

## **Children's Section: In the Interest of Children: Application and Reality**

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This section of the *Journal of Juvenile Law & Policy* focuses on the real life experiences of those who work with children on a daily basis, and also covers turning points in the law. The Journal strives to include the thoughts, feelings, and ideas of a diverse body of individuals in order to encourage a well rounded understanding of contemporary juvenile issues. This section contains glimpses in to the life of those who work with children and the law on a daily basis, highlighting the triumphs and struggles of working around children and the law. Furthermore, enclosed are briefs on recent court decisions making waves in juvenile law and policy.



## CHILD WITNESSES

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By Mrs. Krystal Callaway Jaime, *esq*\*

While in law school, I had the opportunity to advocate for three children who were called to testify in criminal proceedings. In one matter, I advocated on behalf of a family member and in another matter, I advocated for two children of a client I represented in a family law matter. It is my understanding, based on conversations with the prosecuting attorneys and advocates, that the experiences of the children I worked with is very common. It is unfortunate, but both occasions left me bewildered as to how in a society that strives to protect the rights of individuals, the rights of children in criminal proceedings have been so neglected.

In the matter involving the family member, the defendant pled out so the child never had to testify in court, but the trauma experienced by the child in the two days preparing for court testimony has lasted a lifetime. In both of my advocacy cases, the children met with the DA for less than an hour prior to the day of trial. While there were advocates who were allowed to accompany the children in the courtroom, the children spent only a few hours with the advocate, a virtual stranger, prior to the time when their testimony was required. As a “comfort” tool the children were given a small stuffed animal to take with them while testifying and the day before the children were scheduled to testify they were briefly shown the courtroom. Victim’s compensation was also available to assist financially with counseling but in both cases it was up to me, as the advocate, or the parents of the children to make sure that the children had counseling

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available them, both before and after their trial testimony as required. While these measures are all steps in the right direction, they are just baby steps and it is important to point out that once the matters were “resolved”, no further support was offered to the children.

As an attorney I realize the limitations that often exist given the time pressures and caseloads. However, these limitations often lead to inadequate preparation of both the case and the witnesses. For example, in the matter involving the children of the client, one of the children testified in court as to a statement made by the defendant that had great cultural significance. The advocate mentioned this to the DA, but no evidence was ever presented at trial regarding the significance of the child’s testimony.

In both of these cases, I was left with the impression that when it comes to child witnesses, the criminal justice system is more criminal than just. It appeared to me that in a system designed to uphold and protect justice, budgeting and conviction rates have become the priority. What is most disconcerting is that while there are a few individuals and scholars, not much has been done in the way of research and debate regarding these issues.

## A GLIMPSE INTO THE EXPERIENCE OF A CASA

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By Ms. Janet Stroman, *esq.*\*

During my first year of law school, I attended a noontime presentation sponsored by the student group, Advocates for the Rights of Children. This presentation, given by the director of Yolo County's Court Appointed Special Advocates, inspired me and approximately five of my classmates. The six of us soon embarked upon the necessary training, which took place two evenings per week for six weeks and provided an intensive education into the Juvenile Dependency system, working with children as an advocate, mental health issues and numerous other topics.

Following the training, I was presented with information regarding several children who were currently dependents of Yolo County under the Juvenile Dependency system. For various reasons, a social worker or judge had decided that these particular children needed more individual attention than the system could provide and therefore, had requested the appointment of a CASA. I was asked to select one of these children to whom I would be appointed as an advocate. I selected to represent 4 year old boy who was 1/8 Native American. He was very sweet, but even at that young age, he had developed considerable bitterness that erupted at unexpected times and caused the social worker to be concerned and request a CASA. As a CASA, I spent time with Daniel (name changed for confidentiality) on a weekly basis with activities such as playing at the park, going to see

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the cows milked at the University of California, Davis or enjoying a meal such as a simple picnic.

An important part of the CASA advocacy is allowing the child the opportunity to express their concerns to someone who can relay those concerns to the court through a report expected prior to each hearing. Sometimes Daniel would talk of things that had happened to him; he told one such story while we walked along a creek. In that story, Daniel and his younger sister had been placed in a cave by his parents. After a long time in the cave, the police came and took them out. More often, Daniel, as well as the other CASA children who I later worked with, would be most open when riding in the backseat of my car while I drove.

As Daniel's case progressed and after a long period of non-involvement, the Native American tribe to which Daniel was enrolled became involved in the case under the Indian Child Welfare Act. For Daniel's mother, Daniel and Daniel's three siblings (in addition to these four children, mother had four other children who resided with their father) the tribe's involvement was a positive influence. The chief and various other tribal authorities appeared for each court hearing; the children were placed on a trial basis with the mother who had moved in with great grandmother on the reservation; and mother began employment at the tribal center. In addition, a childcare center was built on the reservation where Daniel and his three siblings were initially the only children. When the children were released to the custody of their mother and the court's jurisdiction terminated, my involvement also terminated.

As a CASA, I spent considerable time communicating with all of the individuals involved in Daniel's life: attorney, Child Protective Services social worker, foster care mother, mother, teacher, tribal members and the judge through reports and at the court hearings. A CASA is able to effect changes in the life of a child by gathering appropriate information and advocating for any necessary changes. Judges and other

individuals in the child's life listen to the CASA'S recommendations and act upon them.

Being a CASA is a considerable commitment as to time, energy and emotion, but ultimately the rewards of advocating for a child whose voice has not been heard and whose needs have not been addressed are overwhelming.





