34 C.F.R. § 104.3(j) (2011) (section 504); 42 U.S.C.A. § 12102(2) (2011) (ADA) Although this language sounds broad, the Supreme Court held, prior to the statutory amendment, that it should be read narrowly. The Court ruled that impairments must be evaluated after considering medical intervention or other means, including those of the body's own automatic systems, that the individual uses to mitigate the impact of the impairments. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999). It held that the "regarded as" term applies only if an entity subject to the law mistakenly believes that a person has a physical or mental impairment that substantially limits one or more major life activities or mistakenly believes that an actual impairment substantially limits one or more major life activities. The Court declared that to be substantially limited in the major life activity of performing manual tasks, an individual must be severely restricted "from doing activities that are of central importance to most people's daily lives," and that the impairment's impact must be "permanent or long term." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002).

The ADA Amendments Act, passed in 2008 and effective January 1, 2009, explicitly disapproves these two major Supreme Court cases limiting the coverage of the ADA and, by extension, section 504. ADA Amendments Act of 2008, § 2(b)(2)–(5). It provides that the definition of disability "shall be construed in favor of broad coverage of individuals," and declares that the intent of Congress is "that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations," rather than whether the claimant's impairment meets the definition of a disability. Further, "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active," and the determination whether an impairment substantially limits a major life activity must be made "without regard to the ameliorative effects of mitigating measures," except for ordinary eyeglasses or contact lenses.

The new statute provides a nonexclusive list of major life activities that explicitly includes sleeping, reading, concentrating, thinking, and communicating, as well as performing manual tasks, seeing, hearing, eating, walking, speaking, learning, and working. The term "major life activities" now also includes the operation of major bodily functions, such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." A person meets the requirement of being regarded as having an impairment that substantially limits a major life activity if the person establishes that he or she has been subjected to a prohibited action "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." All these definitional provisions apply to section 504 as well as the ADA.



With respect to public elementary and secondary students, the expansion of coverage of section 504 and the ADA in the new law is momentous. This fact is particularly true for children, who, through their own extraordinary effort, through medical and other therapies, or through supplemental devices, aids, or services, overcome whatever limits their physical or mental conditions impose on them. These children are now covered by section 504 and the ADA, as long as their impairments would substantially limit a major life activity if they were not mitigated. Moreover, the list of things that are major life activities now explicitly includes reading, concentrating, thinking, communicating, and sleeping, as well as hearing, speaking, and learning. The “operation of a major bodily function” provision is especially important in its coverage of children with serious medical conditions even when the conditions are satisfactorily treated.

Meeting Educational Needs Adequately

What are the educational entitlements of children who are covered by section 504 and the ADA? Any discussion of the rights of children with disabilities to public education begins with the standard of “appropriate education” under IDEA. In *Board of Education v. Rowley*, 458 U.S. 176, 200 (1982), the Supreme Court construed the duty to provide appropriate education to children with disabilities who are eligible under IDEA to mean services sufficient to provide “some educational benefit” to the eligible child. It said Congress’s intent was “more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.” The Court rejected a standard adopted by the lower courts that a child be provided services sufficient to maximize his or her potential commensurate with the opportunity provided children without disabilities to maximize theirs. The lower courts in *Rowley* had adapted that standard from the regulations applicable to elementary schools and high schools under section 504. The *Rowley* case did not present any claims under section 504 or the section 504 regulations themselves, so there was no occasion to investigate the rights that section 504 (and eventually the ADA) would confer on a student.

Regulations promulgated under section 504 require a recipient of federal funding that operates a public elementary or secondary education program to provide a free, appropriate public education to each child covered by section 504 in the recipient’s jurisdiction. 34 C.F.R. § 104.33(a) (2011). The section 504 regulations define appropriate education as “the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements” of further regulations governing educational setting, evaluation and placement, and procedural safeguards. This regulation entails applying the standard that the lower courts used in *Rowley* but that the Supreme Court rejected.

Cases Interpreting the Section 504 Regulation

Two notable cases suggest that the section 504 appropriate education regulation should be interpreted and enforced exactly as written. *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008),



is a damages case in which parents contended that their two daughters, both of whom had autistic conditions, were denied adequate services by public schools in Hawaii. A hearing officer found that the children were denied appropriate education in violation of IDEA and ordered prospective remedial action. The parents subsequently filed suit for damages asserting, among other claims, that the failure to provide adequate services during the period before remediation constituted a violation of section 504. The district court granted summary judgment for the school system, holding that there is no section 504 cause of action for violation of the right to appropriate education and that IDEA is the exclusive avenue for claims that fall within its scope.

The Ninth Circuit overturned the decision, ruling that IDEA is not an exclusive remedy and that the appropriate education duty under IDEA is not identical with that under section 504. The court stressed that the section 504 appropriate education standard requires “a comparison between the manner in which the needs of disabled and non-disabled children are met” Failure to offer a valid IDEA program may, but does not necessarily, violate the section 504 duty. Because the parents, like the school system, incorrectly assumed that the standards are identical and that the failure to provide appropriate education under IDEA as identified by the hearing officer necessarily supported the section 504 claim, the case had to be remanded. *See, generally, Mark H. v. Hamamoto*, 620 F.3d 1090 (9th Cir. 2010) (overturning a summary judgment granted to a school district on remand, upholding the claims and assigning the case to a different judge).

Lyons v. Smith, 829 F. Supp. 414, 419 (D.D.C. 1993), foreshadowed *Mark H.* In *Lyons*, the federal district court affirmed a hearing officer’s decision that a child with attention deficit hyperactivity disorder (ADHD) did not fit in the IDEA category of “other health impaired.” At the same time, it reversed the hearing officer’s decision declining to order that the child be given special education pursuant to section 504. The court declared that the child was entitled to “an education designed to meet his individual educational needs as adequately as the needs of nonhandicapped persons are met.”

Lyons is precisely parallel to the situation that is likely to become common in the wake of IDEA eligibility cutbacks and section 504/ADA coverage expansion: a claim by a non-IDEA-eligible child, not for damages relief, but rather for prospective creation and implementation of a program providing appropriate education under the section 504 standard. *Lyons* cautioned that section 504 does not require anything more than preventing discrimination on the basis of disability and expressed doubt that the interventions required to serve a child who is not eligible under IDEA in a nondiscriminatory manner would include special education, but it placed its emphasis on the regulation mandating that the needs of the child be met as adequately as the needs of others. In response to a request for interpretation of the duties that public schools owe students covered by section 504 but not IDEA, the Office for Civil Rights of the U.S. Department of Education stated that the section 504 appropriate education duty does not incorporate any cost or other limit as may be conveyed by a “reasonable accommodation” standard but instead that precedent imposing such a limit in some education cases applies to post-secondary institutions only. “Letter to Zirkel,” 20 *Individuals with Disabilities Educ. L.*



Rep. 134 (1993). Thus, in the view of the Department of Education, the section 504 appropriate education duty may in fact be more exacting than the *Lyons* court envisioned.

