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### Legal Advocacy and Education Reform: Litigating School Exclusion

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# LEGAL ADVOCACY AND EDUCATION REFORM: LITIGATING SCHOOL EXCLUSION

DEAN HILL RIVKIN\*

## I. INTRODUCTION

Public education has become a crucible for fundamental debates about the nature of American democracy. This is especially true with issues surrounding exclusion of children from school. Excluding students from our “open” public school systems has sparked a robust discourse about the core purposes of public education. Litigation over exclusion highlights the critical importance of education to our children and our nation.

In *Plyler v. Doe*,<sup>1</sup> the United States Supreme Court invalidated a Texas law that withheld state funds for the education of children who were not “legally admitted” into the United States.<sup>2</sup> Justice Brennan, writing for a 5-4 majority, emphasized the importance of educating this “underclass” of children:

Public education is not a “right” granted to individuals by the Constitution. But neither is it merely some governmental “benefit” indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The “American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.” . . .

. . . Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. . . . Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being

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\* College of Law Distinguished Professor, University of Tennessee College of Law. A.B. Hamilton College (1968); J.D. Vanderbilt Law School (1971). This Article is dedicated to attorney Brenda McGee, my spouse. She single-handedly educated me about zealous education advocacy. I also hugely benefited from the insights of attorney Barbara Dyer, the staff attorney for the University of Tennessee College of Law’s Children’s Advocacy Network-Lawyers Education Advocacy Project (CAN-LEARN). CAN-LEARN, which I direct, is a support project for lawyers in Tennessee who represent families and children in education-related cases. See [www.lawschoolconsortium.net](http://www.lawschoolconsortium.net). My research assistant, Madeline McNeeley, contributed greatly to the research and editing of this Article. Many of the practices and stories recounted in this Article stem from countless conversations with families and lawyers about education issues. I have litigated two of the cases discussed in the Article and many more in this field. I take full responsibility for the claims made throughout.

1. 457 U.S. 202 (1982).
2. *Id.* at 224–25.

of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of a basic education with the framework of equality embodied in the Equal Protection Clause.<sup>3</sup>

The *Plyler* Court rightly rejected the State's claim that undocumented children were not "persons" under the Constitution. The State's argument literally objectified the children excluded by the Texas law.<sup>4</sup>

In *Honig v. Doe*,<sup>5</sup> the Court confronted a special education exclusion case involving two emotionally disturbed youths who had engaged in "disruptive behavior," including stealing, extorting money from fellow students, making sexual comments to female classmates, and kicking out a glass window.<sup>6</sup> Writing again for a 5-4 majority, Justice Brennan interpreted the "stay-put" provision of the federal Individuals with Disabilities Education Act (IDEA). The Court's decision prevented the San Francisco Unified School District from expelling these students for their disability-fueled behavior.<sup>7</sup> The Court rejected the school system's argument that Congress could not have intended to require schools to retain "violent or dangerous" students in school while they contested their expulsions through the often ponderous administrative machinery of the IDEA. The majority scolded the school system by underscoring "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."<sup>8</sup> Reading like an education primer, the opinion catalogued various methods that schools could use to educate students "who are endangering themselves or others."<sup>9</sup> The decision conveyed the message that continuing education—even for the most difficult students—trumped the ossified discipline practices of certain school administrators.

Despite the import of these cases, educational institutions continue to devise mechanisms for removing students from schools, which has sounded the death knell for many students' academic careers. As will be discussed in Part II of this

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3. *Id.* at 221–22 (citations omitted).

4. *Id.* at 210. Authorities often objectify children and youths who are excluded from school for behavioral reasons. Their narratives portray these students as disruptive predators or out-of-control troublemakers, rather than persons whose developmental problems need to be understood and accounted for. A step in the right direction is the requirement of a functional behavioral assessment, followed by the development of a behavior implementation plan under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. § 1415(k)(1)(D)(ii) (Supp. 2004). Advocates today are beginning to frame school exclusion as a human rights issue. See Statement of Dignity in Schs. Campaign, A Project of the Educ. Subcomm. of the Am. Bar Ass'n. Children's Rights Litig. Comm., [http://www.abanet.org/litigation/committees/childrights/docs/dsc\\_statement.pdf](http://www.abanet.org/litigation/committees/childrights/docs/dsc_statement.pdf) (last visited Jan. 18, 2008).

5. 484 U.S. 305 (1988).

6. *Id.* at 312–15.

7. *Id.* at 316–17.

8. *Id.* at 323.

9. *Id.* at 325–26.

Article, many of these mechanisms are not transparent. They play on parents' lack of sophistication about their child's education. Others invoke higher norms—like school safety—to justify exclusion. Still others impose penalties on non-conformist behaviors simply because some students' unique personalities are poorly understood by school administrators. These systems of discipline are riddled with unfair rules, procedures, and practices.

Part III will discuss the evolving legal landscape of school exclusion. It begins by exploring the mixed motivations behind school exclusion. This Part will analyze a sample of the growing number of cases that seek to turn “failure in the classroom into success in the courtroom,”<sup>10</sup> and it will explicate the pros and cons of using litigation to prevent school exclusion.

The Conclusion of the Article will evaluate the suitability of law school legal clinics and other public interest law firms for school exclusion work. Education as a whole is under-represented as a substantive area for legal clinics and other nonprofit firms.<sup>11</sup> These firms have not embraced this work for a variety of pedagogical and political reasons, but the time has come to rethink this approach.

If undertaken, attorneys must pursue these cases within a framework of systemic, long-term reform. The task presents a formidable challenge.

## II. PATHWAYS TO SCHOOL EXCLUSION

Historically, schools have used a number of methods to expel, suspend, or otherwise push out students whose behaviors do not meet the rules, norms, or expectations of school systems.<sup>12</sup> These methods range from the obvious to the obscure. Some are legitimate protections of the safety and learning environment for the majority of students. Yet, history has shown that these legitimate methods often migrate into a system of exclusion, turning the “falling through the cracks” case into a lacuna loaded with students that have few prospects of returning to school and completing a vital credential for leading productive lives.<sup>13</sup>

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10. Michael Heise, *Educational Adequacy as Legal Theory: Implications from Equal Educational Opportunity Doctrine* 11 (Cornell Law Sch., Research Paper No. 05-028, Sept. 23, 2005), available at <http://ssrn.com/abstract=815665>. Heise referred to the phenomenon of litigants in school adequacy cases using data generated by the No Child Left Behind Act to prove their cases.

11. Patricia A. Massey & Stephen A. Rosenbaum, *Disability Matters: Toward a Law School Clinical Model for Serving Youth with Special Education Needs*, 11 CLINICAL L. REV. 271, 297–98 (2005). The authors ascribe the “dis-awareness” of this field to “lack of awareness [of its] civil rights implications” and latent disability bias. *Id.* at 271, 285.

