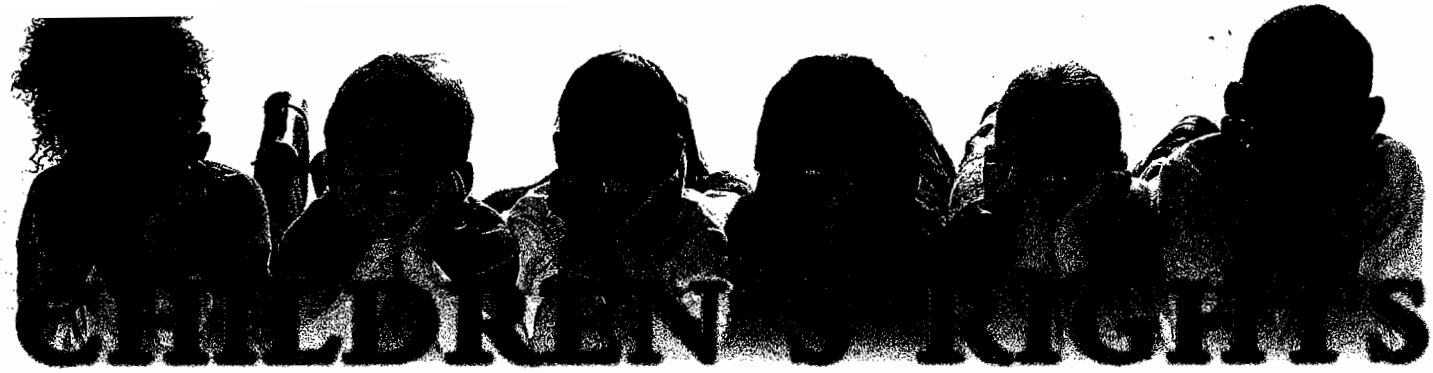

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DISCIPLINE OF STUDENTS IN SPECIAL EDUCATION: PART II

by Linda Boyd

In my previous article on the reauthorized Individuals with Disabilities Education Improvement Act, or IDEA 2004, presented in the fall 2005 newsletter, I touched briefly on the major changes in the protections provided to students with disabilities who face disciplinary action at school. The changes to these protections cause more concern in preserving the educational rights of children with disabilities than any other. In this section of the law, school personnel appear to be given more unilateral authority to change a student's placement without the parent's permission under certain circumstances. Unfortunately, some attorneys who practice this area of law are already seeing some negative effects on students with disabilities because of these changes. First, I will review and clarify the previous information provided regarding the "stay put" rule and then provide more detail on the other issues of concern.

Stay Put

In the previous article, I touched on the changes to the "stay put" rule as it applied to a student's violation of the code of student conduct. Under the basic "stay put" rule, a student with a disability is allowed to "stay put" in his or her current classroom placement pending the results of a due process hearing, unless parents and school officials agree to a change of placement (20 U.S.C. § 1415(j)). To clarify, the basic "stay put" rule has not changed as it applies to a student's special education placement pending a generic due process hearing.[1] However, under IDEA 2004, the local educational agency ("LEA"; another term for "school district") now has the authority to consider, on a case-by-case basis, any unique circumstances when determining if the child's placement

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Applying Disability Rights to Equalize Treatment for People with Disabilities in the Delinquency and Criminal Systems by Joseph B. Tulman

In delinquency and criminal cases, the prohibition against disability discrimination – including the right to reasonable accommodations for people with disabilities -- has remarkable untapped potential. A defense attorney, therefore, might find substantial success in pursuing clients' disability rights protections within the delinquency or criminal context.

This article will present three categories of questions for the defense attorney to consider in order to assert the rights of persons with disabilities who face prosecution and incarceration.[1] The first category concerns the discriminatory processing of people with disabilities and their concomitant rights to accommodations in criminal and delinquency proceedings. The second category concerns discriminatory prosecution and incarceration of

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people with disabilities. The third category concerns the rights of people with disabilities to equal access, with reasonable accommodations, to programs, services, and activities within the criminal and delinquency systems. For each category of questions, one must consider what changes and, in particular, what accommodations are required.

