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DCBA Brief
February, 2019

Article

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DISCIPLINARY PLACEMENTS IN ALTERNATIVE SCHOOLS: REFLECTIONS ON STUDENT IMPACT

In 2015, Illinois enacted groundbreaking legislation in the form of a **school discipline** reform act, Senate Bill 100 (“SB 100”), that has since changed the face of **school discipline** in Illinois. The intention of SB 100 was the “creation of safe and orderly **schools** while seeking to address excessive use of the most severe forms of punishment.”¹ In order to accomplish this objective, SB 100 sets new standards for the use of suspensions, expulsions, and **disciplinary** transfers to **alternative schools**.

For short-term suspensions, defined as three days or less out-of-**school**, a **student** must “pose a threat to **school** safety or disruption to learning opportunities.”² For long-term suspensions, expulsions, or **disciplinary** transfers, a **student** must pose a threat to others or substantial disruption to the operation of the **school** and the **school** must have exhausted all other available and appropriate behavioral and **disciplinary** interventions.³ While data shows that **school** suspensions and expulsions have decreased as a result of this new legislation, the inverse is true of **disciplinary** transfers to **alternative schools**. This article will explore the **impact** on **students** of **disciplinary** transfers to **alternative schools**.

Background on **Alternative Schools**

Under Illinois law, “a **student** who is determined to be subject to suspension or expulsion ... may be immediately transferred to [an] **alternative** program.”⁴ In Illinois, these “**alternative** programs” refer to Type II **schools** which are defined under Article 13A of the **School** Code as programs that are designed for **students** who are disruptive or who exhibit challenging behaviors.⁵ While Illinois legislated the “Safe **Schools** Law” into effect in 1995 and created Type II **schools**, the idea of “safe **schools**” for **students** with behavioral issues stems from the rise of zero-tolerance policies on drugs in the 1980s and the “broken window” theory of policing.^{6 7} As Congress passed legislation such as the Gun-Free **Schools** Act of 1994⁸ (which was later deemed unconstitutional as a violation of the federal commerce clause)⁹ and the Safe and Drug-Free **Schools** and Communities Act of 1994,¹⁰ **students** found themselves **impacted** by forces larger than themselves.

In Illinois, the legislature responded to these forces with the “Safe **Schools** Law” and found that “parents of **school** children statewide have expressed their rising anger and concern at the failure of their local public **schools** to provide a safe and appropriate educational environment for their children and to *deal appropriately with disruptive students* ...”¹¹ However, what the Illinois legislature overlooked in the 1990s and in 2015 with SB 100 was the profound **impact** that **disciplinary** transfers to **alternative schools** have on children.

*23 **Impact of Disciplinary Transfers to Alternative Schools**

Recent data obtained by Professor Miranda Johnson shows that in 2014-2015, before the passage of SB 100, there were approximately 1,558 transfers to **alternative schools** in lieu of other **disciplinary** action.¹² However, in the 2017-2018 **school**

year, a full two years after SB 100, this number jumped to 2,161 **disciplinary** transfers.¹³ Contrariwise, the numbers of expulsions in which **students** received educational services decreased from 498 in the 2014-2015 **school** year to 413 in the 2017-2018 **school** year.¹⁴ The same goes for expulsions where **students** did not receive educational services, which saw a decrease from 637 in 2014-2015 to 159 in 2017-2018.¹⁵ The data reveals a fundamental misunderstanding by **school** administrators and the Illinois legislature of the detrimental **impact** of **disciplinary** transfers.

Students who attend **alternative schools** are less likely to graduate,¹⁶ more likely to be surrounded by peers who engage in alcohol or drug use,¹⁷ and face increased risks of depression.¹⁸ Part of the reason for these outcomes stems from the issue of **student** mobility, which is generally understood to mean a non-promotional **school** transfer.¹⁹ **Students** who experience non-promotional **school** transfers often feel excluded from their peer group, their teachers, and from the **school** curriculum.²⁰

Another cause emanates from the lack of funding for **alternative school students**. In one study, researchers found that nationwide **alternative schools** spent at least \$500 less per pupil than regular **schools**.²¹ In addition, the educators who work with these **students** often lack the requisite dual-certifications in their respective subject area *and* in special education.²² As **students** with disabilities are estimated to make up 12% of **students** enrolled in **alternative schools**, this presents a major obstacle to these **students'** achievement.²³ This confluence of underfunded and unqualified **schools** works to the disadvantage of some of the highest need **students** in our state.

