
2016 Blueprints for Change: Criminal Justice Policy Issues in Virginia



Addressing School Discipline and Court Referrals for Students with Disabilities

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ISSUE

Policy makers and stakeholders throughout the country are reexamining school policies and court referral practices with the goal of diverting students from the court system when possible, ensuring successful court outcomes, and providing all students with the best education and opportunities for success. This trend is attributed, in part, to the latest research in behavior and neurology demonstrating that the adolescent brain differs from the adult brain when it comes to responses to risk, impulse, and negative influences of peers.¹

While new understandings of juvenile development have contributed to broad changes in juvenile justice systems, courts and legislatures have also addressed specific concerns for youth with more limited cognitive abilities. One notable trend has been the adoption of specific statutes in 23 states on juvenile competency to stand trial.² Rather than adopting adult competency statutes that only address mental illness and intellectual disabilities, juvenile competency statutes often include consideration of developmental maturity to ensure a juvenile has the cognitive ability to comprehend and participate in the delinquency hearing.

Disproportionate rates of school discipline and court referrals for students with disabilities have been of particular concern. Students with special needs accounted for up to 26% of all students referred to law enforcement by schools throughout the country, but only represent 14% of the general student population, according to research conducted by the Center for Public Integrity.³ In Virginia, students with disabilities made up 12% of the student population, however, they accounted for 25% of the students with short-term suspensions of ten days or fewer.⁴ Of the juveniles committed to the Department of Juvenile Justice from FY2004 to FY2013, an average of 42% had special education needs each year.⁵

The Virginia legislature has considered numerous proposals targeting these issues. In 2016, the General Assembly passed HB1213, which permits a juvenile alleged to have committed certain delinquent acts on school property or at school-related activities to introduce documents prepared for an Individualized Education Program (IEP) or behavioral assessments for a court to consider when determining whether the student acted intentionally or willfully. The new Code section states,

A. In any proceeding where (i) a juvenile is alleged to have committed a delinquent act that would be a misdemeanor if committed by an adult and whether such act was committed intentionally or willfully by the juvenile is an element of the delinquent act and (ii) such act was committed (a) during school hours, and during school-related or school-sponsored activities upon the property of a public or private elementary or secondary school or child day center; (b) on any school bus

as defined in § 46.2-100; or (c) upon any property, public or private, during hours when such property is solely being used by a public or private elementary or secondary school for a school-related or school-sponsored activity, the juvenile shall be permitted to introduce into evidence as relevant to whether he acted intentionally or willfully any document created prior to the commission of the alleged delinquent act that relates to (a) an Individualized Education Program developed pursuant to the federal Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq.; (b) a Section 504 Plan prepared pursuant to § 504 of the federal Rehabilitation Act of 1973, 29 U.S.C. § 794; (c) a behavioral intervention plan as defined in 8VAC20-81-10; or (d) a functional behavioral assessment as defined in 8VAC20-81-10.

The apparent goal of the bill was to provide courts with evidence of the student's disability in a manner similar to what schools consider when dealing with disciplinary matters. For students with disabilities, if a violation of the school's code of conduct may result in a change of academic placement, the discipline procedures in the Individuals with Disabilities Education Act (IDEA) require school systems to conduct what is known as a "manifestation determination" to determine, (i) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (ii) if the conduct in question was the direct result of the school's failure to implement the student's IEP. Currently, IDEA does not require a manifestation determination for removals for less than ten consecutive school days that do not constitute a change in placement.

The national Center for Information and Parent Resources stresses that the school, the parent, and relevant members of the student's IEP team are involved in conducting the review. To make these determinations, the group reviews the student's file, including the IEP, and other relevant information provided by the school and the family.

While the bill was under consideration by the General Assembly, concern was raised that it changed when and how juvenile courts address mental capacity and behavioral factors. Similar debates on how and when courts should consider evidence to mitigate culpability and address mental capacity have played out with varying outcomes in other state legislatures and courts. Rooted in these debates is the fundamental role of juvenile courts and their distinctions from adult criminal courts. Juvenile courts in America were established on principles of protection, treatment, and rehabilitation, and were designed to be less punitive and adversarial in nature. In Virginia, different nomenclature and added protections have been adopted. Juveniles are tried in adjudicatory hearings to determine delinquency rather than a finding of guilt.

¹ Sarah Alice Brown, *Trends in Juvenile Justice State Legislation 2011-2015*, National Conference of State Legislatures, September 2015.

