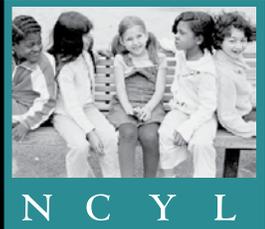


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Alternative Schools: Promise or Peril for Children Exiting the Juvenile Justice System?

By **Haley Upshaw**

Each year, hundreds of thousands of children under the age of 18 are released from juvenile and adult correctional facilities.² The first year after they are released is a critical window of opportunity to help these children reengage in school and get out of the pipeline to prison. Those youth that become involved in work or school activities immediately upon release are more likely to continue those positive activities and not return to the correctional system.³ For youth exiting the juvenile justice system, a positive, rewarding school experience is often crucial to their ability to successfully navigate life outside of prison and build a strong foundation for becoming independent, law-abiding individuals.

Unfortunately, despite the importance of school to these youth, many do not return to school and those that do are often placed in schools that fail them.⁴ Most do not go on to earn GEDs or high school diplomas.⁵ One problem for many formerly incarcerated youth is that they are required to attend alternative rather than mainstream schools. Alternative

schools aim to educate children whose needs cannot be met in regular public schools. Yet many of these schools are ill-suited for youth coming out of detention. Advocates should carefully examine alternative schools, and, if they are not a good “fit” for the student, challenge the placement, if possible. Meanwhile, advocacy groups should take steps to improve these alternative schools so they better serve formerly incarcerated youth.

Alternative Schools: Are They Effective With Youth Exiting the Juvenile Justice System?

While there is no uniform definition for alternative schools, in general they are public schools which provide nontraditional education for students whose needs cannot be met in a regular school. They are often characterized by flexible schedules, smaller teacher-student ratios, and modified curricula.⁶

In theory, alternative schools are an attractive option for some formerly adjudicated youth, as most of these children have histories of academic failure in mainstream schools.⁷ Smaller class sizes allow students to receive more individual attention

and support. Programs that take a functional approach to academics and include some focus on vocational training in addition to academics may make learning seem more relevant for these students. Some alternative programs also provide an opportunity for students to earn credits more quickly than they would in a regular school, which can be helpful for youth who are behind in credits and might otherwise be unable to complete their education.⁸

In practice, it is hard to gauge whether alternative schools are living up to their potential for these youth, whose academic needs and personal challenges are great. There is an overall lack of data about these schools and the students they serve. Because most states do not currently disaggregate state-level data by alternative school designation,⁹ we do not know even basic information like how many students are being served by these schools, for how long, and why. Some states, like California, have not devised adequate accountability schemes for these schools, so there are no consequences for very low performance.¹⁰

1. Trent Atkins et al., *Converging and Diverging Service Delivery Systems in Alternative Education Programs for Disabled and Non-Disabled Youth Involved in the Juvenile Justice System*, 56 *Journal of Corr. Educ.* 253, 283 (Sept. 2005).

2. Howard Snyder, *An Empirical Portrait of the Youth Reentry Population*, 2 *Youth Violence and Juv. Just.* 39 (2004).

3. See Michael Bullis et al., *Life on the “Outs” – Examination of the Facility-to-Community Transition of Incarcerated Youth*, 69 *Exceptional Children* 18-19 (2002).

4. Many of formerly adjudicated youth do not return to school at all. Cora Roy-Stevens, Office of Juvenile Justice and Delinquency Prevention, *Overcoming Barriers to School Reentry*, OJJDP Fact Sheet (Oct. 2004), www.ncjrs.gov/pdffiles1/ojjdp/fs200403.pdf

5. While there has not been much longitudinal research on the educational outcomes of children who have been adjudicated delinquent, one older study found that, upon their release, only 1.6 percent of formerly-incarcerated children earned a high school diploma and 10.5 percent earned a GED. Haberman and Quinn, *The high school re-entry myth: a follow-up study of juveniles released from two correctional high schools in Wisconsin*, 37 *Journal of Corr. Educ.* 114-17 (1986). Another more recent study in Oregon found that approximately a third of formerly adjudicated youth earned some form of completion certificate (either a diploma or a GED). Telephone Interview with Michael Bullis, Professor, University of Oregon College of Education (Aug. 6, 2007).

6. See Camilla Lehr et al., University of Minnesota, *Alternative Schools: Findings from a National Survey of the States*, 4 (Sept. 2004), <http://ici.umn.edu/alternativeschools/>; Laudan Aron, The Urban Institute, *An Overview of Alternative Education*, 6 (Jan. 2006), <http://www.urban.org/publications/411283.html>

7. One study of formerly adjudicated youth in Oregon showed that 37.1 percent had been left back at least one grade before their incarceration, which is over twelve times the general failure rate. See Michael Bullis & Paul Yovanoff, *More Alike than Different? Comparison of Formerly Incarcerated Youth With and Without Disabilities*, 14 *Journal of Child and Family Studies* 127, 136 (March 2005); Telephone Interview with Michael Bullis, Professor, University of Oregon College of Education (Aug. 6, 2007).