12. The historic examples of school exclusion are embodied in two cases that led to the enactment of the IDEA in 1975. *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pa. Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) (*per curiam*). In both of these cases, students with disabilities were excluded from educational opportunities through “warehousing” and the absence of procedural safeguards. *Pa. Ass'n for Retarded Children*, 334 F. Supp. at 1258–60, 1265; *Mills*, 348 F. Supp. at 868.

13. See generally CHILDREN'S DEF. FUND, AMERICA'S CRADLE TO PRISON PIPELINE (2007) (reporting on risk factors and offering solutions to prevent neglect, abandonment, and criminalization).

A. *Criminalizing Students: The School to Prison Pipeline*

The “school to prison pipeline” describes a number of practices by school systems that can cause exclusion. Much like the term “environmental justice” described resistance against environmental practices that disproportionately affected low-income communities and communities of color,<sup>14</sup> the concept of the “school to prison pipeline” has galvanized civil rights groups. Many activists have formed campaigns that discourage schools from using the juvenile delinquency system as the only means of redressing problematic behavior by students, especially students with disabilities.<sup>15</sup> Several high profile episodes of school arrests, especially of very young children,<sup>16</sup> have led to calls for more sensitivity in handling students whose behaviors are symptomatic of emotional distress.<sup>17</sup>

After the tragic episode at Columbine High School, more schools turned to juvenile courts as corrective institutions. Many schools hired school resource officers,<sup>18</sup> and school safety became the mantra for arresting students for education-related infractions. However, this practice existed before Columbine.

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14. See generally Dean Hill Rivkin, *Environmental Justice: A Universal Discourse*, 24 TEMPLE J. SCI. TECH. & ENVTL. L. 249 (2005) (describing Professor Ke Jian’s linking of the environmental justice movement “to its animating cognate, the civil rights movement”).

15. See, e.g., ACLU Criminal Justice Project, *School to School Pipeline—An Overview*, <http://www.aclu.org/crimjustice/juv/24704res20060321.html> (last visited Jan. 18, 2008); S. Poverty Law Ctr., *Legal Action, School-to-Prison Pipeline*, <http://www.splcenter.org/legal/schoolhouse.jsp> (last visited Jan. 18, 2008); THE ADVANCEMENT PROJECT, *EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 45* (Mar. 2005), available at <http://www.advancementproject.org/reports/FINALEOLrep.pdf> [hereinafter EDUCATION ON LOCKDOWN] (concluding that schools districts are “overreaching by inappropriately adopting law enforcement strategies” to address delinquency); NAACP Legal Def. Fund, *School to Prison Pipeline*, <http://www.naacpldf.org/issues.aspx?issue=3> (last visited Jan. 18, 2008) (discussing and following the issue of the “School to Prison Pipeline”).

16. E.g., Tom Marshall & Johathan Abel, *In Class or Custody*, ST. PETERSBURG TIMES, Jan. 20, 2008, at 1A, available at 2008 WLNR 1138858.

17. See FLA. ST. CONFERENCE NAACP ADVANCEMENT PROJECT, NAACP LEGAL DEF. & EDUC. FUND, INC., *ARRESTING DEVELOPMENT: ADDRESSING THE SCHOOL DISCIPLINE CRISIS IN FLORIDA* 53–54 (2006) (recommending changes that local officials, state officials, juvenile court personnel, parents advocates, and education advocates implement).

18. See Nat’l Assoc. of Sch. Res. Officers, *Introduction*, [http://www.nasro.org/about\\_nasro.asp](http://www.nasro.org/about_nasro.asp) (last visited Jan. 18, 2008) (describing school resource officers as “school based law enforcement officers, school administrators, and school security/safety professionals working as partners to protect students, school faculty and staff and the schools they attend”); see also OFFICE OF SCH. SAFETY AND LEARNING SUPPORT, TENN. DEP’T OF EDUC., *SCHOOL POLICE DEPARTMENTS* (2008) (reporting to the Tennessee General Assembly on the law and implications of employing school resource officers). The role and status of law enforcement officers in the schools remains controversial. See, e.g., *R.D.S. v. State*, No. M2005-00213-SC-R11-JV, 2008 WL 315568, at \*9–10 (Tenn. Feb. 6, 2008) (remanding for determination of whether SRO was a school official or a law enforcement officer before finally ruling on a motion to suppress).

In *Morgan v. Chris L.*,<sup>19</sup> a middle school filed a juvenile court petition against a student for allegedly kicking and breaking a water pipe in the school bathroom.<sup>20</sup> The student had been diagnosed with ADHD, a neuro-biological disorder that can lead to impulsive, uncontrollable behavior.<sup>21</sup> Despite knowing about the diagnosis, the school system never identified the student as eligible for the protections of the IDEA.<sup>22</sup> Instead, the school filed a delinquency petition in the local juvenile court based on criminal vandalism.<sup>23</sup>

The parents filed for a due process hearing under the IDEA, claiming that Chris should have been certified as eligible for IDEA protections and that the school circumvented IDEA procedures.<sup>24</sup> The IDEA required that a school conduct a manifestation hearing to determine whether Chris's behavior was connected to his disability before initiating a potential change of placement.<sup>25</sup> The parents prevailed at the due process hearing, and the hearing officer ordered the school system to dismiss the petition, which had been stayed by the juvenile court.<sup>26</sup> On appeal, the District Court and the Court of Appeals affirmed the judgment of the hearing officer. Both courts indicated that the school system had ducked its special education responsibilities by shunting Chris's behavior problems to a forum that did not have the resources or the expertise to assist him.<sup>27</sup> In the case's aftermath, Congress amended the IDEA in 1977 by enacting a provision that allowed school systems to "report[] a crime committed by a child with a disability to appropriate authorities . . . ."<sup>28</sup> The sparse legislative history of the provision admonished schools not to "circumvent" the procedural safeguards of the IDEA, should a petition be filed.<sup>29</sup>

The incidence of school petitions is not well documented.<sup>30</sup> Since Columbine, courts have not been sympathetic to claims that juvenile courts do not have jurisdiction over school-filed petitions.<sup>31</sup> The degree of cooperation between

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19. 927 F. Supp. 267 (E.D. Tenn. 1994), *aff'd per curiam*, 106 F.3d 401 (6th Cir. 1997).

20. *Morgan*, 927 F. Supp at 269; *Morgan v. Chris L.*, No. 94-6561, 1997 WL 22714, at \*1 (6th Cir. 1997) (*per curiam*).

21. *Morgan*, 927 F. Supp. at 268.

22. *Id.* at 269.

23. *Id.*

24. *Id.* at 268.

25. *Id.* at 269 (quoting from the record of the hearing before the administrative law judge).

26. *Id.*

27. *Id.* at 271-72; *Morgan*, 1997 WL 22714, at \*5-6.