A Standard Both Higher and Lower

Mark H. and *Lyons* establish that the section 504 appropriate education standard is enforceable when a case is brought for violation of that statute, but also that the standard it imposes on public schools is different from the IDEA appropriate education standard, perhaps lower, perhaps higher.

Or it may be both, depending on the circumstances. Thus, a wealthy school district that does exceedingly well for its students who do not have disabilities, offering them a range of instruction and activities that maximizes their educational opportunities, would be held to a high standard for children covered by section 504, a standard well above that of *Rowley*. For school districts that are poor or fail for other reasons to offer a decent level of services to children without disabilities, non-IDEA-eligible children with disabilities in those districts might receive services that are below some of the more generous interpretations of the IDEA standard.

Meeting the individual educational needs of a student with a disability as adequately as the needs of students without disabilities requires a potentially difficult comparison, but the task is hardly impossible. There are some levels of services for both children with disabilities and children without disabilities that educational observers consider excellent, good, fair, or poor at serving the respective students' needs. If the children without disabilities receive excellent services in comparison to their peers nationally, then so should the children with disabilities. If services provided to children without disabilities are good, fair, or poor, the same level of quality would apply for children with disabilities.

Other Substantive Educational Obligations

Apart from the fundamental duty to provide appropriate education, as defined by the section 504 regulations, to section 504/ADA-eligible children, there are other educational obligations that have been found to inhere in section 504 and the ADA's application to public schooling. These obligations will assume greater importance in light of the expansion of section 504/ADA eligibility. The duties include avoiding the outright or subtle exclusion of children with disabilities from school (*B.T. ex rel. Mary T. v. Dep't of Educ.*, 2009 WL 1978184 (D. Haw. 2009) (discriminatory age limits); *Bess v. Kanawha County Bd. of Educ.*, 2009 WL 3062974 (S.D. W. Va. 2009) (inducing a parent to keep a child with disabilities home from school)), providing comparable noneducational benefits such as free meals (*C.D. v. N.Y. City Dep't of Educ.*, 2009 WL 400382 (S.D.N.Y. 2009)), providing protection against harassment and abuse on the basis of disability (*Enright v. Springfield Sch. Dist.*, 2007 WL 4570970 (E.D. Pa. 2007)), and avoiding the segregation of children with disabilities (*L.M.P. ex rel. E.P. v. Sch. Bd.*, 516 F. Supp. 2d 1294 (S.D. Fla. 2007)).

Procedural Protections

The section 504 regulations require public elementary and secondary education providers to



afford children who need or are believed to need special education due to disability “a system of procedural safeguards that includes notice, an opportunity . . . to examine relevant records, an impartial hearing with opportunity for participation by the person’s parents or guardian and representation by counsel, and a review procedure.” 34 C.F.R. § 104.36 (2011). These duties closely resemble the rights provided to children covered by IDEA.

Student Discipline

One of the reasons school districts are reluctant to find children eligible for services under IDEA may be the districts’ unwillingness to afford the children the protections from ordinary student discipline provided by that statute. However, disciplinary protections for students with disabilities are also provided under section 504, and in some respects may be greater than those in IDEA. The grandparent of all special education discipline cases is *S-I v. Turlington*, 635 F.2d 342, 350 (5th Cir. 1981), which relied on section 504 as well as IDEA in holding that a student with a disability may not be expelled for misconduct that results from the disability itself, and that, before any proposed expulsion, “a trained and knowledgeable group of persons must determine whether the student’s misconduct bears a relationship to his” or her disability. This right to manifestation review is necessarily entailed by the duty not to discriminate on the ground of disability. As the court said, “How else would a school board know whether it is violating section 504?” The court held that complete cessation of educational services may never occur, even during a valid period of expulsion; that the burden is on the school to make the manifestation determination, even when the student does not demand it; and that expulsion is a change of placement invoking the procedural protections of section 504.

The *S-I* case considered only expulsion, but its principles apply to lesser forms of discipline, such as long-term suspensions or disciplinary removals. Under the current version of IDEA, some disciplinary removals may take place regardless of whether the child’s behavior was a manifestation of the disability, and the definition of what is a manifestation of the disability is quite limited. 20 U.S.C.A. § 1415(k)(1)(E)-(G) (2011). *S-I* would call into question whether school officials have such broad, unilateral authority with regard to children protected by section 504 and the ADA.

Remedies

The range of remedies for denials of appropriate education under section 504 should be no smaller than that applicable to IDEA cases. In *Lyons v. Smith*, 829 F. Supp. 414, 419–20 (D.D.C. 1993), for example, the court overturned a decision by a hearing officer that the hearing officer lacked authority to order a placement for a child upon making a finding that the school system failed to meet the requirements of section 504. Courts have frequently approved requests for ongoing educational services, compensatory education, and tuition reimbursement in section 504 or ADA cases, although in some instances the courts have held the remedy supported by IDEA as well. *See, e.g., J.T. ex rel. Harvell v. Mo. State Bd. of Educ.*, 2009 WL 262094, at *7 (E.D. Mo. 2009); *Neena S. ex rel. Robert S. v. Sch. Dist.*, 2008 WL 5273546 (E.D. Pa. 2008).



Attorney Fees

The ADA specifically allows for attorney fees in administrative proceedings. 42 U.S.C.A. § 12205 (2011). The section 504 provision is not so explicit, but impliedly allows fees for necessary administrative proceedings. Section 504's provision states, "In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 29 U.S.C.A. § 794a(b) (2011). This language is drawn from Title VII, which has been held to allow attorney fees for all administrative proceedings that must be pursued to present a claim in court. *N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 71 (1980).

Expert Witness Fees

The ADA fees provision explicitly includes "litigation expenses, and costs," 42 U.S.C.A. § 12205 (2011), which would appear to cover the charges that parents frequently need to pay to expert witnesses in disputes over special education programs. Although the Supreme Court has ruled that IDEA's fees provision does not extend to expert witness fees (*Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291, 297–98 (2006)), at least one court has ruled that the section 504 fees provision should be read to cover these charges. *L.T. ex rel. B.T. v. Mansfield Twp. Sch. Dist.*, 2009 WL 2488181 (D.N.J. 2009).

Conclusion

As more parents turn to section 504 and the ADA in special education cases, courts will need to confront questions of appropriate education, procedural protections, defenses, and remedies under those laws as distinct from IDEA. The courts should be guided by a straightforward reading of the statutes and regulations. If courts give the relevant provisions their natural reading, they will provide the protection that Congress intended to give schoolchildren with disabilities when it enacted those laws.

