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Decriminalizing Students with Disabilities

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> *A man should be able to find an education by taking the broad highway. He should not have to take by-roads through the woods and follow winding trails through sharp thickets, in constant tension because of the pitfalls and traps, and, after years of effort, perhaps attain the threshold of his goal when he is past caring about it.*[1]

I. INTRODUCTION

The criminalization of students for school-related misconduct has burgeoned into a major national issue.[2] The issue embodies serious questions about crime and punishment, discipline and fairness, disability and difference, and educational adequacy and dysfunction. This article centers on what started as an ordinary case of special education—named *Chris L.*[3]—that transformed into a national cause.[4] The case focused on the legal limitations that govern school systems when they seek to prosecute students with disabilities in juvenile court for school misconduct. Now is a propitious time to revisit the *Chris L.* case.

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1. Draper v. Atlanta Indep. Sch. System, 518 F.3d 1275, 1279–80 (11th Cir. 2008) (special education case) (quoting Meredith v. Fair, 298 F.2d 696, 703 (5th Cir. 1962) (invalidating Mississippi's white-only admissions policy)).

2. *See, e.g.*, Advancement Project, Mapping and Analyzing the Schoolhouse to Jailhouse Track: An Action Kit for Understanding How Harsh School Discipline Policies and Practices are Impacting Your Community (2009); Children's Def. Fund, America's Cradle To Prison Pipeline (2007), *available at* http://www.childrensdefense.org/child-research-data-publications/data/cradle-prison-pipeline-report-2007-full-lowres.pdf; Deconstructing the School-to-Prison Pipeline: New Directions for Youth Development (Johanna Wald & Daniel J. Losen eds., 2003); Elora Mukherjee, NYCLU & ACLU, Criminalizing the Classroom: The Over-Policing of New York City Schools (2007), *available at* http://www.nyclu.org/pdfs/criminalizing_the_classroom_report.pdf; NAACP Legal Def. and Educ. Fund, Dismantling the School-To-Prison-Pipeline (2006), *available at* http://www.naacpldf.org/content/pdf/pipeline/Dismantling_the_School_to_Prison_Pipeline.pdf; NYCLU, Annenberg Inst. For Sch. Reform & Make The Road New York, Safety With Dignity: Alternatives to the Over-Policing of Schools (2009), *available at* http://www.annenberginstitute.org/pdf/Safety_Report.pdf; Elizabeth Sullivan & Elizabeth Keeney, Nat'l Econ. & Soc. Rights Initiative, Teachers Talk: School Culture, Safety and Human Rights 21–29 (2008), *available at* http://www.nesri.org/Teachers_Talk.pdf; Monique L. Dixon, *Combating the Schoolhouse-to-Jailhouse Track Through Community Lawyering*, 39 Clearinghouse Rev. 135 (2005); ACLU, *Talking Points: The School-To-Prison-Pipeline* (June 6, 2008), http://www.aclu.org/racial-justice/school-prison-pipeline-talking-points (last visited Mar. 3, 2010); Southern Poverty Law Center, S*chool-To-Prison-Pipeline: Stopping the School-To-Prison Pipeline By Enforcing Special Education Law*, http://www.splcenter.org/legal/schoolhouse.jsp (last visited Mar. 3, 2010). In *Safford Unified Sch. Dist. # 1 v. Redding*, Justice Thomas, who has urged a drastic hands-off approach by courts in school matters, cited instances of criminalization of students as a result of school policies that he termed controversial. 129 U.S. 2633, 2646–58 (2009) (Thomas, J., concurring in part and dissenting in part).

3. Morgan v. Chris L., 927 F. Supp. 267 (E.D. Tenn. 1994), *aff'd*, 106 F.3d 401 (6th Cir. 1997), *cert. denied*, 520 U.S. 1271 (1997).

4. For an incisive analysis of the ethics of everyday practice, see David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, *in* Everyday Practices and Trouble Cases 68 (Austin Sarat et al. eds., 1998).

Chris L. stands as an important historical guidepost to the current efforts to derail the "school-to-prison pipeline,"[5] both for students with disabilities and for all students at risk of educational distress. Chris L. was a middle school student who was diagnosed by his doctor as having Attention Deficit/Hyperactivity Disorder ("AD/HD").[6] He was struggling in school, both academically and behaviorally.[7] Despite knowledge of Chris's problems, his school system did not evaluate him for possible certification under special education laws.[8] He was involved in an incident in a school bathroom, where he was accused of kicking a pipe and causing water damage.[9] The school system promptly filed a juvenile court petition against Chris for criminal vandalism.[10] Years of successful litigation ensued. The vivid facts of the *Chris L.* case and its nonpunitive, child-centered judicial opinions make this case a gateway for understanding and potentially stemming the over-criminalization of students. Today, the over-criminalization and push-out of students by schools is viewed by many as counterproductive to sound educational practice and inimical to the human and civil rights of students.[11] In such an environment, the lessons of *Chris L.* readily can be universalized to all students enmeshed in the pipeline, regardless of their disability status.

This article will first chronicle the evolution of methods of school exclusion under the Individuals with Disabilities Education Act ("IDEA"). Next, an in-depth account of the *Chris L.* case will disclose the manifold tensions that arise when IDEA rights are asserted to defend against a central tactic of school exclusion—criminalization of students with disabilities for behaviors that are a manifestation of their disorders. The article will then review the effect of the compromise language adopted in the 1997 reauthorization of the IDEA, followed by an analysis of the conflicting attitudes and inconsistent court decisions left in the reauthorization's wake. Next, an analysis of the governing IDEA rules and the problems inherent in their deployment to stem the use of criminalization by schools will be discussed. This article will conclude with a call for reform, encouraging usage of the *Chris L.* case as the path for courts and legislatures to follow.

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5. The school-to-prison pipeline refers to systemic policies and practices that push our nation's schoolchildren, especially at-risk children, out of classrooms and into the juvenile and criminal justice systems. It reflects a prioritization of incarceration over education, particularly for children of color. *See* New York Civil Liberties Union, Racial Justice, http://www.nyclu.org/issues/racial-justice/school-prison-pipeline (last visited Mar. 3, 2010).

6. *Chris L.*, 927 F. Supp. at 268.

7. *Id.*

8. *Id.*

9. *Id.* at 269.

10. *Id.*

11. *See* Dean Hill Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 Tenn. L. Rev. 265 (2008).

II. SPECIAL EDUCATION: LEGALIZATION AND RESISTANCE

Chris L. was a salient special education case. It involved issues of conduct and misconduct that have been perennially divisive in school systems across the country. As *Chris L.* shows, a host of inequalities pervade the field of special education. A concise discussion of the history of the IDEA provides the necessary context for a re-examination of the *Chris L.* litigation and this article's argument for its universal application to all students.

A. Legalization: Protecting Rights

Congress enacted the IDEA in 1975.[12] In its findings, Congress noted that "millions of children with disabilities . . . [are] excluded entirely from the public school system and [do not go through the educational process] with their peers."[13] To redress this problem, the IDEA sought to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living."[14] To achieve this goal, Congress conferred a panoply of rights on children with disabilities and their parents to aid them in their disputes with school systems.[15]

The scheme that Congress enacted to promote these ends and to protect the educational rights of children with disabilities rested on a dense thicket of procedural protections.[16] This scheme was designed to ensure that the parents of students with disabilities have enforceable opportunities to participate in all aspects of educational decision making for their child.[17] The aptly named "due process hearing" was the centerpiece for resolving special education disputes. Such hearings were constructed to curtail the previously virtually unfettered discretion enjoyed by school administrators in educating (or failing to educate) students with disabilities.[18] Accordingly, the IDEA was a crowning achievement of legal liberalism.

Significant scholarly critiques of the regime of rights embodied in the IDEA soon emerged. David Neal and David Kirp posited that the rights-based IDEA

12. 20 U.S.C. § 1400 (2006).

13. 20 U.S.C. § 1400(c)(2)(B).

14. 20 U.S.C. § 1400(d)(1)(A).

15. 20 U.S.C. § 1400(d)(1)(B).

16. 20 U.S.C. § 1415 (2006).

17. *See* Donna L. Terman et al., *Special Education for Students with Disabilities: Analysis and Recommendations*, 6 The Future of Child. 1, 4, 15 (1996), *available at* http://futureofchildren.org/futureofchildren/publications/docs/06_01_FullJournal.pdf.

18. In enacting IDEA, Congress sought to redress the abuses of uncabined discretion epitomized in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972).

safeguards impeded cooperative decision-making between parents and schools.[19] Joel Handler emphasized the weaknesses inherent in the due process model for parents who have little sophistication in educational advocacy and/or little access to legal representation.[20] Martha Minow analyzed the contradictory goals embedded within the IDEA and critiqued the "partial approach of litigation" in cases involving "different" people.[21]

In light of the critiques of the IDEA's efficacy, it is no small irony that parents who have been able to enforce their children's rights in court have fared exceptionally well on traditional criteria.[22] Since 1983, the United States Supreme Court has decided eleven IDEA cases involving individual disputes between children and their schools.[23] In nine of these cases, the Court substantially upheld claims that the school system was not providing adequate services or protections to children with disabilities.[24] In these cases, the Court displayed great deference both to the expansive remedial intentions of Congress and to the choices made by parents seeking to secure educational and treatment services for their children.[25] Notably, the Court was distinctly unsympathetic to arguments made by school systems that either the lack of

19. David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 Law & Contemp. Probs. 63, 79 (1985).

20. Joel F. Handler, The Conditions of Discretion, Autonomy, Community, Bureaucracy 79 (1986).

21. Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law 35–39, 350–72 (2nd prtg. 1991). In special education, parents often focus on relationships rather than rights. David M. Engel, *Essay: Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 Duke L.J. 166, 199 (1991).

22. Attorneys for school systems view the process of litigation under the IDEA as overly cumbersome, dominated by sophisticated parents and their experienced counsel, and in need of major reform. Kevin J. Lanigan et al., *Nasty, Brutish . . . and Often Not Very Short: The Attorney Perspective on Due Process*, *in* Rethinking Special Education for a New Century 213, 225–28 (Chester E. Finn, Jr. et al. eds., 2001). *But see* President's Comm'n on Excellence in Special Educ., A New Era: Revitalizing Special Education for Children and Their Families (2002), *available at* http://www2.ed.gov/inits/commissionsboards/whspecialeducation/reports/images/Pres_Rep.pdf. Parents of children with special education needs "often do not feel they are empowered when the system fails them." *Id.* at 8.

23. Forest Grove Sch. Dist. v. T.A., 129 U.S. 2484 (2009); Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006); Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49 (2005); Cedar Rapids Cmty. Sch. Dist. v. Garret F. *ex rel.* Charlene F., 526 U.S. 66 (1999); Florence County Sch. Dist. v. Carter, 510 U.S. 7 (1993); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Honig v. Doe, 484 U.S. 305 (1988); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 (1985); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984); Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

24. These cases include: *Forest Grove Sch. Dist.*, 129 U.S. 2484; *Winkelman*, 550 U.S. 516; *Schaffer*, 546 U.S. 49; *Cedar Rapids Cmty. Sch. Dist.*, 526 U.S. 66; *Florence County Sch. Dist*, 510 U.S. 7; *Zobrest*, 509 U.S. 1; *Honig*, 484 U.S. 305; *Sch. Comm. of Burlington*, 471 U.S. 359; *Irving Indep. Sch. Dist.*, 468 U.S. 883.

25. *See Forest Grove Sch. Dist.*, 129 U.S. at 2491–96; *Winkelman*, 550 U.S. at 523–35; *Schaffer*, 546 U.S. at 52–62; *Cedar Rapids Cmty. Sch. Dist.*, 526 U.S. at 73–78; *Florence County Sch. Dist*, 510 U.S. at 12–15; *Zobrest*, 509 U.S. at 10; *Honig*, 484 U.S. at 309–12; *Sch. Comm. of Burlington*, 471 U.S. at 367–68; *Irving Indep. Sch. Dist.*, 468 U.S. at 891–93.

available resources or traditional educational considerations limited their ability to fulfill the obligations imposed by the IDEA.[26]

B. Resistance: Disciplinary Exclusion

From its enactment, school systems resisted—mostly in low visibility ways—the restraints placed on their autonomy by the IDEA.[27] The exclusion of behaviorally problematic students from school has been a long-standing phenomenon in school systems.[28] This history of exclusion precipitated the enactment of the IDEA in 1975. One of two foundational cases cited in the legislative history of the IDEA, *Mills v. Board of Education of the District of Columbia* provided relief on equal protection grounds to seven "exceptional" children with behavioral disorders who challenged their exclusion from the public schools of the District of Columbia.[29] These students, who were deemed to have behavior problems, suffered from mental retardation, emotional disturbance, or hyperactivity.[30] They ranged in age from eight to sixteen.[31] Pleading lack of funding from Congress, the school system argued that diverting more money to special education would be "inequitable" to those students who did not qualify for such special education services.[32]

Mills, and a similar case from Pennsylvania on behalf of mentally retarded children who were also excluded from school because of their challenging behaviors,[33] led to the zero-reject principle embodied in the IDEA.[34] In enacting the IDEA, Congress specifically targeted students with mental or emotional disabilities for assistance.[35] Such assistance included a plan of individualized instruction (the "individualized education plan" or "IEP") as well as support services designed to benefit the student's learning and behavior at school.[36] The IDEA also specified a regime of procedural

26. The most recent example is the *Forest Grove* case, where the Court, over strong fiscal arguments by school systems, rejected claims that Congress intended that parents place a child in an inappropriate public school setting before seeking reimbursement for a private placement. *Forest Grove Sch. Dist.*, 129 U.S. at 2487.

27. The grand intentions of educators that IDEA would lead to individualized learning plans for all students were short-lived. *See* Richard A. Weatherley & Michael Lipsky, *Street-Level Bureaucrats and Institutional Innovation: Instituting Special Education Reform*, 47 Harv. Educ. Rev. 176, 196 (1977).

28. *See* Mitchell L. Yell, David Rogers & Elisabeth Lodge Rogers, *The Legal History of Special Education: What a Long, Strange Trip It's Been!*, 19 Remedial & Special Educ. 219 (1998).

29. 348 F. Supp. 866 (D.D.C. 1972).

30. *Id.* at 868.

31. *Id.* at 869–70.

32. *Id.* at 875.

33. P.A. Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972).

34. 20 U.S.C. § 1400(d) (2006).

35. The IDEA legislative history revealed that the needs of children with emotional disabilities were substantially unmet. *See Honig*, 484 U.S. at 309 (citing S. Rep. No. 94-168 (1975)).

36. 20 U.S.C. § 1414(d)(1)–(7) (2006).

safeguards—including notice and an opportunity to contest proposed alterations in a disabled student's educational program—to ensure meaningful parental participation in the special education process.[37] These "procedural safeguards" tangibly limited the formerly unchecked discretion that school systems exercised over removal of special education students who misbehaved.

