

THE BEST DEFENSE IS A GOOD
OFFENSE: INCORPORATING SPECIAL
EDUCATION LAW INTO DELINQUENCY
REPRESENTATION IN THE JUVENILE
LAW CLINIC

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INTRODUCTION

In the spring of 1992, the District of Columbia School of Law (DCSL) initiated a special education advocacy project within its Juvenile Law Clinic. DCSL hired a lawyer with expertise in special education law to work with the other clinicians and law students participating in the Juvenile Law Clinic to provide special education representation for children in juvenile delinquency matters.

Part I of this Article defines the goals of the special education advocacy project. The goals fall into the following three categories: 1) direct service goals for DCSL delinquency clients; 2) educational goals

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for law students in the DCSL Juvenile Law Clinic, and 3) goals for raising the standard of practice in the community.

Part II describes the systemic problems that prompted DCSL to initiate the project. A large percentage of children in the delinquency system have undiagnosed educational problems and unmet educational needs. Prosecutors, defense attorneys, probation officers, judges, and other persons in the delinquency system continuously ignore children's special education needs and fail to recognize the causal connection between educational problems and delinquent conduct. These actions maintain a system that ultimately harms the children.

The remainder of the Article examines methods for implementing this project. Part III explores client service considerations and objectives of the project. Part IV describes the pedagogical design of the clinic. Finally, Part V provides a brief discussion of plans for raising the standard of practice in the community.

I. THE GOALS OF DCSL'S SPECIAL EDUCATION ADVOCACY PROJECT

The first goal of DCSL's special education advocacy project is to improve client service. The project seeks to use special education law to address educational problems underlying the delinquent conduct of DCSL's juvenile clients and, in the process, extricate those clients from the delinquency jurisdiction of the court. In a delinquency matter in the District of Columbia, a prosecutor has the burden of proving not only that a child has committed the alleged offense, but also that the child is "in need of care and rehabilitation."¹ If a child receives appropriate services or treatment from agencies outside of the court, a prosecutor cannot sustain the latter burden because that child requires no *further* care or rehabilitation. Moreover, a defense attorney can preempt the prosecution of a juvenile who has received treatment outside of court by arguing that there is no need for "care and rehabilitation" through the court system. Therefore, by obtaining the appropriate educational services for DCSL delinquency clients, the clinical supervisors and law students will often have delinquency cases dismissed.

The second DCSL special education advocacy project goal is to train law students to work proactively. In essence, law students will study,

1. D.C. CODE ANN. § 16-2301(6) (1989 Repl.) (providing that "[t]he term 'delinquent child' means a child who has committed a delinquent act and is in need of care and rehabilitation").

adapt, and implement the strategy outlined above of transforming delinquency defendants into special education plaintiffs. Rather than relying exclusively on delinquency defense strategies such as suppression of evidence or affirmative defenses, law students will develop alternative solutions and strategies through the special education system. In addition, students will learn that an attorney can address a client's underlying problems and, at the same time, provide an effective defense to a delinquency charge. On a more conceptual level, the law students' challenge is to integrate knowledge from two areas of the law: delinquency and special education.

The third program goal is to raise the standard of practice in the community. Specifically, the program seeks to train lawyers in the community who regularly represent children in delinquency matters to use special education law proactively for their clients. To accomplish this goal, DCSL will present a series of training sessions for lawyers. In addition, DCSL will also establish a network of private, special education legal experts who are willing to accept referrals from attorneys representing children in delinquency cases.

II. A STATEMENT OF THE PROBLEM: THE FAILURE TO ADDRESS EDUCATIONAL NEEDS OF PRE-DELINQUENT AND COURT-INVOLVED YOUTH

Each year, thousands of children in the District of Columbia enter the juvenile delinquency system.² The majority of these children have learning disabilities, emotional disturbances, or mental retardation.³ Family Division judges, probation officers, juvenile prosecutors, and defense attorneys typically lack the training to recognize educational disabilities. Moreover, they are generally ignorant of special education law. Consequently, children in the delinquency system do not receive the special educational services they need, and the juvenile court consistently fails in its mission to ensure proper care and rehabilitation for children.⁴ In the District of Columbia, the average child in the delin-

2. District of Columbia prosecutors annually file over four thousand delinquency cases. DISTRICT OF COLUMBIA COURTS: ANNUAL REPORT 75 (1990).

3. Congress has labeled these children as "children with disabilities" under the Education of the Handicapped Act, 20 U.S.C. § 1401(a)(1) (1988) which defines "handicapped children" as those who are "mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services."

4. The prevalence of educational disabilities among children in the delinquency sys-

quency system has fallen approximately two school years behind the peer group in actual school placement. In academic achievement, the average child in the delinquency system is an additional three to four years behind the peer group. In concrete terms, the average child in the delinquency system should be in the ninth or tenth grade, but is only in the seventh or eighth grade. Furthermore, that child is functioning at the fourth-grade level in reading, language development, and math.⁵ The overwhelming majority of court-involved youth in the District of Columbia — perhaps eighty-five percent — have not been evaluated to determine whether they are disabled and would therefore qualify for special education services.⁶

Undetected educational deficiencies may be a fundamental cause of juvenile delinquency.⁷ Therefore, the failure of judges, probation officers, and attorneys to recognize and address the educational deficiencies of children in the delinquency system may yield more delinquent conduct.

Children with learning disabilities, emotional disturbances, or mental retardation tend to misunderstand their legal rights⁸ and to have difficulty assisting defense counsel in the preparation and presentation of their cases. A child whose intelligence and adaptive skills indicate at least moderate mental retardation⁹ is eligible for a dismissal

tem is well documented. See, e.g., Susan P. Leviton & Nancy B. Shuger, *Maryland's Exchangeable Children: A Critique of Maryland's System of Providing Services to Mentally Handicapped Children*, 42 MD. L. REV. 823, 843 n.125 (1983).

Juvenile correctional administrators report that over 42% of the incarcerated delinquent population have handicapping conditions. The most common handicapping conditions in this population are emotional disturbance (16%), specific learning disability (10%), and mental retardation (10%). Other studies indicate that the incidence of specific learning disabilities in this population ranges as high as 80%.

