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Mediating the Special Education Front Lines in Mississippi

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MEDIATING THE SPECIAL EDUCATION FRONT LINES IN MISSISSIPPI

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I.

I had never been to a high-security prison for children before. Sure, some of the inmates were as old as twenty-one, but the occupants of this youth correctional facility in Mississippi were all children when they committed some very serious crimes, serious enough that they were adjudicated as adults.

So what was I, a labor and employment law professor from the University of Mississippi School of Law, doing in such a place? Well, in addition to my primary research and scholarship focus, I have become involved in a round-about way with the much-overlooked area of special education law.

During my first year as a law professor, I had no problem figuring out that I would teach employment discrimination law and labor law in the first semester. After all, these were the areas my law practice focused on prior to coming to academia. More difficult to determine was what course I would pair with employment law in the second semester. With the encouragement of the Associate Dean, I decided on school law because of its constitutional law emphasis and its significant overlap with labor and employment law.

At around the same time, the special education program director at one of the local school districts near the University had been asked by the Mississippi Department of Education to help find special education mediators. Federal special education law, much to its credit, requires that before a due process hearing may be held on a special education dispute, states must provide, at their own expense, parties with the ability to engage in a voluntary, confidential mediation process with a qualified and impartial mediator who has knowledge of special education law and mediation techniques.[1] Knowing that I was now teaching school law, the Dean passed on this information to me. By the following fall, after summer training and some shadowing of experienced mediators, I was conducting my first special education mediation.

II.

Some background may be in order for those unfamiliar with special education law. Children with disabilities[2] are entitled under the Individuals with

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* Jessie D. Puckett, Jr., Lecturer and Assistant Professor of Law, University of Mississippi School of Law; Special Education Mediator, State of Mississippi. I would like to extend my sincere appreciation to Nancy Levit for helping to develop the Law Stories project and for inspiring me to contribute my own law story. I dedicate this story to the special education children of Mississippi whose example has provided me with constant inspiration.

[1] 20 U.S.C. § 1415(e)(1) (2000 & Supp. IV 2004) ("Any State educational agency or local educational agency that receives assistance under this part shall ensure that procedures are established and implemented to allow parties to disputes involving any matter . . . to resolve such disputes through a mediation process.").

[2] A "child with a disability" means a child "with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness),

Disabilities in Education Act (IDEA)[3] to a free and appropriate education (FAPE)[4] in the least restrictive environment practicable.[5] The blueprint for the subsequent education of the child is then contained in a written, individual education plan or IEP.[6] Issues that commonly arise under this framework include eligibility, placement, and provision of special education and related services.

As a mediator, my job was to travel across the state of Mississippi, from Biloxi to Clarksdale and from Corinth to Natchez, and mediate special education disputes between the families of special education children and local school districts. Through this relatively inexpensive and quick process, the hope was to avoid the more adversarial due process hearing, with the possibility of ensuing appeals to the state or federal courts. On the other hand, the benefits of successful mediations accrue to both sides. For the schools, more money is available for providing special education services for other students, and less time is spent with special education personnel consumed in litigation. For eligible children with disabilities, the reward is more appropriate special education and related services on an expedited basis.

In over four years, I have mediated nearly thirty special education disputes involving children in regular and special education classrooms, in special schools for the blind and deaf, and in the institutional setting. Happily, most of these disputes resulted in mediation agreements, without need for further litigation between the parties. Each mediation has elements that make it unique. But before the mediations discussed in this story, I had never been to a juvenile correctional facility, let alone a maximum security one, to hear a special education dispute.

For a good while, and unbeknownst to me, a running disagreement had existed between the correctional facility and the relatives of some inmates about the provision of special education services. With the help of a non-profit

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serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services." Id. § 1401(3)(A)(i)-(ii).

[3] *Id.* §§ 1400-1487 (2000).

[4] A FAPE includes special education and related services that are reasonably calculated to permit a child with a disability to benefit educationally. *Id.* § 1401(8)(A)-(D); *see also* Bd. of Ed. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982) (holding that an inquiry into whether a FAPE has been provided depends on whether the school has adequately complied with procedures set forth in IDEA and whether the individual education plan is reasonably calculated to enable the child to receive educational benefits).

[5] "Least restrictive environment" means:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A).

[6] An "IEP" is defined as a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title." *Id.* § 1401(11); *see also id.* § 1414(d) (outlining the specific requirements which the IEP must satisfy).

organization, the families alleged that youth in the facility had gone a number of years without any special education services and/or with inadequate services, and asked for compensatory education[7] for these inmates. The correctional facility contested the eligibility of some of these students for some of the periods involved and maintained that in some circumstances, security and penological interests trumped the right of the youth to the level of special education and related services to which they would normally be entitled.