Keywords: litigation, children's rights, Individuals with Disabilities Education Act, Rehabilitation Act of 1973, Americans with Disabilities Act

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The OCR As a Tool in Dismantling the School-to-Prison Pipeline

By Rosa K. Hirji and Benétta M. Standly — May 23, 2011

In the midst of an 11 percent spike in discrimination complaints filed with the Department of Education's Office of Civil Rights (OCR) last year, as well as the release of independent reports revealing the high rates of disciplinary action against African American students, the OCR has

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announced a reinvigorated approach to enforcing civil rights statutes that uses a disparate impact analysis. *Education Week* (Oct. 12, 2010); see also Dan Losen and Russell Skiba, Southern Poverty Law Center, *Suspended Education: Urban Middle Schools in Crisis* (2010); National Association for the Advancement of Colored People (NAACP), *Misplaced Priorities: Under Educate, Over Incarcerate*, (2010); ACLU of Florida, *Still Haven't Shut Off the School to Prison Pipeline: Evaluating Florida's New Zero Tolerance Policy Law*, (2011).

The movement against the "school-to-prison pipeline" must examine the significance of this change in the investigation of racial disparities in school discipline in the context of its overall goals. From this perspective, how much can we rely on the OCR to remedy the school-to-prison pipeline in communities of color, and does this represent a step forward?

The Movement Against the School-to-Prison Pipeline

The ABA's resolution against the use of zero-tolerance discipline in schools in 1992 was part of the initial rising tide against the school-to-prison pipeline. Since then, a coalescing movement consisting of individual parents, community stakeholders, community-based organizations, social justice organizations, civil rights organizations and members of the bar have successfully exposed the systemic disproportionate impact that students of color face in school systems that rely heavily on policies—including overreliance on suspension, expulsion, and zero-tolerance discipline and policing—that criminalize school-based misbehavior. For more background on the problem, readers are encouraged to visit the websites for the [Children's Rights Litigation Committee](#), the [Dignity in Schools Campaign](#), and the [American Civil Liberties Union \(ACLU\)](#).

The movement has grown from one that mobilized defensively against zero-tolerance discipline policies to one that critically analyzes educational policy and the conditions in educational institutions that lead to a school-to-prison pipeline, in particular for communities of color. Various segments of the movement have identified systemic problems that go beyond discrete policy frameworks, from underlying class and race biases in instruction, discipline, and school governance to the criminalization of youth by the increasing role of law enforcement and the imposition of increasingly punitive penalties; from the defunding and privatization models of education to the failure to address the needs of the most vulnerable populations, including homeless, foster, and special needs students and pushing youth into the inferior system of education called alternative schools. The school-to-prison pipeline has severe and lasting consequences for students, parents, schools, and communities.

In turn, there is a demand for systemic, longer-term solutions, such as a high standard for a right to an education, equity in schools, the participation of low-income communities in developing and monitoring the implementation of school policy, the creation of positive school climates, the provision of multi-systemic models of support and intervention for low-income families, and promoting alternative models of school discipline. Subsequent ABA resolutions and the work of various sections and committees of the ABA, including the Section of Litigation through its Children's Rights Litigation Committee and the Criminal Justice Section through its Juvenile



Justice Committee, the Commission on Youth at Risk, and the ABA Center for Children and the Law, reflect an understanding of the need for broader change.

Change in the Way That OCR Operates

The OCR's announcement that it will take a more aggressive approach to enforcing civil rights in educational outcomes, discipline disparities in particular, using a "disparate-impact" analysis is a step in the right direction. According to Russlynn Ali, assistant secretary of education and head of OCR, the new policy for analyzing discrimination complaints represents a major shift in practice at the OCR because the last administration pursued cases mostly using a "different treatment" or "intentional discrimination" standard. *Education Week* (Oct. 7, 2010). Using a disparate-impact analysis broadens the scope of the OCR investigations and provides a vehicle to substantiate the movement's long-standing claims that the problem is systemic and that alternative solutions are viable.

Title VI of the Civil Rights Act of 1964 prohibits intentional discrimination on the basis of race, color, or national origin in any institution that receives federal funds. To prove intentional discrimination, one must show that "a challenged action was motivated by intent to discriminate." *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993). Challenging school policies under the theory of intentional discrimination would be an uphill battle when there is no evidence that the policy was adopted for the purposes of disadvantaging a particular group or that a purportedly legitimate reason for the policy was a pretext for discrimination. Discrimination is much more nuanced, particularly in the racially segregated South and dense urban areas across the country.

However, the act also authorizes federal agencies to adopt regulations to effectuate its provisions. Utilizing this authority, most federal agencies have adopted the disparate-impact standard. OCR regulations state that any recipient of federal funds may not "utilize criteria or methods of administration which have *the effect of* subjecting individuals to discrimination," thus barring unintentional disparate-impact discrimination. 34 C.F.R. 100.3(b)(2) (2004) (emphasis added).

The disparate-impact theory looks at differences in outcomes among students of color or other students that result from neutral policies or procedures, even if no intent to discriminate exists. Secretary of Education Press Conference (Mar. 8, 2010); see e.g. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (discussing disparate impact under Title VII of the Civil Rights Act of 1964). Thus, a student who is a member of a racial minority and subjected to school disciplinary policies can prove discrimination if the policy resulted in the different treatment of similarly situated white students.

Disparate impact is a three-step burden-shifting analysis. The group that is challenging the policy or practice must first show by preponderance of evidence that a seemingly neutral policy has a disproportionate adverse effect on a protected class. *Elston*, 997 F.2d at 1407. This can be demonstrated by a significant, statistical disparity in outcomes for that group compared to other



groups. The OCR has promised to develop guidelines for how it will calculate the disparity in school discipline and has stated publicly that it will look at data and work with other sources, including “school and district officials, parents, advocacy groups, and community organizations.” *The Chronicle*, (Mar. 8, 2010) (quoting Justin Hamilton, Education Department spokesperson); *Education Week* (Oct. 7, 2010). In March 2010, the OCR expanded civil rights data collection as it relates to school discipline. [Civil Rights Data Collection](#), OCR. The OCR will now have school discipline data by race, ethnicity, gender, limited English proficiency (LEP) status, and disability, and is therefore more likely to identify patterns, trends, and disparities.

If a prima facie case is made of statistically significant disparity, the education agency will then have the burden of demonstrating that the policy or practice is justified by an “educational necessity.” In other words, the policy must have a demonstrable relationship to an important educational goal. *Elston*, 997 F.2d at 1412–13. In the zero-tolerance context, school districts may argue that such a policy is necessary to deter school violence. Adira Siman, Note, “Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color,” 14 *Cornell J. L. & Pub. Pol’y* 327 (2005) (provides a detailed analysis of the disparate impact of zero-tolerance policies). However, there still needs to be a necessary relationship between the policy and the goal of deterrence, and numerous studies have shown that zero-tolerance policies are ineffective in preventing violence, and, in some cases, they even exacerbate school discipline.