Id.

5. Nancy Opalack, *School Related Problems of the Court Referred Youth: An Academic Profile 2* (1984) (unpublished manuscript, on file with the DCSL Juvenile Law Clinic).

6. *Id.*

7. See, e.g., Margaret S. Bearn, Note, *Disciplinary Exclusion of Handicapped Students: An Examination of the Limitations Imposed by the Education for All Handicapped Children Act of 1975*, 51 FORDHAM L. REV. 168, 188 n.138 (1982) (noting that "[a]mple evidence exists that extreme misbehavior in children often results from a mental or neurological handicap that is not readily detected").

8. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (providing that the *Miranda* warning includes the right to remain silent and the right to an attorney).

9. D.C. CODE ANN. § 6-1902(2) (1989) provides:

of a delinquency matter and referral to the mental retardation system.¹⁰ A child who functions above the moderate range and is not eligible for a dismissal nonetheless may be incompetent to assist defense counsel.¹¹ Moreover, these children, even when innocent of any delinquent act, tend to be ineffective or counterproductive as witnesses.

Currently, no lawyers in the District of Columbia provide special education legal representation for their clients in delinquency cases. In addition, attorneys representing children in delinquency matters rarely refer these cases to attorneys who can provide special education representation.

If attorneys advised their delinquency clients of their special education rights and then pursued those rights, attorneys often could extract children from the delinquency system altogether. Indeed, the juvenile court is authorized to dismiss a delinquency case "for social reasons" under the District of Columbia Superior Court Juvenile Rule 48(b).¹² The comment to that rule advises that the court may "dismiss cases inappropriate for [court] action and refer them to appropriate social agencies."¹³ For an educationally handicapped child, the "appropriate

"[M]oderately mentally retarded" means a person who is found, following a comprehensive evaluation, to be impaired in adaptive behavior to a moderate, severe or profound degree and functioning at the moderate, severe or profound intellectual level in accordance with standard measurement, as recorded in the Manual of Terminology and Classification in Mental Retardation, 1973, American Association on Mental Deficiency.

Id.

10. D.C. CODE ANN. § 16-2315(c)(1) (1989) (providing that the Family Division shall also suspend the legal proceedings against the child).

11. See *In re W.A.F.*, 573 A.2d 1264, 1267 (D.C. 1990) (holding that the same need exists to determine competency to stand trial for a child as for an adult).

12. D.C. SUPER. CT. JUV. R. 48(b) (1990) provides in pertinent part: "Even though the [delinquency court] may have required jurisdiction, it may at any time during or at the conclusion of any hearing dismiss a petition and terminate the proceedings relating to the child, if such action is in the interests of justice and the welfare of the child." *Id.*

The philosophy of the juvenile system prioritizes the welfare and rehabilitation of the individual child over the factual determinations of guilt or innocence. *In re M.C.F.*, 293 A.2d 874, 877 (D.C. 1972). Furthermore, a trial court may dismiss a petition for social reasons when the juvenile named in the petition is "not in need of care and rehabilitation" and thus is not a "delinquent child." *In re C.S. McP.*, 514 A.2d 446, 450 (D.C. 1986). See generally *Kent v. United States*, 383 U.S. 541, 554 (1966) (noting that the juvenile court's major goal is to determine the needs of the child and society and not the adjudication of criminal behavior); *In re L.J.*, 546 A.2d 429, 438 (D.C. 1988) (same).

13. D.C. SUP. CT. JUV. R. 48(b) cmt. (1990) (noting that the judge has broad discretion).

agency" might be a proper special education placement.

For most of the children with special needs, the District of Columbia's delinquency system does not provide rehabilitation. The District of Columbia consistently fails to generate educational programs, foster care placements, counseling, and other services which would help to stem recidivism and alienation among our youth. Intake probation officers process cases rather than provide confidential social services. The District of Columbia also fails to provide local residential treatment options for emotionally disturbed children. Moreover, juvenile incarceration facilities are overcrowded and understaffed, and officials operating these facilities do not protect the children from physical and emotional harm. Judges unnecessarily incarcerate many young District of Columbia residents because they fail to distinguish neglected or homeless children from dangerous children.¹⁴

Over the past six years, the District of Columbia has failed to implement numerous provisions of a consent decree ordered in *Jerry M. v. District of Columbia*.¹⁵ That order requires the District of Columbia to provide, among other things: intensive services for youths raised in substance-abusing families, therapeutic foster homes, an entrepreneurial program for reforming drug dealers, secure shelter houses, and various educational and vocational services.¹⁶

The court-appointed monitor reported to the judge presiding over the *Jerry M.* case that the District of Columbia's "non-compliance

14. A disproportionate number of children in the delinquency system suffer neglect. Like educational handicaps, child neglect fundamentally causes delinquency. Unfortunately, lawyers representing children in District of Columbia delinquency cases also lack sufficient training to raise child neglect issues within the context of a delinquency case.

The author is currently researching the treatment of neglected children in the delinquency system. The central goal of that research focuses on developing strategies that will force judges, probation officers, social workers, and prosecutors in the delinquency system to recognize and remedy child neglect. The development and dissemination of strategies for representing neglected children in the delinquency system is analogous to the special education advocacy project outlined in this Article.

In a second phase of expansion, DCSL's Juvenile Law Clinic anticipates adding a staff attorney with expertise in child abuse and neglect representation. Ideally, during this second phase, DCSL would identify sufficient resources to add to the clinical team a social worker with expertise in children services to the clinical team.

15. See generally *District of Columbia v. Jerry M.*, 571 A.2d 178 (D.C. 1990) (representing a class of committed children detained at District of Columbia juvenile institutions); *Jerry M. v. District of Columbia*, 119 Daily Wash. L. Rep. 2581 (Super. Ct., Dec. 3, 1991).

16. 119 Daily Wash. L. Rep. at 2583-85.

