

## CENTER FOR LAW AND EDUCATION

### EXAMPLES OF WORK ON SCHOOL DISCIPLINE

- CLE successfully argued the case in *Goss v. Lopez* before the Supreme Court, thereby establishing as the law of the land that disciplinary exclusion for even a single day is a deprivation of liberty and property interests in the student's education, thereby triggering protections under the due process clause. (1975)
- CLE has provided assistance – ranging from case consultation to training sessions in virtually every state to intensive ongoing assistance to full co-counseling – to other attorneys and advocates representing students excluded from school in thousands of other cases in both federal and state courts across the country. This has included both individual representation and co-counseling class actions, including actions challenging class-wide racially disparate discipline and negotiating remedies. In addition as described below (see Practice Manual), CLE has continued to provide extensive legal support in the form of legal research, memoranda, pleadings and briefs to counsel for public interest and pro bono counsel for students from low-income families in cases raising myriad discipline related issues, as well as support and assistance in analyzing and drafting state and federal legislation related to school discipline matters. (1969-current)
- CLE published a detailed *Model Code of Student Rights and Responsibilities*, providing robust recognition of rights, strict limits on exclusion, and extensive procedural protections (1975). Along with this, CLE collected and analyzed discipline codes from around the country. Much of this work has continued to the present as CLE has continued to provide support to students, families, educators and advocates in reviewing and drafting legislation to mitigate the harsh impact of zero tolerance statutes and their aftermath. See entry below (2009-10) describing CLE's collaborative work with and on behalf of Boston Public School students and clients.
- CLE assisted a multi-racial group of Boston high-school students during the implementation of desegregation, serving as their advisor as they (1) drafted recommendations for a new code of discipline that was far more detailed and sophisticated than the recommendations of any of the adult parties involved in desegregation; (2) got the state board of education to support many of their recommendations even though it meant overriding the positions of the then state commissioner of education; and (3) got the Boston School Committee to adopt most of their recommendations despite the vigorous opposition of the then Boston Superintendent of Schools, resulting in what could easily be judged as the most progressive code in the country in limiting student exclusion and protection student rights. (1976-1978).
- CLE wrote a critical *amicus* brief for *Honig v. Doe* drawing its analysis from a seminal federal district court ruling in *Stuart v Nappi* (D. Conn.), a case in which CLE provided legal support and technical assistance to local legal services counsel. The Supreme Court ruled that school officials cannot unilaterally remove a student with disabilities from school for any reason and must seek parental consent or a court order. (1988)

- CLE authored an encyclopedic 540-page discipline manual (*School Discipline and Student Rights: An Advocate's Manual*), widely regarded as the advocate's "bible" (1982) along with updates and related publications, including an updated and revised *Procedural Due Process Rights in Student Discipline* (1990); *Racially Disparate School Discipline: An Outline of Case Law* (1992); *Abusive School Discipline and Other Offensive Conduct Against Students: A Summary of Decisions Concerning Substantive Due Process Claims* (1992).
- CLE as co-counsel filed multiple successful class actions challenging the denial of a free appropriate public education to African American students with disabilities who are suspended/expelled and otherwise excluded from school and denied a free appropriate public education (FAPE) for behavior related to disability (FL), and to disproportionately low-income, racial and ethnic minority students and students with disabilities detained and incarcerated and denied FAPE (CT, VT, NH) for behavior related to disability. (1989, 1990, 1993, 1999). *Smith v. Wheaton* (D. Ct); *James O. v. McDonald* (D. NH)
- CLE published *School Discipline: State Law Challenges*, following the enactment of the Gun Free School Act and the subsequently enacted "zero tolerance" statutes to assist legal services program attorneys and other pro bono attorneys attempting to contend with the harsh impact of such statutes that had been enacted in almost every state. (1995)
- CLE has worked extensively over the years for the Office for Civil Rights on its data collection surveys of schools and districts and on its response to racially disparate discipline. CLE regularly has submitted extensive comments to Notices of Proposed Rulemaking on issues pertaining to data collection for students subjected to disciplinary exclusion. (1990-2010)
- CLE produced *Educational Rights of Children with Disabilities: A Primer for Advocates*, was widely recognized in the advocacy world as a major contribution to helping attorneys and advocates for students and their parents. CLE published multiple stand alone articles in Poverty Law Clearinghouse Review addressing the disciplinary exclusion of students with disabilities for attorneys and parent advocates (1991-2000), and provided training sessions for Protection & Advocacy Attorneys, Legal Services and Private Pro Bono counsel, parents and educators through Parent Training and Information Centers working in collaboration with school personnel in 49 states and territories.
- CLE published *A Revised and Updated Primer for Advocates* (2001), which incorporated a substantial chapter on Suspension, Expulsion and Denial of Education for Discipline Reasons; Incidents Involving Knives and Weapons; Students with Other Kinds of Behavior Schools Deem Dangerous; Manifestation Determinations; Challenging Discipline Decisions, including on behalf of Students Not Previously Identified as Having a Disability.
- CLE staff testified as Senator Harkin's witness before the U.S. Senate Committee on Disability Policy on issues and concerns related to the inappropriate use of discipline to remove students with disabilities from schools and to deprive them of a right to a free appropriate public education (1995). In 1994-95, CLE led the opposition to pending IDEA bills that sought