A Day in the Life at an **Alternative School**

When a **student** does find themselves at an **alternative school** they are faced with a dearth of resources and support. These resources might include common place activities, such as after-**school** tutoring or resource rooms for **students** who need *24 extra academic support.²⁴ However, the lack of **student** engagement does not stop there as **students** are generally not offered extra-curricular activities such as yearbook or theatre, and sports teams are virtually non-existent at **alternative schools**.²⁵

In one striking example, a study in Orlando, Florida compared two **schools** and found that the neighborhood **school** offered dozens of advanced **placement** courses, extra-curricular activities, and sports.²⁶ In contrast, the local **alternative school** offered no advanced **placement** courses, extra-curricular activities, or sports.²⁷ It is perhaps unsurprising then that **students** placed in **alternative schools** report feeling disengaged from their **school** environment and experience high rates of **school** non-completion.²⁸

Further, as part of a rising trend, **students** in **alternative schools** often find themselves educated online, with private companies such as Ombudsman, Catapult, and Magic Johnson Bridges-cape offering online instruction for **students** who attend virtual **alternative schools**.²⁹ In these **schools**, **students** find themselves spending the **school** day in front of computers, for up to four hours a day, with little to no live teaching.³⁰ Again, the experience of online **schooling** for **students** often results in feelings of social isolation and disengagement from **school**. As Ray Salazar, a Chicago Public **Schools** high **school** teacher, pointed out, "These **students** who are steered into online **alternative schools** need more in-person guidance and instruction, not less."³¹

It is also critical to point out that many of the private, online **alternative schools** do not release data on **student** outcomes, length of **student** enrollment, or the extra-curricular and other activities that they offer. As a result, these **schools** often operate in a gray area with little oversight from the public **school** district they contract with and the parents and **students** that they allegedly serve.

The Courts Speak

It may be unsurprising that there is little case law from Illinois on the issue of **disciplinary** transfers to **alternative schools** as the issue is often overlooked by **school** administrators and the legislature alike. In one case, *Betts v. Board of Education of the City of Chicago*, the Seventh Circuit did issue an opinion about **disciplinary** transfers to **alternative schools**.³² In *Betts*, a **student** challenged the Chicago Public **School's** decision to transfer her from her neighborhood **school** to an **alternative school**.³³ The

court noted that the transfer was a “penalty which is tantamount to expulsion.”³⁴ However, the court held that the **student** was offered sufficient procedural due process when the **student** was provided with notice of the charges, an opportunity to prepare for a meeting with the **school**, and a fair and impartial decision following a hearing.³⁵

While the *Betts* decision was issued in 1972, it is at least debatable that the outcome would be any different today in light of the 2015 passage of SB 100. While SB 100 requires **schools** to exhaust all available and appropriate interventions,³⁶ **school** districts may argue that providing notice and an opportunity to be heard is all that is needed to exhaust those intervention requirements. While this circumvents the spirit of SB 100, **school** districts may feel that an admonishment to a **student** and the opportunity to be heard after that admonishment is all that is needed. Perhaps, that is why the data cited above shows an increase in the amount of **disciplinary** transfers to **alternative schools**.

Since the decision in *Betts*, the Illinois courts have issued at least one favorable opinion for **students**. In *Huebner v. Board of Educ. Of Twp. High Sch. Dist. 211*, the Northern District of Illinois granted a preliminary injunction to a **student** finding that he would suffer irreparable harm if he was transferred to an **alternative school**.³⁷ The *Huebner* court, in a decision that ***25** is aligned with more recent research, found that a transfer to an **alternative school** would deny the **student** the quality of education that he was capable of receiving at a neighborhood **school**.³⁸ In addition, the court found that the **student** would face stigma from his fellow **students** and a deprivation of credits for regular classes and advanced **placement** classes.³⁹ As *Huebner* was decided 25 years after *Betts*, it perhaps indicates that Illinois courts are more willing to recognize the harm that comes to **students** when they face a transfer to an **alternative school**. However, as no post-SB 100 suit has been filed, it is difficult to tell what Illinois courts would do when faced with a challenge to a **disciplinary** transfer.

In Illinois and across the nation, courts would be wise to follow the decision that was issued by a court in the Eastern District of Pennsylvania, that strikingly found that “the analogy between a transfer for the good of the pupil and a jail sentence for a convicted felon for ‘rehabilitation’ is not entirely remote.”⁴⁰ The case, *Everett v. Marcuse*, involved a class action lawsuit brought by parents in Philadelphia.⁴¹ The lawsuit challenged the informal and *ad hoc* procedures through which **students** were transferred to **alternative schools**.⁴² The court ultimately held that “transfers involve protected property interests of pupils” and that a **student’s** transfer must be held in abeyance pending a determination by a fair and impartial person or group of persons who can review the transfer decision.⁴³ While *Everett* undoubtedly represents an outlier, it is also a beacon to guide future courts, and especially courts in Illinois when they are called upon to apply SB 100 to a **student** challenging her transfer to an **alternative school**.

Moving Forward

Practitioners, **school** administrators, and parents alike should be aware of the profound **impact** that **disciplinary** transfers to **alternative schools** have on **students**. As discussed above, **students** face social isolation, stigma, and a myriad of issues when transferred to **alternative schools**. Practitioners can respond by using the data cited above in suits seeking procedural due process protections or preliminary injunctions for the **students** and parents that they are representing. **School** administrators likewise can use the data to revisit their own **school**-level policies on the use of **alternative school placements**, and work to reduce the number of **disciplinary placements** as SB 100 originally intended. Finally, parents can be cognizant of the difficulties that their **students** may face if their **school** attempts to transfer their **student** and be better equipped to fight a proposed transfer. It is through this collaborative, and at times adversarial process, that the true spirit of SB 100 can be realized. Ideally, this would result in the numbers of **students** being transferred to **alternative schools** being brought into line with the numbers seen in expulsion data.

