WHAT SPECIAL EDUCATION ATTORNEYS AND ADVOCATES NEED TO KNOW ABOUT IMMIGRATION CONSEQUENCES OF SCHOOL BASED BEHAVIORS

Julia Longoria
Staff Attorney
Disability Rights Texas
jlongoria@drtx.org

Constance R. Wannamaker
Supervising Attorney
Disability Rights Texas
cwannamaker@drtx.org

I. INTRODUCTION/BACKGROUND

Throughout the country court-involved youth face potential immigration consequences for behavior directly or indirectly related to their disability. This paper discusses potential problems that may arise for children here in the U.S. both with and without status and ways to avoid negative immigration consequences that may arise from disability related behaviors.

Studies show that disproportionate numbers of students who end up in the juvenile justice system have disabilities that would make them eligible for special education services. Due to under-identification of children for special education services and non-existent or poor behavioral supports for children who have been identified as special education eligible, many of these students become involved in the juvenile justice and criminal systems. By arresting students, charging them with assault, destruction of property or other criminal offenses for disability related behaviors, school districts place immigrant students in potentially precarious immigration situations. This paper discusses the potential impact of juvenile and adult convictions on students with and without legal immigration status. This paper provides a background on immigrant classifications, discuss behaviors and resulting criminal charges that may lead to negative immigration consequences and discuss ways to prevent students from entering the criminal and juvenile justice systems and to mitigate the impact of these behaviors on immigration status for already court involved youth.

II. ENTITLEMENT TO PUBLIC EDUCATION

A. Are undocumented students entitled to a public education?

1. In *Plyler v. Doe*, the Supreme Court held that students are entitled to a public education regardless of immigration status.[1]

a) *Plyler* concerned a challenge by undocumented Mexican immigrants to a Texas Statute that withheld funds for the education of students who are "not legally admitted" from school districts and which authorized districts to refuse to enroll undocumented children. Finding the state could show no substantial interest in denying

[1] *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982).

undocumented immigrant children educational services, the Supreme Court held that the Texas statute violated the Equal Protection Clause of the 14th Amendment to the Constitution.

b) *Plyler* unequivocally established that undocumented students have a constitutional right to attend public elementary and secondary school for free.

(1) Thus, following *Plyler's* mandate, school districts may not ask questions about a child's immigration status, even under the guise of establishing school residency requirements.

(2) School districts may likewise not ask students for documents that reveal a student's immigration such as passports, green cards, visas, or social security cards or social security numbers.

(3) While a state may impose residency requirements for free attendance at public schools, districts may not use those requirements to deny enrollment to students living with guardians who are not their natural parents or who are considered homeless under the McKinney Vento Act to. [2]

c) Undocumented children with disabilities also have a statutory right to special education services under the IDEA and Section 504[3].

d) School districts are not required to report undocumented students to ICE. Furthermore, ICE should not conduct enforcement actions at schools.[4] This is a great concern for many parents, even after they have overcome enrollment barriers.

e) Research indicates that school districts frequently discourage and the delay the enrollment of undocumented children into the public school system, through stringent enrollment requirements such as proof of residence and proof of guardianship. These delays persist despite laws that require immediate enrollment of undocumented students. Other undocumented students are forced to enroll in alternative school placements or learning programs that focus on behavior rather than on academics. Together, these practices discourage the enrollment of undocumented students in violation of *Plyer v. Doe*.[5]

---

[2] *Martinez v. Bynum*, 461 U.S. 321,331 (1983); 42 U.S.C. § 11431, *et seq.*; *National Center on Homelessness and Poverty RI v. New York*, 224 F.R.D. 314, 319 (D.N.Y. 2004).

[3] 20 U.S.C. § 1400 *et seq*.; Section 504, 29 U.S.C. § 794 *et seq*.

[4] Memorandum from John Morton, Director, ICE, to Field Office Directors, Special Agents in Charge, and Chief Counsel (Oct. 24, 2011), https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf ("This policy is designed to ensure that these enforcement actions do not occur at nor are focused on sensitive locations such as schools and churches.").

[5] Ensuring Every Undocumented Student Succeeds: A Report on Access to Public Education for Undocumented Children, The Georgetown Law Human Rights Institute Fact-Finding Project, April 11, 2016 at 24. https://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/events/upload/2015-16-HRI-Fact-Finding-Report.PDF

III. THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT ("FERPA")[6] LIMITS WHAT INFORMATION SCHOOL DISTRICTS MAY SHARE WITH OUTSIDE PARTIES AND AGENCIES.

