

Mental Health Screening in Schools: Child, Parent and the State of Illinois
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INTRODUCTION

On April 20, 1999, two high school seniors walked into Columbine High School and embarked on a shooting spree that ended their young lives and resulted in death of 12 students and one teacher.¹ The Littleton, Colorado community was devastated by the bloodshed, and the entire country was shocked and horrified.² Everyone was left asking how had no one noticed that these two students were so disturbed? Suddenly, juvenile mental health was on Americans' minds, and their government took note.

After the Columbine massacre, the United States Surgeon General held a conference on juvenile mental health and issued "Mental Health: A Report of the Surgeon General," which called for integrated community-based mental health services.³ The report stated specifically that "primary health care, the schools, and other human services must be prepared to assess and, at times, to treat individuals who come seeking help."⁴ That same year, the Surgeon General convened a conference titled "Children's Mental Health: Developing a National Action Plan."⁵ The report presented at that conference stated that every year, "one in ten children and adolescents suffer from mental illness severe enough to cause some level of impairment," however, "it is estimated that

¹ Block, Jerald J. *Lessons from Columbine: Virtual and Real Rage*, AM. J. OF FORENSIC PSYCHIATRY, Vol. 28, Issue 2 (2007).

² *Id.*

³ Mental Health: A Report of the Surgeon General, 1999, available at <http://www.surgeongeneral.gov/library/mentalhealth/home.html>.

⁴ *Id.*

⁵ U.S. Dep't of Health and Human Serv., Report of Surgeon General's Children's Mental Health: Developing a National Action Plan, 11, 2000, available at <http://www.surgeongeneral.gov/topics/cmh/childreport.html>.

one in five of such children receive mental health services.”⁶ Again schools were referenced to as venues for prevention and detection of childhood mental illness.⁷

Shortly thereafter, George W. Bush ordered the New Freedom Commission on Mental Health to conduct a study of mental health services in the United States, and to make recommendations based on those findings.⁸ In 2003, the Commission reported its findings and established six goals for the delivery of health services.⁹ Under goal number four: “early mental health screening, assessment, and referral to services are common practice,” the Commission recommends “quality screening and early intervention...in both readily accessible, low-stigma settings, such as primary health care facilities and schools, and in settings in which a high level of risk exists for mental health problems, such as criminal justice, juvenile justice, and child welfare systems.”¹⁰ After the Commission reported their findings, a number of states have enacted litigation regarding mental health screenings in public schools. Mental health screening in schools has become an important issue, relevant to the health of our children, families and communities.

In this paper, I will first discuss the history of jurisprudence involving the tension between the rights of the state, parents and children. I will then discuss the Illinois Children’s Mental Health Act of 2003, and how it relates to the to traditional notions of state intervention in the family sphere. I will argue that legislation regarding mental health screening in schools can be drafted constitutionally for the benefit of children.

⁶ *Id.*

⁷ *Id.*

⁸ President’s New Freedom Commission on Mental Health, 2003, available at <http://www.mentalhealthcommission.gov/reports/reports.htm>.

⁹ *Id.*

¹⁰ *Id.*

PARENTAL RIGHTS

Governmental legislation and initiatives regarding mental health screening and programming in schools has raised concerns for those who feel that that these actions are an infringement upon family privacy. Some parents and family activists argue that mental health screening in schools encroaches on a parent's right to raise their child as they see fit.¹¹ There is a long history in this country of cases that address the tension between parent's rights and the state's interest regarding children. In *Stantosky v. Kramer*, the United State's Supreme Court held that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."¹² The Supreme Court has held that parents have a fundamental right to raise their children as they see fit.¹³ Additionally, governmental interference with this right should be very limited.¹⁴

In *Meyer v. Nebraska*, the Supreme Court held that parents have the right to have their children instructed as they choose.¹⁵ At issue in *Meyer* was a statute that made unlawful the teaching of a foreign language to a child under the age of ten.¹⁶ The Court ultimately found that the statute infringed on parents' fundamental liberty interest to

¹¹ McElroy, Wendy. Foxnews.com, "Mandatory Mental Health Screening Threatens Privacy, Parental Rights," September 17, 2004, available at <http://www.foxnews.com/story/0,2933,132397,00.html>.