Even if there is a substantial justification, the policy can still be invalidated where there is another equally effective method for achieving the stated goals that would result in less disproportionality. *Elston*, 997 F.2d at 1407. According to Russlynn Ali, an education agency would be found out of compliance if an equally sound policy would have less of a disparate impact. *Education Week*, (Oct. 7, 2010). Such an alternative, supported by many in the movement, is positive behavior intervention and supports (PBIS). PBIS is implemented in approximately 7,100 schools across the country and encouraged by the Department of Education. In Jefferson Parish, Louisiana, the implementation of PBIS led to a reduction of school suspensions by 29 percent for students with special needs and 24 percent for mainstream students within one year of implementation. Ronald K. Lospennato, “Multifaceted Strategies to STOP the School to Prison Pipeline,” 42 *Clearinghouse Rev.* 528, 532 (2009).

Update on OCR Compliance Reviews and Investigations

The OCR has received volumes of complaints in the past 10 years about the disproportionate number of suspensions, expulsions, arrests, and dropouts of vulnerable, fragile, and disabled children across the country. Given the involvement of various ABA committees and groups in calling into question zero-tolerance policies, it is not surprising that at the fall leadership meeting of the ABA Section of Litigation on October 2, 2010, Secretary of Education Arne Duncan and Russlyn Ali focused much of their remarks on addressing racial disparities in zero-tolerance policies. Ali has been unapologetic in her quest to ensure equal educational access for African



Children's Rights Litigation

FROM THE SECTION OF LITIGATION CHILDREN'S RIGHTS LITIGATION COMMITTEE

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American students, stating that “my sense of urgency could not be greater.” *The Root* (April 20, 2011).

As part of its invigorated approach, the OCR has announced that it will proactively conduct its own compliance investigations in enforcing its regulations. Using a disparate-impact standard, the OCR plans to initiate compliance investigations in up to 60 school districts, of which five or more selected districts will focus on disciplinary policies. Last fall, the press began reporting on OCR investigations across the country. Based on early statements by the agency and news reports, those districts include but are not limited to the Christina School District in Wilmington, Delaware; the Slamanca City (New York) Central School District; Winston-Salem/Forsyth (North Carolina) County Schools; San Juan (Utah) School District; and Rochester (Minn.) Public Schools. This is in addition to the investigation of nearly 7,000 complaints recorded last year. According to the OCR, in the thousands of cases handled in the first year under the Obama administration, resolution agreements increased by 11 percent. Voluntary resolutions in which schools made sufficient changes without additional prodding jumped 32 percent. [Recent Resolutions](#), OCR. The OCR posted online [voluntary resolutions and settlement agreements](#) reached with school districts.

The OCR also announced that it would be issuing technical assistance guides on discipline codes during the winter of 2010, but the office has yet to do this, and the word is that this guidance has become low on the OCR’s priority list. The legal, advocacy, and directly impacted community anxiously await such guidance. Community stakeholders could leverage these guidelines at school district codes of conduct, student handbooks, tribunal hearings, and disciplinary code revision committee sessions, which are open to the public.

The Departments of Justice and Education convened for the first time last fall, where community leaders, government officials, and legal advocates were invited to discuss the school-to-prison pipeline and share integrated advocacy strategies. This effort confirmed the intent of the two agencies to collaborate and signaled the Department of Justice’s interest in pursuing discipline cases. In a public briefing before the U.S. Commission on Civil Rights, the OCR received input that the focus on disparate impact would be an opportunity to illustrate to school districts nationwide best practices, in addition to remedies that would address punitive and disparate disciplinary practices. *Education Week* (March 2, 2011). In formally adopting these recommendations, the OCR would be in a position to provide significant oversight and authority over schools currently depriving children of their right to a high-quality public education.

However, the OCR is already beginning to face some criticism. The first major compliance review was initiated against the Los Angeles Unified School District (LAUSD) to look at whether it provides adequate services to students learning English. This move was harshly criticized by a group of civil rights, advocacy, and education representatives (including the California State Superintendent of Public Instruction) in an open letter that claimed the OCR was ignoring African American students and alleging that the department’s decision to focus on English Language Learner (ELL) students but not African American students was more political

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than educational. *The Los Angeles Sentinel* (April 1, 2010). A similar compliance review initiated against Boston Public Schools at around the same time resulted in a compliance agreement by September 2010—within six months. However, one year later, the LAUSD review is still pending.

The most recent and only settlement related to school discipline was recently reached between the Justice Department, the OCR, and a school district in Minnesota resolving allegations of race and national origin harassment and the disproportionate discipline of Somali American students at Owatonna High School. While the settlement agreement outlines the measures the district will take to prevent harassment against students based on race, color, or national origin, the terms around developing appropriate disciplinary measures are general and not helpful in addressing concerns about an overreliance of exclusionary forms of discipline. The agreement makes no mention of the use of alternative forms of school discipline for acts of harassment outside of exclusion and, in fact, requires the school district to use discipline that includes, “if circumstances warrant, suspension or expulsion.” OCR, Resolution Agreement #05-10-1148, Independent School District #761, Owatonna. It is disappointing that the OCR did not use this opportunity to explore conflict resolution methods such as [restorative justice practices](#), which can be effective in de-escalating harassment and hostile environments.

Although those involved in the movement to dismantle the school-to-prison pipeline are encouraged by the October 2010 guidance from the Obama administration through the OCR and the Department of Justice on the bullying of lesbian, gay, bisexual, and transgender (LGBT) youth, it inherently fails to address the deeply embedded racism and criminalization of youth in public school systems today. In the case of the bullying of LGBT youth as well as sexual harassment of gender and sexual minorities, the OCR must shift its sporadic approach of addressing the needs of one, two, or a dozen children to creating safer, richer, and more diverse educational environments for all children. Transformational change and practices in our public schools must in fact be systemic, not episodic.

How Significant Is the OCR's Change in Practice?

The media has greeted the OCR's announcement of disparate-impact analysis with much fanfare but little in-depth reporting. For a movement that is interested in making structural, systemic, and institutional changes, it is critical that we analyze the OCR's new practice in the context of movement-building and long-term priorities. In this way, we can effectively add the OCR as another tool in our arsenal to dismantle the school-to-prison pipeline but also understand the structural limitations of the OCR's role in addressing school disciplinary disparities.

One focus of the response to the school-to-prison pipeline has been to expose the disproportionate impact of school disciplinary and criminalization practices; another has been to endorse alternative approaches such as PBIS and restorative justice practices. Collectively, the movement has produced numerous reports, including analysis of outcome data published by educational agencies, state departments of education, and the federal government, as well as independent reports. The movement has even engaged in creative methods of collecting



anecdotal evidence, including public hearings, participatory research, story gathering, and human rights documentation. This has played an influential role in pushing for better data collection by all facets of government, but primarily by the OCR itself. Across the country, local coalitions and groups have studied, endorsed, and actively worked to get school districts to adopt alternative approaches to school discipline, including PBIS and restorative justice practices.