[with the consent decree] is substantial, and there are no grounds to assume that [they] will comply with [the order] if left to their own devices."¹⁷ In summarizing the District of Columbia's efforts to conform with the order, the court described the District of Columbia's approach as "derelict, unconscionable, and disobedient."¹⁸

In a subsequent ruling, the *Jerry M.* court found the District of Columbia in contempt of court for the non-provision of general, vocational, and special educational services to children incarcerated in the District of Columbia's juvenile prisons, Oak Hill and Cedar Knoll.¹⁹ Ordering specific remedial actions, the court imposed harsh monetary sanctions to force compliance.²⁰

Although educational deficiencies may cause delinquency, there remains a shortage of preventive programs. Children entering the delinquency court face a general failure to discover and diagnose educational problems. Moreover, the courts do not even know how to respond to unmistakable educational problems. Probation officers devote practically no time addressing the educational needs of children they supervise. Incarcerated children have little chance for success in a terribly flawed educational delivery system. These systemic breaches provide resistance to any type of remediation.²¹

17. *Id.* at 2583.

18. *Id.* at 2585.

19. *Jerry M. v. District of Columbia*, 119 Daily Wash. L. Rep. 2693 (Super. Ct., Dec. 17, 1991). The Court introduced its findings with the following statement:

One of the few givens in our society is that, as a general proposition, young people with a high school diploma or equivalency have a great advantage over those without one. It is also uncontroverted that career or vocational skills are essential if a youth is to turn from criminal behavior to become a productive member of the community. Unfortunately, nothing in the record of this case indicates that defendants have made the effort necessary to equip [juvenile facility] residents with the educational or vocational skills they need so desperately. Despite five years of promises . . . the record is rife with indications of serious problems in the education of youth in [D.C.'s] facilities. Some of those problems are longstanding, and involve serious issues of systemic change Others appear to be nothing more than common sense

Given the sordid history of compliance in this case, and the harm done to youth deprived of meaningful educational opportunities, the court is reluctant to extend further time to the defendants.

Id. at 2.

20. *Id.* at 2701-02.

21. See generally Margaret Beyer et al., *Treating the Educational Problems of Delinquent & Neglected Children*, (1988) (on file with the ABA Juvenile Justice Center, Washington D.C.).

III. CLIENT SERVICE CONSIDERATIONS AND OBJECTIVES OF THE SPECIAL EDUCATION ADVOCACY PROJECT

The basic strategy animating the special education advocacy project of DCSL's Juvenile Law Clinic is to assert the special education rights of a delinquency client in order to dismiss that client's case "for social reasons."²² Various considerations will influence the manner in which DCSL clinicians and law students implement the strategy.

In considering a delinquency client's defense, an attorney must initially determine whether to pursue special education rights. An attorney representing a child in a delinquency matter cannot, consistent with professional ethics, make such a decision or substitute the attorney's judgment for the child's. In a delinquency matter, DCSL represents the child. Often, the client has dropped out of school and resists re-entering school. This resistance typically reflects an understandable desire to avoid renewed failure and frustration. The clinician or law student should listen empathetically and, in light of the client's own perceptions of self-interest, counsel and advise the client. If such discussions do not convince the client to seek a psycho-educational evaluation and pursue special education rights, the matter ends.

If the child decides to pursue educational rights, the attorney must involve the child's parent²³ in that advocacy. Many of the special education rights, particularly the procedural rights, inure to the parent rather than to the child.²⁴ The child's attorney in a delinquency matter does not face an inherent conflict of interest by concurrently assuming representation of the parent in the special education system. However,

22. See *supra* notes 12-13 and accompanying text for a discussion of the trial courts' discretion to dismiss a juvenile petition for social reasons.

23. One might substitute the plural "parents" or the term "guardian"; for simplicity, however, the reference will be to the "parent."

24. See, e.g., Education of the Handicapped Act, 20 U.S.C. § 1415(b)(1)(A) (1988) (granting parents the right to examine records of their handicapped child); § 1415(b)(1)(C) (granting the right to prior written notice of educational changes); § 1415(b)(2) (granting the right to a due process hearing); *but cf.* § 1417(c) (protecting the rights and privacy of both parents and students).

Similarly, the federal regulations primarily focus on rights of the parent. See, e.g., 34 C.F.R. § 300.500 (1991) (defining the terms "consent," "evaluation," "personally identifiable" with reference to the parent); § 300.502 (granting parents the right to examine the records of their handicapped child); § 300.504 (granting the right to notice and consent); § 300.506 (granting the parents the right to an impartial due process hearing); *but see* § 300.344(a)(4) (granting the child the right, where appropriate, to participate in meetings); § 300.550 (requiring the least restrictive environment for the needs of the child).

the attorney must advise the parent of potential conflicts and limits of legal representation should a conflict arise. In this situation, DCSL will have the parent consider a retainer agreement detailing the limits of the representation and DCSL's intentions if a conflict arises.

Conflicts will arise. For example, a parent may believe that the child's special educational needs dictate placing the child in a residential school and the child may balk at the idea of living away from home. Certainly, attorneys dealing exclusively with delinquency matters often encounter differences of opinion — euphemistically put — between parent and child.²⁵

Special education law allows the government only fifty days to place a juvenile in an appropriate educational setting following a request for educational evaluation.²⁶ In theory, an advocate should be able to secure a special education evaluation and placement for a client in fifty to sixty days. Delinquency matters in the District of Columbia occupy at least sixty days from arrest and initial hearing until the first scheduled trial date. Therefore, under ideal conditions a delinquency client with competent counsel could realize a special education placement and file a motion to dismiss for social reasons before the delinquency matter reaches its first scheduled trial date.

Federal and local laws require the government to provide each child with a "free appropriate public education" (FAPE).²⁷ The government is not obligated, however, to provide an optimal learning environment.²⁸ In contrast, the family court applies a "best interest of the

25. In an actual situation, the parent's opinion may be expressed in words such as "I can't control him; lock him up!" An attorney is also likely to encounter a neglectful parent, or *not* encounter a missing parent. The Education of the Handicapped Act, therefore, provides for the appointment of a surrogate under 20 U.S.C. § 1415(b)(1)(B).

26. *Mills v. Board of Educ.*, 348 F. Supp. 866, 878 (D.D.C. 1972).

27. See 20 U.S.C. § 1400(c) (providing that the purpose of the Education of the Handicapped Act assures "free appropriate public education" emphasizing "special education" to meet the special needs of handicapped children); 34 C.F.R. 300.1(a) (same).

