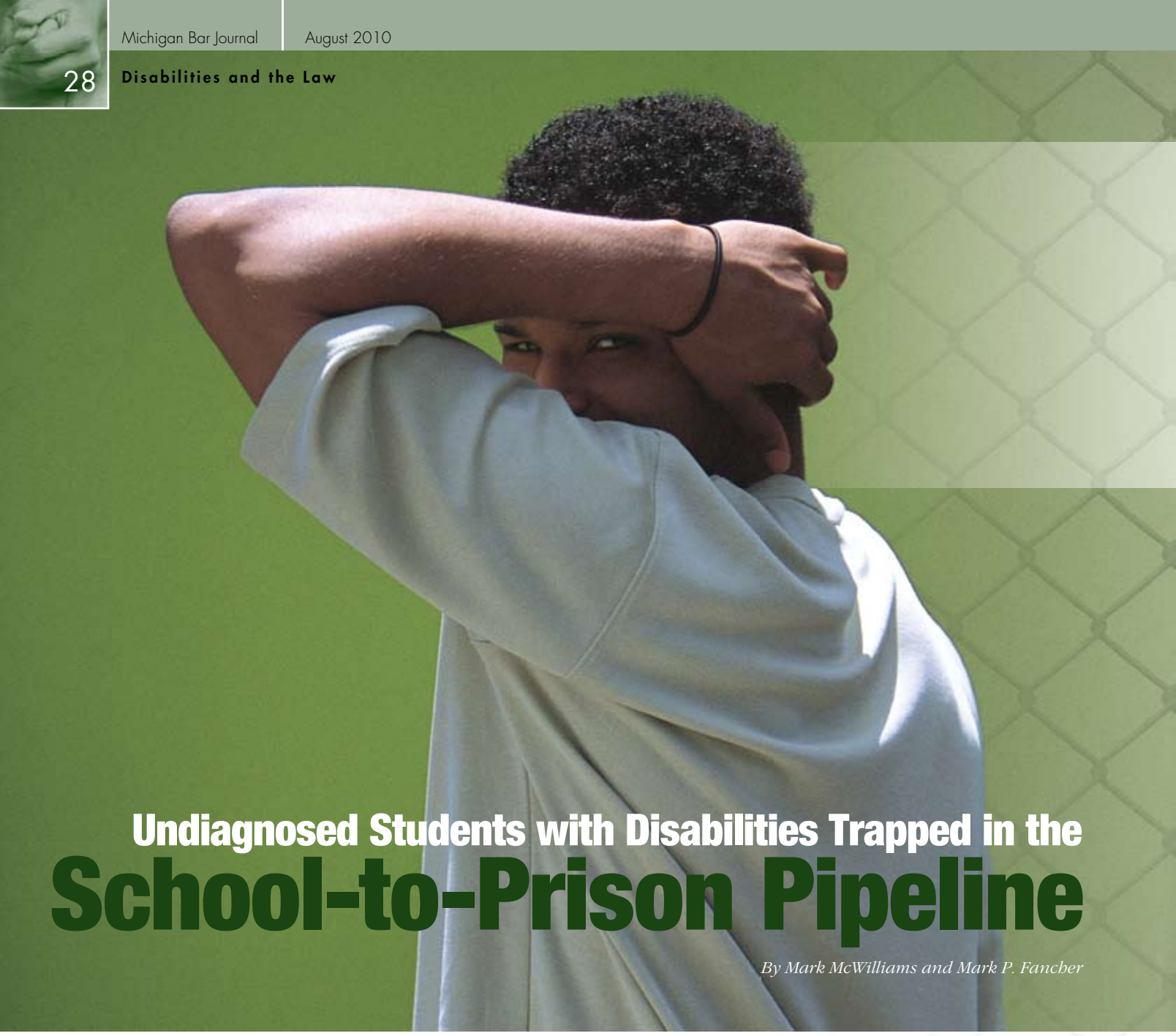

Undiagnosed Students with Disabilities Trapped in the School-to-Prison Pipeline

By Mark McWilliams and Mark P. Fancher

Because nine-year-old "Terrence" found himself engaged in fights and confrontations with teachers several times each week, his mother repeatedly asked that the principal of the child's southeast Michigan school arrange for a disability evaluation. The principal refused, claiming that a finding of an anger management disability would stigmatize the child for the rest of his life.

