

# **SPECIAL EDUCATION ADVOCACY**

Under the Individuals  
with Disabilities  
Education Act (IDEA)

For Children in the Juvenile Delinquency  
System

*Edited by*

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*Produced by*

**The University of the District  
of Columbia School of Law  
Juvenile Law Clinic**

*Sponsored by*

**The Annie E. Casey Foundation  
Juvenile Detention  
Alternatives Initiatives**

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**SPECIAL EDUCATION ADVOCACY  
UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)  
FOR CHILDREN IN THE JUVENILE DELINQUENCY SYSTEM**

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**SYMPOSIUM: THE UNNECESSARY DETENTION OF CHILDREN IN THE DISTRICT OF COLUMBIA,**  
produced by the District of Columbia Law Review,  
(with articles applicable to delinquency detention in any U.S. jurisdiction).

# Acknowledgments

**T**his manual is a product of the vision and financial support of people at the Annie E. Casey Foundation through its Juvenile Detention Alternatives Initiative. Many thanks to Bart Lubow and Maurice Moore of the Annie E. Casey Foundation for their patience, support, and guidance through the process of our producing this manual. We have received additional financial support for editing and formatting the manual from Tracey Hughes and David Stern and from the *Jerry M. Fund*.

Mary Hynes, a colleague on the faculty of the Juvenile Law Clinic and my principle co-author in this project, wrote much of the text presents and elucidates special education law. An expert in both special education law and child welfare (neglect) law, Mary spends much of her time using special education law on behalf of children and families, including foster parents, who are involved in the child welfare system.

Joyce McGee entered the Juvenile Law Clinic in the Spring of 1997; soon thereafter, in addition to becoming the Editor-in-Chief of the *University of the District of Columbia Law Review*, she became my co-editor of this manual. Displaying an uncanny ability to mince words, turn phrases, and punctuate sentences, she weeded through these pages. Her more profound contribution, however, was turning "dry legal scholarship" into an entertainingly-formatted publication. Joyce knows how to use publishing software. Thank goodness!

Eileen Ordover and Kathleen Boundy of the Center for Law and Education also

joined this project in 1997 in order (1) to include in the manual information from and references to the 1997 amendments to the IDEA, (2) to provide a core version of the chapter on discipline, delinquency, and disability, and (3) to apply their unique expertise in education law to ensure that the presentation of the law in this manual is accurate.

Susan E. Sutler ("Suji"), a colleague on the faculty of the Juvenile Law Clinic, was the principal author of Chapter Nine: The Special Education Process: Individualized Education Program (IEP). Through the decade of the 1990's, Suji has worked with law students in the clinic as she helped to develop strategies for applying special education law and practice to advance the cause of children in the delinquency system and to champion, as well, the interests of the parents of those children.

Milton C. Lee, Jr. ("Tony"), a former colleague on the faculty of the Juvenile Law Clinic, co-authored Chapter Two: Strategies for Using Special Education Law to Improve the Outcome of an Individual Delinquency Case. Tony brought to our clinic unparalleled zeal and irrepressible humor. The consummate public defender, Tony is now "neutralized" as a hearing commissioner on the bench of the District of Columbia Superior Court.

Numerous people have provided assistance in this project, helping us to understand, formulate, and frame the issues, arguments, assertions, and insights that appear in the manual. Particularly, we extend our thanks to Loren Warboys, Susan

# Acknowledgments

Burrell, and Marc Schindler of the Youth Law Center; Glenn Young of the National Institute For Literary; and Dean Rivkin of the University of Tennessee School of Law. We apologize for not including the names of all of the other people who have contributed. For inaccuracies and other blunders, we accept the responsibility, and we encourage readers of this manual to contact us with corrections and suggestions.

For their support as co-conspirators, collaborators, and confidantes, my thanks go to Mark Soler of the Youth Law Center, Pattie Puritz and Wendy Shang of the American Bar Association Juvenile Justice Center, Vinny Schiraldi of the Justice Policy Institute, Ellen Wayne and Leila Peterson of the Institute for Conflict Analysis and Resolution, and, of course, scores and scores of law students who labored in the Juvenile Law Clinic during the last twenty semesters in which we have experimented with using special education to advocate on behalf of the children in the District of Columbia delinquency system.

For continuing support of our work in the Juvenile Law Clinic, including support for our advocacy on behalf of children with education-related disabilities who are in the child welfare system, we thank The Eugene and Agnes E. Meyer Foundation. We have also received support for our special education/delinquency advocacy work from The Public Welfare Foundation, The Legal Services Corporation, and The Freddie Mac Foundation. For our work to reduce detention rates in the District of Columbia – specifically, to support the organizing, writing, editing, convening, and printing of the symposium “The Unnecessary Detention

of Children in the District of Columbia”, we received support from The Robert F. Kennedy Memorial Foundation and from the Annie E. Casey Foundation.

– **Joe Tulman**

# Introduction

**T**he intended audience for this manual is defense attorneys who represent children in delinquency matters and in status offenses; the intended audience includes also disability rights attorneys and other public interest attorneys with an interest in representing children who are enmeshed in the delinquency system.

Children strive to be productive and to be accepted. Children who are marginalized and considered to be delinquent are, in large proportions, also children with education-related disabilities. Typically, children in the delinquency system "failed" in the education system before entering the delinquency system.

Adults responsible for delinquency systems and educational systems across the country have an opportunity to help make those marginalized, delinquent children productive and accepted.

The advocacy described in this manual revolves around the Individuals with Disabilities Education Act (IDEA), a federal law incorporated into state law in all fifty states and in the District of Columbia. (Other laws are relevant to the enforcement of educational rights for children with disabilities, notably -- in the federal law -- section 504 of the Rehabilitation Act and the Americans with Disabilities Act. With only a few exceptions, however, the authors have not addressed or presented those laws in this manual.) The IDEA protects children with education-related disabilities, affording them a right to a free, appropriate public education. This central right under the IDEA

provides a path to productivity and to acceptance.

Advocates who read and use this manual can be catalysts or change agents who help move children from delinquency systems back into educational systems that, in turn, can lead those children to jobs and, when appropriate, to higher education. This manual is a "how-to" presentation for that effort. Moreover, the IDEA furnishes a financial incentive for advocates to use special education law on behalf of children in the delinquency system: the IDEA provides for attorneys' fees at market rate for those who prevail in asserting special education rights.

Having prepared this manual under the auspices of the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI), the authors focused particularly on case precedent from the Second, Seventh, and Ninth Circuits -- circuits with JDAI sites. Lawyers who use this manual should search, whenever appropriate, for additional binding and persuasive authority.

Faculty and law students in the Juvenile Law Clinic of the D.C. School of Law have been using special education advocacy under the IDEA for the majority of the clinic's delinquency clients since 1990. This manual reflects the experience of those clinicians. The authors present case examples, strategies, and theories with the expectation that they will be useful to advocates throughout the country. At the same time, the authors acknowledge emphasizing some laws and practices peculiar to the District of Columbia, and they trust that this bias will not deter or distract the reader.

# Dedication

## MANUAL LABOR

*Dedicated: CHILD*

Enforcers, executives, and executioners exigently escort . . .  
(against essentially nonexistent resistance)  
. . . adolescents  
into jails and prisons,  
amidst reports that the juvenile courts  
lie dying at the age of one hundred.

Pundits, politicians, and professionals proudly produce . . .  
(while plundering the public's profits and progeny)  
. . . "predators"  
for the minds in manors,  
and the tycoons are reduced to buffoons,  
hands standing in the pens of iniquity.

Mothers, schoolmasters, and youth-managers mustn't misunderstand . . .  
(despite massive media imaginings, imagings)  
. . . minors  
shown on screens and bulk prints  
who, at the start, in the head and the heart,  
need teaching in the stead of constraining.

– JBT '98

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# Chapter One

The Best Defense is a Good Offense:

Using Special Education Advocacy for Delinquency Clients

*Written By*

**Joseph B. Tulman**

By using special education rights and remedies to augment competent delinquency representation, advocates for children can often prevent placements in juvenile incarceration facilities and unnecessary placements in residential treatment facilities.

Advocates seeking to improve outcomes for children in the delinquency system --and, specifically, to reduce detention rates -- should incorporate special education advocacy into their delinquency practice. The premise of this manual is that, by using special education rights and remedies to augment competent delinquency representation, advocates for children can often prevent placements in juvenile incarceration facilities and unnecessary placements in residential treatment facilities. Also, advocates can extricate children from juvenile prisons, detention centers, and restrictive mental health placements. Indeed, in some cases, strategic use of special education advocacy can result in dismissal of delinquency matters altogether.

### **I. The objectives: Getting children educated; getting children out of detention; getting children out of the delinquency system**

The objectives in using special education advocacy for delinquency clients are to obtain appropriate educational services, a lower incarceration rate, and a lower rate of continuing juvenile court jurisdiction. Advocates can use special education law on behalf of delinquency clients to address educational problems underlying delinquent conduct and, in so doing, can either attempt to extricate those clients from the delinquency jurisdiction of the court or influence the delinquency court to be less punitive toward the clients.

Fundamentally, special education advocacy is a means for delinquency clients to gain access to services that can substitute for or negate the perceived need for preventive detention and post-disposition incarceration. Under the federal law, adopted by every state, a child with a disability<sup>1</sup>

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<sup>1</sup> To qualify for special education services, the child must have a disability that substantially affects learning.

is entitled to educational services, as well as to “related services” and “transition services”. Related services can include group and individual counseling, speech and language therapy, transportation to educational services, and any other service that enables the child to benefit from the educational services. Transition services<sup>2</sup> assist a child in making the transition from school to post-secondary education, from school to work, and from dependency to independence. Related services and transition services are broad categories that allow the creative, pro-active advocate to help a client obtain meaningful services to augment individually-designed educational services. Taken together, these services can substitute for incarceration; an advocate often will be able to convince a judge that the services provide a safe and productive alternative to preventive detention or post-disposition incarceration.

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Fundamentally, special education advocacy is a means for delinquency clients to gain access to services that can substitute for or negate the perceived need for preventive detention and post-disposition incarceration.

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Obtaining special education services for a child with disabilities involves requesting an evaluation of the child from the school or school system.<sup>3</sup> If the child is eligible for services (*i.e.*, if the child has a disability that substantially

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<sup>2</sup> Transition services are required for children with disabilities who are fourteen years old or older.

<sup>3</sup> Following the initial evaluation, the evaluation process must occur at least once every three years; the parent can request evaluations more frequently.

affects the ability to learn at a normal rate), then the school personnel must meet with the parent, the child (if the parent and child want the child to participate), the evaluators, and a teacher (or someone from the school familiar with the child's school work) to develop an Individualized Educational Program (IEP) of appropriate services.<sup>4</sup> School personnel then must provide a notice of educational placement, proposing a school program that can implement the IEP.

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Remarkably, availability of services or financial considerations are not legitimate excuses for a school system's failure to provide services; the law simply requires the school system to provide appropriate service as outlined in the IEP

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On behalf of the child – through a representative (including an attorney) or *pro se* – the parent is entitled to challenge any aspect of the evaluation, eligibility determination, IEP development, and educational placement on procedural grounds. For example, the parent may contend that the evaluation was improper or that additional or independent evaluations are needed. The parent may challenge the objectives outlined in the IEP or advocate for additional related services. Similarly, the parent may contest the school placement proposed for the child by school system personnel.

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<sup>4</sup> “Appropriateness” is the operative standard. A school system is not required to provide a child with optimal services or to maximize the child's potential; rather, the school system is required to provide appropriate educational and related services that allow the child to make progress from year to year toward graduation.

The Individualized Education Program (IEP) process takes place at least once each year, and the parent can request more frequent reviews and modifications of the IEP (if, for example, the parent perceives that the goals and objectives in the IEP are inappropriate).

Determining what the child needs is an individualized process: addressing the particular needs of the particular child. Remarkably, availability of services or financial considerations are not legitimate excuses for a school system's failure to provide services; the law simply requires the school system to provide appropriate services as outlined in an IEP. If the school system fails to provide appropriate services, the parent can obtain private services and force the school system to pay.

The role of the parent in the special education process provides a remarkable contrast with the role of the parent in the delinquency system. Typically, in the delinquency system, the parent has no formal role. Moreover, based upon a feeling that the child's delinquency involvement reflects badly on the parent, the parent may blame the child for the misconduct and inform probation officers, judges, and even prosecutors that the child needs punitive treatment. Often parents who are desperately seeking services for a troubled child rely on the delinquency system without realizing that the delinquency system is rarely constructive and without realizing that the educational system has services. The special education system is based on a model of collaboration between the parent, expert evaluators, and educators. Rather than relying on a judge to order a delinquency placement or probationary conditions, the parent can work with school personnel – including psychologists and teachers – to design an individualized program for the child.

Special education advocacy turns delinquency defendants into special education plaintiffs. Rather than relying exclusively on delinquency defense strategies (e.g., suppression of evidence, affirmative defenses), lawyers can develop alternative solutions and strategies through the special education system. The advocate's challenge is to learn and integrate delinquency law and practice with special education law and practice. Knowing both

areas of law, the advocate can formulate legal theories that would not otherwise be available. For example, an advocate defending a truancy case can challenge the delinquency court's jurisdiction based upon an alleged failure of the school system to exhaust administrative remedies regarding the child's special educational needs. With access to two separate avenues for litigation (the delinquency court and the special education administrative hearing process), the advocate can develop and implement a wide range of problem-solving strategies that would not otherwise be possible. For example, the advocate can obtain evaluations of the child through the special

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education process and, if beneficial, use those evaluations in a challenge to a *Miranda* waiver.

In some jurisdictions, statutory or contract provisions appear to limit public defenders to traditional criminal and delinquency defense work. Even in jurisdictions without such limitations, defense attorneys nonetheless may perceive – given the crush of casework – that it would be difficult, if not impossible, to devote time to learning special education law and to advocating for clients regarding those additional matters. However, because special education advocacy can significantly benefit delinquency clients, defense attorneys who cannot themselves incorporate special education practice should team up with other attorneys who can provide special education representation for delinquency clients.

Special education litigants who prevail are entitled by statute to attorneys' fees at market

rate; hence, defense attorneys seeking to expand resources for representing indigent delinquency clients may find that special education representation actually eases the financial constraints surrounding delinquency representation. Defense attorneys who opt for teaming with special education attorneys likely will be able to locate special education attorneys willing to take the cases based upon the prospects of recovering attorneys' fees. Public defenders seeking to team with outside special education attorneys may think about the following five, somewhat imprecise, categories: (1) attorneys in private practice who already specialize in special education representation, (2) attorneys who specialize in special education representation specifically or disability law generally who work in non-profit, public interest organizations (including protection and advocacy centers), (3) attorneys – sometimes referred to as “panel attorneys” – who accept court appointments in delinquency cases who are willing to learn special education law, (4) pro bono attorneys, typically from larger firms, who want to help indigent children and who are willing to learn special education law, and (5) attorneys and law students from law school disability rights or juvenile law clinics.

In most cities, towns, and rural areas, public defenders and other delinquency attorneys likely will have difficulty initially finding attorneys who know special education law and who are willing to represent delinquency-involved, indigent children and their families. Yet, in light of the availability of attorneys' fees – as noted above – advocates for children enmeshed in the delinquency system should be able to expeditiously train and organize a cadre of attorneys who are willing and able to provide special education representation for this constituency. (This manual is intended to facilitate precisely that process of training and organizing.)

## II. The problem: Incarcerating<sup>5</sup> children unnecessarily, particularly children with disabilities

American unnecessarily incarcerates children in large numbers. The problem is well-documented,<sup>6</sup> and the problem of over-incarceration is particularly acute in regard to minority and poor children, children who are neglected, and children with disabilities.

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Characteristics common to children with disabilities, such as difficulty in listening, thinking, and speaking, may lead a judge to misinterpret the behavior of a child with learning disabilities; the ultimate result could easily be the unnecessary detention of a child who is not dangerous and who does not pose a risk of flight

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Juvenile court judges detain high percentages of children who appear to be dangerous and who appear to present a risk of flight. Often, however, judges make detention determinations based upon misimpressions. Essentially, judges misinterpret characteristics associated with learning disabilities, emotional disturbance, or mental retardation. Characteristics common to children with disabilities, such as difficulty in listening, thinking, and speaking,<sup>7</sup> may lead a judge to

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<sup>5</sup>The term “incarceration” in this context refers to pre-trial and pre-disposition (i.e., pre-sentencing) confinement, as well as to post-disposition confinement.

<sup>6</sup>See, e.g., *Symposium: The Unnecessary Detention of Children in the District of Columbia*, 3 D.C.L. Rev. ix (1995).

<sup>7</sup>See, Leone et al. at n. 16, citing Thomas M Shea & Anne M. Bauer, *Learners with Disabilities* (1994). A child with a disability might present apparently illogical reasons for actions. See, *id.* At n.

misinterpret the behavior of a child with learning disabilities; the ultimate result could easily be the unnecessary detention of a child who is not dangerous and who does not pose a risk of flight. A mentally-retarded child who is having difficulty understanding the proceedings may appear to a judge to be irrational or offensively disinterested. Similarly, a judge may incorrectly presume dangerousness or flight risk when encountering an emotionally-disturbed child who appears hostile or defiant.<sup>8</sup>

Although the defense attorney may have little information about a client’s educational background at the time of the initial hearing, specific questioning of the child or the parent may indicate a disability. Being sensitive to honor confidentiality, protect privacy, and avoid stigmatization, the attorney can alert the court or the intake officer to the possible educational issues; further, the attorney should argue that the child will not receive appropriate educational services in the detention facility, adding to the child’s frustration.<sup>9</sup> Thus, the attorney often can defeat proposed detention that is based on illegal and inappropriate factors.

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17, citing Pencer J Salend, *Effective Mainstreaming: Creating Inclusive Classrooms* (1994).

<sup>8</sup>Although the focus of this text is the likelihood that judges will make misinformed detention determinations (based upon a misinterpretation of characteristics associated with disabilities), intake probation officers and juvenile prosecutors are prone to make the same errors in interpretation and judgment. Defense attorneys commonly fail to prevent or effectively challenge those misinterpretations and misjudgments and the resulting detention decisions.

<sup>9</sup>Juvenile court rules typically cite the emotional and mental condition of the child as a relevant factor in detaining a child “to protect the child.” All parties involved must differentiate between behavior that results from a disability and poses minimal or no threat, and behavior that more likely indicates dangerousness or risk of flight.



### A. The prevalence of special education needs among children in the delinquency system

Youths with disabling conditions are grossly overrepresented among those confined in juvenile detention and correction systems. Approximately seven percent of all public school students in the United States have been identified as having disabilities such as mental retardation, emotional disturbance, and learning disabilities.<sup>10</sup> Within the juvenile justice system, however, children and adolescents with disabilities are grossly overrepresented and are disproportionately detained and confined. Studies and meta-analysis of disabling conditions among incarcerated juveniles estimate the prevalence rate at twelve percent to seventy percent.<sup>11</sup>

Several theories explain the overrepresentation of youths with disabilities among incarcerated juveniles.<sup>12</sup> Examples include the school failure

theory,<sup>13</sup> the susceptibility theory,<sup>14</sup> the differential treatment theory,<sup>15</sup> and the metacognitive deficits hypothesis.<sup>16</sup> While the school failure, susceptibility, and metacognitive explanations suggest that learning and behavioral characteristics of certain youths directly or indirectly lead to delinquent behavior, the differential treatment thesis suggests that aspects of policing and judicial processing of youths at all stages of the juvenile justice system result in more punitive treatment of suspects and offenders who have disabilities. In attempting to explain this overrepresentation, researchers face a complex set of factors associated with delinquent behavior, variability in the classification and reporting of offenses, imponderables connected to judicial discretion, and problems with measuring disabilities. Hence the disability-delinquency link lacks empirically-established explanations.

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<sup>10</sup>See U. S. Department of Education, Sixteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act (1994).

<sup>11</sup>See generally Pamela Casey & Ingo Keilitz, *Estimating the Prevalence of Learning Disabled and Mentally Retarded Juvenile Offenders: A Meta-analysis*, in *Understanding Troubled and Troubling Youth* 82- 101 (Peter E. Leone ed., 1990); National Council for the Mentally III in the Criminal Justice System, *Responding to the Mental Health Needs of Youth in the Juvenile Justice System* (J.J. Cocozza ed., 1992); Donna M. Murphy, *The Prevalence of Handicapping Conditions Among Juvenile Delinquents*, 7 REMEDIAL & SPEC. EDUC. 7 (1986); and D.J. Morgan, *Prevalence and Types of Handicapping Conditions Found in Juvenile Correctional Institutions: A National Survey*, 13 J. OF SPEC. EDUC. 283 (1979).

<sup>12</sup>Leone et al., *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C.L. REv. 389, 390 and n.3-6 (1995).

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<sup>13</sup>See generally Charles A. Murray, *The Link Between Learning Disabilities and Juvenile Delinquency: Current Theory and Knowledge* (1976); Travis Hirschi, *Causes of Delinquency* (1969).

<sup>14</sup>See Murray, *supra* note 3.

<sup>15</sup>See generally Ingo Keilitz et al., *Learning Disabilities and Juvenile Delinquency*, in *CONTEMPORARY CRIMINOLOGY* 95 (L. D. Savitz & M. Johnson eds., 1981); Ingo Keilitz & Noel Dunivant, *The Relationship Between Learning Disability and Juvenile Delinquency: Current State of the Knowledge*, 7 REMEDIAL & SPEC. EDUC. 18 (1986).

<sup>16</sup>See generally K.A. Larson, *A Research Review and Alternative Hypothesis Explaining the Link Between Learning Disabilities and Juvenile Delinquency*, 21 J. OF LEARNING DISAB. 357 (1988).

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 Particularly under-examined  
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 against children with disabilities,  
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Particularly under-examined is the disproportionate use, against children with disabilities, of preventive detention. Preventive detention is, by definition, secure confinement prior to trial and disposition or prior to a probation or parole (after-care) revocation hearing. Similarly under-scrutinized is judges' securely confining children with disabilities at disposition in disproportionate numbers; defenders of the status quo justify this incarceration as treatment.

### **B. Failure to address educational needs of pre-delinquent & court-involved youth**

The overwhelming majority of children enmeshed in the delinquency system do not receive meaningful rehabilitation.<sup>17</sup> In the District of Columbia, for example, the government has failed consistently to generate educational programs, foster care placements, counseling and other services which would help to stem recidivism and alienation among court-involved youth. The District of Columbia does not provide local residential treatment options for emotionally disturbed children. Conditions at the juvenile incarceration facility are inhumane. Officials operating the facility do not adequately protect

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<sup>17</sup>Many children with cases in the delinquency system are not in need of care and rehabilitation and should be screened out of the system. *See generally*, Tulman, *The Role of the Probation Officer in Intake: Stories from Before, During, and After the Delinquency Initial Hearing*, 3 D.C. L. REV. 235 (1995). Other children could receive care and re-habilitation from agencies other than the court system and should be screened out of the delinquency system. *See*, note 2, *supra*

the children from physical and emotional harm. Failing to distinguish children who are neglected or home-less from children who are dangerous, judges incarcerate many young District of Columbia residents unnecessarily.<sup>18</sup>

Educational deficiencies are a cause of delinquency, but few preventative, educational programs exist that serve children in the delinquency system. The majority of children entering the delinquency court have undiagnosed and unattended special education needs, but typically no agency attached to the delinquency system routinely evaluates or even screens children for special education needs. Schooling comprises by far the largest part of a child's day, but the delinquency system usually fails to provide adequate schooling for incarcerated children. These systemic breaches are resistant to remediation.<sup>19</sup>

Federal, state, and local laws obligate government employees who work with children in the delinquency system to identify or "find" children who have disabilities that significantly affect ability to perform in school. This "child find" obligation applies, generally speaking, to

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<sup>18</sup>*See generally*, *Symposium: The Unnecessary Detention of Children in the District of Columbia*, 3 D.C.L.REV. ix (1995). Children in the delinquency system are disproportionately neglected children. *See*, Beyer, *Juvenile Detention to "Protect" Children for Neglect*, 3 D.C.L.REV. 373 (1995). Like educational disabilities, child neglect is a fundamental cause of delinquency. The development and dissemination of strategies for representing neglected children in the delinquency system is analogous to the special education advocacy process outlined in this manual. Advocates must develop strategies that will force judges, probation officers (and other social workers) and prosecutors in the delinquency system to recognize and to address child neglect.

<sup>19</sup>*See generally*, M. Beyer, N. Opalack, and P. Puritz, "Treating the Educational Problems of Delinquent & Neglected Children," (1988) (paper available from the ADA Juvenile Justice Center, Washington, D.C.)

all executive branch workers who are responsible for the care of children, not just to school personnel. Furthermore, executive branch personnel who work with children in juvenile institutions and in the community are obligated to obtain appropriate educational services for children with disabilities.

### III. Client service considerations: Whether and how to use special education advocacy for delinquency clients

Various considerations influence whether and how an attorney implements the strategy of advocating for a delinquency client's rights. A threshold consideration is the delinquency client's decision whether to pursue special education rights. An attorney representing a child in a delinquency matter cannot, consistent with professional ethics, pursue special education rights if the child does not want to pursue those rights. An attorney in a delinquency matter cannot – and should not – substitute the attorney's judgment for the child's. Often, the client in a delinquency matter has dropped out of school and resists re-entering school. Such resistance typically reflects an understandable desire to avoid renewed failure and frustration. The attorney should listen empathetically and, in light of the client's own perceptions of self-interest, counsel and advise the client. If such discussions do not convince the client to seek a psycho-educational evaluation and to pursue special education rights, the matter ends.

If the child decides to pursue educational rights, a secondary consideration arises; whether the delinquency attorney or another attorney assumes responsibility for the special education representation.<sup>20</sup> Either way, the attorney handling the

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<sup>20</sup>If another attorney represents the child's parent regarding special education rights, then the delinquency attorney will not be in a position to execute a special education strategy to influence the delinquency case independent of that other attorney. When a child whom University of the District of Columbia School of Law (UDCSL) clinical law

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special education matter must involve the child's parent in that advocacy.<sup>21</sup> Many of the special education rights, particularly the procedural rights, inure to the parent rather than to the child.<sup>22</sup>

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students and their supervisors represent in a delinquency case agrees to pursue special education rights, UDCSL clinicians typically represent both the child and the parent in the special education representation. University of the District of Columbia School of Law clinicians also often represent children and parents in pursuing special education in situations in which the child is already represented by another attorney in one or more delinquency cases.

<sup>21</sup>One might substitute the plural "parents" or the term "guardian"; for simplicity, the reference in this text will be to the "parent".

<sup>22</sup>*See, e.g.*, Individuals with Disabilities Education Act, 20 U.S.C. §1415(b)(I)(A) (parent's right to examine records), §1415 (b) (I) (C) (right to prior written notice of educational changes), and § 1415(b)(2) (right to hearing); *but cf generally, id.* § 1417 (c) (protection of rights and privacy of parents and students).

The regulations, similarly, focus primarily on rights of the parent. *See, e.g.*, 34 C.F.R. §300.500 (terms "consent", "evaluation", "personally identifiable" all defined with reference to the parent), §300.502 (parent's right to examine records), §§300.504 & 300.505 (right to notice and consent), §300.506 (right to hearing); *but see, id.* §300.344 (child's right, where appropriate, to participate in meetings) and §300.550 (least restrictive environment and needs of the child).

The IDEA provides for the appointment of a surrogate for a child whose legal custody has been transferred to the state. *Id.* §1415(b)(I)(B).

The child's attorney in a delinquency matter does not face an inherent conflict of interest in concurrently assuming representation of the parent in the special education system.<sup>23</sup> However, the attorney must advise the child and the parent of the potential conflicts that can arise between parent and child. The attorney must advise the parent and child of the limits of legal representation in the event that a conflict arises.<sup>24</sup> It is advisable for the attorney to ask the parent and the child to consider, and then execute, a retainer agreement detailing the limits of the representation and noting the attorney's intentions in the event that a conflict between the parent and the child were to arise.<sup>25</sup>

Having received permission in advance from the

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<sup>23</sup>Clinicians at UDCSL maintain confidentiality with the child regarding all aspects of the delinquency matter; they do not communicate with the child's parent regarding the facts and strategies of the delinquency matter. Theoretically, maintaining confidentiality with the child occurrences or transactions in the school setting (*e.g.*, a charge for allegedly assaulting someone in school); and excluding the parent would be even more difficult if the school-based delinquency allegation were to implicate the disability (*e.g.*, if the child charged with the school-based assault was seriously emotionally disturbed and assaultive behavior was for that child a manifestation of the disability).

<sup>24</sup>Conflicts will arise. For example, a parent may believe that the child's special educational needs dictate placement in a residential school, and the child may balk at the idea of living away from home.

<sup>25</sup>The attorney could execute a retainer agreement regarding special education representation with the parent alone (assuming, as discussed above, that the child had agreed initially). If the "child", however, is over eighteen, the child has a right to be a party to the special education matter and to contract for representation without the parent. Clinicians at UDCSL typically execute a special education retainer agreement with both the parent and the child. When the "child" is eighteen or over, UDCSL clinicians leave to that child the decision regarding whether the advocates should invite the parent to become involved in the special education matter.

parent and child, the attorney can help them resolve any disagreements that arise. In practice, the need often arises to mediate disagreements between parent and child clients in special education matters. If the attorney cannot successfully mediate a disagreement between the parent and the child regarding a significant matter, then the attorney might be required to withdraw as counsel in the special education matter.<sup>26</sup> The attorney ordinarily will succeed in helping the clients resolve disputes that may arise, and, accordingly, the attorney will rarely, if ever, encounter situations that require withdrawal.

Often, parent-child disputes are central to the problems that lead to the child's involvement in the delinquency system. Indeed, failure at school and conflict at home are characteristic elements of a serious delinquency case. Representing the child and the parent together, the attorney is well-positioned to work with them on school and family problems.<sup>27</sup> By helping to reveal and to resolve some parent-child disputes, the attorney is helping the clients learn to cooperate, to collaborate, and to address their own problems. Thus, resolving disagreements between the parent and child can be a critical step for the child educationally, as well as emotionally.

The attorney must remain sensitive to the clients' prerogatives, providing forthright and respectful counsel. For example, some clients would be inclined to choose a private, residential treatment center for emotionally disturbed

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<sup>26</sup>In such a conflict situation, an attorney who also represents the child in a delinquency case would have to review the ethics of remaining on the delinquency case.

<sup>27</sup>Family counseling, as well as individual counseling for the child, may be appropriate "related services" that the attorney helps to secure in the child's special education individualized education program (IEP).

children over incarceration.<sup>28</sup> Counsel should fully inform the client, however, of the likely outcomes of those respective placements. If the child's post-disposition placement in the juvenile prison is likely to be shorter in duration than placement in a residential treatment center, the attorney should advise the client of that likelihood. If the juvenile prison is closer to the child's home and more accessible for family visitation than the residential treatment center, then the attorney necessarily would want to point out that difference, as well. On the other hand, an attorney who has evidence that a residential treatment facility might indeed provide better therapeutic and educational services than a juvenile prison would share that evidence with the client and provide appropriate counsel and advice to the client. After informing a parent and a child regarding disparities in such things as "time served", distance from home, and available services, an attorney must respect the clients' informed decision.

Both the attorney and the clients should investigate and visit any special education schools (day program or residential) under consideration before making a placement decision. A school that "looks good on paper" may, in reality, be disorganized, punitive, or non-rigorous. School personnel may be insensitive to the client's needs and background. The staff and student body at many private schools, for example, may be majority white. An African-American or Latino client must consider whether such an environment is acceptable; indeed, attorneys and clients are likely to encounter school officials, teachers, and students who are racist and who stereotype delinquency clients.

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The special education placement process can be quite positive for a delinquency client and the parent. The attorney is inviting them to participate in designing an IEP and to "go shopping" for a school that fits the child's needs. People enmeshed in the delinquency system rarely have a sense of control. Exercising special education rights provides them with real choices of services and approaches.

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<sup>28</sup>Incarceration and placement in a "residential therapeutic center" both represent restrictive alternatives. The present discussion is not necessary an endorsement of placing children in such settings.

# Chapter Two

Strategies for Using Special Education Law to Improve  
the Outcome of an Individual Delinquency Case

Knowing and applying  
both delinquency law  
and special education law, a  
delinquency defense attorney  
can formulate and prove  
legal theories that would not  
otherwise be available.

*Written by*

Joseph B. Tulman

& Milton C. Lee, Jr.

Using special education advocacy turns delinquency defendants into special education plaintiffs. Knowing and applying both delinquency law and special education law, a delinquency defense attorney can formulate and prove legal theories that would not otherwise be possible. A defense attorney can utilize the special education process to help a client develop alternatives to incarceration that a judge will accept. Moreover, the special education process (through which the child participates in designing an Individualized Education Program (IEP)) can be empowering for the child.

In this chapter, six broad theories and strategies are developed for advocates who wish to utilize the special education process in conjunction with delinquency or status-offense cases. The six sections that follow are:

- (1) Using Special Education in Support of a Motion to Dismiss for Lack of Jurisdiction;
- (2) Using Special Education in Support of a Motion to Dismiss for Social Reasons;
- (3) Using Special Education During the Intake Process;
- (4) Using Special Education as a Justification for Keeping the Child in the Community;
- (5) Using Special Education Rights to Guide the Residential Placement Process for Delinquent Youth; and,
- (6) Using Special Education Evaluations to Demonstrate that a Child with a Disability Did Not or Could Not Comprehend Miranda Warnings

The practice of law is, by definition, a “practice” that evolves and changes. Hence, these broad theories and strategies are offered as instructive and illustrative, not as necessarily established or exclusive.

### **I. Using special education in support of a motion to dismiss for lack of jurisdiction**

Advocates for children, in many jurisdictions, must contend with prosecutors, school system representatives, or both, who initiate the filing

#### **A Sampling of Theories and Strategies Available to the Delinquency Defense Attorney**

**Truancy** - In a truancy case, an attorney can challenge the delinquency court’s jurisdiction based upon an alleged failure of the school system to exhaust administrative remedies regarding the child’s special education needs.

**Miranda** - An attorney can obtain evaluations of the child through the special education process and, if beneficial, use those evaluations to demonstrate that the child was not capable of waiving Miranda (*Miranda v. Arizona*, 384 U.S. 436 (1966)) rights knowingly and intelligently.

**Mens Rea** - An attorney can demonstrate through expert testimony that, notwithstanding appearances and people’s ordinary interpretations, a child with mental retardation or with a receptive and expressive language disorder was not interacting meaningfully or knowingly (i.e., was not acting with criminal intent) with a purported co-defendant in an alleged crime or delinquent act.

**Behavior Management Program** - For a child who is incarcerated and who is seriously emotionally disturbed, an attorney can develop, with the assistance of a clinical psychologist, a behavior management program within the IEP that prohibits the use of aversive techniques (e.g., corporal punishment, restraints, harsh language) and requires the use of positive reinforcement and rewards.

**Denial of FAPE** - In a special education hearing, an attorney can prove that the juvenile incarceration facility is not providing and cannot provide the delinquency client with a free appropriate public education; the attorney could use such a finding to argue that the delinquency court must order the client moved to a more appropriate place or released to the community.

**Collaboration** - An attorney might find that engaging personnel from an incarceration facility with regular requests and challenges – including record production, evaluations, IEP meetings and hearings – tends to make those personnel more receptive to a good-faith proposal from the attorney to place the child in a special education placement outside of the institution.

of charges alleging chronic or habitual truancy.<sup>1</sup> Another status offense, in some jurisdictions, is “ungovernability”, which is defined as “disobeying the lawful and reasonable commands of the parent or guardian.”<sup>2</sup>

The factual basis for charging a child with “ungovernability” could support, in some instances, a delinquency charge, as well. For example, a child who physically resists a parent – even a parent who uses corporal punishment – might be vulnerable to a charge of simple assault. A child with a disability, as defined in the Individuals with Disabilities Education Act (IDEA), may appear to be ungovernable when, in fact, the child is incapable – absent appropriate accommodations – of processing and understanding reasonable and lawful commands. Similarly, a child who is emotionally disturbed (as defined in the IDEA) may be “well behaved” or “manageable” if, as part of the child’s IEP, a proper behavior management program is in place. Hence, in such a case, an advocate may use special education law and facts to challenge the jurisdiction of the court, or, in the alternative, to mount a substantive defense to the minor delinquency or status offense charge. These approaches are available typically

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<sup>1</sup>These matters are regarded as “status offenses” because the offenses, by legal definition, are unique to children; an adult who acts in the proscribed manner would not, due to the status of “adulthood”, be subject to scrutiny or prosecution. Most state statutes designate these status offenses as “Persons In Need of Supervision (PINS)” or “Children In Need of Supervision (CHINS)” cases. Status offenses are generally viewed as non-criminal in nature. *See, e.g., In re B.L.B.*, 432 A.2d 722 (D.C. 1981); *District of Columbia v. B.J.R.*, 332 A.2d 58 (D.C. 1975).

<sup>2</sup>*E.g.*, D.C. Code Ann. § 16-2301(8). Running away (from home or school, etc.) may be classified as “ungovernable” behavior or may constitute a separate status offense category. Children also can be charged, in some jurisdictions, as status offenders, for possessing alcohol or cigarettes.

whether or not the child has been diagnosed previously as disabled.

### A. Status offense cases

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 A child with a disability, as defined in the Individuals with Disabilities Education Act (IDEA), may appear to be ungovernable when, in fact, the child is incapable— absent appropriate accommodations—of processing and understanding reasonable and lawful commands.  
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Some courts have dismissed status offenses and related, minor delinquency charges on jurisdictional grounds if, in essence, the school system had failed to fashion and implement an appropriate educational program for the child. In *In re Ruffel P.*, 582 N.Y.S.2d 631 (Fam. Ct. 1992), the principal of the child’s elementary school brought a “Persons In Need of Supervision” (PINS) actions based on an allegation of several acts of violent behavior during the school year. The eight-year-old was represented by a law guardian who sought dismissal of the action in the interest of justice and because the school district had failed to exhaust its administrative remedies in an effort to develop and secure an appropriate educational setting for the respondent.

The court, recognizing that it was without jurisdiction to review the decisions of the school district, nonetheless dismissed the petition in the interest of justice. In dismissing the case, the court concluded that

it is appropriate for the school district to attempt to fashion, from its many resources, a reasonable and appropriate environment for a child before commencing judicial proceedings. The



Court finds that it would be most unjust to adjudicate this young boy as a PINS and subject him to probable destructive placements until after the district has at least attempted, in good faith, to engage the problem.

*Id.* At 634

The court felt constrained to dismiss the action given the school system's admission that its only response to the problems presented by the child was nothing more than disciplinary measures. While the school district had elected not to classify the child as having an educational disability, the evidence produced at a hearing demonstrated that the child's emotional problems prevented him from controlling his behavior and, as such, interfered with his ability to learn.<sup>3</sup>

Because the parents were apparently able to handle the child at home, a reasonable response was for school personnel to arrange alternative educational services, including services at home, to benefit both the respondent and his parents. The court, in dismissing the action, recognized that the respondent might eventually be placed in a facility, but that such placement would be appropriate only in extraordinary circumstances and only after the school system made a good faith effort to solve the problem.

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<sup>3</sup>The Court declined to place the respondent on probation, as requested by the school district, because probation would be futile. As long as the school refuses to place [the respondent] in a setting where he can succeed behaviorally as well as academically, probation would place respondent in an untenable situation. It would only be a matter of time until respondent would be before this court on a violation petition which could precipitate placement.

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In some cases, children become "behavior problems" only after school personnel have ignored for years the children's learning disabilities.