A. FERPA requires that an educational institution must procure a written consent from a parent or adult student prior to releasing educational records.[7] There are, however, exceptions to this requirement.

1. Law enforcement records may not be educational records. Accordingly, records kept by a school district's law enforcement division or unit may not be protected by FERPA.
2. Numerous other exceptions also exist for disclosure without consent including:
   a. to school officials within the educational agency, including teachers and subcontractors;
   b. federal agencies for reporting purposes;
   c. for federal financial aid applications; or
   d. pursuant to subpoena by a court. [8]

IV. FAPE, LANGUAGE BARRIERS, AND PARENTPARTICIPATION.

A. The IDEA provides for meaningful parental participation in IEP meetings. However, for many parents whose native language is not English, the struggle to communicate with their child's educators is a barrier to meaningful participation in their child's educational decisions. Parents with limited English proficiency are disadvantaged in attempting to access and fully participate in the educational programs offered to their children.

1. IDEA sets out in great detail how parents of students with disabilities shall participate in all aspects of their child's educational program.[9] For parents that do not speak English, their ability to participate is frequently limited by a district's failure to provide documents in their native language or translators during IEP meetings and in regular communication.
2. School information and documents that are distributed to all parents must be translated into the major languages spoken by parents with limited English skills.[10] This does not always happen. Parents are often sent notices and daily communication in English instead of their native language. Even when documents exist in a parent's language, they are often difficult to find, or parents are told that the documents do not exist in their native language.[11] This

[6] 20 U.S.C. § 1232g, *et seq.*; 34 C.F.R. § 99.1 et *seq.*
[7] 34 C.F.R. § 99.30.
[8] 34 C.F.R. § 99.33.
[9] See 34 CFR § 300.321 (a) (1); 20 U.S.C. § 1414 (d) (1) (B)-(d) (1) (D).
[10] 20 U.S.C. § 1414 (d) (1) (B) (i); 34 CFR § 300.322 (e).
[11] Ensuring Every Undocumented Student Succeeds at 41.

provides parents with a truncated understanding of their child's education and services and programs available to their child.

3. School Districts must have a system of oral interpretation for parents with limited English skills.[12] Often, districts rely on district staff with no professional translation training to translate communication between parents and the district. This may result in abbreviated or summarized translations that do not convey exact meanings. Or worse, a lack of understanding of the technical realities of special education, may lead to improper translations altogether. In some instances, untrained district staff tasked with translating during IEP meetings or during regular interactions between parents and educators, may improperly advise parents instead of simply translating.

4. Districts should be aware that the failure to provide written translations can in some instances amount to a denial of FAPE.[13]

5. It is important to verify that evaluations are conducted in the appropriate language. Districts frequently conduct special education evaluations in English when they do not have bilingual evaluators on staff. This may result in skewed and inaccurate evaluation results, making it difficult to identify a child's individual needs.

V. WORKING WITH UNDOCUMENTED PARENTS.

A. Fear over the possibility of deportation has risen in the last few years. Despite assurances that immigration arrests will not occur at schools except in emergency situations[14], parents are hesitant to enroll their children in school. Increased fear has also led to undocumented children withdrawing from school or dropping out of school altogether.[15]

B. Even once parents have enrolled their children in school, some parents may be reluctant to advocate for their children's educational rights for fear of retaliation. Due to a parent's undocumented status, parents may feel vulnerable to negative immigration consequences should they pursue their child's right to education services.

C. Parents may also be reluctant to utilize forms of redress for violation of their rights due to lack of immigration status. Parents often do not know that immigration status is not a barrier to accessing complaint and due process systems implemented to address educational concerns or violations. Without knowing their rights, parents may be reluctant to initiate the complaint process.

---

[12] 20 U.S.C. § 1414 (d) (1) (B) (i); 34 CFR § 300.322 (e).

[13] See, e.g., Oakland Unified Sch. Dist., 66 IDELR 175 (SEA CA 2015) (finding that a California district excluded a sixth-grader's mother from the IEP process by failing to translate evaluations and IEP documents into Spanish).

[14] Memorandum from John Morton.

[15] Ensuring Every Undocumented Student Succeeds at 51-53.