Ultimately, Terrence's mother became fed up and arranged an intra-district transfer for her son. Before the end of his first day at his new school, Terrence, who is black, got into a fight with a white student. Even though the fight was a mutual affray, the white child was not punished. At Terrence's suspension hearing, his mother explained yet again her suspicions that Terrence had a disability and requested an evaluation. In response, the school district's board voted to suspend Terrence for the balance of the school year and evaluate him when he returned in the fall.

Terrence is only one of many students who, contrary to federal and state law, do not receive disability evaluations *before* they are suspended from school. Their disabilities are likely to cause repeated problems, leading to multiple suspensions and increased risk of dropping out, permanent expulsion, and maybe even incarceration. The failure to evaluate for disabilities contributes to a demonstrated racial "suspension gap" that negatively impacts communities of color—the black community in particular.

This article will examine the law regarding discipline of students with disabilities, the disproportionate impact of discipline practices on students of color and students denied access to special education evaluation and due process, and possible solutions to better protect and ensure educational success for all students.

Fast Facts

The failure to evaluate for disabilities contributes to a demonstrated racial "suspension gap" that negatively impacts communities of color—the black community in particular.

Many schools consider behavior to be volitional rather than driven by disability, resulting in improper denial of special education services, inadequate behavior supports, or improper findings that behavior is not related to disability.

Once students leave educational programs, they are in many cases immediately sent careening through the slippery pipeline toward prison.

Legal Requirements for Pre-Suspension Testing for Disabilities

A school may suspend or expel a student—and in some situations has to[1]—but in no case can the school suspend or expel a student without due process.[2]

Students with disabilities have additional due process protections. Why? Before 1975, when the Individuals with Disabilities Education Act (IDEA) was first enacted into law, the educational needs of millions of children were not being met, in part because such students were excluded from school under the school's discretionary authority to suspend or expel students.[3] IDEA requires that students with disabilities be allowed to attend school. The additional protections for students with disabilities exist to ensure that IDEA is implemented properly and so students are not excluded because of their disability status.[4]

The heart of IDEA's discipline due process is the *manifestation review,* which is part of what are commonly referred to as individualized education programs (IEPs). The manifestation review is a process in which an IEP team decides whether the behavior that resulted in disciplinary measures is related to the student's disability and whether the school did everything possible to prevent misconduct. Specifically, the team decides whether:

- The conduct in question was caused by or had a direct and substantial relationship to the child's disability; or
- The conduct in question was the direct result of the school's failure to implement the IEP.[5]

The IEP team must consider all relevant information related to the behavior that is the subject of discipline.[6] That information includes evaluation and diagnostic results, information supplied by the parents, observations, and the current IEP and placement.

IDEA allows for re-evaluation more frequently than every three years if conditions warrant a re-evaluation or a parent or teacher requests it. Changes to IDEA in 2004 require agreement to conduct evaluations more than once a year.[7]

A parent may disagree with the results of an evaluation and request an independent educational evaluation (IEE) at the school's expense. An IEE is "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question."[8] If the parents choose to obtain an independent evaluation, that evaluation must be considered in decisions regarding the student's education and may be introduced as evidence at any administrative hearing. A parent may disagree with any finding made by the school or IEP during the manifestation review process by signing in disagreement with the manifestation review and requesting a due process hearing.[9]

During the manifestation review or due process hearing, a student may be placed in an interim alternative educational setting,[10] but the "stay-put" requirement acts to stay any expulsion.[11] Interim alternative educational settings must continue to provide services and supports to enable students with disabilities to participate in the general education curriculum and progress toward meeting IEP goals.[12]