¹² *Stantosky v. Kramer*, 455 U.S. 745,753 (1982).

¹³ *Meyer v. Nebraska*, 262 U.S. 390, 397 (1923).

¹⁴ *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

¹⁵ *Supra* note 13, at 401.

¹⁶ *Id.* at 396-98.

instruct their children as they see fit.¹⁷ The Court also noted that parents have a corresponding obligation to take care of children.¹⁸

In *Pierce v. Society of Sisters*, the Supreme Court again addressed the balance of authority between parents and the state.¹⁹ In *Pierce*, the Court addressed the validity of the Compulsory Education Act of 1922, which required that all children between ages of eight and sixteen to attend public school, with very few exceptions.²⁰ The Act made it unlawful for a parent to send his or her child to private school.²¹ The Court held that the Act unreasonably interfered with the right of parents to direct the upbringing of their children.²² However, power was still reserved to states to regulate the schools and require that “certain studies plainly essential to good citizenship” be taught.²³

The balance between parent’s rights and the rights of the state shifted in *Prince v. Massachusetts*, where the Court held that parental authority is not absolute, and can be restricted if doing so is in the interests of a child’s welfare.²⁴ In *Prince*, the guardian of a child was convicted of violating child labor law by letting her nine year-old niece hand out religious material on a street corner.²⁵ Two liberty claims were at issue: (1) a parent’s right to bring up the child without restraint, and (2) child’s right to observe the ways in which she is raised, including religious practices.²⁶ The Court reasoned that the state has broader authority when it comes to children and may limit “parental freedom and

¹⁷ *Id.* at 401.

¹⁸ *Id.*

¹⁹ *Pierce v. Society of Sisters*, 268 U.S. 510.

²⁰ *Id.* at 535-36.

²¹ *Id.* at 531.

²² *Id.*

²³ *Id.* at 533.

²⁴ *Prince v. Massachusetts*, 321 U.S. 158, 168.

²⁵ *Id.* at 159-60.

²⁶ *Id.* at 166-67.

authority in things affecting the child's welfare."²⁷ The Court also took a paternalistic view of children's rights by noting that the state has greater liberty to curtail the rights of children than adults, even in some instances where the child's guardian is present.²⁸

For nearly a century after the decision in *Meyer*, *Pierce*, and *Prince*, the Supreme Court did not address parental autonomy.²⁹ The power struggle between parent's rights and the rights of the state over the care, custody, and control of children came before the court in 2000 in the case of *Troxel v. Granville*.³⁰ In *Troxel*, the Court declared unconstitutional a Washington state law that allowed third parties to petition for visitation of children regardless of the objection of the child's parents.³¹ The plurality opinion stated "the interest of parents in the care, custody and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court."³² The plurality opinion in *Troxel* represents a shift back in favor of parent's rights, and the reaffirmation of "a presumption that fit parents act in the best interests of their children."³³

The shift in *Troxel* in favor of parent's rights represents a possible hurdle for the constitutionality of mandated mental health screening in schools. In each case discussed in this paper however, the Court has tempered the rights of parents to raise their children as they see fit with some acknowledgement of a corresponding obligation for parents to

²⁷ *Id.* at 168.

²⁸ *Id.* at 68-69.

²⁹ Jennifer H. Gelman, *Brave New School: A Constitutional Argument Against State-Mandated Mental Health Assessment in Public Schools*, 26 N. ILL. U. L. Rev. 213, (2005).

³⁰ *Id.*; *Troxel v. Granville*, 530 U.S. 57 (2000).

³¹ *Id.* at 59.

³² *Id.* at 65.

³³ *Id.* at 69.

care for their children and that it is permissible for the state to intervene when a child's welfare is threatened. Where children's mental health needs are systematically not being met by their parents, is it the duty of the state to step in and provide the help children need?