28. 20 U.S.C. § 1415(k)(6)(A) (Supp. 2004) (originally enacted as 20 U.S.C. § 1415(k)(9)(A) (1997)).

29. 143 Cong. Rec. S4403 (daily ed. May 14, 1997) (statement of Sen. Harkin) (stating that schools should not use referrals to "circumvent [their] responsibilities under IDEA").

30. See generally Eileen L. Ordovery, *When Schools Criminalize Disability: Education Law Strategies for Legal Advocates* (April 2002) (unpublished manuscript), available at [http://www.cleweb.org/Downloads/when\\_schools\\_criminalize\\_disabil.htm](http://www.cleweb.org/Downloads/when_schools_criminalize_disabil.htm) (discussing this phenomenon).

31. *Joseph M. v. Se. Delco Sch. Dist.*, No. CIV.A.99-4645, 2001 WL 283154, at \*5-6 (E.D. Pa. Mar. 19, 2001); *Commonwealth v. Nathaniel N.*, 764 N.E.2d 883, 887 (Mass. App. Ct. 2002);

juvenile courts and school systems varies dramatically on the local level. Some juvenile courts are not receptive to school-filed petitions, believing that the system is “dumping” children into the judicial systems. The courts understand that they lack the resources that schools have when it comes to developing plans for treatment and rehabilitation of youth offenders. Other juvenile courts only see their role as facilitating correction and punishment. In these courts, juveniles are often subjected to probation plans that rigidly require adherence to school rules and strict attendance. These plans are often recipes for serial violations based on minor infractions of school rules. They also place juveniles at risk of incarceration, especially those with mental or emotional impairments.

### B. School Discipline

School discipline policies and practices have been the subject of intense controversy for some time.<sup>32</sup> Critics have argued that they fuel school exclusion and unfairness. First, studies show that school discipline is disproportionately leveled against students of color.<sup>33</sup> In a recent study, a Task Force appointed by the Mayor of Knox County, Tennessee, found that “[t]he data on school discipline shows clear disparities based on race.”<sup>34</sup> Poverty, which in Knox County is correlated with race, was determined to be “a more significant indicator of disciplinary incidents than race.”<sup>35</sup> Among other suggestions, the Task Force recommended more training of school personnel in multicultural awareness and increased opportunities for dialogue addressing race issues.<sup>36</sup>

School discipline has a number of deep-seated problems.<sup>37</sup> First, the racial aspects of school discipline virtually guarantees that the students who are expelled live in neighborhoods with less community supports and services. Family incomes in these areas are generally lower. Once a student is suspended

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*In re Beau II*, 738 N.E.2d 1167, 1171 (N.Y. 2000).

32. See generally TEXAS APPLESEED, TEXAS’ SCHOOL-TO-PRISON PIPELINE: DROPOUT TO INCARCERATION (2007) (drawing a convincing connection between school discipline policies and practices and involvement in the juvenile justice system).

33. RUSSELL J. SKIBA ET AL., THE COLOR OF DISCIPLINE: SOURCES OF RACIAL AND GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT 2 (Indiana Educ. Policy Ctr., Policy Research Report No. SRS1, June 2000), available at <http://www.indiana.edu/~safeschl/cod.pdf>; ADVANCEMENT PROJECT & CIVIL RIGHTS PROJECT AT HARVARD UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES vi (June 2000), available at [http://www.civilrightsproject.ucla.edu/research/discipline/opport\\_suspended.php](http://www.civilrightsproject.ucla.edu/research/discipline/opport_suspended.php); EDUCATION ON LOCKDOWN, *supra* note 15, at 7.

34. DISCIPLINE TASK FORCE, KNOX COUNTY SCHS., RACIAL DISPARITY IN SCHOOL DISCIPLINE TASK FORCE—FINAL REPORT 7 (Mar. 12, 2007) (unpublished report), available at [http://www.kcs.k12tn.net/reports/taskforce/discipline\\_task\\_force.pdf](http://www.kcs.k12tn.net/reports/taskforce/discipline_task_force.pdf).

35. *Id.* at 3, 7.

36. *Id.* at 1, 7.

37. See Marc Levin, *Schooling a New Class of Criminals? Better Disciplinary Alternatives for Texas Students*, POLICY PERSPECTIVE (Texas Pub. Policy Found., Mar. 2006), available at <http://www.texaspolicy.com/pdf/2006-03-PP-DAEP-ml.pdf>.



or expelled, the impetus to return to school is diminished. Long-term suspensions often lead to the practical termination of a student's educational career.

Second, school disciplinary rules are often fatally overbroad. "Behavior prejudicial to the good order" of the school<sup>38</sup> is hardly a standard that gives guidance to a student (or parents) on what types of behavior are subject to school discipline. Yet, standards such as this give administrators virtually unregulated discretion to exclude students for even minor misconduct. These codes provide a recipe for imposing exclusion on students who do not fit into the regimented nature of most public schools.<sup>39</sup>

Third, the minimal due process protections that were articulated in *Goss v. Lopez*<sup>40</sup> have become a facade for arbitrariness in determining both liability and punishment.<sup>41</sup> "Some kind of hearing"<sup>42</sup> has not protected students from administrators who impose their own idiosyncratic interpretations of school rules.

In serious cases, where the prospect of long-term exclusion is high, the full panoply of due process procedures is often not afforded to students.<sup>43</sup> The vast majority of students are not represented by counsel at these base school hearings.

Providing representation at these hearings could greatly improve students' chances. At least one concerted effort to supply counsel to students has yielded success in dropping the rates of expulsions and long-term suspensions.<sup>44</sup>

Finally, zero-tolerance policies have left a taint on schools from their prior misuse, though they are on the wane and often limited to serious offenses, such as gun possession or drug peddling.<sup>45</sup> Under these strict liability rules, where no finding of individual culpability or intent is necessary, school administrators do not have to exercise any discretion before excluding a student.<sup>46</sup> This mentality

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38. Tenn. Code Ann. § 49-6-3401(b)(1)(C) (Supp. 2007).

39. The broad discretion given to base-school administrators and appeals bodies—to set the duration of a suspension—mirrors the issue of sentencing discretion in criminal cases.

40. 419 U.S. 565 (1975).

41. Susel Orellana, *Advocacy at School Expulsion Hearings*, 9 AM.BAR ASS'N CHILD. RTS. LITIG. COMM. NEWSL. 5 (Winter 2007); Simone Marie Freeman, Note, *Upholding Students' Due Process Rights: Why Students Are in Need of Better Representation at, and Alternatives to, School Suspension Hearings*, 45 FAM. CT. REV. 638, 641–42 (2007).

42. *Goss*, 419 U.S. at 579.