For each of these categories, the Americans with Disabilities Act (ADA) and United States Supreme Court cases interpreting the ADA provide a reasonable and useful basis for asserting the rights of the accused or convicted person who has a disability. This article invites the defense attorney to participate in developing these approaches and to use them routinely in representing persons with disabilities in delinquency and criminal cases. The article begins with an overview of relevant Supreme Court cases and then applies the principles outlined in those cases to the three categories identified above. In each of those categories, this article will identify arguments that are based on those principles that can be asserted on behalf of defendants with disabilities.

The Americans with Disabilities Act as a Basis for Reviewing and Reforming the Treatment of People with Disabilities in the Delinquency and Criminal Systems

Through the process of passing the ADA, Congress found pervasive evidence that people with disabilities have been subjected to isolation and discriminatory institutionalization, and that they have been excluded from public programs, services, and activities.[2] Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[3] Title II forbids discrimination against "qualified"[4] individuals with disabilities in the provision or operation of public services, programs, and activities.[5]

The United States Supreme Court unanimously found in *Pennsylvania Department of Corrections v. Yeskey*[6] that state prisons are "public entities" under Title II of the ADA[7] and that programs, services, and activities within prisons are, likewise, covered by Title II.[8] Thus, the ADA protects state prisoners (and, by obvious extension, county or other local detainees) against disability discrimination and requires reasonable accommodations in regard to participation in programs, services, and activities.[9] Yeskey was a state prisoner excluded from a Motivational Boot Camp program due to his hypertension.[10] By entering and successfully completing the program, Yeskey would have reduced his sentence by twelve to thirty months.[11]

In *Tennessee v. Lane*,[12] the United States Supreme Court held that Congress was authorized under §5 of the Fourteenth Amendment to legislate (through Title II of the ADA) protections for people with disabilities that would guarantee equal access to state and local courts.[13] Moreover, as to protections of rights that implicate both the rational basis test for equal protection of a non-suspect class (i.e., people with disabilities) as well as the heightened scrutiny reserved for consideration of fundamental rights (i.e., the Due Process right of access to courts and the Sixth Amendment – through the Fourteenth Amendment -- confrontation right), the Court affirmed the power of Congress to provide prophylactic measures that cut a broader swath and proscribe facially constitutional conduct in order to protect those fundamental rights.[14] Lane, a person with paraplegia who uses a wheelchair, was a criminal defendant. His trial was in an inaccessible courthouse, and he refused to crawl, or to be carried, up stairs to attend his trial.[15] The Court endorsed the power of Congress to abrogate state sovereign immunity in this context and to authorize aggrieved individuals to sue for injunctive relief as well as damages.[16]

In *Olmstead v. L.C.*,[17] the Supreme Court determined, with a "qualified 'yes'", that the ADA's "proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions."[18] L.C. and E.W. are mentally retarded and have serious mental health diagnoses, as well.[19] Each was institutionalized and sought a community-based placement. State medical professionals concluded that community-based placement was appropriate for both women, but placements were not available.[20] Relying on Congressional findings of historical and persistent segregation and isolation of people with disabilities and discrimination in, *inter alia*, the use of institutionalization,[21] the Court found that Congress defined segregation and unnecessary institutionalization of people with disabilities as illegal discrimination.[22] The Court also recognized that the ADA

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requires public entities to "make reasonable modifications" to avoid "discrimination on the basis of disability," unless those modifications would entail a "fundamenta[l] alter[ation]".[23] On that basis, the Court remanded the matter to the lower courts for a further examination of the state's fundamental alteration defense.[24]

Discriminatory Processing of People with Disabilities: *Do you have clients with disabilities who are being processed in the criminal or delinquency system in a discriminatory manner?*

Nothing in the rationale of *Tennessee v. Lane* suggests that holding should be limited in subsequent cases to the literal question of getting into the courtroom. On the contrary, a common sense reading of both the relevant provisions of the ADA and *Tennessee v. Lane* would suggest that a person who has a disability that affects *equal participation* in a court proceeding has the right not to be excluded from those public services or activities and, indeed, to have reasonable accommodations to ensure that equal participation.[25] Indeed, the *Lane* decision instructs that states must be prepared to incur significant expenses in order to accommodate persons with disabilities.[26]