² *Ibid.*

³ Chris Zubak-Skees, *A State-by-State Look at Students Referred to Law Enforcement*, Center for Public Integrity, April 10, 2015.

⁴ Virginia Department of Education, *Safe Schools Information Resource database*.

⁵ Virginia Department of Juvenile Justice, *Profiles of Committed Juveniles Fiscal years 2004-2013*, October 2015.

After a court determines that a juvenile is delinquent, the court then orders a disposition rather than a sentence.

Recognizing that, in Virginia, courts address a juvenile's mental state in the later dispositional phase but not in the earlier adjudicatory stage, there was concern that in allowing the court to consider psychological evidence during the trial stage to negate the intentionality requirement, the bill introduced for the first time the legal concept of "diminished capacity" in Virginia law.

One of the arguments against introducing evidence mitigating culpability at the adjudicatory stage is that a juvenile court's ability to provide supervision and care is predicated on a court first finding a juvenile delinquent. This rationale follows the Virginia Supreme Court's reasoning for why juveniles in Virginia are not afforded the defense of Not Guilty by Reason of Insanity (NGRI). While the legal concept of NGRI is provided for adult defendants, a corresponding concept is not found in the juvenile court statutes. The Virginia Supreme Court explained that "[w]hen a juvenile is found to be delinquent, the juvenile court or the circuit court has several available options with regard to making orders of disposition for [the juvenile's] supervision, care and rehabilitation."⁶ The court explained that one of those options is to commit a juvenile with mental illness or intellectual disabilities who has been adjudicated delinquent to a hospital or outpatient treatment for medical care.

Virginia is not alone in not recognizing the juvenile insanity defense. While almost all states recognize adult NGRI, courts in

Virginia, Arkansas, Ohio, and Michigan have explicitly stated that NGRI is not a recognized due process right for juveniles. Only about ten states recognize the juvenile insanity defense, either by statute or case law. In most states, the laws are silent on juvenile insanity and it remains uncertain how the respective state courts will address the juvenile insanity defense if asserted by the defendant.

The concept of diminished capacity, while not previously recognized in Virginia law, is recognized to varying degrees in other states for adult defendants, allowing them to provide evidence of their mental states and culpability short of proving insanity or lack of competency to stand trial.⁷ As opposed to the insanity defense, which is an affirmative defense that uses evidence of psychological impairment to prove that defendants do not understand the nature and consequences of their actions or know right from wrong, the concept of diminished capacity allows for the use of psychological evidence to negate the intent or mental state elements of the charged offense. In some states, psychiatric evidence is used more broadly to mitigate a defendant's moral culpability.

Introduction of psychiatric and developmental evidence is more limited for juveniles. In Wisconsin, for example, a juvenile may plead "that he or she is not responsible for the acts alleged in the petition by reason of mental disease or defect" and may petition the court to order a physical, psychological, mental, or developmental examination in order that such conditions may be considered.⁸

POLICY DISCUSSION

When Governor McAuliffe signed HB1213, he asked the Secretary of Public Safety and Homeland Security and the Secretary of Education to further study issues related to the disproportionate number of students with disabilities being disciplined in school settings. On September 20, 2016, the Secretaries co-hosted with DCJS this Blueprints for Change policy session to study school referrals to the juvenile justice system, utilization of IEPs during

court proceedings, diversion alternatives, and how to best support juveniles with disabilities.

Dr. Joanne Cashman from the National Association of State Directors of Special Education facilitated the conversation.

The first half of the session addressed three main questions pertaining to schools, and the second half dealt with three main questions regarding the juvenile justice system.

DISCUSSION ON SCHOOL DISCIPLINE AND COURT REFERRALS

Policy Questions—School Discipline and Court Referrals

1. What factors are driving the disproportionate number of students with disabilities being disciplined in school settings and referred to the juvenile justice system?
2. What policies and practices, beyond federal legal protections, would better ensure that students with disabilities receive fair outcomes?
3. What policies and practices are currently in place in Virginia to ensure that only appropriate school-based delinquency

matters are referred to the criminal justice system? What are the barriers to implementing these practices? What else is needed?

The panelists, representing diverse perspectives, suggested a variety of factors that contribute to the disproportionate number of students with disabilities being disciplined in school settings and referred to the juvenile justice system.

One is the increase in the overall number of students with disabilities and the increasingly limited resources available to

⁶ *Commonwealth v. Chatman*, 260 Va. 562, 570 (2000).