43. See, e.g., *C.B. v. Driscoll*, 82 F.3d 383, 386 (11th Cir. 1996) ("[O]nce school administrators tell a student what they heard or saw, ask why they heard or saw it, and allow a brief response, a student has received all the process that the Fourteenth Amendment demands."); Freeman, *supra* note 41, at 641–42.

44. Libby Sander, *In School Expulsion Cases, a Little Legal Advice Goes a Long Way*, 29 CHI. LAW. 60, 61 (2006).

45. ADVANCEMENT PROJECT & CIVIL RIGHTS PROJECT, *supra* note 33; RUSSELL SKIBA ET AL., AM. PSYCHOLOGICAL ASS'N COUNCIL OF REPRESENTATIVES, *ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS* (2006), available at <http://www.apa.org/ed/cpse/zttfreport.pdf>.

46. See *Seal v. Morgan*, 229 F.3d 567 (6th Cir. 2000).

has bled into non-zero tolerance practices, giving administrators subtle power to make questionable findings in non-zero tolerance cases.

### C. Special Education

Students with disabilities are especially vulnerable to the mechanisms of exclusion.<sup>47</sup> Exclusion of students with disabilities takes many forms. Initially, families may not recognize that their child qualifies for special education services and protections. Often, warning signs are overlooked. Behaviors are attributed to notions that the student is simply choosing inappropriate actions, is lazy, lacks motivation, or comes from bad genes. Students fortunate enough to cross the threshold for evaluation often are improperly found not to have a qualifying disability. If a disability is diagnosed, students can be denied eligibility by a finding that the disability does not adversely impact a student's education. Evaluations that result in a finding of no disability often are marred by not being sufficiently comprehensive, with not all suspected areas of disability being evaluated. Even if the evaluation was sufficiently comprehensive, all areas of suspected disability may not be addressed in the Individualized Education Program (IEP).<sup>48</sup> In these cases, if the family is not apprised of their right to request an Independent Education Evaluation (IEE),<sup>49</sup> the family will forfeit what may be the student's last chance to be identified for special education services. Additionally, a student may qualify under the first requirement that they have a disability but not be found to satisfy the succeeding requirements of eligibility for special education services—namely a need for special education services in order to succeed not only academically but also functionally and developmentally.<sup>50</sup> Many decisionmakers only look at adverse impact on the student's academic achievement and do not consider the adverse impact on the student's functional and developmental progress. Whatever the reasons for the determination of ineligibility, students who need assistance are frequently bypassed.

Another group of students are not identified because some believe that aggressive intervention strategies might forestall the need to label a student as disabled. The 2004 IDEA Amendments allow schools to use 15% of IDEA funds to provide early intervening services (EIS)<sup>51</sup> to students at risk of needing special education services, prior to referral for evaluation. However, few rules prescribe which students fit this category, when or how parents are made aware of the

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47. Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 419 (2001).

48. See generally U.S. DEP'T OF EDUC., A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM (July 2000), available at <http://www.ed.gov/parents/needs/spced/iepguide/iepguide.pdf> (providing an overview of the IEP process).

49. 34 C.F.R. § 300.502(a) (2007).

50. 20 U.S.C. § 1401(3)(A)(i)–(ii) (2007); 20 U.S.C. § 1414(b)(3)(A)(ii) (2007); 34 C.F.R. § 300.301(c)(2).

51. 20 U.S.C. § 1413(f)(1) (2007); 34 C.F.R. § 300.226(a).

potential need to evaluate, or how EIS squares with a referral to evaluate. Such an option can distract the team from referring a student for evaluation. This can cause an even longer delay before students receive appropriate support and special education services.

School personnel may suspect that students have one or more of the so-called “hidden disabilities,” such as ADHD, ADD, Specific Learning Disabilities (SLDs), language processing disorders, and others. In these cases, the team can avoid using a trial period to ascertain whether the student has learning problems. The team may decide to use special Response to Intervention (RTI)<sup>52</sup> practices that are specifically recommended in conjunction with SLDs.<sup>53</sup> Problems arise when these methods become protracted and are never re-evaluated. As of yet, these methods have insubstantial scientific or objective grounds and few evidence-based procedures, which leaves students vulnerable to subjective variables.<sup>54</sup> Without a focused set of goals and strategies, a student may drift over time. If a school does not attend to the student’s problems, he or she may never attain comprehensive assistance through an IEP or a 504 plan.<sup>55</sup>

Some students exhibit challenging behaviors that cause them to be perceived as “just bad kids.” School administrators have used this as an excuse to exclude them or deny them evaluation. When these students are referred for evaluation, often the outcome is delay and an inaccurate and incomplete identification of disability is formed.<sup>56</sup> Also, school systems may, through less than aggressive outreach, avoid their IDEA “child find”<sup>57</sup> obligation proactively to identify and recommend students for evaluation.

School officials commonly use school discipline actions illegally to exclude students who they know are at risk of having a disability, instead of referring them for evaluation.<sup>58</sup> These students rise through the grades with little academic

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52. 34 C.F.R. § 300.307(a)(2).

53. See NAT’L JOINT COMM. ON LEARNING DISABILITIES, RESPONSIVENESS TO INTERVENTION AND LEARNING DISABILITIES (2005), available at <http://www.nclld.org/index.php?option=content&task=view&id=497>.

54. See CTR. FOR MENTAL HEALTH IN SCHS., MENTAL HEALTH IN SCHOOLS AND SCHOOL IMPROVEMENT: CURRENT STATUS, CONCERNS, AND NEW DIRECTIONS 4-1 to 4-10 (2008).

55. A 504 Plan specifies accommodations and modifications for students with qualifying impairments as defined by § 504 of the Rehabilitation Act. 29 U.S.C. § 701 et seq.; see 34 C.F.R. § 104.33.

56. A classic example of this practice involves students with ADHD. Despite specific categorization as a qualifying disability under the IDEA’s “Other Health Impaired” classification, school systems may refuse to certify any student diagnosed with ADHD on the theory that, with medication or therapy, the student’s behaviors can be manageably corralled. The corollary theory for excluding this entire segment of students is that the ADHD is not adversely affecting the student’s education because the student has passable grades.

57. 34 C.F.R. § 300.111.

58. Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 36 (2003).

success, while frequently being disciplined, suspended, or expelled. Many of these students also have problems in other parts of their lives, such as traumatic family circumstances, multiple moves resulting in different school settings, parental divorce, family drug abuse, and more. Even if finally evaluated, many students with a history of “behavior difficulties” also are not comprehensively assessed. This results in non-identification of hidden disabilities like learning disabilities, speech and language processing disorders, depression, and bipolar disorder.