Thirteen years after the enactment of the IDEA, the United States Supreme Court confronted claims by a California school system that the IDEA hamstrung its efforts to deal with students whose disruptive and violent behaviors created risks of harm to themselves, their classmates, and their teachers. In *Honig v. Doe*, the San Francisco Unified School District sought to expel indefinitely two emotionally disturbed students for engaging in dangerous conduct at school.[38] John Doe, one of the students involved in this case, assaulted another student at the developmental center attended by both students.[39] Doe had been the target of teasing and ridicule by his peers, and his IEP sought to assist him when he confronted such frustrating situations.[40] Challenging his exclusion as a violation of the IDEA, the district court ordered the school district to return Doe to his school following twenty-four school days of expulsion.[41]

The San Francisco school system also sought to expel Jack Smith, a student they identified as emotionally disturbed.[42] Smith showed a propensity for verbal hostility and physical aggression.[43] He suffered from extreme hyperactivity and low self-esteem.[44] He was impulsive, anxious, and easily distracted.[45] His behavior at school included stealing, extorting money from fellow students, and making sexual comments to female classmates.[46] When Smith's behaviors persisted, the school system sought his expulsion.[47] He received home instruction until he re-entered school by order of the district court.[48]

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37. 20 U.S.C. § 1415(a)–(j) (2006).

38. 484 U.S. at 312.

39. *Id.*

40. *Id.* at 312–13. As recounted in the Court's majority decision:

> On November 6, 1980, Doe responded to the taunts of a fellow student in precisely the explosive manner anticipated by his IEP: he choked the student with sufficient force to leave abrasions on the child's neck, and kicked out a school window while being escorted to the principal's office afterwards. Doe admitted his misconduct and the school subsequently suspended him for five days.

Id. at 313.

41. *Id.* at 314.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 315.

46. *Id.*

47. *Id.*

48. *Id.*

Justice Brennan's majority opinion in *Honig* first recounted the clear congressional intent in enacting the IDEA to require school systems that receive IDEA funding, to serve even the most difficult students.[49] Recounting the history of exclusion from schools faced by students with mental and emotional disabilities—the literal "warehousing" of students in separate schools or classes and the system's neglect of students until they dropped out of school—the decision emphasized the complex scheme of procedural safeguards designed to ensure that students with disabilities be "mainstreamed," not segregated, to the maximum extent appropriate.[50] Justice Brennan also highlighted the critical role that Congress intended parents to play in formulating their child's educational program.[51] This collaborative process was a vast departure from the status quo, where school systems enjoyed considerable discretion to exclude disabled students from school, often indefinitely. The IDEA, as a rights-based scheme, consequently ushered in a new era where each student was guaranteed an opportunity to remain in school.

Citing the "unequivocal" language of section 1415(e)(3) of the IDEA, which prescribed that during the IDEA review process, students are entitled to "stay-put" in their then current educational placement, the Supreme Court[52] rejected the urging of the school systems to read a "dangerousness" exception into the stay-put provision of the IDEA.[53] The schools argued that Congress did not include such an exception either because it was too "obvious for comment" or because Congress inadvertently omitted this authority—an oversight that the Court should correct.[54] Citing *Mills* as a major source of guidance for Congress, Justice Brennan surveyed the IDEA to demonstrate Congress's insistence that students with emotional disabilities be educated regardless of their difficult and disruptive behaviors:

> We think it clear, however, that Congress very much meant to strip school systems of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts.[55]

Justice Brennan also detailed the various educational methods, and administrative and judicial routes, that school systems can pursue to deal with the problem of

49. *Id.* at 309–12.

50. *Id.*

51. *Id.* at 311–12.

52. *Id.* at 323. Justice Scalia and Justice O'Connor dissented on mootness grounds. *Id.* at 332 (Scalia, J., dissenting).

53. *Id.* at 323.

54. *Id.*

55. *Id.* at 323–24.

dangerous behavior.[56] Accordingly, the plea by the schools to be accorded more discretion was soundly rebuffed.

By the 1990s, school systems began engaging in a second wave of disciplinary exclusion. Seeking relief from the responsibilities of continuing to educate students with disabilities even after they were expelled for misconduct, the school systems devised three strategies. One was to deny IDEA eligibility to students with mental and emotional disabilities and pursue expulsion on the same basis as students in what is called "regular education."[57] A second strategy was to continue educational services, but in a segregated setting.[58] The third strategy (and the focus of this article) was to prosecute students with disabilities by filing juvenile court petitions.[59] The *Chris L.* case challenged the third practice.

III. *CHRIS L. v. KNOX COUNTY SCHOOLS*: AN ARRESTING CASE OF SPECIAL EDUCATION

A. A Child's History

On May 11, 1993, Chris L., a fourteen-year-old eighth grader at Northwest Middle School in Knoxville Tennessee, allegedly kicked and broke a pipe in a school bathroom.[60] The principal estimated that water from the ruptured pipe caused approximately $800 in damage.[61] At the time of the incident, Chris was in the bathroom with another boy.[62] Both were eighth graders and were not authorized to be in this bathroom, which was reserved for sixth graders.[63] Following the incident, the principal called Chris's mother to pick him up. When she arrived, she was told that Chris would be suspended for three days.[64] She was directed to attend a "disciplinary" meeting on May 17th.[65]

The next day, the school system, through a security officer, filed a petition against both boys in the local juvenile court. The petition stated:

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56. *Id.* at 325–27.

57. *See* Mark Kelman & Gillian Lester, Jumping the Queue: An Inquiry into the Legal Treatment of Students with Learning Disabilities 109–10 (1997).

58. Daniel J. Losen & Kevin G. Wellner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 Harv. C.R.-C.L. L. Rev. 407, 407–08 (2001).

59. *See Chris L.*, 927 F. Supp. at 267.

60. Due Process Hearing Final Order at 1, *In re* Chris L., No. 93-19 (Tenn. Dep't of Educ. July 28, 1993) [hereinafter Due Process Hearing Final Order] (on file with author).

61. *Id.* at 8.

62. *Id.* at 5.

63. Transcript of Proceedings at 149, Chris L. v. Knox County Sch. System, (Tenn. Dep't of Educ. May 12, 1993) [hereinafter Due Process Hearing Transcript] (on file with author).

64. Due Process Hearing Final Order, *supra* note 60, at 5.

65. *Id.*

> Petitioner avers that said child is delinquent or unruly and in need of treatment or rehabilitation, or dependent and neglected within the meaning of the law of the State of Tennessee in that said child did on May 11, 1993, commit the offense of vandalism, in that said child, along with Jonathan [W.], did kick and burst a main water line pipe in a bathroom at Northwest Middle School in Knox County, Tenn.[66]

The L. family did not learn of the filing of the petition until the May 17th meeting.

As with many similar cases, *Chris L.* did not begin with the filing of the juvenile court petition. A sensible starting point would be 1986, when Chris's father, Mike L., first became concerned about Chris's progress in school.[67] By the time that Chris was in the fourth grade, he was receiving Ds in his coursework and, according to his father, "[h]is conduct was very unsatisfactory."[68] This pattern continued in the fifth grade. At the initiation of school personnel, a school psychologist tested Chris to determine if he was eligible for services under the federal special education laws.[69] Although he was deemed ineligible, the school set up a contract system to assist Chris with his grades and his behavior.[70] His parents were an integral part of this system. Under this plan, Chris's behavior and schoolwork improved slightly.[71]

In the fall of 1990, Chris began sixth grade at Northwest Middle School. His grades were Ds and Fs, and his behavior was no better.[72] At some sacrifice, Chris's parents enrolled him in a program at the Sylvan Learning Center, where, with individualized attention, he appeared to make small strides in several of his subjects.[73] Nevertheless, Chris "failed" the sixth grade and was told that he would have to repeat it.[74] Yet, when he returned the next school year, Chris was inexplicably placed in the seventh grade.[75] His grades remained low and his behavior was a concern for the entire school year. At one point, the principal sought permission from Chris's parents to paddle him when he misbehaved.[76] They refused to give their permission.[77]

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66. Petition at 1, *In re* Chris L. (Knox County, Tenn. Juvenile Court May 12, 1993) (on file with author).

67. Due Process Hearing Transcript, *supra* note 63, at 99.

68. *Id.* at 100.

69. *Id.* at 101–02.

70. *Id.* at 102.

71. *Id.*

72. *Id.*

73. *Id.* at 103–08.

74. *Id.* at 111–12.

75. *Id.* at 113.

76. *Id.* at 114.

77. *Id.*

In the late spring of 1992, Chris's parents met with the school psychologist, a school counselor, and the principal.[78] The school psychologist reported that Chris's teachers unanimously had identified a set of problematic characteristics including "hard to follow instructions, fails to finish, short attention span, frequent activity shifts, excessive talking, often does not listen, [and] often loses things."[79] Chris was identified as impulsive—someone who "acts before thinking."[80] The school psychologist suggested that Chris likely suffered from AD/HD and recommended that Chris be tested by his doctor.[81] Within a week, Chris's pediatrician had diagnosed him with this disorder and prescribed the medication Ritalin.[82] Mike L. hand-delivered a letter to the principal explaining the diagnosis and the need to administer the medication during school.[83]

Despite the diagnosis and medication, Chris did not fare any better when he returned for the 1992–93 school year, Chris's final year at Northwest Middle School. By mid-year, Chris's school performance and behavior had deteriorated further. His grades were all Ds and Fs, and he was in a cycle of misbehavior that worsened as time went on.[84]

In early February, Chris was suspended from school, first for three, and then for two days.[85] When Chris returned, the assistant principal told Chris's father that he had instructions from the principal to suspend Chris for the rest of the school year.[86] Mike L. pleaded with the assistant principal, telling him that Chris was scheduled to see his pediatrician to adjust his medication.[87] Chris won a reprieve, and at Mike L.'s insistent urgings, the school initiated its own evaluation pursuant to the IDEA.[88]

Despite the on-going evaluation, Chris received no interventions—such as a behavior management plan—from the school. In fact, during this time period, Chris received thirty-three "demerits," was suspended for five days out of school (making a total of twelve for the school year), and received eight days of in-school suspension.[89] Before imposition of these disciplinary actions, the school did not consult with

78. *Id.*

79. *Id.* at 117.

80. *Id.*

81. *Id.* at 118.

82. *Id.* at 118–20, 122.

83. *Id.* at 119–20.

84. *Id.* at 121–26. Chris L.'s disciplinary record revealed the following infractions: throwing pencils, refusing to do work, throwing a watch, refusing to sit in a seat, horse-playing, clowning in class, being late to class, talking out, not doing work, being out of place (in hallway without permission), refusing to abide by "civil rules of behavior," refusing to sit down, being too talkative, refusing to do work, wandering off, causing an unruly scene, arguing with a teacher in class, and throwing airplanes in class. *Id.*

85. Due Process Hearing Transcript, *supra* note 63, at 127–28, 132.

86. *Id.* at 128.

87. *Id.* at 128–29.

88. *Id.* at 129, 140.

89. *Id.* at 135–36.

Chris's parents or conduct a manifestation hearing to determine the relationship between Chris's behaviors and his AD/HD.[90] Instead, the school counselor suggested that Mike L. seek private counseling for Chris. Using his private health insurance, Mike L. arranged for Chris to see a local psychologist with expertise in AD/HD.[91]

By May 11, 1993, the date of the incident in the bathroom, the school had not informed the family that the IDEA evaluation was complete.[92] No M-team meeting had been scheduled to consider Chris's eligibility under the IDEA.[93] Instead, when the L. family arrived for the meeting on May 17th, they were informed that the session would constitute an M-team meeting, in addition to a meeting to consider discipline for Chris.[94] Those present at the meeting included the school principal, the school psychologist, a counselor, and a teacher.[95] Preliminarily, the group agreed that Chris was to be certified as having AD/HD, and thus eligible for IDEA certification under the category of "Other Health Impairment," the catch-all category for students whose disabilities did not fit into IDEA's other, more specific categories.[96] Following this determination, the principal recommended suspending Chris for the rest of the school year.[97] When Mike L. objected, the school psychologist suggested that, instead of suspension, Chris be placed in a separate "resource" class for the rest of the year.[98] No recommendation on discipline emerged.

Next, the M-team considered whether Chris's action in the bathroom was a manifestation of his disability. Although no formal decision was made, there was sentiment expressed that a manifestation existed.[99] The principal then called Chris into the room to inquire why he had been in the sixth grade bathroom.[100] As one of the smallest boys in the eighth grade, Chris explained that boys picked on him when he was in the eighth grade bathroom.[101] The principal lamented that Chris had not told him of this problem so that he could rectify it.[102] The meeting concluded with no discussion of the juvenile court petition that had been filed.

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90. *Id.* at 136.

91. *Id.* at 137–38.

92. *Id.* at 140–42.

93. In Tennessee at the time, an M-team was a "Multidisciplinary Team" meeting. These meetings are now called Individualized Education Program Team (IEP Team) meetings under the IDEA. *See* 34 C.F.R. § 300.321 (2007). States differ in their terminology for these legally compelled gatherings of administrators, teachers, experts, and parents (and the child, at the discretion of the parents).

94. Due Process Hearing Transcript, *supra* note 63, at 142–44.

95. *Id.* at 143–44.

96. *Id.* at 145; *see also* 20 U.S.C. § 140(3)(A)(i) (2006) (the IDEA "catch-all" category).

97. Due Process Hearing Transcript, *supra* note 63, at 146.

98. *Id.* at 146–48.

99. *Id.* at 148–49.

100. *Id.* at 149.

101. *Id.*

102. *Id.*

Several days later, following a conversation with the father of the other boy in the bathroom, Mike L. called the principal and made him an offer.[103] He said that the two families would split the $800 in damage that was caused in the bathroom.[104] The principal was receptive and replied that he would "see what he could do."[105] However, he called back later that day and told Mike L. that he could not drop the juvenile court charges, stating that it was "out of his hands."[106]

B. Seeking Redress

Mike L. was incensed that the school had neglected Chris for as long as it did. He attributed much of Chris's misbehavior to the school's failure to address Chris's AD/HD.[107] He also expressed genuine frustration that the principal did not accept what he considered to be a fair offer to compensate the school in exchange for the dismissal of the Knox County Juvenile Court charge.[108] He did not want Chris to have anything to do with the juvenile court system because he believed that it was unresponsive, uncaring, and punitive.[109] This belief was confirmed by his initial unsatisfactory meeting with a juvenile court staff worker, who refused to drop the petition despite the progress that was made at the May 17th meeting.[110]

A trial in the juvenile court was scheduled for early July.[111] Mike L. rejected the option of appearing in the juvenile court to seek dismissal of the charges. He was concerned that if the case was not dismissed, and probation was ordered (a likely outcome in the juvenile court), Chris would face conditions of probation that would pro forma carry a stipulation that the child exhibit good behavior in school.[112] If this condition was violated, violation of probation proceedings could be instituted, with potentially serious consequences.[113] Thus, Mike L. concluded that commencing due process litigation was the preferable route of recourse.[114]

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103. *Id.* at 153–54.