## **HELPING CHILDREN ACHIEVE – ONE CLASSROOM AT A TIME**

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By Mrs. Tivona Lamberth\*

As an elementary school teacher, I have had the opportunity to work with numerous children, each with his or her own personality, background and characteristics. I try my best to work with each child individually and cater to their abilities and learning style according to their Individualized Education Plans. Although I am able to work with students one-on-one periodically, most of my interactions with my students occur in a classroom setting where I am trying to teach and engage numerous students with different learning capacities, grades and levels at the same time. In order to do this, Classroom management plays a crucial part of my classroom. I use Lee Canter's Assertive Discipline modes and a classroom plan broken down into three categories: (1) expectations/rules, (2) rewards and (3) consequences.

When children enter my classroom on the first day of school, I know that their minds are racing. - What can I do to aggravate my new teacher? - I want to be teacher's pet! - Am I going to do well this year? No matter what the child is thinking, it is good to set the classroom ground rules early. This allows children who may aspire to be the classroom clown or the full-time center of attention to realize that as the teacher I will not tolerate disruptive behavior. It also allows those students who are unsure about what to expect to set their minds at ease.

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\* Tivona Lamberth graduated from California State University, Stanislaus in 2006 with Bachelors in Liberal Studies with a concentration in Exceptional Children. Prior to teaching a 4th-6th grade Learning Handicapped Special Day Class, Tivona completed 2 years of teaching as a Special education intern through the Stanislaus County Office of Education seeking a mild/moderate specialist credential.

When it comes to rules, I want to keep it simple. I have found that a few, simple but important rules help manage the many children trying to share the same classroom space. First, my students must follow directions the first time. Second, students must not take part in any behavior that disrupts teaching or learning. Third, all students must be respectful to themselves, others and property; and lastly, they must finish their work. These rules, although few, help students remember that they are at school to learn and improve the skills they need to achieve their goals. The rules also help them understand that others in the classroom attend school for the same reason and thus, they need to respect other's opportunities to learn and achieve without disruption.

Although I always start with rules, rules by themselves do not always work, especially with younger children. Therefore, the second and third parts of my classroom plan incorporate rewards and consequences. In my classroom, I have established a token economy using play money. It is used for positive reinforcement, consequences and it is even an additional learning tool. Every morning, students automatically receive \$5.00 for being present at school, on time and prepared. They also receive payment for tasks such as completing a classroom job, being on task, completing a homework assignment and giving correct responses. I also reserve the right to add to this list when a student does something additional that deserves recognition and reward.

However, if students do not complete homework assignments, disrupt the learning environment, refuse to follow directions or fail to work independently on individual assignments, it costs the student a certain amount of money, and this varies depending on the severity of the offense. Then, twice a month, students, who have kept track of their money in their "checkbook", have the opportunity to purchase items such as pencils, drawing materials, candy, chips, homework passes and other small items. I have found that students actually favor the items without monetary value such as lunch with the teacher. This demonstrates to me that many children prefer interaction and attention rather than tangible items.


Overall, I will admit, my system does not work some of the time, and in that case it can be adapted for individual students. However, I have found that a system designed to set expectations early, then provide on-going and systematic rewards and consequences has helped the students in my classroom meet expectations and even excel above them.



## RECENT COURT DECISIONS AND LEGISLATION IMPACTING JUVENILES

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### DELINQUENCY

 *US v. Jackson*  
504 F.3d 250 (2d Cir. 2007).

In 2005, the court sentenced Defendant Kashawn Jackson, a prior felon, for a term of ten years for possession of cocaine with intent to distribute. *Id.* at 251-52. Jackson argued that his New York youth offender adjudication in 2001, which vacated a conviction of a Class D felony, was not a prior felony under 841(b)(1)(B) because the District Court failed to consider whether Jackson served his sentence in a juvenile or adult facility as alleged by the holding in *U.S. v. Sampson*. *Id.* at 252 (citing *U.S. v. Sampson* 385 F.3d 183 (2d Cir.2004)). Jackson argued that the holding in *Sampson* required a six-factor test and that the District Court failed to make a mandatory finding of fact as to one of these factors: the type of facility in which Jackson was incarcerated. *Id.* The Court held that there was no set formula and that none of the six factors were required; instead, they were all variables in considering whether a juvenile adjudication was indeed a prior final conviction under 21 U.S.C. §841(b)(1). The Court affirmed the judgment of conviction and ten-year mandatory minimum sentence. *Id.* at 253-54.

📖 *In re Christopher B.*  
156 Cal. App. 4th 1557 (2007).

Christopher B. was charged with burglary and vandalism based on the testimony of Brice M. *Id.* at 1559. Counsel for Christopher moved to dismiss because the sole evidence against Christopher was the uncorroborated testimony of the accomplice, Brice M. *Id.* at 1560. The trial court denied the motion to dismiss on two grounds: the court in *In re Mitchell P.*, 22 Cal. 3d 946 (1978) had held that CAL. PENAL CODE § 1111, which limited the use of uncorroborated accomplice testimony, did not apply in juvenile courts; and, there was additional evidence which corroborated Brice M.'s testimony. *Christopher B.*, 156 Cal. App. 4th at 1560.

The California Court of Appeal affirmed the judgment. They held that although there was no additional evidence to support Brice M.'s uncorroborated accomplice testimony, the California Supreme Court in *Mitchell P.* had expressly denied application of the accomplice corroboration rule in juvenile adjudications. *Id.* at 1561 (citing *In re Mitchell P.*, 22 Cal. 3d 946 (1978)). However, the court expressed reservations about their ruling, believing it was no longer good law and warranted review by the California Supreme Court. *Id.* at 1563, 1565. *Mitchell P.* emphasized several policy reasons behind the refusal to apply the accomplice corroboration rule to juvenile adjudications. *Id.* at 1561 (citing *In re Mitchell P.*, 22 Cal. 3d 946 (1978)). Among them were the legislature's choices of the word "conviction," indicating an intent to distinguish between adults and juveniles; rehabilitation of a youth outweighing the policy against the use of uncorroborated testimony; idea that a judge is better able to accord accomplice testimony its appropriate weight; and a lesser punishment for a juvenile than an adult. *Id.* at 1562.