When students with disabilities violate school rules or act in inappropriate ways, administrators may suspend them for no more than ten school days without it being a change in educational placement.<sup>59</sup> These students may be deprived of educational services during this time. If the suspension lasts for more than ten days, the school must conduct a manifestation hearing to determine whether a change of placement is appropriate.<sup>60</sup> The rules governing manifestation hearings changed in the 2004 IDEA Amendments. They gave greater latitude for schools to find that a student’s behavior is not a manifestation of the student’s disability.<sup>61</sup> As a consequence, although the student is still entitled under IDEA to receive continuing educational services, he or she may be transferred to an interim alternative educational setting.<sup>62</sup> These settings are places where virtually all students have exhibited challenging behaviors, and the quality of education is questionable. In these placements, a student’s IEP may be difficult, if not impossible, to implement. Some refer to these settings as “warehouses.” They are schools characterized by a maze of punitive processes and very little in the way of Positive Behavior Support,<sup>63</sup> procedures, or effective behavior intervention techniques. As a consequence of this neglect, students may be inhibited from making meaningful educational progress. Alienation from the education process is a logical consequence of such treatment.

Standardized test performance is another way to exclude students with disabilities. Many students with disabilities find standardized tests to be a frustrating barrier. Since the enactment of the accountability requirements in the No Child Left Behind Act of 2001,<sup>64</sup> all states have developed protocols that include standardized testing that students must successfully complete before they may graduate with a regular high school diploma. Often, challenged students need supplemental assistance to prepare them to take and to succeed in standardized testing. First, administrative staff must recognize that students have these needs. Second, they must create strategies to assist in preparation and successful execution of state tests. Students who are eligible for special

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59. 34 C.F.R. § 300.536(a).

60. 20 U.S.C. § 1415(k)(1)(E)(i) (2007).

61. *Id.* § 1415(k)(1)(E)(i)(I) (requiring that the student’s conduct be caused by or have a “direct and substantial relationship to” the disability).

62. 34 C.F.R. § 300.530(d)(2).

63. 20 U.S.C. § 1414(d)(3)(B)(i) (2007); 34 C.F.R. § 300.324(a)(2)(i).

64. 20 U.S.C. § 6301 (2007) (reauthorizing the Elementary and Secondary Education Act of 1965).

education services should have this incorporated in their overall program far in advance of testing.<sup>65</sup> Without the existence of adequate programs, many students fail these tests, and thus, they do not receive regular diplomas. Future gainful employment could hang in the balance.

Students with disabilities also must have transition services plans incorporated into their IEPs by age sixteen.<sup>66</sup> These services must include “[a]ppropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and . . . [t]he transition services (including courses of study) needed to assist the child in reaching those goals.”<sup>67</sup> Such services are crucial to the futures of students with disabilities, considering that students with disabilities have more trouble fitting into real-life roles without preparation and transition. Many educators do not provide adequate transition services to students with disabilities, despite this being their last chance for a successful transition from high school into higher education, the working world, or independent living. The 2004 IDEA Amendments significantly tightened schools’ responsibilities to ensure that a meaningful transition plan is created and implemented.<sup>68</sup>

#### D. Truancy

Compulsory education laws compel schools to enforce attendance policies. State funding and NCLB requirements have heightened the focus on ensuring that students attend school regularly. The concept of truancy is an old one.<sup>69</sup> Today, the once feared truant officer has transformed into a team composed of school personnel, juvenile court staff, district attorneys, and social services representatives. Parents are warned about their child’s poor attendance, excoriated for the child’s behavior, and sometimes prosecuted for neglect.

However, truancy laws fail to address the root causes of a student’s aversion to school.<sup>70</sup> Some truants are actually students with unidentified special

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65. 34 C.F.R. § 300.324(a).

66. 34 C.F.R. § 300.320(b).

67. 43 C.F.R. § 300.320(b)(1)–(2).

68. The goals of a transition plan must now be measurable, and the transition services designed to achieve these goals must be included in the student’s IEP. 34 C.F.R. § 300.320(b). Also, if an outside agency fails to provide the student with the required transition services, an IEP team must be reconvened to identify alternative strategies to meet the transition objectives. 34 C.F.R. § 300.324(c)(1).

69. See, e.g., Harold O. Levy & Kimberly Henry, Op-Ed., *Mistaking Attendance*, N.Y. TIMES, Sept. 2, 2007, § 4, at 11. The article states, “America is awash in casual truancy,” further noting that “[s]kipping school has been going on since biblical times,” and that insufficiently meaningful statistics perpetuate denial about the problem and failure to identify appropriate solutions. *Id.*

70. See Lorenzo A. Trujillo, *School Truancy: A Case Study of a Successful Truancy Reduction Model in the Public Schools*, 10 U.C. DAVIS J. JUV. L. & POL’Y 69, 83 (2006) (describing a successful early intervention program for reducing truancy).

education needs.<sup>71</sup> Tighter rules for screening and evaluation are a necessary step for identifying why these students stop attending school. For students already certified under the special education laws, truancy penalties are not the answer.<sup>72</sup> Instead, an IEP or 504 team should meet promptly to ascertain what in the student's IEP or section 504 plan needs to be modified. The team may need to introduce or intensify services, such as social work or psychological counseling. The team may even formulate wrap-around services, which are a heavy regime of support for the student and her family.

Before prosecuting parents or students, truancy enforcers should exhaust a number of other explanations.<sup>73</sup> For example, bullying has received attention both in the popular press and by school systems and legislatures.<sup>74</sup> School systems and courts should first protect students vulnerable to bullying before taking action against the family. Likewise, schools should explore whether an insensitive or poorly trained teacher could be the cause of a student's skipping school before punishing the student for truancy.

#### *E. Push-Out Practices*

Some schools resort to "push-out" practices with students who perform poorly and are not eligible for special education protections. These schools appear more concerned about test scores and higher achievement than reaching troubled students. Sometimes these practices of exclusion are subtle. For example, a school administrator tells a student that her best option is to drop out and take the GED because she is behind in credits for graduation. These "drop-outs" often fail to receive either a GED or regular diploma. Litigators in New York City have successfully challenged one type of exclusionary practice,<sup>75</sup> but most are under the radar of effective accountability.

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71. See *West Lyon Community Sch. Dist. and Northwest Area Educ. Agency*, 48 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 232 (State Education Agency Iowa 2007) (finding school violated IDEA by failing to evaluate student's psychological needs based on chronic absenteeism).

72. See, e.g., *Independent Sch. Dist. No. 284 v. A.C.*, 258 F.3d 769 (8th Cir. 2001) (holding that student's truancy was caused by an emotional disability and required a residential placement).

73. The tragic death of 16-year-old Kaleb Shelton illustrates this point. Jim Balloch, *DCS Defends Omni Visions*, KNOXVILLE NEWS-SENTINEL, Dec. 17, 2007, at B1, available at <http://license.icopyright.net/user/viewFreeUse.act?fuid=NjQxNTyO>. Kaleb had a learning disability. *Id.* He was prosecuted for truancy, eventually expelled from school, and placed in foster care. *Id.* He died at the hands of his foster father. *Id.*

74. TENN. CODE ANN. §§ 49-6-1014 to -1019 (2002).

75. See generally Elisa Hyman, *School Push-Outs: An Urban Case Study*, 38 CLEARINGHOUSE REV. 684 (2005) (describing the litigation and awareness campaign).