THE STATE'S INTEREST

There are several constitutional principles that have been commonly used to frame the role of the state in child rearing. The common law doctrine of *Parens Patriae*, which means literally "parent of the country," historically gave the English king the "right and responsibility to protect people legally incapable of caring for themselves, including children."³⁴ In *Prince*, the Court notes that "acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways."³⁵

Additionally, the state may regulate children and the family generally under their police powers to promote the public health, safety and welfare.³⁶ However, the doctrine of *parens patriae* and the state's authority under their police powers are restrained by the state's "official tradition of nonintervention" into family affairs, including the parent and child relationship.³⁷ The tradition of nonintervention is partially the result of the practical

³⁴ Douglas E Abrams and Sarah H. Ramsey. *Children and the Law: Doctrine, Policy and Practice*, 15 (Ed. 3rd. 2007).

³⁵ *Supra* note 24, at 167.

³⁶ *Id.* at 16.

³⁷ *Id.* at 17.

problem of enforcement by the state within the family sphere, because much of what goes on between family members happens in private.³⁸

Although parental rights to “care, custody, and control” over their children has been affirmed by the Supreme Court³⁹, in the context of medical decisions, lower courts in the U.S. have held that the state’s interest in the protecting the welfare of children outweighs parental decision-making. In *Paraham v. J.R.*, parents had their minor children admitted to mental hospitals, and the children later filed suit claiming that the Georgia statute that granted parents authority to voluntarily commit their children against their wishes was unconstitutional.⁴⁰ The lower court found the statute unconstitutional, but the Supreme Court reversed because they deemed the process involved in committing the children to be adequate (including evaluation by a physician).⁴¹

The presumption that parents act in the best interest of their children has generally been overcome where the child’s life is threatened.⁴² However, decisions regarding non-life threatening medical situations represent more of a gray area. The Supreme Court has not spoken specifically on the matter, but lower courts have at times held that the state may usurp parental rights where parents refuse medical care for their children that is not life threatening.⁴³ Additionally, even if the Supreme Court were to hold that the state can overcome parental rights in the case of non-life threatening care, it is not clear that this would include mental health services.

³⁸ *Id.*

³⁹ *Supra* note 32.

⁴⁰ *Paraham v. J.R.*, 42 U.S. 584, 587 (1979).

⁴¹ *Id.* at 608.

⁴² Jay M. Zitter, Power of Court or other Public Agency to Order Medical Treatment Over Parental Religious Obligations for Child Whose Life is Not Immediately Endangered, 21 A.L.R. 5th 248 (2000).

⁴³ *Id.*

Legislation can avoid challenges on these grounds by requiring parental consent to mental health testing in school on either an “opt-in” or “opt-out” basis. In case of actually requiring the administration of mental health service against the wishes of a parent, the best facts would be a case in which a child’s physical wellbeing is actually threatened by her mental impairment. However, such a case would also raise issues of the child’s rights.

CHILDREN’S RIGHTS

The tension between a parent’s right to make choices about their children and the state’s right to ensure the health and welfare of children are often discussed and debated. However, the rights of children are often left out of the equation. In fact “most legal and social policy is based on the beliefs that children lack capacity to make decisions on their own and that parental control of children is needed to support a stable family system, which is crucial to the well-being of society.”⁴⁴ However, we live in a society that greatly values individual liberty, and treating children as merely property of parents or the state would go against these values.⁴⁵

Mental health screening in schools raises many issues regarding the welfare and privacy of children. One issue is that the science of psychology is still evolving and many things have been historically characterized, as “mental illness,” such as homosexuality, is no longer considered pathology.⁴⁶ What may be incorrectly labeled as mental or emotional health problems today, may be regarded as healthy in the future. Additionally, a child flagged early on as having mental illness may face stigmatization. A child’s

⁴⁴ Michael S. Wald, *Children’s Rights: A Framework for Legal Analysis*, 12 U.C. DAVIS L. REV. 255, 258-60 (1970).