through purported consensus of the disability community to undermine the Supreme Court's ruling in *Honig v. Doe*, and to eliminate rights and protections accorded students with disabilities subject to disciplinary exclusion, including the rights of students who are neither dangerous to self or others from staying-put and continuing to be educated during periods of exclusion. CLE's strong letter in opposition, on behalf of low-income clients, was read from the floor of the House by New York Congressman Major Owens who on behalf of the Black Caucus underscored the importance of the rights CLE sought to protect, in particular, for those students with disabilities who are poor and students of color who were subject to disproportionate rates of exclusion from school. Parent Training Information centers, including the Community Parent Resource Centers serving under-represented students with disabilities of color from across the nation, joined CLE and the National Center for Independent Living in stopping the legislation subsequently rewritten and reauthorized in 1997 without eroding the most critical safeguards and protections.

- CLE filed an *amicus curiae* brief before the Court of Appeals for the Sixth Circuit in *Chris L. v. Morgan* that challenged the criminalization of a child's disability related behavior. The Appellate Court relied on arguments presented in CLE's brief, which has been widely cited and disseminated, to bar school districts from filing petitions of delinquency to limit the educational rights of students with disabilities under the Individuals with Disabilities Education Act. (1996)
- CLE subsequently published a manual *When Schools Criminalize Disability/Education Law Strategies for Legal Advocates* that explores various legal theories and strategies for challenging inappropriate school-initiated delinquency petitions and crime reports, and addressing their aftermath. The collection of materials discusses approaches that, while well-grounded in law, had not necessarily been tested in the courts. In particular, these materials, which continue to be utilized, focus on using education advocacy based on IDEA, Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act to hold local schools accountable when they criminalize the behavior for which they are legally obligated to provide appropriate educational services; obtain better outcomes for clients in the juvenile courts; enforce schools' obligation to address behavioral issues as educational ones; and reduce the risk of future school-initiated delinquency petitions or crime reports. (2000)
- Because CLE represents low-income children with disabilities who are disproportionately children of color who are subjected to disproportionately high rates of suspension and exclusion from school, CLE was invited to testify before the US Civil Rights Commission (2002) in opposition to inappropriate use of zero tolerance policies to exclude students from school and to deny education to disproportionately racial and ethnic minority students and students with challenging behaviors related to their disabilities whose behaviors are not effectively addressed as educational issues.
- CLE was invited as Senator Kennedy's witness and testified again before the US Senate HELP Committee in opposition to proposed legislation through the reauthorization of IDEA that would result in the criminalization of students' behavior and these particular students being channeled into alternative schools identified as part of the school-to-prison pipeline. (2003)