> If...the disproportionate prosecution and incarceration are a result of an effort – conscious or otherwise – by school officials or prosecutors to exclude children with disabilities from school, these actions arguably would be illegal under the ADA

Many people in the criminal and delinquency systems who are not incompetent under the *Dusky*[27] standard nevertheless have disabilities that significantly affect a major life function.[28] Consider, for example, a person who is mildly mentally retarded and who also has severe deficiencies in expressive and receptive language skills.[29] Consider further the number of ways that this person -- in contrast with similarly-situated, non-disabled persons -- is at a disadvantage as the accused person in a criminal or delinquency case.[30]

In police custody, this client initially relates to the interrogating officer a version of the facts that is consistent with innocence. In reaction to questions and suggestions by police officers, however, the client adopts a version of the facts that is more consistent with guilt. The defense attorney should recognize the possibility that police interrogators have taken advantage of the accused person's malleability, a function of the mild mental retardation and the speech-language disability.[31] An expert witness for the defense could explain to the court as part of a pre-trial motion to suppress the statements or to the trier of fact at trial that the accused person's altered statements are a product of police interrogators' manipulating the accused person and, in essence, taking advantage of the person's disabilities. In addition, those altered statements may not be reliable. Thus, the defense attorney could argue effectively that the use of the statements by the prosecution violates not only the Fifth Amendment,[32] *Miranda*,[33] and the law of evidence,[34] but also that the Americans with Disabilities Act.

When are the police, therefore, on notice of a legal obligation to provide reasonable accommodations to suspects who have disabilities? When are police prohibited from interrogating a person with disabilities who is in custody, or prohibited from pushing that person into altering a statement? In *Colorado v. Connelly*,[35] a decision that preceded the passage of the ADA, the suspect was suffering from chronic schizophrenia and his confession to murder was a result of command hallucinations.[36] The police officer, as a result of initial inquiries, knew that the suspect had been a patient in mental hospitals.[37] Writing for the majority, Chief Justice Rehnquist found that the statements and the *Miranda* waiver were voluntary because "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause...."[38] Remarkably, the majority endorsed Connelly's counsel's conclusion "that as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the "voluntariness" calculus."[39] The Court added, however, that "this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional "voluntariness."[40] Through the ADA, Congress has recognized the historical discrimination that has re-

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sulted in segregation and unnecessary institutionalization of people with disabilities. Congress, furthermore, has required accommodations in the manner in which public entities conduct their practices and activities. Arguably, therefore, the ADA's prophylactic reach should require officers to be aware of a suspect's disability and to accommodate – perhaps by refusing to interrogate even when a person with a disability is apparently "willing" to waive the right to remain silent.

In *Moran v. Burbine*,[41] a defense attorney, engaged by the accused's sister, contacted the police and obtained assurances from them that they would not question the accused until the next day. Nevertheless, police[42] obtained *Miranda* waivers and confessions from Burbine that evening.[43] The majority reasoned that "[o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law."[44] What, though, if a suspect in Burbine's position was a person with a disability and the attorney called to inform the police of the client's disability and to request, on behalf of the client, an accommodation (*viz.*, a request to forego interrogation until the attorney is allowed to speak with the client)? Would the ADA provide for a different outcome than the ruling in *Moran v. Burbine*?

Defense attorneys quite commonly keep marginally competent and verbally low-performing defendants off the witness stand both[45] as a recognition of the possibility of impeachment with statements made to the police[46] and because the defense attorneys assess the likelihood that the accused person will be an effective witness as very low. In either instance, the failure to testify is a result of the failure by the defense attorney to recognize and understand the client's disabilities. In such circumstances, the defense attorney should consider asking for an accommodation to facilitate the accused person in testifying.