⁴⁵ *Id.*

⁴⁶ *Supra* note 29, at 238.

educational opportunities could be affected as well as the perceptions of the teachers and administration whom the child comes in contact with on a daily basis.⁴⁷

Additionally, many fear of the over medication of children and the affect this may have on their lives. In the case of Eric Harris, one of the infamous shooters in the Columbine High School Massacre, Harris had actually received mental health treatment and was prescribed the anti-depressant Lucvox.⁴⁸ Some have argued that the use of these drugs may have contributed to Harris' actions on April 20, 1999.⁴⁹ Additionally, CCN also reported that, days before the shooting, Harris "was rejected by the Marine Corps recruiters days before the Columbine High School massacre because he was under a doctors care and had been prescribed an antidepressant medication."⁵⁰ Therefore, not only was his mental health treatment unsuccessful, but his diagnosis and treatment had also limited his opportunities.

On the other hand, research has shown that undiagnosed mental illness in children can have devastating effects. Children with undiagnosed mental illness are "twice as likely to drop out of school," more likely to experiment with drugs and alcohol and at a higher risk for suicide.⁵¹ These negative outcomes make the case for diagnosing mental illness in children very strong, even if selected treatment options may be disputed. Additionally, as in the case with the Illinois legislation, anti-stigmatization can and

⁴⁷ *Id.* at 239.

⁴⁸ "Columbine Shooter was Prescribed Antidepressant." April 29, 2009. http://articles.cnn.com/1999-04-29/health/9904_29_luvvox.explainer_1_antidepressant-ssris-drugs?_s=PM:HEALTH. Accessed May 1, 2011.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Katherine McKeon Curran. Mental Health Screening in Schools: An Analysis of Recent Legislative Developments and the Legal Implications for Parents, Children and the State, QUINNIPIAC HEALTH L. J., 96 (2008).

should be a goal of governmental programming.⁵² On balance, it seems that children would be better served by testing that could diagnose mental illness, and schools which they are already required to attend and spend much of their day seems like a good venue for testing. It is clear that children's mental health needs are not being met by their parents alone, and as discussed in the introduction, state intervention has resulted.

ILLINOIS'S CHILDREN'S MENTAL HEALTH ACT OF 2003

In 2003, the Illinois state legislature enacted the Children's Mental Health Act of 2003, which has three important aspects.⁵³ The first requirement of the Illinois statute is the development of a system of "coordinated mental prevention, early intervention, and treatment services for children from birth through age 18."⁵⁴ Second, the statute requires that the Illinois State Board of Education "develop and implement a plan to incorporate social and emotional development as part of the Illinois Learning Standards."⁵⁵ Lastly, the statute addresses "teaching and assessing social and emotional skills and protocols for responding to children with social, emotional, or mental health problems, or a combination of such problems, that impact learning ability."⁵⁶ The "assessment" or screening portion of the statute draws the most controversy.

The comprehensive mental health initiative reaches into the realm of what has traditionally been a private, familial matter. One central issue that was not addressed in the original version the statute, but has been added by amendment, is that parental

⁵² 405 ILL. COMP. STAT. 49/5(a) (2003).

⁵³ 405 ILL. COMP. STAT. 49 (2003).

⁵⁴ 405 ILL. COMP. STAT. 49/15(a) (2003).

⁵⁵ 405 ILL. COMP. STAT. 49/15(a) (2007).

⁵⁶ 405 ILL. COMP. STAT. 49/15(b) (2007).

consent is required for mental health screening of children in Illinois schools.⁵⁷ The issue of parental consent may ultimately be a deciding factor if the Illinois statute is challenged for constitutionality.

The statute also calls for an “anti-stigma campaign,” which was launched in 2008 as the “Say It Out Loud” campaign “which seeks to de-stigmatize mental health and promote greater understanding of children’s social and emotional development needs.”⁵⁸ This helps to rectify issues of children’s rights, and increased awareness and acceptance of mental health issues will help all individuals with a mental health problem.

It is the underlying goal of legislation such as the Children’s Mental Health Act of 2003, that increased diagnoses coupled with anti-stigmatization will help children with mental illness be more successful, and better able to reach their goals. Additionally, the implementation of social and emotional standards into Illinois curriculum, may lead to prevention of mental health issues, which is truly the best outcome.

⁵⁷ 405 ILL. COMP. STAT. 49/5 (2008).

⁵⁸ Illinois Children’s Mental Health Partnership Mission and History.
<http://www.icmhp.org/aboutus/aboutmission.html>. Accessed on May 11, 2011.