Therefore, an administrative process, as outlined by the OCR, that legitimizes efforts to demonstrate the discriminatory effect of policies regardless of intent, presents alternatives, and provides a regulatory arm to hold educational institutions accountable is consistent with the priorities of the movement. It builds on the experience and expertise of the movement. This is particularly critical for parents, students, and community organizations that otherwise do not have access to lawyers or the courts so that they may seek direct intervention.

At the same time, when viewed in the context of significantly diminished ability to obtain legal remedies in the courts for civil rights violations, the OCR's new practice simply represents a small step to regain what we have already lost. Similarly, litigation for racial equality in the 1950s and 1960s began under a disparate-impact analysis. For the first 20 years of discrimination litigation, proof of intent was unnecessary, and the existence of segregation or disparate impact was sufficient to challenge a wide variety of practices in court. Derek W. Black, "Cultural Norms and Race Discrimination Standards: A Case Study in How the Two Diverge," 43 *Conn. L. Rev.* 503, 510 (2011). Since 1973, however, the Supreme Court has tightened the ropes on the ability of plaintiffs to address inequity by inserting an intent requirement into all race-discrimination claims under the Equal Protection clause of the Constitution. However, plaintiffs were able to continue to assert disparate-impact claims under Title VI. Finally, in 2001, the U.S. Supreme Court held that there is no private right of action to enforce Title VI, using the disparate-impact standard. *Alexander v. Sandoval*, 532 U.S. 275 (2001). Thus, advocates unfortunately lost the ability to effectively use the courts to hold school districts liable for the types of systemic violations that rely on a demonstration of statistical disparities and disparate impact.

While a regulatory agency like the OCR can enforce Title VI, using a disparate-impact standard, a private individual can only assert intentional discrimination. Relying on just the intentional-discrimination doctrine "has devastated racial and gender equity" in education cases, and civil rights advocates have viewed this as essentially closing courts as viable venues for remedying discrimination. Derek W. Black, "The Mysteriously Reappearing Cause of Action: The Court's Expanded Concept of Intentional Gender and Race Discrimination in Federally Funded Programs," 67 *Md. L. Rev.* 358 (2008).

In effect, the movement against the school-to-prison pipeline has been divested from the ability to directly challenge the types of discriminatory practices that are most relevant to the communities that we represent. The OCR's compliance mechanism remains the only remaining vehicle to challenge discrimination in education, using a disparate-impact standard. This vehicle will prove useless unless the OCR exercises its enforcement arm and takes swift action against offending schools and school districts across the nation. For example, a complainant has no



recourse if he or she disagrees with the remedial action—or if the OCR does not enforce its regulations.

The OCR's commitment to remedy disparities in school discipline and the school-to-prison pipeline is vulnerable to political influence, depending on the level of support it gains from the current administration. As with the previous administration, the OCR can decide to simply not enforce regulations using disparate-impact analysis. The OCR can also decide what level of investment it will make in discipline cases, as opposed to other areas of discrimination. Finally, the end result of an OCR complaint will most likely lead to remedial action by the school district that may or may not involve the complainant and will not include the imposition of liability. The OCR's effectiveness will remain negligible unless the revocation of federal funding is exercised to invoke immediate compliance and dramatically reduce the over-disciplining of vulnerable children and children of color in America's public schools.

In addition, the Department of Justice can enforce and pursue civil rights cases, using disparate impact. However, to date, the department has intervened in only one case relating to school discipline—the Owatonna case mentioned previously—which resulted in a settlement agreement.

What Results Can We Expect from the OCR?

The University of California, Los Angeles (UCLA) Civil Rights Project recalls the desegregation era between 1965 and 1970 as an example of the potential for the OCR to influence education and civil rights policy. During that window, the OCR brought 600 proceedings against school districts and terminated federal funds in 200 districts, and as a result, “by 1970, southern schools were the most integrated in the country.” A key component of this success included the issuance of firm regulations and a strong partnership between the OCR and the Department of Justice Civil Rights Division in the enforcement of desegregation. Since then, however, activities of the OCR have come to “a virtual standstill” caused by political machinations that resulted in a disconnection between the OCR and the Department of Justice, challenges by conservatives, and the weakening of political support to address racial inequities. The Civil Rights Project at UCLA, *The Integration Report*, issue 23 (2010).

The Civil Rights Project recommends that the OCR duplicate the aggressive efforts of the 1960s and 1970s. The research institute suggests strong public declarations, developing relationships with advocates and communities, issuing strong guidance, coordinating with the Department of Justice, providing technical assistance to school districts, and inserting educational equity into conversations around social equity in areas such as housing, transportation, land use, and urban planning. In particular, the institute recommends that, in light of *Sandoval*, the OCR should be more strategically proactive in investigating complaints and, if it uncovers significant disparities in discipline, that it provide to the school districts the broad steps that must be taken to correct them and play an active role in monitoring progress.

The ability of the OCR to pursue an aggressive posture and strategy is dependent on the commitment and investment of the Obama administration to equity issues overall. Civil rights



groups including NAACP, the Lawyers' Committee for Civil Rights Under Law, the National Urban League, the Rainbow PUSH Coalition, the National Coalition for Educating Black Children, the NAACP Legal Defense and Educational Fund, and the Schott Foundation for Public Education have critiqued the administration's focus on policies that undermine equity. A report issued by the above mentioned groups alleges that the administration has undermined the need for an equitable system of education by having a focus on competitive grants, such as the Race to the Top grants that have denied funding to children of color in some of the poorest school districts in the country; intending to make Title I competitive; using unproven methods of educational change that penalize schools in economically disenfranchised areas; relying on charter schools and quick-fix strategies such as closing public schools; and relying on test scores for measuring teacher effectiveness. National Opportunity to Learn Campaign, *Civil Rights Framework for Providing All Students an Opportunity to Learn through Reauthorization of the Elementary and Secondary Schools Act* (July 26, 2010); Dianne Ravitch, *Why Civil Rights Groups Oppose the Obama Agenda*, Education Week Blog, (September 14, 2010). In this context, civil rights advocates may rightfully remain skeptical of the outcomes of the administrations' education policy on overall education equity.

The Struggle Must Continue

More than 55 years after *Brown v. Board of Education*, many students of color throughout the United States continue to struggle in racially isolated, underfunded, inadequate public schools. The movement to dismantle the school-to-prison pipeline across the country will strengthen and increase in momentum if the OCR digs deep, identifies the root causes of disproportionate harsh discipline in our public schools, and pursues the aggressive enforcement of compliance to civil rights laws. The OCR provides the movement with a critical vehicle to address racial and other disparities that result from the school-to-prison pipeline and provides an important resource for school districts to implement alternative approaches. Legal advocates, community leaders, parents, and even students can be directly involved in monitoring educational inequities and the reporting of these inequities to the OCR.