*F. Alternative Education*

Many school districts do not maintain alternative schools to educate students whom they suspend or expel for infractions of school rules.<sup>76</sup> Lengths of suspensions vary, but suspensions and expulsions last anywhere from one to 180 days. Even the shorter suspensions can harm a student's educational progress when students miss tests and school work. A 180-day expulsion for a zero tolerance offense often means that a student will miss two or three semesters of school, a sure incentive to drop out.

Even in school systems that offer alternative education, barriers to participation exist. Many systems do not provide transportation to alternative schools.<sup>77</sup> This is especially burdensome when the alternative programs meet at night or in parts of town not readily accessible by public transportation. Students who can attend an alternative school program often face inadequate instruction.<sup>78</sup>

*C.S.C. v. Knox County Board of Education*<sup>79</sup> involved a three-hour, four-day-a-week Night Alternative Program (NAP), which only offered computer-based programs and did not cover all aspects of the State's required curriculum.<sup>80</sup> A challenge to the adequacy of the instruction under state regulations failed. The court held that such instruction was within the exclusive province of the school system.<sup>81</sup> Likewise, state regulations required educators to make counseling services "accessible" to students in alternative schools.<sup>82</sup> Despite testimony showing that the school system had not provided such behavioral services in two-years, the court did not require the system to develop a written plan for providing such services.<sup>83</sup> Such inattention to deficient services in alternative schools is all too common.<sup>84</sup>

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76. See, e.g., DIGNITY IN SCHOOLS CAMPAIGN, ALTERNATIVE SCHOOLS AND PUSHOUT: RESEARCH AND ADVOCACY GUIDE (2007).

77. See, e.g., *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 461–62 (1988) (upholding a North Dakota law allowing local school boards to charge families a user fee for bus service). Justice O'Connor remarked, "The Constitution does not require that such service be provided at all . . . ." *Id.* at 462.

78. David J. D'Agata, *Alternative Education Programs: A Return to "Separate but Equal?"*, 29 NOVA L. REV. 635, 640 (2005).

79. *C.S.C. v. Knox County Bd. of Educ.*, No. E2006-00087-COA-R3CV, 2006 WL 3731304, at \*1 (Tenn. Ct. App. Dec. 19, 2006).

80. *Id.* at \*1–3, 7.

81. *Id.* at \*7–9.

82. *Id.* at \*9.

83. *Id.*

84. See generally JOHN G. MORGAN, COMPTROLLER OF THE TREASURY, TENNESSEE'S ALTERNATIVE SCHOOLS (April 2005), available at [http://www.comptroller1.state.tn.us/repository/re/final\\_alt\\_school.pdf](http://www.comptroller1.state.tn.us/repository/re/final_alt_school.pdf) (last visited Jan. 18, 2008).

### G. Education in Jails and Correctional Institutions

Incarcerated youths in juvenile detention facilities or state youth prisons often receive inferior educational services.<sup>85</sup> Students who are or should be in special education services are particularly vulnerable. The prison staff have free reign to fit students in an education program, rather than tailoring a program for individual students. The lack of advocates for students exacerbates this situation.

Youths who have been transferred from juvenile courts to adult jails often do not receive any education, despite long waiting periods for a plea or trial.<sup>86</sup> Criminal defense lawyers customarily do not push for educational services in jail out of genuine concern that their clients might disclose harmful information. As a consequence, these youths never receive even basic instruction.

### H. General Inadequacy of Educational Opportunities

The inadequate distribution of resources in many school systems (not the statewide issue of school financing, but its local counterpart) creates pockets of schools that lack a number of ingredients for good education. These schools are invariably in poorer areas of the community, those that disproportionately house a sizeable number of households of color. Although, in part, NCLB was designed to redress these inequities, they persist all around the country. Schools in this category lack decent facilities, advanced courses, experienced teachers, guidance counselors, meaningful early intervention programs, diverse extracurricular activities, and other criteria of quality education. Some school administrators fail to implement even the remedial measures of NCLB, such as after-school tutoring programs for students in “failing” schools.<sup>87</sup> The connection between inadequate distribution of resources and school drop-out rates is not easily documented. Some blame entrenched local politics of school boards and municipal government—matters largely insulated from judicial review.

## III. CONFRONTING SCHOOL EXCLUSION IN THE COURTS: OPPORTUNITIES AND ISSUES, COMPLEXITIES AND CONTRADICTIONS

### A. Motivations Behind School Exclusion

Motivations behind exclusionary policies and practices are mixed and complex. They implicate profound questions about democracy and education. Despite glowing rhetoric about the importance of education to our economic,

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85. See, e.g., *Marcus X. v. Adams*, 856 F. Supp. 395 (E.D. Tenn. 1994) (describing the inadequate services provided to one student while in a juvenile correction facility).

86. *Doe v. Knox County*, No. 143196-2 (Tenn. Ch. Ct. filed June 7, 1999).

87. Rhea R. Borja, *Companies Want Changes in NCLB Tutoring Policies*, EDUC. WK., January 24, 2007, at 10, available at <http://www.edweek.org/ew/articles/2007/01/24/20tutor.h26.html>.



political, and social systems, school exclusion remains a well-kept secret, except to the families that it affects. To understand the roles that lawyers and courts play—or should play—one must begin by examining the motives underlying school exclusion.

### 1. Racial and Ethnic Currents

Many schools have not yet embraced the vast social and cultural changes that are transforming public education today. Institutional racism is prevalent. Its subtlety makes it difficult to discuss, much less root out. The same holds true with the cross-cultural currents that are infused into public education. Elected school boards and politicians sometimes make change slow and difficult.

### 2. Regimentation

For a long time, the scheme of public education has conflicted with the needs and expectations of growing segments of the school-age population. Critics fault the NCLB for allowing rigid testing to push weaker students by the wayside. Until the education community appreciates the necessity of plans for all students, not just for students with disabilities, the failure to adapt to different learning needs will continue to frustrate many students and their families. Without intending to oversimplify, this frustration on the part of the students often manifests itself as “bad behavior,” which is then used as a justification to exclude students.

### 3. Politics

Schools exclude students with problematic behaviors because parents of other students complain that these students create disruptions in the classroom or pose safety problems. These concerns should not be dismissed. They usually stem from good-faith efforts on the part of the majority of parents in a school to protect their children. However, parents can overreact, and they can put serious pressure on school administrators. If a principal fails to remove or isolate a problematic student, complaints to the superintendent or the school board could stall that principal’s career. Majority rule has driven public education throughout history. The topic of exclusion is no exception, no matter how vulnerable a particular student or class of students may be.