104. *Id.* at 155. Neither boy confessed to having kicked the pipe. Instead, they pointed the finger at each other. *Id.* at 154.

105. *Id.*

106. *Id.* at 154–55.

107. *See id.* at 144–46.

108. *See id.* at 155.

109. *See id.* at 151–52.

110. *See id.*

111. *Id.* at 156. Mike L. also complained about having to pay for the services of the Sylvan Learning Center and the clinical psychologist. Additionally, he wanted Chris's school disciplinary record expunged. *See id.* at 155–57.

112. *See* Tenn. Code Ann. §§ 37-1-131(2)(A), (a)(2)(B)(iii) (2009).

113. *See* Tenn. Code Ann. § 37-131-132 (2009).

114. Mike L. was "shocked" that the juvenile court petition could not be dismissed by the school system. Due Process Hearing Transcript, *supra* note 63, at 153. The principal told Mike L. that it was "out of

C. Due Process

The decision to file for a due process hearing under the IDEA was settled.[115] On June 4, 1993, a due process request letter was sent to the school superintendent specifying the grounds for a hearing and the relief requested.[116] This triggered the appointment of an administrative law judge ("ALJ") from the panel of private attorneys maintained by the State Department of Education.

The only two witnesses for the L. family were Dr. Lance Laurence, Chris's treating psychologist, and Mike L. Chris himself would not testify. The theory of the case was straightforward—Mike L. was entitled to reimbursement for the expenses he incurred since the school system had failed to evaluate and certify Chris in a timely fashion as required by the IDEA regulations.[117] Regarding the juvenile court petition, the L. family argued that the IDEA requires a manifestation hearing prior to filing a juvenile court petition because such a petition caused a change of placement.[118]

The underlying theory of the case was unambiguous. The school should be held accountable for its neglect of Chris's academic and behavioral needs.[119] The episode in the bathroom was fueled by this neglect.[120] The filing of the juvenile court petition served no educational purpose and conflicted with settled case law in Tennessee.[121] The school system, accordingly, should be ordered to withdraw its petition.

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our hands." *Id.* at 154. By filing this case, he did not want to see the school system be able to shirk its responsibilities by "dumping" children with behavioral problems into juvenile court. *See id.* at 155.

115. Mike L. took comfort in the forty-five-day timeframe prescribed by the U.S. Department of Education for deciding due process cases and insisted that it be adhered to. *See* 34 C.F.R. § 300.510 (2010). Additionally, he was swayed by the prospect of recovering his out-of-pocket costs for psychological treatment and tutoring should he prevail in the hearing. *See* Due Process Hearing Transcript, *supra* note 63, at 25, 155–57.

116. Brief for Defendants at 2, Morgan v. Chris L., 927 F. Supp. 267 (E.D. Tenn. 1994) (No. 3-93-cv-524) [hereinafter District Court Brief for Defendants] (on file with author).

117. Due Process Hearing Transcript, *supra* note 63, at 25–26.

118. The IDEA now requires a manifestation determination if a student with a disability has been determined to have committed an offense that violates a school rule or the school code of conduct that could result in exclusion from school for over ten days. The hearing must be held within the first ten days of the removal. *See* 20 U.S.C. §1415(k)(1)(E) (2006). This provision serves as another check on the discretion of school officials to exclude students with disabilities from their current educational program for disability-related conduct. *See generally* Shawna L. Parks & Maronel Barajas, *School Discipline and Special Education*, 41 Clearinghouse Rev. 337 (2007). Prior to the due process hearing, the school system's attorney from the Knox County Law Director's Office said that the system would likely settle the claims for reimbursement, and, with Dr. Laurence's involvement, would develop an appropriate IEP for Chris for the next school year. He emphasized that the school system would litigate the juvenile court petition before the ALJ in the due process hearing. After filing the request for a due process hearing, Mike L. requested that the juvenile court hearing, which was scheduled for July 8th, be postponed. The case was continued indefinitely.

119. District Court Brief for Defendants, *supra* note 116, at 12.

120. *Id.*

121. *See In re* Male Special Educ. Student Age 14 (Tenn. Bd. of Educ. Oct. 9, 1987) (on file with author); *In Re* McCann, No. 158, 1990 Tenn. App. LEXIS 125 (Tenn. Ct. App. Feb. 27, 1990).

The due process hearing was conducted on June 28, 1993.[122] The only issue was the propriety of the juvenile court filing. Dr. Laurence, a specialist in treating people with AD/HD, testified that the main goal of his therapy sessions with Chris was to "stabilize and contain his ADD problem."[123] He described the chief features of AD/HD and concluded that the behavior that formed the basis for the juvenile court petition was a manifestation of Chris's AD/HD.[124] In forming this opinion, he alluded to Chris's attention difficulties, his impulsivity, and his difficulties with self-control (a form of "noncompliance").[125] The cross-examination of Dr. Laurence centered on the problems that the L. family was experiencing.[126]

The next witness was Mike L. He dispassionately reviewed Chris's history of school difficulties, his frustrations with the treatment that Chris had received at school, and his efforts to provide support for Chris.[127] Mike L. testified that when he was informed at the meeting on May 17th that the juvenile court petition would not be withdrawn, "I was just, like, in shock."[128] Mike L.'s cross-examination was unremarkable. Its prime thrust was to shift the locus of Chris's problems from his school performance and his AD/HD to the turmoil that Chris had experienced since his parents' divorce.[129]

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122. Because of the short time frame, there was little discovery prior to the due process hearing. Chris's lengthy school records were obtained. The school system requested documents from Dr. Laurence, but he only had maintained sparse treatment notes. As required by administrative rule, the names of potential witnesses were exchanged five days before the hearing. Mike L. and Dr. Laurence were listed for the family. The school system listed the names of the principal and several administrators of the special education program. Due Process Hearing Transcript, *supra* note 63, at 2–15.

123. *Id.* at 41. Dr Laurence observed: "I thought he was beginning to develop some negativistic and oppositional behaviors as well; very touchy, temperamental, moody, angry, tending to avoid taking responsibility for himself and assigning blame onto others." *Id.* at 42.

124. *Id.* at 52. The chief features were as follows:

> Attention Deficit Disorder, with or without hyperactivity, in this case with hyperactivity, is a disorder characterized by excessive degrees and amounts of behavior, generally around three dimensions; attention, impulsivity, and hyperactivity. . . . It is generally these three factors that people look at when they make the diagnosis, and then each of these factors have a variety of symptoms and behavior patterns that are quite common to that.

Id. at 38.

125. *Id.* at 73. Dr. Laurence testified that Chris never wavered from the contention that he did not cause the actual damage, instead blaming it on the other boy. *Id.* at 172.

126. These problems stemmed from the divorce of Chris's father and natural mother. Chris was also having difficulties in his relationship with his stepmother. Dr. Laurence was working with Chris, his father, and stepmother on these issues. *Id.* at 40–43.

127. *Id.* at 98–157.

128. *Id.* at 152.

129. *See id.* at 158–74.

The school system called no witnesses. The Director of Special Education for the school system was present for the entire hearing, but he did not testify.[130] The school system argued that the ALJ did not have "jurisdiction" to hear the juvenile court matter and that the IDEA did not grant immunity to students with disabilities shielding them from prosecution.[131]

On July 28, 1993, the ALJ rendered his opinion. The findings of fact and conclusions of law began as follows:

> The student has a history of behavioral problems and poor grades which have been addressed by his parent in every manner suggested by school personnel to include medical examination and diagnosis of ADHD, individual educational services from Sylvan Learning Center, psychological services, changes in medication prescribed for ADHD, and numerous meetings with school personnel.[132]

Finding that the behavior underlying the juvenile court petition was a manifestation of Chris's disability, the ALJ held that the filing of the petition should be considered "the initiation of a change in placement and/or disciplinary action commensurate with expulsion or suspension for more than ten days."[133] The ALJ found that by not timely certifying Chris for special education and by not conducting a manifestation hearing prior to the filing of the petition, the school had violated its obligations under the IDEA.[134] The school was ordered to "take all actions necessary to seek dismissal of the juvenile court petition filed against the student."[135]

Seeking to enforce immediate implementation of the decision, the L. family filed a state court action under the Tennessee Administrative Procedures Act ("TAPA") seeking to compel the school system to withdraw the juvenile court petition.[136] TAPA provides that the decision of an ALJ must be complied within fifteen days unless a stay is granted.[137] This proactive maneuver, if successful, would have mooted the only issue in the case, which was yet to be appealed.

D. A Federal Case

During the time that the TAPA case was awaiting an expedited hearing in state court, the school system filed its own appeal of the ALJ's decision in the United States District Court for the Eastern District of Tennessee, which is vested with

130. Although the IDEA contains a provision that permits the introduction of new evidence if the decision of the ALJ is appealed to either federal or state court, this authority is left largely to the discretion of the district court judge. 20 U.S.C. § 1415(i)(2)(C)(ii) (2006).

131. Due Process Hearing Transcript, *supra* note 63, at 16–17.

132. Due Process Hearing Final Order, *supra* note 60, at 16–17.

133. *Id.* at 19.

134. *Id.* at 8–20.

135. *Id.* at 20. Following the ALJ decision, the school system had sixty days to appeal.

136. Jurisdiction was based on Tenn. Code Ann. §§ 49-10-601(h)(1), 49-10-602 (2009).

137. Tenn. Code Ann. § 4-5-318(f)(3) (2009).

jurisdiction over IDEA appeals.[138] This stayed the enforcement of the ALJ order. During the fall of 1993, Chris started ninth grade at his zoned high school with an IEP that specified several behavioral goals and the methods to reach them.[139] The pretrial process culminated with an agreement that each party could submit limited additional evidence through depositions, affidavits, or exhibits.[140] The court would then hear oral arguments and decide the case. But other developments punctuated the routine course of this litigation.

While the case was pending, Chris was caught in school with a small amount of marijuana. In pleadings to the district court, the Knox County Schools asserted that they did not know how to proceed with this incident and wanted guidance.[141] Mike L. believed that the episode warranted a review of Chris's IEP, not disciplinary punishment. In pleadings, it was argued that this was a new matter unripe to incorporate into the existing case, and that, in any event, the school system was seeking an improper advisory opinion.[142] The court ultimately agreed, and the matter was dropped from the litigation. Chris was "punished" by his parents, and continued uninterrupted in school.

At the hearing on February 4, 1994, the school system's local attorney pleaded with the court that it was hamstrung by the ALJ's decision in dealing with special education students who committed acts of delinquency, as Chris L. allegedly had done.[143] They alluded to hypothetical special education students who committed murder, rape, sexual molestation, aggravated assault, or weapons offenses, arguing that the school system could not find appropriate placements for students who were violent.[144] In response to this "parade of horribles," as it was characterized by Chris's lawyers, it was emphasized that the Supreme Court had confronted the same issue in *Honig v. Doe*, and had identified educational methods and legal avenues under the IDEA for school systems to pursue.[145] The judge was also unmoved by the brief testimony by the Director of Special Education that, because approximately 20% of

138. *Chris L.*, 927 F. Supp at 267–68. Jurisdiction was proper pursuant to 20 U.S.C. § 1415(i)(3) (2006).

139. Brief in Support of Motion to Supplement the Record at 2, Morgan v. Chris L., 927 F. Supp. 267 (E.D. Tenn. 1994) (No. 3-93-cv-524) [hereinafter Brief in Support of Motion to Supplement the Record] (on file with author).

140. *See* 20 U.S.C. § 1415(e)(2) (2006).

141. Brief in Support of Motion to Supplement the Record, *supra* note 139, at 1–2.

142. Response in Opposition to the Plaintiff's Motion to Supplement the Record, Morgan v. Chris L., 927 F. Supp. 267 (E.D. Tenn. Feb. 3, 1994) (No. 3-93-cv-524) (on file with author).

143. The distinction between delinquent and unruly acts is an elusive one. *Compare* Tenn. Code Ann. § 37-1-102(b)(9) (2009) (delinquent acts), *with* Tenn. Code Ann. § 37-1-102(b)(25) (2009) (unruly child). *See infra* note 293 and accompanying text.

144. Transcript of Oral Argument at 22, Morgan v. Chris L., 927 F. Supp. 267 (E.D. Tenn. 1994) (No. 3-93-cv-524) (on file with author).

145. *Id.* at 23. In response to an argument by the school system that parents at an M-team would never agree to the filing of a juvenile court petition, the judge responded, "Write your congressman." *Id.* at 24.

the students in the Knox County Schools were IDEA certified, the ALJ's decision would wreak havoc on school discipline.[146]

The decision came down seven months later. On October 9, 1987, the district judge ruled four-square in favor of Chris.[147] Adopting the facts essentially as they were presented by the L. family, the court first relied on a Tennessee IDEA due process opinion that ordered a school system "to do everything it can" to dismiss a juvenile court petition.[148] In particular, the court adopted the rationale of *In re McCann,*[149] a four-year-old case decided by the Tennessee Court of Appeals. In *McCann*, a rural school district filed a juvenile court petition against Tony McCann, a boy with mental and emotional disabilities who was physically and verbally abusive to teachers and who was involved in fighting and other disruptive behavior.[150] No M-team meeting was held to determine whether the behavior was a manifestation of Tony's disabilities. After the petition was filed, the juvenile court judge ordered Tony's mother to keep him out of school pending a court-ordered evaluation.[151] Eventually, Tony was placed in the temporary custody of the state because of his mother's inability to curb his behaviors at home.[152] The Tennessee Court of Appeals found that the school system had violated the IDEA and cognate Tennessee regulations, holding that "[t]he school system must follow mandated administrative procedures before turning the handicapped student over to the juvenile court system."[153]

Next, the court rejected the argument that, by divesting the juvenile court of jurisdiction, the Tennessee Department of Education wielded the power of a "super-legislature," ultimately holding that the ALJ's order did not direct the juvenile court to do a thing as the remedy was directed at the Knox County Schools—proper parties in an IDEA proceeding.[154] The court also deferred to the ALJ's findings that Chris's behavior was a manifestation of his AD/HD.[155] Based on this finding, the court

146. The District Judge also rejected the import of the proffered affidavits of the Juvenile Judge and Chief Probation Officer. The district judge stated: "I don't need Judge Garrett, I don't need a probation officer. You know, I've been a lawyer for more than thirty years, and I've been a judge for more than thirteen years, so I have some idea of what goes on in juvenile court and I've practiced in juvenile court. . . . I don't know anything the judge or probation officer can tell me about juvenile court since they have nothing to do with this particular case." *Id.* at 25.

147. *In re* Male Special Educ. Student Age 14 (Tenn. Bd. of Educ. Oct. 9, 1987) (on file with author).

148. *Id.* at 17 (ALJ ordered school system to "do everything it can" to have petition filed in juvenile court dismissed).

149. *In re McCann*, 1990 Tenn. App. LEXIS 125. The decision was written by an appeals court judge who was soon elevated to the Tennessee Supreme Court. Tony McCann was represented by a legal services lawyer who was part of the author's informal practice group.

150. *Id.* This was deemed an "unruly" petition.