In the years since *Mitchell P.*, there have been changes that call into question its holding. *Id.* at 1563. First, the

legislature has emphasized punishment and protection of the public over rehabilitation of the individual youth. *Id.* at 1563-64. Also, juvenile adjudication now increases punishment for later crimes as it considered a prior conviction under the Three Strikes law. This law allows for an increased sentence for an adult, is a significant factor in the trial court's determination of which prison terms is appropriate for the individual, enhances the possible sentence of either an adult or juvenile due to aggregation, and can be used as a factor in the penalty phase of a capital murder trial. *Id.* at 1564-66. There has also been an increase in the violations that allow a minor to be tried as an adult without adjudicating the minor's unfitness for juvenile adjudication, and the rebuttable presumption of unfitness itself has been lowered to 14 years of age from age 16. *Id.* at 1565-66. Lastly, the prevailing trend in other state courts has been to favor the applicability of the accomplice corroboration rule to juvenile adjudications. *Id.* at 1566.

For the purposes above, the court qualified their affirmation of the trial court by indicating that the holding in *Mitchell P.* barring use of the accomplice corroboration rule warranted reevaluation. *Id.* (citing *In re Mitchell P.*, 22 Cal. 3d 946 (1978)).

📖 *S.E. v. Grant County Bd. of Educ.*  
522 F.Supp. 2d 826 (E.D. Ky. 2007).

A.E. was a bi-polar seventh-grade student, who suffered from Attention Deficit Hyperactivity Disorder (ADHD). *Id.* at 827. She regularly received medication in the school nurse's office. On the last day of school in May 2005, A.E. normally received her medication in the nurse's office. However, the nurse gave her the four remaining tablets and asked A.E. to keep them with her. Later in the day, A.E. gave another student one of the pills. *Id.* at 828. Assistant Principal Lacey notified A.E.'s mother of the incident and informed her

that law enforcement would contact her over summer; however, this never occurred. On the first day of the new school year in August 2005, Lacey called A.E. into his office and required her to write, sign, and date a statement, otherwise, A.E. claimed, she would not be able to leave. After Lacey gave the statement to Officer Osborne, he suspended A.E. and told her that she would be subject to six-month probation in the juvenile justice system. A court designated worker then gave A.E. the option to enter into a diversion agreement or face formal court proceedings; A.E. selected the diversion program. Not long after this, A.E. suffered stress that resulted in physical pain and emotional distress and required her to be homebound instructed for the remainder of the year. *Id.*

A.E. alleged disability discrimination in violation of §504 of the Rehabilitation Act of 1973 as well as alleging failure to provide notice and a hearing in violation of her rights under the Rehabilitation Act. She brought a 42 U.S.C. §1983 action alleging violations of her Fourth Amendment right to be free from unreasonable search and seizure and her Fifth Amendment right not to incriminate herself. *Id.* at 828-29. The court held that under the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994), a §1983 action was barred when it would require the court to make a finding that the underlying conviction was invalid. *S.E.*, 552 F. Supp. 2d at 828-29. To allow otherwise would create a possible situation where the same issue was being litigated simultaneously and where it would be possible for the §1983 action to have a result that conflicted with the result of the underlying offense, i.e. the §1983 action was favorable to the plaintiff while the underlying offense was unfavorable. *Id.* at 830.

A.E. argued that *Heck* did not apply because diversion should not be treated as a conviction. *Id.* However, previous cases had held that diversion was treated as a conviction and precluded a §1983 action. Because the diversion program was intended to give individuals accused of first-time minor offenses a chance at personal rehabilitation without a trial or jail time and expungement of the record, allowing §1983



actions would undermine these policy reasons as it would allow litigants to take advantage of the lenient treatment and then turn around and sue the officer. *Id.* at 830-31.

The court also dismissed the Rehabilitation Act claim because A.E. failed to exhaust all remedies under the Individuals with Disabilities Act (IDEA). *Id.* at 832-33. A.E. claimed that she was not required to exhaust all remedies because these remedies would be futile due to the fact that she was homebound instructed. *Id.* at 832. However, the administrative process of IDEA cannot be avoided by the unilateral act of removing a child from a public school, and the court held that A.E. unilaterally acted when she removed herself to homebound instruction, and therefore her claim was without merit. *Id.* at 832-33.

📖 *Cote H. v. Eight Judicial Dist. Court ex rel. County of Clark*  
175 P.3d 906 (Nev. 2008).

Cote, a juvenile, was caught and confessed to fondling a 4-year old girl. Cote was under 14 years old at the time. He was charged with lewdness with a minor under 14 years of age per NEV. REV. STAT § 201.230(1) (2005). Cote moved for dismissal on the grounds that “he was a member of the class of persons protected” by the statute. *Cote H.*, 175 P.3d at 907. The trial court denied the motion. Cote petitioned the Nevada Supreme Court for a writ of prohibition or mandamus and to stay the juvenile court proceedings. The Court granted the stay and directed the state to answer the petition.