Educating parents about their child's rights may help encourage parents to proceed with litigation, but in some cases the mounting fear regarding immigration policies may prove a greater barrier.

D. Barriers and obstacles erected by school districts, such as rigid enrollment practices, failure to provide professionally trained translators, and failure to provide documents in a parents' native language may discourage parents from enrolling their children in school or from attempting to exercise their child's educational rights.

VI. COURT INVOLVEMENT FOR CHILDREN WITH DISABILITIES

A. Students with disabilities in Texas are over-represented in school-based arrests, court referrals, and referrals to the juvenile justice system.[16] Many students with disabilities also experience behavioral manifestations of their disabilities. However, rather than providing appropriate behavior interventions and supports, school districts frequently rely on police presence and enforcement to address behavioral concerns. For children with disabilities, this is not only inappropriate, but may be a denial of FAPE.

B. Frequently, children with disabilities may go unidentified for special education services, particularly if the child's disability primarily manifests as a negative behaviors.

VII. BACKGROUND OF DIFFERENT CLASSIFICATIONS OF IMMIGRATION STATUS (LIMITED)

A. Citizenship
   1. U.S. Citizenship can be obtained in 4 ways
      a) U.S. citizenship may be obtained by birth in the U.S. or its territories;
      b) U.S. citizenship may be obtained through acquisition. For instance, even though a child is born outside the U.S., if at least one parent was a US Citizen at the time of the child's birth, the child may automatically "acquire" citizenship. [17]
      c) A person may also obtain citizenship through naturalization. Naturalization is the process by which a legal permanent resident applies for and becomes a U.S. citizen.
      d) In some circumstances, a child may "derive" citizenship upon the naturalization of their parents.[18]

[16] Dangerous Discipline: How Texas Schools are Relying on Law Enforcement, Courts, and Juvenile Probation to Discipline Students, A Report by Texas Appleseed and Texans Care for Children, December 14, 2016. Available at http://stories.texasappleseed.org/dangerous-discipline.
[17] INA Sec. 301. [8 U.S.C. 1401]
[18] INA Sec. 320. [8 U.S.C. 1431]

(1) Under the Child Citizenship Act of 2001 an individual who turned 18 on or after Feb. 27, 2001, a child born outside of the U.S. may automatically become a U.S. citizen if at least one parent is a U.S. citizen by naturalization or birth, the child is under 18 and unmarried, the child resides in the U.S. in legal and physical custody of a U.S. citizen parent, and the child is an legal permanent resident. If all of these conditions are met, a child may automatically become a U.S. citizen.

(2) Individuals who turned 18 before Feb. 27, 2001 automatically become USC if their parent was naturalized before the child turned 18, the child became a legal permanent resident before turning 18, the child was unmarried and one of the following criteria is met: a) the other parent was or became a U.S. citizen before the child's 18th birthday, or b) the child was born out of wedlock and not legitimized before the age of 16 and the naturalized parent was the child's mother, or c) the child's other parent was deceased, or d) the child's parents were divorced or separated and the naturalized parent had legal custody of child following the divorce or separation.

B. Legal Permanent Resident

1. Petitions for permanent residency are based on either family relationships or employment. In both cases, visas are issued once petitions are approved based on preference categories. Issuance of visas are subject to availability by both country and preference category. Depending on the demand for visas in different preference categories and the applicant's country of origin, the wait for a visa to become available can be extremely long. In some cases, the wait for an available visa, after the initial petition is approved, may be more than 20 years. For instance, an applicant from Mexico, who is the married son or daughter of a U.S. citizen, currently has a visa available if a petition was filed on their behalf before December 8, 1994.[19]

2. Petitions based on family relationship[20]

(a) Immediate Relatives visas are based on a close family relationship with a United States citizen described. There is not a cap on the number of visas available to applicants in this category. Consequently, immediate relative applications are not subject to a visa waiting list. Relationships included in this category include the spouse of a U.S. citizen, the unmarried child (under age 21) of a U.S. citizen, an orphan adopted abroad by a U.S. citizen (in specifically described circumstances) and the parent of U.S. citizen who is at least 21 years old.