151. *In re McCann*, 1990 Tenn. App. LEXIS 125, at *4.

152. *Id.*

153. *Id.* at *11.

154. *Chris L.*, 927 F. Supp. at 270–71.

155. *Id.* at 271–72.

disposed of the school's argument that, from a therapeutic standpoint, Chris would have been better off facing the ordinary consequences of his alleged actions in the juvenile court.[156] Finally, the court relied on the testimony of Dr. Laurence and the deposition testimony of a psychiatrist who evaluated Chris at the school system's request to counter the school's contention that Chris was misdiagnosed with AD/HD instead of Oppositional Defiant Disorder ("ODD"), which would not have qualified Chris for IDEA eligibility.[157]

E. Appeal

The school system appealed the judgment to the United States Court of Appeals for the Sixth Circuit.[158] Lawyers from around the country saw the decision as a vehicle for confronting school systems that increasingly were using juvenile courts to banish problem children with disabilities from the schools.[159] The Knox County Schools began a campaign to convince other school systems to support its positions in the appeal.[160] There was an attempt at several settlement conferences with a Sixth Circuit mediator to bridge the principled differences, but no compromise was reached.

As briefing proceeded, the school system made the same technical arguments it did in the district court. It argued that the filing of the petition did not constitute a change of placement under the IDEA, and therefore no procedural protections were

156. *Id.* at 271.

157. *Id.* at 271–72. ODD is a potential qualifying disorder under section 504 of the Rehabilitation Act. *See* 29 U.S.C. § 794 (2006).

158. An Atlanta law firm supplanted the Knox County Law Director as lead counsel. While the appeal was pending, another round of litigation commenced over the L. family's entitlement as prevailing parties to statutory attorney's fees under 20 U.S.C § 1415(i)(3)(B) (2006). FED. R. CIV. P. 54(d) was relatively new at the time, and the plaintiffs were one day late in meeting the rule's fourteen-day limitation on filing a petition for fees. Accordingly, the court dismissed the petition for fees as untimely. If the rule had specified ten days to file fee petitions, the petition would have been timely, given intervening weekends and holidays. It took approximately six months and the authority of a recent Supreme Court decision, but the district court ultimately ruled that the delay was excusable neglect that did not have any adverse impact on the school system. The district court proceeded to award substantially all of the fees requested. *Chris L.*, 927 F. Supp. at 272.

159. Because of the nationwide scope of the issues, amicus assistance was sought from the Center for Law and Education and the Protection and Advocacy organizations in the Sixth Circuit. Amicus briefs for Chris L. were filed by the Center for Law and Education, the Michigan Protection and Advocacy Service, and Ohio Legal Rights Service. *See, e.g.*, Brief for Center for Law and Education and Juvenile Law Center as Amici Curiae Supporting Defendant-Appellee, Morgan v. Chris L., 106 F.3d 401 (6th Cir. 1997) (No. 94-6561) (on file with author).

160. Amicus briefs for the Knox County Schools were filed by Metropolitan Nashville and Davidson County School System and the National School Boards Association. *See* Brief for Metropolitan Nashville and Davidson County School System as Amici Curiae Supporting Plaintiff-Appellant, Morgan v. Chris L., 106 F.3d 401 (6th Cir. 1997) (No. 94-6561) (on file with author); Brief for National School Boards Association as Amicus Curiae Supporting Plaintiff-Appellant, Morgan v. Chris L., 106 F.3d 401 (6th Cir. 1997) (No. 94-6561) (on file with author).

necessary before filing.[161] It also elaborated on the far-reaching adverse consequences it believed flowed from the district court's decision. To illustrate, the school system's brief posed what it termed a hypothetical:

> If a disabled student rapes a school teacher at school, under the ruling of the District Court, prior to reporting such conduct to juvenile authorities, written notice must be provided that an M-team meeting will be held and the parents are invited to attend. At the M-team meeting, the M-team could decide that the rape was not a manifestation of the student's disability, and only then could it decide that the juvenile authorities should be alerted. However, pursuant to the ruling of the District Court, if the parents object to the M-Team's decision regarding manifestation, the parents can, at that point, initiate a due process hearing and the disabled student will remain in the current educational placement during the pendency of the due process proceedings.[162]

The school system said that this meant that neither the school system nor the teacher could file charges with the juvenile court until the due process proceedings and court review are completed.

For the first time, the school system raised constitutional objections to the ruling of the ALJ and the district court. The first was premised on Article I, Section 8, the Spending Clause, and *Pennhurst State School & Hospital v. Halderman*.[163] The school system argued that the decision below imposed an intrusive obligation—barring the filing of a petition—that was beyond the scope of congressional power.[164] The second constitutional argument, which was grounded in the Tenth Amendment and *Gregory v. Ashcroft*, asserted that the district court's prohibition on filing criminal petitions intruded on the "traditional state function of protecting its citizens from the perpetration of crimes by juveniles and of providing needed rehabilitation services to them."[165] These constitutional arguments, which were rooted in the new federalism jurisprudence of the Rehnquist Court, sought to immunize school systems from the reach of the federal mandates of the IDEA. If the IDEA was not premised on the power of Congress under the Fourteenth Amendment, as was argued by the school system, but only bottomed on the Spending Clause, then a federal court ruling that mandated that a

161. Brief of Appellant at 15–33, Morgan v. Chris L., 106 F.3d 401 (6th Cir. 1997) (No. 94-6561) (on file with author).

162. *Id.* at 30.

163. *Id.* at 35–37; *Pennhurst State Sch. and Hosp.*, 451 U.S. at 1 (Congress exceeded its authority under the Spending Power to require Pennsylvania to fund the "bill of rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6010(1)–(2) (2006)). The appellants conceded that all circuits had held that the IDEA was also enacted pursuant to section 5 of the Fourteenth Amendment.

164. Brief of Appellant, *supra* note 161, at 35–37.

165. *Id.* at 38–40; Gregory v. Ashcroft, 501 U.S. 452 (1991) (Congress did not intend to include state judges under the protections of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–624 (2006), because there is no plain statement of such intention in the statute).

school system refrain from prosecuting a student with disabilities—a power not expressly included in the IDEA—was beyond the realm of congressional power.

The National School Boards Association ("NSBA") and the Metropolitan Nashville and Davidson County School System filed amicus briefs. Both cited a rising tide of school violence and the role that juvenile courts play in combating crimes in school.[166] They also emphasized the responsibilities of school systems to promote school safety and protect the majority of students.[167] Each claimed that the district court decision would prohibit schools from calling the police or would require the police to make on-the-spot determinations about a student's disability.[168] Chris's bathroom incident was transformed into a scenario where a "student brings an Uzi to school and starts shooting people."[169]

The appellees' brief highlighted the limited nature of the district court's decision and its grounding in the language, purpose, and history of the IDEA and state law.[170] It conceded that school systems could call the police, mental health crisis units, or any other resource to aid in responding to students who exhibit disruptive or dangerous behaviors. Specifically, the brief argued that schools could not be prohibited from calling the police in cases of serious violence.[171]

The brief raised several pivotal questions: What constituted a "crime" in the context of misbehavior at school? Could the distinction between "unruly" behavior and "delinquent" behavior stand up to close scrutiny? Shouldn't the institution best equipped to devise corrective plans for students, and not an entity like the juvenile court (whose resources are scarce and whose expertise with children with disabilities is sorely lacking), be the entity of first choice for dealing with misconduct?[172]

The amici for the appellees—the Center for Law and Education, the Juvenile Law Center of Philadelphia, the Michigan and Ohio protection and advocacy programs, and Children and Adults with Attention Deficit Disorders ("CHADD")—broadened the context of the case. In particular, the Michigan and Ohio protection and advocacy programs and CHADD presented studies demonstrating the over-representation of children with disabilities in the juvenile court system, identifying as a chief cause of this phenomenon the paucity of community-based services for

166. Brief for National School Boards Association, *supra* note 160, at 8; Brief for Metropolitan Nashville and Davidson County School System, *supra* note 160, at 8–9.

167. Brief for National School Boards Association, *supra* note 160, at 8–11; Brief for Metropolitan Nashville and Davidson County School System, *supra* note 160, at 4.

168. Brief for National School Boards Association, *supra* note 160, at 11–13; Brief for Metropolitan Nashville and Davidson County School System, *supra* note 160, at 8–10.

169. Brief for National School Boards Association, *supra* note 160, at 2.

170. Brief of Appellees at 26, Morgan v. Chris L., 106 F.3d 401 (6th Cir. 1997) (No. 94-6561) (on file with author).

171. *Id.* at 42–44. It was the myriad of cases like Chris's that troubled special education lawyers and advocates across the country.

172. *Id.* at 43. The brief also concisely responded to the new constitutional arguments of the school system, figuring that the Sixth Circuit would not be interested in hearing these claims for the first time on appeal in a case that rested predominantly on statutory grounds. *Id.* at 44 n.11.

children with mental and emotional disabilities, including school system programs.[173] These briefs also pointed out the inextricable connection between a student's learning and behavior and the many options that are available to schools, working in conjunction with other agencies with behavioral expertise, to address these problems through a comprehensive approach.[174]

The case was argued on April 16, 1996, before Judges Richard Surheinrich (Michigan), Guy R. Cole (Ohio), and Leroy J. Contie (Ohio).[175] The Atlanta counsel for the Knox County Schools began by emphasizing that the issue on appeal was a "pure issue of law as to whether the district court erred in adopting a per se rule that in every instance in which a school official files a petition with Juvenile Court that that constitutes a change in placement under IDEA that must go through the Act's procedures."[176] The judges inquired into the criteria that the school system used in deciding whether to file a juvenile petition and whether the school system had a policy that embodied these criteria.[177] The school system's attorney had to concede that there were neither criteria nor a policy.[178] The judges seemed sympathetic to Chris's problem. Judge Contie noted that "[the school system is] trying to separate out the manifestation of the crime . . . [b]ut the manifestation of the act resulting from [Chris's] disability is intertwined with his problem, and you can't guarantee that [Chris] isn't going to be sent to a juvenile home

173. Brief for Michigan Protection & Advocacy Service, Inc. et al. as Amici Curiae Supporting Defendant-Appellee at 5–10, Morgan v. Chris L., 106 F.3d 401 (6th Cir. 1997) (No. 94–6561) (on file with author).

174. *Id.* at 20–24; Brief for Center for Law and Education and Juvenile Law Center, *supra* note 159, at 13–19. The briefs admonished that the decision below was a bulwark counseling against the practice of transforming educational disputes into criminal ones. Brief for Michigan Protection & Advocacy Service, Inc. et al., *supra* note 173, at 38–42; Brief for Center for Law and Education and Juvenile Law Center, *supra* note 159, at 19–23.

175. Counsel did not learn the composition of the panel until the morning of the argument. Having researched all IDEA decisions in the Circuit, the Appellees were able to quickly determine that none of the judges on the panel had written an IDEA decision in the past. Judge Surheinrich was a President George Bush appointee; Judge Cole had been recently appointed by President Clinton; Judge Contie, a senior judge, was appointed by President Reagan.

176. Transcript of Oral Arguments at 2, Morgan v. Chris L., 106 F.3d 401 (6th Cir. 1996) (No. 94-6561) [hereinafter Sixth Circuit Oral Arguments] (on file with author).

177. Almost immediately, Judge Surheinrich asked:

> JS: Counsel, would that mean that any time a crime is committed it must be reported to the juvenile . . .
>
> CW: No sir, not every crime.
>
> JS: If it's a per se rule why wouldn't it? Why wouldn't you have as a citizen the obligation if it's a per se rule to report every crime to the authorities?
>
> * * *
>
> CW: Your honor, the answer to that is no. There are some crimes that by federal and state law must be reported but not all crimes are required to be reported.

Id.

178. *Id.* at 2–3.

for twenty days."[179] Toward the end of the appellant's argument, Judge Cole summarized his view of the school system's constitutional and statutory claims:

> I have some difficulty, personally . . . accepting your argument that there is an infringement here on sovereign rights that are historically and traditionally left to the states. It seems to me . . . that we've got a situation where the school system arguably ignored federal law and failed to attend to the educational needs of a child for an entire school year. And that this discipline problem escalated because of the failure of the school system to follow Federal law and guidelines in terms of putting together a program for this kid, and this escalated into maybe a more serious discipline problem, and now the school system seeks to discipline him through the criminal system as opposed to through a structured program . . . . I guess maybe we're looking at this through different prisms, but it seems to me that the school system is seeking to punish a child for the school system's ineptitude.[180]

The issue of when "reporting" of crimes should take place was a palpably sensitive one at the heart of the case. It had been decided during preparation for the oral argument that, if pressed, the appellees would take the position that the school system could and should report dangerous actions to the police.[181] In response to Judge Surheinrich's question whether "there should . . . be a per se rule . . . that says that reporting a crime is a change of position,"[182] the counsel for the appellees responded as follows: "The answer your Honor is we don't read a per se rule into the District Court's decision. The nature of IDEA litigation is individualized."[183] The remaining questions sought to clarify the IDEA manifestation process and the relationship of this process to juvenile court proceedings.

The case remained under submission for nine months.[184] On January 21, 1997, the panel, in a per curiam decision, which was not recommended for publication, affirmed the judgment of the district court. The opinion tracked the child-focused, disability-driven, school-failure emphasis that had been pursued from the beginning of the case. It posed the issue on appeal as "whether on May 12, 1993, by filing a juvenile court petition for the alleged destruction of school property, the Knox County School System was in violation of IDEA procedural requirements insuring

179. *Id.* at 4.

180. *Id.* at 5.

181. A Tennessee statute vests exclusively in the principal the authority to report serious crimes to law enforcement. Tenn. Code Ann. § 49-6-4301(a) (2007).

182. Sixth Circuit Oral Arguments, *supra* note 176, at 7.

183. *Id.* The appellees had internally debated whether to insist that every act of misconduct, however severe, be treated the same, or concede that the facts of this case, as found by the ALJ and the district court, warranted the finding of a potential change of placement here. The latter point could not be pressed too vigorously. Even though Judge Contie envisioned Chris potentially spending twenty days in juvenile detention, this was an unlikely result even from the most punitive juvenile judge.

184. During that time, the appellees continued to consult by telephone with disability rights attorneys and public defenders from across the country who were using the district court decision either in the IDEA proceedings or in juvenile court.