Although Cote had a “plain, speedy, and adequate remedy” at law, the Court considered mandamus relief for two reasons: because the issue was an important question of law and because it was an issue of first impression that appeared to arise frequently in the lower courts. *Id.* at 908. Turning to the

merits, the Court reviewed the statutory interpretation question *de novo*.

The statute applies to “[a]person who willfully and lewdly” commits the prescribed acts. *Id.* at 908 (emphasis in original)(quoting NEV. REV. STAT § 201.230(1) (2005)). Preliminarily, the Court noted that the term “person” in similar statutes has historically been interpreted broadly. The Court cited with approval a Connecticut decision that reasoned, “we will not interpret [a similar provision] to give minors license to sexually molest other minors.” *Id.* at 909 (citing *In re John C.*, 569 A.2d 1154, 1156 (Conn. App. 1990)). The Court held that a broad construction furthers the goals of the statute: protecting minors from assault. Further, it does not lead to absurd results. Therefore, the plain meaning should prevail. The Court concluded that under Nevada law, “a minor under the age of 14 who knows right from wrong constitutes a ‘person.’” Thus, the trial court did not abuse its discretion when Cote mandamus relief. *Id.* at 909.

**DEPENDENCY**

📖 *Tonya M. v. Superior Court of Los Angeles County*  
42 Cal. 4th 836 (Cal. 2007).

Petitioner Tonya M. petitioned for writ relief after the court terminated her reunification services at a six month review hearing. I.D., Tonya M.'s child, was born five weeks early and both mother and child tested positive for methamphetamines at the time of I.D.'s birth. Tonya M. admitted to having used methamphetamines throughout her pregnancy and two days before giving birth. *Id.* at 840. The Los Angeles County Department of Children and Family Services then placed I.D. in foster care. The lower court continued the statutorily mandated (Cal. Welf. & Inst. Code 361.1, subd. (a)(1)) six month review hearing because the County could not find Tonya M. for several months and did not establish due diligence in notifying Tonya M. and I.D.'s father. The time of the first hearing was nine months after the original jurisdictional and dispositional hearing. *Tonya M.*, 42 Cal 4th at 841.


At that time, the juvenile court found no substantial likelihood that the child, then under three years old, would be returned to his mother by the 12-month review date. Tonya M. then petitioned for writ relief, claiming that because her scheduled six- month hearing actually occurred at the nine month mark, the 12-month review was only four months away and she should be allowed the full six months that occurs between a typically scheduled 6- and 12- month review. *Id.* at 842. This raised the issue as to whether a juvenile court should be able to decide at the six-month review hearing to continue or terminate services, even if the next review is at a shorter time than six months away. *Id.* at 843.

The California Supreme Court held that services will be considered by the number of months until the next scheduled review, and that in Tonya M.'s case, only four

months remained until the 12 month review. The Court cites California Welfare and Institutions Code, section 366.21, subdivision (e), which allows faster resolution for a child under the age of three in cases like Tonya M's. The Court found this interpretation to be consistent with legislative intent.

However, the Court notes that the text alone in this section does not unambiguously determine the Legislature's intent. The Court looks to the dependency scheme as a whole, which grows more narrow in its willingness to offer reunification at the 6 month, 12 month, and 18 month reviews, and continues services no more than 18 months. Given this structure, the Court concludes that courts should consider the actual, and not hypothetical, months in between services, no matter the date on which the review hearings were held. *Id.* at 844-46.

Additionally, the Court makes reference to Assembly Bill No. 1524, which expedites a placement plan for children under three because of their special developmental needs, which are best met with permanent placement plans. The Court also found that pursuant to California Rules of Court, rule 5.71(f)(1)(e), a placement hearing is appropriate only if there is "a substantial probability that the child may be returned within 6 months or within 12 months of the date the child entered foster care, whichever is sooner." This Court opines that this rule reflects the Judicial Council's interpretation of relevant statutes and therefore deserves some deference. *Id.* at 846. For these reasons, the Court held that there is no rational basis for giving parents an extension on services if their originally scheduled hearing is delayed.

 *W.P. v Madison County Department of Human Resources*  
Ala. Civ. App LEXIS 591 (2007).

W.P. (the father) appeals a judgment terminating his parental rights of C.R. (the child). The Madison County Department of Human Resources (DHR) took custody of the child upon receiving a report that alleged father (J.R.) purchased and used cocaine. After removal, DHR determined that W.P., not J.R., was actually the biological father of the child. At that point the father became active in the child's life, contacted all of the child's social workers and began the process to pay child support. *Id.* at 2-3. In May 2005 he stated he was overwhelmed and wanted to voluntarily give his parental rights to the child's foster parents, but shortly thereafter changed his mind. *Id.* at 4.

In September 2005, DHR petitioned to terminate the rights of S.G. (mother) and the father. In October 2006, the court began ore tenus proceedings, where the trial court is the sole judge of facts and credibility of the witnesses and acts as jury. This type of proceeding makes an appeal difficult to overturn because the court's determination of facts is presumed to be correct. At the conclusion of these proceedings the juvenile court terminated both mother and father's parental rights and recommended that the child's foster parents adopt the child. The father then appealed, claiming a lack of clear and convincing evidence supporting the termination of his rights. *Id.* at 13-14.

The juvenile court pointed to shoplifting convictions, physical assault of a previous girlfriend and leaving two of his children unattended in a vehicle as evidence supporting termination. However, the father made counter-arguments with regard to each of these instances. First, he argued that the shoplifting convictions were not serious enough to warrant termination of his parental rights because they were not felonies. Second, the assault should not suffice because it occurred four years before the child's birth and he completed a 12-13 week anger management class as a result. Finally, he understood that he had lacked proper judgment in leaving the children alone in the car. *Id.* at 7-10.