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### B. Delinquency cases

In delinquency cases, courts have been more hesitant than in status offense cases to recognize relevant mandates of the IDEA in fashioning dispositions or sentences for children who have been identified as disabled under the IDEA. In *In re Christopher V.T.*, 22 IDELR 89 (Oct. 31, 1994), a child with an emotional disturbance pleaded guilty to assault. The child, through counsel, moved to "forego" the disposition hearing because the court was required to determine the least restrictive method of meeting the child's needs and because the federal law so narrowed the dispositional alternatives that any hearing would be "a foregone conclusion." Specifically, counsel for the child asserted that, because the individualized education program (IEP) required home teaching, any dispositional order that required a placement outside of the home would impinge upon the child's right under the federal law to a free, appropriate public education (FAPE) in the least restrictive environment.

In denying the child's motion, the court noted "concerns [that] are broader than merely ensuring that the respondent is receiving a free, appropriate public education." *Id.* at 90. The dispositional statutory scheme authorized the family court judge to determine whether a respondent required supervision, treatment, or confinement; if so, the judge then must determine the least restrictive method by which to meet the child's needs, as well as the needs of the community for protection. The court found that "least restrictive environment" meant "that

placement of students with disabilities in special classes, separate schools, or other removal from regular educational environment occurs only when the nature and severity of the disability is such that, even with the use of supplementary aids and services, education cannot be satisfactorily achieved.” *Id.* The court concluded that the “least restrictive environment” requirement is used in the educational placement context and is an expression of the clear preference in the law to mainstream children with disabilities whenever possible.<sup>4</sup> *See generally, Board of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

In a similar case in the United States District Court for the Middle District of Tennessee, the court upheld the order of an administrative law judge (ALJ) from a due process hearing directing the school district to seek termination of the juvenile proceedings. *In Morgan v. Chris L.*,<sup>5</sup> school officials initiated the filing of vandalism charges against a student diagnosed as having Attention Deficit Hyperactivity Disorder (ADHD). Despite the student’s protracted history of escalating academic and behavioral problems, the school system neither completed a special education evaluation nor provided special education services prior to the decision to file a delinquency petition. In addition, school system personnel failed to advise the student’s parent of any substantive or procedural rights under the IDEA. The parent received inadequate oral notice of a meeting, held after the petition was filed, of the multi-disciplinary team designed to develop methods of dealing with behavior resulting from the disabling condition.

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<sup>4</sup>At least one jurisdiction has held that the best interest of the child standard encompasses the IDEA least restrictive environment standard. *In re White*, 429 N.E.2d 1383 (Ill. App. 1982).

<sup>5</sup>927 F.Supp. 267 (E.D. Tenn. 1994) *aff’d*, 106 F.3d 401 (6<sup>th</sup> Cir. 1997), *cert. denied*, 117 S.Ct. 2448 (1997).

In response to these violations of the IDEA, the parent requested a due process hearing. At the hearing, the ALJ found, based on expert testimony, that the child’s disabling condition was responsible for the behavior complained of by the school district and concluded that the commencement of a delinquency proceeding constituted a change in placement which entitled the parent and the child to the procedural and substantive protections afforded under the IDEA.<sup>6</sup> The ALJ also found, that the filing of a petition in juvenile court constituted the initiation of a change in placement commensurate with expulsion or suspension for more than ten days.<sup>7</sup>

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<sup>6</sup>School officials may not, generally speaking, sanction a student for conduct that is related to the student’s disability. Rather, if the behavior is a manifestation of the student’s disability, the school must appropriately modify the child’s IEP and, if necessary, change the child’s placement (through the IEP process) as a means of addressing the student’s behavior. *See, S-I v. Thurlington*, 635 F.2d 342 (5<sup>th</sup> Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981). Recent amendments to IDEA make even more explicit schools’ obligation to employ appropriate educational interventions rather than punitive discipline. For a full discussion of these and other discipline issues. *See* Chapter 4 (regarding delinquency, disability, and more school discipline), *infra*.

<sup>7</sup>For a more detailed discussion of the substantive and procedural rights afforded a child with a disability regarding a change in placement, see Chapter 10 and Chapter 11. In *Honig v. Doe*, 484 U.S. 305 (1988), the Supreme Court held that the suspension of a student with disabilities for a period exceeding ten days constitutes a change in placement that triggers the “stay put” provision. (“Stay put” refers to the parent’s right to keep the child in the current placement during the pendency of the special education litigation process.) The Court also refused to infer a “dangerousness” exception to the stay put provision; holding instead that, in emergency cases, the school may seek injunctive relief to authorize suspension of more than ten days. The stay-put rights recognized in *Honig* have been modified somewhat by the 1997 amendments to IDEA. For a

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 The IDEA does not – and probably could not – preclude school officials' reporting alleged delinquent conduct to police and prosecutors.  
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The district court, reviewing a direct appeal by the school district, upheld the ALJ's ruling. The court found that the ALJ had not required the juvenile court to take any action; rather, the court found that the ALJ had ordered the school district to seek dismissal of the delinquency petition because of "the potential which juvenile court proceedings have on changing a child's educational placement in a significant manner." *Id.* at 785. The district had clearly failed to adhere to the IDEA's procedural and substantive requirements.

In upholding the ALJ and district court decisions, the Sixth Circuit Court of Appeals found that the school system had breached its duty under IDEA to identify, evaluate, and provide this student with a free appropriate public education; had unlawfully attempted to secure a program for him from the juvenile court, instead of providing services itself; and had, by filing the petition, improperly sought to change his educational placement without following the IDEA's change-in-placement procedures. The court, like the lower court and ALJ, expressly held that the filing of the delinquency petition constituted a change in educational placement, entitling the student to IDEA procedural protections, including the convening of an IDEA team meeting prior to such a proposed placement change.<sup>8</sup>

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full discussion on this issue, *see* Chapter 4.

<sup>8</sup>The Sixth Circuit's otherwise unpublished per curiam opinion is reported at 25 IDELR [Individuals with Disabilities Education Law Report] 227. As part of the IDEA Amendments of 1997, and

The IDEA does not – and probably could not – preclude school officials' reporting alleged delinquent conduct to police and prosecutor. On the other hand, as demonstrated in the *Chris L.* case, prosecution is a misguided substitute for providing special education services to a child with a disability. Advocates for children should protect clients from such misguided prosecution; advocates can file motions to dismiss in the delinquency court and can also pursue remedies in the special education administrative forum. Similarly, courts should not tolerate attempts by school officials to circumvent their responsibilities to children and parents.

In determining their own jurisdiction, juvenile courts appear to distinguish between PINS matters and delinquency cases in weighing the impact of IDEA requirements. Courts in PINS matters are inclined to require school officials to make a good faith effort at developing appropriate educational interventions before seeking relief from the court. In delinquency allegations, on the other hand, courts are more inclined to balance the best interests of the child and the protections made available under the IDEA against concerns involving the perceived safety of the community. As *Morgan v. Chris L.* suggests, however, when school officials file delinquency charges based upon the very conduct that federal education law requires them to address, advocacy that brings to the court's attention school officials' breach of their substantive obligations can prove effective.

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subsequent to the Sixth Circuit decision in *Morgan v. Chris L.*, language was added to IDEA stating that "[n]othing in this part shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability." 20 U.S.C. §1415(k)(9) as added by Pub. L. 105-17, III STAT. 88 (June 4, 1997). As discussed *infra* in Chapter 4, this new provision in no way overrules or otherwise undermines the holdings in *Morgan v. Chris L.*

## II. Using special education in support of a motion to dismiss for social reasons

In almost all cases, whether PINS or delinquency, the jurisdiction of the juvenile court is premised on a need for care and rehabilitation of the child.<sup>9</sup> If, in representing a child in a delinquency matter, an advocate can demonstrate that the child is not in need of care and rehabilitation or that the child is receiving adequate care and rehabilitation through sources other than the court, the court may relinquish – and perhaps must relinquish – its power over the child.<sup>10</sup> Children diagnosed with an educational disability under the IDEA (e.g., emotional disturbance, learning disabilities, and mental retardation) are eligible to receive, in the least restrictive environment, appropriate services to accommodate for the disability or otherwise respond to the child's individualized educational needs.<sup>11</sup>

In the District of Columbia, as in many other jurisdictions, the court rules provide for the dismissal of juvenile and PINS cases for social reasons when dismissal is in the interest of justice and welfare of the child.<sup>12</sup> This standard

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<sup>9</sup>See D.C. Code §§11-1101(13) and 16-2301(6) for an example of a juvenile court jurisdictional statute.

<sup>10</sup>See D.C. Code §§11-1101(13) and 16-2301(6) for an example of a juvenile court jurisdictional statute.

<sup>11</sup>See, *Hendrick Hudson Dist. Bd. of Educ.* "Rowley, 458 U.S. 176 (1982).

<sup>12</sup>Rule 48(b) of the Juvenile Branch of the Family Division of the Superior Court of the District of Columbia authorizes the dismissal of a juvenile or PINS action for social reasons. Super. Ct. Juv. R. 48(b) provides, in relevant part: Even though the Division may have required jurisdiction, it may at any time during or at the conclusion of any hearing dismiss a petition and terminate the proceedings relating to the child, if such actions is in the interest of justice and the welfare of the child. . . .

commits to the discretion of the trial judge whether dismissal is appropriate or that the child would benefit from further court action.<sup>13</sup> The court's authority to dismiss a juvenile action for social reasons exists not only before a trial or plea, but also after an adjudication of guilt.<sup>14</sup> The authority to dismiss in such a situation is premised upon the basic philosophy of the juvenile system that "more stress is placed on the welfare and rehabilitation of the individual child than on the technical questions of factual guilt or innocence."<sup>15</sup>

Special education advocacy can help a family to obtain specialized services and appropriate opportunities for a child with an educational disability. Specialized services and appropriate opportunities, in turn, can form the basis of a motion to dismiss a pending delinquency or PINS case.<sup>16</sup> Zealous and competent child advocates will recognize in this strategy the possibility of focusing the delinquency court on the child's potential and productivity rather than on the need to punish and constrain the child.

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<sup>13</sup>A rebuttable presumption from case law in the District of Columbia supports a conclusion that the commission of a delinquent acts shows the need for care and rehabilitation; if an advocate for a child presents evidence and successfully rebuts the presumption, the court must dismiss the case. See, *In re M.C.F.*, 293 A.2d 874, 877 (D.C. 1972).

<sup>14</sup>See, *In re C.S.McP.*, 514 A.2d at 448.

<sup>15</sup>*In re M.C.F.*, 293 A.2d at 877.

<sup>16</sup>An advocate is more likely to succeed on a motion to dismiss for social reasons in situations in which the disability contributes to the behavior that is the subject of the court action. Similarly (and self-evidently), judges are more likely to dismiss delinquency cases that are relatively less serious. Nonetheless, advocates are well-advised to assert clients' rights to a dismissal for social reasons in delinquency cases that involve alleged behaviors that are not a manifestation of a child's disability and in delinquency cases that reflect alleged behavior of all levels of seriousness.

Moreover, for decades, families with access to private health insurance to pay for therapy and sufficient income to pay for private schools – including boarding schools and military schools – have often spun those services and opportunities into lifesavers for floating children out of the delinquency system. The availability of special education services and opportunities, by rights established in federal law, allow indigent and low-income families to benefit from essentially the same argument to extricate their children from delinquency involvement.

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A proactive child advocate will work actively with the child's family and with school personnel to develop or refine an IEP that meets the individual child's needs and, therefore, forms a solid basis for dismissing a pending delinquency matter.

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A proactive child advocate will work actively with the child's family and with school personnel to develop or refine an IEP that meets the individual child's needs and, therefore, forms a solid basis for dismissing a pending delinquency matter. To advocate in this manner, one must understand not only special education services, per se, but also the range of available "related services" and "transition services".<sup>17</sup> Related services are, essentially, developmental, corrective, and other supportive services that help the child benefit from special education.<sup>18</sup> Hence,

<sup>17</sup>For a more detailed explanation of related services and transition services, see Chapter 9.

<sup>18</sup>"Related services" means "transportation, and such developmental, corrective, and other supportive services...as may be required to assist a child with a disability to benefit from special education ..." 20 U.S.C. § 1401(22); 34 C.F.R. §

related services include, but are not limited to, transportation, individual and group counseling, speech and language therapy, physical and occupational therapy, and recreational therapy. Transition services are, essentially, a coordinated set of activities to help the child move from school to work, from school to post-secondary education (if appropriate), and from living dependently to living independently.<sup>19</sup>

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300.16 (1997). In October 1997, the U.S. Department of Education published extensive proposed changes to the regulations implementing the IDEA. See 62 Fed. Reg 55025 (October 22, 1997). These proposed regulations should be finalized before the end of 1988; both the substance and citations for some regulatory provisions (e.g., current 34 C.F.R. § 300.16) likely will change.

<sup>19</sup>The term "transition services" has been defined as "a coordinated set of activities for a student, designed with an outcome oriented process, which promotes movement from school to post-school activities, including [but not limited to] post-secondary education, vocational training,... employment... [and] independent living...." 20 U.S.C. § 1401(30). Transition services include, but are not limited to, instruction, related services, community experiences, development of employment and other adult-life objectives and vocational evaluation. *Id.* Transition services focusing on a student's course of

Based upon the broad definitions of related and transition services, the advocate can help the parent and school personnel construct for a child with significant needs a fairly comprehensive package of services, including, for example, individual, group, or family counseling, recreational services, internships and job supports, tutoring, and, if needed, one-on-one transportation to school. The student may also need remedial instruction for designated subjects, along with particularized vocational instruction. Developing this information may put the advocate in a position to demonstrate that the child is receiving services designed to provide care and rehabilitation; accordingly, in such a case, further intervention by the court would not provide any additional service.<sup>20</sup>

If the child has received specialized treatment while the court case is pending, counsel may seek to demonstrate that not only is the child receiving services designed to meet the child's needs, but also that the child has so benefitted from the services that care and rehabilitation are no longer necessary. In such a case, arguably, court intervention would no longer be appro-

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study must be included in the IEP beginning at age fourteen. 20 U.S.C. § 1414(d)(1)(A) (v)(ii). The full array of transition services must be in place by no later than age sixteen, and younger if appropriate. *Id.*

<sup>20</sup>A prosecutor may contend, or a judge may muse, that the pendency of a delinquency matter "hanging over the child's head" is valuable in keeping the child focused and disciplined. This belief probably is not sustained or supported by studies. The real question is whether fear of incarceration -- the only "service" available through the delinquency system that is not available in other systems -- is, by itself, a sufficient reason to keep a delinquency case open. Counsel might reassure the judge that if the child "messes up", there probably could be a new charge that a well-meaning prosecutor could bring to re-invigorate the fear of incarceration. Within a fair system, however, the fear of incarceration should rarely be a factor. Incarceration should be a consideration only if the child is violent and demonstrably dangerous to others.

priate. If the court-involved child has not previously been identified as eligible to receive special educational services,<sup>21</sup> the advocate might convince the court to dismiss simply by initiating the special education process and arranging for appropriate services. Advocates must constantly monitor and assess the educational status and progress of a child to determine whether to seek or renew a request for dismissal in the interest of justice.

### III. Using special education during the intake process

The decision to petition, paper, or charge a case is much like the decision to dismiss a case for social reasons. The decision-maker must deter-

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<sup>21</sup>The court has some authority to refer the child adjudicated as in need of supervision to the school system for special education evaluation. *E.g., Oscar F. v. County of Worcester*, 587 N.E.2d 208 (Mass. 1992). The court also can refer a child facing a delinquency charge for special education evaluation. In some jurisdictions, state law explicitly provides for such evaluations, including school system involvement in the delinquency proceeding for the purpose of seeing that evaluations are conducted. Tennessee law, for example, requires juvenile courts to follow state and federal law regarding evaluations whenever special education is deemed necessary. TENN. CODE ANN. § 37-1-128©(1). New Hampshire law provides for joinder of the school district for the purpose of determining whether the child has a disability or, where the child already receives special education services, reviewing the services being provided. *See* N.H. REV. STAT. ANN. § 169B :22.

The advocate can work with the child's parent -- or, if the child is eighteen or above, with the child alone -- to initiate the special education process; therefore, typically, the advocate does not need to ask the court to order an evaluation or to refer the child for evaluation. In some instances, the advocate may perceive an advantage to involving the court in referring the child for special education evaluation. For example, if school system personnel are slow to evaluate children or resist dealing with children in the delinquency system, a court order may provide the advocate with some useful "clout".

mine whether the child "needs" the court or the juvenile justice system. Police officers, intake probation officers, and prosecutors all have the discretion to keep a child out of the delinquency system. Police officers not infrequently decide to release, rather than to arrest, a child based upon a perception that the child is "a good kid" and that the parents have the situation in hand. Based on reports that a child is doing well in school, an in-take probation officer may decide to "informally adjust" the case. Considering the status of a child's parents and their promises to put the child into private treatment, a prosecutor may decide to informally divert or to "no-paper" a case.

In seeking to use special education on behalf of a child facing a delinquency charge, an advocate should examine carefully standards and procedures governing the intake function.<sup>22</sup> The legal standard for "no-papering", diverting, or adjusting a prosecution is often unclear to those applying it, and the process for "no-papering", diverting, or adjusting a prosecution is often hidden and out of view.<sup>23</sup> Indeed, people rarely scrutinize the standard or question how the switch was pulled.

Many people immersed as role-players in the delinquency system – including defense attorneys, prosecutors, probation officers, and judges – are surprised to hear that standards and procedures exist for "no-papering", diverting, or adjusting a delinquency case. They assume that decisions to proceed with a prosecution are wholly within the discretion of the prosecutor and that only instances of selective prosecution or blatant discrimination give rise to grounds to challenge that discretion. A close reading of the

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<sup>22</sup>See generally, Tulman, *The Role of the Intake Probation Officer in Detention: Stories from Before, During, and After the Initial Hearing*, 3 D.C.L.REV. 235 (1995).

<sup>23</sup>Someone pulls the hidden switch to de-rail the prosecution typically when the child is "from the right side of the tracks."

delinquency statute in a given jurisdiction, however, likely will reveal such standards and procedures. In the District of Columbia, for example, the intake probation officer – in most cases – must make a recommendation to petition or not to petition the case. A decision by the intake probation officer not to petition is reviewable by the prosecutor only upon appeal by the complainant. D.C. Code § 16-2305. The intake probation officer should be evaluating, principally, whether the child who is the subject of the prospective petition is "in need of care and rehabilitation." Hence, in such a case, the intake probation should de-rail the prosecution (or – to extend the metaphor – not allow the train to leave the station).

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A child who is receiving, or should be receiving, special education services may be a child for whom that standard arguably requires switching systems, from the delinquency track to the educational track.

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A child who is receiving, or should be receiving, special education services may be a child for whom that standard arguably requires switching systems, from the delinquency track to the educational track. Often the people responsible for making that decision are simply asleep at the switch or do not realize that the switch is actually functional. Yet, a non-exercise of discretion is, by law, an abuse of discretion. A failure to apply a standard constitutes a procedural violation.

An advocate may be well-advised to provide information about the child's educational status (including the fact that appropriate special education services are, or will be, available to the child) to the intake probation officer and even,

perhaps, to the prosecutor.<sup>24</sup> In a surprisingly high percentage of cases, the intake probation officers – and, less surprisingly, the prosecutors – are not aware of the child’s educational status. The information that appropriate services are available for the child through the special education system might be sufficient to persuade the intake probation or the prosecutor to forego charges. In addition, the advocate should, whenever possible, challenge any violation of the intake process and any abuse (or non-exercise) of discretion that results in charges being filed against a child who can receive care and rehabilitation through appropriate special education services.

#### IV. Using special education as a justification for keeping the child in the community

Over the last several years, rates of preventive detention of juveniles have risen in jurisdictions all over the country. Rates of post-disposition and post-sentencing incarceration in juvenile and adult facilities, respectively, also are high and rising precipitously.<sup>25</sup> Advocates can use the special education process to develop for a child an individualized program that will function as an alternative to detention or as an alternative to post-disposition, or post-sentencing, incarceration.

In determining pre-trial placements, courts are generally concerned with issues of dangerous-

ness and risk of flight.<sup>26</sup> Generally speaking, detention statutes provide that a court can order detention of a child in a delinquency matter based upon evidence that a child is dangerous to self or to others. A court also can detain a child who presents a risk of non-appearance. To be sufficient to support a detention order, evidence must be clear and convincing.<sup>27</sup>

Arguably, a child charged with a delinquent act who is also eligible for special education services is entitled to receive those services in the least restrictive environment.<sup>28</sup> Delinquency law – and, in particular, delinquency preventive detention standards – requires in some jurisdictions that the court maintain the child in the least restrictive environment or that the court provide for the child the most home-like environment possible.<sup>29</sup>

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<sup>26</sup>See D.C. CODE § 16-2310 for an example of a preventive detention statute. The District of Columbia's provision permits pretrial detention if the government demonstrates that the child presents a danger to the safety of other persons, a danger to self, or a danger of serious loss or damage to the property of others; in addition, the provision permits detention if the child poses a demonstrable risk of flight.

<sup>27</sup>See, Julia Colton-Bell & Robert J. Levant, *Clear and Convincing Evidence: The Standard Required to Support Pretrial Detention of Juveniles Pursuant to D.C. Code Section 16-2310*, 3 D.C. L. REV. 213 (1995). Before trial, of course, a child -- like an adult charged with a crime -- enjoys a presumption of innocence.

<sup>28</sup>See, *In re White*, 429 N.E.2d 1383 (Ill. App. 1982). While in *White* the court determined that residential placement was necessary for three children with mental retardation where the parent had to follow through on community resources made available to the children, the court recognized that the least restrictive environment was a preference.

<sup>29</sup>See, e.g., DISTRICT OF COLUMBIA SUPERIOR COURT JUVENILE RULE 2 (court removing child from home must secure for the child "custody, care and discipline as nearly as possible equivalent to that which should have been provided

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<sup>24</sup>An attorney, of course, cannot disclose, without agreement from the client, confidential information obtained from the client or other "secret" information obtained during the course of the representation.

<sup>25</sup>In light of this "steep inclination" by judges to incarcerate children, advocates should be aware that, by law, children retain benefits of the IDEA even when preventively detained or incarcerated post-disposition or post-sentencing. See Chapter 5, *infra*.



On behalf of a child who is receiving particularized services through the school system, an advocate can argue that these services will address behaviors that, otherwise, could justify a detention order. One can envision readily how related services could target behaviors that are dangerous or problems that, if un-checked, would create a risk of flight. For example, a court may be inclined to permit a child to remain in the community based upon the information that the child will be engaged in individual and group psycho- logical counseling. In addition, the providers of special education services often are, in essence, monitoring the child as well. If the child is eligible for, but is not receiving, services that would address dangerous behaviors or running away (or other avoidance behaviors), the advocate can and should work rapidly to get those services in place in order to avoid or to rescind a detention order. If the child's IEP does not require services that would ameliorate the problematic behaviors, the child's parent (through counsel) can always request that the multi-disciplinary team re-convene to revise the IEP.

A judge may resist ordering detention if the judge knows that special education services will not be available to a child if that child is removed from the home.<sup>30</sup> A judge likely will not know that a detention center does not provide special education and related and transition services unless the child's advocate demonstrates those facts. An advocate should not assume that

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for [the child] by his parents.")

<sup>30</sup>A requirement that the court provide the least restrictive environment and provide special education services in the least restrictive environment suggests a corollary: a detention center at which staff cannot provide special education services is, by definition, not the least restrictive environment at which special education services can be provided. Hence, a court should not detain or incarcerate a child with education-related disabilities at a facility at which staff cannot provide a free, appropriate public education.

a judge will respond merely to an argument to that effect or an appeal to the judge's compassion or parental instincts. Courts should not assume facts that attorneys have asserted but not proved.

When a child is removed from the home – whether pretrial, pre-disposition, or disposition<sup>31</sup> – the child retains the right to receive a free, appropriate public education.<sup>32</sup> (For a detailed presentation of rights of incarcerated young people to special education, see Chapter 5, *infra*.) Thus, when confronting a situation in which a judge may impose a period of incarceration, an advocate should be mindful of the child's right to special education services.<sup>33</sup>

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<sup>31</sup>In fashioning an appropriate disposition under the laws in most jurisdictions, courts must consider the best interest of the child. Any valid consideration of the best interests of a child with education-related disabilities should result in a dismissal or some other dispositional order through which the child is able to obtain a free, appropriate public education.

<sup>32</sup>Courts have long recognized that incarcerated youth with disabilities (whether in juvenile or adult facilities) retain their rights under IDEA to a free appropriate public education, including special education and related services. In *Green v. Johnson*, 513 F.Supp. 965, 976 (D. Mass. 1981), for example, students incarcerated in an adult facility brought an action under the IDEA claiming that they had been denied a free, appropriate public education while incarcerated. The district court held that the students' "incarcerated status may require adjustments in the particular special education programs available to them as compared to programs available to children with special educational needs who are not incarcerated, but their incarcerated status does not eviscerate their entitlement under federal and state law." See also *Alexander S. v. Boyd*, 876 F.Supp. 773 (D.S.C. 1995) (juvenile facilities); *Donnel C. v. Illinois State Bd. of Ed.*, 829 F.Supp. 1016 (N.D. Ill. 1993) (pre-trial detention).

<sup>33</sup>Advocates should be aware that the 1997 amendments to the IDEA modified the rights of some youth who are incarcerated in adult facilities. The

## V. Using special education rights to guide the residential placement for delinquent youth

In an occasional delinquency case, a court will determine that a child will not benefit from care and rehabilitation in the community and that the type of treatment necessary is only available through a residential treatment center. In such a case, the advocate must be aware of the child's right to obtain appropriate educational services while in a residential placement. The advocate also must be aware of the ability to influence the selection of an appropriate residential placement given the educational needs of the child.

In some instances, placement in a residential treatment center may be consistent with the preference expressed in the IDEA for the least restrictive environment.<sup>34</sup> The evaluation process conducted by the local school system is an important aspect of obtaining an appropriate residential treatment placement. During the evaluation period, the school system will (or, at least, should) complete a social history, psychological evaluation, intelligence testing, hearing and speech evaluations, and any other tests necessary. These evaluations and assessments will be used in determining the type of disability and the level of placement necessary for the child's treatment. The ultimate placement should be a facility designed to provide the educational services specified in the child's individualized education program (IEP).

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1997 changes permit states to enact laws denying special education and related services to youth aged 18 through 21 who are incarcerated in adult facilities and who were not identified as needing special education in their last educational placement prior to incarceration. 20 U.S.C. § 1412(a)(1)(B)(ii), as added by Pub. L. 105-17 (June 4, 1997). The amended law also modifies certain IEP requirements for youth who have been convicted as adults under State law and incarcerated in adult facilities. See 20 U.S.C. § 1414(d)(6). For a detailed discussion of these provisions, see Chapter 5.

<sup>34</sup>See, e.g., *In re White*, 429 N.E.2d 1383 (Ill. App. 1982).

## VI. Using special education evaluations to demonstrate that a child with a disability did not or could not comprehend *Miranda* warnings

Courts traditionally have scrutinized with a great deal of caution statements obtained by the police from juveniles.<sup>35</sup> Before any statement that was the product of custodial interrogation<sup>36</sup> may be introduced into evidence, the government must prove by a preponderance of the evidence that the accused was provided with a complete set of *Miranda* warnings.<sup>37</sup> The government bears the additional burden of demonstrating, by a preponderance of the evidence, that any waiver or intentional relinquishment of *Miranda* rights was knowing, voluntary, and intelligent.<sup>38</sup> Waiver is determined by a careful review of all the facts and circumstances surrounding the

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<sup>35</sup>E.g., *In re Gault*, 387 U.S. 1 (1967); *In re C.P.*, 411 A.2d 643 (D.C. 1980); *In re F.D.P.*, 352 A.2d 378 (D.C. 1976).

<sup>36</sup>The threshold question in determining whether a *Miranda* violation has occurred is whether the accused's statement was the product or result of custodial interrogation by government agents. "Interrogation" has been defined to include "not just express questioning, but also any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 201 (1980). "Custody" has been defined as the deprivation of freedom of action in any significant way. *Miranda*, 384 U.S. at 444. The test – as formulated by the D.C. Court of Appeals – is whether "the investigating officer physically deprives the suspect of his freedom of action in any significant way." *Miley v. United States*, 477 A.2d 720, 722 (D.C. 1984).

<sup>37</sup>*Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

<sup>38</sup>See generally, *Brewer v. Williams*, 430 U.S. 387 (1977); *Lego v. Twomey*, 404 U.S. 477, 489 (1972).

relinquishment of the privilege.<sup>39</sup> Factors that have traditionally guided courts in determining issues regarding waiver include the individual's prior experience with the legal system, the circumstances of the questioning, any allegations of coercion, and any delay between arrest and confession.<sup>40</sup> The age and educational level of the accused are factors that should weigh heavily in the consideration of the totality of the circumstances in determining issues relating to the waiver of constitutional protections.<sup>41</sup>

The advocate for a child who is eligible for or receiving special education services has an opportunity – based, in part, upon the educational disability – to contest the validity of any purported waiver of constitutional rights. Thus, the advocate may be able to block admission into evidence by the prosecution of any statement made by the child. Courts have demonstrated concern and skepticism regarding the ability of a child who has educational difficulties to waive Miranda rights.

For example, in *Cooper v. Griffin*, 455 F.2d 1142 (5<sup>th</sup> Cir. 1972), petitioners were convicted in state court of armed robbery at the age of fifteen and sixteen. In a subsequent habeas corpus action, petitioners challenged the validity of their Miranda waivers. Witnesses testified about the petitioners' level of functioning at the time that they waived their rights and made the statements. Petitioners' mother and father testified that they were mentally retarded at birth. At least two teachers also testified, indicating that the petitioners were placed in a special education class for mentally retarded children, read at a second grad level, and had IQ scores below sixty-nine. All of the witnesses doubted that either petitioner was capable of intelligently

waiving constitutional protections. The appellate court, in reversing the lower court ruling and finding that the waiver was invalid, emphasized that both petitioners had been diagnosed as being mentally retarded since birth could barely read, had no prior experience with the legal system, and in no way could have understood the “gravity of the charges against them, the consequences of a conviction, any defenses which might be available to them, or any circumstances which might mitigate the charges.” *Id.* at 1145.

An invalid waiver was also found in *United State v. Blocker*, 354 F. Supp. 1195 (D.D.C. 1973). In *Blocker*, a twenty-one year old was arrested and charged with passing an altered one dollar bill. Blocker was questioned extensively for one and one-half hours, strip searched and told that he would face a stiff sentence and high bond if he did not cooperate with the agents. As a result, Blocker finally waived his *Miranda* rights and made a statement. During the course of pretrial motions, evidence was presented through school records and psychological evaluations that Blocker was of low intelligence (IQ of 70), completed the seventh grade but had difficulty reading, and had been enrolled in special education classes. The court found that the government had failed to meet its burden of demonstrating that Blocker had voluntarily waived his *Miranda* rights.

In each of these cases, the successful challenge to the validity of the purported Miranda waiver was greatly supported by the presentation of educational records and individuals who were familiar with the juvenile's educational abilities. *Cf., In re F.D.P.*, 467 (D.C. 1983) (a fifteen-year-old child with an IQ of 74, but with prior experience, was found to have been able to waive Miranda, in part, because no expert testimony was presented regarding appellant's abilities).

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<sup>39</sup>*North Carolina v. Butler*, 441 U.S. 369 (1979).

<sup>40</sup>*E.g., In re F.D.P.*, 352 A.2d at 380.

<sup>41</sup>*See, e.g., McBride v. Jacobs*, 101 U.S. App. D.C. 189, 190, 247 F.2d 595, 596 (1957).

### Excerpt

*Leone, et al.*, Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention, 3 D.C.L. Rev. 389 (1995):

To further illustrate the difficulties youngsters have in understanding the justice system, two researchers conducted investigations regarding juveniles' comprehension of their Miranda rights. See *Miranda v. Arizona*, 384 U.S. 436 (1996). Thomas Grisso found that many adolescents do not fully understand their *Miranda* rights.<sup>1</sup> While the majority of the more than 400 delinquent youths studied had faulty understandings of *Miranda* rights, the most noteworthy misconceptions involved the right to an attorney before and during interrogation. Additionally, the results indicated that age and IQ scores significantly predicted the juveniles' understanding of *Miranda* rights. Within Grisso's sample, younger respondents and youths with lower measured levels of intelligence were associated with faulty understanding of legal rights.

In a similar investigation, Barbara Zaremba interviewed 115 male public school students in Virginia aged fourteen to eighteen. Nearly one-third of those studied had been identified as learning disabled by their school systems.<sup>2</sup> The influences of IQ, age, socio-economic status, and school placement on the understanding of *Miranda* warnings were considered. When asked what "You have the right to remain silent" means, one respondent stated, "I have to remain silent, while they arrest me, I think." Another stated, "I don't have to say anything until the police ask me questions." In response to the second warning, "Anything you say can be held against you in a court of law," adolescents made statements such as, "What does that mean?"; "I can't figure that one out"; "After they ask me to remain silent, I shouldn't say anything because it will be used

against me"; and "If you say anything unless they tell you to say anything, it will be on your record when you go to court."

Another warning, "You have a right to an attorney before and during interrogation," was interpreted by some as follows: "You can have a lawyer, but I don't know when"; "At the time of your trial one of your privileges is to have an attorney present"; and "I don't know about that."

"The court will appoint an attorney if you cannot afford an attorney" is another *Miranda* warning. One respondent thought this meant, "They'll give me a lawyer that's not so good from downtown." The most significant finding reported by Zaremba was that the presence of a learning disability severely hampered youths' understanding of the *Miranda* warnings, regardless of other factors.

While empirical evidence is limited, the Grisso and Zaremba studies indicate that young people with lower IQ levels and those with learning disabilities misunderstand rights intended to guard against self-incrimination extended to juveniles as a result of *In re Gault*, 387 U.S. 1 (1967) and *Kent v. United States*, 383 U.S. 541 (1966). Ironically, although unable to comprehend their rights, many youths nevertheless waive them. Again, their deficits impede their capability to protect their own interests and maneuver successfully through this process. In short, the behavior, language, and communication skills of young people with disabilities can contribute to their unnecessary detention while awaiting a dispositional hearing.

<sup>1</sup> See Thomas Grisso, *Juveniles' Capacity to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L.REV. 1134; and Thomas Grisso, *Juvenile's Waive of Rights: Legal and Psychological Competence* (1981).

<sup>2</sup> Barbara A. Zaremba, *Unpublished data*, 1995 (on file with the District of Columbia Law Review).

## Steps to Special Education Advocacy

### STEP 1

#### Identification and Pre-referral Intervention

- ! "Child-Find": Public school agency is required to identify, locate, and evaluate children who are disabled and need special education. *See 34 C.F.R. § 300.220 and Chapter 6 of this manual.*
- ! If it appears a child may be retained, the school system must take intervention steps to ensure promotion of the child.
- ! If a child is retained despite intervention, the school system must make formal referral for special education assessment and obtain parental consent before doing so.
- ! Four to six week intervention period in regular education setting is optional.

### STEP 2

#### Formal Request to Public School to Evaluate Child

- ! A formal request for assessment should be sent to the school that the child attends to formally request assessment of the child.
- ! Once form is filed, child is under IDEA.

### STEP 3

#### Evaluation of Child

- ! After the formal request, a full assessment of the child should occur.
- ! Types of evaluations: Psychoeducational cognitive (IQ) (academic, perceptual); Clinical Psychological (emotional personality); Occupational/Physical Therapy (motor skills); Medical (vision, auditory, psychiatric, neurological, physical); Speech/Language; Vocational.
- ! BLMDT Members: Parent or guardian; Child; and Assessment Team: coordinator, psychologists (school, clinical, neuropsychologist), speech therapist, social worker, principal, teacher(s), counselor, transitional & vocational persons, occupational & physical therapists.
- ! Miscellaneous: Each assessor must draft written report describing results of test and recommendations; Parents must get a copy of evaluations before IEP meeting to review; Parent has a right to an independent evaluation and under certain instances, at public expense; Evaluations must be in the child's native language.

### STEP 4

#### Eligibility of Child for Special Education under IDEA

- ! Child must be between the ages of three and twenty-one *and* have a disability that adversely affects his or her ability to learn or make progress in school.
- ! The child needs specialized instruction, and/or related services in order to learn and make progress in school.
- ! Eligibility -- and final recommendation -- is a team decision that includes parent input.
- ! If ineligible, school system must draft and send letter to parent, explain reasons for ineligibility and include educational prescriptions to be carried out in the regular classroom.
- ! Parent has a right to challenge eligibility, classification of disability, and/or evaluations.
- ! Disability classifications: Learning Disabled (LD); Seriously Emotionally Disturbed (SED); Mental Retardation (MR); Autistic; Visual Impairment (VI); Speech/Language Impairment (SI); Other Health Impairment (OHI); Traumatic Brain Syndrome; Orthopedic Impairment (OI); Hearing Impaired (HI)

## Steps to Special Education Advocacy

### STEP 5

#### Individualized Educational Program (IEP)

- ! The IEP is a written document and a conference/meeting.
- ! **Purpose of IEP:** Create a document with objectives, measurable goals, specialized instruction and related services for a child's unique need.
  - S Provide a working guide for school personnel to implement the goals set out in the IEP.
  - S Provide an opportunity for the team to discuss their findings with the parent and answer any questions the parent may have.
- ! **Notice:** School must notify parent – in writing – of time, place and who will attend IEP conference, and notice must be in a language and manner the parent can understand.
  - S If student is sixteen years of age, transitional services must be included in the notice and be stated in IEP.
  - S If transitional services are to be included in IEP, the school system must invite the student.
- ! Other Requirements: Parent must have input and has a right to bring advocate or anyone else to IEP.
  - S Parent should receive all evaluations within a reasonable time prior to the IEP.
  - S The school team may bring a draft IEP, but parent has the right to change, amend, or modify it.
  - S When in disagreement, complete as much as IEP as possible to ensure the student gets some services while dispute gets resolved.

### STEP 6

#### Placement

- ! The school system must consider placement annually in accordance with the child's IEP.
- ! The child should be placed in the Least Restrictive Environment.
- ! The child should be placed as close to home as possible.
- ! The child should get instruction within the regular education setting as much as possible.
- ! A parent has the right to challenge any proposed placement and the "stay put" provision will allow the child to remain at his or her last current placement while the dispute gets resolved over the proposed placement.
- ! If the public school system can not provide a child with the services required by his or her IEP, a parent can seek to have the child placed into a private placement – at public expense – in order to receive a free, appropriate public education.
- ! The continuum of services is the range of levels of special education services available; the range of levels is as follows: regular education classroom, separate special education classroom, separate special education school, residential placement, hospital/institution, detention facility.
- ! The team – which includes parent – determines which level of placement is appropriate.

### STEP 7

#### Annual Reviews

- ! A child's IEP and placement must be reviewed on an annual basis.
- ! A parent may request a review at any time during the year.
- ! **Purpose of Annual Review:** To determine student's progress; to modify or develop new IEP; and to revisit the student's disability classification and placement level.

### STEP 8

#### Triennial Reviews

- ! A triennial review involves a complete assessment of the child, comparable to the initial testing that took place to determine eligibility.
- ! Triennial reviews must occur within three years of last complete assessment.
- ! The purpose of the triennial review is to reconfirm the student's disability, instruction and related service needs.