28. *Hendrick Hudson Bd. of Educ. v. Rowley*, 458 U.S. 176, 200 (1982). The requirement for a "free appropriate public education" is satisfied when a state provides individualized instruction with sufficient support services to permit a child with disabilities to benefit educationally from the instruction. *Id.* at 203. The state is not required to "maximize a student's potential." *Id.* at 200. The instruction must meet state educational requirements, must be provided at public expense, must be roughly equal to grade levels used in the state public schools, and must comply with the child's individualized educational program (IEP) as formulated in compliance with the applicable regulations. *Id.* at 203.

child" standard for dispositional orders.²⁹ Therefore, the court can order any legal service or treatment standard that satisfies the child's needs.³⁰ Nothing precludes a court from overturning a special education hearing officer's refusal to order a school placement under the FAPE standard. The following scenario illustrates this point: An attorney represents a child and parent who desire an expensive private school placement for the child. The attorney can petition the special education system in the first instance and, if not successful in that forum, can resort to the family court.

A tenuous but potentially useful interplay exists between the special education requirement for placement in the "least restrictive environment" and the delinquency court's obligation to protect the community from a dangerous child. An attorney for a child in a delinquency matter might persuade a judge to release a child by stressing the child's special education needs and the requirement, under special education law, to place the child in the "least restrictive environment."³¹ Indeed, the delinquency system also claims to favor placement of children in the least restrictive setting.³² Moreover, in light of the *Jerry M.*³³ court's finding that the District of Columbia has failed to provide special education services to children at the juvenile incarceration facilities as required by the consent decree, class counsel could also argue for release of children with special education needs.

Many clients would choose a private, residential treatment center for emotionally disturbed children over incarceration. Counsel should fully inform the client, however, of the likely outcomes of the respective placements. In the District of Columbia, the average post-disposi-

29. See, e.g., D.C. CODE ANN. § 16-2320(a) (1989) ("If a child is found to be neglected the Division may order any of the following dispositions which will be in the best interest of the child.").

30. *Id.* at § 16-2320(a)(5).

31. Under the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(15) (1988), state child-welfare agencies must develop plans ensuring "reasonable efforts" to prevent unnecessary foster placements and ensuring "reasonable efforts" to return a child, once placed, back home. Arguably, these provisions govern delinquency placements as well.

32. See, e.g., D.C. CODE ANN. § 16-2310 (1989 Repl.) (mandating that a court shall not detain a child unless that child poses a threat to society). See also D.C. SUP. CT. JUV. R. 2 (1990) which requires, for a child removed from the home, "custody, care and discipline as nearly as possible equivalent to that which should have been provided for [the child] by his parents."

33. *District of Columbia v. Jerry M.*, 571 A.2d 178, 192 (D.C. 1990).

tion stay in the juvenile prison is approximately six months.³⁴ Alternatively, a stint in a residential treatment center — either by the delinquency court's order or by a special education hearing officer's ruling — likely lasts for a period of at least one year. Because almost no residential treatment centers exist in the District of Columbia area, a client choosing to pursue such a placement often resides some distance away from home. After informing a client of these disparities — the likelihood of greater "time served" and greater distance from home — an attorney must respect a client's informed decision to choose incarceration over residential treatment.

The basic strategy of using a special education victory to dismiss a delinquency matter is a theme with nearly endless variations. Below are several of the variations, each illustrated with the story of a current or recent DCSL Juvenile Law Clinic client.

Case #1

I.C., a child with no prior arrests, became a client of the clinic in the fall of 1991 following his arrest for assault. He had previously been identified as having special education needs before this arrest and charge. I.C.'s current educational placement is not appropriate, however, and his individualized educational program is out-of-date. Consequently, DCSL's clinicians and law students will explore challenges to the current educational placement in order to find the best suited placement for him. In addition, if the school system has not implemented an individualized educational program and does not respond in a timely manner in its subsequent efforts, the child may be able to enter a private school and obtain reimbursement from the school system. Therefore, DCSL may attempt to place I.C. in a private school unilaterally, without waiting for personnel from the public school system to suggest an educational placement. Once proper services are in place, I.C. can argue for a dismissal of the delinquency matter "for social reasons." I.C.'s case presents only a slight variation, therefore, on the

34. Six months merely estimates the average post-disposition stay and does not include children who are "restrictively committed" and incarcerated until released by order of the court under D.C. CODE ANN. § 16-2322(a)(1) (1989).

A dispositional order vesting legal custody of a child in a department, agency, or institution shall remain in force for an indeterminate period not exceeding two years. Unless the order specifies that release is permitted only by order of the Division, the department, agency, or institution may release the child at any time that it appears the purpose of the disposition order has been achieved.

Id.

basic theme of securing a successful educational program which should give rise to a motion to dismiss for social reasons: I.C. was already identified for special education before the current arrest.

Case #2

D.H., fifteen years old, became a DCSL Juvenile Law Clinic client in the fall of 1990 when charged with the unauthorized use of a vehicle. Unfortunately — and remarkably — D.H. had been arrested in three additional delinquency matters within four months of becoming a DCSL client. One of the three additional charges occurred in a nearby Maryland suburb; the court in Maryland preventively detained D.H.

In recent years, D.H.'s father tragically perished in a motorcycle accident, and his mother had been murdered in a drug-related incident. D.H. has both serious learning disabilities and emotional disturbance. Despite his functioning at the first-grade level in reading and other basic skills, D.H. had never been identified as requiring special education. With the agreement of D.H. and his grandmother, his legal guardian, DCSL arranged for special education legal representation.³⁵

To implement the special education strategy, counsel arranged for psychological and educational testing, as well as interviews at numerous special education schools. Counsel also obtained and coordinated special orders from the two delinquency courts to temporarily transfer custody of D.H. from Maryland to the District of Columbia. The orders provided for a series of one-day supervised releases for evaluations and interviews.

Eventually, D.H. and his grandmother settled on a private, special education school which subsequently accepted D.H. The special education attorney then prevailed in the administrative hearing and obtained a ruling to place D.H. at the particular school. The Maryland delinquency court tacitly endorsed this educational placement and released D.H. onto probation. Similarly, following a plea to one of the District of Columbia charges and dismissal of the other two, the District of Columbia court placed D.H. on probation.