How does the law treat students facing long-term suspension or expulsion who have not previously been eligible for special education but *may* have a disability that has not been identified? Students who have not been found eligible for special education are protected by IDEA (including manifestation review, stay put, etc.) in three distinct circumstances. A school district shall be deemed to have knowledge that a student has a disability if, before the behavior occurs:

(1) The parent of the student has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to supervisory or administrative personnel of the appropriate educational agency or the student's teacher that the student is in need of special education and related services;

(2) The parent of the student has requested an evaluation of the student; or

(3) The teacher of the student or other personnel of the local educational agency has expressed specific concerns about a pattern of behavior demonstrated by the student directly to the director of special education of such agency or to other supervisory personnel in the agency.[13]

Schools are not deemed to have knowledge that a student has a disability if parents refuse to consent to evaluations or if the school has evaluated the student for services and found him or her ineligible.[14]

If a student in special education is expelled, the school must still serve him or her by providing post-expulsion services.[15] Post-expulsion services must be more than minimal homebound services and must be determined by an IEP team (or a hearing officer if the parent appeals the IEP team's post-expulsion services as being inadequate).

Problems with Pre-Suspension Testing in Michigan

Once students leave educational programs, they are in many cases immediately sent careening through the slippery pipeline toward prison. A recent report by the American Civil Liberties Union (ACLU) of Michigan titled "Reclaiming Michigan's Throwaway Kids" suggests that this "school-to-prison pipeline" is disproportionately populated by students of African descent.[16] Undiagnosed disabilities contribute to racial disparities such as the following:

- In the Fitzgerald School District, black students were only 28.6 percent of the total secondary-school student population of 1,684 during the 2006–2007 academic year but received more than 42 percent of the 3,004 suspensions.
- In the Van Dyke School District during 2007–2008, black students were 32 percent of the secondary-school student population of 973 but received 58 percent of 317 short-term suspensions. Nine of 12 students receiving long-term suspensions were black, and all four students expelled that year were of African descent.
- In the Ann Arbor School District during 2006–2007, black students were 18 percent of the secondary-school student population of 9,655 but received 58 percent of the 817 suspensions.
- In the Taylor School District from 2005 through 2007, black students were 20 percent of the secondary-school student population of 10,221 but received 35 percent of the 10,898 short-term suspensions.

There is also significant evidence indicating that the conduct of white and black students is not considerably different, but black students are disciplined more often for behavior that is subjectively regarded as misconduct. For example, the offense of disrespect can be entirely in the eye of the beholder.

These problems are compounded when school officials decline to seek out objective evidence of the causes of misconduct. Leslie Harrington, executive director of the Student Advocacy Center of Michigan, said:

> Experts talk about the disproportionate [number] of black students with special education certifications. We see the opposite in certain affluent school districts where black students, often poor, are denied the support that an individual behavior plan can provide because the predominantly white administration assumes these students are *choosing* to act out. Put simply—they would rather not have to spend the resources on a kid who they believe doesn't belong there in the first place.[17]

Rosemary Black Hackett, a legal advocate at the Student Advocacy Center, confirmed that because most of the students the center serves are low-income children of color, the assertion that these students are often suspended or expelled rather than evaluated is not mere speculation.[18]

Federal law requires school districts to conduct "child find" activities to "identify, locate, and evaluate" all children with disabilities.[19] Children not identified for evaluation are not counted, and there is not a clear measure of how many children never enter the evaluation process. More than twice as many children are identified by community mental health service providers under the more restrictive definition of "seriously emotionally disturbed" than are identified as "emotionally impaired" by schools.[20] It is possible, then, that the widespread failure to comply with child find masks a much larger problem that children are remaining unidentified and therefore unsupported.

The failure to comply with child find is an indicator of another problem—school districts failing to consider the behavioral aspects of disabilities when identifying children whose disability-related behavior adversely impacts education. Federal law foresees that a student's need for special education services is not defined only by progress from grade to grade, but encompasses a broader sense of educational success.[21] Despite the legal standard, many schools consider behavior to be volitional rather than driven by disability, resulting in improper denial of special education eligibility, inadequate behavior supports to address disability-related conduct, or improper findings in manifestation determination reviews that behavior is not related to disability.