## Steps to Special Education Advocacy for a Delinquency Client

### Preliminary Steps and Organizing Actions

- 1** Counsel should read and study this manual. In addition, counsel should obtain copies of relevant state and local laws and regulations, as well as relevant school board and youth authority policies.
- 2** Counsel should identify local attorneys (e.g., private practitioners specializing in special education law, attorneys from the protection and advocacy center, law school clinicians), as well as educators (e.g., university-level professors of special education) who have expertise regarding special education law, practice, services, and evaluations. Counsel should organize training sessions with those experts for delinquency attorneys, social workers, and other interested advocates who work with children in the delinquency system.
- 3** Counsel also should consider organizing training sessions (regarding special education rights and services) for judges; probation and parole officers; detention center counselors, teachers, and administrators; mental health workers; vocational rehabilitation agency workers; private service providers (including organizations that run alternative-to-detention programs); neglect system social workers and administrators; and school system personnel.
- 4** Ideally, counsel would create a fund to support independent or private evaluations and private *Burlington* remedies for clients.
- 5** Counsel should learn how to file for attorney's fees when prevailing in a special education proceeding or matter.
- 6** Counsel should consider raising money from foundations and other sources in order to set up a special education advocacy project in the local public defender office, as part of a law school clinic, or as an independent project. Such a project can become self-funding based upon the attorney-fee-shifting provision of the IDEA.
- 7** Delinquency counsel should consider whether to provide special education representation and advocacy or to advise the delinquency client and the parent to engage outside counsel for the special education representation. If the latter, delinquency counsel should identify special education attorneys who are willing and able to provide special education representation for delinquency-involved children (and their parents).
- 8** Counsel should check ethical rules of the jurisdiction to determine any limitations or concerns regarding representing the child and the parent jointly in the special education matter. Counsel should study and reflect upon conflict-of-interest provisions and solicitation provisions. In addition, counsel should avoid discussing facts of the delinquency case with the parents. This caution to avoid discussing the delinquency facts with the parents is particularly difficult to respect in the context of a delinquency case (or truancy case) that arises from an incident that allegedly occurred at the child's school.
- 9** Counsel should draft a special education retainer agreement for use with delinquency clients and their parents; counsel also should draft a retainer agreement for use with delinquency clients who are eighteen years old or above and who decide to assert their special education rights without parental involvement.

## Steps to Special Education Advocacy for a Delinquency Client

### Steps to Take in an Individual Case

*Counsel should:*

- 1** Discuss with the child advantages and disadvantages of employing a special education strategy within the delinquency case. Counsel also should discuss with the child the need to engage a “parent” as a client also for purposes of the special education representation. (If the child is eighteen, counsel should discuss with the child the choice of representing the child alone in the special education matter.)
- 2** Execute a retainer agreement with the client(s) and obtain from the parent and the child a release form to facilitate collection of records, etc.
- 3** Have extensive discussions with the client(s) to determine, at least preliminarily, the goals of the client in terms of education and (for the child) in terms of the delinquency case.
- 4** Obtain all relevant educational, medical, psychological records and evaluations. Counsel should investigate the child’s educational, medical, and social history.
- 5** Chart the child’s educational history, literally creating a chart that organizes the information by year, grade-in-school, school attended, grades on report cards, scores on achievement tests, evidence of special education actions (including referrals for evaluation), etc. In essence, counsel must think of every possible category to include in the chart.
- 6** Based upon relevant special education legal provisions, identify the rights and legal theories that advance the educational and delinquency-case goals of the client(s); Construct a strategy that incorporates all of the steps in a special education case (identification through triennial reviews) and that takes advantage of special education remedies (including private placements via *Burlington* and compensatory education claims). *See also, Summary of Strategies for Obtaining Release from Detention or Other Incarceration for Delinquency Clients on following pages.*



## Summary of Strategies for Obtaining Release from Detention or Other Incarceration For Delinquency Clients

### Detained Child

Based on special education actions (including provision of services not previously available or supplied to the child), move for reconsideration of detention (or equivalent procedural action to effectuate release).

#### **IEP exists**

*Begin at Step 5 in the special education process:* implement or re-design IEP; based on new-found services, obtain child's release; if child not properly evaluated (or not evaluated within past three years), *begin at Step 3 or Step 8* in order to obtain accurate evaluation; based on new understanding of child's disability and needs, effectuate release.

#### **Eligible for Special Education: no current IEP or placement.**

*Begin at Step 5 or at Step 6 in special education steps:* find interim placement or stay put in last placement or design IEP and then locate placement.

#### **Not previously identified as eligible for special education**

*Begin at Step 2 in special education steps:* request evaluation and/or ask court to refer for evaluation; consider ex parte evaluations through delinquency system in order to expedite special education evaluation process; explore failure by school and other public agencies to "find" the child previously (*see Step 1 in special ed. steps*); look for appropriate

### Committed and Incarcerated Child

interim placement services.

Work with "treatment" and educational personnel at the institution to understand the child's general status, behavior, and adjustment, and to determine the child's school status. Based on special education actions (including provision of services not previously available or supplied to the child), either move the court for child's release or persuade executive-branch authorities to release the child).

#### **IEP exists: school personnel at the institution not implementing the IEP.**

Locate appropriate school placement in the community, with related services and transition services. Seek agreement from authorities to release the child. If agreement not reached, challenge the educational placement in a special education hearing; compel attendance at hearing (to the extent strategically helpful) of institution personnel; also, challenge the placement, to the extent legally possible, as violating child's right to care and rehabilitation or treatment in delinquency commitment.

#### **IEP exists; child receiving appropriate services at the institution.**

This scenario is unrealistic. If it ever occurs, determine whether, based upon provision of educational and other services, the child has been rehabilitated; argue accordingly for release.

#### **No current IEP**

Enlist cooperation of education, mental health, and other institutional staff to join with the child, the parent, and other persons invited by the parent to design an appropriate IEP with related services, transition services, and behavioral supports to allow for safe, productive release of the child.

#### **Child slated for placement at a residential treatment facility; child does not want to go**

Prepare IEP that provides for all appropriate special education, related services, and transitional services (including, as appropriate, wraparound services with in-home family counseling, drug counseling, externship opportunities, job coaching, etc.); argue that twenty-four hour, residential treatment is unnecessary and, in terms of special education law (and delinquency law, if applicable law allows the argument) not the least restrictive environment.

#### **Child in incarceration facility, not receiving appropriate services:**

It is not realistic to assume that counsel can persuade authorities to release the child based upon the strategies described above; child would prefer a residential treatment facility.

Prepare an IEP with participation of above-described personnel and invitees of parent and child to require residential treatment placement.

## Summary of Strategies for Obtaining Release from Detention or Other Incarceration For Delinquency Clients

### Child Arrested

#### *Facing Pre-trial Detention (Or Child Facing Probation/Parole Revocation)*

Based on special education actions (locating services not previously available or currently supplied to the child), argue that the child will return for future court hearings and will not constitute a threat to the community.

**IEP exists:**  
**child in current special education placement:**  
**reasonable appropriate services in place**

Explain to court intake personnel and to the judge/hearing officer that alternative-to-detention program is in place; get parent and school support (teacher or counselor as witness at detention hearing) to request that court not disturb current services to child; if delinquency charge arises from alleged conduct at school, explore whether charge is an attempt by school personnel to circumvent their obligations to educate the child (including “stay put” right of child); if charge involves allegation of weapon, drugs, or “dangerousness” at school, explore possibility of IDEA 45-day interim placement as affirmative strategy for defeating detention; for truancy case, challenge court’s jurisdiction based upon IDEA exhaustion claim and definition of “truancy”.

**IEP exists: child in special education place-**

**ment, but not receiving appropriate services (including related services like counseling, transition services, and behavioral supports)**

Explain to court intake personnel and to judge/hearing officer that framework for alternative-to-detention program is in place; if child is truant, explain that counsel will ensure that related services (including transportation and counseling) can be in place rapidly; meet with school personnel to get appropriate services in place or implemented; to the extent necessary, *begin at Step 5 of special education steps* to enforce implementation or re-design of IEP.

**Identified as eligible for special education:**  
**no current IEP or placement**

Explain to court intake personnel and to the judge/hearing officer that the child has (and the parent has, on behalf of the child) a right to appropriate services that, in effect, with constitute a comprehensive, alternative-to-detention program; to the extent necessary, demonstrate that school system personnel have violated your client’s rights to services and assure the court of your intention and ability to obtain appropriate services. *Begin at Step 5 or at Step 6 in the special education steps:* find interim placement

or stay put in last placement or design IEP and then locate placement; explore possible collaborations between pre-trial delinquency authority and school system to provide community-based services.

**Not previously identified as eligible for special education**

Consider explaining to court intake personnel and to court that the client likely has unmet special education needs and likely is eligible for comprehensive services that you will immediately explore; explanation can put truancy and other behaviors in the best light; if proper, assure the court of your intention and ability – with your client’s involvement – to identify appropriate services; *Begin at Step 2 in special education steps:* request evaluation and/or ask court to refer for evaluation; consider ex parte evaluations through delinquency system in order to expedite special education evaluation process; explore failure by school and other public agencies to “find” the child previously (*see Step 1 in special education steps*); look for appropriate interim placement and services.

**Gerald's cases:  
A comprehensive joint special education and delinquency legal strategy**

Gerald<sup>1</sup> progressed well through elementary school and tested as high as the ninety-eighth percentile in some areas of academic achievement before his mom's and dad's drug problems overwhelmed the family. After his mom's incarceration and coincident with his dad's leaving home, Gerald went to stay with an aunt. He repeated the seventh grade three times. At some point during those three years, he went to stay with a twenty-one-year-old cousin. Also, during the third year in seventh grade, Gerald allegedly became involved in a fight in school. School officials suspended Gerald from school and referred the matter to the delinquency court. Prior to the school-fight arrest, Gerald had never been evaluated or identified as eligible for special education services. No one had been attending to his school-related problems prior to that first arrest.

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Prior to the school-fight arrest,  
Gerald had never been evaluated or  
identified as eligible for special  
education services.  
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Counsel (a court-certified law student and a clinical supervisor) obtained a court appointment to represent Gerald in the school-fight case. (See case #1 in illustration 1-1.) Gerald was fourteen years old. He presented at various times as withdrawn, sullen, and angry. He needed attention.

Based upon advice from counsel, Gerald decided

to employ a special education strategy. Counsel accordingly initiated a special education case, executing a retainer agreement with Gerald and with his father. (See case #2 in illustration 1-1.) Gerald's father was not available during approximately the first year of the special education case. With Gerald's and the father's permission, counsel dealt with the cousin and then with the aunt in place of the father during that initial period of the special education case.

With Gerald's permission, counsel described in general terms to the juvenile prosecutor Gerald's family and school situations and Gerald's plan to obtain special education and related services. Counsel negotiated with the juvenile prosecutor an informal diversion of the school fight (simple assault) case. The parties accordingly asked the court to continue the simple assault case for three months; the court scheduled a status hearing for three months, with the parties anticipating a mutual request for a dismissal. During the ensuing months, counsel shepherded Gerald through the special education evaluation process and, following a determination that Gerald was seriously emotionally disturbed, prepared to develop an IEP and to seek an appropriate placement.

Gerald was arrested – during this same period – and was charged with distributing cocaine. (See case #3 in illustration 1-1.) The cocaine sale, allegedly by Gerald, was from inside a "crack house", at the front door, and the buyer was an undercover police officer. The sale preceded a larger-scale police action to raid the house. Both the sale and the raid occurred on a snowy night. During the raid of the house, several young men fled through the back of the house and through an alley. The police apprehended Gerald in that alley; they apprehended an eighteen-year-old male, A.B., as he attempted to flee from the back of the house. A.B. and Gerald were approximately the same height and weight, and they were wearing similar clothing at the time of their arrests. The police found no drugs on Gerald, but they did find on him a pre-recorded \$20 bill

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<sup>1</sup>Name is changed to protect anonymity of client.

allegedly used by the undercover officer to purchase the drugs. The court released Gerald to his aunt pre-trial, and set a date for trial.

speech services. The placement also provided fifteen hours per week of special education instruction.

Public school system personnel – in response to counsel’s special education advocacy – placed Gerald into an “appropriate” special educational program with necessary psychological and

At the status date for the simple assault case, the court set a new trial date. Counsel’s investigation of the simple assault produced evidence that the complainant and Gerald had engaged in other scuffles – some of which the complainant in this case had initiated. Counsel for Gerald persuaded the prosecutor to allow counsel to

Case	Case/Charge	Duration	Other Information	Outcome
#1	Simple Assault	Long-approx. one year	Informal agreement with prosecutor to delay three months for status hearing and possible dismissal; long delay before final resolution	Mediation
#2	Special Education Case - Failure to identify (child find violation); denial of FAPE	Longest - approx. seven years		Obtained initial placement that included approx. fifteen hours per week in special education; then vocational placement and G.E.D.; school system failed to serve; developed residential option; Gerald stayed with G.E.D. program for a while
#3	Possession with intent to distribute crack cocaine	Long-approx. 15 months	Much investigation; subpoena to A.B., adult co-defendant; developed argument that co-defendant was guilty and that Gerald had a right to present such evidence; files motions to suppress evidence	Court granted motion to dismiss based upon social factors, including availability of special education program
#4	PWID-Crack	Short-approx. two months		Court granted pre-trial motion to dismiss based upon insufficient evidence to establish guilt
#5	Driving without a license	Short-approx. three months	Driving uncle’s car during period of time when court was considering dismissing case #2 for social reasons	Dismissal for social reasons after a few months’ delay, dismissal based on school programming primarily

#6	Drug charge	Medium - approx. six months	Pre-trial Motions to Suppress	Dismissal in pleas with case #7
#7	Drug charge	Long-approx. ten months	Ex parte motion for psychiatric eval. with explanation of social history); preparation of interlocutory appeal in case motion denied; filed pre-trial motions to suppress	Probation

*Illustration 1-1: Gerald's cases*

arrange for a mediation of the ongoing dispute between the two children. The mediation led to an agreement between the two children and their adult family members. Ultimately, the prosecutor agreed to dismiss the simple assault in light of the successful mediation of the dispute.

Recognizing that the defense has difficult winning undercover drug sales in which the police officer has positively identified the alleged seller, counsel developed a number of strategies to challenge the government's evidence and to delay the day of reckoning in case #3. Counsel filed a motion to suppress the identification and to suppress the tangible evidence (the \$20 bill).

Counsel's investigation revealed that the police, in arresting A.B., had recovered cocaine from his pocket. The cocaine recovered from A.B. matched the percentage of purity of the cocaine allegedly sold to the undercover police officer. Counsel developed a theory of misidentification that included the possibility that A.B., rather than Gerald, had been the seller in the undercover officer's purchase of cocaine. Counsel researched case law that arguably allowed the introduction of evidence in Gerald's case tending to inculpate A.B. Counsel also researched the conflict between A.B.'s fifth amendment rights and Gerald's sixth amendment rights to call and to confront witnesses. Gerald's counsel served A.B. with a subpoena. A.B. did not show up on one or two trial dates; counsel argued that A.B. was a necessary witness. Eventually A.B. pled guilty to possession of the cocaine that he had when

stopped by the police. Counsel obtained a written statement from A.B. in which, based upon personal information, A.B. stated that Gerald did not sell cocaine to the undercover officer. Counsel prepared an argument – albeit a weak argument – to demonstrate that A.B.'s possession conviction and the undercover sale were part of the same transaction (thus extinguishing A.B.'s fifth amendment rights). Counsel also researched issues that might allow for an interlocutory appeal in Gerald's case #3.

Gerald was arrested again and charged with possession of cocaine with intent to distribute. (See case #4 in illustration 1-1.) The court detained Gerald for a week in a medium security facility and then, in response to a motion for reconsideration of detention, released Gerald to a youth shelter house (a detention halfway house). The motion to reconsider relied in part on Gerald's having recently started to participate in a therapeutic school program. Gerald was at the youth shelter house for an extended time while counsel helped him to reconnect with his father; the aunt and the cousin were no longer willing to accept custody of Gerald. Gerald's mother, at that point diagnosed with AIDS, remained incarcerated in Kentucky.<sup>2</sup> Counsel arranged for Gerald to visit his mother; the visit was the first in several years.

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<sup>2</sup>The District of Columbia sends its female prisoners to facilities in other states.

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Gerald seemed to appreciate the vigorous advocacy provided in the delinquency and special education matters. Within a period of two years, Gerald significantly improved his living situation and his school situation. He was not as depressed and did not seem to be sad, sullen, or angry nearly as often as he had been two years earlier; his relationship with his father was much more stable.

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The facts of case #4 allowed counsel an opportunity for a quick victory on Gerald's behalf. Gerald was a passenger in an automobile. After stopping the car, the police found drugs underneath Gerald's seat. Those drugs, however, were not in plain view, and no other evidence connected Gerald to the drugs. Based upon a recently published opinion refining the definition of constructive possession, Gerald's counsel filed a dispositive motion arguing that – as a matter of law – Gerald could not be found guilty of constructive possession of the drugs. The trial court granted Gerald's motion and accordingly dismissed the case.

Counsel's delay antics regarding A.B.'s non-availability as a witness and other matters in case #3 continued. That case was already close to a year old. Based upon Gerald's demonstrated progress in his special education placement<sup>3</sup> and Gerald's positive reunification with his father, counsel filed a motion to dismiss case #3 for social reasons. (The motion is based upon the legal argument that a child is, by

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<sup>3</sup>A District of Columbia School of Law student was also tutoring J.M., and J.M. was responding positively to the tutoring and to the regular attention.

definition in the District of Columbia, not delinquent – even if guilty of an offense – if the child is not “in need of care and rehabilitation.”)

Before the motion to dismiss for social reasons in case #3 was heard, Gerald was arrested a fourth time. (See case #5 in illustration 1-1.) The charge was driving without a license. The judge responsible for hearing case #3 and for ruling upon the motion to dismiss for social reasons agreed to continue the hearing on that motion. The judge recognized that Gerald was making significant progress overall and thus kept the motion pending. After waiting a respectable amount of time, counsel also filed a motion to dismiss for social reasons in case #5. Eventually, as Gerald continued to progress at home and in school without any re-arrests, the judge dismissed both case #3 and case #5.

Gerald interacted actively with counsel. Gerald seemed to appreciate the vigorous advocacy provided in the delinquency and special education matters. Within a period of two years, Gerald significantly improved his living situation and his school situation. He was not as depressed and did not seem to be sad, sullen, or angry nearly as often as he had been two years earlier; his relationship with his father was much more stable. Remarkably, his father became somewhat active in the special education matter, speaking with counsel regularly and attending IEP meetings.

Unfortunately, the school system did not provide Gerald with the services required by the first two IEP's developed over the two years following Gerald's being identified as eligible for special education. Gerald eventually decided to discontinue attending school in the primarily special education program counsel had helped to arrange. Gerald opted instead for a vocational program with a general equivalency degree (G.E.D.), as an alternative. That vocational program was not adequate. Rather than fight for his education, Gerald stopped attending that program as well.

Counsel represented Gerald and his father in a

special education hearing claiming, among other things, that the school system owed Gerald compensatory education for the time – the three years that Gerald spent in the seventh grade – that school personnel failed to identify Gerald as needing special education services; counsel also claimed a right to compensatory education for the time that the school system failed to implement Gerald's IEP's. Although counsel prevailed, obtaining a significant amount of compensatory education time as a remedy for the school system's failures, Gerald – whose girlfriend was expecting a baby – was losing interest in school. Gerald continued to participate in G.E.D. tutoring, but he failed to pass the G.E.D.

Gerald was arrested and charged two more times in the District of Columbia, both drug possession charges. (See case #6 and Case #7 in illustration 1-1.) Counsel in a certain sense replicated the overall strategy in cases #3 and #4, developing additional special education services and heavily litigating pre-trial matters in case #7. Counsel commissioned, on an ex parte basis, a psychiatric evaluation of Gerald in preparation for arranging additional services (including possibly residential treatment). Counsel prepared an argument for an interlocutory appeal based upon the possibility that the court might deny the request for a psychiatric evaluation or deny a subsequent motion to dismiss. At the same time, counsel wrote and filed motions to suppress evidence. The delay occasioned by the litigation and arranging evaluations provided Gerald with time again to attempt to stabilize at home and in school.

Consulting with Gerald's father and with Gerald, counsel prepared to seek a residential therapeutic placement for Gerald, either through the school system or through the delinquency court. Gerald pled guilty to the charges in case #7, in exchange for a dismissal of the charges in case #6. Eventually, notwithstanding continuing marginal behavior, Gerald was ordered onto probation by the Court. He continued to function, albeit marginally, in the community.

Counsel continued to work with Gerald on educational and other issues. Law students tutored Gerald for periods of time.<sup>4</sup> Gerald remained in the community without re-arrest, living with his father, for the remainder of his "juvenile" years (i.e., past his eighteenth birthday). Gerald's mother was released from prison, but she was in failing health. Gerald's goal was to obtain a G.E.D. and to get a job. He did not succeed with either goal. As a young adult, feeling the pressure to provide for his child, Gerald went back to drug selling and has been incarcerated for relatively short periods in the adult system.

In retrospect, counsel understood that – even at thirteen and fourteen – Gerald was "living on the street". The "crack house" and his peers became Gerald's support system during his early teenage years following the disintegration of his family. For a period of three or four years, his mid-to-late teenage years, however, Gerald reunited with his father, returned to school, and by-in-large stayed out of serious trouble. A juvenile prosecutor who reviewed Gerald's history – after the facts – expressed surprise that Gerald spent virtually no time in secure detention; the prosecutor opined that, absent the special education advocacy and the vigorous defense work, Gerald would have been in detention for significant stretches of time. The failure of advocacy by counsel in Gerald's case was in not forcing the school system to implement meaningful, comprehensive special education, related services, and transition services.

### **Ray's cases: Designing a meaningful and comprehensive IEP**

Ray, as a thirteen-year-old involved in his first

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<sup>4</sup>One law student described her time tutoring Gerald as the most meaningful experience in her law school career.

delinquency case -- much like Gerald -- presented as sad, sullen, and occasionally angry. Like Gerald, Ray was in many respects living life independently, getting insufficient support or structure. In addition to Ray, his mother has a son, S.L., who is one year older than Ray and five younger children ranging in age from one to seven years old. Ray receives no guidance, nurture, or support from his father. The house is chaotic; three of the little children sleep in a sofa bed with the mother in the living room. They do not seem to have toys. The mother has several belts placed around the house; she apparently keeps them handy in order to "discipline" the children. The family seems chronically to have insufficient supplies of food, and they run out of food toward the end of the month. The children do not have enough clothing.

Ray was arrested and charged with the unauthorized use of a vehicle. The court released Ray pending trial, and before trial Ray entered a diversion program. Within a couple of months, Ray was charged with another unauthorized use of a vehicle. Based on that second charge, the diversion program dropped Ray. As the pressure in the delinquency system mounted, Ray decided, based upon advice of counsel, to pursue a special education strategy.

At thirteen, having failed a couple of grades in school, Ray was in the fifth grade, but he was achieving academically at the second- and third-grade level. Although he was (and is) slender, he towered over the other kids in his class. Because he was chronically underachieving and he was so much taller and older than the other kids, he desperately wanted to be out of elementary school. Not surprisingly, his school attendance started to slip.

On behalf of Ray and his mother, counsel requested a special education evaluation of Ray. School personnel did not conduct the evaluations and did not produce the reports in a timely fashion. The evaluations produced seemed inaccurate. For example, the evaluator who wrote the psycho-educational report found

Ray to be mildly mentally retarded, but no one conducted sufficient adaptive testing to confirm that conclusion. (Ray described to special education counsel during their first meeting how he managed to participate in stealing and stripping cars in order to sell parts. This description alone convinced counsel that this child is operating above the mild mental retardation range.)

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Following several failed attempts over a period of months to get school personnel to convene an IEP meeting, counsel managed to negotiate an "IEP deal" with those officials. The deal was to place Ray in a junior high school program with approximately fifteen hours of special education classes per week with various related services, including counseling.

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Following several failed attempts over a period of months to get school personnel to convene an IEP meeting, counsel managed to negotiate an "IEP deal" with those officials. The deal was to place Ray in a junior high school program with approximately fifteen hours of special education classes per week with various related services, including counseling. As part of the deal, the members of the IEP multi-disciplinary team agreed to re-convene and change the IEP to require a segregated, 100% special education setting for Ray if the less-restrictive, fifteen-hour-per-week program proved to be ineffectual. School personnel did not implement the IEP, but they did allow counsel to place Ray into two different school programs. Neither was



effective.

Counsel filed a request for a special education, due process hearing claiming that the school system personnel had failed for several years to identify Ray as a child with a disability; counsel also alleged that school personnel delayed illegally to conduct the evaluations and then failed to implement the first IEP. The hearing officer granted Ray and his mother a couple of years of compensatory education and ordered the school system to work with the parent to produce another IEP.

Meanwhile, Ray was not going to school. He failed to appear for a court hearing. The police picked him up on a custody order, and, as a result, a judge ordered that Ray stay in a youth shelter house. Ray arrived at the shelter house and announced that he did not intend to stay. The counselor on duty asked Ray to wait until after her shift to leave. Ray accommodated that request, leaving five minutes after the counselor. Soon thereafter the court issued another custody order.

On behalf of Ray, counsel worked with school officials to design a new IEP.<sup>5</sup> This IEP contained the following elements: 100% special education placement (thus, given the shortage of appropriate, 100% special education, public placements, ensuring that Ray could select a private school placement); computer-assisted instruction in academic course work; daily tutoring; family counseling with a psychologist or a licensed clinical social worker in order to design and implement a non-aversive behavior management program; and -- as a transition service -- assistance, presumably by the tutor, learning to cook and put out breakfast each day for the family.

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<sup>5</sup>Counsel and Ray's mother also worked together with school officials to design an IEP for Ray's older brother, ultimately, the two IEP's -- Ray's and his brother's -- were similar.

The school system did not locate a placement and did not issue a notice of placement. Counsel attempted, with limited success, to interest Ray in going to interviews at private or public school programs. Ray may have been wary of going to interviews based upon a concern that someone would become aware of the extant custody order. For more than a year, Ray remained in the community without being re-arrested.

Counsel located John Malloy,<sup>6</sup> a graduate student in the Department of Special Education at a nearby, major university. This graduate student agreed enthusiastically to become a tutor for Ray and for his brother. Based upon the failure of public school officials to provide the services in Ray's IEP, counsel obtained a hearing officer's determination that Ray was entitled to private tutoring from John Malloy at public expense. Moreover, the school system's attorney agreed to designate the private tutoring, for four hours per day, as an interim placement until the parties located an appropriate school program for Ray.

Counsel has attempted to arrange for in-home family counseling and individual counseling, as well, for Ray. The therapist, according to the IEP, must be capable of helping the family to create a behavior management program. The intent behind this requirement is to train the mother to reinforce Ray for positive behavior and, as a consequence, to lighten the mother's load. For example, Ray and his mother could agree that he will receive positive, alone time with his mother in exchange for Ray's baby sitting with the younger siblings for a short period of time. (The same arrangement with Ray's older brother would make it possible for both Ray and his older brother to have alone time with the mother.) Or Ray's mom might agree to help Ray obtain clothing items in exchange for his keeping a curfew. A therapist did agree to begin therapy with the family in

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<sup>6</sup>The name is fictitious.

their home; he had two or three sessions with the family. He then discontinued after the mother's landlord locked her out of her house (presumably based upon a claim of non-payment of rent).

Ray met with the tutor on a regular basis. Among other goals, the tutor attempted to assess Ray's current educational achievement and to prepare Ray academically and emotionally to reintegrate into school. This relationship was productive and helped Ray to stabilize and avoid law violations. After a year, however, Ray was re-arrested and, based upon his previous non-appearances and abscondences, Ray was detained. In detention for two days, Ray continued to meet with his tutor and, perhaps more significantly, expressed a keen interest in helping counsel to identify an acceptable special education school.

While the story of Ray does not appear to be an unqualified success, one must consider whether Ray has done better or worse than he would have done without the special education intervention and, indeed, whether he is involved in more or less delinquent conduct, and whether he is spending more or less time in secure detention than he would have without the intervention. By these measures, Ray is improving. In addition, his mother-- even with her own nearly overwhelming circumstances (many of which have not been detailed in this account) -- is still at least marginally involved with Ray.

Ray has a private tutor with whom he has established a meaningful and socializing relationship. Ray now calls counsel regularly to ask for advice and to discuss his many needs, problems, and aspirations. Moreover, Ray has a good IEP that calls for many significant services, plus Ray has a couple of years of compensatory education "in the bank". He will be able to use those years of compensatory education to obtain individual lessons,

recreational and transitional services above and beyond those required by the standard of appropriateness. The primary challenges outstanding in Ray's case are helping the mother to stabilize her situation, getting the public school system to implement Ray's comprehensive IEP, and getting Ray to stick with that comprehensive program as it materializes for him.

# Chapter

## Three

An Organizing Strategy for Children's Advocates: Combining  
Special Education with Delinquency Representation

As part of the case aggregation strategy, one of the goals is to convince persons in the juvenile justice and educational systems to educate and empower children rather than to punish and contain them.

*Written by*  
Joseph B. Tulman

The nominal goal of the delinquency system is to provide care and rehabilitation for children who have committed offenses. However, care and rehabilitation are almost invariably illusory. Decision-makers dispense rhetoric rather than justice, and so-called child care professionals often provide nothing more than a prison cell.

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An advocate for those adversely affected faces the daunting and complex challenge of attempting to influence judges and other decision-makers to apply their own rules notwithstanding a tradition of ignoring those rule and rationalizing injustice.

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In failing to provide care and rehabilitation, the state is applying the law in a manner that is inconsistent with its own stated norms and projected outcomes. Gary Bellow, a clinical law professor at Harvard, has described generically this type of problem in the following way: a people processing institution is ignoring its own norms and standards to the detriment of poor people, some of whom are our clients. An advocate for those adversely affected faces the daunting and complex challenge of attempting to influence judges and other decision-makers to apply their own rules notwithstanding a tradition of ignoring those rules and rationalizing injustice. Professor Bellow prescribes a "case aggregation strategy" through which advocates collectively concentrate resources on one kind of case in order to vindicate the law and, of course, enforce the rights of the clients and other similarly-situated poor persons.

Professor Bellow and his students recognized that slumlords in Jamaica Plain were, among other things, ignoring their obligations to obey housing codes; at the same time, tenants were not asserting their rights to claim housing code

violations and to withhold rent in defending eviction actions. As a result, the courts were not applying or enforcing the law that protected tenants. The Harvard clinicians declared Jamaica Plain an "eviction-free zone" and concentrated their efforts exclusively on eviction cases with housing code defenses. Ultimately they succeeded in injecting these defenses into eviction cases and in effectively halting evictions in the targeted area.

### I. Case aggregation strategy

In the District of Columbia, faculty and students in the University of the District of Columbia School of Law (UDCSL) Juvenile Law Clinic have applied – over the past four years – a case aggregation strategy to the plight of children in the delinquency system.<sup>1</sup>

The clinicians ask children whom they represent in delinquency cases to consider asserting, with the clinicians' help, educational rights that parallel or strengthen the rights to care and rehabilitation that nominally underlie the delinquency system.

The clinicians initially identified approximately fifty percent of the clinic's delinquency clients for whom special education advocacy was appropriate. In gaining new delinquency clients over the past four years of the Special Education Advocacy Project, the clinicians have maintained this rate of approximately fifty percent in which pursuing special education rights is appropriate.

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<sup>1</sup>University of the District of Columbia School of Law (UDCSL) Juvenile Law Clinic faculty and students have applied the strategy also to children in the dependency (child neglect) system. For current purposes, the focus will be reporting exclusively on efforts affecting children in the delinquency system. The University of the District of Columbia School of Law was formerly known as the District of Columbia School of Law (DCSL) prior to merging with the University of the District of Columbia in 1995.

"Appropriateness" in this context suggests that the client could benefit strategically and substantively from this parallel advocacy and that the client agrees to pursue special education rights.

Part of the case aggregation strategy is changing institutional attitudes regarding the clients and the specific rights being pursued. Clinicians at the University of the District of Columbia School of Law (UDCSL) have conducted bi-annual seminars or training sessions for delinquency and neglect attorneys and for other advocates, training a total of more than one hundred attorneys and, in addition, other non-lawyer advocates. These seminars last for at least nine hours over a three-day period and cover much of the material presented in this manual. Trainees also receive a comprehensive set of special education materials, including statutes, regulations, cases, resource lists, substantive outlines, charts (summarizing the law and process), and hypotheticals. Participants pay a small amount (usually \$150) to attend the training and to receive the materials. This fee seems to ensure for many participants a more serious attitude toward the endeavor. In four of the past eight semesters, UDCSL clinicians have invited a limited number of attorneys to participate in classes and in supervised, special education casework along with the law students. This arrangement is, labor intensive for the supervising clinicians, but it has been effective in preparing a handful of attorneys to practice special education law.

Clinicians at UDCSL have focused considerable energy on eliciting support from the local public defender's office for using special education advocacy as a parallel for delinquency defense. The orientation training for new public defenders contains a short session conducted by a UDCSL clinician on the efficacy of pursuing special education services for delinquency clients. In response to enthusiastic invitations from UDCSL Juvenile Law Clinic faculty to attend (without charge) the nine-hour special education law and practice seminar, a number of

public defenders have attended. In addition, UDCSL clinicians have provided special education advocacy for a number of public defender service delinquency clients.

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Clinicians from UDCSL present this parallel strategy in shorter (one or two-hour sessions) at annual conferences for delinquency and criminal defense attorneys and for delinquency and neglect attorneys. In the fall of 1994, UDCSL clinicians presented a ninety-minute training for local judges. Approximately forty-five (out of sixty) judges attended that training. In June of 1995, the Juvenile Law Clinic – with backing from the Robert F. Kennedy Memorial, the Annie E. Casey Foundation, and others – sponsored a symposium on the unnecessary detention of children in the District of Columbia. The papers and presentations have been published in the D.C. Law Review. *See Symposium, The Unnecessary Detention of Children in the District of Columbia* 3 D.C. L. REV. 193 (1995). A significant focus in the symposium was the tendency to confuse disabilities with dangerousness and, thus, to preventively detain children unnecessarily on that basis. In the summer of 1995, UDCSL clinicians conducted a training for forty employees (educational staff and others) at the juvenile prison.

Parents who prevail against the school system in a special education matter are entitled by federal statute to attorneys' fees at market rate. Children in the delinquency system, and in particular children who are incarcerated, are likely to have special education needs that are unmet. Delinquency attorneys are therefore likely to have

caseloads in which at least half of their clients could benefit from special education advocacy, and the attorneys could make more money pursuing special education services for their clients than if the attorneys were to provide only delinquency representation. In the District of Columbia, attorneys for indigent children in court-appointed cases receive payment at the stated rate of \$50 per hour, billable by the minute with low case caps and an annual cap per attorney. The market rate for special education representation, in contrast, ranges between \$100 to \$230 per hour with no caps of any sort.

Based in part on this financial incentive for delinquency attorneys to tackle special education issues, UDCSL clinicians assumed that training delinquency attorneys in the law and practice of special education would lead rapidly to a broad expansion in access to special education legal services for parents whose children are involved in delinquency cases. University of the District of Columbia School of Law clinicians theorized also that the mounting advocacy would place significant financial, programmatic, and political pressure on the public school system to provide better services for poor children.<sup>2</sup>

Although progressive change almost always seems to take longer than anticipated, attorneys trained by UDCSL are beginning to provide special education advocacy, and the number of special education hearings in the District of Columbia is climbing significantly month by

month. As people have become aware of the need for special education representation and the strategic advantages, UDCSL clinicians have received a growing number of requests to provide representation. To date, UDCSL clinicians have made some referrals for special education representation and intend either to formalize a referral network or to establish closed panels of attorneys for community organizations and parent groups seeking special education representation. It is premature to predict whether the public school system will respond to the mounting pressure by creating more and better programs and enhancing services for special education students.<sup>3</sup>

When UDCSL began to combine special education with delinquency representation, there were no lawyers in the District of Columbia providing special education legal representation to clients they represented in delinquency cases. In addition, lawyers representing children in delinquency matters were not referring their clients to other lawyers for special education legal representation. Both methods for obtaining special education representation are now occurring. Judges also are now referring children with delinquency cases to attorneys who provide special education representation.

Since the fall of 1995, UDCSL clinicians have expanded the organizing effort. A group of law students with a supervising clinician (as well as two or three private attorneys) are representing parents of children<sup>4</sup> at the juvenile prison (Oak

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<sup>2</sup>The school system has been providing services disproportionately to children whose parents could afford to hire attorneys and to advance money for private special education services. Based on Supreme Court case law interpreting the Individuals with Disabilities Education Act (IDEA), a parent whose child is not receiving appropriate special education services is entitled to obtain private services at public expense. This remedy is remarkably effective for people who have money, but poor people typically are not able to take advantage of this remedy.

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<sup>3</sup>Understandably, students of color who live in "inner city" neighborhoods are less likely than white children from affluent neighborhoods to seek private, predominantly white schools. These poor clients typically would prefer quality public school programs in their own neighborhoods.

<sup>4</sup>Special education rights generally, but, as discussed in subsequent chapters, not always exclusively, inure to parents on behalf of their children with disabilities. In the context of special education representation, UDCSL Juvenile Law Clinic faculty and law students typically execute

Hill Youth Center).<sup>5</sup>

For the majority of the clients, appropriate special education services could constitute -- as a matter of delinquency law -- sufficient care and rehabilitation or, for detained children, sufficient preventative services to justify release from incarceration. For clients with records of adjudications for violent offenses for whom release from secure placement is not likely immediately, the clinicians expect to demonstrate that education and treatment personnel at the juvenile prison are not providing, and are not able to provide, appropriate special education services. Federal law requires states to provide appropriate special education and related services to children with disabilities; therefore, the clinicians anticipate that special education advocacy for those clients with violent records will lead to changing the placements for those clients to placements that can provide appropriate services. One must assume that prison officials will not often be able to provide appropriate special education services at the prison, so release to home or to a better treatment environment will be a likely result in a typical case.

## II. Roles of persons in the juvenile justice system

Clinicians at UDCSL intend for the organizing

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retainer agreements with both the parent(s) and the child.

<sup>5</sup>In the fall of 1995, a second section of the UDCSL Juvenile Law Clinic students with a supervising clinician offered their services to organizations of parents whose children have special education needs and to community-based organizations that recognize an interest in developing the capacity to advocate for special education services for their members. A third section of clinic students with a supervising clinician, working with attorneys who are interested in learning special education law and who represent children and parents in neglect cases, are providing special education representation for neglected children.

activities described above, as part of the case aggregation strategy, to convince persons in the juvenile justice and educational systems to educate and empower children rather than to punish and contain them. Ideally, advocates for children can influence every group of actors in the system to shift their conception of the child. The following descriptions by role explore in summary fashion the impact of this shift.<sup>6</sup>

### A. The Child

A child's self-interest in getting released from incarceration or in having a delinquency case dismissed can prompt that child, in response to a suggestion from an attorney or other advocate, to re-think education rights. Advocates can discuss with a child, in addition, a strategy for obtaining services that might make school tolerable and even productive. Some children "choose" delinquency because they see no realistic chance of success in school and in the legitimate job market. Some are depressed and have few positive expectations for the future.<sup>7</sup>

In those circumstances, a child can benefit from observing an advocate who is asserting -- both to the child and to others -- that the child can succeed if there is an Individualized Education Program (IEP) (including related and transition services).<sup>8</sup> Furthermore, incorporating the child

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<sup>6</sup>This presentation does not include descriptions of many roles (*e.g.*, probation officer, teacher, therapists and evaluators) that are clearly relevant to the child's treatment in the delinquency and special education systems. The reader can derive substantive and strategic import from descriptions of the included roles that generalize to those not included.

<sup>7</sup>These descriptions of problems that may lead to delinquent behavior are illustrative and are not intended to be exhaustive.

<sup>8</sup>The terms "related services" and "transition services" are terms of art in special education law. "Related services" are non-educational services, such as counseling, transportation, and occupational

into the process of developing an IEP is also therapeutic and empowering for the child.