- CLE staff contributed its expertise on the educational rights of students subject to disciplinary exclusion by authoring chapters in numerous publications of other organizations focused on challenging zero tolerance policies and practices resulting in the criminalization of student behavior and channeling of students of color and students with disabilities into the school-to-jail pipeline. (E.g., Kim Brooks, Joseph Tulman, Michael Nelson, PACER Center, ABA). In addition, CLE staff provide and have provided hundreds of national and state based workshops, webinars, seminars on, e.g., “Ending the School-to-Jail Pipeline: A Rights Based Approach”; “Time for Change: Challenging School Policies & Practices to Help Students with Disabilities Stay in School”; “From School-to-Jail and Back”; “Challenging Over-representation of Racial Minorities and Students with Emotional Needs”; “Disproportionality & Students with EBD: Possible Responses to Concerns Related to Inappropriate Identification”; “Strategies for Systemically Challenging Behavioral Exclusions”. (on-going)
- CLE initiated in 2008 an award-winning innovative *pro bono* partnership with Choate, Hall & Stewart and Harvard Law School’s Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) – designed to (1) enhance the direct representation available to low-income students facing expulsions, suspensions, and other school placement decisions resulting in their denial of a quality public education; (2) identify, monitor, and pursue broader educational issues, connected with these cases of exclusion, to be addressed systemically, including through litigation and administrative compliance complaints; and (3) ultimately promote legislative reforms aimed at eliminating denial of education as a response to challenging behavior and at improving educational opportunities and outcomes for students, particularly those from low-income families and communities. CLE provides training to and mentors attorneys at Choate who are assigned to selected cases identified and developed by CLE staff, who then provide intensive support and, in some instances, co-counsel the more complex individual cases, and develop and implement strategies for systemic and policy work. In 2010, Choate was chosen as one of the *Boston Business Journal’s* 2010 “Corporate Philanthropy Partners of the Year” for its *pro bono* education law partnership with CHHIRJ and CLE, and received the Thurgood Marshall Award from the Boston Bar Foundation for the *Pro Bono* Education Law partnership. (2008-current)
- CLE, as co-counsel with Choate, won a precedent-setting case (*LB v. Connell*, D. Mass. 2009) in which the federal court ruled that automatically expelling a student for a full school year under the school district’s zero tolerance weapon’s policy violated not only procedural due process but also violated the student’s substantive due process rights as disproportionate to the conduct (where the student was in possession of a knife that he had taken away from a student who was threatening another). CLE and Choate subsequently negotiated changes in the urban district’s policies and practices related to both the abusive use of zero tolerance and the required hearing procedures. (Other examples of changes in policies and practices that have occurred as a result of strong advocacy on behalf of individual and multiple student plaintiffs include dissemination of information to parents and students about the school programs (equity & excellence), training for school personnel, and participatory role for parents in program evaluation, technical assistance, and monitoring and enforcement.) (2009)