Accommodations for a defendant who is testifying might include evidence from an expert to inform the trier of fact as to the nature and extent of the disabilities, as well as to the possible manifestations of the disabilities. These manifestations might include that the witness might be easily swayed by an interrogator (both the police following arrest and the prosecutor on cross-examination), and that the witness could have difficulty providing the facts in a chronologically or otherwise consistent manner. The court might require that the witness reformulate and restate each cross-examination question prior to answering. If the witness is not able to reformulate and restate the questions, then the court would have to find a more effective method for accommodating. An alternative could be to require the prosecutor to submit cross-examination questions in advance to the court so that the court could get an expert to "translate" the questions into language that the accused person would be able to comprehend. A court also may need to appoint a guardian *ad litem* to assist the defendant in understanding the proceedings and the testimony of witnesses. That accommodation may also require breaks throughout the proceedings to allow the guardian *ad litem* sufficient time to confer with the defendant. In addition, if the prosecutor's evidence includes testimony regarding a statement or conversation that the defendant allegedly heard that would allow the inference of the defendant's guilty knowledge of the crime, the defense attorney might consider calling an expert witness to explain to the jury (or judge, as a trier of fact) that the defendant's low receptive language ability likely precludes such an understanding and inference.[47]

Discriminatory Prosecution and Incarceration: *Do you have clients who are being prosecuted and incarcerated unnecessarily and in a discriminatory manner based upon their disabilities?*

People with disabilities are disproportionately represented in juvenile and adult jails and prisons. They also serve longer sentences than their non-disabled peers. In addition, students with disabilities (who are entitled by law to greater protection from school exclusion based upon special education protections[48]) are more frequently suspended and expelled than non-disabled students and more frequently charged with delinquency offenses based upon incidents that occur at school. If these disparities are a function of disproportionately worse conduct by children with disabilities (and if the children with disabilities are receiving appropriate services and accommodations in school and elsewhere), then the disparate impact might not offend the ADA.[49] If, on the other hand, the disproportionate prosecution and incarceration are a result of an effort – conscious or

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otherwise – by school officials or prosecutors to exclude children with disabilities from school, these actions arguably would be illegal under the ADA.[50]

Defense attorneys, similarly, should look for evidence -- in individual cases or in groups of cases – that probation officers or prosecutors are failing to divert the delinquency cases of children with disabilities and that diversion programs are not set up to provide appropriate accommodations for children with cognitive, communicative, or physical disabilities. Decisions by prosecutors to waive children from delinquency court into adult criminal court and decisions by judges to transfer children into criminal court, likewise should be subjected to scrutiny based upon the possibility of disability discrimination. The waiver and transfer decisions are particularly troubling in situations in which other government agency personnel failed to provide disability-related services or to accommodate services available in theory to all children and the waiver or transfer standard requires a finding that the child is "not amenable to treatment." The government should be prohibited from advancing such a conclusion if the government, through other agencies, failed to provide treatment to which the child was entitled.

Defense attorneys must be prepared to challenge the discriminatory actions of officials and administrators who fail to provide accommodations for programs, services, and activities.

The delinquency system is supposed to provide "care and rehabilitation" or "treatment" to delinquent children. In many jurisdictions, the delinquency statute also requires treatment in the least restrictive environment. Under the precepts of *Olmstead* and other Supreme Court cases,[51] one might conclude that a *treatment* system that deprives a person of liberty is bound to provide treatment and to provide it in the least restrictive environment (unless to do so would require a fundamental alteration). Nevertheless, delinquency detention centers and commitment facilities are populated overwhelmingly by children with unmet mental health and special education needs. Indeed, one can even find systems in which children with medical conditions (e.g., asthma or diabetes) who otherwise qualify for halfway house placement are detained or incarcerated in secure facilities simply because those public facilities have an infirmary and the private entities that run the halfway houses are not required, and do not have, nursing care available. Such an incremental deprivation of liberty arguably constitutes a violation of the ADA.[52]

Another avenue for consideration is the possibility that certain criminal or delinquency charges may be discriminatory *ab initio* or by operation of legal presumptions. For example, one might suggest that the government is estopped from leveling a "failure-to-appear" (in court) charge against a person with disabilities for whom court personnel failed to provide appropriate accommodations (e.g., clear instructions with appropriate reminders, or perhaps transportation, for a person with cognitive, communicative, and physical disabilities).