(b) Preference categories are visa types are for specific, more distant, family relationships with a U.S. citizen and some specified relationships with a Lawful Permanent Resident (LPR). There are

[19] https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2017/visa-bulletin-for-december-2016.html

[20] INA Sec. 216. [8 U.S.C. 1186a]

limitations on family preference immigrants. These categories include the unmarried sons and daughters of U.S. citizens, spouses and children (under age 21) of LPRs, unmarried sons and daughters (over age 21) of LPRs, married sons and daughters of U.S. citizens, and brothers and sisters of U.S. citizens (U.S. citizen over age 21).

C. Deferred Action for Childhood Arrivals

1. In June of 2012, President Obama issued an executive order to providing protection from deportation and work authorization to certain undocumented immigrants brought to the U.S. as children.[21] These individuals may request consideration of deferred action for a period of two years, subject to renewal. Approved applicants are also eligible for work authorization. Deferred action is a use of prosecutorial discretion to defer removal action against an individual for a certain period of time. Deferred action does not provide lawful status.

2. Later, in November 2014, President Obama issued additional orders expanding DACA.[22] On June 23, 2016, the U.S. Supreme Court issued a 4-4 decision in United States v. Texas, the case challenging expanded Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).[23] The order reinforced preliminary injunction temporarily halting the implementation of these initiatives. This ruling does not impact the original DACA program launched in 2012.

3. Individuals may be eligible for the 2012 DACA if they meet certain eligibility guidelines. If a person was under the age of 31 as of June 15, 2012, came to the U.S. before turning 16 years old, has continuously resided in the U.S. from June 15, 2017 through the present, was physically present in the U.S. on June 15, 2012 and at the time of making the request for consideration for deferred action with USCIS, had no lawful status on June, 15, 2012, is currently enrolled in school, has graduated or obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the U.S., and has not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and does not otherwise pose a threat to national security or public safety.

D. Special Immigrant Juvenile Status

---

[21] "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children", Memorandum from Secretary of Homeland Security Janet Napolitano for U.S. Customs and Border Protection Acting Commissioner David V. Aguilar et. al., June 15, 2012.

[22] "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are Parents of U.S. Citizens or Permanent Residents", Memorandum from Secretary of Homeland Security J. Johnson for USCIS Director Leon Rodriguez et al., November 20, 2014.

[23] *United States v. Texas*, 579 U.S. ___ (2016)

1. The SIJ program was created to help undocumented children in the United States who have been abused, abandoned, or neglected.[24]

2. To be eligible a child must be unmarried, under 21 years of age at the time of filing with U.S. Citizenship and Immigration Services (USCIS), physically present in the United States, have a qualifying juvenile court order, must apply before child ages out of juvenile court jurisdiction (varies by state), reunification with one or both of the child's parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law, and not in the child's best interest to be returned to his or her country of origin. Certain children who are unable to be reunited with a parent can get a green card as a SIJ. Children who get a green card through the SIJ program can live and work permanently in the United States. Some disqualifications for eligibility for a green card include being a risk to people or property, because of a mental or physical disorder or having abused drugs.

VIII. GETTING STARTED

A. For attorneys who do not practice immigration law, considering immigration issues seem daunting. However, as the education system becomes more entangled with the criminal system, it becomes increasingly important that special education attorneys and advocates consider the immigration consequences of unaddressed disability-related behaviors that may lead to police involvement and on-campus citations.

B. Some clients may have status but may have a difficult time explaining it or may have a limited understanding the legal implications of their status. For instance, a client may tell you that their residency has expired. This may mean one of three things, either their permanent resident card has expired and they maintain residency, their conditional residency has expired and they are no longer in status, or they were removed and are now living in the U.S. with an active removal order.

C. There are questions that an attorney can ask to help clear up some of the confusion about a client's status. First determine when and how a client arrived to the U.S. Ask specific questions that may help clarify any ambiguities. Ask the client if they arrived in the U.S. with permission. Ask if they arrived by plane or if they crossed through a check point. Ask if they arrived without permission and if so, how they entered the U.S. Ask the client if they have ever had any contact with any immigration official. Ask if they have ever had contact with a police. Ask if they have ever been in front of a judge for any reason. The client may not be able to differentiate between an immigration judge and any other type of judge, but it is important information to know. Ask if they have ever had a family member of employer file a petition on their behalf. Ask if they have any family members living in the U.S. who are U.S. citizens or legal permanent residents. Finally, ask if they have ever claimed to be a U.S. citizen

[24] INA Sec. 101 (a) (27) (J). [8 C.F.R. 204.11]

to any immigration official.[25] All of these questions have bearing on a client's status or potential pathway to status.