- CLE, as part of its supporting and collaborative partnership with the *Pro Bono* Education project has developed a Practice Manual that includes numerous memoranda of law addressing specific issues concerning all aspects of student discipline, e.g., the rights of students assigned to an alternative school; the rights of students subject to custodial and non-custodial questioning in public schools; Fourth Amendment implications of searches of students' bags for missing items; implications of students with disabilities admitting to certain facts as part of a manifestation determination hearing and their right not to self incriminate, right to effective counsel, to present and cross examine witnesses in a discipline hearing; and to receive exculpatory statements of witnesses, etc. In addition, CLE has collected and analyzed extensive sets of data and research on suspensions; alternative schools; and alternatives to exclusionary discipline, including, e.g., use of positive behavioral supports and opportunities for restorative justice. (on-going)
- CLE staff worked collaboratively with Boston parents, students and educators in developing recommendations for the Boston Public Schools Code of Discipline (June 30, 2009). The recommendations were drafted collaboratively by CLE and members of the Boston Parent Organizing Network's Code of Discipline Subcommittee, and parent members of CLE's Title I Family School-Level Change Initiative. The recommendations urge BPS to adopt and enforce a Code of Discipline that is based on the core belief that students have the right to a high-quality education and should not be punished by denying them the opportunity to learn by, among other things, limiting the exclusion of students from their usual classroom instruction as a discipline response by using exclusion only in the most extreme circumstances and as a last resort. In addition, CLE worked with members of the Boston Student Advisory Council (BSAC) and the Fifth Floor Student Government at The English High School in developing school-based and districtwide recommendations to the BPS Code of Discipline. Many of the students' proposed recommendations evolved from a set of recommended changes to the English High School Civility Standards initially proposed by members of the Fifth Floor Student Government at EHS with support from CLE. Changes seek to avoid, whenever possible, the exclusion of students from their usual classroom instruction as a response to discipline problems and to promote, instead, the use of alternative approaches to discipline. (2009)
- CLE, through its representation on the American Bar Association's Commission on Youth at Risk, has conceptualized, drafted, and successfully negotiated a far-reaching package of three sets of policy resolutions and reports on the right to quality education that were formally approved by the ABA's House of Delegates. The second set is focused on the right to remain in school – calling for federal, state, and local policy changes to advance the right to remain in school, promote a safe and supportive school environment, and enable children to complete school; eliminate a variety of policies and practices that tend to push students out of school; stringently limit exclusion from the student's regular education program as a response to disciplinary problems; provide full, non-discriminatory, and culturally responsive procedural protections; reduce criminalization for school-related conduct; provide detailed data reporting, monitoring and accountability; ensure that no group of students is disparately disciplined or excluded; and establish programs and procedures to help students, their parents and guardians, and their legal representatives in understanding and exercising rights to remain in school. (Complementing this second resolution and report, the first are on the right to a high-quality

education program and the third are on the right of students who left school or been excluded to resume their education in a high quality program.) (2008-2009)

- CLE attorneys authored chapter: Boundy, K., & Karger, J. (in press). *The Right to Quality Education for Children and Youth in the Juvenile Justice System*. In F. Sherman & F. Jacobs (eds.), *Juvenile Justice: Advancing research, policy, and practice*. Hoboken, NJ: Wiley & Sons. (2011)
- CLE attorneys file 50 page *amicus curiae* brief for CLE and the Charles Hamilton Houston Institute for Race & Justice, Harvard Law School, in school expulsion case before the MA Court of Appeals. The brief responded to the appellate court's specific question regarding "judicial abstention from scholastic disciplinary disputes." We argued that the deference courts have accorded school officials in discipline cases is not without limit; that, in this case, the trial court did not abuse its discretion in denying deference to the school district's decision to expel the student because: (1) district lacked an adequate evidentiary basis to support its decision (including that the district incorrectly drew a negative inference from the student's silence) and (2) district's discipline procedures failed to comply with procedural due process and the district's own policy handbook. (2011)
- CLE attorneys author chapter, Karger, J., Rose, D., Boundy, K.B. *Applying Universal Design for Learning to the Education of Youth in Detention and Correctional Facilities* in the Harvard Ed Publishing Group book *Disrupting the School To Prison Pipeline* (2012).
- CLE prepares for the final phase of its *School Discipline Roadmap* project that will introduce attorneys and advocates throughout the nation to a web-based tool that has been developed by CLE to improve the quality of representation of students who are routinely and wrongfully denied education through disciplinary suspension and expulsion in violation of their federal and state rights. The Discipline Roadmap provides a web-based guide for attorneys and advocates that will assist them to: 1) ask the right questions to elicit information needed to identify potential legal claims on behalf of their student clients; 2) identify the documents necessary for review and consideration, including, written notice of the charges, witness statements, the student's academic progress reports, assessment reports, evaluations for special education eligibility consideration, Individualized Education Programs (IEPs), and disciplinary incident reports; and 3) have at their fingertips caselaw relevant to the array of potential claims. CLE developed the Roadmap in response to the innumerable requests for assistance.