At the same time, the OCR is just beginning to reprioritize and enforce the improvement and equalization of educational programs, discipline policies, and other initiatives. In light of the history of both the OCR and disparate-impact litigation, these are small but significant steps. The OCR's power is simply limited to the investment the Obama administration makes to education equity and, therefore, quite vulnerable. The students, the community organizations, the educational rights attorneys, and the advocacy community should remain cautiously optimistic and maintain pressure on the administration and OCR to fulfill its promises. In the end, however, the struggle to dismantle the school-to-prison pipeline is rooted in a vision for social change. We can only succeed if we cut through the rhetoric and continue to measure our strategies, tools, and victories against that vision. With that in mind, *la lucha continua* (the struggle continues).

Keywords: litigation, children's rights, Department of Education's Office of Civil Rights, school-to-prison pipeline



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Book Review: *Trial Advocacy for the Child Welfare Lawyer*

By Ann M. Haralambie — May 23, 2011

I attended a National Institute for Trial Advocacy (NITA) training program in 1979, back when I was a general-practice trial lawyer also doing child welfare cases. It was a wonderful, exhausting, rigorous course that I found especially helpful in my jury work. Those were the years not too far removed from *In re Gault*, and juvenile courts were still quite informal, especially on the child welfare side. Even as the rigors of federal law and constitutional rights were brought to bear on the practice of child welfare law and proceedings became more formal, it became apparent that certain modifications to “regular” trial practice were necessary. When I was privileged to teach at NITA’s Rocky Mountain Child Advocacy Training Institute (RMCATI), it was immediately clear that trial practice taught in the context of child welfare procedures and fact patterns made a huge difference in the practical application of litigation techniques and strategies in juvenile court.

Marvin Ventrell’s *Trial Advocacy for the Child Welfare Lawyer: Telling the Story of the Family* is a logical extension of the annual RMCATI training programs and fills a void on the bookshelves of child welfare lawyers. Marvin was a general trial lawyer before he took up child welfare and juvenile justice law, and those skills, as well as his long association with establishing and teaching at RMCATI and his tenure as executive director of the National Association of Counsel for Children, make him a logical author for this task. He does not disappoint.

We are long past the days when child welfare law was derisively described as “kiddie law.” This area of the law touches lives and impacts families more than almost any other area of law. The termination of parental rights has been called the civil counterpart to the death penalty. State intervention in families can forever change the lives of family members, for better or worse. The family members involved are frequently represented by court-appointed lawyers, many of whom have few resources with which to represent their clients. They often do not have access to independent social workers, private investigators, or medical and psychological experts. They may have caseloads that make thorough trial preparation nearly impossible. Until relatively recently, the “local standard of practice” would have been considered malpractice in any other practice area. Lawyers might meet their clients only at the courthouse before hearings. They may have their first “conversations” with expert witnesses during their testimony. Some judges want only cursory testimony, with evidence being by offers of proof, declarations, or written reports, and refuse to allow or greatly limit the time for opening statements and closing arguments. Legal memoranda and citations to statutory and case law are the exceptions, not the rule. Without the

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Children's Rights Litigation

FROM THE SECTION OF LITIGATION CHILDREN'S RIGHTS LITIGATION COMMITTEE

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eyes of a jury trial in most states, trial advocacy can be seen as a luxury the child welfare field cannot afford. There are so many cases and so little time allocated to each.

However, with so much at stake, efficient and effective trial advocacy is necessary. It is clearly necessary for the individual parties, whose lives hang in the balance, but it is also necessary for the field itself. All of its participants need to be held accountable by the stick of malpractice liability and the carrot of professional pride. *Trial Advocacy for the Child Welfare Lawyer* gives the often overworked, under-resourced, and under-appreciated child welfare lawyer the tools needed to advance to the next level—to become the excellent trial lawyer our families and children deserve. While there are other books dealing with substantive child welfare law and the related multidisciplinary knowledge, this is the first book to help the lawyer apply that knowledge in a way that can greatly improve the process and the outcome of cases.

Ventrell gives individual attention to each lawyer in the case, including those working for the agency, the parents, and the child. The book does not see child welfare law as settling for less than excellent trial practice. In addressing the American Bar Association's Commission on Women at its August 1992 annual luncheon, Hillary Rodham Clinton said, "The law, the lawyers, and the judges protecting our families deserve the respect now given to the law, the lawyers, and the judges protecting our corporate boardrooms." Child welfare law has become more professional since *Gault* largely because a critical mass of lawyers decided to remain in the field rather than stay just long enough to gain experience and move on to more lucrative fields. They came together in organizations, wrote articles and books in the field, established journals, and eventually (largely with Ventrell's vision and shepherding) created an ABA-recognized specialty certification in child welfare law. It is now time to address the finer points of trial techniques and advocacy practiced in our child welfare courts, and NITA has recognized that what it began with the annual RMCATI training programs should now be presented in book form as well.

As Ventrell points out, each case is a story, and the lawyer is the storyteller of the family's story. The story starts to be created when the lawyer first gets the case, and the story is developed as the case progresses. Judges need to be persuaded as to what the facts are and why the parties did what they did. *Trial Advocacy for the Child Welfare Lawyer* walks the reader through the process with specific tools. For example, to aid in formulating the story of a case, the book includes a Case Analysis Summary, a Good Facts/Bad Facts Chart, and a Proof Chart. Ventrell provides the outline, making it easy for lawyers to organize the facts and issues of a case in a meaningful and efficient way. He analogizes the case-analysis process to a legal version of the scientific method, formulating and testing hypotheses.

Following the case analysis is case preparation: direct examination, closing arguments, cross-examination, objections, and opening statements. One or more chapters are devoted to each of these phases of case preparation. The best trial-practice books provide the underlying reasons for why lawyers should do things certain ways and easily accessible tools for doing them. *Trial Advocacy for the Child Welfare Lawyer* does that as well. This is a book that newcomers to the

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field will find to be an invaluable resource, and experienced lawyers will use it to refresh and enhance their trial skills.

Most trial advocacy books deal with commercial, personal injury, or criminal law examples. While lawyers can certainly apply the rules and techniques to child welfare cases (a leading question is a leading question regardless of practice area), there are specific issues in child welfare cases that require nuances in practice that are not present in most other areas. *Trial Advocacy for the Child Welfare Lawyer* is primarily directed to the adjudicatory hearing but applies equally to any hearing at which witnesses testify and exhibits are offered.

One omission that I would have liked to have seen rectified is a chapter addressing specific trial advocacy issues that arise at subsequent hearings and their typically abbreviated time frames. As we push courts to increase hearing times and reduce unrealistic case loads, we must still deal with the existing limitations. Many of these cases involve sequential evidentiary hearings over a period of months or years. They may involve moving from dependency review hearings to termination of parental rights hearings or guardianship or adoption hearings. The relevant players may change with new case workers and experts. The children's placements may change, involving new foster parents, group homes, or residential treatment centers. Family members may come or go as kinship resources. The lawyers for various parties may change from time to time. The judge may change. Certainly, the children grow older, and their needs change. Child welfare cases are not transactional. Although they may begin with a discreet event, as personal injury or criminal cases do, the family's circumstances are always being scrutinized, and the reasons for keeping a child in the system may no longer be related to the original reason for court involvement. All of these circumstances make trying a child welfare case particularly challenging. To the extent that a child welfare lawyer can organize the case and keep useful notes, making the transition from one hearing or one lawyer to the next will be easier.