[sic] Chris's rights."[185] It next discussed the relevant provisions of the IDEA—AD/HD eligibility, discipline, change of placement—and the leading cases interpreting these sections, stressing the importance of the procedural safeguards "as a means of curbing the unilateral ability of schools to punish a disabled student for behavior that is a manifestation of the student's disabilities."[186] The court specifically noted that "the decisions of the ALJ and the district court simply require that schools contemplating juvenile petitions do what the IDEA requires of them."[187]

Echoing the sentiments that Judge Cole had expressed in oral argument, the opinion continued with several propositions that were raised but not pressed. The first was the recognition that when schools fail to comply with the strictures of the IDEA, children with disabilities can be causally harmed: "When school systems fail to accommodate a disabled students' [sic] behavioral problems, these problems may be attributed to the school system's failure to comply with the requirements of the IDEA."[188] Next, the opinion acknowledged the phenomenon of disciplinary exclusion, including the specter of bad faith by the school system: "Indeed, rather than affording Chris the procedural safeguards mandated by the IDEA, the Knox County Schools sought to exclude him through a punitive and disciplinary measure in juvenile court."[189] Finally, the decision recognized the invalidity of the schools' position that they were merely seeking more effective services for Chris: "By resorting to juvenile court, the school system is, at a minimum, proposing that the juvenile court develop its own program of rehabilitative services for Chris."[190] The court went on to state that, "pursuant to the IDEA's procedural safeguards . . . the school system must adopt its own plan and institute an M-team meeting before initiating a juvenile court petition for this purpose."[191]

F. Talking Out of School

The local press was critical of the decision and its supposed implications.[192] One headline read, "Court Ruling Hurting Schools."[193] The accompanying article stated that a school bus driver had informed the superintendent that students on his bus, who

185. Morgan v. Chris L., No. 94-6561, 1997 U.S. App. LEXIS 1041, at *7 (6th Cir. Jan. 21, 1997).

186. *Id.* at *14.

187. *Id.*

188. *Id.* at *14–15.

189. *Id.* at *15.

190. *Id.* at *17.

191. *Id.* The decision cited a Tennessee juvenile court statute requiring that a petition for delinquent or unruly conduct must allege "that the child is in need of treatment or rehabilitation." Tenn. Code Ann. § 37-1-120(1) (2009).

192. David Keim, *Knox Loses Special Education Case: County Ignored Federal Rules in Charging Unruly Disabled Student-Appeals Court*, Knoxville News-Sentinel, Jan. 23, 1997, at A1.

193. David Keim, *Court Ruling Hurting Schools: Officials Say Decision Limits Discipline of Special-Ed Students*, Knoxville News-Sentinel, Jan. 25, 1997, at A1.

had read about the decision in the paper that morning, said "Well, gee, we can do anything we want to now . . . . Because I'm [hyperactive] . . . I can do whatever I want and get by with it. I can kick the wall or whatever."[194]

Another story followed: "Does Disability Place Pupil Beyond Law? Knox Case May Go to Supreme Court."[195] It quoted Chris's version of what had transpired.[196] Mike L. was quoted as saying that although he believed that Chris should have suffered consequences for being in an unauthorized bathroom, the juvenile charges were too severe.[197] He was worried that a juvenile record might hinder Chris's chances of getting a job.[198] The article further noted that Chris confessed that he sometimes used his disability to his advantage when he did not want to do school work, but stated that he now was more mature and wanted to help his natural mother pay her bills.[199] The article concluded with this quote from Chris: "[T]he school system wanted to use me as an example and they've just pushed it just too far."[200]

G. Certiorari

"Our legal counsel messed up," a spokesperson for the Knox County Schools said when the system's petition for rehearing and rehearing en banc was dismissed as untimely by one day.[201] But with the decision to file for certiorari already announced, the school system evidently had decided to go for broke. It hired Carter Phillips, a highly regarded Supreme Court practitioner of Sidley Austin in Washington D.C., to write the certiorari petition.[202] Alan Morrison of the Public Citizen Litigation Group, an experienced and talented Supreme Court advocate, agreed to steer the respondents through the certiorari process, pro bono.[203] The amici in the Sixth Circuit agreed to join in opposing certiorari.

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194. *Id.*

195. David Keim, *Does Disability Place Pupil Beyond Law? Knox Case May Go to Supreme Court*, Knoxville News-Sentinel, Jan. 30, 1997, at A1.

196. *Id.* As he consistently had done, he pointed the finger at the other boy and recounted how, when he went to the office to report the incident, he was told that he was suspended when the principal saw that his socks were wet. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. David Keim, *Special-Ed Appeal Lost Because of Missed Deadline: County Plans to Go to Supreme Court*, Knoxville News-Sentinel, Feb. 25, 1997, at A1.

202. His retainer agreement with the school system called for a cap on payment of $25,000 plus expenses for preparing the petition, "lobbying the Solicitor General," and working with amici. Letter from Carter G. Phillips, Sidley Austin, to Richard Beeler, Knox County Law Director (Apr. 1, 1997) (on file with author). The retainer agreement was obtained through a statutory open records request to the Knox County Law Department.

203. There is much arcana surrounding Supreme Court practice, and a seasoned hand was an invaluable resource, as will be seen.

The school system's certiorari petition was filed on April 21, 1997. Its tone was alarmist:

> The decision of the Sixth Circuit has sent shockwaves throughout both the state educational community and the state juvenile justice systems. School officials, who are legitimately concerned with the safety and security of students and school property, must now consider whether a student who engaged in illegal conduct may have a disability and whether the procedures of the IDEA must therefore be satisfied before seeking the intervention of juvenile justice authorities.[204]

The petition cited statistics on school violence and discussed how schools were having tremendous difficulties responding to the problem of delinquency.[205] Citing federalism concerns, the petition argued that the lack of clear authority in the IDEA could not justify the appropriation of core state functions such as school discipline and juvenile justice.[206] The petition further claimed that the Sixth Circuit decision constituted a "breathtaking" arrogation of state power and an affront to federalism, and that the expansive reading of the IDEA's stay-put provision was in conflict with Congress's intentions and with *Honig v. Doe*.[207] The petition exclaimed: "The notion that a school official dealing with delinquent behavior should consider first the commands of the IDEA before invoking the powers of the juvenile justice system is nothing short of astonishing."[208]

The amici on behalf of the Knox County Schools, the NSBA and the Georgia School Boards Association ("GSBA"), were equally harsh in their assessments of the potential for mischief caused by the Sixth Circuit decision. Although Chris committed simple vandalism, the NSBA argued that the rationale of the decision would apply "when a student brings an Uzi to school and starts shooting people."[209] Noting that 20% of students with serious emotional disorders are arrested at least once before they leave school, the NSBA posed the ultimate hypothetical:

> Under the rule established in the decision below, if a student is holding another student or a teacher at gunpoint or a serious gang fight involving disabled students breaks out in the school, school officials would be in violation of the IDEA if they called the police because the student may be ultimately incarcerated.[210]

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204. Petition for Writ of Certiorari at 8, Morgan v. Chris L., 520 U.S. 1271 (1997) (No. 96-1681) (on file with author).

205. *Id.* at 8 n.2.

206. *Id.* at 8.

207. *Id.* at 10–11.

208. *Id.* at 14.

209. Motion and Brief Amicus Curiae of National School Boards Association in Support of Petition for Writ of Certiorari at 3, Morgan v. Chris L., 520 U.S. 1271 (1997) (No. 96-1681) (on file with author).

210. *Id.* at 17–18.

The GSBA followed suit. It argued that "[i]n the calculus of values inherent in public schools, there can be no higher priority than that which should be accorded to the personal safety and protection of innocent students . . . ."[211] The GSBA urged that the Court "should not sanction a Court decision which seems to give violent, disruptive, disabled children a license to pillage, maim, and even kill, free from the traditional criminal processes relied upon to protect human life and property."[212]

Wanting to avoid Supreme Court review, counsel for the L. family insistently pursued the dismissal of the juvenile court petition. They succeeded in obtaining an official determination from the juvenile court that it had dismissed the petition and destroyed Chris's records.[213] With the dismissal and Chris turning eighteen, it was argued that the matter was moot. The rest of the brief in opposition stressed the fact-driven, local nature of the ruling. The decisions of all three tribunals, it was pointed out, rested on state court cases and state education rulings. These cases were squarely situated within the remedial purposes of the IDEA.

H. The 1997 Reauthorization of the IDEA

Throughout the litigation, Congress had been working on the reauthorization of the IDEA. It looked as if a bill acceptable to all interests would be enacted in the fall of 1996.[214] Interest in the bill peaked when lawyers from the Center for Law and Education learned that there was a concerted effort by the NSBA to "overrule" *Chris L.* in the reauthorized bill.[215]

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211. Motion and Brief Amicus Curiae on Behalf of Georgia School Boards Association, Inc. in Support of Petitioner at 10, Morgan v. Chris L., 520 U.S. 1271 (1997) (No. 96-1681) (on file with author).

212. *Id.* at 10.

213. The memorandum embodying this determination was written by the juvenile court's chief probation officer. It succinctly described the juvenile court's handling of this matter:

> The petition in question was filed May 12, 1993 and was set for hearing on July 8, 1993. On that date the matter was passed to be reset because other litigation was pending on this matter in other courts. As that litigation remained active elsewhere the petition was never reset in this court. When the youth turned 18 on January 3, 1997 our case was closed. At that time, in keeping with our policy, since no formal disposition had ever been entered regarding this youth, the record was destroyed and his name has been removed from the records of this court.

Memorandum from Larry Gibney, Knox County Juvenile Court Chief Probation Officer, to Steve Griffin, Knox County Schools Chief of Security (Mar. 12, 1997), *cited in* Respondent's Brief in Opposition at Appendix B, Morgan v. Chris L., 520 U.S. 1271 (1997) (No. 96-1681) (on file with author).

214. Key issues surrounding cessation of educational services for students with disabilities who are expelled for misbehavior, other disciplinary provisions, assistive technology, and procedural protections were close to being resolved.

215. Telephone Interview with Kathleen Boundy, Co-Dir., Ctr. for Law & Educ. (Feb. 1997) (on file with author). The Atlanta counsel for the Knox County Schools was an active participant in the NSBA's legal affairs. The school system itself was organizing protests from other Tennessee school systems directed toward Tennessee Senator Bill Frist, a physician who was a key player in the reauthorization.

In the negotiations over the reauthorization, the *Chris L.* case was being portrayed by the school system negotiators factually just as it was painted in the briefs and certiorari petition of the school system and its allies—an outlier court had immunized students with disabilities from prosecution, so the tale went, no matter how severe their crimes.[216] The image propagated was one of Chris looking like Sylvester Stallone carrying an Uzi and running amok in school. Columbine still had not occurred, but the fear of such a debacle was exploited.[217] This was the IDEA out of control, it was claimed. Surely Congress could never have intended this startling result.

The lawyers and advocates from the disability community worked hard to counter this image. They urged congressional staff members to read the decision and judge for themselves whether the predicted "parade of horribles" could be pinned on the *Chris L.* litigation. Compromise language was drafted that became part of the IDEA.[218] This section is entitled "Referral to and Action by Law Enforcement and Judicial Authorities," and states in relevant part:

> Nothing in this part shall be construed to prohibit an agency from reporting a crime by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.[219]

The disability advocates argued that because *Chris L.* did not prohibit "referrals," this section was unnecessary and would constitute an open invitation for school systems to prosecute students with disabilities in juvenile court. The language remained in the bill, however, in part because of the heavy pressure from the NSBA and the tacit approval of Senator Frist.[220] Furthermore, representatives of the United States Department of Education viewed the provision as reasonably innocuous.[221]

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216. Telephone Interview with Kathleen Boundy, Co-Dir., Ctr. for Law & Educ. (Mar. 1997) (on file with author).

217. In February of 1997 a well-publicized school shooting occurred in Bethel, Alaska. There were other reported school shootings in October and December of that year. Dave Cullen, Columbine 14 (2009).

218. 20 U.S.C. § 1415(k)(6)(A) (2006).

219. *Id.* This provision was denominated a "[r]ule of construction." For purposes of statutory interpretation, this rule should be interpreted to limit this section to the referral of "crimes," not status offenses like truancy. In subsection (B) of this section, the transmission of special education and disciplinary records to appropriate referral authorities is permitted only in compliance with the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g (2006). FERPA contains specific exceptions for the transmission of records without parental consent. 34 C.F.R. § 300.535(b)(1) (2006). None of these exceptions can be read to allow the disclosure of a student's records to referral authorities without, for example, a court order.

220. Telephone Interview with Kathleen Boundy, Co-Dir., Ctr. for Law & Educ. (Apr. 1997) (on file with author).

221. Telephone Interview with Thomas Hehir, Former Dir. of Office of Special Educ. Programs, U.S. Dep't of Educ. (Oct. 30, 2002) (on file with author).

They believed that the section merely codified the holding in *Chris L.*, which they concluded did not prohibit referrals to law enforcement personnel.[222]

The reauthorization process began again in earnest in January of 1997, almost simultaneously with the Sixth Circuit decision. A consensus-based process of mediation, led by a key staff member of Senator Trent Lott, went forward.[223] When the Sixth Circuit affirmed the district court, any hope of excluding the new language was lost. The disability community worked to prevent any amendments to the new provision that would make it easier for schools to refer special education students to juvenile court, in part by containing any harmful language in the legislative history. They succeeded on both fronts. The only legislative history on this section is a statement by Senator Harkin, one of the legislation's co-sponsors, which stated that "[t]he bill also authorizes . . . proper referrals to police and appropriate authorities when disabled children commit crimes, so long as the referrals do not circumvent the school's responsibilities under IDEA."[224] A compromise bill was achieved. President Clinton signed the legislation on June 4, 1997.[225]

After consultation with the Court's Chief Deputy Clerk, counsel for the respondents faxed a letter to the Supreme Court, with a copy to counsel for the Knox County Schools. The letter alerted the Court to this new provision in the IDEA, but stated that it should have no discernible effect on this case. The next announcement day was scheduled for June 9, 1997. On that day, certiorari was denied.[226] In consultation with the L. family, counsel issued a press release stating in part:

> After four years, four successful court decisions, including an appeal to the U.S Supreme Court, and the expenditure of hundreds of thousands of dollars by the Knox County Schools, this case has concluded successfully for Chris and his family. We hope that school system administrators have learned a lesson about identifying and educating students with behavioral disabilities. Cases like this wouldn't arise if school administrators pursued a policy of helping disabled students and their parents—as the law intends—not fighting them in court.[227]

The school system defended its pursuit of the case. The superintendent said that by "continuing on the path we chose," people focused on the issue and understood "the

222. A leading special education publication portrayed the 1997 Amendment as "effectively" overruling *Chris L.* Perry A. Zirkel, *Prosecuting Disabled Students: IDEA '97 Effectively Negates Chris L.*, The Special Educator, June 4, 1999.

223. The staff member had a child with a serious physical and mental disability.

224. 143 Cong. Rec. S4401 (1997) (statement by Sen. Harkin).

225. Office of Special Education & Rehabilitative Services, http://www.ed.gov/offices/OSERS/Policy/IDEA/the_law.html (last visited Mar. 8, 2010).

226. *Chris L.*, 106 F.3d 401 (6th Cir. 1997), *cert. denied.*, 520 U.S. 1271 (1997).