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 In some cases, children become  
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 school personnel have ignored  
 for years the children's learning  
 disabilities.  
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Persons who participate in UDCSL's special education law and process training sessions often ask whether it is fair or productive to counsel the child to adopt a label as "disabled" in order to avoid harsh treatment in the delinquency system. First, if the label does not fit, the child probably cannot and should not wear it. As a matter of fact, the advocate in many cases can help the client avoid the negative aspects of special education labeling. For example, school personnel have historically over-identified minority children as mentally retarded (MR); a special education advocate can force school personnel as a matter of law and fact to remove an improper MR label. Similarly, school personnel may over-identify children known to have delinquency charges as seriously emotionally disturbed (SED); an advocate can defeat an improper SED label. In some cases, children become "behavior problems" only after school personnel have ignored for years the children's learning disabilities. Second, many people in schools and in courts label children who become delinquency clients in ways that are not fair and not productive. Some of those labels are, for example, "stupid", "dangerous", "truant", and "incorrigible". The advocate should help the

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therapy, that are needed to make education successful. "Transition services" are services that help the student with disabilities make a successful transition from school to work, college, and independent living.

child and the child's parent(s) develop strategies to overcome negative labels. If special education services would be helpful for the child, the advocate may be able to suggest ways in which the child can avoid negative aspects of the special education label while still obtaining services. Third, the child as client (as well as the child's parent(s)) is in a position to consider, with the advice of counsel, the pros and cons of pursuing special education services. For some clients, assuming a label of, for example, "learning disabled", "seriously emotionally disturbed", or "mentally retarded" may be an unacceptable alternative. In such a case, the advocate would not pursue special education services.

#### **B. The defense attorney: Ethical problems**

An attorney's job as a litigator is to tell a convincing story supported, of course, by demonstrable facts and pertinent legal authority. In delinquency cases, a defense attorney can advocate effectively by changing the essential narrative, starting with a re-definition of the main character. One might list words commonly associated with "delinquent" in the popular culture and contrast that list with a list of words associated with "special education student", and then consider which list describes a more sympathetic main character. In re-casting the delinquency defendant as a child with disabilities who has rights to special educational services, the defense attorney can think more like a civil plaintiff's attorney litigating to obtain rights denied illegally.

Representing a child in a delinquency matter, an attorney is bound ethically, in essence, to honor the child's own perception of best interest. Frequently attorneys violate this ethical prescription, paternalistically superimposing their sense of clients' best interest. This violation of trust, no matter how well-intended, has multiple negative



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An attorney who obtains a child's permission, on the other hand, to pursue special education services is in a position to address the child's underlying problems and, at the same time, provide an effective defense to a delinquency charge.

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effects. Often clients face harsher treatment or separation from their families due to their own attorneys providing confidential information (e.g., suggesting that the family cannot protect the child). Furthermore, a child whose attorney violates trust may become more mistrustful of authority; thus, a well-intentioned, but misguided attorney can compound a child's problems. An attorney who obtains a child's permission, on the other hand, to pursue special educational services is in a position to address the child's underlying problems and, at the same time, provide an effective defense to a delinquency charge. The pursuit of special education services occurs through an administrative process that is separate from the delinquency proceedings. The attorney and the client(s), based upon client-centered problem solving, can control whether they provide information concerning the special education process to the delinquency court.

### C. The parent or guardian

Many parents of children in the delinquency system feel that they have tried but failed to help their child and that they cannot find meaningful services for their child in the community. Parents of incarcerated children typically encounter a dilemma that provides no positive alternative: on the one hand, the child is not safe or controlled in the community; on the other hand, the child is harshly treated in the juvenile prison and receives no meaningful services or education

there. The parent is likely to feel blamed by others, at least in part, for the child's failure. The parent is also likely to feel that the public school system failed the child and is not responsive. Moreover, the delinquency process provides essentially no formal role for the parent; thus, the parent will likely express frustration (regarding the parent's own ineffectiveness), defensiveness (over the blame inherent in the child's "failure"), and anger (at the child and the system) by withdrawing emotionally and even physically from the delinquency process.

In designing an individualized, special education program for a child, the focus is appropriate services that will ensure progress rather than on blaming the child or the parent. The school system by law must provide appropriate services; school personnel cannot avoid this obligation by arguing that the services do not exist or that there is insufficient funding. Therefore, the parent, when armed with knowledge of the law, will likely feel more effective in dealing with school personnel. As a secondary consequence, the parent can work with the child's advocate to introduce meaningful treatment options for the child in the delinquency proceedings, thus diffusing the difficult dilemma described above in which the parent reasonably perceives that neither prison nor the community provide adequate care for the child. For example, the parent can obtain access to psychological counseling, even without generous, private medical insurance coverage. The parent and child can also work with the special education multi-disciplinary team to identify comprehensive transitional services that provide the child with a realistic opportunity to succeed in post-secondary education, work, and independent living.

In the special education process, the parent has a key, formal role. The parent asserts the educational rights of the child and, as a member of the treatment team, provides intimate knowledge of the child and helps to design an IEP. In the special education process, in stark contrast to the delinquency process, the child and the parent are

likely to have a common set of goals<sup>9</sup> and sometimes even a common adversary (the school system). The child's parent or guardian can think of the child as needing opportunity rather than as ungovernable or oppositional. It can be great for the child to see the parent advocating, and great for the parent to see the child advocating. In other words, the special education process potentially provides psychological, procedural, and substantive satisfaction for the parent. The parent has a formal role and a voice in the process, and the process is arguably more understandable in some significant ways than the delinquency process.

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#### D. The Judge

Judges also can conceptualize cases from a different perspective as advocates for children with disabilities present affirmative plans based upon a child's legitimate needs that went undiagnosed and untreated often for five or more years. Judges may have a difficult time accepting an argument that the delinquency or juvenile justice system failed the child; however, an argument that the educational system can

provide services (or failed the child and must now provide services) may be more palatable. Generally speaking, judges get too few constructive choices; they appreciate an attorney generating a positive approach that, in addition, does not draw on the court's resources and tends not to generate opposition from prosecutors, probation officers, and others. Indeed, representatives of the school system are unlikely to be in front of the delinquency court, and the court has no jurisdiction directly over the educational matter. The child's advocate is not asking the court to order anything or take action based upon special education law. Rather, the advocate is asking the judge to allow the educational services that the parent(s) and the advocate have obtained (or are obtaining) to substitute for the usual delinquency responses. The educational system provides answers that the judge has few reasons to question and, lacking experience with that system, little basis for questioning.

Courts often must contend with overcrowded and recidivism-swollen case dockets in the delinquency system. In some jurisdictions, therefore, a priority for courts is to move the cases and, if it seems reasonable, get some of the non-serious cases out of the system. If the judge feels comfortable that another public system is going to be responsible for the child and for the child's rehabilitation, that judge will be receptive to a suggestion to close the delinquency case or to put the child under probationary supervision with, as a condition of probation, participation in the special education services provided by the school system. Judges often fear that dismissing a delinquency case will "send the wrong message" to the child, that the child will internalize a lesson that the system does not exact account-ability. The court avoids this message by acknowledging that the educational system will be responsible for monitoring the child following the dismissal of the delinquency case. In shifting responsibility for the child to the school system, the judge may actually perceive a fundamental justice if the judge senses that the school system failed the child

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<sup>9</sup>Clinicians at UDCSL in most special education cases execute a retainer agreement to represent both the parent and the child; the retainer anticipates that the parent and the child may disagree on an important aspect of the case and that they will allow the UDCSL clinician (attorney or law student) to help them attempt to resolve the disagreement. A disagreement that cannot be resolved may result in the clinic withdrawing from representation due to a conflict of interest. In practice, the clinicians often help parents and children work through their disagreements regarding what services or programs are best for the child, and the clinic rarely withdraws from a case.

previously (perhaps before the delinquency involvement began). Furthermore, the school system provides services through the special education process that may prevent future anti-social behavior. Hence, the court is likely to perceive the shift of responsibility for the child to the school system as constructive.

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Judges too often slip into power struggles with children in delinquency cases, exemplified by a case in which a child violates conditions of probation and a court, often in anger, revokes probation. The story line is familiar, but flawed. A judge interacting only periodically and formally with a child is not in a position to engender genuine change in the attitudes of a deviant or perhaps oppositional child. On the contrary, through the exercise of coercive power, the judge is recreating a dynamic that was at best ineffectual and at worst abusive between the child and the child's actual parent. Threats of incarceration from a judge acting as parent-figure may intensify the abused or oppositional child's understandably jaundiced and alienated reaction.

#### **E. Prison personnel and youth services workers**

Prison personnel and youth services workers (for children who are wards of the state) may feel that everyone else, including parents, school personnel, defense attorneys, and even probation officers, have failed the child before the child ends up adjudicated as delinquent and incarcerated. The prison personnel and youth services workers are left with a child whom they reasonably perceive to be dangerous or, at least, ungovernable. The parents, teachers, and other

adults in the child's life are largely relieved of any duties or responsibilities once the child has been committed to the custody of the state. In addition, these workers are operating in bad conditions often without sufficient financial and programmatic resources.

In advocating for special education services for a child who is a ward of the state and perhaps incarcerated, one is not suggesting that the prison personnel or youth services workers have failed the child; rather, one is identifying a need to pull parents and public school personnel back into the child's life. Without exception, incarcerated children will be returned – sooner or later – to the community. Prison personnel and youth services workers have a stake in making that return successful. Involving parents and public school personnel can facilitate a quicker and more success-ful re-integration. For detained children (children incarcerated pending trial or disposition), prison staff (particularly the education staff) and youth services workers, can assist the child in obtaining an IEP that will take effect when the child returns to the community and that, through its existence, will hasten the child's return to the community. For children who have been incarcerated through a dispositional order, prison personnel and youth services workers can facilitate that return by cooperating in the special education process. Children who are incarcerated and who have educational disabilities have a right to special education services; hence, special education laws provide a means for parents and advocates to bring additional educational resources to the juvenile prison. With proper communication from advocates and parents, prison personnel and youth services workers may see the potential for expanding educational resources at the institution as a positive area for collaboration. On the other hand, advocates for children must continuously question whether identifying additional resources for an institution (a juvenile prison) is ultimately beneficial.

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An advocate does not "save"  
children, and there are no miracle  
cures in the delinquency system.  
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The Individuals with Disabilities Education Act (IDEA) is civil rights legislation that blossomed out of the soil of school desegregation precedents. The majority of incarcerated children are children of color who are poor. In the District of Columbia, one hundred percent of the incarcerated children fit that description. White children and children from wealthy families often avoid delinquency sanctions by obtaining services through private educational or mental health providers. The IDEA offers children with disabilities, regardless of their race or socio-economic status, a similar opportunity to substitute services for punitive treatment (imprisonment). Many front-line workers in the correctional system identify in racial and class terms with the incarcerated children and can recognize the injustice inherent in the system. They might agree that the IDEA is a good tool for obtaining humane and constructive services for incarcerated children.

An advocate does not "save" children, and there are no miracle cures in the delinquency system. Pursuing special education services for children in the delinquency system does not ensure the child's success or transform overnight the often horrendous conditions and circumstances that led to the child's failures. But, engaging the child and the parent in a process with goals that concern educating the child and substituting that process and those goals for the delinquency process is an extremely productive approach. How the child and parent negotiate their problems and interact with the larger society is, in itself, the essence of the therapeutic endeavor.

# Chapter

# Four

School Discipline and Students with Disabilities

Fundamentally, a child with serious or chronic delinquent behavior predictably has experienced consistent school failure and stagnant school achievement from an early point in elementary school.

*Written by*

Eileen L. Ordover

& Joseph B. Tulman

Delinquency defense, school discipline, and disability issues intersect in a variety of ways. Fundamentally, a child with serious or chronic delinquent behavior predictably has experienced consistent school failure and stagnant school achievement from an early point in elementary school. Typically, school personnel failed to address the child's poor achievement when that problem first appeared and for a number of years thereafter. The child's unremediated school failure and lack of achievement led almost inexorably to behavior problems, both within school and outside of school, and then to truancy and dropping out.<sup>1</sup> (Some commentators refer to this ultimate absence from school as a "force out" rather than a "drop out".)

Counsel should collect all relevant school records -- including school discipline records -- for a delinquency client. Excavating records from kindergarten and first grade through the child's current grade (or the grade in which the child left school altogether) often unearths a startling pattern of educational neglect, including a failure to diagnose and address learning disabilities or other education-related disabilities, and a corresponding pervasive, punitive, and essentially illegal application of school discipline sanctions. Addressing the school discipline issues thus becomes a vital part of obtaining appropriate educational services, and of using those services as part of a defense strategy.

A child's school failure and discipline history, and the parallel history of school personnel's failure to diagnose and address the child's education-related disability, may provide counsel with a basis for seeking a dismissal of a

delinquency matter or for mitigating the length and severity of the delinquency disposition. See Oliver's case in Chapter 5 on page 5-9.

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 Counsel may find that a client who is eligible for special education is concurrently facing delinquency charges, as well as suspension or expulsion.  
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Counsel may find that a client who is eligible for special education is concurrently facing delinquency charges, as well as suspension or expulsion. Indeed, a client may face disciplinary proceedings in school for the same incident for which delinquency charges have been filed. In such a situation, counsel must consider not only how to obtain and use special education services, but also counsel must consider how school investigations and disciplinary proceedings may potentially compromise or bolster the defense. For example, a prosecutor may attempt to admit in a delinquency case physical evidence seized by school officials in violation of the Fourth Amendment rights of the student/defendant. Counsel must inform a child of the Fifth Amendment privilege against self-incrimination and must warn a child who faces a delinquency proceeding that a prosecutor might seek to use statements made by that child if the child testifies in the related school discipline proceeding.

Defense counsel might find that a discipline proceeding presents an unusually rich opportunity to "discover" the witnesses and evidence that a prosecutor ultimately will present at a subsequent delinquency trial. Indeed, in most jurisdictions, delinquency discovery rules -- like criminal discovery rules -- allow for relatively narrow opportunities for defense counsel to obtain information about the government's case against the accused. The government is not obligated, generally speaking, to provide names of witnesses or witnesses' statements prior to the

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<sup>1</sup> Obviously, other factors, as well, often contribute to deviant behavior. Physical abuse, for example, is highly correlated to deviant conduct in school, at home, and in the community. Moreover, certain education-related disabilities may manifest in disruptive behavior in school whether or not the child previously experienced extended periods of school failure and educational neglect.

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delinquency fact finding hearing. The usual civil discovery tools (*e.g.*, interrogatories, requests for admissions, depositions) also are not available in delinquency matters. A school discipline hearing, therefore, can function as a preparatory "dry run" of the delinquency trial.

In order to deal effectively with these prospects regarding the inter-play of school discipline, delinquency, and disability, counsel must locate and understand -- in addition to delinquency and evidence law -- the following four bodies of law:

(1) **The Individuals with Disabilities Education Act (IDEA):** The IDEA contains substantive and procedural protections against disciplinary exclusion from school of students with disabilities. The IDEA also imposes upon school personnel an obligation to provide appropriate services to address behavioral issues of students who are disabled.<sup>2</sup>

(2) **Section 504 of the Rehabilitation Act (§504) and the Americans with Disabilities Act (ADA):** Section 504 and the ADA, and the regulations implementing them, protect against discrimination on the basis of disability in school discipline.

(3) **Case Law Regarding Constitutional Rights in the School Setting:** Students with disabilities, like all students, are entitled to certain basic constitutional protections in school discipline and investigations. The Supreme Court and lower courts have developed a body of cases interpreting and applying these protections.

(4) **Local and State Laws, Ordinances, and Regulations Relating to School Discipline:** Local ordinances and school regulations (and perhaps state laws and regulations) define, in the first instance, what conduct by students ostensibly warrants sanctions, what process is due to students facing school discipline, and the stringency and duration of the possible sanctions. In addition, state and local laws and

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<sup>2</sup>As of this writing, in April 1998, an amendment to the IDEA that would significantly undermine these protections was pending before Congress. Readers should check for subsequent developments.

regulations incorporate and, at times, reformulate governing principles and provisions *from* the IDEA and the other sources of law referenced in numbers (1) - (3), above.

In light of these relevant bodies of law, this chapter primarily presents the various rights implicated when school officials impose punitive discipline upon students with disabilities. The chapter begins with a discussion of school personnel's programmatic obligations towards students whose disabilities manifest in challenging behavior. Following that discussion is a presentation of basic constitutional rights in school discipline. Included in the chapter after the overview of constitutional rights are a couple of case histories detailing how defense counsel successfully used the school discipline hearing process to delay and then derail delinquency prosecutions. Next, the chapter considers IDEA provisions regarding discipline, as well as §504 and ADA protections against discrimination in disciplinary procedures and disciplinary sanctions. Finally, the chapter examines the special issues that arise when school personnel initiate delinquency proceedings for in-school conduct.<sup>3</sup>

In considering discipline and disability, counsel should recognize, remember, and realize the following key principle: no child who is protected by the IDEA should ever be without an appropriate educational placement to attend. While this principle had been a matter of dispute prior to the 1997 amendments to the IDEA, as discussed below, the law now expressly states that all children with disabilities are entitled to a free appropriate public education, "including those who have been suspended or expelled." 20 U.S.C. § 1412(a)(1).

#### I. School personnels' programmatic

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<sup>3</sup>A consideration of state and local provisions from around the country is beyond the scope and scale of this manual. Nevertheless, counsel and advocates for children must find and fathom all relevant state and local provisions.

### obligations towards students with behavioral issues

Securing appropriate education and services for children whose disabilities entail behavioral manifestations was a key impetus behind enactment of the IDEA -- known when it was passed in 1975 as the Education for All Handicapped Children Act. Prior to that time, educators and administrators routinely labeled children with disabilities as behavioral problems, and thus excluded them from public education, or relegated them to segregated programs with inadequate services.<sup>4</sup> Statistics before Congress indicated that eighty-two percent of children classified as emotionally disturbed were completely excluded from school.<sup>5</sup>

Embedded in the history of the IDEA is the understanding that an apparent right of access to school is meaningless for children with behavioral manifestations if that access is not accompanied by a right to programming that takes into account behavioral needs. Nonetheless, officials, administrators, and teachers in many school districts still refuse to address appropriately the behavioral consequences of disability. Some school functionaries ignore this duty altogether. Others, while purporting to provide behavioral programming, in reality focus their efforts exclusively on controlling the children in school. Rather than addressing behavior and its root causes as part and parcel of the children's educational and developmental needs, those who make and implement school policy often tend to view behavior narrowly as something to be "managed" or "controlled". Commonly, the focus and virtually the exclusive goal is to minimize the disruption of classroom activities. The behavioral needs of children thus become addenda to education -- often in the

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<sup>4</sup>See, e.g., *Mills v. District of Columbia Bd. of Ed.*, 348 F. Supp. 866 (D.D.C. 1972).

<sup>5</sup>*Honig v. Doe*, 484 U.S. 305, 309 (1988) (citing legislative history).

form of "behavior management plans" -- rather than as subjects for education, and special education services, in their own right.<sup>6</sup> Similarly, school personnel often consider behavioral manifestations as relevant only to discipline *per se*, and they mistakenly conceive of behavioral manifestations solely as impediments to academic progress or as impediments to a student's deriving sufficient "benefit" from the education provided. Such school personnel thus fail to recognize that special education, related services, and transition services are vehicles for comprehending oneself and others, and for transforming thereby one's interactions with other people.

Narrow approaches and restrictive responses to behavioral manifestations violate the duty to provide a free appropriate public education ("FAPE"). Courts have recognized routinely that the meaning of education under the IDEA is broad and encompasses, *inter alia*, a child's unique social and emotional needs as well as his or her academic ones.<sup>7</sup> For children whose dis-

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<sup>6</sup>Columnist Coleman McCarthy, a noted peace activist and scholar, speaks to audiences about -- among a myriad of topics -- educators' neglect of conflict resolution. With rhetorical aplomb, McCarthy asks how many people studied algebra in secondary school. All hands go up. He then asks how many people had a course in conflict resolution. Few hands appear, if any. McCarthy secures his point by asking people whether they are more likely, on any given day, to use algebra or to attempt to resolve interpersonal conflicts.

<sup>7</sup>*Seattle School District No. 1 v. B.S.*, 82 F.3d 1493,1500 (9th Cir. 1996) ("[e]veryone agrees that A.S. is exceptionally bright and thus able to test appropriately on standardized tests. This is not the sine qua non of 'educational benefit,' however. The term 'unique educational needs' [shall] be broadly construed to include. . . academic, social, health, emotional, communicative, physical and vocational needs"); see also, e.g., *Babb v. Knox County School System*, 965 F.2d 104,109 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 380 (education under IDEA encompasses "both academic instruction and a broad range of associated services traditionally grouped



abilities entail challenging behaviors, FAPE thus requires "special education," or "specially designed instruction," aimed at behavioral issues, as well as any necessary behaviorally-related "related services."

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 Narrow approaches and restrictive responses to behavioral manifestations violate the duty to provide a free appropriate public education ("FAPE").  
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The duty to address behavior as a part of FAPE extends well beyond simply managing or controlling behavior in the classroom. Thus, *Chris D. and Cory M. v. Montgomery County Bd. of Ed.*<sup>8</sup> rejected as insufficient and as a denial of FAPE a school's substitution of disciplinary exclusion and attempts at behavior management for meaningful behavioral programming and supports. The court found "[t]he system of behavioral control...Cory's teachers have

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under the general rubric of 'treatment'). For examples of other cases stressing the broad meaning of education under the IDEA, see *Timothy W v. Rochester School District*, 875 F.2d 954,962 (1st Cir. 1989), *cert. denied*, 493 U.S. 983 ("the Act's concept of special education is broad, encompassing not only traditional cognitive skills, but basic functional skills as well"); *Kruelle v. New Castle County School District*, 642 F.2d 687, 693-94 (3rd Cir. 1981) ("the concept of education is necessarily broad. . . [w]here basic self-help. . . skills. . . are lacking, formal education begins at that point"); *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269, 275 (3rd Cir. 1980), *cert. denied*, 452 U.S. 968 (1981) (same). *Cf.*, *Stacey G. v. Pasadena Independent School District*, 547 F. Supp. 61,77 (S.D. Tex. 1982) (" . . . an essential element of an appropriate education for a child as handicapped as Stacey is an opportunity to develop skills that would allow Stacey to be as self-sufficient as possible and to function outside of an institution").

<sup>8</sup>753 F. Supp. 922 (M.D. Ala. 1990).

implemented [to be] woefully inadequate," and an impermissible substitute for "attempting to teach him to control his own behavior."<sup>9</sup> The court faulted the school system for the fact that "[t]he few behavioral' goals' contained in Cory's most recent IEP actually describe only general classroom rules and the punishments and rewards for breaking or following these rules, rather than any individualized strategies for changing Cory's behavior."<sup>10</sup> The court observed that to the extent that Cory at times behaved appropriately in class, it was "only because a teacher or other adult is literally standing over him."<sup>11</sup> The school personnel's efforts and their legal position were unacceptable because "[c]learly such a dependency-building approach does nothing and in fact may make it more difficult to enable Cory to behave in a regular classroom or in the real world."<sup>12</sup> The school personnel's approach thus violated Cory's right to receive education in the least restrictive environment as well as his right to FAPE; the school's approach offered "no realistic prospect of returning to the 'regular' class setting, which, of course, would be the least restrictive environment for any student."<sup>13</sup> Amendments made to the IDEA in 1997 underscore the duty of school personnel to address problem behavior as an educational matter, as both an aspect of FAPE and a strategy for preventing disciplinary exclusion. The statute now explicitly states that, if a child's behavior impedes the child's learning or that of others, the IEP must include "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." 20 U.S.C. § 1414 (d) (3)(B). In addition, any time a child is suspended from school or otherwise removed for disciplinary

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<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* at 933.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.* at 934.

reasons from the usual educational placement, school personnel must conduct a functional behavioral assessment, and develop a behavioral intervention plan. 20 U.S.C. § 1415 (k) (1)(B). If such an assessment already has been done and a plan developed, the IEP team must review the plan and modify it as necessary to address the behavior that prompted the removal. *Id.*<sup>14</sup>

Finally, as discussed in detail below, under certain circumstances, school personnel may remove a child to an “interim alternative educational setting” as a response to certain types of alleged behavior. Those placements, under the law, must provide services to address the alleged behavior. 20 U.S.C. § 1415(k)(3).

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Like all students, students with disabilities enjoy certain basic constitutional rights in school discipline and investigations, including procedural due process and protections against unreasonable searches and seizures.  
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<sup>14</sup>While the statute clearly provides that these rights apply in suspensions of any length, the U.S. Department of Education, without legal analysis, has taken the position that schools need not conduct functional behavior assessments or develop or review behavioral intervention plans unless the child will be excluded from his or her current placement for a total of eleven days or more during a given school year. See Judith E. Heumann, Assistant Secretary Office of Special Education and Rehabilitation Services and Thomas Hehir, Director Office of Special Education Programs, Memorandum to Chief State School Officers Re: Initial Disciplinary Guidance Related to Removal of Children with Disabilities from their Current Educational Placement for Ten School Days or Less, (OSEP Memo 97-7, September 12, 1997) (hereinafter “OSEP Memo 97-7”), reprinted at 26 IDELR 981; Notice of Proposed Rulemaking (hereinafter “NPRM”), 62 Federal Register 55025, 55102 (October 22, 1997) (proposed 34 C.F.R. § 300.520 (b), ©).

Similar obligations to address behavior with appropriate educational interventions flow the regulations implementing §504 and the ADA. Thus, for students with disabilities whom the nevertheless must provide special or regular education and related services in the least restrictive environment consistent with their needs, including the aids, services and accommodations necessary to ensure that they receive an education that is as effective as that provided other students. 34 C.F.R. §§ 104.4(b)(1)-(3), 104.33(b)(1), 104.34 (§504); 28 C.F.R. §§ 35.130(b)(1)-(3), (7), (8), 35.130(d) (ADA).

## II. Basic student rights in school discipline<sup>15</sup>

Like all students, students with disabilities enjoy certain basic constitutional rights in school discipline and investigations, including procedural due process and protections against unreasonable searches and seizures. Section 504 and the ADA, which prohibit disability discrimination in all aspects of public education, afford additional protections in investigations and disciplinary hearings.

### A. Procedural due process

A student suspended for any amount of time is entitled to procedural due process, meaning, at a minimum, some form of notice of the charges and an opportunity to be heard. *Goss v. Lopez*, 419 U.S. 565 (1975). School officials may exclude a student before a hearing only in genuine emergencies. *Id.* at 582-83.<sup>16</sup> A student who admits to the misconduct should nonetheless be afforded a hearing on the issue of penalty. See, e.g., *Strickland v. Inlow*, 519 F.2d, 744, 746 (8th

<sup>15</sup>For a more complete presentation of school discipline issues, see Soler, et al., REPRESENTING THE CHILD CLIENT, ¶ 6.04[1 ]-[6], pp. 6- 32 through 6-87 (1996).

<sup>16</sup>Even then, a hearing must be held as soon as possible after the student is removed from school. *Lopez v. Williams*, 372 F. Supp. 1279 (S.D. Ohio 1972), *aff'd sub nom. Goss v. Lopez*, 419 U.S. 565 (1975).

Cir. 1975). While courts tend to afford school officials substantial latitude in disciplinary decisions, a sanction that might ordinarily be permissible for a particular infraction may nonetheless be disproportionate or from otherwise inappropriate in light of an individual student's circumstances. *See, e.g., Matter of P.J.*, 575 N.E.2d 22 (Ind. Ct. App. 1991) (semester-IDEA does not cover, school system personnel long expulsion for consumption of alcohol on school property enjoined where student had used alcohol as her way of disclosing recent sexual abuse); *Washington v. Smith*, 618 N.E.2d 561 (Ill. App. 1st Dist. 1993) (student who brought ice pick to school to return to a friend but who did not exhibit or brandish it, nor threaten anyone with it, had not engaged in misconduct sufficient to support one-semester expulsion).

The type of notice and kind of hearing required -- including how formal the hearing must be, and student rights at the hearing -- depend upon the seriousness of the charges and the severity of the possible penalty. *Goss*, 419 U.S. at 578-80, 584; *Matthews v. Eldridge*, 424 U.S. 319, 333, 334-35 (1976) (specific dictates of due process require consideration of the private interest at stake, the risk of erroneous deprivation of that interest through procedures used, the probable value of additional procedural safe-guards, and the government's interest, including additional fiscal and administrative burdens). Uniformly recognized, however, is the right to an impartial decision-maker. *See, e.g., Gorman v. University of Rhode Island*, 837 F.2d 7, 15 (1st Cir. 1988).

*Goss* held that in "usual" cases of suspensions for ten days or less, required procedures include at a minimum oral or written notice of the charges, an explanation of the evidence supporting them, and an opportunity for the student to tell his or her side of the story. *Goss*, 419 U.S. at 581-82. This "notice" and "hearing" may occur simultaneously. *Id.*<sup>17</sup> Long-term

<sup>17</sup>More rigorous procedures may be required for short suspensions in "unusual" situations. *Goss*, 419 U.S. at 484. For instance, more serious charges

suspensions and expulsions require more formal procedures. *Goss*, 419 U.S. at 584; *Jackson v. Franklin County School Board*, 806 F.2d 623, 631 (5th Cir. 1986). A substantial body of case law has developed in which courts have considered whether a particular element of due process was, in fact, due under the circumstances.<sup>18</sup> Such cases contemplate, for example, the right to detailed prior notice of the school's evidence; the right to confront and cross-examine witnesses; the application of various presumptions and burdens of proof in school disciplinary matters; the right to be represented by counsel; and the privilege against self-incrimination. Courts generally have not been as rigorous in applying due process and other constitutional protections as students and their advocates would hope, and decisions vary widely. Counsel should investigate case law in the relevant jurisdiction, as well as any available state-law claims and protections.

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that will appear in the student's education record may represent a greater infringement of liberty interests, even if the suspension itself is short-term (*e.g.*, a two-day suspension for smoking versus a two-day suspension for stealing or assault), and so require greater protections under the *Matthews* test. Or a short-term suspension might bring with it other consequences, such as academic penalties for each day of absence, or the students' missing an exam. Other constitutional rights, such as free expression, might also be at stake. Counsel should check for relevant decisional law in their jurisdiction.

<sup>18</sup>For a detailed summary of the extent to which procedural protections apply in school discipline matters, *see REPRESENTING THE CHILD CLIENT*, *supra* n.15, at ¶ 6.04[5], pp. 6-49 through 6-67.

### B. Searches and investigations

School searches fall within the protections of the Fourth Amendment's right against unreasonable searches and seizures, yet the U.S. Supreme Court has fashioned a relaxed or compromised standard for measuring the legality of such governmental intrusions upon students. *See generally, New Jersey v. T.L.O.*, 469 U.S. 325 (1985). School searches do not require a warrant, *id.* at 340, and the government can search based upon reasonable grounds rather than the ordinary constitutional minimum standard of probable cause. *Id.* at 340-41. School personnel can justify reasonable searches based upon alleged violations either of law or of school rules. *Id.* at 342.

Counsel challenging a school-based seizure or search should examine and, if appropriate, challenge the reasonableness of both the inception and the scope of the intrusion. *See, id.* at 341- 42. The *T.L.O.* sliding standard of "reasonableness under all of the circumstances" is unquestionably a departure from the clearer steps of probable cause and reasonable articulable suspicion that form the core of the Court's Fourth Amendment decisions;<sup>19</sup> nevertheless, in challenging the reasonableness of intrusions in school, one must still examine and apply search and seizure case precedents from settings other than schools. Conceptually, the reasoning of Fourth Amendment cases as to the significance of governmental behavior and the meaning of suspects' behaviors is entirely applicable.<sup>20</sup>

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<sup>19</sup>One may still assert that the ordinary standards of probable cause and reasonable articulable suspicion apply in school searches and seizures in which the police take the lead and the nature of the governmental action is primarily law enforcement rather than educational. *See, REPRESENTING THE CHILD CLIENT, supra* n. 15, ¶ 6.05[2][b][v], pp. 6-99 through 6-101.

<sup>20</sup>*See, e.g., In re William G.*, 709 P.2d 1287 (Cal. 1985) and other cases cited in REPRESENTING THE CHILD CLIENT, *supra* n. 15 at ¶ 6.05[2],

In *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), the Supreme Court expanded the legitimacy of suspicion less searches (from cases like *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989)) to include random drug testing of student athletes in the public school setting. Notwithstanding that ruling, the overriding principle that governmental intrusions require reasonable suspicions particularized to an individual person arguably controls all other instances of governmental intrusions upon students' privacy within the public schools. Thus, counsel should always challenge a search of a group of students or an entire class when the ostensible justification for the search is the particular sanctionable activity of one (identified or unidentified) student.

Fundamentally, counsel is likely to encounter school administrators and officials who seem either arrogant regarding their power over students or ignorant of the applicable legal constraints. These attitudes may flow from assumptions debunked and arguments dismissed by the *T.L.O.* court that, for example, teachers and principals act in loco parentis and that children in school maintain no right to privacy. Counsel also should be alert to the possibility that a particular school rule that provides the ostensible justification for the intrusion upon a student's privacy is itself an inane, indefensible, and, therefore, illegal basis for sanctioning a child.<sup>21</sup>

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pp. 6-92 through 6-107.<sup>21</sup> One would have to demonstrate, presumably, that the rule advanced no reasonable governmental interest or that the specific rule was inconsistent with other controlling portions of the school system's disciplinary rules. *But compare, T.L.O.*, 369 U.S. at 382 (Stevens, J. dissenting)(infractions of minor school rules should not justify Fourth Amendment intrusions) with *id.* at 342-43 n.9, 344 n.11 (majority opinion)(explicitly applying ruling to instances of alleged infractions of school rules)(cited in REPRESENTING THE CHILD CLIENT, ¶ 6.05[2][b][viii], p. 6-106.

The Supreme Court upheld the search in *T.L.O.* and thus did not reach the question of the applicability of the exclusionary rule to school searches. *See, T.L.O.*, 469 U.S. at 332-33. Lower courts, however, have uniformly applied the exclusionary rule when prosecutors have sought to introduce in a delinquency or criminal matter evidence illegally seized from an accused in the school setting.<sup>22</sup> On the applicability of the exclusionary rule to admission of illegally-obtained evidence in school disciplinary hearings, courts have ruled both ways.<sup>23</sup>

### C. Disability discrimination in investigations

Although there is a dearth of case law on the subject, counsel should be aware that the manner in which school disciplinarians conduct investigations of alleged misconduct, and the manner in which decisionmakers interpret and use that information, may constitute impermissible disability discrimination. For example, a child with a cognitive impairment may become confused during repeated questioning and, therefore, may give unclear or inconsistent answers. If those answers are then interpreted as evidence of dishonesty and used as a basis for finding the student guilty and imposing a disciplinary sanction, the student has been subjected to discrimination on the basis of disability. A deaf student who has been denied an interpreter, and who is thus unable to fully comprehend or effectively communicate responses, also has suffered discrimination. The anti-discrimination principles of §504 and the ADA, and their implementing regulations, require school disciplinarians and decision-makers to take into

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<sup>22</sup>See REPRESENTING THE CHILD CLIENT, *supra* n.15, ¶ 6.05[2][b][ix][A], pp.6-107 through 6-108.

<sup>23</sup>*Id.* at ¶ 6.05[2][b][ix][B], pp.6-108 through 6-109; *see also, In the Matter of Juan C. v. Cortines*, 647 N.Y.S.2d 491 (Sup. Ct. 1996), (applying exclusionary rule to school disciplinary hearing), *reversed on other grounds*, 679 N.E.2d 1061 (N.Y. Ct. App. 1997).

account and accommodate the disabilities of accused students. *See* 29 U.S.C. §794; 42 U.S.C. §12132; 34 C.F.R. §104.4(b)(1)(iv), (4); 28 C.F.R. §35.130 (b) (3)(I), (7).

### D. Case histories

#### 1. The case of Leonard F.

Leonard, at the age of twelve, was arrested in school for allegedly possessing a handgun. After seizing Leonard in the school library and confiscating a gun, the police officers -- on the recommendation of the vice-principal -- presented Leonard to a group of his peers (two classrooms combined) and told them that Leonard was "a criminal" who would be incarcerated for his law violation. School officials subsequently expelled Leonard for two semesters.

University of the District of Columbia School of Law (UDCSL) clinicians were appointed to defend Leonard in the ensuing delinquency matter. The investigation led to evidence of modest credibility that Leonard had found the gun on his way to school and that he was planning to give it to an adult when he encountered one whom he felt he could trust. At the same time as they developed their delinquency defense, UDCSL clinicians worked with Leonard and his mother to challenge the two-semester expulsion levied by the school. The school board's general disciplinary regulations prohibited this length of removal for a twelve-year-old child. In addition, by initiating the special education evaluation process, Leonard's mother -- through counsel-- was able to challenge the expulsion as a violation of the special education "stay-put" provision.<sup>24</sup> At the disciplinary hearing in which UDCSL clinicians challenged the two-semester expulsion, the school officials agreed that the expulsion was invalid and agreed, further, to forego any suspension based upon an agreement that Leonard would transfer to a different

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<sup>24</sup>*See. Honig v. Doe*, 484 U.S. 305 (1988), and *Hacienda v. Honig*, 976 F.2d 487 (9th Cir. 1992).

school.

In the delinquency case, UDCSL clinicians effectively challenged the behavior of the school officials and the police in arresting Leonard and publicly "convicting" and chastising him. The motion contained citations to police arrest regulations regarding the proper handling of juveniles, as well as an application of the law requiring confidentiality of juvenile matters to the facts of the police officers' displaying Leonard to his school-mates. In addition, the UDCSL advocates referred in the motion to double jeopardy law and to a local court rule that requires "fundamental fairness" in dealing with children; the advocates based the request for dismissal on the power of the court to dismiss for social reasons. Contending with a complicated motion raising issues that, at least in appearance, seemed to be "of first impression", and comforted to an extent perhaps by the settlement (through transfer) of the school disciplinary matter, the prosecutor did not mount an entirely aggressive defense to the motion to dismiss. The complicated nature of the motion, combined with unopposed continuances to deal with the school disciplinary issues, resulted in a significant delay prior to the date of the delinquency trial. During that time, Leonard avoided any additional delinquency court involvements. Ultimately, the delinquency court, finding implicitly that Leonard had already been "punished" (and that punishment -- at least punishment involving public humiliation -- was impermissible), dismissed Leonard's case based primarily on the violations of arrest procedures and confidentiality committed by the police and school officials.

## 2. The case of Talia P.

University of the District of Columbia School of Law's Juvenile Law Clinic advocates represented Talia on a charge that she, along with four other female teenagers, hit and kicked a girl at school. The formal charge was "assault with a dangerous weapon", a shoe. Talia had no prior contacts with the delinquency system, and she did not appear to have significant

educational problems. Juvenile Law Clinic advocates, in conformance with school system disciplinary regulations, requested a disciplinary hearing to challenge Talia's suspension. During the investigation, UDCSL advocates learned that this event was one of a series of confrontations between distinct groups of girls at the school. In negotiations with the principal immediately preceding the disciplinary hearing and based upon information from other witnesses, UDCSL advocates also learned that one of the assailants, however, reportedly passed the mace to someone in the crowd, and school officials did not recover it. Further, the principal was "protecting" various students who had been witnesses to the alleged assault; the principal apparently was concerned that divulging the identity of witnesses and allowing the children to testify (in the disciplinary hearing or a delinquency trial) would increase the likelihood of retaliation and continued violence between the groups of girls.

University of the District of Columbia School of Law advocates successfully argued for a postponement of the disciplinary hearing citing the government's procedural violations in refusing to provide exculpatory information and refusing to produce other arguably "discoverable" material. In addition, UDCSL advocates had discussed with the principal the potential advantages of mediating the dispute. In preparing for the delinquency matter, subsequently, UDCSL advocates developed discovery requests and challenges that, if needed, would potentially frustrate the prosecution. (In other words, UDCSL advocates anticipated that the principal would not provide to the prosecutor information about the mace and the names of other students, not actually charged, who may have been responsible for the assault.)