There is an obvious social cost to the racial suspension gap in the form of actual and perceived racial discrimination. But there is also an economic cost that grows out of a connection between long-term suspensions, the school dropout problem, and incarceration. The annual cost of educating a child in Michigan is between $5,000 and $10,000. The cost of incarcerating an individual is approximately $30,000. Many dropouts require welfare, public health care, and other public services. Research indicates that each year, dropouts cost Michigan about $2.5 billion.

The failure to identify disability-related conduct also has significant consequences for students with disabilities threatened with expulsion. When students with disabilities are not identified, they lose the procedural protections set forth in IDEA—the right to a

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manifestation determination review, the right to a special education due process hearing, and the right to stay put—and must rely on the minimal constitutional due process protections set forth in *Goss v Lopez*.[22]

In addition, students with disabilities lose the benefit of updated and individualized evaluations, including independent educational evaluations. In losing evaluation rights, both students and schools miss important opportunities to identify corrective and preventive academic and behavior supports that might help the student succeed in school.

Finally, students with disabilities also lose access to services and educational supports, including those that would follow them even if they were expelled or moved to an alternative setting. Without the services set forth in individualized education programs, students with disabilities have no assurance that they will receive any support or even have access to education. For students with disabilities expelled under the state zero-tolerance laws, the consequences are especially severe, as the law permits schools to deny reinstatement at any time—essentially meaning those students will receive no education at all.

Recommendations for Reform

The ACLU of Michigan report makes numerous recommendations for reform that apply to all students, including:

- Uniform due process for disciplinary proceedings
- State law reform to conform Michigan's zero-tolerance laws to federal law requiring expulsion only for firearms offenses
- Adoption of alternatives to expulsion, including restorative practices
- Availability of high-quality alternative education for all
- Rare reliance on the criminal justice system to address disciplinary issues
- Enactment of a statewide right to education[23]

For students with disabilities, numerous advocacy strategies can be used effectively in individual situations to ameliorate the harsh effects of Michigan's school discipline policies and practices. For example, if a student is being referred outside the classroom

or subjected to frequent short-term suspensions, it is useful to look at the student's IEP goals, behavior plan, and services and supports offered to make sure they are appropriate, challenging them when necessary. With the changes brought forth by IDEA 2004, it is more important than ever to ensure that a student's IEP describes as completely and accurately as possible the student's needs and the services and supports to meet them. This review should, if possible, happen before a discipline problem rises to the level at which a manifestation review is necessary.

Assuming that a student's IEP is complete and accurate, IDEA does not allow schools to expel students with disabilities when the conduct in question is caused by the failure to implement the IEP. In a situation in which a student is subjected to constant reviews with little progress, one may look at IEP implementation as an issue in preventing discipline problems from becoming more serious and as a basis to improve the student's program if there is behavior that leads to discipline.

There are also implementation reforms that would help students with disabilities avoid disability-related discipline and stay in school. The federal and state governments must recommit to enforcing existing special education law by mandating corrective actions in the hundreds of districts that do not conduct timely special education evaluations. Policy should also be clarified to identify the breadth of child find to encompass not only students whose parents request evaluations, but also those who may qualify but have not been formally identified. Policy should also be clarified to specify that adverse educational impact is broader than academic progress but encompasses the full range of school performance, including behavior.