⁷ The 11th Circuit Court of Appeals provides a comprehensive explanation of how diminished capacity is used in different states and different Federal Circuits in *United States v. Cameron*, 907 F.2d 1051, 1062-62 (11th Cir. 1990).

⁸ Wisconsin Statute §§ 938.295 and 938.30(4)(c).

provide prevention and intervention options for them. The number of students with disabilities has increased from about 161,900 in 2011 to about 165,400 in 2015.

The increase does not necessarily trigger increased funding for services. The state provides funding for instructors and teachers, but not school-based social workers, counselors, nurses, or specialized instructional support. Participants expressed concern that limited resources for appropriate services simply compounds their challenges. It was even suggested by a participant from a jurisdiction which historically has provided substantial funding for schools, that the increased numbers of students with disabilities have strained the county's ability to provide services.

Also noted was the fact that school administrators and teachers do not necessarily have the training and background in addressing behavior and special education. The training educators receive while in college addresses academics and pedagogical theories, but it does not focus on understanding how factors such as trauma, poverty, unemployment, and food scarcity can contribute to behavioral issues in the classroom.

School divisions also struggle to hire specially trained teachers. At the start of the 2016–2017 school year, Virginia schools had not yet filled 5,000 special education teacher positions. One participant expressed concern that each summer special education directors scramble to fill positions not knowing if they will have enough teachers at the start of the school year. While long-term substitutes are used to fill in gaps, the shortage of specially-trained educators is concerning for school administrators.

A third factor discussed was the changing nature of education, even as early as kindergarten. Early childhood education prepares some students for the learning environment of elementary school, but not all students participate in pre-kindergarten education. To account for the different preparation levels, kindergarten was once used as an opportunity to not only teach academic subjects, but to also teach students proper behavior for the classroom. With increased pressure for academic learning as early as kindergarten, the opportunities for these important lessons have diminished. In middle and high schools, more of school counselors' time is devoted to testing and scheduling, than to providing treatment counseling.

A fourth factor that was discussed is implicit and explicit bias by school administrators and teachers. While the discussion for this Blueprints session was focused on students with disabilities, it was suggested that for too long policy makers have not addressed the disproportionality of school discipline for students with disabilities because they have been reluctant to address disproportionate discipline rates for students of color.

In addressing policies and practices that are currently in place or that could be implemented to ensure students with disabilities receive fair outcomes, there was strong agreement on the importance of collaborative approaches that bring together expertise from various agencies and systems.

One such system-wide intervention promoted by the Department of Education is the Virginia Tiered Systems of Supports, a data-driven decision making framework that establishes academic, behavioral, and social-emotional supports needed for a school to provide an effective learning environment for all students. The behavioral component of VTSS is Positive Behavioral Interventions and Supports (PBIS), a nationally-recognized approach to support positive academic and behavioral outcomes.

One panelist expressed concern that at times, the tools employed by school divisions can cause unintended problems when interventions are not trauma-informed or do not address root causes of school behavioral problems. Other participants also pointed out the need for trauma-informed interventions and for school officials to understand that while trauma can change how the brain functions, the introduction of protective factors can reverse its impact.

Participants all stressed the need for collaboration with state agencies to address challenges related to school discipline. Currently, the training required for school board members is limited and participants suggested that school board members would welcome more training on best practices and other issues related to school discipline. School administrators could also benefit from assistance reviewing available data and school boards could benefit from understanding that data in order to make informed policy decisions.

Several participants suggested that when school discipline is administered, it needs to be done in a meaningful manner. Suspending a student from school without support, reporting requirements, or continued education interrupts the student's academics without helping the student.

A well-received suggestion was the use of multidisciplinary teams (MDT) to address the needs of the students and to work collaboratively across agencies and disciplines to best serve the students. These MDTs would be similar to the multidisciplinary teams currently in place for addressing child abuse and it was suggested that, rather than suspending elementary school students, MDTs could be formed to identify root causes of their behavioral problems and address them.

There was a consensus goal that efforts should be made by multiple systems to work to keep youth out of the criminal justice system.