The Alabama court applied the two prong test found in *Ex parte Beasley*, 564 So. 2d 950, 954 (Ala. 1990) to these facts:

First, the court must find that there are grounds for the termination of parental rights, including, but not limited to, those specifically set forth in § 26-18-7, Ala. Code 1975. Second, after the court has found there exist grounds to order the termination of parental rights, the court must inquire as to whether all viable alternatives to a termination of parental rights have been considered. *Id.* at 14-15.

Section 28-18-7 Ala. Code 1975 provides that the court must find clear and convincing evidence to terminate parental rights. *Id.* at 15. The appellate court found that while the father may not be a model parent, he demonstrated commitment to taking care of this child and proved himself to be a stable and trustworthy parent for his other children. *Id.* at 21. The allegations against him were refuted in fact. Therefore, there was no clear and convincing evidence sufficient to terminate parental rights and the court reversed and remanded the case for judgment consistent with this opinion. *Id.* at 22.

 *In re Davonta V*

940 A.2d 733 (Conn. 2008)

Davonta, a 10-year old, was the subject of two dependency petitions. The first, which resulted in a protective custody order, was terminated when Davonta's mother ("Respondent") entered the witness protection program and moved out of state in 1999. The second was filed in 2000 and Davonta was adjudicated neglected and placed in foster care. In 2002, the state moved to terminate respondent's parental rights. After a long trial, the juvenile court found that

respondent had not rehabilitated herself, and that there had been reasonable reunification efforts. The juvenile court terminated her parental rights. *Id.* at 735.

On appeal, respondent contended that since Davonta's adoption by his foster parents was not guaranteed, it was not in his best interests to terminate his biological mother's rights. A split Appellate Court agreed, and the Connecticut Supreme Court granted review to determine "whether it is ever in a child's best interest to terminate his parents' rights when an adoptive family has not been secured and the child retains good relations with his extended biological family." *Id.* at 736.

In reviewing the lower courts, the Court afforded "great deference" to the trial court's factual findings. *Id.* at 737. Relying on expert and lay testimony, the trial court had found that Davonta needed permanency, was happy in his foster home and loved his foster family, and did not want to speak to his biological mother; moreover, as long as she had parental rights, Davonta's life could not stabilize. Therefore, the trial court's order guaranteed Davonta visitation with his biological family members. *Id.* at 737-40. Given these facts, and the conclusion that the trial court's order served Davonta's best interests, the Court held as a matter of law that the mere fact that an adoption is not final does not preclude the termination of parental rights. *Id.* at 742.

**EDUCATION**

📖 H.R. 3763 (GRADUATES ACT), 110<sup>th</sup> Cong. (2007)

In October 2007 Representatives Dave Loebsack (D-IA) and Philip Hare (D-IL) introduced a bill to Congress to give competitive grants to eligible educational partnerships. The purpose of the partnerships would be to implement strategies in secondary schools with a goal of improving student achievement and supporting at-risk students in postsecondary education and the workforce. Congress found that to compete in a global economy and to provide support for American companies, it is important for United States students to have both a secondary diploma and postsecondary education. According to the findings, almost 90 percent of the fastest growing and best paying jobs require some type of postsecondary education. However, only one-third of all United States high school students graduate in four years and are prepared for a four-year college or university. For the class of 2006 alone, dropouts will cost the United States more than \$309 billion in lost or reduced earnings.

H.R. 3763 seeks to amend Title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6301 et seq.) by reassigning part I as part J, and inserting the following sections after section 1830. Section 1851 describes the purposes of the fund, which are:

- (1) To improve the achievement of at-risk secondary school students and prepare such students for higher education and the workforce;
- (2) to create evidence-based, replicable models of innovation in secondary schools at the State and local level; and
- (3) to support partnerships to create and inform innovation at the State and local level to improve learning outcomes and transitions for secondary school students.



Section 1852 defines the partnerships that may receive these grants. Eligible partnerships include a combination of either a state or local education agency *and* an institute of higher education, a non-profit, a community based organization, a business or a school development organization. Subsections 2, 3, 4 and 5 also define eligible schools as public (including charter) middle and high schools.

Section 1853 discusses the grants available, sub-grants to eligible schools and the application process for grants. In detail, it establishes the method of grant review as well as the qualities of partnerships to assess when awarding grants. Relevant qualities include diversity in activities funded by the grants, geographic distribution in awards (including rural and urban areas) and distribution among all grade levels (grades 5 through 12) in the eligible schools.

In addition, Section 1853 discusses the types of students targeted for the fund. Types of students include those who are: not making adequate progress towards graduating in four years, pregnant or already parents, working to support themselves and their families and former wards of the juvenile justice system. The partnerships will create personalized learning environments to help these students. Options include extending the school day, providing advisors, involving students and parents in creating individual plans for the future and providing more credit opportunities and experience in both post-secondary education institutions and the workforce.

The bill's sponsors propose \$500,000,000 allotment for fiscal year 2008 and for each of the succeeding five years.

📖 *Curry ex rel. Curry v Hensinger*  
513 F.3d 570 (6th Cir. 2008).\*

A Michigan public elementary school held an event called “Classroom City” in which students, using simulated money, bought and sold goods they made. Joel Curry, a fifth grader, brought homemade Christmas tree ornaments shaped like candy canes. Unbeknownst to school officials, Joel attached cards, explaining the Christian symbolism of candy canes, to each ornament. School and school district officials conferred and prohibited Joel from distributing the cards. Nevertheless, Joel continued to sell the ornaments without the cards attached. *Id.* at 574-76.