The entire process from D.H.'s first arrest to the probation orders took approximately nine months. Unfortunately, D.H. remained preventively detained in Maryland for the latter five months. The rapid sequence of D.H.'s arrests — two of which resulted in robbery

35. DCSL's representation of D.H., however, began before initiation of the special education advocacy project within the Juvenile Law Clinic.

charges — made a dismissal for social reasons inconceivable. From the defense perspective, release onto probation was a significant victory. Indisputably, the special education services paved the way for the probation orders. Stated another way, it is highly unlikely that the Maryland or the District of Columbia Court would have returned D.H. to the community had the advocates not obtained the private, special education school placement.

Case #3

K.W., age sixteen, has experienced periods of suicidal ideation. His family lives in terribly trying circumstances. Their apartment, in a state of disrepair, leaks sewage outside that renders an unbearable stench and is a breeding ground for mosquitos. Violence permeates the area and residents live in fear of stray bullets. Furthermore, K.W. worries about his mother who suffers from poor health.

Although K.W. had numerous arrests prior to DCSL's representation, only one arrest led to an adjudication of delinquency. In that case, the diagnostic probation officer suggested no remedies and identified no resources to address K.W.'s overwhelming social, emotional, and educational problems. Instead, the probation officer recommended incarceration. The court followed the probation officer's recommendation and committed K.W. to the juvenile incarceration facility. As a first offender, K.W. spent approximately eight months in the juvenile prison. In 1990, K.W. was placed in aftercare — juvenile parole.

In the fall of 1991, DCSL commenced its representation of K.W., defending him on a charge of unauthorized use of a motor vehicle. Early in the case, the DCSL law student arranged for psychological and educational evaluations of K.W. These evaluations resulted in the identification of special education problems. The law student then negotiated an agreement with aftercare personnel — prior to the trial in the new case — to place K.W. in a private, special education day program which has a contract with the aftercare program.

Based on the school placement and other services that were arranged, the law student filed a motion to dismiss the charge for social reasons. The law student will argue, *inter alia*, that K.W. is not in need of care and rehabilitation *in this new case*. In addition, the student will argue that K.W.'s incarceration following his first adjudication was inequitable because it resulted from the failure of the probation officer, the defense attorney, the prosecutor, school personnel, and the court to address K.W.'s needs.

Even if K.W.'s new case is dismissed, the aftercare program will nonetheless remain in place. DCSL will seek a ruling through the special education system to place K.W. at the special education day placement. On the strength of that ruling, K.W. would not longer need payment through aftercare for his schooling. He could allow the aftercare order to expire without further extension. Ideally, K.W. should not be subjected to aftercare because the aftercare workers can administratively revoke aftercare if a child does not comply with the aftercare contract. By allowing the aftercare case to expire, DCSL will remove K.W. from the jeopardy of incarceration.

If K.W. remained in aftercare, however, an aftercare worker could move to revoke the aftercare and incarcerate K.W. based on an allegation that K.W. breached his aftercare agreement by, for example, failing to attend school. In the special education system, a child cannot be incarcerated nor can the child be expelled or suspended from school unless the school can demonstrate that the suspension is for reasons unrelated to the special education needs of the student.

IV. MODIFYING THE PEDAGOGICAL DESIGN OF THE JUVENILE LAW CLINIC TO INCORPORATE SPECIAL EDUCATION ADVOCACY

A. *The DCSL Clinical/Public Service Program*

The District of Columbia School of Law (DCSL) was established in 1987 as an independent agency of the District of Columbia supported by public funding. Pursuant to District of Columbia law, DCSL provides clinical legal education to students and public service to low-income persons.³⁶ This statutory clinical requirement is unique in American legal education.³⁷

DCSL's statutory mandate also requires the recruitment and enrollment of persons from groups historically under-represented in the practice of law.³⁸ DCSL's student body consists of one-half minority,

36. D.C. CODE ANN. § 31-1546(b) (1988) provides in pertinent part: "The Board of Governors shall, to the degree feasible, operate the School of Law as a *Clinical* law school committed to representing the legal needs of low-income persons, particularly those who reside in the District of Columbia." *Id.* (emphasis added).

37. The majority of DCSL's faculty teach in the clinics. No distinction exists between clinical and non-clinical faculty in terms of status or remuneration.

38. D.C. CODE ANN. § 31-1546(b) (1988 Repl.) provides in pertinent part: "The Board of Governors shall also, to the degree feasible, recruit and enroll students from racial, ethnic or other population groups that in the past have been under-represented

one-half women,³⁹ and one-half with District of Columbia residency. The average student is thirty-four years of age. A large number of the students chose to attend DCSL because of its emphasis on clinical education.⁴⁰

Students participate in the clinical program throughout their three years of legal education, with a requirement that each student complete three clinics. The first clinic (Clinic I), a three-credit course, is mandatory for each student in the second semester of the first year. The second clinic (Clinic II), a six-credit course, is mandatory in the first semester of the second year. Each student may choose to take the third clinic (Clinic III), another six-credit course, in any of the final three law school semesters. Each credit represents fifty hours of clinical work; thus, each student spends 750 hours in the clinical program.⁴¹

DCSL has six clinics: Public Entitlements, Government Accountability, Legislation, HIV, Landlord-Tenant/Consumer, and Juvenile Law. Faculty and students in DCSL's Juvenile Law Clinic — and in the predecessor juvenile clinic at Antioch — have provided children with high quality legal representation for nearly two decades.

B. *Evaluation of DCSL Clinical Law Students*

The District of Columbia School of Law utilizes a sophisticated system for evaluating law students' performance in clinical work.⁴² In applying this evaluation system, clinical professors assess students' achievement in terms of the following six broad categories of lawyering competency: oral communication, written communication, legal anal-

among persons admitted to the bar in these several states and in the District of Columbia." *Id.*

39. DCSL is also strongly committed to equal opportunity hiring. Currently, DCSL employs 35% minority faculty members and 40% female faculty members. The DCSL Dean is also a minority.