Indeed, although it is axiomatic that a child convicted as an adult and incarcerated in an "adult prison" [8] is still entitled to a FAPE under IDEA,[9] "the child's IEP Team may modify the child's IEP or placement . . . if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated."[10] The two special education mediations I was asked to conduct at the correctional facility required me to help the parties determine where the proper balance lay between the educational interests of the child and the security interests of the prison.

III.

I arrived early at the correctional facility on a Friday morning and was buzzed in by security to the reception area. I could not help notice two things as I walked in: they were in the process of expanding the facility for more child/adult prisoners, and the entire existing facility was surrounded with thick barb-wire and guard towers. I had been forewarned that I could not bring a cell phone or my briefcase, just the essential mediation documents in a manila folder. Similar to travel in an airport these days, I was asked to take off my shoes, watch, and belt before I went through a metal detector. The guard explained to me that I could not walk in the prison without an escort.

After clearing security, I walked with another guard through two imposing, electronic iron gates before being escorted to the educational wing of the facility. As I walked through the common areas, I noticed boys of all ages in different color striped prisoner jump suits doing all sorts of chores, including laundry, cleaning bathrooms, and preparing food for lunch.

The mediation itself took place in the educational wing's library, a room that the librarian had obviously tried to make as welcoming as possible. The first

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[7] "Compensatory educational services are services designed to provide remedial educational programming to make up for the time when the school system was responsible for providing educational services but failed to do so." THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW (2d ed. 2001) (citing M.C. v. Cent. Reg. Sch. Dist., 81 F.3d 389 (3d Cir. 1996)).

[8] Although the IDEA statute and regulations refer to "children with disabilities" incarcerated in "adult prisons," *see infra* note 9, Mississippi places children convicted as adults under State law in a juvenile-only, single-sex facility, where they may remain until the age of 21.

[9] 20 U.S.C. § 1412(a)(11)(C) ("[T]he Governor (or another individual pursuant to State law), consistent with State law, may assign to any public agency in the State the responsibility of ensuring that the requirements of this part are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.").

[10] *Id.* § 1414(d)(6)(B); 34 C.F.R. § 300.324(d)(2) (2006).

inmate was there with his non-profit legal representatives on the one side of the table, and on the other side sat correctional facility and Department of Corrections officials and their legal representatives.[11] While the first mediation was fairly routine and was successfully resolved, the second mediation that day illustrated the tremendous difficultly in providing inmates in the facility with special education and related services under these trying circumstances.

James K.[12] had committed an armed robbery at the age of fourteen in Meridian, Mississippi.[13] He was convicted of the crime as an adult and incarcerated in the "adult" prison of the youth correctional facility. When I met him, James was eighteen years old, and he sat at a conference table surrounded by his legal representatives in an orange-striped prison jump suit. He was slight in build, shy and polite, and if I had met him casually on the street, I would have sworn that he did not seem to possess the moxie to commit such a violent crime.

Far from an extraordinary claim, James's representatives alleged that the correctional facility had failed to provide special education and related services to him for a number of years, and more recently, the special education services he was receiving were inadequate. On his behalf, they were seeking compensatory education during his remaining time at the prison.

However, to understand the true scope of the educational dilemma surrounding James, it is necessary to explain two classifications that exist at a maximum security youth prison. I myself had not considered these issues before walking into the facility, and they posed issues that IDEA only tangentially took into consideration through its provisions.

First, all inmates are given a custody classification when they enter the prison. The inmates are then subsequently classified and housed based on their conduct and their ability to follow the facility rules. It appeared that most of these inmates came in at the C custody level, and then either moved up to less restrictive custody (A or B custody), or remained at the same level or moved down to the even more restrictive D custody.

In turn, custody level is directly related to the amount of special education services an inmate can hope to receive during a given day. This is because, as noted above, the State has the right to consider "bona fide security or compelling penological interest[s] that cannot otherwise be accommodated" in deciding the appropriate level of special education in the youth-adjudicated-as-adult context. Thus, whereas a B custody inmate may be able to receive up to three hours of

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[11] I am purposely not mentioning the name of any of the participants in the mediation, including the inmates, to protect their privacy and the integrity of the mediation process. Consistent with a confidentiality pledge that I and the parties signed, I will not explain in detail what was said during the mediation, nor seek to characterize the bona fides of the positions that the parties took. Instead, I will discuss in general terms the larger issues at play in one of the mediations and the eventual resolution to which the parties came.

[12] James K. is not his real name.