Finally, as Illinois courts look for guidance on how to rule on the inevitable suits that will be filed post-SB 100, they would be wise to visit the ruling in *Everett*. *Everett’s* ruling recognizes the property interest in education established by the Supreme Court in *Goss v. Lopez*,⁴⁴ but also takes it a step further by holding transfers in abeyance until the property interest can be protected with sufficient procedural due process. As Illinois courts look for ways to protect a **student’s** property interest, perhaps adopting the ruling in *Everett*, that a **student** must be afforded a hearing *before* her transfer can occur would be the direction to take and the best way to fulfill the intention of SB 100. Regardless of the direction the courts take, it is undeniable that **students** are at the core of this issue and are **impacted** by the most by **disciplinary** transfers. It is up to practitioners, **school** administrators, parents, and the courts to ensure that **students** in Illinois get the education that they ultimately deserve.

Footnotes

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Jose I. Sanchez, “VOCYE's Groundbreaking Bill, SB 100, to Address ‘**School**-to-Prison Pipeline’ Passes Illinois Legislature,” <http://voyceproject.org/campaigns/campaign-common-sense-discipline/sb100/> (last visited Dec. 13, 2018).

2

 105 ILCS 5/10-22.6(b-15).

3

 105 ILCS 5/10-22.6(b-20).

4

105 ILCS 5/13A-4.

5

105 ILCS 5/Art. 13A.

6

Ellen M. Boylan, *Advocating for Reform of Zero Tolerance **Student Discipline** Policies: Lessons from the Field*, Education Law Center, 1 (2002).

7

Center for Evidence-Based Crime Policy, “Broken Windows Policing,” <https://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/broken-windows-policing/> (last visited Dec. 14, 2018) (The broken window theory of policing “focuses on the importance of disorder (e.g., broken windows) in generating and sustaining more serious crime.” In other words, petty offenses are treated with zero-tolerance as a way to stymie more serious crimes from occurring.)

8

 18 U.S.C. § 922(q)(1)(A).

9

 *United States v. Lopez*, 514 U.S. 549, 568 (1995).

10

20 U.S.C.A. § 7101 *et seq.*

11

 105 ILCS 5/13A-1(g)

12

Illinois State Board of Education, End of Year **Student Discipline** Report (obtained by Professor Miranda Johnson).

- 13 *Id.*
- 14 *Id.*
- 15 *Id.*
- 16 DePaoli et al., *Building a Grad Nation: Progress and Challenge in Raising High School Graduation Rates*, 30-31 (2017).
- 17 Jorge Ruiz de Velasco, *Alternative Education Options: A Descriptive Study of California Continuation High Schools*, WestEd 3-4 (April 2008).
- 18 Russell Rumberger, *Student Mobility: Causes, Consequences and Solutions*, National Education Policy Center 9 (June 2015), http://nepc.colorado.edu/files/pb_rumberger-student-mobility.pdf.
- 19 *Id.* (Where a “promotional school transfer” refers to moving from, for example, junior high to high school or from 6th grade to 7th grade.)
- 20 *Id.*
- 21 Heather Vogell et al., *‘Alternative’ Education: Using Charter Schools to Hide Dropouts and Game the System*, ProPublica, (2017).
- 22 Lehr, C. A. & Lange, C. M., *Alternative Schools and the Students They Serve: Perceptions of State Directors of Special Education*, University of Minnesota: Minneapolis, Institute on Community Integration, 6 (2003).
- 23 Camilla Lehr et al., *Alternative Schools - A Synthesis of State-Level Policy and Research*, 30 REMEDIAL AND SPECIAL EDUCATION 21 (Jan./Feb. 2009).
- 24 Vogell, *supra* note 20.
- 25 *Id.*
- 26 *Id.*
- 27 *Id.*
- 28 *Id.*; see also DePaoli *supra* note 15.
- 29 Francesca Berardi, *Take These Students, Please*, Slate Magazine (2017), available at: http://www.slate.com/articles/news_and_politics/schooled/2017/05/chicago_now_has_schools_where_online_learning_is_all_the_kids_do.html.
- 30 Vogell, *supra* note 20.

31 Berardi, *supra* note 28.

32  *Betts v. Bd. of Ed. of City of Chicago*, 466 F.2d 629, 633 (7th Cir. 1972).

33 *Id.*

34 *Id.*

35 *Id.*

36  105 ILCS 5/10-22.6(b-20).

37 *Huebner v. Board of Educ. Of Twp. High Sch. Dist. 211*, 1997 U.S. Dist. Lexis 3568 (N.D. Il. 1997).

38 *Id.*

39 *Id.*

40  *Everett v. Marcase*, 426 F. Supp. 397, 400 (E.D. Penn. 1977).

41 *Id.*

42 *Id.*

43 *Id.*

44  *Goss v. Lopez*, 419 U.S. 565, 736 (1975).

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