University of the District of Columbia School of Law advocates convinced the juvenile court prosecutor and all other participants to refer the delinquency case to mediation. Following a successful mediation between the girls involved in

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the fight,<sup>25</sup> the prosecutor moved to dismiss the pending delinquency charge against all five girls.

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Only a small percentage of incarcerated children have been evaluated for special education needs. Those who have been identified as special education eligible typically have no current IEP and are not receiving appropriate educational services while detained pre-trial and pre-disposition or while incarcerated post-disposition.  
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In juvenile incarceration facilities, the children typically are between two and six or seven years below grade level in academic performance. Only a small percentage of incarcerated children have been evaluated for special education needs. Those who have been identified as special education eligible typically have no current IEP and are not receiving appropriate educational services while detained pre-trial and pre-disposition or while incarcerated post-disposition.

University of the District of Columbia School of Law clinicians represent children who are preventively detained or incarcerated post-disposition at the juvenile prison and advocate for their special education rights based upon a belief that, with proper services, those children could be released. For the relatively small percentage of incarcerated children who have been seriously violent, the right to special education services is no less viable. If officials at the incarceration facility do not offer appropriate services, a spec-

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<sup>25</sup>Co-mediators conducted the mediation under the auspices of a local court-annexed dispute resolution center. One of the mediators was an adult; the other was a high school student, trained as a mediator through a school-based, conflict-resolution program.

ial education advocate for the child and the parent can force the system either to serve the child or place the child in a more appropriate setting.

### 3. The case of Daniel T.

Daniel pled guilty to attempted Unauthorized Use of a Motor Vehicle (UUV). A judge placed Daniel on probation for one year. While on probation, Daniel was arrested an additional three times, leading to a court order following the third arrest for placement in a pre-trial halfway house. Daniel ran away from the halfway house and was arrested yet again; the judge revoked his probation and put him in a medium security juvenile facility. At that point, Daniel came to the attention of UDCSL. One of the lawyers trained by UDCSL brought Daniel's case to the Clinic.

Daniel had been previously identified as eligible for special education services as a learning disabled (LD) student, but he had not received appropriate services. In addition, Daniel is diabetic and takes insulin twice a day. University of the District of Columbia School of Law advocates and the private practitioner resolved to get Daniel re-evaluated and to obtain an appropriate educational program for him with all necessary services. The goal was to get an appropriate school placement for Daniel from the public school system before the disposition (that is, sentencing) in his new delinquency case.

The University of the District of Columbia School of Law advocates obtained a ruling from a hearing officer ordering the school system to complete an IEP and propose an interim placement for Daniel pending completion of a neuropsychological evaluation. In conjunction with Daniel's delinquency attorney, the UDCSL advocates submitted a memo to the judge in the delinquency case outlining Daniel's educational needs. The delinquency attorney then requested that the judge again place Daniel on probation and rely on the special education placement to provide the services Daniel requires. The prosecutor, in contrast, asked the judge to keep

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Daniel incarcerated. Basing her decision on UDCSL 's educational advocacy and UDCSL's ability to deliver an appropriate placement from the public school system, the judge ordered placement at a group home (post-disposition halfway house). For some time, the administrators of Daniel's special education program become an asset to the school. The other students reportedly considered him to be a leader.

Some months later, Daniel stopped going to the special education placement. Daniel's mother reported to University of the District of Columbia School of Law that she had visited Daniel's school and that school officials were not controlling the children. She further stated that Daniel was not happy with the lack of decorum. UDCSL advocates attempted without much success to help Daniel find a placement that he found suitable. Nevertheless, Daniel had no re-arrests prior to his eighteenth birthday.

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Special education advocacy shifts the focus to the child's right to educational opportunities, offering the defense attorney a rhetorical and legal handle to defeat preventive detention and post-disposition incarceration.  
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Adults tend to perceive children in the delinquency system as bad actors rather than as castle builders, symphony writers, or future leaders. Special education advocacy Shifts the focus to the child's right to educational opportunities, offering the defense attorney a rhetorical and legal handle to defeat preventive detention and post-disposition incarceration.

### III. Disciplinary exclusion under the IDEA as amended

#### A. Legal background

Disciplinary exclusion of children with disabilities has long been a legally complex and contentious reported that he was adjusting well and had issue under the IDEA. The IDEA Amendments of 1997 have complicated further this already complex body of law. To work effectively for delinquency clients who present overlapping school discipline and disability issues, advocates should examine not only the current law of disciplinary exclusion, but also the history behind the current law.

Prior to the 1997 amendments, the IDEA was silent as to discipline and disciplinary exclusion. Administrative and judicial interpretations of the IDEA's broad rights to FAPE and to procedural protections defined, in the context of school discipline, the rights of students and the limits on school authority. In this manner, the courts addressed three major issues: (1) procedural rights in the face of disciplinary exclusion, (2) the continued availability of educational services after "expulsion,"and (3) the rights of students not identified as having a disability prior to a disciplinary incident and attempted exclusion.

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To work effectively for delinquency clients who present overlapping school discipline and disability issues, advocates should examine not only the current law of disciplinary exclusion, but also the history behind the current law.  
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Procedural rights in disciplinary exclusion: In 1988, the U.S. Supreme Court held that exclusion of a special education student from school for more than ten days constitutes a change in placement, triggering all the rights and procedures ordinarily attendant to placement changes under the IDEA. *Honig v. Doe*, 484



U.S. 305 (1988).<sup>26</sup> These rights include the right to file a complaint, the right to have a due process hearing, and the right to remain in the current, in-school educational placement pending completion of administrative and judicial proceedings. *Id.*<sup>27</sup> The ruling in *Honig* thus prohibited school personnel from unilaterally excluding special education students; once the parent triggered stay-put, school personnel could remove the child from the current educational placement over parental objection only by obtaining an order from a court of competent jurisdiction. *Id.* at 328. To obtain such an order, the school system had to demonstrate that maintaining the child in the current placement was substantially likely to result in injury to the child or others, and that reasonable efforts to minimize the risk of harm through the use of supplementary aids and services had not succeeded. *Id.*, *Light v. Parkway C-2 School District*, 41 F.3d 1223 (8th Cir. 1994). *Honig* held that there were no exceptions to these rules, even as to students deemed "dangerous" or "disruptive" by school personnel. *Honig*, 484 U.S. at 323. Education after expulsion: In its administrative interpretations, the U.S. Department of Education long maintained that (1) no child with a disability could be "expelled" for conduct related to a disability, (2) a child could be "expelled" for "unrelated" conduct, and (3) a child "expelled" for unrelated conduct remained entitled to a free appropriate public education. Courts split on the issue of education after expulsion. All agreed that school officials could not exclude a student from school for more than ten days and could not deny education for

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<sup>26</sup>As noted above, the 1997 IDEA Amendments definitively answered this question: all students with disabilities are entitled to FAPE, even during periods of suspension or expulsion, and even if the behavior that led to the exclusion has been deemed unrelated to the disability.

<sup>27</sup>Special education practitioners refer to the provision establishing the right to remain in the current placement pending resolution of the dispute as the "stay-put" provision.

conduct related to a disability. Several courts held that school officials could sanction a student for unrelated conduct by excluding the student for more than ten days as long as school personnel provided the student with appropriate educational services. Shortly before the 1997 Amendments, two Courts held that students expelled for unrelated conduct may be denied all education.<sup>28</sup>

Students not previously identified as having a disability: Prior to the 1997 legislation, Courts reached inconsistent conclusions when faced with the question of whether students not previously identified as having a disability under the IDEA may invoke IDEA protections to forestall disciplinary sanctions. These cases most commonly presented the following scenario: a suspended or expelled student requested an evaluation to determine eligibility for IDEA services; the student filed a complaint challenging school personnel's past failures to identify and evaluate the student and to provide the student with special education and related services; and the student invoked stay-put rights in an attempt to return to (or remain in) school notwithstanding the disciplinary exclusion. Courts differed as to whether these students could invoke stay-put and, if so, what constituted the student's "current education placement" for purposes of the provision.

The IDEA Amendments of 1997 explicitly address disciplinary exclusion. While retaining the basic premises of *Honig*, the amended statute clarifies and changes prior law in several critical ways. As discussed below, key changes include the treatment of students alleged to have been involved in certain kinds of incidents involving weapons or drugs; the rights of students not previously found eligible for services under the

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<sup>28</sup>As noted above, the 1997 IDEA Amendments definitively answered this question: all students with disabilities are entitled to FAPE, even during periods of suspension or expulsion, and even if the behavior that led to the exclusion has been deemed unrelated to the disability.

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IDEA; suspensions of ten days or less; and, for the first time in the statute, distinctions in rights and treatment for students whose behavior has or has not been deemed by school officials to be a manifestation of disability.

**B. Disciplinary exclusion as a change in placement**

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In responding to attempts at disciplinary exclusion, counsel thus must be aware of both the general change-in-placement rights and procedure, and the specific, supplementary ones that attach in the discipline context under the 1997 amendments.  
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The 1997 Amendments to the IDEA did not disturb *Honig's* core holding that suspension for more than ten days or expulsion trigger all of the change-in-placement procedures mandated by the statute and by the implementing regulations.<sup>29</sup> The amendments did, however, expand the range of disciplinary actions that constitute changes in placement, characterizing as a "change in placement" placement in an interim alternative educational setting, in another setting, or on suspension for not more than ten school days. *See* 20 U.S.C. §1415(k)(1)(A)(I).

In responding to attempts at disciplinary exclusion, counsel thus must be aware of both the general change-in-placement rights and procedures, and the specific, supplementary ones that attach in the discipline context under the

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<sup>29</sup>*See also, Board of Educ. of Hendrick Hudson Cent. Sch. Dist. "Rowley,* 458 U.S. 176,206-07 (1982) (right to FAPE includes right to have all educational decisions, including placement decisions, made in accordance with IDEA procedures).

1997 Amendments. The following discussion addresses changes in placement for more than ten days. Changes for ten days or less are discussed separately below.<sup>30</sup>

Mandated procedures for all placement changes for more than ten days include:

- convening of an IEP team meeting, with full consideration of the child's needs, evaluation data, current program and placement, and placement options, consistent with 34 C.F.R. §§ 300.343, 300.344 and 300.533 (1997);
- meaningful opportunity for, and efforts by school officials to ensure, parental participation in the meeting, as per 34 C.F.R. §§ 300.344-.345 (1997); and
- prior written notice of the school system's proposal to change the student's placement, including an explanation of why the school system intends to take the proposed action, a description of the alternatives it considered along with an explanation of why those alternatives were rejected, a description of each evaluation procedure, test, record or report the school system used as a basis for its proposal, and an explanation of all the procedural safeguards available to parents under the IDEA. 20 U.S.C. §§ 1414(d), (f), 1415((b),(c),(d)).<sup>31</sup>

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Under the 1997 Amendments to the IDEA, school personnel seeking to exclude a child for discipline reasons must take additional steps.  
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<sup>30</sup>*See "Exclusions of Ten Days or Less Under IDEA."*

<sup>31</sup>As discussed in Chapter 11, the latter include, among other things, notice and consent rights, access to records, the right to an independent educational evaluation, the right to file a complaint, mediation rights, due process hearing and appeal rights, the right to bring a civil action in court, the right to an attorney's fee award, and the right to have the child remain in school in the current placement if a complaint is filed. *See* 20 U.S.C. § 1415.

In addition, a team of qualified persons, with parents participating, must make placement decisions. The team members must be knowledgeable about the student's needs, the evaluation data (regarding the student), the student's current placement and program, and placement options. 20 U.S.C. § 1414(f); 34 C.F.R. §§300.344-.345, 300.533 (1997). Finally, as discussed above, a parent who disagrees with a proposed change in placement has the right to file a complaint, to have a due process hearing, to bring a civil action if aggrieved by the hearing outcome, and to have the child remain in the current educational placement pending completion of administrative and judicial proceedings. 20 U.S.C. § 1415(b)(5),(f) (j).

### **C. Supplementary rights and procedures in disciplinary exclusion: Manifestation reviews**

Under the 1997 Amendments to the IDEA, school personnel seeking to exclude a child for discipline reasons must take additional steps. The school personnel must first determine whether the behavior in question was a manifestation of the child's disability. 20 U.S.C. § 1415 (k)(4),(5).<sup>32</sup>

If the behavior was a manifestation, school officials cannot suspend the child for more than ten days<sup>33</sup> or expel the child. School personnel, however, may propose changes in the child's IEP or in the placement, consistent with the rights and procedures outlined above. *See* 20 U.S.C. § 1415(k)(5)(A). If the behavior was not a manifestation, school officials can suspend or expel

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<sup>32</sup>As discussed above, school personnel also must conduct a functional behavioral assessment (if they have not already done so) and develop or refine an existing) behavioral intervention plan before or not later than ten days after suspending a student. 20 U.S.C. § 1415(k)(1)(B).

<sup>33</sup>Suspensions often days or less are discussed below.

the child for the same amount of time a non-disabled child would be disciplined. *Id.* However, a child with a disability must be provided a free appropriate public education<sup>34</sup> during the suspension or expulsion period, and that education (FAPE) must be designed and developed consistent with the rights and procedures outlined above. *Id.*; 20 U.S.C. § 1412(a)(1).<sup>35</sup>

The IEP team, which includes parents and other "qualified personnel", makes the manifestation determination. 20 U.S.C. § 1415(k)(4)(B).<sup>36</sup> This

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<sup>34</sup>Given the IDEA definition of a "free appropriate public education," discussed in Chapter 6, home tutoring will rarely, if ever, fulfill the duty to provide FAPE to excluded students. In addition, the U.S. Department of Education's proposed regulations implementing the 1997 IDEA Amendments would require placements for suspended and expelled students to meet the criteria for "interim alternative educational settings," discussed below. *See* 62 Fed. Reg. at 55074 (October 22, 1997)(proposed 34 C.F.R. § 300.121(c)(3), incorporating by reference proposed 34 C.F.R. § 300.522).

<sup>35</sup>The statute at 20 U.S.C. § 1412(a)(1) explicitly states that all children with disabilities, including those who have been "suspended" or "expelled" from school, are entitled to a free appropriate public education. The statute makes no distinction between short-term (ten days or less) and long-term (more than ten days) suspensions. Nonetheless, the U.S. Department of Education has taken the position that the right to FAPE is triggered only when a student has been suspended for more than ten days in a school year. *See* OSEP Memo 97-7, *supra*; NPRM, *supra*, 62 Federal Register at 55074 (proposed 34 C.F.R. § 300.121(c)(2)).

<sup>36</sup>The statute does not define the term "qualified personnel." As a matter of common sense, "qualified personnel" are those with the professional expertise and understanding required to address the questions that comprise the manifestation review, discussed below. Required "qualified personnel" likely will vary depending upon the student's disability and the overall circumstances. The requirement that the IEP team be supplemented by "qualified personnel" is an important recognition that IEP teams, by definition, do not include all of the

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team must consider all relevant information, including evaluation and diagnostic results, information supplied by the student's parents, observation of the child, and the child's IEP and placement. 20 U.S.C. §1415(k)(4)(C)(I). The team must find that the behavior was a manifestation of disability if:

- in relation to the behavior the child's IEP or placement was inappropriate. OR
- in relation to the behavior, special education services, supplementary aids and services, and behavior intervention strategies were not implemented in a manner consistent with the child's IEP and placement; OR
- the child's disability impaired the ability to understand the impact and consequences of the behavior; OR
- the child's disability impaired the ability to control the behavior.

20 U.S.C. § 1415(k)(4)(C).

An important potential inconsistency exists between the manifestation review scheme and the constitutional right to procedural due process in student discipline. One of the purposes of the manifestation review is to determine whether the student may be subjected to the school's ordinary discipline procedures, including suspension or expulsion, for the behavior in question. The manifestation review assumes by its very terms that the student has, in fact, engaged in the alleged misconduct -- one of the very "facts" the school must prove at any suspension or expulsion hearing. If the manifestation review is held before the suspension or expulsion hearing, then students and their parents must either concede "guilt" -- which school officials otherwise would be required to prove at a constitutionally-adequate hearing -- so that they may meaningfully participate in the manifestation review, or surrender their right to participate in, and advocate during, the manifestation deter-

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expertise required to determine manifestation. For a discussion of the legal requirements regarding IEP team membership, see Chapter 9.

mination.<sup>37</sup>

A possible solution to this dilemma would be to hold a constitutionally-adequate hearing prior to the manifestation review on the sole issue of whether the alleged misconduct transpired. If the student is found to have committed the act then the matter would be referred for a manifestation determination. If the team found that the conduct was a manifestation of disability, any discipline record resulting from the hearing would be expunged, and the matter would proceed in a manner consistent with the IDEA. If the team found that the behavior was not a manifestation of disability, a second hearing would be held on the question of sanction (subject, of course, to IDEA rights concerning appeals and stay-put).<sup>38</sup>

### **D. Disciplinary exclusion of students accused of conduct involving drugs weapons or dangerous behavior**

If the IEP team finds that a child's behavior was

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<sup>37</sup>The procedural inconsistency presented parallels, in a sense, the provisions in some states that allow for the transfer of a child to the jurisdiction of the adult criminal court based in part upon the unproven, present allegations against the child. Counsel might review, therefore, case precedent in which courts interpret such transfer provisions.

<sup>38</sup>The pendency of a delinquency matter flowing from the same facts that led to the discipline action, obviously, further complicates how one might handle the discipline hearing and manifestation determination review. A number of legal and practical concerns arise. For example, counsel should remember that the Fifth Amendment privilege against self-incrimination protects the child against compelled testimony in proceedings other than delinquency and criminal matters. One must determine whether manifestation evidence or opinions presented by the child or by the parent would be available at a subsequent delinquency hearing. This determination alone implicates educational privacy rights and whether the state would or could use the parent as a witness against the child.

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not a manifestation of disability, the child may be subjected to the same disciplinary sanctions applied to non-disabled students -- including long-term suspension or expulsion. In such a circumstance, however, school personnel must

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Regarding behavior that was a manifestation of disability, the 1997 Amendments carve out a separate approach for students who have allegedly engaged in certain conduct involving weapons or drugs or who have engaged in "dangerous" behavior in school.  
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continue to provide FAPE. In contrast, if the child's behavior was a manifestation of disability, school officials may not impose punitive discipline, including suspension or expulsion, but may propose to change the child's IEP and/or placement, if appropriate. Regarding behavior that was a manifestation of disability, the 1997 Amendments carve out a separate approach for students who have allegedly engaged in certain conduct involving weapons or drugs or who have engaged in "dangerous" behavior in school. This separate approach provides students fewer rights and gives school personnel greater flexibility than in discipline matters relating to other categories of alleged misconduct.

#### 1. Weapons and drugs

Under the 1997 Amendments, school personnel may unilaterally place a child in an "appropriate interim alternative educational setting" for the same amount of time a non-disabled child would be subject to discipline, but for not more than forty-five days, if the child:

- "carries" certain dangerous weapons to school or a school function, or
- knowingly possesses or uses illegal drugs at school or a school function, or
- sells or attempts to sell a controlled substance at school or a school function.

20 U.S.C. § 1415(k)(1)(A)(ii).<sup>39</sup>

A child may not be removed, however, to an interim alternative educational setting unless:

- keeping the child in the current placement is substantially likely to result in injury to the child or others. AND
- reasonable efforts to minimize the risk of harm in the current placement, including the use of supplementary aids and services, will not be effective; AND
- the interim alternative educational setting meets statutory requirements (see below).

See 20 U.S.C. § 1415(k)(6)(A)(ii), incorporating by reference the standards set out in 20 U.S.C. § 1415(k)(2). Prior to removing a child to an interim alternative educational setting, school personnel must also consider the appropriateness of the child's current placement. *Id.*

In addition, either before or no later than ten days after placing a child in an interim alternative educational setting, school personnel must conduct a functional behavioral assessment (if they have not already done so) and develop (or refine an existing) behavioral intervention plan. 20 U.S.C. § 1415(k)(1)(B).

#### 2. Dangerous behavior

If school personnel propose to change a child's placement because of dangerous in-school behavior (other than the weapon and drug cases described above) that is a manifestation of disability and the child's parents dispute the school's decision, the school may seek

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<sup>39</sup>"Weapon" means "a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length." See 20 U.S.C. § 1415(k)(10)(D), incorporating by reference the definition of "dangerous weapon" found at 18 U.S.C. § 930 (g)(2). For definitions of "illegal drugs" and "controlled substance," see 20 U.S.C. § 1415(k)(10)(A).

permission from an IDEA due process hearing officer to place the child in an interim alternative educational setting for up to forty-five days.

Such an interim placement order may be proper if the hearing officer

- determines that the school system has demonstrated by more than a preponderance of the evidence that keeping the child in the current placement is substantially likely to result in injury to the child or others; AND
- considers whether the school system has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; AND
- considers the appropriateness of the child's current placement; AND
- determines that the interim alternative educational setting meets the statutory requirements (described below).

20 U.S.C. § 1415(k)(2).

### 3. Interim alternative educational settings

An "interim alternative educational setting" must meet strict statutory criteria. It must provide FAPE, in the full legal sense of the term. It must enable the child to continue to participate in the general curriculum, and to continue to receive the services, including those set out in the child's current IEP, that will enable him or her to meet the IEP goals. 20 U.S.C. §§1412(a)(I), 1415 (k)(3)(B)(I). Furthermore, the interim alternative educational setting must include services and modifications designed to address the behavior that triggered the child's interim placement so that the behavior does not recur. 20 U.S.C. §1415(k)(3)(B)(ii). Because of these requirements, home tutoring will virtually never be a legally permissible interim alternative educational setting.

In a weapon or drug case, the interim alternative educational setting is determined by the IEP team, which by definition includes parents. 20 U.S.C. §§ 1415(k)(3)(A), 1414(d)(I)(B)(I). In

cases of "dangerous" behavior brought to a hearing officer, the hearing officer makes the determination. 20 U.S.C. § 1415(k)(2). One may expect, however, that school personnel will seek to propose a specific interim alternative educational setting to the hearing officer. School personnel, however, must permit parents to participate in developing any such proposal. *See* 20 U.S.C. §1414(f)(local and state educational agencies "shall ensure that parents of each child with a disability are members of any groups that makes decisions on the educational placement of their child"); *see also* 20 U.S.C. § 1414(d)(1)(B)(I) (parents as IEP team members).

### E. Notice, hearing and "Stay-put" rights under the IDEA as amended

School personnel must notify parents the same day of any decision (1) to place a child into an interim alternative educational setting for an alleged weapon or drug incident, (2) to seek permission from a hearing officer to remove a child to an interim alternative educational setting, or (3) to change a child's placement (i.e., suspension or expulsion) for more than ten days for other alleged violations of the school discipline code. 20 U.S.C. § 1415(k)(4)(A). This notification must include notice of all of the procedural safeguards available under the IDEA. *Id.* This immediate notice is in addition to the statutory notice requirements that ordinarily apply whenever a school proposes to make changes in a child's education.<sup>40</sup>

Parents have a right to file a complaint and have an expedited impartial due process hearing if they disagree with a determination that a child's behavior was not a manifestation of disability, or, indeed, if they disagree with any decision regarding placement made in the discipline

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<sup>40</sup>For a discussion of IDEA notice requirements, see Chapter II.

context.<sup>41</sup> As was true prior to the 1997 Amendments, there is no exception to "stay-put" rights simply because school officials deem a student to be a discipline problem, or dangerous, or disruptive. *Honig, supra.*; 20 U.S.C. § 14150). Thus, as discussed above, ordinarily if a parent challenges any aspect of a disciplinary exclusion and requests a due process hearing, the child has the right to remain in school, in the same placement as before the suspension or expulsion, until the hearing and any judicial proceedings conclude.

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 As was true prior to the 1997 Amendments, there is no exception to "stay-put" rights simply because school officials deem a student to be a discipline problem, or dangerous, or disruptive.  
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The 1997 Amendments to the IDEA, however, modified "stay-put" rules for students accused of the behavior described above involving weapons, drugs, or dangerous conduct in school. The new statutory provision, found at 20 U.S.C. § 1415(k)(7)(A), contains confusing wording and is ambiguous in some respects. Thus, § 1415(k)(7)(A) is a likely source of future litigation.

Section 1415(k)(7)(A) does address clearly the "stay-put" placement of a child placed by school personnel in an interim alternative educational setting for a weapon or drug incident. If the parent appeals, the child remains in the interim alternative placement chosen by the school until either the hearing officer issues a decision or the forty-five-day time limit ends, whichever occurs

sooner, unless the parent and the State or local educational agency agree otherwise. 20 U.S.C. § 1415(k)(7)(A).

Under the terms of section 1415(k)(7)(A), the child in a weapon or drug case shall remain in the interim alternative educational setting if a parent requests a hearing to contest a determination by the IEP team that the weapon or drug incident was not a manifestation of the child's disability. As discussed above, however, once it makes a finding of "no manifestation," the school need not place or maintain the child in an interim alternative educational setting (with its forty-five-day time limit) but, rather, may suspend or expel the student, while continuing to provide FAPE elsewhere. Thus, in circumstances in which a parent is appealing a manifestation determination, there will not necessarily be an interim alternative educational setting, as defined by the statute, to maintain as the child's stay-put placement. The best reading of the statute is that, under such circumstances, the school must provide an interim alternative educational setting as soon as the parent appeals. This interim alter-native educational setting then becomes the stay-put placement under § 1415(k)(7)(A), subject to the time limits and other conditions described in that section.

Finally, § 1415(k)(7)(A) speaks to the stay-put placement of a child whom a due process hearing office has placed in an interim alternative educational setting, pursuant to 20 U.S.C. § 1415(k)(2), at the request of the school system. Reconciling this aspect of § 1415(k)(7)(A) with the rest of the statute is difficult.

Section 1415(k)(7)(A) states in pertinent part that "[w]hen a parent requests a hearing regarding a disciplinary action described in . . . paragraph (2) to challenge the interim alternative educational setting or the manifestation determination, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer. . . ." However, the "disciplinary action described in . . . paragraph (2)" is placement in an interim alternative educational setting by a hearing

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<sup>41</sup>Under the U.S. Department of Education's proposed regulations, expedited hearings must result in a decision within ten business days of the hearing request, unless the parents and school officials agree otherwise. *See NPRM, supra*, 62 Fed. Reg. at 55104 (proposed regulation 34 C.F.R. § 300.528(a)(I)).

officer, see 20 U.S.C. § 1415(k)(2), meaning that there already will have been a hearing on the interim alternative educational setting and any manifestation issues. Nothing in the statute explicitly grants parents the right to a second hearing. Further, the IDEA elsewhere provides that due process hearing decisions -- including those made under § 1415(k) -- are final and binding reference the standard set out in § 1415(k)(2), unless appealed to a higher state administrative authority in a state that provides for state-level review of special education due process hearing results,<sup>42</sup> or to a court. See 20 U.S.C. § 1415(i)(1)(A), (i)(2)(A).

Under all circumstances, once an interim alternative educational placement expires -- no more than forty-five days after the child has been placed there -- the student is entitled to return to the placement that preceded the interim alternative placement. If school personnel wish to change this prior placement and the parent objects, the prior placement -- not the interim alternative educational setting -- becomes the stay-put placement. 20 U.S.C. § 1415(k)(7)(B). If school personnel wish to assert that the student if returned to the preceding placement, would pose a danger, they may request an expedited hearing and seek permission from an IDEA due process hearing officer to change the child's placement despite the stay-put right. 20 U.S.C. § 1415(k)(7)(C). As is the case whenever removal to an interim alternative educational setting is sought, the hearing officer can rule in favor of the school system only if the hearing officer

- determines that the school system has demonstrated by more than a preponderance of the evidence that keeping the child in the current placement is substantially likely to result in injury to the child or others; AND
- considers whether the school system has made reasonable efforts to minimize the risk of harm in the child's current placement including

the use of supplementary aids and services; AND

- considers the appropriateness of the child's current placement; AND
- determines that the interim alternative educational setting meets the statutory requirements.

20 U.S.C. § 1415(k)(7)(C), incorporating by reference the standard set out in § 1415(k)(2).

#### **F. IDEA rights of students not previously determined eligible for special education and related services**

A student who is the subject of a disciplinary action who has not previously been identified as eligible for services under the IDEA nonetheless may assert IDEA rights and procedural protections if the school system "had knowledge," before the behavior in question occurred that the child was a child with a disability. ' 20 U.S.C. § 1415(k)(8)(A). The school system will be deemed to have had such knowledge if

- the parent expressed concern in writing that the child needs special education and related services; OR
- the child's behavior or performance demonstrated the need for such services; OR
- the parent had requested an evaluation; OR
- the child's teacher or other school system personnel had expressed concern about the child's behavior or performance to other school system staff.

20 U.S.C. § 1415(k)(8)(B).<sup>43</sup>

If school system personnel did not "have knowledge," they can subject the child to the same disciplinary measures to which non-disabled children are subjected for comparable behavior. 20 U.S.C. § 1415(k)(8)(C)(I). If, in these

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<sup>42</sup>For a discussion of one-tiered versus two-tiered administrative hearing systems, see Chapter 12.

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<sup>43</sup>A parent need not have expressed concern about special education needs in writing if "the parent is illiterate or has a disability that prevents compliance with [these] requirements." 20 U.S.C. § 1415(k)(8)(B)(I).



circumstances, the parent requests a special education evaluation, school system personnel must expedite the evaluation; if the expedited evaluation demonstrates that the child is disabled and eligible for special education, school system personnel must provide a free appropriate public education on an expedited basis. 20 U.S.C. § 1415(k) (8)(C)(ii). Pending the results of the evaluation, the child remains in the “educational placement” determined by school authorities. *Id.* The statute's use of the phrase “educational placement” indicates that educational services must be provided during this period, even if the child has been suspended or expelled from school.

#### **G. Exclusions often days or less under the IDEA**

The IDEA Amendments of 1997 authorize school personnel, acting unilaterally, to place a child in an appropriate interim alternative educational setting, in another setting, or on suspension for up to ten school days to the same extent that such alternatives would be applied to children without disabilities. 20 U.S.C. § 1415(k)(1)(A)(I).

The statute characterizes each of these actions as a change in placement. See *id.* This characterization is significant in light of the procedural requirements that ordinarily attach to attempted changes in placement (as discussed above and in other chapters of this manual). However, 20 U.S.C. § 1415(k) modifies these procedural requirements in two significant ways. First, it permits “school personnel” to make these short-term disciplinary changes in placement. 20 U.S.C. § 1415(k)(1)(A)(I). This permission supplants the usual requirement that the IEP team, with parental participation, make placement changes. Second, 20 U.S.C. § 1415(k)(4)(A)(I) modifies the usual rule regarding notice, providing that parents must be notified on the date that the decision to make the change is made. Under ordinary circumstances, prior notice is required when a school proposes to initiate a change in placement. 20 U.S.C. § 1415(b)(3).

The statute is somewhat unclear as to whether a manifestation review must precede disciplinary changes in placement lasting ten days or less. See 20 U.S.C. § 1415(k)(4)(A)(ii). The U.S. Department of Education has taken the position that a manifestation review must be done when the total number of days of suspension in a school year reach eleven.<sup>44</sup> Counsel should be aware, however, that as a §504 matter (as discussed below), suspension for even one day for conduct related to a disability should be deemed illegal discrimination.

As noted above, the plain language of the IDEA requires F APE during suspensions of ten days or less, 20 U.S.C. § 1412(a)(1), and a functional behavior assessment and behavioral intervention plan after placement in an interim alternative educational setting, in another setting, or on suspension for even one day. 20 U.S.C. § 1415(k) (1)(B). For the reasons previously discussed, the U.S. Department of Education's positions to the contrary are erroneous.

#### **IV. Disciplinary exclusion under §504 and the ADA**

Section 504 and the ADA are independent sources of protections in disciplinary exclusion. In certain respects, these protections are weaker than those afforded by the IDEA. Most significantly, section 504 and the ADA do not provide stay-put protection or a continuing right to education after suspension or expulsion for behavior determined to be unrelated to disability.

Section 504 and the ADA are, nevertheless, critical for those students with disabilities who are not covered by the IDEA. Students may be outside IDEA coverage because they do not have one of the specific disabilities listed in the IDEA, or because they do not require “special education,” or because, though perhaps IDEA-eligible, they had not been deemed so prior to

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<sup>44</sup>See OSEP Memo 97-7, *supra*; NPRM, *supra*, 62 Fed. Reg. at 55103 (proposed 34 C.F.R. § 300.523(b)).

the relevant disciplinary incident, and the school district did not “have knowledge,” as discussed above, of the child's disability.

Section 504 and the ADA protect students against unfair discipline in two ways. First, under both statutes and their implementing regulations, imposition of any punitive discipline for conduct that is a manifestation of disability should be deemed to constitute illegal discrimination. 29 U.S.C. § 794; 34 C.F.R. §§ 104.3(j), 104.4 (b), 104.33, 104.35; 42 U.S.C. § 12132; 28 C.F.R. § 38.130 (a),(b) (implementing the ADA).<sup>45</sup> This includes suspensions often days or less, absent a genuine safety emergency.

Second, much like the IDEA, the § 504 regulations require that certain procedures be followed before a child's placement may be changed. Required procedures include a comprehensive evaluation by appropriate, qualified personnel prior to any “significant change in placement;” notice to parents of school district actions regarding identification, evaluation or placement; an opportunity for parents to examine relevant records; and an opportunity for an impartial hearing and for a review process. 34 C.F.R. §§ 104.35, 104.36. All placement decisions must be made by a group of persons knowledgeable about the child, the evaluation data and the placement options. 34 C.F.R. § 104.35(C).

A suspension exceeding ten days constitutes a “significant change of placement” under the regulations, triggering all of the aforementioned

procedural requirements and rights.<sup>46</sup> The school system, therefore, must conduct a comprehensive evaluation meeting all of the requirements of 34 C.F.R. § 104.35(b) before attempting to exclude a student for more than ten days.<sup>47</sup> The evaluation must also include a determination of whether there is a connection between the behavior for which discipline is to be imposed and the student's disability.<sup>48</sup> A series of short-term suspensions that cumulate to more than ten days may also constitute a change

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<sup>46</sup>See, e.g., Memorandum of Oct. 28, 1988 to OCR Senior Staff from L.S. Daniels, reprinted at EHLR 307 :05 (hereinafter “OCR Memo”).

<sup>47</sup>Note that IDEA does not necessarily require a reevaluation prior to a disciplinary change in placement. As virtually all children covered by IDEA are also protected by § 504, this § 504 right is an important supplement to IDEA rights. Counsel should not hesitate to invoke it.

<sup>48</sup>OCR Memo, *supra*. Disability and conduct may be related in a variety of ways. See, e.g., *S-1 v. Turlington*, 635 F.2d 342, 346-47 (5th Cir. 1981), (“a determination that a handicapped student knew the difference between right and wrong is not tantamount to a determination that his misconduct was or was not a manifestation of his handicap”: for example, “a child with low intellectual functioning who might respond to stress or respond to a threat in the only way that they feel adequate, which may be verbal aggressive behavior,” or an orthopedically disabled child might behave aggressively towards other children, provoking fights, as a way of dealing with stress and feelings of physical vulnerability); *School Board of Prince William County v. Malone*, 762 F.2d 1210, 1216 (4th Cir. 1985) (student with specific learning disabilities acted as a go-between in drug deals for fellow students; district court had properly reasoned that “[a] direct result of Jerry's learning disability is a loss of self image, an awareness of lack of peer approval occasioned by ridicule or teasing from his chronological age group. . . . These emotional disturbances make him particularly susceptible to peer pressure. Under these circumstances he leaps at a chance for peer approval”). See also Memorandum of Nov. 13, 1989 to OCR Senior Staff from William Smith, 16 EHLR 491,493.

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<sup>45</sup>See also the following U.S. Department of Education/Office of Civil Rights complaint decisions: School Administrative Unit #38 (NH), 19 IDELR 186; Ohio County (KY) School District, 17 EHLR 528; Compliance Review of Riverview (WA) School District, EHLR 311:103; and Nash County (NC) School District, EHLR 352:37. See also *Thomas v. Davidson Academy*, 846 F. Supp. 611 (M.D. Tenn. 1994) (§504 and the ADA require modifications to school discipline policies to avoid discrimination).

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of placement for § 504 purposes, triggering the above-described protections.<sup>49</sup>

If the behavior is found not to be a manifestation of disability, the student may be subjected to the same disciplinary measures as are non-disabled students, including suspension or expulsion without education. However, according to judicial decisions in, at least, the Fifth, Sixth and Eleventh Circuits,<sup>50</sup> educational services should continue.

The parent has a right to an impartial due process hearing to challenge the evaluation results, the manifestation determination, any resulting placement decision, or any other actions regarding the identification, evaluation or educational placement of the student. 34 C.F.R. § 104.36.<sup>51</sup> The § 504 regulations have no stay-put provision. However, it should be possible to obtain a temporary restraining order and/or preliminary injunction requiring a child's reinstatement in school by meeting the usual criteria for preliminary relief.

Section 504, in contrast with the IDEA, extends full protection against suspension and expulsion

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<sup>49</sup>OCR Memo, *supra*.

<sup>50</sup>*S-I v. Turlington*, 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981); *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982). *See also* OCR Memo, *supra*.

<sup>51</sup>Some students may lose some of these protections if they are currently using illegal drugs or alcohol. School officials may discipline a student with a disability for "the use or possession of illegal drugs or alcohol" to the same extent that a non-disabled student would be disciplined if the disabled student "currently is engaging in the illegal use of drugs or in the use of alcohol." 29 U.S.C. §706(8)(C)(iv). Although such students ordinarily have a right to a hearing under other laws, they do not have a right to a hearing under the §504 regulations. *Id.* Provided that they are also "children with disabilities" within the meaning of IDEA, however, they retain all of the IDEA rights described above.

(as described above) to any student who is or may be an "individual with a disability", without regard to whether the school district has yet identified the student as disabled. In numerous complaint decisions, the U.S. Department of Education/Office for Civil Rights ("OCR"), which enforces §504, has so ruled. *See, e.g., Templeton (CA) Unified School District*, 17 EHLR 859 (OCR 3/19/91); *Prince George's County (MD) Public Schools*, 17 EHLR 875 (OCR 3/22/91); *Lumberton (MS) Public School District*, 18 IDELR 33 (OCR 6/24/91).

## V. School-filed crime reports and delinquency petitions

Faced with the above-discussed limits on excluding students directly, school system administrators may turn to the juvenile courts or to the police, filing delinquency petitions or crime reports based upon students' in-school behavior. By resorting to the juvenile justice system, school administrators often are mistakenly attempting to avoid basic obligations to educate students with disabilities. Ironically, students' aberrant behavior frequently is a reflection of the school system's past failures to provide appropriate educational and related services.

Two recent legal developments are particularly relevant to this issue: a favorable federal district court opinion in *Morgan v. Chris L.*, affirmed in an unpublished decision by the Sixth Circuit Court of Appeals in 1997,<sup>52</sup> and a subsequent provision added to the IDEA in the 1997 amendments addressing school reporting of "crimes" committed by students with

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<sup>52</sup>*Morgan v. Chris L.*, 927 F. Supp: 267 (E.D. Tenn. 1994), *aff'd* 106 F.3d 401 (6th Cir.), *cert. denied*, 117 S.Ct. 2448 (1997). (The reader might wish to find the Sixth Circuit opinion in the *Individuals With Disabilities Education Law Reporter: Morgan v. Chris L.*, 25 IDELR 227 (6<sup>th</sup> Cir. 1997).)

disabilities.<sup>53</sup>

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 By resorting to the juvenile justice system, school administrators often are mistakenly attempting to avoid basic obligations to educate students with disabilities.  
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### A. *Morgan v. Chris L.*

*Morgan v. Chris L.* dealt with a school-filed delinquency petition against a student with Attention Deficit Hyperactivity Disorder (ADHD) accused of kicking and damaging a lavatory water pipe. Chris L. had a long history of academic and behavioral difficulties. Even after school staff recommended private counseling and private assessment for possible ADHD, school personnel continued to treat Chris' difficulties as a discipline problem, rather than providing appropriate special education and related services. A special education evaluation, requested by the parent, was pending at the time of the alleged incident.