Beyond legal remedies, there are at least three types of school-wide strategies that can not only prevent the need for discipline and expulsion but also work to improve other aspects of school life for students, including academic achievement.[24] They are:

- **System of Care/Wraparound:** This model, promoted by funding from the federal Substance Abuse and Mental Health Services Administration (SAMHSA), comes from the 1992 Children's Community Mental Health Services Act. SAMHSA has funded more than 140 community systems of care, including some in Michigan. System of care applies a mental health orientation with its attendant goals and terminology to individual children with severe mental health or emotional needs. System of care refers to the overall system of coordinating mental health services while the wraparound philosophy is the expression of that system in providing coordinated services to individual children based on their unique needs. Schools have historically had weak links to this model despite the potential for collaboration through the Safe and Healthy Schools Act.
- **Interconnected Systems:** This approach, promoted by funding from the federal Maternal and Child Health Bureau, views all providers as part of three interconnected systems of prevention, early intervention, and care. It has been promoted by two federally funded research centers—the Centers for Mental Health in Schools at UCLA and University of Maryland—and the prolific writings of Adelman and Taylor at UCLA. Unlike system of care, it focuses on overall mental health and school success for all children.
- **Positive Behavior Support:** This approach, promoted by programs funded through the U.S. Department of Education, comes from work on applied behavior analysis first used with individuals but now applied systemically. Its goals focus less on overall mental health outcomes and more on school socialization, behavior, and academic achievement. Like interconnected systems, positive behavior support has its three levels of intervention (universal, selective, and indicated) and applies to all students. There is some evidence that school-wide positive behavior support can successfully incorporate a system of care/wraparound approach at the selective (small groups of at-risk children) and indicated (intensive individual children) levels.

For students with disabilities expelled under the state zero-tolerance laws, the consequences are especially severe, as the law permits schools to deny reinstatement at any time—essentially meaning those students will receive no education at all.

Michigan has some policies and systems in place to begin implementation of such services. In 2006, the State Board of Education adopted policies on school-wide positive behavior support and on "Keeping Kids in School," a policy that supported many of the reforms recommended in this article.[25] Currently, the board is considering a policy on school mental health services.[26]

The state already has 86 school-based and school-linked health programs in 24 counties, most of them run by hospitals or county health departments.[27] The state Department of Human Services (DHS) also sponsors 71 family resource centers in 14 counties.[28] The family resource centers are advertised as one-stop shops for human services in schools that have failed to make adequate yearly progress toward state achievement goals for multiple years. Services available include "access to mental health services, therapy, and other services in agreement with local partners."[29]

Michigan now also requires community mental health (CMH) service providers to participate and lead system-of-care initiatives mandated by its February 2009 program policy guidelines and applications for renewal and recommitment. The system-of-care focus is on Medicaid-eligible children in DHS systems (child welfare and juvenile justice) who would otherwise be eligible for CMH services. The description does include educational outcomes related to school attendance and achievement as well as an outcome that focuses on improved behavior.[30]

Conclusion

The cost of the school-to-prison pipeline is an inexcusable waste of human potential that might otherwise be of service to Michigan. By improving and enforcing rights and educational opportunities and de-emphasizing discipline that removes children from schools, Michigan can begin to reclaim these children, help ensure their educational success, and enrich our communities. ■

Mark McWilliams is director of information, referral, and education services with Michigan Protection and Advocacy Service, Inc. Mark has worked as an attorney with individuals with disabilities in Michigan, California, and West Virginia since 1990. He teaches alternative dispute resolution at Thomas M. Cooley Law School and obtained his JD from the University of California, Hastings College of Law, in 1985.

Mark P. Fancher is the attorney for the Racial Justice Project of the ACLU of Michigan. Through his work, he addresses racial discrimination against public school students of color, racial profiling, public defender system reform, attacks on affirmative action, and juvenile sentencing issues. He is a graduate of Rutgers University School of Law in Camden, New Jersey. He received a bachelor of science degree from the University of Tennessee.