Right of Equal Access, with Reasonable Accommodations, to Programs, Services, and Activities: *Do you have clients who are being excluded from opportunities in the criminal or delinquency systems based upon their disabilities?*

Prison officials in Pennsylvania refused admission for Ronald Yeskey to the boot camp program because of Yeskey's disability. This case is instructive. Defense attorneys should be prepared to advocate affirmatively for those opportunities and, of course, for necessary accommodations. In addition, defense attorneys must be prepared to challenge the discriminatory actions of officials and administrators who fail to provide accommodations for programs, services, and activities.

Defense attorneys should ensure that intake probation officers individually assess accused persons for disabilities and the need for accommodations in consideration for, and admission to, alternatives to pre-trial detention. In the same vein, a defense attorney for a young person with education-related disabilities should insist that the intake probation officer investigate that youth's right to special education services. The attorney should ensure, as well, that the intake probation officer recognizes that specialized instruction, related services, and

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transition services through the special education system can vitiate the need for detention or, indeed, provide the kind of "care and rehabilitation" that should substitute altogether for intervention by delinquency court personnel.

In preparing for sentencing (or disposition, in a delinquency case), defense counsel should survey the range of community-based treatment options and determine what accommodations the particular client might require to gain admission to particular programs, services, and activities. Indeed, the probation officer charged with conducting a pre-sentence (or pre-disposition) investigation should be required to identify the defendant's disabilities and determine what accommodations are appropriate. If the jurisdiction has specialized sentencing categories (e.g., a hybrid "Youth Act" treatment for defendants who are over the age limit of the delinquency court but who are still amenable to rehabilitation), the defense attorney should ensure that the pre-sentence investigator considers appropriate accommodations. In addition, the defense attorney should ensure that the pre-sentence investigator and the judge recognize that school system personnel, vocational rehabilitation system personnel, Medicaid personnel, and others with duties to provide disability-related services to the client have failed to provide those services over a period of years. A refusal by the pre-sentence investigator or by the judge to provide opportunities for services would compound the historic discrimination and constitute, arguably, a violation of the ADA.

A major area for consideration is the need for accommodations for people with disabilities who are on probation.[53] Indeed, a significant percentage of incarcerated people are serving time due to violations of probation conditions (rather than the commission of a new offense). The client with mild mental retardation and expressive and receptive speech-language impairments (or other disabilities) might violate conditions of probation as a result of disability-based discrimination if not provided with appropriate accommodations (e.g., a probation officer who is specially-trained to communicate appropriately and to verify that the probationer truly understands the requirements). The defense attorney should submit formal, written requests for appropriate probation accommodations, citing the ADA. When judges refuse to order the accommodations, when probation officers refuse to provide the accommodations, or when prosecutors, probation officers, and judges converge to revoke the probation of a client for whom no accommodations were provided, the defense attorney should invoke the ADA.

Conclusion

The massive increase in incarceration in the United States over the past three and a half decades has been perpetrated primarily upon poor people of color, and most of those who wind up behind bars also are people with major mental health or other significant disabilities. A defense attorney who is representing clients with disabilities who are facing prosecution and incarceration has a potentially long list of disability rights challenges to evaluate and advance. ■

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[1] *See generally* Robert Silverstein, *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy,* 85 Iowa L.Rev. 1691, 1718-26 (2000) (discussion of equality of opportunity as a core policy of disability rights legislation). Equality of opportunity includes "individualization and interdisciplinary assessments; genuine, effective and meaningful opportunity -- accommodations, auxiliary aids and services, and program accessibility; genuine, effective, and meaningful treatment -- modifications of policies and procedures; and treatment in the most integrated setting." *Id.* at 1719 (capitalization and punctuation altered from the original).

[2] *See* 42 U.S.C. § 12101. *See also Tennessee v. Lane,* 541 U.S. 509, 516 (2004).