227. Press Release, Counsel for Chris L., U.S. Supreme Court Rejects Knox County School's Appeal in Chris L. Case (June 9, 1997) (on file with author).

absurdity of what schools are dealing with."[228] He called "asinine" the courts' interpretation that "a special-needs student could potentially commit a crime in a classroom and escape charges because of his or her condition."[229]

I. The Aftermath

The following letters to the editor encapsulate the conflicting currents surrounding the *Chris L.* case:

> September 24, 1993
>
> Editor, The News-Sentinel
>
> I was appalled to read in The News-Sentinel of an eighth-grader who kicked loose a water pipe in a bathroom at Northwest Middle School—causing $800 in damages—whose parents asked that his juvenile petition be dismissed because he has attention deficit disorder. As a parent of a seventh-grader who has been treated for ADD and who still has a harder time with school work than his classmates of equal intelligence, I know that living with and working with ADD children is not an easy task. But ADD kids are not stupid. In fact, most are excellent manipulators. The hardest part of living with an ADD child is staying in control while working with a kid who knows exactly how to push you to the edge. Still, at some point in their lives, all these ADD children have to live in the real world—where actions bring consequences. To allow a child to perform an act of vandalism and then excuse him by claiming, "He can't help it—he's ADD," is not doing the child or society any good. . . . I'm glad that his problem has a name and that ADD is recognized as a definite learning disability. Knowing what he has, how it affects him and how to control it have done wonders for our son's self-esteem. But as we have struggled with ADD in our own family, we have watched it become more and more of a catch-all to explain away everything from kids who can't read to kids who pull guns on the teacher. . . . A kid who causes $800 worth of damage to school property ought to be personally paying back the $800 to the school principal—$2 or $5 or $10 at a time—for as long as it takes to settle his debt.
>
> Jane Schuler
> Knoxville[230]

228. Randy Kenner, *Knox Appeal of Special-Ed Case Rejected: U.S. Supreme Court Turns Down Petition*, Knoxville News-Sentinel, June 10, 1997, at A1.

229. *Id.* With the cooperation of the lawyer in the Law Director's office, the case was rapidly settled on a fully compensatory amount of attorneys' fees. The school system paid approximately five times this amount to the Atlanta Law Firm and to Sidley Austin.

230. Jane Schuler, Letter to the Editor, Knoxville News-Sentinel, Sept. 24, 1993, at A17.

October 15, 1993

Editor, The News-Sentinel

> Jane Schuler's letter . . . regarding the child with ADD (attention deficit disorder), who is being prosecuted in Juvenile Court for damaging school property, needs a reply. I found myself wondering what news story she had read, since she evidently read a different story from the one I read. Her statement that the child should be made to pay back the damages was interesting, to say the least. This is exactly what the parents of the child in question offered to the school system. The school system refused to accept this, wishing instead to further stigmatize and traumatize an already disturbed child by throwing him into the Juvenile Court system, to be arrested, handcuffed, strip-searched and locked up in a cage. They apparently feel this will help this child a lot more than working with the parents and mental health professionals to come up with a placement and services that would help this child overcome this type of destructive behavior. . . . No one that I know of is advocating that we tolerate such behavior as what occurred at Northwest Middle School. What we should be doing is trying to help these children by coming up with the psychological, medical and educational services they need to overcome this handicap, not putting them in jail. Just as you wouldn't jail an epileptic [child] for having a seizure, you certainly shouldn't treat an ADD or ADHD child any more harshly for displaying his or her handicap. One last thought for Ms. Schuler. I suggest that you push Knox County Schools to start obeying the state and federal laws regarding special education. . . . That means that it is Knox County officials who are the lawbreakers, not the ADD child.
>
> Michael Lawson
> Knoxville[231]

Public defenders, special education lawyers, and child advocates recognized the deleterious consequences surrounding the issue of over-criminalization.[232] With the shootings at Columbine in 1999 and other highly publicized episodes of school violence,[233] the open invitation to school systems contained in the 1997 Amendments spurred increased use of the juvenile courts to handle in-school misconduct by students with disabilities.[234] Although statistics do not exist to gauge the exact extent

231. Michael Lawson, Letter to the Editor, Knoxville News-Sentinel, Oct. 15, 1993, at A13.

232. Students with disabilities are overrepresented in the juvenile court system. Approximately two-thirds of the nation's juvenile inmates have at least one mental illness. *See* Solomon Moore, *Mentally Ill Offenders Strain Juvenile System*, N.Y. Times, Aug. 10, 2009, at A1. *See* Dean Hill Rivkin & Brenda McGee, *Disability Advocacy in Juvenile Delinquency Representation*, *in* Tennessee Association of Criminal Defense Lawyers, A Practical Guide For Juvenile Defense (1997).

233. *See* Cullen, *supra* note 217.

234. Research on rates of exclusion from school shows that students with disabilities are disproportionately excluded, despite the strictures of the 1997 IDEA Amendments. *See* Russell J. Skiba, *Special Education and School Discipline: A Precarious Balance*, 27 Behav. Disorders 81, 84 (2002).

of this practice,[235] knowledgeable lawyers believe that the practice is national in scope.[236] A recent study by the American Bar Association's Juvenile Justice Center on the state of juvenile courts in Virginia found that the juvenile justice system was being loaded down with inappropriate referrals, particularly mental health and school-related cases.[237] Although IDEA decisions emerged soon after the *Chris L.* decision that acknowledged that impermissible motives often prompted school systems to file juvenile court petitions,[238] in recent years, judges have been decidedly hostile to *Chris L.*-type claims.[239]

This trend of hostility began within weeks of the 1997 reauthorization. A Wisconsin state appellate court allowed a juvenile prosecution of a child with a disability to go forward, distinguishing *Chris L.* on state law grounds because the district attorney had initiated the case (as required by Wisconsin law) instead of the school officials.[240] The student, who was diagnosed as emotionally disturbed at age three, was partially enrolled in classes for students with emotional disabilities.[241] He

235. *See generally* U.S. Dep't of Educ. et al., Nat'l Center for Educ. Statistics, Indicators of School Crime and Safety: 2002 iii (2002), *available at* http://nces.ed.gov/pubs2003/2003009.pdf. Statistics on school crime show that in 1996–97, 10% of all public schools reported at least one serious violent crime to a law enforcement representative. *Id.* at 18. Another 47% of public schools reported a less serious violent or nonviolent crime. *Id.* The remaining 43% of public schools did not report any of these crimes to the police. *Id.* The vast majority of crimes reported by public schools were of the less serious violent or nonviolent type. *Id.* In the 1996–97 reporting period, 424,000 total crimes were reported to the police; 402,000 of these were of the less serious nature. *Id.*

236. *See* Eileen L. Ordover, When Schools Criminalize Disability: Education Law Strategies for Legal Advocates iii (Nov. 2001) (unpublished manuscript, on file with author). In 1996, the National Council on Disability found that "schools still try to expel or suspend students who present behavioral or other special challenges." Nat'l Council on Disability, Improving the Implementation of the Individuals with Disabilities Education Act: Making Schools Work for All of America's Children, Supplement viii (1996), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/14/86/85.pdf.

237. ABA Juvenile Justice Ctr., A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings 4–5, 20–23 (2002), *available at* http://www.njdc.info/pdf/cfjfull.pdf; *see also* The Advancement Project & The Harvard Civil Rights Project, Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies (2000), *available at* http://www.civilrightsproject.ucla.edu/research/discipline/opport_suspended.php.

238. *See, e.g.*, Cabot Sch. Dist., 29 IDELR 300 (Ark. SEA 1998) (the "call to the police by agent of the school was not . . . placed for the purpose of preserving the legitimate safety of the students and the faculty, but was made for . . . purposes of avoiding compliance with the child's behavior management plan . . . and of causing a change in placement.").

239. *See, e.g.*, Joseph M. v. Southeast Delco Sch. Dist., No. 99-4645, 2001 U.S. Dist. LEXIS 2994, at *16–17 (E.D. Pa. Mar. 19, 2001) (holding that section 1415(k)(9)(A) overruled the *Chris L.* determination that filing of juvenile petition constituted change of placement); Commonwealth v. Nathaniel N., 764 N.E.2d 883, 886–87 (Mass. App. Ct. 2002) (student with disabilities prosecuted for possession of small amount of marijuana in school and found not entitled to IDEA procedural protections); State v. Trent N., 569 N.W.2d 719 (Wis. Ct. App. 1997) (IDEA procedures need not be exhausted before state can file delinquency petition for disabled student who was on juvenile court probation).

240. *Trent N.*, 569 N.W.2d at 725; *see also Nathaniel N.*, 764 N.E.2d at 886–87.

241. *Trent N.*, 569 N.W.2d at 722.

was prosecuted for three incidents: in one, he allegedly hit another student; in another, he allegedly lit a match and threw it into a school locker; and in a final incident, he was accused of disorderly conduct.[242] His parents contested the adequacy of his school program under the due process procedures of the IDEA. The court, however, reasoned that the *Chris L.* remedy—withdrawal of the juvenile petition—was unavailable as against the district attorney.[243] Several years later, a pair of cases explicitly held, unfortunately with little serious analysis, that the 1997 Amendments had "effectively overruled" *Chris L.*[244]

Several experienced education advocates have creatively analyzed the room ostensibly left open in the *Chris L.* provision of the 1997 amendments to the IDEA.[245] Open areas include: What is "reporting"? What is a "crime"? Who are "appropriate authorities"? These advocates have also charted inventive pathways to challenge referrals to law enforcement under section 504 of the Rehabilitation Act and the Americans with Disabilities Act. Others have shown advocates how to use the IDEA for better educational outcomes once a student is enmeshed in juvenile court proceedings.[246] The rising awareness of these issues should lead to new rules-based challenges,[247] making the climate for revisiting *Chris L.*-type legal claims ripe. What

242. *Id.*

243. *Id.* at 725 (concluding that the IDEA does not trump the juvenile court's jurisdiction when a delinquency petition is filed against a child covered by the IDEA).

244. *See* Joseph M. v. Se. Delco Sch. Dist., No. CIV. A. 99-4645, 2001 WL 283154, at *6 (E.D. Pa. Mar. 19, 2001) (stating that the 1997 amendments made to the statutory language of the IDEA, by plain meaning of the statute, overrules *Chris L.* as the case was decided before the 1997 amendments); *see also Nathaniel N.*, 764 N.E.2d at 887. In *Joseph M.*, the student was emotionally disturbed. His IEP recommended that he receive a "full-time emotional support placement" outside of the school district. The district took disciplinary actions against Joseph M. on at least seven occasions, including filing reports with the police department. He ultimately set a small fire in the school cafeteria. This episode led to his incarceration. *Joseph M.*, 2001 WL 283154, at *2–3. *Nathaniel N.* went even further than *Joseph M.*, reckoning that Congress had implicitly rejected the reasoning in *Chris L.*, and that a referral to juvenile court could not constitute a change in placement. *Nathaniel N.*, 764 N.E.2d at 887. In *Nathaniel N.*, the student had a long history of allegedly disruptive behavior. He was the subject of numerous disciplinary actions, including directing vulgar language at teachers, disobeying school rules, and failing to report for assigned detentions. A psycho-educational evaluation concluded that Nathaniel's behavior potentially warranted placement in a program for students with behavioral and emotional disturbances. He ultimately was found with two small packets of marijuana while at school and was prosecuted. *Id.* at 885–86.

245. *See, e.g.*, Ordover, *supra* note 236, at 18–20.

246. *See generally* Joseph B. Tulman & Joyce A. McGee, Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA): For Children in the Juvenile Delinquency System (1998) (detailing best defenses and strategies under special education law, including the IDEA).

247. Based on the information provided by a listserv run by the Council of Parent Attorneys and Advocates ("COPAA")—an organization of attorneys, special education advocates, and parents—there appears to be an upswing in the number of lawyers in legal services and other public interest programs devoting attention to the problem of criminalization. *See generally* COPAA, http://www.copaa.org (last visited Mar. 8, 2010); *see also* Dignity in School Campaign, Presenting a Human Rights Framework for Schools: A Model Code on Education and Dignity (2009).

is needed is an encompassing theory that returns the issue to the remedial roots of the IDEA. School administrators should restore the use of reasonable discretion to fashion nonpunitive consequences for school-based misbehavior for *all* students.

Given the history of the litigation of this issue, future challenges will face an uphill—but not insurmountable—battle. Cases like *Joseph M.* and *Nathaniel N.*,[248] and subsequent opinions by IDEA hearing officers[249] have provided the "green light" to schools to refer students to police (and juvenile courts) for less and less serious offenses. One disturbing opinion held that if school officials *subjectively* believe that a student's conduct might be characterized as "criminal," they may report the student to the police.[250]

This trend prompted a task force of the American Psychological Association to criticize an "increase of referrals to the juvenile justice system for infractions that were once handled at school"[251]—an increase disproportionately affecting children with disabilities.[252] Cases brought under the IDEA are littered with stories of inappropriate referrals. A Kentucky student was charged with drug trafficking after she was pressured into giving a classmate some of her prescription Adderall.[253] Prior to the incident, she had pleaded with the school nurse to keep her medication for her so that she would not be exposed to such pressures.[254] A Minnesota student shoved a classmate and an education assistant and threatened a teacher, who called the police.[255] Although no damage or injuries resulted, he was charged with fifth degree

248. *Joseph M.*, 2001 U.S. Dist. LEXIS 2994; *Nathaniel N.*, 764 N.E.2d 883. For a detailed discussion of these cases, please see *supra* note 244.

249. *See e.g.*, Flour Bluff Indep. Sch. Dist., 108 LRP 40201, 40213 (Tex. SEA 2007) (holding that a school can report "alleged crimes" even if the "rationality [or] effectiveness" of the practice is questionable); Katy Indep. Sch. Dist., 108 LRP 2915 (Tex. SEA 2007) (holding that a school may pursue criminal prosecutions for acts related to a child's disabilities, even for *minor* criminal offenses) (emphasis added); *see also* Logansport Cmty. Sch. Corp. & Logansport Area Joint Special Serv. Coop., 107 LRP 35429 (Ind. SEA 2006) (holding that a school may report an alleged crime to police "for purpose[s] of documentation," even if no damages were caused, and even if the school did not intend to press charges and no charges were in fact brought).

250. Harwich Pub. Sch., 107 LRP 30521 (Mass. SEA 2007) (holding that school officials were entitled to report a student's animated flipbook depicting a plane crash to police, even though the student had done nothing that could possibly be construed as criminal).

251. Russell Skiba et al., Am. Psychological Ass'n Zero Tolerance Task Force, Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations 9 (2006), *available at* http://www.apa.org/pubs/journals/releases/ZTTFReportBODRevisions5-15.pdf [hereinafter APA Report].

252. *Id.* at 6. The report is careful to note that referrals to juvenile courts have increased across the board—not just for students with disabilities. *Id.* at 76–77. However, students with disabilities are disproportionately represented in the juvenile justice system, and referrals for relatively minor offenses are undoubtedly contributing to the overrepresentation. *See supra* notes 232–34.

253. S.E. v. Grant County Bd. of Educ., 544 F.3d 633, 635–37 (6th Cir. 2008) (IDEA claim dismissed on exhaustion grounds).

254. *Id.* at 635.