Joel and his parents sued the school district and the school’s principal, Hensinger, for violating Joel’s First Amendment right. The District Court granted summary judgment for both the school district and Hensinger, finding that the district had violated none of Joel’s rights and that Hensinger was entitled to qualified immunity. The plaintiffs appealed as to the holding on Principal Hensinger. *Id.* at 573.

The Appellate Court affirmed on different grounds. The Court found that Joel’s expression took place during a school-sponsored activity, and thus was not private expression. The court therefore applied *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). *Curry*, 513 F.3d at 577. Under *Hazelwood*, school officials are given wide latitude to regulate student speech during school-sponsored events. Here, the facts counseled in favor of respecting the principal’s discretion: Joel’s “admitted purpose” was to “promote Jesus to other students,” Joel “evaded” the school’s formal approval process, and the school had a legitimate interest in protecting its students from being offended. *Id.* at 579. The Court

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\* The defendant’s name appears in the body of the opinion as “Hensinger,” as opposed to “Hensiner” in the caption.

therefore concluded that Hensinger acted out of her “reasonable evaluation of pedagogical concerns” and “within her discretion as a school administrator.” *Id.* at 579-80. Since there was no constitutional violation, the Court did not evaluate whether Principal Hensinger was entitled to qualified immunity. *Id.* at 580.

#### Public and Independent School Choice

Vermont State Assembly Bill H.009, 2007 – 2008 Regular Session


Status: In the House

Introduced by Representative Otterman of Topsham, Vermont, State Assembly Bill H.009 will allow parents to select the school their child attends. If passed, parents may enroll their students in any public school that has room for the students, any private school that accepts the students, or a home study program. Public schools will annually report the number of students it has capacity for and the school will receive state funding for each student enrolled. Similarly, if the parents instead wish to enroll their child in private school or in a home study program, either the private school or the parents will receive a certificate stating the school will receive state compensation for the student's education.

Vermont has the longest running full school choice program in the nation. THE CENTER FOR EDUCATION REFORM, JUST THE FAQs - SCHOOL CHOICE 2008, <http://www.edreform.com> (follow the “FAQs” link under “Resources” on the right side of the page. Then follow the “Just the FAQs - School Choice” link about halfway down the page)(last visited April 8, 2008). Established in 1869, the program's purpose was to make sure students living in rural areas with a population too small to support a public school still had access to public education. In 1961, the statute became the issue of controversy when opponents argued state funding should not be used to support a child enrolling in a

religious school. The Supreme Court of Vermont agreed, and in *Swart v. South Burlington Town School District* the Court ruled state funding for the education of students enrolled in religious schools was a violation of the U.S. Constitution's Establishment Clause. *Swart v. South Burlington Town School District*, 122 Vt. 177 *passim* (1961). In 1994, the Vermont Supreme Court overruled the holding of *Swart* with *Campbell v. Manchester Bd. of School Directors*, finding state reimbursement for students located in rural areas without a local public school to be constitutional even if the student attended a religious school. *Campbell v. Manchester Bd. of Sch. Directors*, 161 Vt. 441 (1994). However, the Virginia Board of Education ignored the Court and did not change the tuition reimbursement policies established in 1961 INSTITUTE OF JUSTICE, VERMONT SCHOOL CHOICE (2008), <http://www.ij.org/schoolchoice/vermont2/index.html> (last visited March 19, 2008). The Board threatened "to eliminate state aid to the Chittenden Town school board because Chittenden wished to grant tuition to parents selecting religious schools." *Id.* In 1999 the Vermont Supreme Court again examined the practices of the Board of Education, holding that state funding for students enrolled in religious schools violates the Vermont State Constitution's "compelled support" clause. *Chittenden Town School Dist. v. Department of Educ.*, 169 Vt. 310 (1999).

As currently drafted, H.009 would reverse the holding of *Chittenden* and would compel the Department of Education to provide tuition vouchers "to any secular or sectarian independent school which accepts the student." H.009 (Vt. 2008). As of March 8, 2008, the bill is active and being heard by the House Education Committee.

 An Act to Amend Tennessee Code Annotated, Title 39, Chapter 17; Title 49, Chapter 5 and Title 49, Chapter 6, relative to steroid abuse.

Tennessee H.B. 4167, 2007 – 2008 Regular Session

Status: In House subcommittee K-12 of Education of Education Committee


Tennessee is one of the latest states to propose legal ramifications for use of illegal steroids in high school athletics. HB 4167 proposes that it be “an offense for any person who is not a practitioner or lawful manufacturer of anabolic steroids to knowingly, with the intent to compromise the outcome of an athletic competition, procure, sell, or administer anabolic steroids or cause such drugs to be procured, sold, or administered to a student-athlete.” THE TENNESSEE GENERAL ASSEMBLY, BILL SUMMARY FOR HB4167 / \*SB3522 (2008), <http://www.legislature.state.tn.us/> (follow the hyperlink “Legislation” then select the “bill number index” hyperlink. On the main page, follow the hyperlink “HB4101-HB4200”, then select the hyperlink HB4167) (last visited March 19, 2008). Additionally, the bill calls for the creation of an instructional program about steroid abuse for students in grades 7 through 12, and requires any teacher who knows of steroid abuse to inform the principal, who would then notify local police enforcement.