8. See Cora Roy-Stevens, Office of Juvenile Justice and Delinquency Prevention, *Overcoming Barriers to School Reentry*, OJJDP Fact Sheet (Oct. 2004), www.ncjrs.gov/pdffiles1/ojjdp/fs200403.pdf. (Many court-involved students perform below grade level and have histories of truancy and suspension. Few, if any, have high school credits.)

9. Camilla Lehr et al., University of Minnesota, *Alternative Schools: Findings from a National Survey of the States*, 18-20 (Sept. 2004), <http://ici.umn.edu/alternativeschools/>

10. See, e.g., Elizabeth Hill, Legislative Analyst's Office, *Improving Alternative Education in California* 25 (Feb. 2007), http://www.lao.ca.gov/2007/alternative_educ/alt_ed_020707.pdf

Concerns have been raised that some alternative school programs provide pared down academics,¹¹ and limited or no special education and related services. In fact, in some districts, special education services are suspended or terminated entirely¹² when children enter alternative schools. Others have inadequate funding to sustain appropriate levels of service and programs and the quality and quantity of special education staff.¹³

One questionable technique used by some alternative schools is independent study.¹⁴ In California, about 35 percent of students in community alternative schools (which include students who are on probation or probation referred) are assigned to independent study, in which they are expected to complete work independently and only meet with a teacher for an average of one hour a week.¹⁵ Educators question the effectiveness of independent study for low-performing students in general,¹⁶ and it seems an especially poor choice for children returning from the highly-structured detention environment.

Despite the fact that these schools may not work for all youth exiting the juvenile justice system, many states require that youth coming out of the correctional system be placed in alternative schools without regard to their educational needs.¹⁷

Advocates should not accept these placements without question. They should examine alternative schools carefully, determine whether they will provide a quality educational experience for each particular youth and, if not, explore ways to challenge the placement. In addition, advocates should work to improve alternative education so that it better serves this population of children.

Advocating for Youth: Challenging Alternative School Placements

Alternative schools vary significantly in the quality and types of programming they offer. Therefore, the first step for advocates is to learn about the alternative schools in their area, find out what services the schools provide, and determine whether they have successfully served youth coming from correctional facilities. An advocate should then assess the school's programming in light of the particular child's needs. If the alternative school does not provide appropriate programming or services for that child, the advocate should push for a different placement.

Advocates should explore different ways to challenge a youth's placement in an alternative school, including:

- challenging individual placements by raising due process violations,
- exploring additional due process challenges for special education students, and
- challenging state statutes that require these youth to attend alternative schools.

Due Process Challenges

Advocates may be able to raise due process violations in challenging an alternative school placement. Advocates should carefully review all state statutes, regulations, and district policies relating to involuntary alternative school placements to see if they meet due process requirements, and then see if these requirements are being met.

For example, in California, many children in alternative schools are assigned to independent study, but the law states that participation in independent study is voluntary and that, before a child can be placed into an independent study program, his parent

or guardian must consent to the placement in writing.¹⁸ If this procedure is not followed in a given child's case, an advocate may bring a due process challenge against the district.

Due process challenges are also appropriate when youth are involuntarily transferred to alternative schools after expulsion. Expulsion requires due process protections including notice and some kind of hearing.¹⁹ School districts may seek to expel youth coming from detention facilities for the same incidents that gave rise to the students' delinquency petitions. By representing these children in their expulsion hearings, advocates may be able to prevent their exclusion from regular schools.

In bringing a due process challenge, advocates may need to establish that the placement was done for disciplinary reasons and therefore implicates due process protections.²⁰ This is because a number of courts have held that a school district may transfer a child to another school for administrative reasons without any due process procedures, as children have no property right to attend any particular school.²¹

Due Process Challenges for Children with Disabilities

Those advocating for youth with disabilities have additional tools to challenge alternative school placements. Children with disabilities are "grossly overrepresented" in the juvenile justice system,²² so it is especially important for advocates to be aware of these tools. There is little data on the extent to which students with disabilities are being served in alternative schools and the quality of the services they receive. However, a number of practitioners in the field have voiced concerns that

11. Trent Atkins et al., *Converging and Diverging Service Delivery Systems in Alternative Education Programs for Disabled and Non-Disabled Youth Involved in the Juvenile Justice System*, 56 *Journal of Corr. Educ.* 253, 283 (Sept. 2005).