The final chapter, which covers ethics and professionalism, does not merely use child welfare examples but gets to the heart of what makes child welfare law unique. Who is the agency lawyer's client—the agency or the people in general? Does the child's lawyer represent the child's wishes, best interests, or both? How does one deal with a client with diminished capacity? This chapter takes a stark look at the "informality" culture that has allowed us to be lax about confidentiality and loyalty to our clients. It is important to end the book with this reminder of our ethical and professional duties to our clients, opposing counsel, and the court. Excellent trial lawyers know the law, present it with skilled advocacy, and are thoroughly ethical and professional. *Trial Advocacy for the Child Welfare Lawyer* calls on us all to step up our game and reach for that excellence of practice.

Keywords: litigation, children's rights, book review, trial advocacy, child welfare

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Part 1: LGBTQ Youth in the Juvenile Justice System

By Amanda Valentino – January 6, 2011

Lesbian, gay, bisexual, transgender, and questioning/queer (LGBTQ) youth represent at least 13 percent of the total detained population in the juvenile justice system. Katayoon Majd, Jody Marksamer & Carolyn Reyes, *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts* 10 (2009). Many of these youth experience debilitating harassment, violence, and discriminatory charges while in the juvenile justice system and are not obtaining the services they need because they are “under the radar.” Although defense attorneys and other youth advocates see the increasing numbers of identifiable LGBTQ youth enter into the system, many go unnoticed because they keep their LGBTQ identities a secret. They might not conform to the common LGBTQ stereotypes that one usually encounters in today’s mainstream media; therefore, they are not easily recognized. They might also be abused by close family members and peers because of their orientation and are afraid to ask for help or talk about personal issues while in the juvenile justice system. Although some safeguards are in place to ensure the safety of LGBTQ youth as a whole in detention facilities, more can be done to promote awareness and keep all LGBTQ youth safe.

An Increase in Identified LGBTQ Youth

Adolescence is an important time of social and emotional development. Children struggling with traumatic experiences in detention facilities can develop serious problems: social isolation, behavioral difficulties, and overall issues that can have a negative impact on their current quality of life and future functioning. Ashley Eckes & Heidi Liss Radunovich, *Trauma and Adolescents* 2 (2007). Therefore, more attention needs to be focused on education and awareness for defense attorneys who are representing clients who may not be open about their LGBTQ orientation.

Some may believe that the LGBTQ youth population does not exist, refusing to accept that children are sexually active or sexually identify themselves at a young age. However, this is not the case. Even though estimates of the gay, lesbian, and bisexual population vary in the United States, many researchers believe that between 5 and 6 percent of youth fit into one of these categories. Human Rights Watch, “Young and Queer in America,” in [*Hatred in the Hallways: Violence and Discrimination Against Lesbian, Gay, Bisexual, and Transgender Students in U.S. Schools*](#) (2001) (last visited Dec. 13, 2010). For example, the estimated number of children currently enrolled in school is 76 million, U.S. Census Bureau, [Back to School: 2010–2011](#), which means that at least 3.8 million school-age children in the United States are dealing with sexual orientation issues.

According to researchers, on average, the age of same-sex attraction awareness is 10, and the average age at which youth disclose their sexual orientation is 14. A. Daugnelli, A. Grossman & M. Starks, “Parents’ Awareness of Lesbian and Bisexual Youth’s Sexual Orientation,” *J. Marriage & Family*, May 2005, at 478. A 1996 study of youth found that generally girls were aware of their attraction to other girls at age 10 and had their first same-sex experiences at age

15. Human Rights Watch, *supra*. The study also established that boys had their first awareness of same-sex attraction at age 9 and their first same-sex experience at age 13. In addition, in 1998, a group of adults were surveyed about their first realization of their attractions to the same sex. The survey found that the first awareness of an attraction to the same sex occurred at an average age of 13 for men and between 14 and 16 for women. The average age for the first same-sex experience was 15 for men and 20 for women. These studies are evidence that today's youth are recognizing their same-sex attractions at younger ages.

Unfortunately though, there are no clear data regarding the prevalence of people who identify themselves as transgender. *See* Human Rights Watch, *supra*. ("Transgender" is an umbrella term that is used to describe the identities and experiences of people whose gender identity does not conform to society's stereotypical definition of "male" or "female" in some way. This broad definition makes it difficult to compile statistics about this community.) However, some think that there may be about 1.1 million transgender youth and adults in the United States. [One Million Transgender Youth and Young Adults in the United States?](#) (Feb. 13, 2010). This statistic is hypothetical and extrapolated from recent surveys around the country; therefore, it cannot be deemed accurate until transgender status is captured in the census. But there is no argument as to whether these individuals are particularly vulnerable to harassment in and out of the criminal justice system.

Disproportionate Representation

There is a cyclical relationship between the LGBTQ identity and the juvenile justice system: Many youth become caught in the revolving door of the juvenile justice system because they identify as LGBTQ. These youths' first encounters with the criminal justice system usually occur either on the streets or in school. Between 20 percent and 40 percent of homeless youth and runaways in the United States identify themselves as LGBTQ. Rudy Estrada & Jody Marksamer, "Lesbian, Gay, Bisexual, and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice Systems Safe for All Youth Through Litigation, Advocacy and Education," 79 *Child Welfare* 2, 4 (2006). This is because many LGBTQ youth leave home to escape hardship or abuse due to their lifestyle. Many others are kicked out because their families do not approve of their homosexuality or sexual identity. As a result, youth become victims of the street and engage in nonviolent "survival crimes" to obtain cash flow and food. Jody Marksamer & Shannan Wilber, *The Model Standards Project* 3 (2002). Typically, these "survival crimes" consist of prostitution, petty theft, or shoplifting. Estrada & Marksamer, *supra*, at 5 n.28.

In addition, LGBTQ youth find themselves in juvenile detention facilities as a result of the horrifying discrimination, abuse, and harassment in their schools. This adversity forces LGBTQ youth to either fight to defend themselves or skip school to escape peer persecution. Marksamer & Wilber, *supra*. Either way, these youths end up in the courtroom on criminal charges because they have engaged in self-defense or because they are chronic truants.

Due to harassment at school, LGBTQ youth sometimes find themselves in the role of the offender in the courtroom and behind bars. One youth, Beth G., who was interviewed for the Human Rights Watch study, spoke of months of repeated verbal threats and abuse in school: "I was so angry that I'd been tolerating this behavior, that I was trying to accept it . . . I realized, it's affecting me at school; it's pushing me out of classes." Human Rights Watch, *supra*, ch. VI., "Coping with Harassment and Violence." It is evident that this is not an isolated problem because peer abuse can affect many aspects of a child's life. In turn, the adversity facing LGBTQ youth can drive them into the menacing grip of the juvenile justice system and, when behind bars, into further abuse from their peers and detention employees.