### 4. Failure to Adopt Evidence-Based Practices

School systems change slowly. Many universities’ schools of education maintain cozy relationships with their local and statewide school systems for a variety of self-serving purposes. Nevertheless, some institutions are conducting cutting-edge research on issues of behavioral support. School reform advocates say that anti-exclusion solutions should be directed primarily at school employees, and not solely focused on students. Educational pioneers are testing

promising reforms, such as school-wide programs of positive behavioral intervention and supports, at school systems across the country.<sup>88</sup> These programs focus on ending the practice of referring normal disciplinary action to the courts and reducing the number of suspensions and expulsions. They also attempt to create a climate of tolerance and good citizenship among students and teachers. Yet, supporters of the status quo often resist these innovations because they conflict with the prevailing philosophy about school discipline.

### B. Why Litigation?

Whether conducted by legal clinics, legal services programs, nonprofit public interest law firms, private attorneys, or government agencies, litigation over school exclusion must be carefully thought through. Blending direct representation of individual students with systemic reform strategies requires a comprehensive understanding of the local context. This includes becoming familiar with the school system, the state and federal courts, the advocacy community, grassroots groups, and the political landscape. A court-focused, rights-based approach may set back reform efforts if the conditions are not ripe for change. On the other hand, restraint from litigation sometimes means ignoring individual needs, which creates cruel paradoxes for lawyers in this field.

This highlights some of the challenges of modern day public interest lawyering.

In *Law and School Reform: Six Strategies for Promoting Educational Equity*,<sup>89</sup> various authors adduced several rationales in favor of using litigation to confront educational inequities like school exclusion. Their justifications include the following: (1) to compel additional resources and accountability to fill gaps

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88. See, e.g., Press Release, All American Patriots, Barack Obama: Obama, Durbin, Hare Introduce Bill to Improve Student Behavior in Schools (Oct. 3, 2007), available at <http://www.allamericanpatriots.com> (search "All American Patriots" for "Bill to Improve Student Behavior"; then follow "Barack Obama" hyperlink); Press Release, S. Poverty Law Ctr., SPLC Wins Special-Education Services for Baton Rouge Students (Nov. 16, 2006), available at <http://www.splcenter.org/news/item.jsp?aid=224>. Positive behavior intervention and supports is a school-wide program in which all school personnel are trained to recognize students with emotional problems and to respond to these students using proven methods of behavioral support. See generally Positive Behavioral Interventions and Supports, School-Wide PBS, <http://www.pbis.org/schoolwide.htm> (last visited Jan. 18, 2008) (describing and promoting this discipline).

89. LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY (Jay P. Heubert ed., Yale Univ. Press 1999). This excellent volume strikes chords of hope and doubt about reliance on litigation to achieve education reform. There is little question that in certain areas—school finance or special education—litigation precipitated profound changes in the provision of educational services to children in poor school districts and to disabled students. But proper skepticism about the fine balance of law, policy, politics, and advocacy in this field pervades the volume, as it does in this Article. See also Michael Heise, *Litigated Learning, Law's Limits, and Urban School Reform Challenges*, 85 N.C. L. REV. 1419 (2007); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003).

education to vulnerable groups, (2) to correct market failures in the distribution of educational resources, (3) to correct bureaucratic failures, (4) to challenge political power, and (5) to give parents a “voice” in educational decision-making.<sup>90</sup> As described in the book’s six case studies of education reform litigation, realizing these goals can precipitate meaningful changes for marginalized students. But the test of litigation’s mettle is whether a judge’s decree will bring about lasting reform. The question remains as to whether litigation will alienate future “collaborative” efforts for change or stifle relationships necessary for lasting success.

Other compelling reasons support turning to litigation to redress school exclusion. A major reason is the opportunity to respond to a specific child and family in crisis. Parents do not turn to lawyers willy-nilly just to sue their children’s schools. They hire lawyers as a last resort when their concerns have been ignored for a long period. Even a short time out of school can harm a student’s academic progress and cause emotional distress. Labeling a student as “bad” can cause long-term consequences for a child’s development. A lawyer might be in an ideal position to protect a student from exclusion by litigating existing rules.

Still, a myopic focus on individual cases, however successful under conventional measures, may stymie changes that would benefit the same student throughout her school career. Public interest lawyers must weigh this possibility in light of a system where the unmet need for legal representation outpaces the available supply of knowledgeable lawyers. Because the bulk of for-profit education representation is conducted by small firms or solo practitioners, these lawyers’ financial needs may prevent them from taking clients who are unable to pay even a reduced fee. Turning away a potential client is a serious matter. In some settings, non-lawyer advocacy organizations may assist families in representing their child’s needs, especially in special education cases that do not reach the due process administrative hearing level.<sup>91</sup> But many cases require skilled lawyers with working knowledge of the technical and institutional dimensions of education representation. Meeting the immediate needs of a child may be the right course to take from both an ethical and moral standpoint. All legal players in this field must set priorities; not every individual case can be served. Lawyers must carefully examine the waterwheel of cases to determine where the limited legal resources can be most effectively allocated.

### C. *Why Not Litigation?*

Deciding between using either litigation or extrajudicial advocacy to combat school exclusion is unnecessary. A blend of strategies is the hallmark of modern

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90. LAW AND SCHOOL REFORM, *supra* note 89.

91. See Stephen A. Rosenbaum, *The Juris Doctor Is In: Making Room at Law School for Paraprofessional Partners*, 75 TENN. L. REV. 315, 323–29 (2008) (describing the unique opportunities of paralegals to engage in advocacy on behalf of parents and students in the special education setting).

public interest advocacy, regardless of the field. But striking an appropriate balance depends on trained vision and good timing.<sup>92</sup> Legal strategists must account for pitfalls in anti-exclusion litigation when developing a long-range advocacy strategy.

First, as *Brown v. Board of Education*<sup>93</sup> and its progeny have demonstrated, establishing a new rule that will benefit an individual client or even a class of persons is not always enough to fix the underlying policy or practice. Unless careful attention is paid to implementation, bureaucratic resistance and maneuvering can attenuate new rules. To ensure full relief, lawyers must coordinate with savvy clients or advocacy organizations. This takes vigilant, time-consuming, and resource-intensive monitoring.<sup>94</sup>

Second, enforcement is often necessary but difficult. Returning to the court that granted the relief is sometimes problematic. Judicial attention and resolve can wane. State judges, most of whom are elected, inevitably keep an open eye on the impact of a decision against the education system, which is often a community's largest municipal agency. The history of serial enforcement in prison litigation cases shows how political backlash can erase an otherwise promising judgment.<sup>95</sup> Concerns about judicial expertise, separation of powers, and the cost of implementation can intrude on the enforcement process, freezing the relief that was granted.