DISCUSSION ON THE JUVENILE JUSTICE SYSTEM

Policy Questions—Juvenile Justice System

1. Should evidence to mitigate culpability, such as documents for an Individualized Education Program (IEP) and behavioral assessments, be considered by courts during the adjudicatory stage of delinquency hearings for juveniles? Does the introduction of such evidence at the adjudicatory stage rather than the dispositional stage impact services provided to juveniles and lead to an appropriate court outcome?
2. Are current measures, safeguards, or court procedures sufficient to ensure fair hearings and fair outcomes for juveniles when a disability may have an impact on the willfulness or intentionality to commit a delinquent act?
3. Are there other mechanisms that should be considered to allow judges to consider juveniles' mental or behavioral capacities when determining culpability?

There were divergent views on whether evidence to mitigate culpability, such as students' Individualized Education Programs (IEP) and behavioral assessments should be considered by the courts during the adjudicatory stage of delinquency hearings. One participant reiterated the original opposition to the bill that would permit courts to consider such information, suggesting that important services for a child may not be adequately provided to the youth because courts are not able to order services prior to the finding of delinquency.

There was also concern that introducing documents developed for educational purposes into a criminal proceeding to address criminal culpability could have unintended consequences. For example, if the documents include subjective rather than objective information, they could produce disparity in court outcomes. One participant expressed concern about the reliability of documentation that is not originally developed for the courts. If an evaluation is required by the court, then an evaluation should be conducted that can be informed by the educational documents, but documents created for educational purposes should not replace the court's own evaluation.

Others suggested that it may be appropriate for courts to have this information during the adjudicatory stage to ensure youths are not found delinquent if they did not form the required intent to commit the criminal act. To ensure due process and fairness, courts should have information that is relevant to consider the intent.

There was also concern raised about the negative consequences of a court first labeling as delinquent a student who was not able to form intent due to disability in order to access services. In essence, the system would be naming the child a criminal in order to provide services to the child. One participant commented that there is a potential to further limit service options, as there are fewer options for a youth as the number of delinquency charges or convictions increases.

The group was reminded by one participant that, in addition to the services provided by schools or in the community, the juvenile courts have other means of assisting youth who truly need services.

One option available to courts is provided for under the Children in Need of Services (CHINS) sections of the *Code of Virginia*.

With respect to documents for the courts, a school official suggested that when courts request information, rather than only requesting the IEP, the courts would benefit from obtaining all documents related to the IEP, including the psychological and medical information.

Building upon the suggestions made about using MDTs in school discipline settings, several participants expressed a need for stronger communication and collaboration between school officials, law enforcement, and prosecutors before a youth is tried for delinquency.

One participant suggested that the appropriate time to consider a student's disability is prior to charging the student with delinquency. In juvenile courts in Virginia, prosecutors decide whether to prosecute after a juvenile is charged, but are not involved in charging decisions or required to approve charging a youth with a delinquent act. Rather, law enforcement officers make that determination, often at the recommendation or with input from school administrators. Because school administrators already have information on a student's disability and are familiar with the nature of the student's conduct, they are in the best position to utilize that information to distinguish between a student's actions that are related to a disability and actions that are simply criminal in nature.

One of the challenges to creating a collaborative process is the communication and relationships between schools, law enforcement, and prosecutors. Further work needs to be done to develop strategies and plans for sharing information on students with disabilities who are referred to law enforcement.

While schools have critical information, the decision to prosecute rests with the Commonwealth's Attorney. More work needs to be done to provide guidance on navigating federal privacy laws such as the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act (HIPAA), to allow for information sharing while protecting the privacy of the students.

At the root of both conversations was the reality of finite and often limited funding for appropriate intervention services. A recent examination of how funds are allocated through the Children's Services Act (CSA) revealed that significant funds are used to place students in private-placement settings, rather than addressing their needs through services available in the schools. The over-use of private school placements and other expensive service options may be attributed to the failure to develop or adhere to best practices for placement decisions.

One participant recognized that there can be misguided incentives for decision makers to place youth in more expensive options in other systems, rather than keeping the youth in their own systems. To reverse this, several states have shifted funding models, with the states providing funding for locally-based services, and making the localities responsible for paying for more expensive residential programs.

This *Blueprints for Change* policy session provided an opportunity for stakeholders to examine the intersection of education and the criminal justice system for youth with mental, psychological, and behavioral conditions that may impact their intentionality in committing certain delinquent acts. During the course of the two-hour conversation about school discipline and the juvenile justice system, participants expressed the need for stronger collaboration between systems and disciplines. While HB1213 addressed a component of information sharing from the educational setting to the courts, to fully address the needs of students with disabilities entering the juvenile justice system, professionals in both the education and criminal justice systems should work together on each individual case to ensure fair and appropriate outcomes.



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