The issue of steroid abuse affects students of both sexes and across a variety of age groups. Most commonly, steroid abuse is seen in “male athletes seeking to better their performance in sports, be more competitive in the pursuit of athletic scholarships, or to gain recognition outside of the arena.” ASSOCIATION AGAINST STEROID ABUSE, ANABOLIC STEROID USE IN ADOLESCENTS AND HIGH SCHOOLS (2007), <http://www.steroidabuse.com/steroid-use-in-high-schools.html> (last visited March 19, 2008). Although steroid abuse in high school athletics had been recognized as an issue several years earlier, the problem had not been aggressively addressed by

legislation until 2005. HAYLEY WYNN, STATES STEP UP TO THE PLATE AGAINST STEROIDS (2005), <http://www.stateline.org> (in the search field at the top of the page enter the title of the report. Then follow the hyperlink titled “States step up to the place against steroids”) (last visited March 19, 2008). Since then many states have considered and passed bills similar to HB 4167. It appears that these efforts may have had a positive effect in deterring steroid usage in high schools.

While it is too early to determine if the legislation has made an impact on steroid usage, a report from the Monitoring the Future Survey by The University of Michigan, in 2006, indicates that there has been a slight decrease every year in the percentage of students that have tried steroids at some point in their life since 2003. JOHNSTON, L. D., O'MALLEY, P. M., BACHMAN, J. G., & SCHULENBERG, J. E., MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE 1975 – 2006 VOLUME 1: SECONDARY SCHOOL STUDENTS 44 (reporting a decrease of steroid usage from 3.5% of all twelfth grade students in 2003 to 2.7% in 2006).

As of March 8, 2008 HB 4167 remains active.

 *Winkelman v. Parama City School District*  
127 S. Ct. 1994 (2007)

Jacob, a 6 year old diagnosed with autism spectrum disorder, qualifies for a free public education under the Individuals with Disabilities Education Act (“IDEA”). His parents ( “the Winkelmans”) worked with the local school district to develop an Individualized Education Plan (“IEP”) for Jacob, but the parties were unable to agree on the terms. As required by the IDEA, the Winkelmans and the school district participated in an administrative proceeding to remedy the dispute, which ultimately resulted in a plan that left the Winkelmans unsatisfied. The Winkelmans subsequently enrolled Jacob in a private school. Unrepresented by legal

counsel, the Winkelmanns filed suit in the United States District Court for the Northern District of Ohio, alleging that the school district failed to provide Jacob a free appropriate public education in compliance with the IDEA and that his IEP was inadequate. They sought damages for the cost of Jacob's private school education and the legal proceedings, as well as declaratory relief.

The District Court found that the school district offered to provide Jacob with an appropriate education as required by the IDEA. The Winkelmanns appealed to the Sixth Circuit Court of Appeals, which dismissed the appeal until the Winkelmanns obtained legal counsel for Jacob. The court stated that the right to a free public education "belongs to the child alone," and that the Winkelmanns as parents were not entitled to any relief from the school district. *Winkelman v. Parama City School District*, 127 S. Ct. 1994, 1999 (2007) [hereinafter *Winkelman*]. The Winkelmanns again appealed, relying on *Maroni v. Pemi-Baker Regional School Dist.*, 346 F.3d 247 (2003). In *Maroni*, the First Circuit Court of Appeals ruled parents had "statutory joint rights" under the IDEA that allows parents to bring claims to the court on their own behalf. *Id.* at 258.

The United States Supreme Court granted certiorari to resolve this disagreement among the Circuits. The Supreme Court found that the IDEA accords parents "independent, enforceable rights" by allowing them to actively participate in the creation of the IEP and to proceed through an administrative hearing when they are unsatisfied with the IEP. *Winkelmanns* at 2002. The Court stated that "it would be inconsistent with the statutory scheme to bar them from continuing to assert these rights in federal court." *Id.* at 2002. The Court further found that "it is not a novel proposition to say that parents have a recognized legal interest in the education and upbringing of their child." *Id.* at 2003. After carefully examining the language of the IDEA, the Court found that the Winkelmanns could proceed to federal court without legal representation for Jacob. The appellate court's

finding was overturned and the case was remanded for further proceedings.

Justice Scalia, joined by Justice Thomas, concurred in finding that the Winkelmanns should be able to proceed to trial *pro se* under the IDEA when seeking reimbursement for private school expenses, but not when they seek to establish that their child's public education would have been inadequate.

📖 *Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*  
512 F.3d 252 (6th Cir. 2008)

Plaintiffs-Appellants are eight school districts and eleven education associations that filed suit in the United States District Court for the Eastern District of Michigan. *Id.* at 257. After a judgment dismissing plaintiffs' suit, they appealed to the Sixth Circuit Court of Appeals. *Id.* at 258. Plaintiffs' claims were made based on §7907(a) of the No Child Left Behind Act of 2001 (NCLB), which states: "General prohibition. Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a state, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State of any subdivision thereof to spend any funds or incur any costs not paid for under this Act." *Id.* at 257, quoting 20 U.S.C. §7907(a).

Plaintiffs sought a declaratory judgment stating that "states and school districts are not required to spend non-NCLB funds to comply with the NCLB mandates, and that a failure to comply with the NCLB mandates for this reason does not provide a basis for withholding any federal funds to which they otherwise are entitled under the NCLB." *Id.* at 257-58, quoting Joint Appendix to 20 U.S.C. §7907(a) at 67. In addition, plaintiffs sought an injunction to prevent the Secretary from denying any states or school districts federal



funds based on failure to comply with NCLB standards if the reason for such non-compliance is a refusal to spend non-NCLB funds to achieve compliance. *Sch. Dist. of City of Pontiac*, 512 F.3d at 258.