255. Shakopee Indep. Sch. Dist., 45 IDELR 171 (Minn. SEA 2005) (holding that the conduct was criminal).

assault and disorderly conduct.[256] Similarly, school officials were allowed to call the police to report an Alabama student who made a verbal threat to a teacher and used profanity in the principal's office.[257] Finally, in an extreme Minnesota case, two students were charged with disorderly conduct in an apparent act of retaliation against their parents' complaints that the school should have provided them with an IEP.[258] The basis of the disorderly conduct charge was tipping off a classmate's hat and tapping his foot during class—charges that the court nonchalantly held were supported by "probable cause."[259]

These cases have erased the line between criminal prosecutions and routine discipline. Courts have seized on the compromise language of section (k)(6) of the IDEA to sanitize the behavior of school officials who report in order to exclude difficult children. At the same time, courts have either ignored or eviscerated the limitation on a school's discretion to report, namely that referrals cannot be used to "circumvent" a school's obligations under the IDEA.[260] The *Trent N.* court was blindly optimistic that police and prosecutorial discretion and juvenile court supervision would prevent schools from referring students under section (k)(6) in an attempt to "end run" around the IDEA.[261] Thus far, this far-sighted optimism remains in the minority.

In reality, there are several dynamics at play that must be confronted for the issue to be viewed more sympathetically by the courts. First, police and prosecutorial discretion has not proven to be a significant check on school referrals. Often, the responding police officer will not know that a child has a disability.[262] Even armed with such knowledge, officers may lack the necessary training or understanding to

256. *Id.*

257. Guntersville City Bd. of Educ., 47 IDELR 84 (Al. SEA 2006) ("I'll kick your ass if you touch me again."). The hearing officer held that the school did not commit a violation of IDEA by reporting the conduct even though the outburst was *caused* by the school's failure to properly implement the student's IEP. Unfortunately, the police in this situation determined that the student was in violation of his probation and arrested him.

258. S.A.S. v. Hibbing Pub. Sch., No. 04-3204JRTRLE, 2005 WL 2230415 (D. Minn. Sept. 13, 2005); *see also* B.L. v. Boyertown Area Sch. Dist., 52 IDELR 42 (E.D. Pa 2009) (IDEA-certified student whose behavioral problems included frequent use of derogatory and inappropriate remarks arrested by a state trooper at the behest of his principal for cursing a teacher).

259. *S.A.S.*, 2005 WL 2230415, at *3–4.

260. IDEA Regulations Commentary, 64 Fed. Reg. 12,537, 12,630–31 (Mar. 12, 1999); *see also supra* note 224 (Senator Harkin's discussion of the amendments).

261. *Trent N.*, 569 N.W.2d at 724 ("We see no reason to conclude that these authorities will abandon their statutory duties to exercise their discretion in a fair and impartial manner, always bearing in mind the best interests of the child. And should such discretion be misused, it is always subject to the superintending authority of the juvenile court.").

262. School officials are often reluctant to pass along such information because of a fear that they will violate FERPA. For example, a Tennessee school called the police to arrest an autistic child who had kicked and bitten teachers when they tried to physically restrain him during an outburst. They did not inform the officers of the disability or the child's aversion to touching because they believed that FERPA prohibited sharing that information, even in an emergency. Christina E. Sanchez, *Autistic Boy's Arrest at School Fuels Debate on Discipline for Disabled*, The Tennessean, Mar. 30, 2009, *available at* http://www.theautismnews.com/2009/03/30/autistic=boys-arrest-at-school-fuels-debate-on-discipline-for-disabled/.

appreciate what the disability means. Second, another factor profoundly influencing the aftermath of *Chris L.* has been the explosive growth of school resource officers.[263] *Chris L.* certainly was not the stimulus for this development. The prominent school shootings of 1997 and Columbine led many communities to place sworn officers in the schools to patrol and to handle incidents that school officials refer to them. These officers are frequently called on to intervene in behavioral problems exhibited by students, especially those with disabilities.[264] Although ostensibly independent of school officials, anecdotal stories suggest that many of these officers hew to directives from school principals and do not serve as independent safeguards on the issue of what constitutes a crime.[265] Further, juvenile court judges often "encourage referrals" because they believe that court supervision (and threatened sanctions) are the only hope for "troubled" children.[266]

Unfortunately, courts have yet to find a significant obstacle to the exclusion of children with disabilities in the IDEA, even where (as in *Chris L.*) the school's own failures caused the behavior being reported,[267] and even where the school's subjective intention was to exclude the child. The following quote from a West Virginia hearing officer epitomizes the problem:

> Sadly, the school district's strong desire to criminalize this child with a disability is abundantly clear and disturbing. The teacher threw herself into the student's space when he was not hurting anybody, resulting in her being kicked and stomped. Before the teacher even reported the April incident to her principal, she first excused herself to call the state police to begin the juvenile court process . . . . Although the school district's desire to criminalize this student [for behaviors that are a manifestation of his disabilities] is

263. *See generally* National Association School Resource Officers (NASRO), http://nasro.mobi/cms/index.php (last visited Mar. 8, 2010).

264. *Id.*

265. NYCLU, Safety With Dignity, *supra* note 2. *See* Paul J. Hirschfield, *Preparing For Prison? The Criminalization of School Discipline in the USA*, 12 Theoretical Criminology 79, 79 (2008) ("American schools increasingly define and manage the problem of student discipline through a prism of crime control."). *See generally* Sally Engle Merry, *The Criminalization of Everyday Life*, *in* Everyday Practices and Trouble Cases 14, 15 (Austin Sarat et al. eds., 1998) ("The criminalization of everyday life—the redefining of customary practices as crimes—takes shape on a rhetorical terrain of threatened violence, disorder, and danger on which expanded legal regulation promises dominant groups security and control.").

266. As noted in the APA Report:

> It might be expected that juvenile court judges would discourage school referrals to the juvenile justice system practices if for no other reason than concern about increase in case loads taxing the limited-resource system of the courts. Yet many judges tolerate and even encourage referrals because of their belief that referral is the only way to get "help" for troubled youngsters.

APA Report, *supra* note 251, at 78.

267. *E.g.*, *Guntersville City Bd. of Educ.*, 47 IDELR at 118. The issue of lack of intent, a prerequisite to criminal prosecution, is a defense that deserves more serious consideration in the context of cases such as this one.

> unfortunate, . . . the school district and the teacher may pursue such charges if they choose to do so.[268]

IV. REASSESSING

A. Complexities

Poverty or public interest lawyers who practice in settings where client crises, coupled with limited resources are the norm, often ask: When do we choose to use the existing rules to achieve short-term gain and when do we engage with allies on more systemic levels? More frequently, the question is, how do we do both? These lawyers discuss innovative direct service strategies such as case aggregation, institutional targeting, focused priorities, and other methods designed to connect casework with broader community struggles. They also consider—or should consider—basic transformations in the structure and methods of their practices. As difficult as this change is to imagine for many lawyers, it is important for them to assess their genuine satisfaction with their current case practices and to engage in thought experiments about the evolving models of community lawyers that have emerged during the last decade.[269] Such change is hard, and the paths toward a more strategic practice are strewn with professional and political difficulties. As the *Chris L.* case demonstrates, individual cases—including those not litigated with law reform as an express goal—can have long-term legal and political ramifications. *Chris L.* exemplifies how an issue can transform from a case to a cause.[270]

Is *Chris L.* a story of success or failure? Any case that galvanizes lawyers the way *Chris L.* did inevitably has many dimensions. Unpacking those dimensions is a polycentric task. Yet to shrink from this type of self-critical analysis robs others both of precious history and rare glimpses into the low-visibility work of lawyering. This proclivity for self-critique infuses the "steady work" that Gary Bellow urged; it is imperative both to engage in and to examine legal work to understand its potential for social change.[271]

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268. *In re* Student with Disability, 108 LRP 45824 (W. Va. SEA 2008) (citation omitted).

269. *See, e.g.*, Penda D. Hair, Louder Than Words: Lawyers, Communities and the Struggle for Justice (2001); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 Cal. L. Rev. 1879 (2007); Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 Harv. C.R.-C.L. L. Rev. 297 (1996); Susan D. Bennett, *Little Engines That Could: Community Clients, Their Lawyers, and Training in the Arts of Democracy*, 2002 Wis. L. Rev. 469 (2002); Matthew Diller, *Lawyering for Poor Communities in the Twenty-First Century*, 25 Fordham Urb. L.J. 673 (1998); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 Harv. C.R.-C.L. L. Rev. 407 (1995); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era,* 48 U. Miami L. Rev. 1099 (1994); Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. Pub. Int. L. J. 49 (1991); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice,* 1 Clinical L. Rev. 157 (1994).

270. *See generally* Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. Rev. L. & Soc. Change 109 (1993–94).

271. *See* Bellow, *supra* note 269.

On a conventional level, *Chris L.* glowingly accomplished several goals. First, and many practitioners believe foremost, the stated goals of the clients were achieved. Chris almost immediately received acceptable educational services, in time the juvenile petition was dismissed, and Mike L. was reimbursed for his legal fees. The case also served as a vehicle for Mike L. to vindicate his belief that Chris had been treated unfairly and to show Chris that he would go to great lengths to support him.

On a different level, the case had perverse national reverberations, which were not anticipated when the case was initiated. The inclusion of section 1415(k)(9)(A) in 1997 could be viewed as an open door encouraging school systems to prosecute students with disabilities, although the section was much more limited. In this sense, the case could be viewed as winning the battle but losing the war. This is not an eventuality that client-centered lawyers can always anticipate, nor arguably should they.

B. Contradictions

Rules, rights, and roles force lawyers to take sides. The IDEA is one of the last of the entitlement statutes. It is the zenith of legalization. Yet the decision to litigate this case may have narrowed the field of vision.[272] Mobilizing the local and statewide disability advocacy groups to combat the school systems' systematic practice of criminalizing students might have yielded more permanent results, or at least shaped the thinking of school authorities to be more sensitive to the rights of students with disabilities.[273] However, such a massive undertaking from an individual case simply cannot be mounted without a broader alliance of concerned parents, advocacy groups, and other sympathetic interests. It is often hard to reconcile a lawyer's primary obligation to an individual client with broader law reform aims.

In *Chris L.*, the lawyers advocated with passion.[274] Using concepts of narrative theory, Chris was described as a small, troubled child, neglected by a school system

272. Minow, *supra* note 21, at 370 ("Legal analogies become narrow references to precedents, telescoping the creative potential of a search for surprising similarities into a limited focus on prior rulings that could 'control' the instant case. As a result, fabricated categories assume the status of immutable reality.").

273. A major shortcoming of situating legal practices more in the community is the practical reality that private practitioners can only recover attorney's fees if they prevail in litigation. A substantial portion of community legal needs are met by solo or small-firm practitioners. These lawyers can ill-afford to spend generous time conducting community education or community organizing campaigns. An innovative project that endeavored to formulate new models of community practice networks, with support from law schools, was the Law School Consortium Project. Law School Consortium Project, http://law.umaryland.edu/programs/clinic/initiatives/lscp/ (last visited Mar. 8, 2010).

274. Myles Horton, the founder of the Highlander Research and Education Center, a venerable grassroots school for social justice advocates, is reputed to have said about lawyers to the effect: "If all you have is a hammer, the only thing you see is nails." *See generally* Myles Horton & Paulo Freire, We Make the Road by Walking: Conversations on Education and Social Change (Brenda Bell et al. eds., 1990). For advocacy of a multi-faceted approach to special education lawyering, including community organizing and alliance-building, see Stephen A. Rosenbaum, *When It's Not Apparent: Some Modest Advice to Parent Advocates for Students with Disabilities*, 5 U.C. Davis J. Juv. L. & Pol'y 159, 185–93 (2001). For advocacy of broad alliance-building in the context of the larger disability rights movement, see Michael S. Wald, Comment, *Moving Forward, Some Thoughts on Strategies*, 21 Berkeley J. Emp. & Lab. L. 473, 475 (2000).

that discriminated against students with disabilities. He faced, the narrative went, a dysfunctional and punitive juvenile court system.[275] The school system painted the same picture, but more grotesquely.[276] Was this fair to Chris and other students with disabilities?

Moreover, the claims made by the school system about the deleterious effects of the "dual system" of discipline and the unfairness of the application of the anti-discrimination principle in the context of this case had strong public appeal.[277] The former argument was designed to divide the regular education community from the special education community. Was this an exercise of control and power designed to stifle collective dissent and action?[278]

The rhetoric was appealing: special education children, such as Chris, were being accorded more favorable treatment than non-special education students based on differences that are socially constructed.[279] The school system proclaimed that immunity from discipline and the extra resources accorded students with mental and emotional disorders were siphoning money and energy from the education of the majority of students.[280] To be sure, the contraction of the virtually unconstrained disciplinary prerogatives that schools had enjoyed for years before the IDEA caused internal anxiety within school systems,[281] but studies have concluded that the tensions

275. *See generally* Anthony G. Amsterdam & Jerome Bruner, Minding the Law (2nd prtg. 2002) (on the use of narrative theory).

276. *See* Minow, *supra* note 21, at 36–38 (on labeling); *see also* Colleen M. Fairbanks, *Labels, Literacy, and Enabling Learning: Glenn's Story*, 62 Harv. Educ. Rev. 475 (1992).

277. *See* Kelman & Lester, *supra* note 57, at 102–11. For criticism of Kelman and Lester's application of the anti-discrimination principle to students with learning disabilities, see Andrew Weis, *Jumping to Conclusions in "Jumping the Queue,"* 51 Stan. L. Rev. 183, 219 (1998) (book review) ("Kelman and Lester's book is flawed fatally because they have chosen to ignore the perspectives of their own subjects.").

278. *See* Dean Hill Rivkin, *Lawyering, Power, and Reform: The Legal Campaign to Abolish the Broad Form Mineral Deed*, 66 Tenn. L. Rev. 467 (1999). *See generally* James C. Scott, Weapons of the Weak: Everyday Forms of Peasant Resistance (Yale Univ. Press 2000) (1985).

279. AD/HD is a neuro-biological disorder, considered a chronic illness by the American Medical Association's Council on Scientific Affairs. Larry S. Goldman et al., *Diagnosis and Treatment of Attention-Deficit/Hyperactivity Disorder in Children and Adolescents*, 279 JAMA 1100, 1105 (1998); Karen R. Stern, Office of Juvenile Justice and Delinquency Prevention, *Fact Sheet: A Treatment Study of Children with Attention Deficit Hyperactivity Disorder*, May 2001, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/fs200120.pdf (children with AD/HD at higher risk of engaging in delinquent and anti-social behavior—describing prominent treatment modalities); *see also* Gerald A. Gioia & Peter K. Isquith, *New Perspectives on Educating Children with AD/HD: Contributions of the Executive Functions,* 5 J. Health Care L. & Pol'y 124 (2002).