12. See Camilla Lehr et al., *supra* note 8.

13. *Id.*

14. See *id.* (56 percent of states surveyed offered independent study at alternative schools).

15. Elizabeth Hill, *supra* note 9 at 12.

16. *Id.*

17. See, e.g., Ala.Code § 12-15-71(l); Tex. Educ. Code Ann. § 37.0081.

18. Cal. Educ. Code §§ 46300.7, 51747(c) (8).

19. See, *Goss v. Lopez*, 419 U.S. 565, 579-80 (1975).

20. See, e.g., *Everett v. Marcuse*, 426 F.Supp. 397 (D. Pa. 1977) (holding that disciplinary transfers from one regular school to another involve protected property interests of the pupils and are sufficiently significant to warrant due process protection); Miss. Op. Att'y Gen. No. 97-0268 (1997) (The Mississippi Legislature has

seen fit to confer a property or liberty interest on students who are assigned to alternative school for disciplinary reasons) (citing Miss. Code Ann. § 37-13-92); *Swany v. San Ramon Valley Unified School Dist.*, 720 F.Supp. 764 (ND Cal 1989) (student has a protected property interest in a high school education); *Gliane v. Long Beach Unified School Dist.*, 2007 WL 2111045 (Cal. Ct. App. 2007) (holding that school district was required to hold expulsion hearing before transferring the student from one comprehensive school to another for disciplinary reasons).

21. See, e.g., *Stafford Municipal School District v. L.P.*, 64 S.W. 3d 559 (Tex. App. 2001) (holding that transferring student

from regular classes to an alternative education program does not impact a protected property interest or liberty interest and thus the district's failure to inform him of appeal rights did not violate due process).

22. Peter Leone et al., *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. Rev. 389, 389 (1995). Studies vary greatly, but many estimates place the percentage of incarcerated juveniles who have disabilities at forty to sixty percent. See, e.g., Patricia Puritz & Mary Ann Scali, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*, Office of Juvenile Justice and Delinquency Prevention Report, p.17 (1998).

special education and related services are not provided in some alternative schools or, if provided, are of questionable quality.²³

Federal and state laws regarding special education provide significant procedural protections and access to services for children with disabilities,²⁴ which can give rise to due process challenges. For example, there are several ways in which the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 may affect students as they seek to reenroll in school upon exiting juvenile detention. First, if a child has an Individualized Education Program (IEP), he is entitled to a “free appropriate public education” (FAPE) in the “least restrictive environment” (LRE) that will meet his needs.²⁵ The child’s placement must be based on his IEP, the parent must be involved in determining the child’s placement,²⁶ and consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs.²⁷ Since some alternative schools offer limited, if any, special education services,²⁸ an advocate may be able to establish that an alternative school placement would not provide FAPE and could prevent the student from receiving the quality of services necessary.

Second, additional procedural steps are required before a school can expel a child with disabilities. If a school wishes to expel or suspend a child with an IEP for more than 10 days in any school year, the school district must hold a “manifestation determination” review with the parent and other members of the IEP team before the child’s place-

ment can be changed.²⁹ An advocate should ensure that this meeting, as well as the expulsion hearing, takes place within the statutorily required timelines, and file a due process complaint³⁰ challenging the educational placement if they did not.

Finally, if a child with a disability is involuntarily transferred to an alternative school in accordance with all of these procedural protections, or volunteers to attend an alternative school believing it is an appropriate placement, an advocate can still help to ensure that the child’s IEP or 504 plan³¹ is fully implemented in the alternative school. Anecdotal evidence suggests that some alternative schools offer only limited resource room services.³² If a child’s IEP or 504 plan provides for more services than what is offered at the alternative school, an advocate can file a due process complaint challenging the placement for failure to provide FAPE and either request that the services be provided in the alternative school or that the child be transferred to a school capable of providing the necessary services.

Challenge State Statutes that Require Placement in Alternative Schools

Advocates may be able to bring legal challenges to state statutes that create a presumption that youth who have been in detention must attend alternative schools.

One example of such a challenge is *D.C. v. School Dist. of Philadelphia*.³³ This class action challenged a Pennsylvania law that did not allow youth convicted of a crime to return to a regular classroom. Instead, the law required that the youth be sent to a

transition center where a transition plan would be developed. If the child’s underlying offense was a certain kind (involving weapons, drugs, alcohol, tobacco, or any act of violence), the child had to be placed in an alternative education setting and could not return to the regular classroom.³⁴

One of the *D.C.* class members had been adjudicated delinquent of unauthorized use of an automobile and placed in a residential facility for three months. Upon his release, he was not allowed to return to a regular high school, but was instead assigned to an alternative school for disruptive students that did not offer sports and had limited scholastic opportunities.³⁵ The Court held the statute unconstitutional for creating an irrebuttable presumption, in violation of due process, by prohibiting a class of students convicted of specified underlying offenses from returning to the regular classroom.³⁶ The Court also held that, although a hearing is not required in all cases before a student may be assigned to an alternative school, due process requires that students at least be afforded the opportunity to challenge the assignment.³⁷

Changing the System: Improving Alternative Schools

Advocates should also consider legal challenges to the quality of education in alternative schools. Such challenges could be based on state constitutions or state statutes. In addition advocates should push for legislation to improve the ability of alternative schools to serve youth exiting the justice system.