Following an IDEA administrative due process hearing, an administrative law judge ruled that the school system personnel had violated the IDEA by failing to evaluate Chris in a timely manner and by attempting to use the juvenile court process to change his educational placement without following the IDEA's procedural safeguards. The ALJ ordered the school system to seek dismissal of its juvenile petition. The school system appealed into federal district

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<sup>53</sup>One might also anticipate a ground swell of cases, under § 504 and the ADA, challenging the disproportionate and thus discriminatory court referral of school discipline matters involving children with disabilities. One such case, filed by lawyers from the Juvenile Advocacy Project of the Legal Aid Society of Palm Beach County, is currently pending in the United States District Court for the Southern District of Florida.

court, which affirmed the ALJ's decision and order. *See Morgan v. Chris L.*, 927 F. Supp. 267 (E.D. Tenn. 1994).

On appeal, the Sixth Circuit, in an unpublished opinion, upheld the ALJ and district court decisions. The Sixth Circuit found that the school system had breached its duty under the IDEA to identify, evaluate and provide Chris with a free appropriate public education; had unlawfully attempted to secure a program for the student from the juvenile court, instead of providing services itself; and had, by filing the petition, improperly sought to change Chris' educational placement without following the IDEA's change-in-placement procedures. The court, like the lower court and the ALJ, expressly held that the filing of the delinquency petition constituted a change in educational placement, entitling Chris to IDEA procedural protections, including the convening of an IDEA (multi-disciplinary) team meeting prior to such a proposed placement change.<sup>54</sup>

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<sup>54</sup>Of significance to the holding in *Chris L.* is the fact that the school authorities directly filed the delinquency petition. *Cf.*, *State v. Trent N.*, 569 N.W.2d 719, 724 (Wis. App. 97) (possibility of "end run" around IDEA by school officials negated by role of intake workers and prosecutors who exercise discretion in whether to proceed with delinquency petition and prosecution). While, under Wisconsin law, the IDEA does not block juvenile court jurisdiction regarding a child with a disability who allegedly breaks the law in school (*id.*), the juvenile court can dismiss a petition in the child's best interest and refer the matter back to the intake worker for disposition. *Id.* at 725 n.10.

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 Ironically, students' aberrant behavior frequently is a reflection of the school system's past failures to provide appropriate educational and related services.  
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## B. IDEA amendments of 1997

### 1. Reporting crimes

The IDEA Amendments of 1997 added to the statute language addressing the reporting of "crimes" committed by students with disabilities. This provision, entitled "Referral to and Action By Law Enforcement and Judicial Authorities," states that "[n]othing in this part shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities. . . ." 20 U.S.C. § 1415(k)(9)(A)(emphasis added). The legislative history explains that schools may not report crimes to even "appropriate" authorities where doing so would circumvent the school's obligations to the child under the IDEA.<sup>55</sup>

The terms "reporting" and "appropriate authorities" are not defined in the statute and, therefore, must be given their ordinary meaning. Thus, properly interpreted, the new language limits schools to notifying law enforcement agencies (e.g., police) of crimes, and does not authorize notifying the judicial branch (e.g., through the filing of delinquency petitions). In regard to the judiciary, the new law simply provides that nothing in the IDEA "shall be construed. . . to prevent. . . judicial authorities

<sup>55</sup>See statement of Sen. Harkin, one of the legislation's co-sponsors, at Congo Rec. May 14, 1997 at S4403 ("The bill also authorizes. . . proper referrals to police and appropriate authorities when disabled children commit crimes, so long as the referrals, do not circumvent the school's responsibilities under IDEA").

from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability." 20 U.S.C. § 1415(k)(9)(A).<sup>56</sup>

### 2. Transmitting records

Section 1415(k)(9) further provides that when a school reports a crime alleged to have been committed by a child with a disability, it must send copies of the child's special education and disciplinary records to the "appropriate authorities" to whom it reports the alleged crime. 20 U.S.C. § 1415(k)(9)(B). Other provisions of the IDEA<sup>57</sup> require states and local school systems to comply with the Family Educational Rights and Privacy Act (FERPA),<sup>58</sup> which, with a few narrow exceptions, prohibits disclosure of education records without prior written parental consent (or the consent of a student aged 18 or older). Section 1415(k)(9)(B) must be construed

<sup>56</sup>Because juvenile courts are not "appropriate" authorities to whom crimes may be reported, § 1415(k)(9) has no bearing on the holdings in *Morgan v. Chris L.* This would be the case even if "appropriate authorities" could be construed to encompass juvenile courts. Section 1415(k)(9)(A) states simply that "[n]othing in this part shall be construed to prohibit an agency from..." It says nothing about whether IDEA may be construed to require schools to take certain steps, or abide by certain procedures, before doing so. *Morgan V. Chris L.* does not prohibit schools from ever filing petitions; it merely requires that change in placement procedures be followed first. In addition, as noted above, the legislative history of § 1415(k)(9)(A) clarifies that reporting "crimes" is impermissible where doing so would circumvent the school's obligation to the student under IDEA. This is consistent with Morgan's further holding that the delinquency petition before it was improper in light of the school system's violations of the student's substantive rights under IDEA to be evaluated and receive appropriate educational services.

<sup>57</sup>Specifically, 20 U.S.C. §§1412(a)(8) and 1417(c).

<sup>58</sup>20 U.S.C. § 1232g.

in light of, and consistent with, the IDEA provisions referencing FERPA.<sup>59</sup> Therefore, school personnel may not send records to the authorities to whom it has reported a crime unless the disclosure falls within one of FERPA's very narrow exceptions.<sup>60</sup>

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<sup>59</sup>*See, e.g., Weinberger v. Hynson, Wescott and Dunning, Inc.*, 412 U.S. 609, 631-32, 93 S.Ct. 2469, 2484 (1973) (“task in interpreting separate provisions of a single Act is to give the Act the most harmonious, comprehensive meaning possible. . .”).

<sup>60</sup>For FERPA exceptions, see 20 U.S.C. § 1232g(b); 34 C.F.R. §§ 99.31, 99.38 (1997). There is no blanket exception for crime reports. In addition, construing § 1415(k)(9)(B) to permit disclosures prohibited by FERPA likely violates the Fourteenth Amendment equal protection rights of students with disabilities: a dual system would result whereby children without disabilities accused of crimes, but not those with disabilities, would be protected against involuntary disclosure to authorities of their confidential education records. A proper construction would avoid this result. *See Debartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397 (1988) (“where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. . . [t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality. . .”).

# Chapter

# Five

Enforcing Special Education Law on Behalf of Children  
Incarcerated in Juvenile or Adult Facilities

The young people  
incarcerated in delinquency  
placements, as well as  
in adult penal institutions,  
are not a representative  
cross section of those  
who are deviant.

*Written by*

Joseph B. Tulman  
& Mary G. Hynes

**D**elinquency incarceration facilities are particularly uncaring places.<sup>1</sup> In regard to this fundamental feature, the juvenile justice system is a replica of the adult criminal incarceration system. Indeed, commentators correctly characterize the juvenile justice system --and juvenile incarceration facilities, in particular -- as primarily a training ground that “graduates” youngsters into the adult criminal system. The recent trend to put younger people in greater numbers into adult facilities, viewed against this back-drop, is not a fundamental change. Rather, the trend represents an innovative, “early-admissions policy” for post-secondary incarceration.

The young people incarcerated in delinquency placements, as well as in adult penal institutions, are not a representative cross section of those who are deviant. Much like poor and minority children, children with disabilities appear in disproportionate numbers in the delinquency system generally, and in incarceration facilities specifically.<sup>2</sup> Large percentages of children in

the delinquency system and adults in the criminal system are severely undereducated, and literacy skills in these populations are strikingly low.<sup>3</sup>

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disability status is not as well documented as race status and class status. Estimates of the correlation vary widely. *See generally*, Patricia Puritz & Mary Arm Scali, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*, Office of Juvenile Justice and Delinquency Prevention Report 1998, at 16-17 (studies regarding prevalence of disabilities within delinquency incarceration populations report ranges between 42 percent and 60 percent); *see also*, Leone, et al., *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. REV. 389 (1995), and *Education as Crime Prevention: Providing Education to Prisoners*, Research Brief, The Center on Crime Communities & Culture (September 1997) at 3, [hereinafter Education as Crime Prevention], citing R.I. Gemignani, *Juvenile Correctional Education: A Time for Change* (NCJ Publication No. 150309, Office of Juvenile Justice and Delinquency Prevention 1994) at 2.

Ironically, while deinstitutionalization of people with disabilities has become common in mental health and mental retardation systems, in the delinquency system, American society continues to incarcerate a large numbers of children with disabilities. Moreover, those children, generally speaking, have disabilities that are relatively less incapacitating than persons institutionalized traditionally in the other systems. Similarly, a large percentage of the people populating penal institutions are emotionally disturbed, mentally retarded, mentally ill, or learning disabled.

A central premise of this chapter is that an astoundingly large percentage of the young people with disabilities who are incarcerated in juvenile or adult facilities would not be incarcerated on the basis of their alleged or proven offenses absent the presence of the disability.

<sup>3</sup>*Education as Crime Prevention*, *supra* note 2 at 3-5.

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<sup>1</sup>Parts of this chapter are adapted from, and correspondingly appear in, an upcoming article by Joseph B. Tulman and Mary G. Hynes in the Loyola University School of Law Children's Legal Rights Journal.

<sup>2</sup>For a clear and insightful account of the history of the Juvenile Court, *see William Ayers, A Kind and Just Parent: The Children of Juvenile Court* (1997), chapter 2 (“Jane Addams: History and Background”). Ayers presents through the entirety of the book a compassionate, yet hard-hitting critique of a juvenile incarceration facility. *See*, Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L.REV. 715 (1991) (“Since their inception, the reality of custodial institutions has contradicted the juvenile court’s rhetorical commitment to rehabilitation.”) *See also*, Jerome G. Miller, *Last One Over the Wall: The Massachusetts Experiment in Closing Reform Schools* 8 (1991)(The existence of reform schools “ensured that juvenile offenders would receive the worst the system could offer--punishment labeled as treatment.”). As a correlate for delinquency and incarceration,



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 The young client who is incarcerated  
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Whether rejecting or accepting the premise that education is effective in reducing delinquent or criminal conduct<sup>4</sup> and that, conversely, incarceration is not effective in reducing delinquent or criminal conduct, one should recognize that special education advocacy can provide effective instrumental strategies for obtaining release of young people from incarceration.

The young client who is incarcerated has several fundamental and self-evident problems. The client is confined; liberty is restrained. Further, the client likely faces intimidating and perhaps brutal circumstances on a daily basis inside the institution.<sup>5</sup> In addition, the client most likely is not receiving an appropriate or even adequate education. Regarding these post-disposition deprivations, lawyers tend to overlook their fundamental function as professional problem-solvers who are engaged by clients to address those clients' most-pressing problems.<sup>6</sup>

As a result of systemic limitations and perceptual mistakes, lawyers fail to address for

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<sup>4</sup>See, *Education as Crime Prevention*, *supra* note 2 at 5-7 (summarizing studies demonstrating that educational programs are more effective in reducing juvenile and adult recidivism rates than other responses).

<sup>5</sup>See, e.g., Miller, Last One Over the Wall, *supra* note 2 at 55-80. See generally, James Gilligan, *Violence* (1997) (Chapter 7).

<sup>6</sup>See generally, Patricia Puritz, Sue Burrell, Robert Schwartz, Mark Soler, & Loren Warboys, A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings, 38-40 and 53-55 (1995).

their clients these most-pressing problems. First, the right to representation afforded under the Sixth Amendment to indigent persons accused of criminal or delinquent offenses does not extend to post-disposition or post-sentence challenges to conditions of incarceration. Second, resources for indigent defense are limited,<sup>7</sup> and decision-makers reasonably apportion those limited resources primarily and almost exclusively to trial work.<sup>8</sup> Third, the model of criminal defense and "just desserts" from the adult system permeates the juvenile court.

Lawyers, probation officers, judges, and others in the system tend to rationalize that an accused who is found guilty and is "sentenced" gets a deserved punishment and that the case is then over. Under this approach, advocates for children do little preparation for disposition hearings; they tend not to prepare alternative disposition plans; and they tend not to challenge prosecutorial assertions and judicial declarations that children "need" to be put into, and need to remain in, prison-like settings.<sup>9</sup>

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<sup>7</sup>See generally, Robert Burke, Mary Broderick, & Julie Walko, *Indigent Defense Caseloads and Common Sense: An Update* (National Legal Aid & Defender Association 1992) at 3-13.

<sup>8</sup>Absent a commonsensical but, nevertheless, unlikely extension of the right to counsel, advocates for children should seek other means or methods for supporting continued legal representation and advocacy. Fee shifting is available for parties prevailing in cases filed under 18 U.S.C. section 1863. Successful civil contempt challenges also provide attorneys' fees.

<sup>9</sup>*Cf generally*, Puritz, et al., A Call for Justice, *supra* note 6 at 51-53 (summarizing the "shortcomings" of juvenile representation at dispositional hearings).

Acting as a litigator<sup>10</sup> representing an incarcerated child, an attorney can address, through three options,<sup>11</sup> the failure of the staff and administration at a youth incarceration facility to provide care and rehabilitation.<sup>12</sup> A first option: the attorney can develop and file a law suit, perhaps a class action, challenging conditions of confinement.<sup>13</sup> A second option: within the delinquency case itself, after the disposition, the attorney can file a motion for an order to show cause why the government agency (and individual personnel and officials) responsible

for the child's care and rehabilitation should not be held in civil contempt for failure to comply with the court's original disposition order that required the government to provide care and rehabilitation.<sup>14</sup> A third option: the attorney can enforce the child's rights under federal, state, and local law to receive appropriate special education and related services. This third option is the focus of the legal and problem-solving analysis in this chapter.

The third option is particularly attractive because a party (parent or majority-age student) prevailing against the school district in a special education matter is entitled to attorneys' fees, from the government, at a reasonable or market rate.<sup>15</sup> Thus, special education advocacy can provide a basis for funding advocates to challenge any and all of the conditions of

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<sup>10</sup>Attorneys, of course, also advocate through means other than litigation. An attorney, for example, could draft legislation and lobby for legislative remedies for inhumane conditions at an incarceration facility. Many public defenders are prohibited by statute or by contract from engaging in systemic advocacy of that sort. Most public defenders are not in proximity of a state legislature and, moreover, have large-volume caseloads that seem to make legislative advocacy an incomprehensible indulgence.

<sup>11</sup>The three options presented are, of course, not suggested as substitutes or replacements for motions to reconsider disposition order or appeals of underlying adjudications. A fourth option is to challenge treatment of children by governmental custodians under child abuse and neglect laws.

<sup>12</sup>See generally, Patricia Puritz and Mary Ann Scali, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*, Office of Juvenile Justice and Delinquency Prevention Report (1998). The authors detail "six. . . methods of improving oversight, monitoring, and services for detained and committed youth. . .", including (1) The Civil Rights of Institutionalized Persons Act, (2) Ombudsman programs, (3) Individuals with Disabilities Education Act, (4) Protection and Advocacy Systems, (5) Administrative Procedure Act, and (6) Self- Assessment. *Id.* at xi-xii.

<sup>13</sup>For a listing of class action suits that challenge conditions at juvenile incarceration facilities and that include educational claims, see Puritz & Scali, *Beyond the Walls*, *supra* note 2 at 18-19.

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<sup>14</sup>Civil contempt orders are of two types: coercive and compensatory. *United States v. United Mine Workers*, 330 U.S. 258, 303-304 (1947). The purpose of civil contempt is "[to enforce compliance and] to remedy any harm inflicted on one party by the other party's failure to comply." *Doe v. General Hospital of the District of Columbia*, 434 F.2d 427,431 (D.C. Cir. 1970).

If the government has not implemented the disposition order to provide services or, more generally, to provide care and rehabilitation, an attorney also might ask the court to issue a writ of mandamus to force the youth services agency personnel to provide care and rehabilitation; in the alternative, an attorney might ask the court to reassert its original disposition authority. See, e.g., *In re A.A.I.*, 483 A.2d 1205 (D.C. 1984). In many jurisdictions, the law provides for motions to modify or terminate the disposition order or motions to void the order based upon mistake or newly-discovered evidence. See, e.g., *In re D.W.G.*, 115 D.W.L.R. 2097 (D.C. Super. Ct. 1988). Also, the law must provide a basis to challenge the court's jurisdiction. See, e.g., D.C. Code Ann. § 16-2324(a) (1996). On a more mundane note, the law also must provide, in some form, for a motion for release from incarceration.

<sup>15</sup>P.L. 105-17 § 615 (i)(3); 34 C.F.R. § 300.513.

confinement that relate to the provision or implementation of special education and related services at juvenile incarceration facilities. Also covered are challenges based upon failures of school system personnel and juvenile incarceration facility personnel to identify children who have educational dis-abilities.

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By enforcing federal, state, and local special education rights on behalf of children, advocates can extricate those children from delinquency placements, jails, and penal institutions. By redefining children as students with potential for being productive, rather than as offenders (or as predators) whom society needs to restrict and repress, adults responsible for children charged with delinquency and criminal offenses can create a system genuinely attuned to goals of care and rehabilitation.

### **I. The IDEA and children incarcerated in Juvenile facilities.**

The fact of incarceration in a juvenile facility does not vitiate a child's right to special education under the IDEA.<sup>16</sup> Courts have long held that children continue to have rights under the IDEA regardless of incarceration.<sup>17</sup> The

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<sup>16</sup>See, Mary G. Hynes, *Children with Disabilities in Detention: Legal Strategies to Secure Release*, 3 D.C. L. Rev. 299 (1995).

<sup>17</sup>See, e.g., *State of Conn. v. State Dept. of Ed.*, 699 A.2d 1077 (Superior Court 1997); *State of Wisconsin v. Trent N.*, 26 IDELR 434 (Wisc. Ct. App. 1997); *Alexander S. v. Boyd*, 876 F.Supp. 773

Office of Juvenile Justice and Delinquency Prevention has recently reported that there are as many as twenty-five pending class action cases on behalf of children incarcerated in juvenile facilities which incorporate an educational claim under the IDEA or the Rehabilitation Act or both.<sup>18</sup>

Of particular interest is the court's decision in *Alexander S. v. Boyd*, describing the state's obligations to children incarcerated in both pre-trial detention and post-adjudication incarceration. With regard to children in pre-trial detention, the court adopted the conclusion of the United States Department of Education holding:

In the case of short-term, temporary confinement, the State may meet its obligation under IDEA and Section 504 . . . by implementing the IEP from the previous school district or placement instead of developing a new one. The IEP must be implemented to the extent possible in the temporary setting.. To the extent the implementation of the old IEP is impossible, services that approximate, as close as possible, the old IEP must be provided.<sup>19</sup>

With respect to children in long term confinement, however, the court held that the state is obligated to develop a new IEP as soon as the juvenile is transferred to one of the long term institutions.<sup>20</sup>

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(D.S.C. 1995); *Donnell C. v. Illinois*, 829 F.Supp. 1016 (N.D. Ill. 1993); *In re G.C. v. Coler*, 673 F.Supp. 1093 (S.D. Fla. 1987); *Andre H. v. Ambach*, 104 F.R.D. 606 (S.D.N.Y 1985); *Green v. Johnson*, 513 F.Supp. 965 (D. Mass. 1981); *In re Marc. A.*, 21 IDELR 341 and 21 IDELR 1079 (N.H. 1994) and *In re JohnK.*, 216 Cal. Ct. App. 1985).

<sup>18</sup>Puritz & Scali, *Beyond the Walls*, *supra* note 2 at 18-19.

<sup>19</sup>*Alexander S.*, 876 F.Supp. at 153.

<sup>20</sup>*Id.*

While the 1997 amendments, discussed below, significantly circumscribe the states' obligation to provide special education services to children incarcerated in adult facilities, the amendments have no impact on the rights of juveniles incarcerated in juvenile facilities. In fact, the proposed regulations specifically add "juvenile" correctional facilities as public agencies subject to the IDEA.<sup>21</sup> The legislative history also emphasizes that the rights of children incarcerated in juvenile facilities are unaffected by the amendments relating to children in adult facilities.<sup>22</sup>

## II. The IDEA and children<sup>23</sup> incarcerated in adult corrections facilities

The 1997 amendments to the IDEA significantly modify the states obligation to provide special education and related services to children who are incarcerated in adult facilities. Some of these modifications affect only those who are eighteen through twenty-one; others affect all children incarcerated in adult facilities, regardless of age. While the amendments do not completely abrogate the states' responsibility to children with disabilities incarcerated in adult facilities, they do give states considerably more leeway in

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<sup>21</sup>Proposed 34 C.F.R. § 300.2. Federal Register, October 22, 1997, p. 55030.

<sup>22</sup>"Neither do they [the amendments] affect students who are in juvenile facilities." House Report No. 105-95, p. 95. The same result is evident from the floor debates: "Ms. Boxer. Does this bill make any changes to current law with respect to disabled students incarcerated in juvenile facilities? Mr. Harkin. No." Congressional Record, May 13, 1997, S4376.

<sup>23</sup>This section of the chapter contains information regarding young people who are under eighteen years of age and incarcerated in adult facilities, as well as information regarding young people who are between the ages of eighteen and twenty-one (inclusive). To avoid confusion, the authors consistently will use the term "children" rather than "young people" or "young adults".

how they elect to provide services to this population, if at all.

### A. Children age eighteen through twenty-one

The 1997 amendments authorize states to exclude from eligibility entirely children aged eighteen through twenty-one who, "in the educational placement prior to their incarceration in an adult correctional facility: (I) were not actually identified as being a child with a disability. . . or (II) did not have an individualized education program."<sup>24</sup> In other words, states need not identify any new special education cases among persons who are incarcerated. On the other hand, states continue to be obligated to serve those children who have already been identified as needing special education before their incarceration.

The amendments do not directly speak to the situation of children who have dropped out of school at the time of incarceration. The House Report provides that the law does not exclude students who "had been identified. . . but who had left school prior to their incarceration."<sup>25</sup> Comments on the floor of the House tend to support a reading which would require states to provide special education services to students who had once been identified as eligible for special education but who had dropped out of school before being incarcerated.<sup>26</sup>

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<sup>24</sup>P.L. 105-17, § 612 (a)(1)(B)(ii).

<sup>25</sup>House Report No. 105-95 at p. 91.

<sup>26</sup>"Mr. Martinez. . . Members need to understand that disabled children do not often go straight from school to jail. However, the high dropout rate of children with disabilities often lead to these individuals encountering our justice system. . . Fortunately, the provisions in this bill will ensure that those children who drop out and then get into difficulties with our justice system will continue to be served in adult correctional facilities." Congo Recd. May 13, 1997, at H 2536.

However, the House Report also provides that the Act “makes clear that services need not be provided to all children who were at one time determined to be eligible.”<sup>27</sup> Thus, presumably, the Act does exclude students who may have been eligible at one point in their educational history but who were no longer eligible at the time of incarceration. Conceivably, for example, a student could receive special education services in elementary school but not need such services in middle school. If such a child were subsequently incarcerated, he or she would not be eligible to receive special education in an adult prison. Thus, continuing eligibility is probably limited only to those students who were eligible or who had an IEP in educational placement immediately preceding their incarceration.

#### **B. All children incarcerated in adult facilities**

The remaining amendments to the IDEA relating to children incarcerated in adult facilities affect all children, regardless of age. They include: (1) a new formula for withholding funding from states for failure to comply with the IDEA with regard to children incarcerated in adult facilities; (2) the permissible exclusion of incarcerated students from participation in statewide assessments; (3) new limitations on the obligation to provide transition services to incarcerated children and (4) the addition of penological considerations in developing individualized education programs.<sup>28</sup>

The new withholding formula allows states to entirely discontinue providing special education services to children incarcerated in adult prisons while incurring only a minimal financial penalty.<sup>29</sup> The IDEA authorizes the Governor to “assign to any public agency in the State the

responsibility of ensuring that the requirements of this part are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.”<sup>30</sup> Thus, the State Educational Agency no longer need be the ultimately responsible agency for educational special education and related services to children incarcerated in adult prisons. Instead, the Governor may designate another agency, presumably the Department of Corrections, to assume this responsibility. If the state then decides to discontinue providing services to these children, the Secretary of the U.S. Dept. of Education may withhold only that agency's funding. The withholding must be:

proportionate to the total funds allotted. . . to the State as the number of eligible children with disabilities in adult prisons under their supervision of the other public agency is proportionate to the number of eligible individuals with disabilities in the State under the State educational agency; and. . . shall be limited to the specific agency responsible for the failure to comply with this part.<sup>31</sup>

This provision enables a state to discontinue providing special education services to children incarcerated in adult facilities without suffering a severe financial penalty. The only funding the state could lose would be the funding specifically allotted for special education services for prisoners. The remainder of the state's federal special education allocation, *i.e.* the allocation for the State Educational Agency, is untouched.

The import of this withholding formula is evident from the following colloquy contained in the Senate debate on the amendments: Mrs. Boxer. . . Under current law, if a State fails to provide special education services to eligible prisoners, that State faces the loss of all Federal special education funding. . . This issue is particularly important to the State

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<sup>27</sup>House Report No. 105-95 at 91.

<sup>28</sup>P.L.105-17 at §§ 612, 614 and 616.

<sup>29</sup>P.L.105-17 at §§ 612 and 614.

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<sup>30</sup>P.L.105-17 at § 612 (a)(11)(C).

<sup>31</sup>P.L.105-17 at § 616 (c)(1)(2).

of California. My State does not provide special education services in adult prisons, as a result, it faces the loss of over \$300 million in Federal special education assistance. It seems unconscionable to me that the needs of approximately 600,000 California special needs children could be jeopardized because my State does not provide special education services to an estimated 1,500 prisoners.

It is my understanding that this bill makes several significant amendments to these provisions and dramatically changes the scope of sanctions that can be imposed on States for failing to provide special education services to those incarcerated in adult prisons. Would the Senator elaborate on those changes?

Mr. Harkin. . . Under the legislation, States are authorized to transfer the responsibility for educating juveniles with disabilities convicted as adults and incarcerated in adult prisons from State and local education agencies to other agencies. . .

Mrs. Boxer. What are the consequences of the transfer of authority. . . ?

Mr. Harkin. If a State makes such a transfer and if the Secretary finds that the public agency is in noncompliance, the Secretary must limit any withholding action to that agency. Furthermore, any reduction or withholding of payments must be proportionate to the number of disabled children in adult prisons under the supervision of that agency compared to the number served by local school districts. For example if one percent of the disabled students were in adult prisons, the Secretary could only withhold one percent of the funds.

Mrs. Boxer. In the State of California, approximately one-fourth of one percent of all people eligible for special education are convicted of felonies as adults and incarcerated in adult prisons.

It is my understanding that under this bill, if California does not provide special education services in prisons it stands to lose only one-fourth of one percent of its allotted share...is my understanding correct?

Mr. Harkin. The Senator is correct. . . .<sup>32</sup>

While comparable statements were made during the House debate,<sup>33</sup> at least one member emphasized the states' continuing obligation to serve children who either had an IEP or who had been identified as eligible for services in their last educational placement. Mr. Martinez remarked:

While the bill before us today provides several exemptions for serving disabled children in adult correctional facilities, States will still be required to serve those who had an individualized education program in their last educational placement. Members need to understand that disabled children do not often go straight from school to jail. However, the high drop out rate of children with disabilities often leads to these individuals encountering our justice system.

Fortunately, the provisions in this bill will ensure that those children who drop out and then get into difficulties with our justice system will continue to be served in adult correctional facilities.<sup>34</sup>

For those states which elect to continue providing special education services to children incarcerated in adult facilities, the 1997 amendments narrow the states' obligations in developing and implementing individualized education programs for these children. States need not allow children incarcerated in adult facilities to participate in standardized statewide

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<sup>32</sup>Congressional Record, May 13, 1997, S4375.

<sup>33</sup>During the House floor debate on the IDEA amendments, Mr. Riggs, a member of the House commented: "This bill also allows states, at their discretion, to deny services for adult prisoners while forfeiting only the pro rata share of Federal funding for that small segment of the total IDEA eligible population." Congo Record, May 13, 1997, H2535.

<sup>34</sup>Congo Record, May 13, 1997, H2535-36.

educational testing.<sup>35</sup> The amendments also provide that states need not provide "transition services" to incarcerated children who will be over age twenty-two at the time of their release from prison.<sup>36</sup> These services are designed to help adolescent special education students move from school towards self-sufficiency.<sup>37</sup> They include an array of options, intended to promote productive post-school activities.<sup>38</sup> Transition services must be based on the individual student's needs, taking into account the student's preferences, and may include a variety of learning experiences.<sup>39</sup> Despite the obvious rehabilitative benefits of such services, children who may still be young adults capable of leading productive lives at the time of their release need not

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<sup>35</sup>“The following requirements do not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons. . . the requirements. . . relating to participation of children with disabilities in general assessments.” P.L.105-17 at § 614 (d)(6)(A)(i).

<sup>36</sup>“The requirements. . . relating to transition planning and transition services. . . do not apply with respect to such children whose eligibility under this part will end, because of their age, before they will be released from prison.” P.L.105-17 at § 614 (d)(6)(A) (ii).

<sup>37</sup>“The term ‘transition services’ means a coordinated set of activities for a student with a disability that - (A) is designed with an outcome-oriented process, which promotes movement from school to post-school activities. . . .” P.L.105-17 at § 602 (30).

<sup>38</sup>Transition services may include post-secondary education, vocational training, integrated employment, continuing and adult education, adult services, independent living, or community participation. P.L.105-17 at § 602 (30)

<sup>39</sup>Such experiences may include instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if necessary, daily living skills and functional vocational evaluation. P.L.105-17 at § 602 (30).

receive transition services while incarcerated.

This provision reflects Congress’ determination that transition services would serve no rehabilitative purpose for persons who will not be returning to society.<sup>40</sup> However, by excluding all persons who will be over age twenty-two upon release, the statute deprives individuals who would most likely benefit from transition services as they integrate back into society. The legislative history strongly suggests that transition services continue to be appropriate where they will assist a young adult return safely and productively to society.<sup>41</sup>

<p>!!!</p> <p>An individualized education program that contains meaningful and comprehensive special education, related services, and transition services can provide a safe and productive alternative to preventive detention or post-disposition incarceration.</p> <p>!!!</p>
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Finally, states are now authorized to modify a child’s IEP based on “a bona fide security or compelling penological interest that cannot

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<sup>40</sup>“Mr. Harkin. . . This exception applies to those inmates for whom special education will have no rehabilitative function for life after prison. Our aim in assuring that prisoners receive special education is to make them better able to cope after prison, resulting in a safer environment for all of us. This goal does not apply for those who will not return to society. . . .” Congo Record May 13,1996 S4376.

<sup>41</sup>“Mr. Harkin: . . . Our aim in assuring that prisoners receive special education is to make them better able to cope after prison, resulting in a safer environment for all of us.” Congo Rcd. May 13, 1996 S4376.

otherwise be accommodated.”<sup>42</sup> Just what type of situation will constitute a “bona fide security interest” or a “compelling penological interest” is not clear. The language of the exception itself suggests that least restrictive environment considerations, i.e., the requirement that a child with a disability be educated with non-disabled peers “to the maximum extent appropriate,” factor into the exception.<sup>43</sup> Thus, for example, a state may rely on this exception to segregate a prisoner receiving special education services from the general prison population for security reasons. The legislative history suggests that, in the case of a child who has been incarcerated in an adult facility and sentenced to death or life without parole, a state would be justified in discontinuing services.<sup>44</sup> What other situations may be included will be determined as states rely on this exception over time.

### III Using the IDEA in representing children in delinquency matters or in criminal cases:

*Getting them out and keeping them out of incarceration*

#### A. In general

Special education advocacy is -- as described in

previous chapters -- a means for delinquency clients to gain access to services that can substitute for or negate the perceived need for preventive detention and post-disposition incarceration. An individualized education program that contains meaningful and comprehensive special education, related services, and transition services can provide a safe and productive alternative to preventive detention or post-disposition incarceration. Similarly, in the adult correctional system, if services are available through the special education system, the court may determine that the risk of dangerousness is diminished and that the corresponding benefit of rehabilitation can be accomplished in the community.<sup>45</sup>

Ultimately, success in educating and empowering children in the delinquency system can influence the adult criminal system. The influence will be direct, as advocates enforce special education law on behalf of young people incarcerated in adult facilities. The influence will also be indirect and pervasive, as advocates demonstrate that education and individualized services are more effective than imprisonment.<sup>46</sup> [need references back to other notes in this note.]

#### B. Oliver's case: Using special education advocacy to extricate a child from incarceration facility

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<sup>42</sup>“If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child’s IEP Team may modify the child’s IEP or placement notwithstanding the requirements of [the least restrictive environment] if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodat-ed.” P.L.105-17 at § 614 (d)( 6)(B).

<sup>43</sup>P.L.105-17 at § 614 (d)(6), referencing § 612 (A)(5)(A) (least restrictive environment).

<sup>44</sup>“Mr. Harkin. Public agencies may modify an IEP for bona fide security or compelling penological reasons. For example, the public agency would not be required to develop an IEP for a person convicted as an adult and incarcerated in an adult prison who is serving a life sentence without the possibility of parole or is sentenced to death.” Congo Record May 13,1997 S 4376.

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<sup>45</sup>The attorney should search for statutory provisions that allow adult criminal courts to order treatment (rather than standard incarceration sentences) for the youthful offender who demonstrates a capacity to benefit from rehabilitative services. *See, e.g., D.C. CODE § 24-801, et seq.*

<sup>46</sup>*But see, Bishop & Frazier, infra note 53 at 298-99 (positing that successful deinstitutionalization efforts resulting in fewer restrictive juvenile system placements led decision-makers to increase transfer rates to adult system); but see generally, Miller, Last One Over the Wall, supra note 2 at 12-14 (suggesting that deinstitutionalization efforts can be essentially illusory).*



Judges, lawyers, social workers, educators, evaluators, and parents regularly misconstrue children's needs and, as a consequence, continuously pound children with disabilities -- square pegs, so to speak -- into delinquency system, round-hole "remedies"! Oliver's experiences exemplify this phenomenon.

As a young child, Oliver changed schools often. He stuttered. He repeated the first grade; he was in the third grade for three and a half years; and he repeated the seventh grade. School system personnel also, however, "skipped" Oliver from the first grade to the third grade and from the fourth grade to the sixth grade, ostensibly to get him in classes with children closer to his age. Throughout elementary school, Oliver's grades were consistently low. Accompanying comments from teachers on report cards indicated, not surprisingly, that Oliver was having difficulties and needed extra help. Notwithstanding Oliver's tell-tale troubles, school system personnel did not initiate an evaluation to determine whether Oliver had an educational disability.

Early in his elementary school years, Oliver became what teachers often refer to as "a behavior problem." According to Oliver's mother, Oliver was suspended for long periods during his first year in third grade. The mother successfully challenged one of the suspensions. After that successful challenge, however, school personnel began to isolate Oliver in the principal's office. The principal -- again, according to the mother -- literally placed barriers around Oliver in the office and, further, ordered teachers and students not to interact with Oliver. The mother asked school personnel what could be done to help Oliver do better in school. No one informed her of her rights to have Oliver evaluated for special education.

Standard scores on achievement tests revealed uneven performance from year to year, as well as some gaps between Oliver's achievement and his performance in school. Truancy became pronounced when Oliver was in the third grade for

the third time and was an entrenched problem by the time Oliver was in the seventh grade.

When Oliver was twelve years old, his older brother was killed. This death was a trauma for Oliver. A subsequent trauma for Oliver was his witnessing the murder of a friend of his sister. Both of Oliver's parents struggled with drug usage, and Oliver's father left the family not long after the death of Oliver's brother. Apparently, Oliver received no counseling or other services to help him to cope with these traumas and family problems. Oliver's drug use began when he was twelve or thirteen years old.

Oliver engaged in substantial delinquent conduct that resulted in his court-involvement beginning at the age of thirteen. His record includes adjudications for possession with intent to distribute cocaine, possession of marijuana, and unauthorized use of a vehicle. He also missed scheduled court dates and was incarcerated in a maximum-security juvenile facility for the first time when he was fourteen.

Coincident with incarcerating Oliver, the court ordered a referral for special education testing. The testing did not occur for almost another year. That testing resulted in a determination that Oliver was seriously emotionally disturbed and that, therefore, he was eligible for special education services. No special education advocate represented Oliver during the process of that first evaluation and during the formulation of his initial individualized education program (IEP). In addition, the mother apparently did not receive notice and took no part in the creation of the IEP. Persons who prepared that IEP did not identify Oliver as having a learning disability or a speech/language disorder. Consequently, in the initial IEP, they did not adequately address Oliver's educational needs.

Subsequently, when Oliver was sixteen, he and his mother engaged a special education

attorney.<sup>47</sup> At that time, Oliver was incarcerated in a six-month drug program at a maximum security juvenile facility. During the first interview, the attorney observed that, although Oliver spoke rapidly and intelligently, he almost constantly expressed tangential thoughts. He seemed "hyper" and was unable to express himself clearly. In signing a release form, Oliver omitted a letter from his own name. He also struggled with providing the seven digits of his phone number in the proper order. Towards the end of the conversation, Oliver presented his belief that he may be "more focused" when he is using drugs.

The attorney obtained from Oliver a detailed school history; later, the attorney interviewed Oliver's mother at length to learn about Oliver's school history from her perspective.<sup>48</sup> In addition, the attorney retrieved school records spanning Oliver's entire school history from the public school system and from the juvenile incarceration facility. Based upon those records, the attorney compiled a chart to summarize the school history.

The attorney requested new evaluations from the public school system for Oliver and arranged for a private, Medicaid-funded, medical evaluation. A speech pathologist tested Oliver and reported that Oliver exhibited a moderate-to-severe receptive language disorder and a mild-to-moderate expressive language disorder; that evaluator identified a possible language-related learning disability and recommended direct intervention in the form of speech/language therapy. In the same period, an educational psychologist tested Oliver and reported

observing "no distractibility". She found Oliver's overall cognitive functioning to be in the borderline range, with a full-scale IQ of 71, a verbal IQ of 66, and a performance IQ of 80.<sup>49</sup> The psychologist noted that the disparity between performance IQ and verbal IQ was statistically significant and indicated likely effects of emotional and language deficits. Oliver subsequently took a separate test of nonverbal intelligence (TONI-2) and scored 93; that score is within the average range of intelligence.

Academic achievement testing performed in conjunction with the evaluation of Oliver when he was sixteen established grade equivalents in five language-related sub-tests registering in the first- grade range. These results put Oliver in the .1 percentile for his chronological age.<sup>50</sup> He scored higher in math-related sub-tests, measuring predominantly in the fifth-grade range, with percentile rankings between ten and seventeen. The educational psychologist also noted problems for Oliver with visual motor integration skills and fine-motor skills involving pencil and paper, as well as weakness in auditory perception. The psychologist concluded, not surprisingly, that Oliver needed "positive learning experiences, guidance, support and structure."

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<sup>47</sup>The IDEA confers standing on the parents of children with disabilities to pursue the special education rights of their children. *Tschannerl v. District of Columbia*, 594 F. Supp. 407 (D.D.C. 1984). Cf. P.L.105-17 at § 615 (m).

<sup>48</sup>Both Oliver and his mother reported that Oliver had stuttered during his pre-school and early school years.