FOOTNOTES

1. MCL 380.1310(1), 380.1311(1), 380.1311(2), 380.1311a(1).
2. *Goss v Lopez,* 419 US 565; 95 S Ct 729; 42 L Ed 2d 725 (1975); *Darby v Schoo,* 544 F Supp 428 (WD Mich, 1982); *Birdsey v Grand Blanc Community Schools,* 130 Mich App 718; 344 NW2d 342 (1983).
3. 20 USC 1400(c).
4. 64 Fed Reg 12414 (March 12, 1999).
5. 34 CFR 300.530(e).
6. *Id.*
7. 34 CFR 300.303.
8. 34 CFR 300.502; MAC R340.1723c.
9. 20 USC 1415(k)(3); 34 CFR 300.532(a).
10. 34 CFR 300.530(g), 300.532(b), 300.533.
11. 34 CFR 300.518, 300.533.
12. 34 CFR 300.530(d).
13. 34 CFR 300.534(b).
14. 34 CFR 300.534(c).
15. 20 USC 1412(a)(1)(A).
16. Michigan ACLU, *Reclaiming Michigan's Throwaway Kids* (2009).
17. Personal interview with Leslie Harrington, executive director, Student Advocacy Center of Michigan, October 23, 2009.
18. *Id.*
19. 34 CFR 300.111.
20. Compare the number of children identified as "emotionally impaired" by schools under MAC R 340.1706 (16,922, according to 2007 numbers reported by the state at www.ideadata.org) and children identified under the more restrictive definition of "seriously emotionally disturbed" by community mental health service providers (39,072, according to the Michigan Department of Community Health, <http://www.michigan.gov/documents/mdch/TableB2FY08_282600_7.htm>). All websites cited in this article were accessed July 5, 2010.
21. See 34 CFR 300.101(c); see also *Mr. I. ex rel L.I. v Maine School Admin Dist No 55,* 480 F3d 1 (CA 1, 2007); *Alvin Independent School Dist v A.D. ex rel Patricia F.,* 503 F3d 378 (CA 5, 2007); *Marshall Joint School Dist No 2 v C.D. ex rel Brian D.,* 592 F Supp 2d 1059 (WD Wis, 2009); *Eschenasy v New York City Dept of Education,* 604 F Supp 2d 649 (SD NY, 2009); *N.G. v District of Columbia,* 556 F Supp 2d 11 (D DC, 2008); *Johnson v Metro Davidson County School System,* 108 F Supp 2d 906 (MD Tenn, 2000); *Corchado v Board of Education Rochester City School Dist,* 86 F Supp 2d 168 (WD NY, 2000).
22. *Goss v Lopez,* 419 US 565; 95 S Ct 729; 42 L Ed 2d 725 (1975).
23. Michigan ACLU Report, n 16 *supra* at 13–14.
24. Kutash, Duchnowski, & Lynn, *School-Based Mental Health: An Empirical Guide for Decision-Makers* (Tampa, FL: University of South Florida, April 2006), available at <http://rtckids.fmhi.usf.edu/rtcpubs/study04/SBMHfull.pdf>.
25. Michigan State Board of Education, Meeting Agenda, September 12, 2006, consent agenda items X and Y, available at <http://www.michigan.gov/mde/0,1607,7-140-5373_16595---Y_2006,00.html>. The policies themselves are available through the links on the agenda document.
26. Memorandum from Michael P. Flanagan, superintendent, Michigan Department of Education (October 1, 2009) <http://www.michigan.gov/documents/mde/SBE-Mental_Health_in_Schools_Draft_Policy_October_2009_296427_7.pdf>.
27. School-Community Health Alliance of Michigan, *School-Based and School-Linked Health Centers and Programs in Michigan 2006–2007 Directory* <http://www.scha-mi.org/scha_website_new/scha_website_new/pages/centers_prog/2006Directory.pdf>.
28. Michigan Department of Human Resources, *DHS Family Resource Centers 2009* <http://www.michigan.gov/documents/dhs/DHS-Family-Resource-Centers_177408_7.pdf>.
29. Michigan Department of Human Resources, *Family Resource Center Talking Points* <http://www.michigan.gov/documents/FIA-FRC-TalkingPoints_87778_7.pdf>.
30. Memorandum from Michael P. Flanagan, superintendent, Michigan Department of Education, April 14, 2009, with attached March 26, 2009 letter from Michael J. Head, director, Mental Health and Substance Abuse Administration, Michigan Department of Community Health, available at <http://www.michigan.gov/documents/mde/System_of_Care_for_Children_and_Families_275027_7.pdf>.