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92. See Monique L. Dixon, *Combating the Schoolhouse-to-Jailhouse Track Through Community Lawyering*, 39 CLEARINGHOUSE REV. 135, 141–43 (2005); Amy M. Reichbach, *Lawyer, Client, Community: To Whom Does the Education Reform Lawsuit Belong?*, 27 B.C. THIRD WORLD L.J. 131 (2007) (describing the difficulty of keeping focus on the client-lawyer relationship and the significance of client autonomy during the course of complex NCLB reform litigation). The debate over the proper balance of legal and extralegal strategies for reform is ongoing. See Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007); Scott Cummings, *Critical Legal Consciousness in Action* (UCLA Sch. of Law Pub. Law & Legal Theory Research Paper Series, Research Paper No. 07-24; NYLS Clinical Research Inst., Research Paper No. 07/08-5, 2007), available at <http://ssrn.com/abstract=998040> (last visited Jan. 18, 2008) (responding to the Lobel article).

93. 347 U.S. 483 (1954).

94. Implementation committees, paid for by government defendants and composed of representatives of the plaintiffs, have been effective in public institutional cases involving the environment and prisons and jails. See generally Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004). In the context of school exclusion, meaningful reform should involve the institution of school-wide practices that focus on preventing conflict and chronic behavior issues. Today, a program called "Positive Behavior Interventions and Supports" (PBIS) represents a promising alternative to the current system of exclusion. National Technical Assistance Center on Positive Behavioral Interventions and Supports, <http://www.pbis.org/> (last visited Feb. 18, 2008). Implementing such a program must involve a lawyer with the school community in sustained ways.

95. Harvey Berkman, *Proud and Wary, Prison Project Director Bows Out*, NAT'L L.J., Jan. 8, 1996, at A12 (observations of ACLU Prison Project Director Alvin Bronstein).

Third, long-term implementation can become too lawyer-centric. Without mechanisms for involving affected clients in the post-decree, there is real danger in leaving too much decision-making power in lawyers' hands, which removes cases from the evolving realities of the clients' needs and concerns.<sup>96</sup> Questions of accountability, endemic to class action litigation, arise.<sup>97</sup> Lawyers must account for the time it takes to address these dynamics when planning their commitment to a case.

Fourth, anti-exclusion litigation, especially in special education cases, may be too specialized for lawyers who do not concentrate in the field or who do not have steady back-up resources to consult on an ongoing basis. For example, public defenders would be a natural corps of lawyers to litigate anti-exclusion cases regularly. But many public defender offices already stretch staffing beyond advisable capacity. Also, litigating education cases would take a back seat to the daily grist of criminal defense.<sup>98</sup>

Fifth, anti-exclusion cases inevitably drift into litigation that challenges the adequacy of education. As illustrated in *C.S.C.*, such challenges are rarely successful, even with access to representation.<sup>99</sup> In that case, after the court established the right to alternative education under state constitutional and statutory rules, the plaintiffs were compelled to challenge the adequacy of the alternative program that the school system created in response to the threshold ruling.<sup>100</sup> As is discussed above, the effort failed.<sup>101</sup> History has shown that adequacy challenges require intensive fact investigation, close client communications, substantial discovery, and expert testimony. Such challenges have taken decades to litigate in New York City and Boston<sup>102</sup> and thus represent a daunting prospect for many clinics and nonprofit public interest firms.

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96. See Jennifer Gordon, Essay, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133 (2007).

97. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); see also Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 341 (1978) (arguing that in the public interest arena, "the ability of clients who are being represented to keep their attorneys accountable is limited by their lack of economic leverage").

98. Thoughtful public defender programs such as the Public Defender Service in Washington, D.C., and Washington state's public defender service have staff attorneys dedicated to education work for their juvenile clients, but these programs are the exception.

99. *C.S.C. v. Knox County Bd. of Educ.*, No. E2006-00087-COA-R3CV, 2006 WL 3731304, at \*1, \*16 (Tenn. Ct. App. Dec. 19, 2006).

100. See *supra* notes 79–82 and accompanying text.

101. See *supra* notes 83–84 and accompanying text.

102. See, e.g., *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134 (Mass. 2005); Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 348–50 (N.Y. 2003) (issuing a remedial order as the culmination of more than a decade of litigation); Campaign for Fiscal Equity, *CFE v. State: Ensuring Every New York Child Their Constitutional Right to a Sound Basic Education*, available at [http://www.cfequity.org/Litigation\\_Update\\_1page.pdf](http://www.cfequity.org/Litigation_Update_1page.pdf) (last visited Jan. 18, 2008).

## IV. CONCLUSION

The campaign to reduce or eliminate school exclusion involves complicated local and national strategies. Litigation is one component, but it should not be the exclusive focus. Rather, litigation should be reserved for situations where individual needs are critical. The growing recognition of the legal needs in this field will bring much trial and error. Candid sharing of experiences among the involved lawyers, advocates, and clients will be indispensable to long-term reform.

Law schools' legal clinics can play an important role in this effort.<sup>103</sup> Clinical law teachers understand and care about pedagogy. They are uniquely suited to judge the quality of education. For clinics in universities with progressive education schools, opportunities for interdisciplinary learning and collaboration exist. Clinics reluctant to embark on cases that logically lead to "impact" work can focus on target schools. School disciplinary hearings are typically short matters, ideal for law student representation. Aggregating a number of these cases may reveal patterns in disciplinary practices that could persuade even entrenched school administrators—without pursuing "impact" litigation—to revise their policies and practices.

There are downsides, however, that must be addressed. Once a community learns that a law school legal clinic is occupying this field, the clinic could experience a deluge of clients seeking representation. Also, on a personal level, clinicians and clinic students frequently have children in the same school system and would understandably not be immune to concerns about retaliation, however remote. These considerations should be weighed prudently, deliberatively, and collaboratively. As Justice Brennan recognized, the work itself is an expression of democracy that often does not inhere in private litigation. Being part of the solution to school exclusion, not part of the problem,<sup>104</sup> requires creativity, sensitivity, and vision. Clinics should cultivate, inculcate, and model these attitudes and qualities.

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103. Three recent articles offer sophisticated analyses of the importance of broad-gauged education and advocacy strategies in law school legal clinics. See Anthony V. Alfieri, *(Un)covering Identity in Civil Rights & Poverty Law*, 121 HARV. L. REV. 805, available at <http://www.harvardlawreview.org/issues/121/jan08/alfieri.shtml>; Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. (forthcoming Apr. 2008), available at <http://ssrn.com/abstract=1022366>; Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law"*, 2005 WIS. L. REV. 455 (2005).

104. See Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 108 (1977) (arguing that many federal aid programs "may be supporting the very inequalities that brought a federally financed legal aid program into being").