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<sup>49</sup>The intelligence testing performed in the evaluation process one year earlier indicated a full-scale IQ of 68, performance IQ of 77, and verbal IQ of 63. The overall score of 68 falls within the range of mild mental retardation. IQ scores alone, however, call not establish whether a person is mentally retarded. One must also measure and consider the individual's adaptive functioning (*i.e.*, how the individual adapts to the environment in terms of self-care skills and other everyday functions). A standard test for adaptive functioning is the Vineland.

<sup>50</sup>This percentile ranking indicates that 99.9% of his peers are functioning at a higher level in language- based skills.

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The IEP case manager, a public schools employee, refused to add to the IEP that Oliver was learning disabled or speech/language impaired. Even when the evaluators endorsed these conclusions regarding Oliver's disabilities, and even after the special education attorney cited the regulation providing that a child can have more than one disability, the case manager refused to change the disability classification on the IEP.

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A clinical psychologist who tested and interviewed Oliver when he was sixteen as part of the special education evaluation found evidence of chronic depression, evidence of a reading disorder and a disorder of written expression, and no evidence of psychosis. The clinical diagnosis included "Adjustment Disorder with Depressed Mood", "Dysthymic Disorder, Early Onset", and "Cannabis Abuse". Both the psychologist and a psychiatrist, who also interviewed Oliver, recommended that Oliver be placed into a therapeutic, residential facility.

Upon request of the mother and Oliver through the special education attorney, the public school evaluators and other personnel met with Oliver and with the attorney at the juvenile incarceration facility to devise a new IEP. Oliver's mother did not attend the IEP meeting. The aftercare worker (parole officer), however, did attend. With his special education attorney, Oliver prepared for the IEP meeting. At the meeting, Oliver sat beside his aftercare worker. He communicated with her and with the attorney in appropriate ways during the meeting.

The IEP case manager, a public schools em-

ployee, refused to add to the IEP that Oliver was learning disabled or speech/language impaired. Even when the evaluators endorsed these conclusions regarding Oliver's disabilities, and even after the special education attorney cited the regulation providing that a child can have more than one disability, the case manager refused to change the disability classification on the IEP. Everyone "agreed to disagree" and to include in the IEP, nevertheless, services to address Oliver's speech/language disorders and learning disabilities. The IEP also contained individual and group counseling for Oliver, as well as vocational training and other transitional services.

Also at the IEP meeting, the counselor principally responsible for Oliver at the incarceration facility, speaking in loud and angry tones, attacked Oliver for his lack of effort and for his negative attitude. Oliver maintained his composure. The evaluators discussed how Oliver had cooperated with them during the testing process, and a teacher at the facility praised Oliver for working hard and behaving well in school. Oliver presented some of his ideas about his educational needs and responded to his counselor's attacks in a calm and reflective manner. These exchanges at the IEP meeting seemed to impress the aftercare worker.

Based on the new IEP, the special education attorney located a private, special education day school for Oliver. The school is a 100 percent special education program for children with learning disabilities and serious emotional disturbance. The school also provides a strong vocational component; students in the school's building trades program, for example, participate over the course of an academic year in building a home from the foundation up. Based upon a re-request from the special education attorney, public school personnel agreed to place Oliver at the school and to pay the tuition and other costs, and to provide transportation.

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The evaluation results and recommendations developed through the special education evaluation when Oliver was sixteen contrasted radically with the information generated through the delinquency system that was presented to judges in anticipation of disposition hearings when Oliver was thirteen and fourteen years old.

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At the subsequent court hearing, the aftercare worker disclaimed a negative report about Oliver that she had written and submitted to the court prior to the IEP meeting. The aftercare worker explained to the judge (who had retained power to determine Oliver's release date) that Oliver had never before been diagnosed properly. The aftercare worker endorsed removing Oliver from the incarceration facility, placing him in a group home, and allowing him to attend the private special education day school. The judge responded by proclaiming that the decision did not revolve around Oliver's educational disabilities and his special education needs. The special education attorney explained, in some detail, Oliver's educational history and needs, concluding that Oliver's special education needs were indeed pivotal to the decision in the delinquency matter. The aftercare worker strongly endorsed the attorney's conclusions. The delinquency attorney, of course, agreed, as well. The judge ordered release.

The evaluation results and recommendations developed through the special education evaluation when Oliver was sixteen contrasted radically with the information generated through the delinquency system that was presented to judges in anticipation of disposition hearings when Oliver

was thirteen and fourteen years old. The probation officer who prepared the pre-disposition reports for the judges wrote only that Oliver had behaved poorly and scored poorly in school, that he was constantly truant, and that he had repeated several grades. One must assume that Oliver's defense attorneys had added nothing, being themselves unaware of Oliver's educational disabilities and unaware also of the failure of school system personnel during Oliver's entire school career to identify or address those disabilities. Thus, the delinquency judges who passed judgment on Oliver and ordered his incarceration knew little about his school history and absolutely nothing about his educational disabilities.

Oliver's circumstances and reactions typify in several respects the circumstances and reactions of many children who are in serious trouble in the delinquency system and who are incarcerated. First, Oliver's parents did not provide a stable home for him. Second, Oliver has, and has always had, learning disabilities. No one diagnosed or addressed those disabilities throughout his elementary school years. Third, he experienced multiple traumas and received no noteworthy services to address his serious emotional problems. Fourth, Oliver's school failure began early, and he continued to fail in school without any meaningful intervention. Fifth, after years of failure in school, Oliver began to skip school and run away from home. Once in the delinquency system, he also ran away from halfway houses and other non-secure placements. Sixth, Oliver used drugs and sold drugs. Seventh, although Oliver has no history of violent conduct, he was incarcerated at a young age (fourteen) and there-after spent much time incarcerated.<sup>51</sup>

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<sup>51</sup>The Court ordered that Oliver reside in a delinquency group home, a facility that housed a total of ten adjudicated delinquent children. Soon after his placement in the group home, Oliver became embroiled in a conflict regarding the Ownership and possession of a coat. Fearing for *his* safety, Oliver left the group home without permission. While he

### **C. Using special education advocacy on behalf of young people facing incarceration in adult correctional facilities**

#### **1. Transfer from juvenile court to criminal court**

An attorney can use special education advocacy effectively in representing a child with a disability who is facing judicial transfer to adult criminal court. For example, in *State v. Michael S*, the court held that the government's failure to adequately explore Michael's potential for rehabilitation in the juvenile system, with special education assistance, precluded the government's request that Michael be transferred to the adult criminal system.<sup>52</sup> A necessary step for the attorney is to excavate the child's school records and to conduct a thorough investigation of the child's school history. As in Oliver's case, above, the attorney can then demonstrate that the child has an educational disability, that school personnel (as well as juvenile system personnel) never diagnosed or addressed the child's learning needs, and that the child has rights to both a comprehensive evaluation and to appropriate services.

If the standard for transfer requires a judicial finding that the child is not amenable to

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was "on the run" from the group home, Oliver stopped attending school. In short order, the police arrested Oliver on a new drug charge, and the Court ordered detention, again.

Oliver prevailed at trial in the new drug case. Working with the defense attorney who represented Oliver in the old case and in the new case, the special education attorney arranged for Oliver's release to a program that provides supervised living for Oliver in his own apartment. In addition, Oliver switched schools again -- to another 100 percent special education school -- and is receiving counseling and other related services.

<sup>52</sup>*In Re Michael S.*, 423 S.E.2d 632 (W. Va. 1992).

services,<sup>53</sup> the attorney can attempt to defeat the transfer by proving that the child never received services to which the child is entitled under federal, state, and local law.

#### **2. Convincing a criminal court judge to order probation rather than incarceration**

In cases in which a convicted young person is not facing a mandatory minimum sentence, attorneys should be able to obtain at sentencing, with remarkable frequency, orders for probation rather than orders for incarceration. Attorneys should remember, in particular, the requirement under special education law for the school system to provide related services (including individual and group counseling) and transition services (including job training). The availability of these services adequately provide legitimate alternatives to incarceration. Indeed, the recent limitations on the states' obligations to provide special education services to juveniles in adult correctional facilities may make the argument for probation, as opposed to incarceration, more compelling. A young person with a disability in the community may be entitled to special education and related services which no longer need be provided in adult correctional facilities. Thus, counsel may be able to argue that the only means of ensuring that the young person receive certain special education services is to allow that person to remain in the community.

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<sup>53</sup>*But cf: generally*, Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 295 (1991) (study of prosecutorial waiver in Florida finding, inter alia, that -- notwithstanding transfer standard of non amenability to treatment -- only 29 percent of transfers in two counties studied involved the alleged commission of a felony against persons). Thus, based on the relatively non-serious level of offenses in most transfer cases, one cannot conclude that decisionmakers, in making decisions to transfer, are genuinely finding youth nonamenable to treatment.

An attorney should seek agreement from the client, in some cases, to suggest that the judge require that the client Participate in special education services as a condition of probation. Making this "offer" to the judge sometimes helps to convince the judge and the prosecutor that they are taking a risk that is manageable and that is not unreasonable.<sup>54</sup>

A probation officer (or other government or court functionary responsible for preparing a pre-sentence report for the Court) may have a large caseload and, thus, may have difficulty arranging programs and services for young people facing sentencing in criminal matters. In such a case, an attorney may optimize the likelihood of obtaining an order of probation rather than incarceration by arranging special education services, formalized in an IEP. Further, by providing the plan for services and the IEP to the probation officer in advance of sentencing, the attorney will likely increase the chances that the probation officer will adopt the plan and incorporate the plan into the pre-sentence report. Obviously, to whatever extent is necessary, the attorney should work with the probation officer -- and negotiate with the probation officer -- in order to convince the

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<sup>54</sup>If the young person with adult criminal matters pending still has open cases in the delinquency system, the attorney can arrange services through the special education system, as well as through the delinquency system. The attorney then can offer those services as an alternative to incarceration in the adult system. Again, the attorney may find that proposing to make those services a condition of probation in the criminal case helps to convince a judge and prosecutor to agree to the arrangement.

If the child is not eligible for special education services, the defense attorney may attempt to arrange for services through the delinquency system. If the child's cases in the delinquency system are in a post-disposition posture, the attorney might be able, nevertheless, to negotiate for services through a mutually-requested revocation of aftercare (parole). Services through the delinquency system could then become conditions of probation in the criminal case.

probation officer to adopt and incorporate the special education sentencing plan.

### **3. Martin's case: Using special education advocacy to extricate a young person from incarceration in an adult facility**

Martin has an extensive juvenile delinquency record. He is also learning disabled and emotion-ally disturbed. He has been in a number of special education placements including a residential treatment facility. After turning eighteen, Martin continued to get arrested. Primarily, he was arrested on relatively minor charges.

By the time he was nineteen, Martin had a couple of adult criminal convictions. He also allegedly had violated conditions of probation and was facing additional charges for leaving a halfway house and for failing to appear in court. These latter charges resulted in preventive detention in the adult jail pending a probation revocation hearing and a trial on the failure to appear charge.

The criminal court judges encountered Martin as a young person "with an attitude" who regularly seemed to disobey court orders. One of those judges assured Martin that he had received "his last break". The special education advocate compiled evidence of Martin's education-related disabilities, including information from previous psychological and educational evaluations. The advocate provided to the judge that compilation with a detailed cover letter that explained Martin's disabilities and his educational history. Then, coordinating with the criminal defense attorney, the special education advocate appeared at the probation revocation hearing.

The judge who previously had issued the "last break" to Martin listened attentively to the advocate's presentation. In a remarkable and surprisingly-intense moment, the judge stopped the proceeding to address the law student advocate. The judge thanked the student for providing the cover letter and other materials

and for making the oral presentation. The judge explained that he ordinarily spends only a few minutes with each defendant and observes each defendant's demeanor in court without having any other context through which to know that person. The judge acknowledged that he had "judged" Martin to be a person with an attitude problem and had made a note to revoke Martin's probation and order incarceration if Martin violated any conditions of the probation. The judge, in addition, reiterated that he had promised Martin and everyone else that he would incarcerate Martin if and when Martin messed up again. But the judge then thanked the law student for helping the judge to understand some things about Martin, and the judge gave Martin another chance at probation.

**4. Jack's case: Building a case for moving a serious, violent offender from an adult facility to a residential treatment center**

Jack's family background and educational background are an amalgam of neglect. As a young child, Jack was the target of emotional and physical abuse, and he did not receive sufficient support to meet his daily needs. Upon entering elementary school, consequently, Jack demonstrated serious emotional problems.

Unfortunately, educational neglect compounded the earlier neglect. Jack failed the first grade, and school system personnel failed to suggest an evaluation or to diagnose Jack's emotional disturbance and learning disabilities for several years. Even after school personnel identified Jack as disabled, they failed to provide appropriate services.

In contrast, Jack was identified early – before he was a teenager – as a delinquent child. From the age of twelve through seventeen he stayed in a series of delinquency group homes, juvenile incarceration facilities, and residential treatment facilities. Increasingly, Jack resisted attempts at

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 Jack failed the first grade, and school system personnel failed to suggest an evaluation or to diagnose Jack's emotional disturbance and learning disabilities for several years. Even after school personnel identified Jack as disabled, they failed to provide appropriate services.  
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intervention and withdrew from people; he was hostile to adults and, particularly in incarceration settings, to other children. In addition, Jack's propensity to violence focused on women, perhaps as a consequence of having witnessed domestic violence in the home and having been himself a victim of emotional cruelty and physical abuse.

At the age of seventeen, as a result of placement order in a delinquency case, Jack was residing at a private residential treatment facility in a neighboring state. Left alone with one other resident and with a female nurse, Jack physically attacked the nurse, took her keys, and attempted unsuccessfully to escape from the facility. Administrators of the private residential facility terminated Jack from their care, and state officials transferred Jack back to the juvenile incarceration facility.

During the time that Jack was at the juvenile incarceration facility (following his expulsion from the residential treatment center), special education counsel met and discussed with Jack his continuing interests in obtaining special education, related and transition services. Jack expressed tremendous anger regarding the "treatment" he had previously received in juvenile jails and residential treatment centers.

Notwithstanding his anger regarding previous treatment and educational experiences, Jack identified several objectives that he and counsel

recognized as relevant to the process of formulating an IEP. For example, although Jack's mother was dead and his father's whereabouts were unknown, Jack was quite focused on maintaining and strengthening a relationship with an adult relative who could serve as a surrogate parent both for educational and familial purposes. Thus, he agreed to participate in family counseling with his maternal aunt, and he affirmatively agreed with putting parent counseling (with the aunt) or family counseling in the IEP.

Jack readily verbalized vocational goals and, with hesitation, articulated some academic goals. The vocational goals translated directly into proposals for transition services in the IEP. Jack's hesitation in articulating academic goals arguably stemmed from many years of school failure and his related feelings of humiliation and rejection. Still, he recognized that he would be interested in studying in a one-on-one setting with a "good" teacher.

Jack and his counsel participated in an IEP meeting and convinced the rest of the team members that the various services (outlined in general terms above) that Jack had agreed to pursue were indeed appropriate for him. The IEP required placement in a twenty-four hour residential treatment setting with one-on-one teaching, appropriate vocational training and transition services, recreation, and family/parent counseling. In recognition of Jack's academic potential, extremely low function, and language-based disabilities, the participants also incorporated computer-based instruction into the IEP.

Subsequently, Jack was charged as an adult in criminal court based upon the assault of the nurse. The court transferred Jack to a jail in the neighboring state and preventatively detained him pending trial. While incarcerated in the adult facility, Jack did not receive educational services of any sort. Jack was convicted of an aggravated assault and attempted grand larceny. At sentencing in that case, Jack's defense attorney proposed that the court suspend imposition of the adult sentence and return Jack

for placement in the juvenile incarceration facility in Jack's home jurisdiction pending placement of Jack by the school system in an appropriate, secure, residential treatment facility. At the sentencing, the defense counsel called Jack's special education attorney as a witness. Both the defense attorney and special education counsel proposed that the sentencing judge maintain control, a veto power, over Jack's subsequent placements and the power to return Jack to adult prison, if appropriate and necessary, following Jack's twenty-first or twenty-second birthday.

Jack's aftercare worker (parole officer) in his juvenile case supported the plan to return Jack for placement in an appropriate residential treatment facility. She recognized that the youth services (juvenile delinquency) agency and the public school system would be responsible for splitting the cost of Jack's residential care and education. Thus, the availability of treatment potentially provided officials and administrators from the neighboring state an opportunity to avoid the financial burden of incarcerating Jack. Moreover, adult correction system personnel in the neighboring state are apparently ill-prepared to provide special educational services to Jack and other young people incarcerated in adult facilities. Hence, by returning Jack to his home jurisdiction for an educational placement, the judge could have ensured that Jack received his federally- and locally-mandated rights to special education services. In addition, the judge could have helped adult corrections personnel avoid a potential challenge (through the special education adjudication system) based upon their inability to provide Jack with a free, appropriate public education.

The judge, nonetheless, sentenced Jack to twenty years in prison, refusing to suspend the sentence and return Jack to his home jurisdiction for special education placement in a residential treatment facility. The sentencing strategy failed, in part, because special education counsel failed, prior to the sentencing, to find a residential treatment facility that was appropriate for Jack.



In addition, the overall preparation for the sentencing hearing was arguably inadequate and, self-evidently, was insufficiently persuasive. Notwithstanding those shortcomings and setbacks, counsel began the day after the hearing to devise and implement plans to challenge the sentence and counsel will continue to seek an appropriate placement and appropriate services for Jack.

#### **5. Daniel's case: Mitigating sentence, improving the quality of time served**

Like Jack, Oliver, and others described in this chapter, Daniel experienced little more than failure in school from the earliest grades through, ultimately, the point of his incarceration as a teenager. Daniel's public kindergarten teacher wrote on his report card, literally, that he was "failing" kindergarten. A succession of teachers wrote essentially the same comment. Daniel failed year after year in elementary school. Some years, school administrators would allow Daniel to move into the next grade; other years, they would "hold him back".

No one referred Daniel for a special education evaluation. At the age of fifteen, Daniel was arrested and charged in delinquency court for an alleged assault with a dangerous weapon. His mother did not attend the initial hearing, and the judge ordered preventive detention, finding that Daniel -- who had no previous record -- would present, if released pre-trial, a danger to others.

At that point, Daniel and his mother engaged counsel from the UDC School of Law Juvenile Law Clinic to represent them regarding special education matters. Special education counsel (a law student working under the supervision of a clinical professor) requested from the school system a special education evaluation for Daniel. In the meantime, working collaboratively with the delinquency defense attorney, special education counsel also prepared a motion to reduce Daniel's level of detention. The defense

attorney had not yet filed that motion, however, when the government moved to dismiss their case against Daniel. The case was dismissed, and Daniel was released.

Daniel resisted the special education evaluations, but when the law student (special education counsel) accompanied him, Daniel cooperated somewhat with the evaluators. The evaluators concluded that Daniel was both mildly mentally retarded and emotionally disturbed. A psychologist reported that, based upon a consistent failure to negotiate the environment, Daniel was extremely frustrated and was a time bomb waiting to explode.

A first special education placement for Daniel provided approximately fifteen hours per week of specialized instruction in a public school environment. He was also supposed to receive counseling as a related service. Daniel and the special education providers were a dysfunctional team. Daniel resisted the education and related services; the providers routinely failed to show up and failed also, when they did show up, to engage Daniel.

Daniel let counsel know that he was dissatisfied with the special education services and placement. He had experienced nothing but failure, and he did not want to continue with school. Daniel's mother was not prepared to assert a view or position that contradicted Daniel's; on the other hand, perhaps she knew that, given Daniel's consistent failures in school, she would not be able to convince him to trust in the process. She instructed special education counsel to represent Daniel based upon his desires.

The public school special education case manager and the evaluators asserted a position that the current placement was not appropriate for Daniel, and, remarkably, they argued that Daniel needed a twenty-four hour per day, residential treatment placement in order to benefit educationally. Daniel stopped attending school. According to instructions from the

clients, Daniel's special education counsel took no position and took no action. School system personnel also took no action: they did not issue a notice of placement for Daniel, and they did not seek to enforce, through the administrative hearing process, their position that Daniel required a more restrictive educational setting. Daniel and his mother did not respond to contact from the special education counsel, and eventually allowed the representation to terminate.

Approximately a year later, Daniel, then seventeen, and another young man became entangled in a verbal altercation with an off-duty police officer; the two young men returned to the scene of the altercation and shot and killed the officer. Daniel was convicted as an adult of second-degree murder. At the sentencing, with Daniel's permission, special education counsel provided information regarding Daniel's lamentable school history as mitigation evidence. Daniel, at eighteen years of age, re-engaged special education counsel to ascertain whether Daniel can obtain special education services. Daniel has been sentenced to forty-six years to life.

#### **6. Defeating a petition to revoke probation (or parole)**

People who have a receptive or expressive language disorder, by definition, are likely to misunderstand or inaccurately process what other people say to them. They, therefore, relatively frequently do not comprehend instructions. A young person with such a disorder may constantly "mess up" by failing to meet at appointed times with a probation officer, by failing to attend scheduled drug tests and court dates, etc. In many cases, these failures translate into petitions to revoke probation.

Probation officers, prosecutors, defense attorneys, and judges rarely recognize that the young person with a language processing disability is simply not able to comply with the myriad instructions. Rather, people predictably ascribe a "negative attitude" to the young

person. People fail further to recognize the need to accommodate the young person by simplifying directions, drawing maps, writing out instructions, accompanying or "travel training" the young person, making more reminder calls, etc.<sup>55</sup>

In defending a young person with a receptive or expressive language disorder in a probation revocation hearing based upon charges that the child violated conditions of probation, an attorney can call a special education teacher who works with the child or a psychologist who has evaluated the child to prove that the child's non-compliance with conditions is not volitional and that, on the contrary, the adults surrounding the child have misunderstood fundamentally the child's needs. The same analysis, obviously, applies to revocation of parole (or aftercare).

#### **IV. Running into walls on the way to prison deconstruction**

To deconstruct delinquency incarceration facilities and adult corrections facilities, one must confront and surmount conceptual and concrete barriers.<sup>56</sup> [Change note to reflect earlier citation of Miller's book.] One barrier is the dearth of programs that effectively address young people's problems and build upon their strengths.

In releasing Oliver, the judge ordered that he go to a group home. Oliver had eloped, absconded, or -- in the vernacular -- run away from group homes before. Even when buttressed by services at a private special education school, a group home placement constituted a high-risk option

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<sup>55</sup>One might research, as well, whether the failure to accommodate constitutes a violation of other federal, state, or local anti-discrimination laws. Such an inquiry is beyond the scope of this article.

<sup>56</sup>For an enlightened and pathbreaking tour of a statewide demolition operation, see Jerome G. Miller, *Last One Over the Wall: The Massachusetts Experiment in Closing Reform Schools* (1991).

for Oliver. He ran away, ostensibly in response to a confrontation with another child regarding the ownership of a coat. The special education attorney again retrieved Oliver, with a successful legal argument, from the incarceration facility; the Court re-ordered a group home place. Oliver ran away again; the cycles of failure continue to spin.<sup>57</sup>

Some interventions are remarkably effective in reducing recidivism for serious offenders.<sup>58</sup> [Change this note also to reflect earlier citation to Miller's book.] Chart \_\_ presents program characteristics, in a listing developed by Richard W. Sammons, a juvenile justice consultant. Characteristics listed in the left column of the chart are associated with traditional programs; in the right column are characteristics associated with more effective programs.

Rather than accepting boilerplate IEP language, the child and the parent should carefully consider and help craft the IEP educational goals and objectives. Further, they should strive to include in the IEP appropriate related services and transition services. Music therapy, art therapy, family counseling, individualized recreational programming, tutoring, and internships are examples of the kinds of services that one might consider.

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<sup>57</sup>The clinical psychologist and psychiatrist who evaluated Oliver both recommended that Oliver go to a residential therapeutic center. Indeed, Oliver may yet go to such a placement. Arguably, these centers are necessary for some children. The cost per child is extraordinarily high, and, in many cases, the child returns from a year or two in treatment to the same problems that existed before the child left. Often, the child has not meaningfully confronted family crises, nor have the residential treatment center staff helped the child to address substantially the child's educational and vocational needs.

<sup>58</sup>See generally, Jerome G. Miller, *Last One Over the Wall: The Massachusetts Experiment in Closing Reform Schools*, 151-226 (1991).

Based on their discussions and agreements, Davitt and his attorney pushed at the IEP meeting for a daily schedule for Davitt that included half the day in a computer-based educational program to accommodate Davitt's language-processing problems, with a one-on-one teacher, using age-appropriate and academically-appropriate software. They also proposed that, after one semester in school, Davitt participate in a computer-repair training course. Davitt and his attorney proposed also that Davitt work at a barber shop in the afternoons and that he have a job coach. Davitt and his attorney also advocated to include tutoring and instruction so that Davitt could get his barber's license as well as his driver's license. They also proposed music therapy based on Rap Music as a means for Davitt to explore language arts and to explore math concepts (based on the complex rhythms in the music). They also proposed that Davitt participate in a course for learning-disabled teenagers on anger management, conflict resolution, and decision-making offered at night, once a week, in a local church.

School system personnel participating in the IEP meeting for Davitt resisted several of the more creative or unusual proposals that Davitt and his attorney made. The Rap Music emphasis in particular, and music therapy in general, troubled several of the participants. Nevertheless, the IEP and overall release plan were sufficient to convince the judge to release Davitt from the juvenile incarceration facility. For example, Davitt has a mentor and is enrolled in the fourteen-week course. The one-on-one, computer-based educational component has been arranged. Personnel from the youth services agency are providing (or have agreed to provide) some of the services; school system personnel are providing (or have agreed to provide) other services. (Davitt was released a matter of weeks prior to this writing.) Davitt and his attorney continue to advocate informally and search for the remaining services – including Rap-based music therapy – that the team members refused to include in the IEP. Using the administrative litigation process, Davitt and his attorney are prepared to pursue those remaining services.

**Martin's case re-visited: One example of bouncing between public and private school placements**

Part of the difficulties in the school history of Martin, the young man described above (in section III(C)(3)), was his having bounced between private and public school placements. Fairly early in his special education schooling, Martin attended a private, 100% special education day program. That private school program was expensive. Public school administrators re-assigned Martin to a purportedly comparable public school program. Martin's parent – who was not, at that time, represented by special education counsel – did not effectively challenge the placement. That program was overcrowded, and Martin did not receive the special education and related services to which he was entitled.

Following additional delinquency involvement, Martin went off to a residential treatment center in another state. (Martin's jurisdiction, the District of Columbia, essentially has no residential placement facilities that accept children from the delinquency system.) Unhappy being far wary from home, Martin contemplated the rules at the treatment center and recognized that he could effectuate his release by starting a fire. He did that and was sent home.

Martin subsequently returned to the private school placement. That second stint at the private school was disrupted when Martin was arrested, charged with a delinquent act, and incarcerated for a period of months in a juvenile detention facility. Public school personnel claimed that the private school administrators were unjustly requesting payment for Martin for the period of time during which Martin was detained. The private school administrators, for their part, claimed that their contract required payment until school system personnel notified them that a student – Martin, in this case – was terminated. Further, the private school administrators felt that they were not able to “fill” Martin's seat until they clarified his status. Finally, the dispute resulted in the private school administrators' refusal to re-admit Martin unless they received the back payment.

At the subsequent IEP meeting, Martin strongly argued for placement at a public school close to his home. Martin objected to, among other things, the long bus ride on the “cheese bus” (i.e., the yellow

special education students who attend schools outside their neighborhood ride the yellow school buses. Thus, traveling on the bus is stigmatizing.

Recognizing the relative lack of services and structure at the public school and striving to provide Martin with the “least restrictive environment”, the IEP team members agreed to include daily after-school tutoring, a one-on-one teacher's aide (assigned to Martin), as well as extensive other services. These services, however, did not materialize. Martin soon thereafter was the victim of a serious assault (in an incident unrelated to school), and, fearing for his safety, entered a witness protection program. Upon his return, some months later, from the witness protection program, Martin was allowed to re-enroll in his previous private school placement.

Another wall that an advocate might face with the child and parent is the dilemma between, on the one hand, choosing public school placements that may be substandard or at which officials reject (and suspend and expel) and, on the other hand, choosing private placements that are simply “exclusive” and, in that sense, not embracing “delinquents”.<sup>59</sup> In response to this dilemma, advocates can negotiate with both private and public school personnel to devise a program in one setting or the other that meets the needs of a particular child and family.

For a child who has failed consistently in school and who has been out of school for an extended period, counsel may need to work with the child to fashion and propose an individualized program that will reintegrate the child into educational services. Such a program may not resemble a traditional educational program or exist within a standard school setting. Of course, an

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<sup>59</sup> One might say that the public schools often are not academically competent and that private schools are not culturally competent.

unusual or creative program that one must piece together will necessarily be more difficult to implement than a pre-existing program.

Finally, one may run headlong into an additional wall, the wall that represents barriers to economic opportunities. Children with disabilities in the juvenile and criminal justice systems characteristically have relatively poor chances of finding a path that leads, around the barriers, to good training and to good jobs. Many clients who face an apparent inability to become productive and to earn a living within the regular, legitimate economy repeatedly resort to crime, particularly to selling illegal drugs. Recognizing the barriers surrounding economic opportunities for people with disabilities, particularly those who are poor, poorly educated, and members of minority groups, advocates must vigorously enforce clients' rights to special education services and must particularly enforce rights to transition services.

Individualized transition and related services can and should be based in neighborhoods and communities where children who are the subjects of IEP's live. If public school personnel are responsive to children's individualized needs, such transition services increasingly will flourish within, and attached to, neighborhood schools. If, on the other hand, school personnel resist and refuse to provide or pay for appropriate services, children and their advocates can find or create those services and opportunities within the children's neighborhoods and communities and then ask a hearing officer to order the school system to pay for those private services, as well as for attorneys' fees.

Listing or describing other approaches for economic development, community organizing, and individual empowerment would be beyond the scope of this chapter and of this manual.

#### **Sam's case: Attempting to re-integrate a child into school**

Sam is mildly mentally retarded, and he has never succeeded markedly in school. When he first entered the delinquency system at the age of fourteen, he had been truant constantly over a couple of years; he also was using marijuana regularly. Sam also stayed out late at night and appeared to be malnourished.

Sam expressed little interest in re-entering school. Facing incarceration, however, he agreed to participate in several hours of tutoring each day as an "interim" special education placement until he and his special education counsel could locate an appropriate special education placement. Counsel located a student in a masters program in a department of special education at a local university. That graduate student tutored Sam (and Sam's younger brother) on a daily basis.

Sam also agreed to related services, including recreational services of boxing and basketball, and to parent counseling in which a therapist was to train Sam's grandmother (his custodian) to use non-aversive behavior management approaches with Sam. Furthermore, the therapy was to occur in the home, and Sam was to participate by, among other things, helping to identify rewards that he would enjoy receiving as reinforcement for positive behavior.

Sam did participate with the tutor for some weeks, but counsel and others were essentially unsuccessful in finding a therapist who was able and willing to conduct the behavior management training in-home with Sam and with Sam's grandmother. In addition, although counsel located a person to train Sam in boxing, school system personnel were not prepared to pay for that service (absent an administrative hearing battle). Sam had been re-incarcerated before counsel could coordinate the services and obtain agreement from school system administrators to support the services.

Sam spent a few months in the juvenile detention facility. Having participated in tutoring, Sam was able to apply himself to the modest school program offered in the detention center. Sam is now back in the community and planning to enter a special education school. The effort to patch together tutoring and an array of other services was, at best,

**Time dollars guilds (“Time crews”):  
A proposal for creating and developing  
economic opportunities for young people  
with disabilities**

One idea for scaling the wall representing economic barriers is to design and develop a system of “guilds” for young people. The guilds would be, in essence, collectives of teenagers working together to support each other. The guilds would focus on, among other things, home or apartment renovation, food services, transportation (automobile repair and rental), furniture building, child and elder care, computer and information services, and arts.

The guilds would be based on Time Dollars, a system created by Edgar Cahn in which value attaches – without the medium of money – to each person’s labors and to each person’s time. Each person’s hour of work constitutes a Time Dollar that goes into a software “bank”, redeemable for the services generated from another person’s hour of work.<sup>1</sup> One might refer to the separate guilds as “Time Crews”.

Teenagers in the various guilds, through the Time Dollars system, would be able to serve each other without exchanging cash. Moreover, by developing skills through participation in guilds, young people would be able to move into the market economy as apprentices or as regular, paid workers and entrepreneurs.

<sup>1</sup>See generally, Edgar Cahn & Jonathan Rowe, Time Dollars

## V. Conclusion

By using special education advocacy in the manner summarized in this chapter, an attorney can extricate or insulate children and young adults from confinement in juvenile facilities or in adult corrections facilities. On a more substantive basis, one can help a young person who has a disability to become productive and relatively well-adjusted by helping that young person to understand the disability and by helping that young person to obtain appropriate special education, related services, and transition services. The IDEA requires that school system, delinquency system, and -- still, to an extent -- corrections system personnel provide these services to children and young adults who are disabled. Thus, if a sufficient number of trained attorneys<sup>60</sup> enforce rights codified in the IDEA, many cell doors and prison gates could open.<sup>61</sup> One can envision ambitious initiatives in states all over the country for establishing constructive educational programs and for "deconstructing" prisons.

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<sup>60</sup> See, *Burlington v. Mass. Dept. of Ed.*, 471 U.S. 359 (1985). Special education litigants who prevail against the public school system are entitled, by federal statute, to reimbursement for their attorneys' fees.

<sup>61</sup> In this regard, as noted previously, the fee-shifting provision of the IDEA provides a largely untapped basis for funding advocacy for children who are incarcerated or who face incarceration.

# Chapter

# Six

## The Special Education Process: Eligibility and Entitlement

An advocate representing children in the delinquency system should anticipate that a large percentage of those children are eligible for special education, related services, and transition services.

*Written by*

Mary G. Hynes

A child who is between the ages of three and twenty-one (until the end of the semester in which the child turns twenty-two) and has a disability that adversely affects the child's educational performance likely is entitled to a Free, Appropriate Public Education (FAPE). Common disabilities include mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities. A FAPE must be in accordance with state educational agency standards, must include an appropriate elementary or secondary education in the state involved, and also must be based upon an Individualized Education Program (IEP) design-ed for the child. A FAPE must be provided by the state at no cost to the child or, of course, to the child's parent(s).

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A FAPE consists of special education, related services, and, if the child is fourteen years old or older, transition services. Related services are, in essence, any services necessary to help the child benefit from the special education services. Transition services are services that prepare the child to make the transition from secondary school to post-secondary school, from school to work, and from living dependently to living independently. Both categories of services, related services and transition services, are broad categories. The Individuals with Disabilities Education Act (IDEA) and its implementing regulations list a number of these services which state that the lists are not exhaustive or

exclusive.

The Supreme Court has defined FAPE to require that the school system rigidly follow the procedural requirements of the IDEA. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). Procedural violations by the school system likely indicate that the school system has denied the child a free, appropriate public education. On the other hand, appropriateness of an educational program does not require maximizing the child's educational opportunities; rather, appropriateness means that the child is receiving some educational benefit that allows the child to learn the general curriculum adopted for all students, to make meaningful progress in other areas of educational need related to his or her disability, and to make progress towards graduation from year to year.

An advocate representing children in the delinquency system should anticipate that a large percentage of those children are eligible for special education, related services, and transition services. These services can help to stabilize a child and justify, among other things, a court's decision not to detain the child.

### I. Eligibility

The first step in determining whether a student may be entitled to special education and related services is to ascertain whether the student has a disability. If the student has a disability covered by the IDEA, the second step is to establish that the child's disability adversely affects the child's educational performance to the extent that special education and related services are necessary. If the student has a disability that is not covered by the IDEA, or the disability does not adversely affect the student's educational performance, the student may still be entitled to protection under section 504 of the Rehabilitation Act. Depending upon the child's needs, section 504 protection would entitle the student to receive special education and related services, regular education and related services, or



accommodations within regular education.

**A. The IDEA: The basic federal law for children with disabilities affecting education**

The (IDEA) covers children with certain specific disabilities from the ages of three through twenty-one.<sup>1</sup> 20 U.S.C. § 1400 *et seq.*; 34 C.F.R. § 300 *et seq.*. These disabilities are: mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities. 20 U.S.C. §1401(3)(A)(I); 34 C.F.R. §300.7 (1997). The regulations include “multiply handicapped” as a separate disability. 34 C.F.R. §300.7(a)(5) (1997). A student who has one of these enumerated disabilities is eligible for special education and related services if the disability adversely affects the student’s educational performance to the extent that special education and related services are necessary. 20 U.S.C. § 1401(3)(A)(ii); 34 C.F.R.

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<sup>1</sup>Individuals with Disabilities Education act (IDEA) eligibility continues through the semester in which the child turns twenty-two. With the exception of certain older students who are incarcerated in adult facilities and were not previously identified as needing special education, federal law requires that states provide a free appropriate public education (FAPE) to all students from the ages of three through twenty-one unless the provision of educational services to children of ages three, four, five, eighteen, nineteen, twenty, or twenty-one would be contrary to State law or practice. 20 U.S.C. §1412(a)(1); 34 C.F.R. §300.122 (1997). In other words, if State law does not provide for educational services to any children in this age range, the State need not provide special education and related services to children with disabilities in this age range. See *Stewart v. Salem Sch. Dist.*, 670 P.2d 1048 (Or. App. 1983)(Oregon not required to provide special education services to children under regular school age where Oregon did not provide any education services to non-disabled students in the same age range).

§300.7(a)(1) (1997).<sup>2</sup>

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 Advocates must thoroughly familiarize themselves with the criteria for each of the disabling conditions since the nature of the disabling condition will be a primary consideration in developing the child’s educational programming.  
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Advocates must thoroughly familiarize themselves with the criteria for each of the disabling conditions since the nature of the disabling condition will be a primary consideration in developing the child’s educational programming. An accurate understanding of the child’s disabling condition is fundamental to creating an educational program which will meet the student’s unique needs. For example, an educational program designed to meet the needs of a student with learning disabilities would not be appropriate to meet the needs of a student with mental retardation. *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307 (9<sup>th</sup> Cir. 1987)(distinguishing mental retardation from learning disabilities). To secure an appropriate educational program, therefore, an advocate must become familiar with, and conversant in, the defining criteria for each disability. The federal regulations define the various disabilities at 34 C.F.R. §300.7.<sup>3</sup>

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<sup>2</sup>At the States’ discretion, children ages three through nine who are experiencing developmental de-lays may also be eligible for services under the IDEA. 20 U.S.C. §1401(3)(B). This category of eligibility – developmental delays – for children ages three to five is in addition to the other enumerated disabilities. Prior to the 1997 amendments to IDEA, the upper limit for eligibility in the developmental delay category was age five. See 34 C.F.R. §300.7(a)(2)(1997).

<sup>3</sup>For an extensive discussion of educational evaluations and diagnosing disabilities, see Chapter 8, *infra*.

## B. The Rehabilitation Act

If a student is not eligible for special education and services under the IDEA, the student may still be eligible to receive services under section 504 of the Rehabilitation Act. 29 U.S.C. §794; C.F.R. §194 *et seq.* The Rehabilitation Act provides that: “no otherwise qualified individual with a disability . . . shall, solely be reason of his or her disability, be excluded from participation in any program or activity receiving Federal financial assistance. . .” 29 U.S.C. §794(a). A “person with a disability” means a person who (1) has a physical or mental impairment which substantially limits one or more major life activities (including learning); or (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 34 C.F.R. §104.4 (j). A student is considered “otherwise qualified” for educational services if the student is of compulsory school age or if the state provides educational services to non-disabled students of the same age. 34 C.F.R. § 104.4(k). A student is also “qualified” if the student is of an age during which it is mandatory under state law to provide educational services to people with disabilities, or is someone to whom the state is required to provide FAPE under IDEA. *See* 34 C.F.R. §104.3(k)(2) (ii), (iii).