280. For a discussion of the background behind this argument, see Gregory F. Corbitt, Comment, *Special Education, Equal Protection and Education Finance: Does the Individuals with Disabilities Education Act Violate a General Education Student's Fundamental Right to Education?*, 40 B.C. L. Rev. 633 (1998–99); Bruce Meredith & Julie Underwood, *Irreconcilable Differences? Defining the Rising Conflict Between Regular and Special Education*, 24 J.L. & Educ. 195, 196 (1995).

281. *See* Kelman & Lester, *supra* note 57, at 102–03; Wade F. Horn & Douglas Tynan, *Revamping Special Education*, 144 Pub. Int. 36, 44–45 (2001) (arguing that students with behavioral disorders who qualify for special education become accustomed to a "lower" standard of behavior).

caused in some school systems by differential discipline procedures have not interfered in the orderly management of schools.[282]

What about the school system's story? Why did it decide to draw a line in the sand and litigate this case to the end? Were the central office administrators who made that decision pressured by principals and teachers who authentically believed that the dual standard of discipline was interfering with their ability to educate? Was this pressure at least in part animated by a lack of knowledge about behavioral disabilities such as AD/HD? How much disability bias was operating?

Other parties whose views figure into this complex landscape include the juvenile judge and his staff. Although the juvenile judge submitted an affidavit to the district court on behalf of the schools, it was fairly tepid.[283] He did not engage in strong turf protection. Otherwise, the original trial date would not have been allowed to pass so readily. How chagrined were the judge and his staff at the prospect that the school system would be compelled to formulate appropriate consequences for misconduct of this sort? Because students with behavioral disorders compose a disproportionately high percentage of children prosecuted in juvenile courts, did the judge and his staff see the case as a sentinel for lawyers to press more penetrating and time-consuming disability-based defenses for juvenile defendants?[284] This is an outcome that has gained strong momentum in recent years, thanks in part to the attention paid to the phenomenon of the "school-to-prison pipeline."[285]

V. A NEW EPILOGUE

Whatever the answers to these questions, the story is not over.[286] With the growing recognition of the school-to-prison pipeline, there is an opportunity to remake the law that has grown since the *Chris L.* case. The time for a re-imagined analysis is ripe.

The cramped interpretation of the IDEA, which authorizes schools to refer any conduct they believe might fall under some portion of the criminal code, though common in practice, should be rethought. The referral provision in section (k)(6), as

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282. *See* U.S. General Accounting Office, Student Discipline: Individuals with Disabilities Education Act (2001), *available at* http://www.gao.gov/new.items/d01210.pdf.

283. Juvenile Judge Affidavit, Morgan v. Chris L., 927 F. Supp. 267 (E.D. Tenn. 1994) (No. 3-93-cv-524) (on file with author).

284. *See generally* Kim Brooks et al., Children's Law Center, Inc., The Special Needs of Youth in the Juvenile Justice System: Implications for Effective Practice 79–107 (2001), *available at* http://www.childrenslawky.org/publications/specialneedsofyouth.pdf (discussing competency, waiver of rights, and other defenses).

285. *See, e.g.*, *supra* note 2.

286. *See, e.g.*, Crime Statistics Unit, Tennessee Bureau of Investigation, School Crimes Study: A Study of Offenses, Offender, Arrestee and Victim Data Reported To The Tennessee Incident Based Reporting System (2009) (documenting 12,379 offenses occurring at Tennessee schools in 2008, with the largest category being 3575 simple assaults); Philip J. Cook, Denise C. Gottfredson & Chongmin Na, *School Crime Control and Prevention*, Mar. 25, 2009, *available at* http://ssrn.com/abstract=1368292.

the Department of Special Education realized, was not inconsistent with prior case law.[287] *Chris L.* did not hold that schools could not report crimes to police, and the 1997 Amendments cannot fairly be said to have responded to the *Chris L.* case. Instead, section (k)(6) responded to an unfounded fear that schools would be unable to protect student safety in an emergency because of cumbersome procedural requirements, even though no interpretation of the IDEA prior to the 1997 Amendments would have prohibited schools from calling the police for assistance in proper circumstances.[288]

The referral provision in section (k)(6) should not be interpreted in a restricted manner because that interpretation undermines the entire statutory scheme. The IDEA reflects a careful balancing of substantive goals and procedural mechanisms. As the Court explained in *Honig*, the IDEA was intended to remove the "*unilateral* discretion" that had previously been enjoyed by schools in deciding whom to exclude.[289] Unfortunately, the prevailing interpretation of section (k)(6) allows a school to enjoy that same degree of discretion as it enjoyed in the past. This interpretation eviscerates the robust behavioral mandates contained in the statute.[290] If a school's discretion is broad enough to have a child prosecuted for tapping his foot in class, then it must be believed that Congress intended to undermine the goals of the IDEA with a single, ambiguous sentence—that it has hidden an elephant in a mousehole.[291] This is an unlikely scenario.

The only interpretation of section (k)(6) consistent with the IDEA's structure, and coincidentally, consistent with its language, is as a substantive command that forbids exclusion except when a child has committed a *crime*,[292] and a procedural mechanism through which the substantive command can be enforced. The question, then, is how to define a "crime" and how reviewing courts can ensure that schools have not "circumvented" their obligations by referring non-crimes.

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287. *See supra* note 2.

288. This is why the counterpart to section (k)(6) in the Code of Federal Regulations is entitled "Rule of Construction." The provision did not change the IDEA in substance; it merely clarified that the "parade of horribles" feared by school systems was not required by the statute. 20 U.S. § 1415(k)(6)(A) (2006).

289. *Honig*, 484 U.S. at 323.

290. For example, the IDEA requires the use of positive behavioral interventions and supports for students whose behavior impedes the child's learning or that of others. 20 U.S.C. § 1414(d)(B)(3)(B)(i) (2006). The IDEA expressly gives school administrators discretion to consider "unique circumstances on a case-by-case basis" when considering a change of placement for a child with a disability who violates a code of student conduct. 20 U.S.C. § 1415(k)(1)(A).

291. "Congress . . . does not . . . hide elephants in mouse holes." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

292. In other words, the negative implication of section (k)(6)—that schools may *not* refer students to the police for "non-crimes"—is compelled by the statute. The provision in section (k)(6) must be read against the background of *Honig*, which clearly prohibited schools from excluding children simply because they were manifesting their disabilities in ways that violated codes of discipline. *See Honig*, 484 U.S. at 324–26.

In lieu of an unambiguous statement from Congress or a helpful administrative elaboration,[293] the line between "crime" and "circumvention" must be drawn by the courts. Congress's failure to provide clear boundaries does not, however, negate its substantive command—that schools may not circumvent their responsibilities by reporting non-crimes. Courts must take seriously the difference between crimes and non-crimes. It does not seem beyond the capacity of the judicial branch to recognize that foot tapping or profanity is, emphatically, not *criminal* behavior.

Furthermore, there must be some meaningful review of school referral decisions, supported by remedial authority. Where hearing officers and district courts are asked to review school referrals (or referrals by their agents)[294] that result in juvenile prosecutions, they must have the authority to enjoin the school to withdraw those

293. The Office of Special Education and Rehabilitative Services ("OSERS") has taken some abortive steps toward such an elaboration, but its guidance remains ambiguous. *See* Dep't of Educ. Office of Special Educ. & Rehab. Serv., IDEA: Questions and Answers on Discipline Procedures 9 (2009), *available at* http://www.ed.gov/policy/speced/guid/idea/discipline-q-a.pdf.

> Question B-1: What options are available for school personnel when a student with a disability commits a serious crime, such as rape, at school or at a school function?
>
> Answer: Under most State and local laws, school personnel must report certain crimes that occur on school grounds to the appropriate authorities. The IDEA regulations, under 34 CFR § 300.535(a), do not prohibit the school or public agency from reporting crimes committed by students with disabilities . . . .

Id. This guidance suggests that "crimes" include *only* those infractions for which schools are required to report under *mandatory* state reporting laws. However, it can just as easily be read to mean that crimes include *at least* those sorts of infractions, but are not limited to them. It is possible to draw a definition of "crime" by reference to state law in three different ways. First, as the OSERS guidance suggests, is by reference to the state's mandatory reporting statutes. For example, in Tennessee, a school is required to report to law enforcement a reasonable suspicion that a student has committed: (1) a violation of one of several criminal statutes prohibiting possession of drugs or weapons on school grounds, Tenn. Code Ann. § 49-6-4209 (2010), or (2) an assault, battery, or vandalism on school property endangering life, health, or safety. Tenn. Code Ann. § 49-6-4301 (2010). The latter statute furthermore prohibits reporting to police of "any fight not involving the use of a [dangerous] weapon . . . [or] resulting in serious personal injury . . . ." The OSERS guidance suggests that these are the "crimes" that may be reported under IDEA section 1415(k)(6). Alternatively, it is possible to define "crime" by reference to the statutes governing juvenile courts. State statutes will differ, but Tennessee's are typical; they provide for two categories of juvenile offenses. Those categories are: (1) "unruly" or "status" offenses—i.e., those that would not be criminal if committed by an adult, including truancy and habitual disobedience; and (2) "delinquency" offenses—i.e., those that would be criminal if committed by an adult. Tenn. Code Ann. §§ 37-1-102(b)(9), 102(b)(25)(A)(iii) (2010). Defining "crime" by reference to these statutes would command the conclusion that schools may not report "unruly" behavior because it is not "criminal." Finally, an argument is possible under Tennessee law that neither delinquency nor unruly offenses are reportable as "crimes" unless they may be transferred to the state criminal courts. Tennessee law provides that the juvenile courts are intended to "remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior . . . ." Tenn. Code Ann. § 37-1-101(a)(2) (2010). In other words, offenses in the sole jurisdiction of the juvenile courts are simply not "crimes." The only reportable offenses in Tennessee, therefore, would be those in which the student was over sixteen at the time the offense was committed or, if the student was not over sixteen, serious offenses such as rape, robbery, or kidnapping. *See* Tenn Code Ann. § 37-1-103 (2009) (exclusive original jurisdiction of juvenile court); Tenn Code Ann. § 37-1-134 (2009) (transfer of cases to criminal court).

294. This might include police, SROs, or prosecutors in a proper case.

petitions.[295] Perhaps more importantly, where the juvenile justice process has been independently initiated by police or prosecutors, juvenile court judges should subpoena all pertinent records with respect to the disability. The school should also be required to conduct a manifestation determination along the same timeline as it would have if the student had not been referred.[296] That determination should also be provided to the court. A key question, then, for the court is whether the school's action or inaction contributed to the behavior. Where the school has contributed, the court should exercise its authority to oversee the school's progress in meeting the child's needs and supervising the child's progress. Even where the school appears innocent, a full understanding of the child's difficulties may prompt the judge to fashion a less conventional remedy.

Furthermore, recognition of a pattern of referrals may demonstrate a need for collaborative programs. A juvenile court judge is peculiarly suited to facilitating communication and collaboration among various stakeholders such as school officials, police and prosecutors, social workers, guardians ad litem, and others.[297] One such program, initiated in Clayton County, Georgia, has been remarkably successful.[298] This program, which delineates the respective responsibilities of the schools, the police, the juvenile court, and other stakeholders results in a curbing of unbridled discretion.[299] Under this protocol, school referrals dropped by almost 70% since 2004 and juvenile detentions resulting from school referrals are down by 95%.[300] Similar Memoranda of Understanding that concretely specify the roles and responsibilities of the relevant actors have also been promoted by the United States Department of Justice.[301]

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295. This remedial power, exercised by the *Chris L.* Court, undoubtedly survived the 1997 amendments.

296. As the court noted in *Trent N.*, "[t]he school's responsibility under the IDEA . . . does not end when a child enters the juvenile justice system. . . . The school's responsibility to the child is constant." *Trent N.*, 569 N.W.2d at 724.

297. Juvenile courts should screen out as many referrals as is warranted based on the understanding that federal and state special education laws should be the presumptive vehicles for addressing misconduct by students with disabilities.

298. *See* The Child Welfare Policy Centers: Promoting Child Welfare & Juvenile Justice Using Evidence-Based Practices & Strategies, http://www.childwelfarepolicycenters.com/page/page/2260729.htm (last visited Mar. 8, 2010).

299. *Id.*

300. *Id.* Other promising approaches to reducing school-based conflicts, ones that often lead to criminal referrals, are emerging. *See, e.g.*, Jack Daniel, Amy Tillery & Denise Whitehead, *Fresno's Juvenile Behavioral Health Court: A Better Way to Serve Youth*, 43 Clearinghouse Rev. 43 (2009); Rana Sampson, U.S. Dep't of Justice, Bullying in Schools: Problem-Oriented Guides For Police No. 12 (2009).

301. *See* Tammy R. Kochel et al., SRO Performance Evaluation: A Guide to Getting Results 43–45 (2005), *available at*, http://www.cops.usdoj.gov/files/ric/cdroms/sroperfeval/guidepdfs/tool_1.pdf.

VI. CONCLUSION

Chris L. stands as a determined effort by the court system, which rendered the string of favorable nonpunitive, disability-centered decisions in the case, to breathe life into the meaning of what Congress intended in enacting the IDEA. In the tradition of *Honig v. Doe*, *Chris L.* represents a pragmatic recognition that the juvenile courts are unsuitable forums for handling low-level misbehavior by students. The "hegemony" of the juvenile courts[302]—and the schools that uncritically rely on them and the police to enforce school discipline—was shaken by the *Chris L.* litigation. Congress's intervention in the issue was time-bound and opaque. In today's climate of rethinking the fundamentals of school safety, educational adequacy, and school discipline, the *Chris L.* case should be used as a beacon of reform.[303] The path is there for the courts and legislatures to follow[304]

302. Barry C. Feld, Bad Kids: Race and the Transformation of the Juvenile Court 117 (1999).

303. The tenability of the disability/nondisability paradigm is keenly explored in Stephen A. Rosenbaum, *Full Sp[]Ed Ahead: Expanding the IDEA Idea to Let All Students Ride the Same Bus,* 4 Stan. J.C.R. & C.L. 373, 376 (2008). Rosenbaum urges that inclusive educational practices should cover all at-risk students, regardless of whether they meet the constructed eligibility requirements of IDEA. This should be the modern day lesson of *Chris L.*

304. In Tennessee, the Legislature infirmly sought to extend greater protections to students with disabilities by allowing school systems to file a juvenile court petition against a student only after conducting a manifestation determination that demonstrates that the student's triggering behavior was not caused by a disability. *See* Tenn. Code Ann. § 49-10-1304(3)(B) (2009). This section, however, conflicts with *Chris L.*, by permitting the filing of petitions for non-crime status offenses, such as truancy, following a finding that the behavior was not a manifestation of the student's disability. *See Chris L.*, 927 F. Supp. at 270–71. In the IDEA amendments of 2004, Congress gave school authorities substantial discretion to determine on a case-by-case basis whether to order a change of placement for a child with a disability who violates a code of student conduct. *See* 20 U.S.C. § 1415(K)(1)(A) (2006). Since Chris L. was bottomed on a potential change of placement (to juvenile detention), this section could be used to argue that school authorities should exercise the discretion conferred on them by this section before referring any student with a disability to law enforcement officers.