40. In significant respects, DCSL inherited its mission from its predecessor, the Antioch School of Law.

41. Clinical students must complete and submit timesheets which the supervisors review. Students receive credit only for "billable" hours.

42. Dr. H. Russell Cort designed this system and originally implemented it at the Antioch School of Law. See H. Russell Cort & Jack L. Sammons, *The Search for "Good Lawyering": A Concept and Model of Lawyering Competencies*, 29 CLEV. ST. L. REV. 397, 405-11 (1980) (proposing a model of lawyering competency). Dr. Cort is currently a full-time employee at DCSL.

ysis, problem solving, professional responsibility, and practice management.

Professors in each clinic identify an array of tasks that students will perform; each task tests students' relative mastery of various sub-competencies. At the mid-point and end of each semester, the professors give each student a task inventory sheet identifying tasks completed and a numerical assessment, on a scale of one to ten, of the performance for each category of tasks. Also, at the mid-point and end of each semester, the professors provide a narrative evaluation of each student's performance in each of the six lawyering competencies. These narratives explain the student's performance in terms of the sub-competencies tested in the assigned tasks. The professors also reduce these six categorical, narrative evaluations to a letter grade, on a scale of "A+" to "F." Finally, on each student's mid-term and final evaluation, the professors compile the letter grades from each lawyering competency into a composite letter grade. This composite letter grade in the final evaluation form constitutes the student's final grade in the Clinic. Employing this system, professors produce an exceptionally accurate and comprehensive picture of each student's performance.

C. Evaluation of DCSL Clinical Faculty

The District of Columbia School of Law has established a Clinical Management Review Panel for evaluating clinical faculty members in their teaching methods and client service. Currently, the Associate Dean for Education and Acting Clinic Director, the Chair of the Faculty Clinical Affairs Committee, and the Chair of the Faculty Evaluation and Retention Committee comprise this panel.

Each semester, this panel meets with the clinical professor to assess the professor's manner in supervising the management of clients' matters. Panel members review with each clinician random cases under the clinician's supervision. The panel members check file management, probe strategic judgments, examine work product, and discuss supervision.

The panel also conducts lesson plan reviews. Essentially, the panel invites each professor to explicate a lesson plan of the professor's choice. A lesson plan provides the professor with a blueprint for a two-hour class, and it typically includes an outline of substantive material along with the assigned readings, a summary of pedagogical goals, and teaching methodologies. Through this collegial discussion, the professor explores teaching goals and methods. Specifically, the panel mem-

bers ask the clinicians how they use the lesson plans to impart lawyering competencies.

The panel distills the results of case reviews and lesson plan reviews into a report for each professor. The reports include, where appropriate, recommendations for improvement. The panel members may adjust the report after receiving reactions from the clinician evaluated. Ultimately, these reports go to the Faculty Evaluation and Retention Committee and, for tenure-track professors, to the Dean.

At the end of each semester, each student evaluates the clinic and the professors on a three-page form. These evaluations, submitted anonymously, are not available to the professors prior to the professors' submission of final grades.

D. *Description of the Juvenile Law Clinic*

Clinic I (for first year students in their second semester) and Clinic III (second or third year students who received court-certification) are offered in the spring semester of each year. In the fall semester of each year, the Juvenile Law Clinic only involves Clinic II and Clinic III students.

The Juvenile Law Clinic faculty divides the students into teams of one Clinic III, court-certified student and one or two Clinic I or Clinic II students. By design, the teams reflect the diversity of the student population.

The faculty assigns open cases to the teams and every team goes to court early in the semester to acquire at least two additional delinquency cases. Each of the two supervisors who specialize in delinquency representation oversee at least one new case with every team.⁴³ As a result, the teams are exposed to the lawyering style of each supervisor. Moreover, each team meets with each supervisor once per week in a tutorial session to discuss the casework.

The Clinic III student takes responsibility for all aspects of these cases. The Clinic I students share responsibility for various aspects of the representation, including investigating, preparing a case plan, crafting defenses, researching evidentiary issues, drafting motions, and planning for disposition. The Clinic III student on each team has the sole responsibility for drafting certain motions and constructing a trial notebook. The Clinic I students prepare the prosecutor's position for a

43. Similarly, supervisors assign the open cases from the previous semester so that each team has at least one open case with each supervisor.

moot court fact-finding hearing or trial in order to help prepare a case for actual litigation.

The substantive delinquency classroom component of the clinic builds upon criminal procedure and criminal law, but also serves as an introduction to juvenile law from the Supreme Court and from the District of Columbia Court of Appeals. The supervisors designed the substantive classes to parallel the actual casework. For example, the clinical students study and simulate initial hearings right before conducting an actual initial hearing and a class on investigation precedes the investigation of the new cases. In this fashion, the classes cover the major aspects of a delinquency case in chronological order through the fourteen-week semester. The class meets twice per week for two hours each session.

The Juvenile Law Clinic faculty integrates skills training from the casework into the classroom curriculum. They provide, for example, a three-class block on investigation, case planning, and discovery. As mentioned above, the students are responsible for conducting investigation and discovery. The students also produce and continually update a case plan. In the planning process and in the tutorials students are expected to set agendas, propose strategies, and define tasks. Within a day of each tutorial, the team must submit to the supervisor a brief memorandum containing the tasks delineated, to whom each task is assigned, and anticipated completion dates.

To develop oral advocacy, as well as case planning, practice management, and legal analysis skills, the Clinic III students prepare a trial notebook and moot either a contested motion or an upcoming trial. The Juvenile Law Clinic faculty also teaches several classes designed to enhance oral advocacy: trial notebook; opening statement; closing argument; direct examination; cross-examination; fact-finding hearings, including the Jencks Act and motions for judgment of acquittal. There is also a class on evidentiary issue spotting, and the supervisors grade the Clinic III students on their ability to recognize and develop evidentiary issues in the cases.

The students are responsible for researching and writing motions in the cases. Typically, at least one suppression motion arises in each case. Some cases may require motions other than suppression motions, for example, an evidentiary motion, severance motion, motion to dismiss for social reasons, or motion to reduce level of detention. Each Clinic I or Clinic II student is responsible for at least one motion with each supervisor.