[13] Not only have I changed the name of the inmate, but I have used some poetic license in describing the background of his case and the crimes committed to further protect his identity. I have chosen the surname "K." to symbolize the Kafka-esque situation in which this inmate found himself. *See* FRANZ KAFKA, THE TRIAL (1925).

special education per day, the stricter security levels surrounding C and D custody allow only one hour of special education per day. The provision of educational services also is contingent upon such unpredictable events as facility-wide lockdowns and mandated drug testing of inmates.

If that were not complicated enough, there was perhaps a more pressing issue concerning James. Although he was not in a gang prior to being incarcerated, James joined a gang while in prison to make his life more bearable. At some point during his stay, however, James decided that he did not want to remain with the gang and asked facility officials to be placed in protective custody, which was his right to request. That request was granted.

But here's the rub. When an inmate is in protective custody, they are kept separate and apart from all other prisoners for their own safety. This means they cannot go to the education wing of the facility to receive instruction, special education or otherwise. Rather, educational materials are delivered to the inmate in protective custody in his cell for one hour per day without any teacher being present. As a result, even though James was at B custody, protective custody meant that he could not receive more special education than a C custody level inmate does.

The real kicker and why James needs special education: he is mostly illiterate and reads at a second-grade level. No one would argue that he was receiving a free and appropriate public education under IDEA, but because he was the one who requested protective custody, the facility believed that security concerns and penological interests compelled this result.

But wait, there's more. If James asks to be out of protective custody, the correctional facility officials will agree. The problem is that once back with his former gang colleagues, James is certain there will be retribution for his seeking protective custody in the first place. The gang will carry out "punishment" against him which means that he will have to fight four other gang members at once for a couple of minutes before he is forgiven and again let back into the gang. The other gang members may use their fists, but they also may use sharp objects at their disposal to stab him. And whether James is at fault or not, such a fight will most likely lead him back to C custody where again he will be ineligible for more than one hour of special education instruction per day. When I ask facility officials if there is anything they can do to protect James from these events unfolding, they say not short of locking down the prison at all times.

If this is how the mediation ended, it would probably be a lesson about how difficult it is to provide children in adult prison environments with adequate special education, even if both child representatives and prison representatives agree that such education is necessary. But here is where I thankfully can tell the reader that the special education mediation process is making a significant difference, at least in Mississippi. Because of the flexibility of the process, which allows the parties to sit across a table to think about and discuss creative educational solutions, this is not a tragic law story, but one of hope.

After recognizing that James needed a teacher with a special education certification and recognizing that a teacher already on staff had such a certification but was teaching regular education students, the parties worked out a compromise. James would stay in protective custody at the B-level, but would

receive four hours of instruction, four days a week on an individual basis with a certified special education teacher. With a teacher providing intensive instruction, it is now likely that James will be able to read, and it appears a GED is well within his reach.

IV.

It is hard to say what James will do with this opportunity, but he told me that he planned to pursue education even further. In fact, the last thing he said to me as I watched the large electronic gates close between us was that he hoped that someday he would find himself a law student in one of my classes at Ole Miss.

I, of course, hope too that James's prediction will come true. But his story also illustrates what can be achieved through the use of non-traditional, non-adversarial legal processes. Had the mediation not been successful and litigation ensued, it is unclear what the outcome for James would be. Would James, desperate to learn how to read, have left protective custody even though his physical safety was in jeopardy? Would he have had to choose between education and his own well-being? Should a student have to make this type of Hobson's choice?

Even with the success of the mediation process, a few things are certain about what would have happened without its required existence under IDEA. First, a tremendous amount of money would be spent on litigating the case through the various levels of the judicial system. In some cases, an individual special education dispute can cost the parties into the hundreds of thousands of dollars. Second, the litigation could potentially take a number of years before coming to completion. Even if James eventually won his case, he most likely would have already been released before receiving the compensatory education he desired. Third, and finally, a successful verdict for James would probably mean more suffering for other inmates in need of special education assistance because of the resulting lack of funding for the facility as a result of the litigation process.

This is not to say there are not times when litigation is the last and best option for parties to a dispute, including a special education dispute,[14] but in a scenario where children with disabilities are behind bars and need all the breaks to go their way to get their lives back on the right track, mediation provides the necessary balm. The parties were able to consider the applicable IDEA provisions and work out a program which balanced the special education needs of James against the penological and security interests of the correctional facility.

And perhaps because the parties to this mediation were able to think outside of the box and brainstorm ideas with the best interests of James squarely in mind,

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[14] See Paul M. Secunda, *At the Crossroads of Title IX and a New "IDEA": Why Bullying Need Not Be a "Normal Part of Growing Up" for Special Education Children*, 12 DUKE J. GENDER L. & POL'Y 1 (2005).

future James will be fighting back against gangs from in front of bars instead of behind them.