IX. EFFECTS OF DIFFERENT TYPES OF "CONVICTIONS" ON IMMIGRATION PROCEEDINGS.

A. In 2010, the U.S. Supreme Court found that the right to counsel requires criminal defense attorneys to provide their noncitizen clients advice about the immigration consequences of a conviction.[26] The Court's opinion in *Padilla* recognized that division between criminal law and civil administrative immigration law has substantially diminished. The outcomes of criminal cases substantially impact a person's immigration court case. As the public school system relies more heavily on police involvement to address student discipline, it becomes more important for special education attorneys and advocates to acknowledge the real effects of unaddressed disability-related behaviors on a student's ability to remain in the country or apply for status.

B. Inadmissibility and Removal

1. Admission is lawfully entering the U.S. after being inspected and with authorization by an immigration officer. [27] Aliens are considered applicants for admission when they arrive at a port of entry to the United States and also when they are present in the U.S. but have not been lawfully admitted.[28] Nonimmigrants applying to adjust to permanent resident status are also considered to be seeking admission and are therefore subject to the grounds of inadmissibility.[29] Persons admitted to the U.S. as nonimmigrants could become inadmissible for permanent residence based on acts committed while in the U.S. and could be subject to removal if they apply to adjust status.[30] The grounds for inadmissibility and removal are different. The grounds of inadmissibility are listed in section 212 of the INA. The criminal grounds for inadmissibility are listed in INA § 212(a) (2). Included in this list are admission or committing a "crime of moral turpitude" or a controlled substance violation. Moral turpitude" is not defined by statute. Crimes of moral turpitude include crimes of violence and crimes "commonly thought of as involving baseness, vileness or depravity," and reference the current moral standards.[31] Section 212(a) (2) does not require that an applicant for

[25] There are no waivers for false claims to U.S. citizenship. §212(a) (6) (C) of the Immigration and Nationality Act. However, there are some exceptions for minors or for those who believed they are U.S. citizens when they made the claim. *See* Matute v. United States Att'y Gen., 354 F.App'x 426,427 (11th Cir. 2009); See also 9 FAM 40.63 N4.1.; See also 9 FAM.63 N11.
[26] *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010).
[27] INA § 101(a) (13).
[28] INA § 235(a).
[29] INA § 245.
[30] INA § 237(a) (1).
[31] Jordan v. De George, 341 U.S. 223, 223–24, 71 S. Ct. 703, 704, 95 L. Ed. 886 (1951)

admission be convicted of a crime. Admitting to acts that would constitute a crime of moral turpitude is enough to make a person inadmissible.[32]

2. Removal is a legal proceeding to expel a non-citizen from the U.S. who has already been admitted to the United States. Non-citizens may be removable if they were inadmissible at the time of entry, if they violated a condition of their status in the U.S., or if they have committed other prohibited acts. The Immigration and Nationality Act lists six major categories of persons subject to removal. One such category applies to non-citizens who have committed certain criminal offenses. Non-citizens are subject to removal if convicted within five years of admission to the U.S. of a crime of moral turpitude carrying a possible sentence of one year or more, or if convicted at any time of two or more crimes of moral turpitude "not arising out of a single scheme of criminal misconduct," regardless of the sentence imposed.[33] Removal grounds apply only after a conviction. Many "crimes of moral turpitude" are relatively minor offenses. The INA currently defines conviction as "a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendre or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty."[34] An alien is also removable if he has been convicted of an "aggravated felony" at any time after entry.[35]

C. Effect of conviction/citations on student's immigration status.

1. When applying for naturalization, an applicant must demonstrate good moral character.[36] When reviewing an applicant for good moral character, USCIS has the authority to scrutinize the activities of a person's entire life. However, USCIS will give the greatest scrutiny to the "statutory period." The statutory period is the number of years a person was required to have a green card (U.S. lawful permanent residence) before filing for U.S. citizenship. In general, a noncitizen is statutorily barred from establishing good moral character if, during the time for which good moral character must be shown, she is convicted of or admitted committing a single CIMT.[37] If the conviction comes within the petty offense or youthful offender exception to the inadmissibility ground, however, the person is not statutorily barred. However, multiple CIMTs committed may prevent an applicant from establishing good moral