The Juvenile Law Clinic's general goals for Clinic III students⁴⁴ include the following: to provide outstanding legal services to clients; to increase students' proficiency and knowledge in every major phase of delinquency representation; and to familiarize students with the movement of a case through the court system and the structure of a delinquency case. The program strives to make each student feel comfortable handling delinquency cases as a practitioner in the District of Columbia upon graduation.

In summary, the Juvenile Law Clinic's specific goals with respect to the experience of Clinic III students, are: (1) to develop *oral communication* skills through client and witness interviewing, simulating detention arguments or probable cause hearings, and conducting both practice and actual court hearings; (2) to enhance *written communication* skills through the production of, among other things, several motions; (3) to improve *legal analysis* skills by researching and writing motions, as well as through involvement in investigation, identification of defenses, and elements of offenses and spotting and developing evidentiary issues; (4) to sharpen *problem solving* skills through, among other things, case planning — including disposition planning, client contact, and case mooting; (5) to refine understanding of *professional ethics* by engendering student questioning of the defense role and through analysis of potential and actual conflicts; and (6) to develop *practice management* skills through timely scheduling of all casework including the mooting exercise, coordination with the supervisor and Clinic I team members, and maintenance of the case file.

E. *Incorporating Special Education Law Into the Juvenile Law Clinic Curriculum*

The Juvenile Law Clinic faculty has significantly redesigned the clinic to incorporate special education law and practice. For the first semester of the special education advocacy project, in the spring of 1992,⁴⁵ the students are divided into four sections: Clinics I-A and I-B, and Clinics III-A and III-B. Thirteen Clinic I-A students have a delinquency law focus in classroom and casework, and six Clinic I-B students have a special education focus in classroom and casework. Two Clinic III-A students have a delinquency focus in the classroom curric-

44. Supervisors tailor Clinic I or Clinic II students' goals more narrowly.

45. The descriptions of numbers of students and cases are from spring of 1992. The numbers will vary each semester, but illustrate the general process and design of the clinic.

ulum and casework. Four Clinic III-B students have taken the clinic previously (“repeaters”) and have had the delinquency classes which focus on the special education classroom. These Clinic III-B students must also shoulder responsibility for delinquency and special education casework.⁴⁶ Whenever possible, these Clinic III-B “repeaters” represent the same child in both special education and delinquency.

The classroom component of the Juvenile Law Clinic, beginning in spring 1992, separates delinquency law and special education law. A total of fifteen Clinic I-A and III-A students participate in the delinquency law classes and ten Clinic I-B and III-B students participate in the special education law classes. The goal of both focus areas is to present the subject matter of a case from start to finish. As the students work on the various phases of actual cases, they study each phase in the classroom.

Professors hold nine of twenty-one classroom sessions jointly.⁴⁷ Seven of these nine classes allow the students and faculty to explore, in detail, the interaction of delinquency and special education law. The other two joint classes present the relationship of abuse and neglect to delinquency and the *Jerry M.* juvenile facilities class action.⁴⁸

Classes also include six additional sessions, spread throughout the semester, called “grand rounds.” Clinic I students from all six DCSL clinics attend grand rounds together. The Clinic I grand rounds include: (1) Introduction to Advocacy and Case Management; (2) Introduction to Ethics in the Practice of Law; (3) Interviewing; (4) Case Planning; (5) Diversity; and (6) Negotiation. The Clinic I grand rounds topics relate directly to the development of beginning lawyering skills.

46. There are significantly more Clinic I first-year students than Clinic III students for two reasons. First, as a new school, DCSL admits increasingly larger classes each year. Second, every student must take Clinic I in the second semester of the first year. A student may complete the Clinic III requirement in the fourth, fifth, or sixth semester of law school.

47. The following is a listing of the classes: Introduction to Juvenile Law - Supreme Court; Introduction to the Law of Special Education; Delinquency/Special Education Strategy Overview and Case Review; Can a Child with Learning Disabilities or Mental Retardation Knowingly, Intelligently, and Voluntarily Waive *Miranda* Rights?; Access to Alternative Forums for Solving Educational-Related Issues within the School System; Meeting a Child's Educational and Emotional Needs: What Remedy in What System?; Child Abuse and Neglect: The Relationship to Delinquency; and The *Jerry M.* Class Action Challenge to Conditions at the Juvenile Facilities.

48. See *supra* notes 15-20 and accompanying text for a discussion of the *Jerry M.* juvenile facilities class action.

Much like the Juvenile Law classes, these grand rounds sessions fit the chronology of the students' casework. For example, the grand rounds session on interviewing occurs just before the students start new delinquency cases and the grand rounds session on case planning comes within a week of the students' beginning new delinquency cases.

On the same days that the Clinic I students attend grand rounds, all Clinic III students from all six DCSL clinics attend six grand rounds together. The Clinic III grand rounds include: (1) Court Rules; (2) Enforcement of Judgments; (3) Class Actions; (4) Community Organizing; (5) Law Reform; and (6) Law Office Management and Computerization. The Clinic III grand rounds topics are selected to ensure that all students, before graduation, are exposed to certain critical practice issues.⁴⁹

At the beginning of the spring 1992 semester, the three supervisors — two delinquency experts and one special education expert — reviewed all the Clinic's open delinquency cases to determine which clients presented special education legal issues. At least eleven of twenty-three delinquency cases appeared to present significant special education needs and issues. Based on that accounting, the supervisors then assigned the delinquency cases to teams of Clinic I-A and III-A students and to teams of Clinic I-A and III-B students.⁵⁰ The III-B students took control of the special education advocacy in cases. Whenever a Clinic III-B student's delinquency client also presented special education issues, that III-B student was assigned to the special education advocacy for that client.

The supervisors grouped the six Clinic I-B students in teams of two and assigned two special education cases to each team. Each Clinic I-B student takes primary responsibility for one of the two cases assigned to the team.

Clinic I, first-year students will be responsible for all aspects of the special education representation through the administrative level. A person need not be a lawyer or a court-certified law student to represent a child in a special education administrative hearing. Clinic III

49. During the fall semester of each year, Clinic II students have a separate set of grand rounds. The Clinic II grand rounds include: (1) Clinical Advocacy: The DCSL Law Firm; (2) Alternative Dispute Resolution; (3) Diversity II: Race and Gender in the Courts — Issues for Clients and Counsel; (4) Attorney Fee Shifting; (5) Use of Expert Witnesses; and (6) Legislative History and Statutory Construction.