23. See Camilla Lehr, *Alternative Schools and Students with Disabilities: Identifying and Understanding the Issues*, Information Brief (National Center on Secondary Education and Transition), Oct. 2004, <http://www.ncset.org/publications/viewdesc.asp?id=1748>

24. While this article focuses on services for students exiting detention, it is important to note that advocates should use special education laws to ensure that children in detention are identified with disabilities if appropriate and are receiving the necessary special educational services while in detention. Also, if a school in a detention center seeks to reassess the child and modify the Individualized Education Program (IEP), it is important that the parent and advocate attend the IEP meeting to ensure that the IEP is not “downgraded” to require fewer services than necessary as this can have lasting consequences when they exit detention as well.

25. 34 C.F.R. §§ 300.1, 300.114.

26. 34 C.F.R. § 300.501.

27. 34 C.F.R. § 300.116.

28. Camilla Lehr et al., *supra* note 8, 17-20.

29. 34 C.F.R. § 300.530(e).

30. 34 C.F.R. § 300.507.

31. A 504 plan refers to Section 504 of the Rehabilitation Act of 1973. It sets forth the modifications and accommodations that must be provided in order for students with disabilities to perform at the same level as their peers.

32. Interview with Molly Dunn, Attorney, Stanford University Law School Youth and Education Law Clinic (June 21, 2007).

33. 879 A.2d 408 (Pa. Commw. Ct. 2005).

34. *Id.* at 410 (citing 24 Pa. Cons. Stat. Ann. 21-2134 (2002)).

35. *Id.*

36. *Id.* at 420.

37. *Id.* At 420.

Using State Constitutions to Challenge School Quality

Although there is no fundamental right to an education in the federal constitution, all of the states include some form of education clause in their own constitutions.³⁸

Depending on case law in the state and whether education is considered a fundamental right, it may be possible to challenge the adequacy of alternative schools under the state constitution.

Cases seeking to enforce state constitutional guarantees that all students receive an adequate education have met with mixed results.³⁹ However, it is a legal avenue worth exploring when there is compelling evidence that an alternative school is failing to provide its students with a minimally adequate education.

Using State Statutes to Challenge School Quality

There have been very few cases that have challenged alternative schools on statutory grounds, and at least one of those had mixed results.⁴⁰ However, advocates should consider challenging the quality of alternative schools under state statutes. Many of these statutes detail requirements for alternative schools, including the kind of

instruction to be provided, the length of the school day, and the qualifications of the teaching staff – possible fodder for enforcement through litigation.

An example is California's law regarding independent study. In California, 35 percent of students in alternative community schools (which include students on probation or parole or referred by probation) are assigned to independent study.⁴¹ California law requires that the independent study option "be substantially equivalent in quality and in quantity to classroom instruction."⁴² However, anecdotal evidence suggests that in some of these programs, students merely complete worksheets and then meet with a teacher for an hour a week to review the worksheets.⁴³ Most would agree that this type of instruction is not "substantially equivalent" in quality or quantity to general classroom instruction – and therefore may constitute a basis for challenge under California law.

Promoting Legislation to Improve Schools

Advocates can also seek legislative change to improve the quality of education in alternative schools. In California, the Senate has proposed

establishing a process for monitoring the academic progress of students in independent study, revising the alternative accountability system for schools serving high-risk students, such as community schools and continuation schools, and requiring one category of alternative schools to "offer a regular school day equal to the number of instructional minutes provided to high school pupils in the district."⁴⁴ In order to improve the system, advocates can:

- lobby the state legislature to improve data collection and accountability for alternative schools;
- encourage greater equity between alternative schools and regular schools; and
- work with the legislature to eliminate the presumption that students returning from the juvenile justice system should be placed in alternative schools, and instead require an individual determination for each child.

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38. See John Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776-1900*, 42 Am. J. Legal Hist. 1, 2 (1998).

39. See William Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why it Matters*, 56 Emory L.J. 545 (2006).

40. See *C.S.C. v. Knox Co. Bd. of Educ.*, No. E2006-00087-COA-R3-CV, 2006 WL 3731304 (Tenn. Ct. App. Dec. 19, 2006).

41. Elizabeth Hill, *supra* note 9.

42. Cal. Admin. Code tit. 5 § 11701.5.

43. Interview with Molly Dunn, *supra* note 31; Trent Atkins et al., *supra* note 10 (noting that "packets" were one instructional approach consisting of photocopied readings, questions and textbooks and were used in three alternative education programs in this Oregon study).

44. S.B. 679 Reg. Sess. (Cal. 2007).