[32] The ground of inadmissibility for moral turpitude does not apply if the person seeking admission committed the crime before the age of eighteen and at least five years have passed since the end of any confinement, or if the maximum possible penalty for the crime was less than one year and the person was actually sentenced for no longer than six months. INA § 212(a) (2) (A).
[33] INA § 237(a) (2) (A).
[34] INA § 101(a) (48) (A).
[35] INA § 237(a)(2)(iii)
[36] INA §316; 8 CFR §316
[37] INA § 101(f) (3), 8 USC § 1101(f) (3).

character, even if they were committed while as minor, if they were committed within the statutory period. The fact that a person is deportable for CIMT is not a statutory bar to establishing good moral character. However, if a person is a removable, they can be referred to removal proceedings even if he submits an affirmative application. If a student is cited in the school setting for behaviors related to a disability, these citations will be considered for the purposes of establishing good moral character when an applicant applies for naturalization.

2. While most convictions or commissions of crimes for acts committed while under the age of 18 do not make an applicant inadmissible under criminal grounds, criminal convictions or juvenile findings might make an applicant inadmissible if indicates that an applicant has a mental disorder that poses a current threat to self or others. This can be a problem for students who are applying for a green card.

3. DACA is discretionary determination to defer a removal action of an individual. Therefore, USCIS has the discretion to review an applicant's criminal and juvenile involvement in the totality. In order to be eligible for application, an applicant may not have been convicted of a felony offense, a significant misdemeanor offense, or three or more other misdemeanor offenses not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct unless under exceptional circumstances. USCIS may consider juvenile records and expunged records when reviewing an applicant for deferral. Each application will be assessed individually. However, having a juvenile and criminal record makes the application process more difficult.[38] For children with disabilities who may have received a number of tickets for behavior relating to their disability, these tickets may negatively impact their DACA application.

4. When applying for a green card on the basis of an SIJS application, USCIS will again consider admissibility. While a minor may not be inadmissible for criminal convictions committed while not yet 18, and while juvenile dispositions are not considered criminal offenses, a series of convictions or juvenile dispositions may make an applicant inadmissible as a risk to people or property, because of a mental or physical disorder.

D. Examples of problematic convictions for children with disabilities in the school setting under the Texas Penal Code include: §22.01(a) (1) assault, §22.01(b) (1) assault on a public servant, §22.11 harassment of a public servant, §21.08 indecent exposure, §22.07 terroristic threat, §31.03 theft, and any drug related offenses.

[38] Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions, updated on October 27, 2015, visited on December 22, 2016. Available at https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#criminal%20convictions.

X. COMPETENCE ISSUES AND NATURALIZATION.

A. When applying for naturalization, an applicant is asked on the application, "Have you ever been declared legally incompetent or confined to a mental institution."[39] If an applicant has ever stayed in a residential treatment center then they must answer this question affirmatively. Also, if a client has had a criminal charge dismissed due to competency issues, they must also answer this question affirmatively. Under these circumstances, an applicant has the burden of establishing legal competence at the time of application.[40] An applicant may submit medical evidence to establish competency at the time of application. The applicant does not have to prove competence during the entirety of the statutory period.

XI. AS THE PRESENCE OF POLICE OFFICERS, OR SCHOOL RESOURCE OFFICERS, GROW IN PUBLIC SCHOOLS, STUDENT CONTACT WITH THE JUSTICE SYSTEM INCREASES.

A. For students with disabilities, this is particularly true. The presence of a police officer on school campus increases the likelihood that children will be referred to law enforcement. In the state of Texas, youth with disabilities experienced more than twice as many arrests as their representation in the student body.[41] Not all officers are not trained to work with youth and those who do receive training, often receive minimal training.[42] Behaviors related to some disabilities may be seen by educators and police as intentional misbehavior, rather than manifestations of a disability. When police officers are untrained in appropriate ways to respond to students with disabilities, the police officers frequently escalate situations that could be avoided the proper interventions. Even with proper training, officers are frequently not notified which students have disabilities and respond with improper tactics for de-escalation. Child find issues may also exacerbate the number of these youth who are arrested and ticketed in school.