50. Clinic III-B students — students taking the Juvenile Law Clinic for the second time — were assigned to clients whom the law students previously represented in the clinic.

students handle special education matters that proceed beyond the administrative hearing level into court.

Special education law and practice goals for law students in the clinic include:

- each Clinic I or Clinic II student completing one semester in the Juvenile Law Clinic will have a working knowledge of substantive special education law;

- those law students who have represented at least one client in a special education matter will be capable of providing competent legal representation at the administrative level;

- each Clinic III student completing one semester in the Juvenile Law Clinic will have managed at least one case in which pursuing special education rights was important to the delinquency representation;

- each Clinic III student, therefore, will have an appreciation for the strategic and problem-solving value of that approach;

- any Clinic III student who has taken a special education matter into court will have a working knowledge of substantive special education law and thus will be capable of providing competent representation at the administrative and trial court levels;

- all students will be able to articulate how they "took the offensive" in their cases by, for example, obtaining a proper educational placement for a child and shielding that child from harsh treatment in the delinquency system; and

- students will gain sensitivity to their clients' educational rights and needs; this sensitivity will accompany the law students as they graduate and enter the legal profession.

There are also faculty enhancement objectives embedded in the special education advocacy project. Specifically, the two delinquency supervisors will learn special education law and begin to supervise special education cases. One measure of success is the degree to which the supervisors permanently integrate the special education curriculum into the Juvenile Law Clinic.

V. RAISING THE STANDARD OF PRACTICE IN THE COMMUNITY

In the District of Columbia, the vast majority of juveniles charged with delinquent conduct receive legal representation from court-appointed attorneys. A substantial percentage are represented by attorneys who work in the Public Defender Service.⁵¹ Two law schools,

51. No one at the Public Defender Service or Criminal Justice Act office in the

Georgetown University Law Center and the District of Columbia School of Law, currently operate clinics representing children in District of Columbia juvenile delinquency matters.

With the development of the special education advocacy project, DCSL's Juvenile Law Clinic became the first "law office" in the District of Columbia to concurrently offer delinquency and special education representation. DCSL's Juvenile Law Clinic faculty seek to proliferate the approach, outlined above, of integrating special education law into delinquency representation. With that goal in mind, DCSL will conduct training sessions in the law of special education for practicing lawyers who represent clients in delinquency cases. In addition, DCSL will establish a network of private special education legal experts who will accept referrals of cases from attorneys representing children in delinquency cases.

The training sessions for practitioners will occur during the summer months. The training will be modeled upon the clinical teaching in DCSL's clinics; therefore, it will be a "hands-on" training with some use of simulations. Faculty will provide outlines presenting substantive and practical issues. Too often attorneys return from seminars loaded down with materials that never find their way out of a stack or a file drawer. Therefore, faculty will provide sample pleadings, in hard copy and on diskettes, in an effort to make the materials easily usable.

Attorneys who represent children in delinquency cases have a strong self-interest in learning special education law. Under the Criminal Justice Act appointments to represent indigent defendants or juvenile "respondents," attorneys earn thirty-five dollars per hour. A prevailing party in a special education matter, however, can obtain attorneys' fees at the market rate.⁵² Attorneys litigating special education matters against the District of Columbia Public Schools prevail in an extremely high percentage of their cases. Attorneys representing children in delinquency or neglect matters have a pool of clients, most of whom may

Superior Court has compiled the precise percentage of cases handled by PDS and by private, court-appointed counsel. An educated approximation is that PDS handles 15% and private, court-appointed attorneys handle 75-80% of the cases.

52. See Education of the Handicapped Act, 20 U.S.C. § 1415(e)(4)(B) (authorizing the award of "reasonable attorney's fees" to prevailing party's parents or guardians). See also *Moore v. District of Columbia*, 907 F.2d 165, 176 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 556 (1990) (noting that "it is clear from [the House of Representative's] statements that the conferees understood deletion of the House sunset provision as removing any limit on the court's authority to award fees to parents who prevail at the administrative level").

need special education representation. Furthermore, perhaps ten or fewer attorneys in the District of Columbia currently represent plaintiffs in special education law. Therefore, the demand for adequate representation in special education law far outweighs the supply of attorneys competent to handle such matters.

If the training sessions result in a core group of four or five attorneys providing special education representation for their delinquency clients, an effective rise in the local standard of practice will likely result. The attorneys who represent children in delinquency matters, to a large extent, communicate with one another regularly and influence one another's practice. As these attorneys observe one another making education-related arguments in court and begin to discuss special education issues, the number of attorneys who begin to provide special education representation will increase.

As DCSL conducts the training sessions and lawyers begin to infuse their delinquency practice with education issues, some attorneys will recognize the need for special education representation for their clients. For those attorneys who do not wish to learn special education law and provide such representation, DCSL will refer them to attorneys practicing special education law.

Finally, as graduates from the special education advocacy project of the Juvenile Law Clinic enter practice and provide concurrent representation in delinquency and special education, there will again be an influence on the standard of practice in the community.

CONCLUSION

The special education advocacy project of the DCSL Juvenile Law Clinic incorporates high hopes for improved client service. Advocating for children with an awareness of the causes of delinquency results in a more preventive and less punitive approach to the management of delinquency matters. Addressing educational issues in the delinquency system allows one to hope that children, who otherwise might have failed, will succeed in school and perhaps in other endeavors.

The project also attempts to improve clinical legal pedagogy. Students will learn to recognize the relationship between apparently discrete areas of the law while studying and implementing a proactive strategy. They will turn defendants into plaintiffs, asserting rights, rather than only defenses. As a result of this process, perhaps the students will learn the benefits of client-centered lawyering and empowerment of traditionally under-represented persons. It is realistic to

anticipate that DCSL's special education project will change the nature and standard of delinquency practice in the District of Columbia over the next three to five years. Consequently, an attorney may have to refer or handle special education matters to be considered legally effective.

NOTES