Examples of Abuse

LGBTQ youth in the juvenile justice system may face discrimination and harassment that many other detained youth do not encounter, including verbal, physical, and mental abuse. Much of this inequity occurs in tandem with other issues that youth have to grapple with when incarcerated. These issues are magnified, however, for less visible LGBTQ youth.

In 2006, a groundbreaking legal case brought to light specific issues that many LGBTQ youth face in detention. *R.G. v. Koller*, 415 F. Supp. 2d. 1129 (D. Haw. 2006), focused on three individual plaintiffs: a 17-year-old male-to-female transgender girl, an 18-year-old lesbian, and an 18-year-old male perceived to be gay. These three individuals sued the Hawaii Youth Correctional Facility (HYCF), the state's juvenile correctional facility, because of the abuse and harassment they received there due to their sexual orientation and gender identity. *R.G.* was a victory for those advocating for the rights of LGBTQ youth in the juvenile justice system. The judge issued a preliminary injunction requiring HYCF to cease the harassment of the LGBTQ wards. HYCF eventually settled the case and agreed to reform its system and institute a new anti-harassment policy to rectify the inherent discrimination.

R.G. highlighted many of the issues that LGBTQ incarcerated youth face throughout the country. There was continual verbal abuse by the staff at HYCF, including the Youth Correctional Officers. Routinely, staff would use the term "butchie" to refer to female wards who identified themselves as gay, expressed romantic feelings for other girls, or failed to conform to sex stereotypes. On other occasions, staff members expressed their own personal feelings that being gay was "wrong" and "disgusting," and they required the other young wards to develop rules and punishments for LGBTQ wards.

The other two young plaintiffs faced similar verbal abuses and threats. On a regular basis, other wards would call the gay male derogatory names. The young male-to-female transgender girl was called similar names in the presence of staff. Furthermore, the staff would foster this abuse by referring to her as "cupcake" and "fruitcake." This young girl was not allowed to play with her hair "like the girls," and the staff often threatened to "cut off her hair and send her 'over to the boys' side."



These comments, especially the latter, are terrifying to transgender wards in the juvenile justice system. To be sent back to the boys' side would mean that the transgender ward would be put in an area where she did not feel comfortable and the other male wards would most likely notice her uneasiness. This transgender ward at HYCF identified herself as female, and assimilating the genders led to more verbal abuse and physical attacks. At one point, this young woman was actually transferred to the boys' unit where she was subjected to escalating harassment and physical abuse from other wards.

Isolation May Exacerbate the Harm

Juvenile detention employees, like the ones in HYCF, have witnessed this verbal and physical abuse and felt that the only solution to protect these individuals was isolation. The use of isolation and solitary confinement for "protection" is sometimes viewed as reasonable and nonpunitive by detention staff, but, in reality, it has the opposite effect. With isolation, the victimized LGBTQ youth ironically is turned into the offender. Isolating an individual acts more as punishment than protection, and these practices have the potential to lead to physical and mental deterioration. Continual harassment and solitary confinement can wear down one's self-confidence and ideation of self-worth, leading to a downward spiral of mental distress.

In the *R.G.* litigation, Robert Bidwell, M.D., an associate professor of pediatrics at the University of Hawaii John A. Burns School of Medicine, whose specialty is adolescent medicine, conducted interviews of the plaintiffs. In his declaration, he noted that it is well known that prolonged periods of isolation may have adverse psychological effects: "With respect to LGBT[Q] youth, isolation may be perceived as punishment for being LGBT[Q], which evokes feelings of rejection and depression and may manifest itself through a variety of physical symptoms ranging from headaches to self-mutilation." Declaration of Robert J. Bidwell, M.D., at 11, *R.G. v. Koller*, 415 F. Supp. 2d 1129 (2006) (Civ. No. 05-566 JMS/LEK) (Sept. 2005). Dr. Bidwell also commented on the extreme conditions of solitary confinement that the staff forced LGBTQ youth to endure for their "protection" in HYCF. This included long-term segregation for 23 hours a day with nothing other than a pillow and blanket in their holding cell. *R.G.*, 415 F. Supp. 2d. at 1148. The young wards would be allowed to leave their cells for only one hour a day to shower and engage in recreation, and they were not permitted letters, writing instruments, radio, television, or any interaction with other wards. This "protection" at HYCF seemed to cross the line into a solely punitive nature for simply identifying as LGBTQ.

Part 2 of this article will appear in the next issue of *LGBT Litigator*.

Keywords: litigation, LGBT, juvenile justice system, awareness

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NEWS & DEVELOPMENTS

ABA Project Explores Consequences of Conviction

The American Bar Association's [Juvenile Collateral Consequences Project](#) represents an effort to collect and catalogue every collateral consequence of criminal convictions in the United States. At www.beforeyouplea.com, juveniles who are transferred to criminal court can find and read state statutes and administrative rules that include a collateral consequence of conviction. These consequences might include barriers to education, employment, and public benefits.

Keywords: litigation, children's rights, Juvenile Collateral Consequences Project

— *Catherine Krebs, committee director, ABA Section of Litigation, Children's Rights Committee, Washington, D.C.*

Information Packet Explores Bullying, Child Welfare

The [National Resource Center for Permanency and Family Connections \(NRCRFC\)](#) has updated its information packet on [Bullying and Children in the Child Welfare System](#) [PDF] to include discussions on cyber-bullying, as well as statistics and information on bullying and lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth.

The packet explores the characteristics of bullies and victims, explains why bullying is an important and relevant topic in child welfare, and provides information on LGBTQ children in care. It also offers steps families and child welfare professionals can take to provide help, as well as an array of resources on the subject of bullying.

Keywords: litigation, children's rights, NRCRFC, bullying, LGBTQ youth

— *Marlene Sallo, web editor, Children's Rights Litigation Committee*

California Homeless Youth Project Issues Brief on LGBTQ Youth

The [California Homeless Youth Project](#) has released [Struggling to Survive: Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning Homeless Youth on the Streets of California](#) [PDF], an report that highlights the challenges faced by lesbian, gay, bisexual, transgender, and questioning (LGBTQ) homeless youth in California.

The brief is based on an in-depth review of existing research on the LGBTQ youth population, a recently released report from the Hollywood Homeless Youth Partnership (HHYP), and a series



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of interviews conducted with LGBTQ homeless youth and service providers. It highlights the need to implement policies designed to reduce disparities and improve the lives of these youth.

Keywords: litigation, children's rights, California Homeless Youth Project, LGBTQ youth, homeless

— *Marlene Sallo, web editor, Children's Rights Litigation Committee*

ABA Section of Litigation Children's Rights Litigation

<http://apps.americanbar.org/litigation/committees/childrights/home.html>

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