B. In the state of Missouri, a statute was recently enacted that will enhance the criminal charges for school fights. This type of offense carries greater penalties, fines and can result in four years in prison. Attempts or threats to harm will be charged as class A misdemeanors with a maximum penalty of a year in prison. If law enforcement or school officials consider the assaulted person a "special victim," a student may be charged with a class D felony, which

[39] Application for Naturalization, Department of Homeland Security, USCIS, N-400 at 11.
[40] 8 CFR 316.12
[41] Dangerous Discipline, Texas Appleseed and Texans Care for Children, December 14, 2016. Available at http://stories.texasappleseed.org/dangerous-discipline.
[42] *Id.* Stating that only officers in school districts with more than 30,000 students are required to receive training.

carries a maximum prison sentence of seven years.[43] These types of punitive responses to school behavior may have dire immigration consequences for students with disabilities.

XII. HOW TO PREVENT IMMIGRATION CONSEQUENCES

A. First, know the immigration status of your clients from the beginning. If the child is not a United States citizen, advocacy to avoid receipt of citations, arrests and convictions is crucial.

1. Get a good behavior plan in place. Ensure that students with undesirable behaviors receive proper evaluation and support. This often requires requiring the district to bring in an outside behavioral specialist to conduct a functional behavioral assessment using good data collection and observations. At the IEP meeting, advocate for positive behavioral supports rather than calling the police or restraining the student, which can lead to assault charges when the student fights the restraint and hits a teacher or staff member.
2. Demand staff training, including school resource officers, aides and administrators. A good behavior plan is worthless if staff is not trained and equipped to implement it. Demand that SROs are trained in de-escalation techniques.
3. Consider intra-district transfers or private placements.
    a. Often conflicts arise between campus administrators, particular staff, including SROs and parents or students with disabilities on that campus. When teachers and staff dislike a student they may voluntarily (or involuntarily) trigger negative behaviors that result in citations or arrests. Sometimes a change of campus and staff working with the student results in fewer problematic behaviors.
    b. Private placements that specialize in education students with emotional and behavioral disabilities may be less likely to file assault charges or involve law enforcement.

B. If your client becomes involved with law enforcement or juvenile justice, there are steps you can take to minimize the impact of this involvement on the student's immigration status.

1. Provide technical assistance and support to the student's criminal defense attorney or juvenile public defender. Often juvenile criminal defense attorneys are uneducated regarding disability related behaviors and immigration consequences of probation orders and plea bargains. It is essential that the information regarding the student's disabilities is relayed to the judge. It is also essential that the court understand how the student's disabilities manifest themselves at school and the ways in which the school district has failed to provide appropriate behavioral supports to the student.

[43] Missouri Dooms Countless Children to the School-to-Prison Pipeline, Carimah Townes, December 21, 2016, accessed December 22, 2016. Available at https://thinkprogress.org/missouri-school-felonies-d840e8ec7242#.s0w3t6ygi.

2. Review any probation orders and advocate with the student's defense attorney to remove any language relating to school based behaviors. For example, probation orders often state that the student may not receive any further disciplinary referrals at school. If the student has difficulty regulating behaviors, this is a provision that is almost guaranteed to be violated resulting in detention of the student.
3. Attend juvenile court hearings with the student to provide information to the prosecuting attorney and court regarding the student's disabilities. If the student is juvenile court involved due to school based behaviors, advocate for dismissal of the charges based on failure to provide appropriate behavioral supports or failure to follow a behavior plan.
    a. While it is rare for a criminal defense attorney to take a case to a jury trial, in some instances, such as where there is clear provocation by and failure on the part of the district, an acquittal may be won.
4. As noted above, a finding of lack of competence may serve as a bar to citizenship. Be aware of this before advocating for competency evaluation.

XIII. CONCLUSION.

Police presence on public school campuses has continued to increase over the years. When police presence increases, so too does the likelihood that children will be referred to the criminal or juvenile justice system. For children with disabilities, this likelihood is elevated. Without appropriate behavior supports, positive interventions, and proper staff and police training, a child with disabilities is more likely to be penalized in both the criminal justice system and in the education setting. For immigrant children with disabilities, the consequences of this overly punitive system is dire and permanent. As the education system becomes more entangled in the criminal justice system, it becomes exceedingly important that education attorneys and advocates become aware of the potential immigration consequences of education decisions. It is imperative that we proactively advocate for services, supports, and training that will prevent children from being unjustly penalized for behavior related to their disabilities. Together, in coalition with criminal, juvenile, and immigration attorneys, we can work to help immigrant children access better educational opportunities and avoid negative immigration consequences of disability related behaviors.