[3] 42 U.S.C. §12132. "Public entity" includes state and local governments and their agencies and instrumentalities. *Lane*, 541 U.S. at 517 (*citing* 42 U.S.C. §12131(1)). *See also Olmstead v. L.C.,* 527 U.S. 581, 590 (1999). The ADA also addresses discrimination in private accommodations and in public transportation. The focus of this article, however, is Title II discrimination by state and local courts, prosecutors, jails and prisons.

[4] "Persons with disabilities are 'qualified' if they, 'with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.' §12131(2)." *Lane,* 541 U.S. at 517.

[5] *Id.* at 516-17.

[6] *Pennsylvania Dept. of Corrections v. Yeskey,* 524 U.S. 206 (1998).

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[7]*Id.* at 208.
[8]*Id.* at 210.
[9]*See id.*
[10]*Id.* at 208.
[11]*Id.*
[12]541 U.S. 509 (2004).
[13]*See id.* at 530-31.
[14]*See id.* at 518 and 522.
[15]*Id.* at 513-14. Jones, another respondent in the Supreme Court case, is a court reporter who, like Lane, is paralyzed and uses a wheelchair. She was unable to gain access to county courthouses in Tennessee and, thus, was excluded from her work and from her right as a citizen to participate in the judicial process. *Id.* at 514.
[16]*Id.* at 530. In the recent case of *Goodman v. Georgia*, 126 S.Ct. 877 (2006), regarding allegations that prison administrators imposed horrendous conditions upon an inmate who used a wheelchair and who, *inter alia*, was confined to a cell that was too small for maneuvering the wheelchair, the Supreme Court unanimously held that Title II authorizes damages claims by individuals against states, explicitly overriding states' sovereign immunity under the Eleventh Amendment. *Id.* at 880-81. The Court, however, left open the question of whether Congressional authority to authorize damages for individuals suing public entities for disability discrimination is broader than the Constitutional minimum, as it were, afforded under the Fourteenth Amendment and the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 882. The state's Eleventh Amendment challenge did not, and would not, apply with regard to injunctive relief. *See id.* (Stevens, J. concurring).
[17]527 U.S. 581 (1999).
[18]*Id.* at 587.
[19]*See id.* at 593.
[20]*Id. See also id.* at 602 ("the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program").
[21]*Id.* at 588.
[22]*Id.* at 597 ("Unjustified isolation, we hold, is properly regarded as discrimination based on disability."). The majority also found that discrimination under the ADA "by reason of disability" includes unnecessary institutionalization and found also that the lack of an identified comparison class of similarly-situated, but preferentially-treated individuals was inconsequential. *Id.* at 598 ("We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA"). *See also id.* at 600.
[23]*Id.* at 592. The Court also "emphasize[d] that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." *Id.* at 601-602.
[24]*Id.* at 597 ("In evaluating a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably.").
[25]*See, e.g., Tennessee v. Lane,* 541 U.S. at 532. "This duty to accommodate is perfectly consistent with the well-established due process principle that, 'within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard' in its courts." *Id.* (citation omitted).
[26]*Id.* "[O]rdinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. Judged against this backdrop, Title II's affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.' *Boerne,* 521 U.S. at 532, 117 S.Ct. 2157; *Kimel,* 528 U.S. at 86, 120 S.Ct. 631."
[27]*Dusky v. United States,* 362 U.S. 402 (1960); the test for competency of a criminal defendant is "'whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.'" *Id.*
[28]*See* 42 U.S.C. §12102(2) (ADA's definition of "disability").
[29]Participants in the criminal and delinquency system have previously recognized, as a matter of due process, the requirement, for example, to provide sign language interpreters for people who are deaf.
[30]The most recognized disadvantage is in the comprehension and waiver of *Miranda* rights. Most defense attorneys, however, do not recognize that their clients may have language-based disabilities and, accordingly, never examine academic records or engage an expert witness to examine whether the accused could understand *Miranda* warnings and, consequently, knowingly, intelligently, and voluntarily waive those rights.
[31]The defense attorney may not discover what transpired in a custodial interrogation of a person with mental retardation and a speech-language processing disorder because the client may not be able to interpret, retain, or relate the verbal give-and-take with the interrogating officer(s). An appropriate prophylactic accommodation or process alteration, therefore, may be a requirement that police uniformly videotape custodial interrogations.