The Court first affirmed that the plaintiffs have standing to sue under the three constitutional requirements: the plaintiff demonstrated that it had suffered an actual and concrete injury, that the injury is traceable to the defendant, and that the injury will likely be rectified by a favorable ruling. *Id.* at 259. Next, the court held that the plaintiffs stated a valid claim under NCLB. *Id.* at 261. Congress enacted NCLB within its powers from the Spending Clause of the U.S. Constitution. *Id.* at 261, citing U.S. Const. art. 1, § 8, cl. 1. Congress can exercise this power however it chooses, subject to several requirements. *Sch. Dist. of City of Pontiac*, 512 F.3d at 261. One requirement is that Congress unambiguously declare any conditions that a state must meet in order to receive federal funds so as to put the state on “clear notice” of the conditions. *Id.* at 261-63.


Two similar cases provided guidance for the Court, leading it to find that Congress did not meet the clear notice requirement here. In *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, the Supreme Court held that certain provisions within the Developmentally Disabled Assistance and Bill of Rights Act of 1975 that lacked language stipulating express conditions did not create enforceable duties for the state to fulfill. *Sch. Dist. of City of Pontiac*, 512 F.3d at 261-62. In *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, the Court applied this principle to find that, even if the intent of Congress was to attach a condition to federal funds, if the states were not clearly informed of the condition, it is unenforceable against the states accepting such funding. *Sch. Dist. Of City of Pontiac*, 512 F.3d at 263-64.

Applying this rule to the present case, the Court of Appeals found that the Act failed to provide clear notice to the states of their obligation to provide their own funds to ensure compliance where federal funds were insufficient. *Id.* at 265.

The defendant offered two alternate interpretations of §7907(a), both of which the Court ultimately rejected. *Id.* First, the Secretary asserted that the provision was intended merely to prohibit federal officers and employees from making unauthorized changes to the requirements for NCLB-participating states. *Id.* The second interpretation offered was that the provision emphasizes the voluntary nature of NCLB participation. *Id.* at 266-69. The Court rejected both of these on the grounds that they are not obvious interpretations and hence the Act still lacks clear notice for the states. *Id.* at 265.

The Court found that if NCLB was intended to require state compliance with requirements even when federal funding is insufficient to do so, the provisions of the Act itself do not provide clear notice. *Id.* at 272. As the Act is stated, it violates the Spending Clause. *Id.* at 265. The Sixth Circuit reversed and remanded to the District Court. *Id.* at 273.

Justice McKeague filed a dissenting opinion in which he argued that §7907(a) is not ambiguous and that the meaning of the provision is to emphasize that the NCLB cannot be made mandatory for states. *Id.* at 273-74. Justice McKeague also stated that the imposition of requirements even on non-NCLB participant schools indicates that the cost of compliance was not intended to be correlated to the cost of federal funding. *Id.* at 274-75. He pointed out the fact that Congress has never appropriated an amount of federal funding that would come close to fully covering the costs of compliance for participating states, and that even “the maximum amount of money from Congress would still have left the districts short” *Id.* at 276.

 *Anderson v. Sch. Bd. of Madison County*  
517 F.3d 292 (5th Cir. 2008)

After practicing *de jure* race-based segregation, the Madison County School District (MCSD) in Mississippi has been under a federal court order to desegregate its schools since 1969. *Id.* at 294. The School Board filed a motion with the United States District Court for the Southern District of Mississippi seeking full unitary status based on claims that it has fulfilled the requirements and complied with federal orders regarding eliminating racial segregation and discrimination. *Id.* The district court granted the motion and private citizens appealed the decision, primarily based on concerns with a magnet program at Velma Jackson High School (VJHS). *Id.* at 294-95. The United States Court of Appeals for the Fifth Circuit heard the appeal.

First, the Fifth Circuit Court addressed the question of whether the issues decided were ripe for review. *Id.* at 296. Appellants argued that some relevant committee evaluations were incomplete by the time the motion for unity was granted, and also that more time was needed after renovations and repairs to assess whether the magnet program would succeed in drawing more white students to the program. *Id.* at 296-97. The Court rejected these arguments on grounds that it was largely impractical to wait for completion of all projects and evaluations. *Id.* at 297.

Next, the court reviewed the affirmation of unitary status. *Id.* The criteria for determining whether a school district is unitary are: 1) a good faith effort to comply with desegregation orders; and 2) evidence that the school district has “eliminated the vestiges of prior *de jure* segregation to the extent practicable.” *Id.* The district court’s finding that the MCSD met the good faith requirement was plausible based on the evidence in the record. *Id.* at 298.

The Court noted that complete racial balance was not a requirement of the second criterion, and considered several factors to establish the needed evidence, including 1) student assignment; 2) adequacy of school facilities; and 3) diverse racial composition of the faculty. *Id.* With regard to the first factor, student assignment, the court examined arguments by appellants that the magnet program at VJHS failed to attract white students due to the MCSD's lack of good faith commitment. *Id.* at 299. On the contrary, the court found that the failure to draw white students was attributable to location and demographic factors. *Id.*

As to the second factor, the Court found that any discrepancies in facility quality among schools was attributable to differing interests in the student population or school design flaws that were unrelated to former segregation practices. *Id.* at 302-03. As such, the Court found no error in the district court's holding that "[MCSD] has undertaken to address known relevant deficiencies at all its schools, and to provide adequate and proper educational facilities for all its students." *Id.* at 303.

Third, the Court found that the MCSD's failure to satisfy the desired faculty racial composition at VJHS is not fatal because of efforts to remedy the failure and the fact that current ratios are not egregiously unbalanced. *Id.* at 304. The above findings, together with the perceived importance of restoring control of schools to local authorities, led the court to affirm the district court's ruling that the Madison County School District has achieved unitary status and no further oversight is required. *Id.* at 305.