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[32]The Fifth Amendment prohibits the use of unreliable and coerced statements. The admission into evidence of such statements would offend both the privilege against self-incrimination and due process. *E.g., Culombe v. Connecticut,* 367 U.S. 568, 581-84, 602 (1961).

[33]*Miranda v. Arizona,* 384 U.S. 436 (1966).

[34]The law of evidence prohibits the use of evidence for which the prejudicial impact outweighs its probativity. *See generally* FED. R. EVID. 403.

[35]479 U.S. 157 (1986).

[36]*See id.* at 161-62.

[37]*Id.* at 160. Initially, the trial court found that Connelly was not competent to stand trial. After six months of hospitalization and medication, Connelly became competent to stand trial. *See id.* at 161.

[38]*Id.* at 167.

[39]*Id.* at 164 (citation omitted). In addition, the majority wrote that "while mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry." *Id.* at 165.

[40]*Id.*

[41]475 U.S. 412 (1986).

[42]Police officers holding Burbine on a burglary allegation invited police officers from a neighboring jurisdiction to interrogate the suspect on allegations of murder. *See id.* at 416-18.

[43]*Id.* at 415.

[44]*Id.* at 422-23.

[45]Although technically the decision whether to testify is a decision for the defendant to make (*see, e.g., Alvord v. Wainwright,* 469 U.S. 956, 959 n.4 (*denial of cert.*, Marshall, J., dissenting)), a strong warning from defense counsel against testifying is often sufficient to dissuade the accused.

[46]If defense counsel has successfully suppressed the accused person's allegedly inculpatory statement based upon a *Miranda* violation (but not based upon a Fifth Amendment violation), then the defense attorney will counsel the accused person that the government can nevertheless use the suppressed statement for impeachment purposes if the accused person testifies at trial and that testimony is inconsistent with the suppressed statement. *See generally Harris v. New York,* 401 U.S. 222 (1971).

[47]In a case tried to a jury, defense counsel would also, of course, propose appropriate jury instructions.

[48]*See generally Honig v. Doe,* 484 U.S. 305 (1988).

[49]*See generally Alexander v. Choate,* 469 U.S. 287 (1985) (disparate impact on people with disabilities of Tennessee limitation on days of Medicaid reimbursement for hospitalization not discriminatory; greater need for hospitalization of people with disabilities is the determining factor).

[50]A school official cannot legitimately contend that introducing a child with disabilities to the delinquency system based upon an allegation of a minor infraction is a positive effort to obtain services for the child. *Cf. generally, Morgan v. Chris L.,* 927 F. Supp. 267 (E.D. Tenn. 1994), *aff'd* 106 F.3d 401 (6th Cir.) (unpublished opinion), *cert. denied,* 520 U.S. 1271 (1997) (court upholds special education hearing officer's determination that school personnel who neglected student's special education needs should withdraw delinquency petition concerning child's allegedly delinquent behavior in school).

[51]*See generally, e.g., Youngberg v. Romeo,* 457 U.S. 307 (1982).

[52]*See, e.g., United States v. Georgia,* 126 S.Ct. at 883 (Stevens, J., concurring) *citing* The Americans with Disabilities Act, 101st Cong., 2d Sess., p. 1331 (Comm. Print 1990) reporting that persons with hearing impairments were detained over night without knowing their rights or the possible charges against them; police locked a man with AIDS in his car over night rather than putting him in jail; and *citing* California Dept. of Justice, Attorney General's Commission on Disability: Final Report 103 (Dec.1989) finding that inmates with disabilities were unnecessarily confined to medical units without access to work and to various programs.

[53]The same principles apply, of course, regarding reasonable accommodations for parolees. In addition, denying parole based upon a person's status as positive for HIV would violate the ADA.