As a general rule, most students with disabilities will be covered by the IDEA, without reliance on the Rehabilitation Act. However, in some instances, a student may have a disability that is not covered by the IDEA. For example, Attention Deficit Disorder (ADD),<sup>4</sup> an increasingly prevalent disability of elementary age children, is sometimes, but not always, covered by the IDEA under the category of “other health impairment.”<sup>5</sup>

<sup>4</sup>In this context, the term “Attention Deficit Disorder (ADD)” includes the variant “Attention Deficit Hyperactivity Disorder (ADHD).”

<sup>5</sup>In order to qualify as an “other health impairment” under IDEA, a particular child's Attention Deficit Disorder must be a chronic or acute

However, courts have held that a student with ADD may be “otherwise qualified” to receive special education and related services under the Rehabilitation Act, even if the student is not eligible under the IDEA. *See Lyons v. Smith*, 829 F.Supp. 414 (D.D.C. 1993). Another example of where § 504 might be important is where a child has a disability under IDEA, but does not need “special education” -- and so is not IDEA-eligible. Section 504 would nonetheless require the provision of related services and accommodations.

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In other cases, a student with a disability may not require special education services but may be subject to discrimination, thus entitling the student to protection under the Rehabilitation Act. For example, a student who is HIV positive or who has been diagnosed as having AIDS may not need any special services, but may require protection from discriminatory exclusion from

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health problem that results in limited alertness and adversely affects educational performance. U.S. Department of Education Joint Policy Memorandum, September 16, 1991, reprinted at 18 IDELR (Individuals with Disabilities Law Report) 116. *See also* 34 C.F.R. § 300.7 (defining “other health impairment”). Where a child, because of ADD, has heightened alertness to environmental stimuli and, as a result, limited alertness in regard to academic tasks and educational performance, the “limited alertness” criterion is met, and he or she may be eligible for IDEA services. *See Response to Inquiry of Cohen*, 20 IDELR23 (U.S. Department of Education/Office of Special Education Programs 5/13/93). *See also Morgan v. Chris L.*, 927F. Supp. 267 (E.D. Tenn. 1994), *aff'd.*, 106 F.3d 401 (6th Cir. 1997) (child with ADD protected by IDEA).

school on the basis of the nature of the disabling condition. *See, e.g., District 27 Community Sch. Bd. v. Board of Educ.*, 502 N.Y.S. 2d 325 (Sup. Queens 1986) (illegal segregation of HIV positive student); *Robertson v. Granite City Com. Unit Sch. Dist.*, 684 F. Supp. 1002 (S.D. Ill. 1988) (illegal segregation of student with AIDS).

## II. Entitlement

The nature of the entitlement to a FAPE is defined by statutory and regulatory law and by case law. Advocates must be familiar with both the statutory and regulatory definitions of FAPE, as well as the substantive standard for FAPE articulated by the Supreme Court in *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

### A. The statutory and regulatory entitlement

Definitions of the three terms “free, appropriate public education (FAPE)”, “special education”, and “related services”, construed together, describe the core of the statutory entitlement under the IDEA. A fourth term, “transition services”, added to the statute by amendment in 1990, rounds out the services to which an adolescent with a qualifying disability is entitled.

The IDEA provides that a “free, appropriate public education (FAPE)” means “special education and related services that (A) have been provided at public expense. . .; (B) meet the standards of the state educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program. . .” 20 U.S.C. § 1401(8); 34 C.F.R. § 300.8 (1997). The regulations implementing § 504 also entitled covered students to a “free appropriate public education.” *See* 34 C.F.R. § 104.33(a). For purposes of § 504, “free appropriate public education” means the provision of regular or special education and related aids and services

that are designed to meet the needs of the individual student as well as the needs of students without disabilities are met. 34 C.F.R. § 104.33(b).

The IDEA statute and regulations further define the terms “special education” and “related services”. “Special education” means “specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability. . .” 20 U.S.C. § 1401(25); 34 C.F.R. § 300.17 (1997). The term “related services” means “transportation, and such developmental, corrective, and other supported services. . . as may be required to assist a child with a disability to benefit from special education. . .” *See Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 833 (1984).<sup>6</sup>

Further, the term “related services” is broadly defined to include, but is not limited to: speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility training, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training. 20 U.S.C. § 1401 (22); 34 C.F.R. § 300.16 (1997).

Section 300.16(b) of the Code of Federal Regulations as codified in 1997, provides definitions of specific related services listed in § 300.16(a)’s general definition of “related services”. Of particular note to the advocate for

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<sup>6</sup>For an explanation of the distinction between a prohibited “medical service,” for purposes other than diagnosis and evaluation, and a permissible “school health services,” *see Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883 (1984) (clean intermittent catheterization of a child appropriately characterized as a school health service, rather than as a medical service).

children with disabilities who are enmeshed in the delinquency system are “counseling services”, defined in § 300.16(b)(2); “medical services”, defined in § 300.16(b)(4); “occupational therapy”, defined in § 300.16(b)(5); “parent counseling and training”, defined in § 300.16(b)(6); “physical therapy”, defined in § 300.16(b)(7); “psychological services”, defined in § 300.16(b)(8); “recreation”, defined in § 300.16(b)(9); “rehabilitation counseling services”, defined in § 300.16(b)(10); “social work services in schools”, defined in § 300.16(b)(12); “speech pathology”, defined in § 300.16(b)(13); and “transportation”, defined in § 300.16(b)(14).

A requirement added to IDEA in 1990 and amended in 1997, designed to assist adolescents in moving into the “post-school” world, provides that IEPs must include “transition services.” Transition services focusing on the student’s course of study must be included in the IEP beginning at age fourteen. 20 U.S.C. § 1414(d)(1)(A)(v)(ii). The full array of transition services must be in place by no later than age sixteen, and younger if appropriate. *Id.*

The term “transition services” means a coordinated set of activities for a student, designed within an outcome-oriented process, which pro-motes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include instruction, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation. 20 U.S.C. § 1401(30); see 34 C.F.R. § 300.18(a), (b) (1997).

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An advocate can obtain a broad array of meaningful services for a child based upon the statutory and regulatory definitions of “related services” and “transition services.”

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An advocate can obtain a broad array of meaningful services for a child based upon the statutory and regulatory definitions of “related services” and “transition services”. Moreover, in listing categorical examples of related services, transition services, and other entitlements (as well as for various other requirements), the IDEA's implementing regulations' listings are explicitly not exclusive.<sup>7</sup>

The use of the word “include” means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.” 34 C.F.R. § 300.9 (1997). Hence, by applying the definitions of “related services” and “transition services”, an advocate can argue that the provision of a particular service is appropriate and must appear in the child's IEP even if the service sought is not listed explicitly in the IDEA's implementing regulations.<sup>8</sup>

<sup>7</sup>See, e.g., Note to 34 C.F.R. § 300.16 (1997) that states, in relevant part, that “[t]he list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a child with a disability to benefit from special education.” Similarly, the note to 34 C.F.R. § 300.18 (defining “transition services”) states that [t]he list of activities in [the regulation] is not intended to be exhaustive.”

<sup>8</sup>In other words, the fact that the service sought does not appear as a related service or a transition services in a listing in the regulations does not preclude that service from being defined as either a related service or as a transition service. Section

### B. The Supreme Court's definition of (FAPE)

In *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), the Supreme Court provided its interpretation of what constitutes a free, appropriate public education (FAPE) for purposes of IDEA. In *Rowley*, the parents argued that their child Amy, who was deaf, required instruction by a qualified sign-language interpreter in all of her academic classes in order to maximize her academic potential. The school argued that Amy did not require a full-time sign language interpreter because she was achieving passing marks with the assistance of a hearing aid, one hour of tutorial assistance, and speech therapy. The District Court found that while Amy was “advancing easily from grade to grade” in her regular education classes without an interpreter, she “understands considerably less of what goes on in class than she could if she were not deaf,” and, consequently, was not performing up to her fullest capability. *Id.* at 185. This disparity between her achievement and her potential led the District Court, and the Circuit Court, to agree with the parents that the school had denied Amy a FAPE. *Id.* at 186.

The U.S. Supreme Court reversed, holding that the IDEA does not impose an obligation on school systems to develop educational programs designed to maximize the potential of students with disabilities. *Id.* at 200. Instead of creating a federal substantive standard for special education program- ming, the Court held that the IDEA is largely a procedural statute and that compliance with the Act’s procedures will generally yield an appropriate substantive result. In the words of the Court:

When the elaborate and highly specific procedural safeguards . . . are contrasted with the general and somewhat imprecise substantive admonitions

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300.9 of the C.F.R. defines “include” in a manner that negates a school district representative from arguing “expresio unius est exclusio alterius.”

contained in the Act, we think that the importance Congress attached to these procedural safeguards can not be gain-said. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard. We think that . . . adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

*Id.* at 205-206. Consequently, the Court articulated a two-pronged test for determining if whether a school has provided FAPE: “First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonable calculated to enable the child to receive educational benefits?” *Id.* at 206-207.<sup>9</sup>

Courts have not been uniform in their

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<sup>9</sup>In assessing whether the IEP is “reasonably calculated to enable the child to receive educational benefits” the Court noted that when a child with a dis-ability is “being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational bene-fit.” *Id.* at 207 n.28. Advocates seeking to apply this standard should attend not only to whether a student is passing from grade to grade, but also, obviously, to whether the student is achieving curricular goals. A shorthand system for monitoring academic progress is to check the student’s scores on standardized achieve-ment tests. All too often, children receive “social pro-motions” that, in effect, heighten the child’s feeling of being lost academically and hasten the day when the child stops attending regularly or simply drops out of school.

application of either prong of the *Rowley* standard. With regard to the test for procedural sufficiency, courts have vacillated between ruling that procedural failings alone render the resulting program invalid, to holding that some degree of prejudice flowing from the procedural violation must also be established. One Ninth Circuit case holds that the obligation to provide formal written notice of a proposed placement “should be enforced rigorously” under the first prong of the *Rowley* test, and that a school’s failure to provide such formal notice is “not merely technical” but renders the school’s proposed program invalid. *Union Sch. Dist. v. Smith*, 15 F.3d 1519 (9<sup>th</sup> Cir. 1994) *cert. denied*, 115 S.Ct. 428. *But see, Max M. v Illinois State Bd. of Educ.*, 629 F. Supp. 1504, 1517-18 (N.D. Ill. 1986)(failure to provide written notice of rights was not fatal where parents participated in developing educational program).

Yet another Ninth Circuit case holds that “procedural flaws do not automatically require a finding of a denial of a FAPE,” but that such a denial occurs only when those flaws result in “loss of educational opportunity” or “seriously infringe the parents’ opportunity to participate in the IEP formulation process.” *W.G. v. Target Range*, 960 F.2d 1479, 1484 (9<sup>th</sup> Cir. 1992)(failure to include child’s parents and teacher in development of IEP rendered IEP invalid). *See also, Hiller v. Bd. of Educ. of Brunswick Cent. Sch. Dist.*, 743 F. Supp. 958,970 (N.D.N.Y. 1990)(procedural failings did not result in denial of FAPE where parents were “thoroughly involved” in educational planning for child).

With regard to the second prong of the *Rowley* test, the substantive appropriateness of the program, courts have generally given school districts considerable latitude. In *Lachman v. Board of Educ.*, 852 F.2d 290, 297 (7<sup>th</sup> Cir. 1988)(*cert. denied*, 488 U.S. 925), the Court refused to order the school district to adopt a teaching method desired by the child’s parents, holding: “*Rowley* and its progeny leave no doubt that parent, no matter how well-motivated, do not have a right under the EAHCA to compel

a school district to provide a specific program or employ a specific methodology . . .”<sup>10</sup> *Accord, Straube v. Florida Union Free Sch. Dist.*, 801 F. Supp. 1164,1176 (S.D.N.Y. 1992) (IDEA does not impose obligation to “employ a specific methodology” or “provide the ‘best’ available education but rather ‘appropriate’ education”).

In cases, however, in which the evidence establishes that a student has made little progress over time in meeting the objectives contained in an individualized educational program, courts have not hesitated to rule that student has been denied FAPE. *See Ojai Sch. Dist. v. Jackson*, 4 F.3d 1467 (9<sup>th</sup> Cir. 1992) (*cert. denied*, 115 S.Ct. 90 (failure to make any progress on IEP goals for seven years was sufficient evidence that the educational placement was inappropriate.) In addition, if the school’s proposed placement, whatever its intrinsic value, is unable to meet the unique educational needs of a student with a disability, a court will conclude that the program is inappropriate. *See, e.g., Smith*, 15 F.3d at 1525 (placement in a group setting was inappropriate for autistic child where child required full-time, one-to-one instruction in order to learn). Courts have also found a violation of the right to FAPE where, for example, the school’s proposed IEP and placement provided for only four months’ worth of progress in reading skills over an academic year, *Carter v. Florence County Sch. Dist. No.4*, 950 F. 2d 156 (4<sup>th</sup> Cir.1991), *affirmed*, 114 S.Ct. 361 (1993), and the school’s proposal failed to provide for meaningful educational strategies to address the behavioral manifestations of a child’s emotional disturbance. *Chris D. v. Montgomery Rd. Of Educ.*, 753 F. Supp. 922 (M.D. Ala. 1990). Throughout, courts have stressed that “benefit” must be meaningful in order to meet the *Rowley* standard. *See, e.g., Cordrey v. Euckert*, 917 F.2d 1460,1473 (6<sup>th</sup> Cir.1990), *cert. denied*, 111 S.Ct. 1391 (1991) (child must benefit meaningfully within his or

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<sup>10</sup>“EAHCA” stands for the Education of All Handicapped Children Act, an earlier name of the IDEA.

her potential); *Polk v. Susquehanna Intermediate Sch. Dist.*, 853 F.2d 171,184 (3rd Cir. cert. denied, 109 S.Ct. 838 (1988) (de minimis or trivial benefit insufficient; whether benefit is de minimis must be gauged in relation to child's potential); *Hall v. Vance*, 774 F.2d 629, 636 (4th Cir. 1985) (“Congress did not intend that a school system could discharge its duty. . . by providing a program that produces some minimal academic advancement, no matter how trivial”).

In addition, *Rowley* and the lower court decisions applying it must now be read in light of 1997 amendments to the IDEA stressing that the right to a FAPE includes the right to meaningful opportunities to learn the content of the general curriculum adopted for all students, and to make meaningful progress in that curriculum. The IDEA now explicitly requires that IEPs describe how the child's disability affects participation and progress in the general curriculum, and contain goals and objectives geared towards enabling the child to do so; include special education, related services and supports for school personnel that will allow the student to progress in the general education curriculum; and be reviewed periodically and revised to address any lack of expected progress in the general curriculum. 20 U.S.C. § 1414(d)(1)(A), (d)(4).<sup>11</sup>

Also relevant in this context might be two cases holding that parental or student hostility towards a school's proposed placement might preclude the child's attaining sufficient educational benefit/FAPE from the placement. *See Board of Educ. of Community Consolidated Sch. Dist. No.*

*21 v. Illinois Rd. of Educ.*, 938 F. 2d 712 (7th Cir. 1991); *Greenbush Sch. Comm. v. Mr: and Mrs. K.*, 25 IDELR 200 (D. Me. 1996) (holding as well that the child's fear of the school in which it was proposed he be placed would prevent him from receiving educational benefit if the IEP were to be implemented there).

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<sup>11</sup>The statement of Congressional findings included in the IDEA Amendments of 1997 notes that twenty-seven years after the special education statute was first passed, low expectations still plague the education of children with disabilities, and that high expectations, maximum possible access to the general curriculum, and teaching that allows children to meet the challenging expectations that have been set for all students are critical. 20 U.S.C. § 1400(c)(4), (5).

# Chapter

# Seven

The Special Education Process:

Investigating and Initiating the Special Education Case

Investigating a special education matter is fundamentally the same as investigating any case. Counsel must develop a client-centered strategy, interview witnesses, amass documentary evidence, conceptualize a theory of the case, and prepare for a hearing and negotiations.

*Written by*

Joseph B. Tulman



## I. An overview on investigation

Investigating a special education matter is fundamentally the same as investigating any case. Counsel must develop a client-centered strategy, interview witnesses, amass documentary evidence, conceptualize a theory of the case, and prepare for a hearing and for negotiations. As discussed in Chapter 2 of this manual, the strategies that counsel should develop for a delinquency client with special education needs will affect the child's status in both delinquency system and the special education system. Hence, counsel will coordinate the delinquency and special education legal theories, investigations, and actions.

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 The educational neglect that one uncovers at the schools the child has attended may be shocking; counsel must collect this essential information and, indeed, all information about the child's educational experience.  
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When investigating a special education matter, counsel should obtain information concerning the child's educational, developmental, and medical history, as well as information regarding the child's current adjustment to home, school, and community. Whether the child is currently receiving, or has received, services in school or from other public or private providers might be particularly significant.

As in a delinquency investigation, counsel investigating a special education case should "go to the scene of the crime". The educational neglect that one uncovers at schools the child has attended may be shocking; counsel must collect this essential information and, indeed, all information about the child's educational experience. Commonly, a teenager who is incarcerated or, faces incarceration, stopped

making academic progress at some point . . . between kindergarten and third grade. One may find, for example, that a detained sixteen year old is functionally illiterate and knows no math beyond basic addition and subtraction. Commonly, a child's seriously disruptive behavior in school does not begin -- if the child ever became disruptive in school -- until junior high school (or middle school), years after the child's actual academic progress was arrested. Similarly, truant behavior and drug abuse by the child typically develop in junior high school, years after the child began to experience devastating school failure.<sup>1</sup>

Other common discoveries pertaining to detained children are that they have changed schools a number of times and have faced frequent suspensions or even expulsions from school. One also finds that these children have failed (i.e., repeated) one or more grades in school. All of these factors are significant to the special education case.

### A. Preparing a chart and a time line

To organize and master pertinent information in a special education case, counsel should prepare a chart to display the child's educational history. The chart should list across the side of a page each year that the child was (or should have

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<sup>1</sup>Discussion of truant behavior and drug abuse by the child does not suggest that counsel would disclose, either in a delinquency matter or in a special education case, any behavior that is not already evident. Often, however, delinquency prosecutors, school officials, and others have evidence of truancy and drug abuse by the child; in those instances, counsel can demonstrate that these problems developed years after school personnel should have identified the child as having a disability and, by the same token, years after school personnel should have addressed the child's problems. The causal connection with truancy is readily apparent. The causal connection between disability, school failure, and eventual drug abuse might be, in a proper case, a subject to develop through the testimony of an expert witness.

been) in pre-school and in school. Across the top of the page, the chart should contain as many categories/columns as appear relevant. (See sample chart in illustration 7-1 on pages 7-5 and 7-6). Typical categories include, but are by no means limited to, the following: year in school; school attended; grades on report cards; behavior/conduct reported; attendance reported; repeated grade?; teacher comments (written and spoken); scores on standard achievement tests; school disciplinary actions (including suspensions or expulsions); parent's contact/ conversations with teacher or school personnel; parent's requests for help or inquiries about child's (lack of) progress; parent's explicit request (oral or in writing) for special education evaluation; special education evaluations requested by someone other than the parent (e.g., teacher); whether child is special education identified; special education evaluations completed?; special education re-evaluation done?; Individualized Education Program (IEP) completed?; and IEP implementation (with separate columns for various components of the IEP, e.g., a column for each related service).

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 A time line, like a chart, clarifies the case for counsel and for prospective witnesses.  
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Counsel might also, based on the chart and the investigation generally, develop a time line or chronology to delineate the child's developmental, educational, and behavioral history. A time line, like a chart, clarifies the case for counsel and for prospective witnesses. In addition, counsel might use the chart and the time line as demonstrative evidence or as an illustrative aide in presenting the special education case to a hearing officer or, indeed, in advocating for the child at a delinquency disposition (or adult sentencing), detention hearing, or probation revocation hearing.

### **B. Engaging an expert witness or consultant**

Counsel should consider engaging an expert who will examine evaluations of the child, review the child's school history, interview the child, and help to identify, survey, and evaluate possible placements and services for the child.<sup>2</sup>

As in many areas of legal practice, lawyers practicing special education law learn the substance underneath the law by engaging experts who can impart their expertise generally and sort through the facts of a case particularly. Special education experts often are clinical or educational psychologists; people with advanced degrees and experience in special education teaching or evaluation also are likely candidates to be expert consultants and witnesses.

### **C. Interviews: People to see and questions to ask**

In any investigation of special education issues, counsel must interview a variety of people -- school personnel and others -- who are involved with the student. The most important interviews typically are with the child and the parent.<sup>3</sup> The

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<sup>2</sup>Costs incurred in hiring an expert are compensable from the school system if the parent prevails in a special education matter.

<sup>3</sup>Some degree of investigation regarding the educational status of the delinquency client is warranted as part of any delinquency investigation. Indeed, issues as common as school attendance and general academic performance are relevant to the delinquency case. Hence, counsel should interview the child and the parent(s) regarding the child's educational history in all cases. Assuming that the child and the parent sign a general release form, counsel can and should obtain educational records, as well.

interview with the child or with the parent includes many of the same elements as a rudimentary clinical interview.<sup>4</sup> Counsel should follow basic rules of interviewing: orient the interviewee so that the interviewee presents the history of the problem from the beginning; assist the interviewee to present the history completely and in order by asking open-ended questions and by providing verbal prompting (including prompts that keep the narrative in chronological order); provide active listening responses as needed to encourage the interviewee;<sup>5</sup> do not interrupt the interviewee to explore particular issues; after the interviewee relates the story, go back to explore particular points and facts in order to develop information relevant to legal theories and possible legal arguments.

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 In obtaining the child's medical history, counsel should determine whether the child ever sustained any significant head trauma or experienced periods of unconsciousness.  
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In obtaining the child's medical history, counsel should determine whether the child ever sustained any significant head trauma or experienced periods of unconsciousness. Similarly, in

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Before engaging in any special education advocacy, however, counsel must discuss with the child the possible benefits -- and drawbacks, if any -- in pursuing special education advocacy for the child. Counsel should approach the child's parent(s) regarding special education advocacy if, and only if, the child has authorized counsel to take that step. See section II of this chapter, *infra*.

<sup>4</sup>Asking questions in a way that gathers information chronologically can be helpful to the parent or child in answering questions.

<sup>5</sup>An active listening response reflects back to the speaker the substance as well as the emotional content of the speaker's statement.

exploring the child's developmental history, counsel should ascertain whether the child was exposed in utero to alcohol or drugs. Obviously, counsel should solicit information about academic problems or deficiencies, including what the problems and deficiencies are, when the problems began or when the deficiencies became apparent, and what, if anything, school system personnel have done to address the child's academic problems or deficiencies. Investigation often reveals, as noted above, that the child was having academic problems which school personnel did not recognize or address long before any behavioral problems were evident. In their efforts to relate a child's educational history, the child and the parent(s) may have difficulty providing a complete and accurate sequence of events; nevertheless, counsel must piece together -- through interviews and documentation -- a clear chronology of the child's educational experience.

In compiling the chronology and painting a clear picture of the child's educational history, counsel must remember to include the child's strengths and successes. What is the child good at? What interests the child? Does the child enjoy various forms of self-expression, like singing and drawing? An advocate who misses or minimizes these components is adopting -- perhaps without consciously realizing it -- the common, but mistaken perception that delinquency clients are relatively untalented or are academically incapable.

Interviews with individuals involved with the family and child are also essential to a complete investigation. Counsel should interview the child's current teacher and any service providers within the school setting, including any vocational services personnel, and perhaps others who have had contact with the child. Counsel is well-advised to speak with the child's teacher and other potential witnesses face-to-face in the school setting. In-person interviews provide

SCHOOL YEAR	SCHOOL ATTENDED	REPORT CARD GRADES	STANDARDIZED TEST SCORES	REPORTED CONDUCT OR BEHAVIOR	REPORTED ATTENDANCE	REPEATED GRADE??

Illustration 7-1.

TEACHER COMMENTS	DISCIPLINARY ACTIONS	PARENT/SCHOOL CONTACT	PARENT INQUIRIES/HELP RE: CHILD'S LACK OF PROGRESS	REQUEST FOR SPECIAL ED. EVALUATIONS	EVALUATION COMPLETED?	RE-EVALUATION COMPLETED?

Illustration 7-1, continued

more complete information; also counsel is more likely to perceive through a face-to-face interview if a witness is likely to be recalcitrant at a subsequent hearing.<sup>6</sup>

Additionally, counsel should interview professionals and others who are involved with the child through the juvenile justice system in order to obtain any relevant information about the child's emotional and educational status. Finally, counsel must contact any professionals outside of the school system, as well as community-based service providers, who are involved with the family. For instance, family members may receive counseling from a mental health clinician or from a community organization representative. These individuals may not only be able to give a different view of the child than school personnel provides, but also may be able to offer guidance about what has or has not worked for the child.

#### **D. Document to obtain**

Special education cases rise or fall based on documentation. No special education investigation is complete until counsel garners mounds of relevant papers. In addition to maintaining all the documents obtained from the school system and other sources, counsel must be careful to

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<sup>6</sup>Some school system employees might fear retaliation from their employers if they testify to facts that suggest that school system personnel failed to provide a child with FAPE; school system employees also may become defensive in testifying about shortcomings of the school system, sensing perhaps that others may judge that the witness personally failed to serve a child. As with criminal or delinquency investigations, having an investigator or independent witness accompanying counsel as an interview allows counsel to produce impeachment testimony against a witness whose story changes between the time of the interview and the subsequent special education due process hearing. For the same reasons, counsel also might wish to obtain written statements from witnesses who work for the school system or receive payment from the school system.

create a written record of contracts with the school system through methodical correspondence. While counsel can not testify in a special education due process hearing, correspondence documenting counsel's contacts with the school can be submitted as exhibits at a hearing. In a contest of credibility, a contemporaneous letter from counsel to the school documenting the event in question can go a long way in making the client's case.

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 Counsel should always obtain the  
 child's school records at the outset  
 of a delinquency case.  
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Counsel should always obtain the child's school records at the outset of a delinquency case. Records can usually be obtained simply by providing the school with a release executed by the parent and a cover letter requesting records. It is helpful to include a description of the specific records sought. School administrators and clerical personnel may not keep all records in a centralized location, so counsel may need to send the same release and letter to different schools. To get the records as quickly as possible, counsel should arrange to have the records picked up from the school (or schools). If pickup is not an option, however, schools will generally provide the records by mail.

A discussion of the legal basis for obtaining both regular and special education records through educational advocacy is provided in this manual in Chapter 11 on due process rights. Of course, in a delinquency case, counsel also has the option of issuing a subpoena for records.<sup>7</sup>

A subpoena has the advantage of carrying the

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<sup>7</sup>Counsel should not use the subpoena process to produce documents that are not needed for a hearing in the delinquency case.

weight of the court's authority and may result in records becoming available more quickly. The use of a subpoena, however, also alerts the school to the existence of a juvenile proceeding against the child, a fact which may produce immediate and undesirable consequences for the child at school.

Other records such as medical records, employment records, and court documents are also necessary. Medical records, including mental health information, can be particularly important. Unfortunately, hospitals and other medical service providers are not always quick to cooperate with a request for records. Frequently, hospitals will not accept a release form executed by the child's parent that was prepared by some-one outside of the hospital; hospital personnel, in other words, may require – before any records will be provided – that parent execute a release form developed by the hospital's lawyers. In addition, personnel in the hospital records department may function so slowly that counsel must make arrangements to go to the hospital and obtain the records personally. With hospitals, as with schools, counsel may wish to subpoena records rather than wait for voluntary compliance, with a request that is accompanied by a release form.

Finally, in investigating a special education case, counsel must compile documents establishing the client's entitlement to the specific relief desired. Too often lawyers meticulously document the school system's failings but fall short of creating a written record setting forth the basis for the relief requested. If an independent expert or treatment professional will participate in the hearing, counsel should obtain and dis-close the professional's resume. Similarly, if counsel is seeking a private program for the client, a letter of acceptance from the program as well as a pro-gram description should be obtained and disclosed as evidence in the hearing.

## II. The parent as client: Understanding the consequences of joint representation

In a delinquency case the client is, quite obviously, the child. In a special education case, however, the client generally is the parent. Federal law confers due process rights on parents, who act on behalf of their children. *See, e.g., Tschanner v. District of Columbia*, 594 F. Supp. 407 (D.D.C.1984) (parent is authorized to bring action on child's behalf as next friend as well as in own name). Persons eighteen years of age or older can pursue special education rights independently, and, in some circumstances, children under the age of eighteen may have rights to pursue special education rights independent from their parents. *See G.C. v. Coler*, 673 F. Supp. 1093 (S.D. Fla.1987) (handicapped child had standing under the IDEA to bring suit against school for failing to provide special education services at juvenile detention center); *Edward B. v. Brunelle*, 662 F. Supp. 1025 (D.N.H. 1986) (handicapped students placed in residential facilities pursuant to juvenile court orders had standing to sue education department for failure to provide FAPE); *Mylo v. Board of Educ. of Baltimore*, 948 F.2d 1282 (4th Cir. 1991), *cert. denied*, 507 U.S. 934 (1993) (trial court erred in dismissing child's special education action based on misconduct of parent).<sup>8</sup> These cases, however, are the exception to the rule that the parent is the party with the capacity to sue for special education rights.

The term "parent", as defined in the regulations implementing the Individuals with Disabilities Education Act, is a broad term that includes any person who is "acting as a parent of a child". 34

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<sup>8</sup>For a child who is at least minimally capable intellectually, the question of competency to engage counsel and to assert or to waive legal rights independently generally does not arise in the delinquency context. Courts regularly accept waivers from children in delinquency cases of rights to trial, to counsel, to *Miranda* protections, etc. Ironically, the law appears to restrict children from acting primarily in circumstances in which children seek to assert rights. Protecting children from being bound by contract is an exception, but it is an exception that is rarely litigated and of questionable utility.

C.F.R. § 300.13 (1997).<sup>9</sup> (The state cannot, however, act as the child's parent under the act. *Id.*) Many children who are incarcerated or otherwise enmeshed in the delinquency system are not living with a parent or do not have a parent who is caring or providing for them. Counsel should ask the client to identify the person who is acting as the child's parent. Counsel then can be engaged as special education representation on behalf of that "parent".<sup>10</sup> If the parent is missing or cannot be identified, or if the child is a ward of the state, the public agency<sup>11</sup> must assign a surrogate

parent for the child, 20 U.S.C. § 1415 (b)(2), and the agency must select a surrogate parent who is independent of the state and who is knowledgeable and skillful enough to represent the child adequately. 34 C.F.R. § 300.51©)(2) (1997).

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While counsel can not testify in a special education due process hearing, correspondence documenting counsel's contacts with the school can be submitted as exhibits at a hearing.

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<sup>9</sup>Proposed amendments to the Individuals with Disabilities Education Act regulations published on October 22, 1997 would give states the option of recognizing foster parents as "parents" for the purposes of pursuing IDEA rights if (1) the natural parents' authority to make educational decisions for the child has been terminated under State law; (2) the foster parent has an ongoing, long-term parental relationship with the child; (3) the foster parent is willing to participate in educational decision making; and (4) the foster parent has no interest that would conflict with the interests of the child. *See* 62 Fed. Reg. 55071 (October 22, 1997) (proposed new 34 C.F.R. § 300.19(b)). Final regulations are expected to be promulgated in 1998.

<sup>10</sup>Counsel should check applicable rules of professional conduct to determine whether counsel can approach that "parent" to suggest the advantages of pursuing special education services on behalf of the child. One presumes, however, that if the original client (*i.e.*, the child) asks the attorney to offer special education representation to the parent, the attorney is acting consistently with ethical rules in then "solicit-ing" the parent.

<sup>11</sup>Ordinarily, one interprets the term "public agency" in the context of the IDEA as referring to school system personnel. *See* 34 C.F.R. § 300.14 (1997). If, however, a department of youth services or "any other political subdivision of the state. . . [is] responsible for providing education to children with disabilities", *id.*, then that entity also would be responsible for providing special education services and complying with all IDEA requirements. 34 C.F.R. § 300.2 (1997). This responsibility carried by

Given the role of the parent in special education proceedings, counsel must obtain the delinquency client's agreement both to pursue the special education matter and to represent also the child's parent before counsel undertakes a full-scale investigation of special education issues. Counsel also must explain the consequences of joint representation first to the child and then, with the child's permission to proceed, to the parent.<sup>12</sup> Specifically, counsel should explain that, as the case progresses, conflicts may develop between the parent and the child. For example, the child and parent may not agree on which school the child should attend; what services are appropriate for the child (and perhaps for the family); or the amount of time the child needs to be in special education classes. A more profound disagreement between a child and a parent may develop regarding whether the child needs residential treatment. Usually, when conflicts arise, the parent and child are able to resolve the conflict either by themselves or with the assistance of counsel. Only rarely will a conflict arise that a parent and child cannot resolve. In the event that a parent and child can not agree on the purpose or a particular goal of the repre-

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the youth services agency would include the obligation to assign a surrogate parent.

<sup>12</sup>*See* note 9, *supra*.



sentation, counsel will be obligated to withdraw from the special education case.<sup>13</sup> This obligation to withdraw, based upon a conflict that can not be resolved in the special education case, continues even after the delinquency case is over.

Having explained the potential limitations of counsel's role to both the parent and the child, counsel can execute a retainer agreement with the parent (or with the parent and with the child) to pursue special education advocacy on the child's behalf. Counsel should research the applicable rules of professional conduct before deciding how to represent the parent and the child and, accordingly, how to fashion a special education retainer agreement. Essentially, counsel has four options in providing special education representation for a delinquency client. The attorney can offer any of these options to the child and to the parent, or the attorney can decide only to offer one option. The four options are as follows: (1) joint representation of the parent and the child in the special education matter; (2) representation in the special education matter solely for the parent; and (3) representation in the special education matter, with the parent's permission, based solely upon the child's making decisions with counsel; (4) representation in the special education matter solely for the child if the child is eighteen or over or, for a child under the age of eighteen, if counsel is prepared to demonstrate other grounds justifying the representation.<sup>14</sup>

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<sup>13</sup>Counsel should review the jurisdiction's ethical provisions regarding the proper handling of conflicts of interest based upon representation of two clients.

<sup>14</sup>For a child who is a ward of the State, 34 C.F.R. § 300.51(a)(3)(1997), or whose parent can not be identified or located, 34 C.F.R. § 300.51(a)(1), (2), counsel can seek on behalf of the child appointment of a surrogate parent under 34 C.F.R. § 300.514(b).

### III. Developing a theory of the case

#### A. Developing a special education theory

In pursuing special education rights, counsel must assess the child's educational history and then develop a working theory of the case. For children who have never been in special education, counsel's inquiry will focus on whether special education services appear warranted. For children who are currently in special education, counsel's inquiry will focus on whether the special education program is appropriate to meet the child's needs.

##### 1. Assessing information and developing strategies for children who are not already in special education

Regarding a child previously unidentified as to special education eligibility and needs, counsel should look for indicia of a disability that adversely affects the child's ability to learn. Basically, counsel should explore whether the child has a record of poor school performance that is not attributable to factors other than the presence of a disability.<sup>15</sup> Thus, by looking at the child's grades, scores on standardized testing, and the other matters described above in the section on investigation, counsel should ascertain what the child's school performance has been historically poor and whether the child is significantly behind his peers in basic academic competencies.

Several signs may indicate the presence of a dis-

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<sup>15</sup>As suggested above, truant behavior is alone insufficient to justify a conclusion that the child's poor school performance is not a result of a disability. A child may have a disability that led to poor school performance and that ultimately contributed to the truancy. In other words, a disability may have triggered the truancy. Similarly, a child who chronically disrupts in school, but who is not seriously emotionally disturbed, may be hiding unwittingly a learning disability or other disability.

ability. If the child has always had poor grades or has been retained, or if standardized testing reveals that the child is significantly deficient compared to peers, the child may have a specific learning disability or possibly mental retardation. If counsel observes that the child is unable to understand or respond to questions, or if counsel learns through interviewing that the child has difficulty understanding or responding to questions in school, counsel might conclude tentatively that the child has a specific learning disability or a speech or language impairment. If the child's school work evinces difficulty writing or copying, the child may have a visual impairment or a specific learning disability. If the child is easily distracted and inattentive, the child may have attention deficit disorder. A history of head trauma may suggest neurological damage; some children who suffer the continuing effects of head trauma present as being unable to focus their gaze or as having awkward gaits or hand movements. Consistently inappropriate behaviors, a history of discipline problems in school, an inability to get along with others, explosive outbursts, depression, low self-esteem and isolation are all indicators of serious emotional disturbance.

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 Generally speaking, all requests  
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 parent and by counsel should be  
 in writing.  
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If the existence of a disability appears possible based on a review of the information obtained from interviews and documents, counsel should help the parent refer the child to the local school for a special education evaluation.<sup>16</sup> Counsel and

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<sup>16</sup>If the child is incarcerated or in some other out-of-home placement, the referral for evaluation likely will not go to the neighborhood school. Counsel should become familiar with the proper process and location for initiating a request

the parent should make clear to school personnel the specific areas of concern and identify the kinds of evaluations requested. Generally speaking, all requests made to school personnel by the parent and by counsel should be in writing. Counsel should check local rules and case law to determine the amount of time the school has in which to complete the evaluation process.

## **2. Assessing information and developing strategies for children who are already in special education**

Representing a child who has already been identified as needing special education, counsel must determine whether the current educational program and placement are appropriate; if not, counsel must develop a strategy to obtain an appropriate educational program and placement. Developing such a strategy requires a multi-variable inquiry that is, by definition, individualized. Hence, no single strategy exists. Counsel should organize a strategy by considering the three discrete steps: (1) evaluation; (2) programming; and (3) placement. Within each step there are procedural and substantive questions. Consequently, counsel can determine whether, at each step, school personnel can meet their procedural and substantive burdens.

With respect to evaluations, counsel should collect the initial and subsequent evaluations that school personnel have performed, as well as any evaluations performed by outside professionals. The school should have completed at least intelligence and achievement testing, as well as an overall socio-educational history of the child. Regarding a child who exhibits emotional and behavioral difficulties, school personnel will likely complete a clinical psychological evaluation that includes projective personality testing. In addition, local rules may require or circumstances may dictate that school personnel perform additional evaluations, such as speech-language evaluation or a physical exam. For students age sixteen and above (and, if

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for evaluation.

indicated, for students age fourteen and fifteen, as well), a vocational assessment completed by the school should also be included.

After gathering the evaluations, counsel must assess whether the evaluations are appropriate and whether further testing is necessary. Counsel may ask the following questions regarding procedural compliance by school system personnel:

- Was the initial testing completed in a timely manner?
- Is the student overdue for a three year re-evaluation? Did the school use several tests to evaluate the student or only one?
- Was the parent a member of the team that decided what kinds of tests and assessments would be done as part of the evaluation or re-evaluation?
- Was the testing administered by an individual qualified to conduct the testing?
- Was the testing administered in the student's native language?
- Did the parent consent to the testing?
- Did school system personnel provide the parent an opportunity for the school personnel to explain the testing results?
- Did school system personnel advise the parent regarding due process rights?

In addition, counsel may ask the following questions regarding substantive compliance by school system personnel:

- Did the school system evaluate the student for all disabilities the student might reasonably suspected to have, or only one (e.g., evaluated for mental retardation but not specific learning disabilities; evaluated for specific learning disabilities, but no attention deficit disorder)?
- Did the school system evaluate the student in all areas related to each suspected disability?
- Did any of the evaluations indicate that further evaluations are necessary? If so, were those further evaluations done?
- Are the evaluations internally consistent?
- Do the evaluation tend to support or refute the existence of a single disability or multiple areas of need?
- Did the evaluations produce information about

the child's unique instructional needs, or did they focus only on determining the child's disability?

- Do the evaluations provide sufficient information to design the educational services and supports the child needs to succeed in the general curriculum, and meet the academic expectations set for all students?

- If the child had behavior that impedes learning, did the evaluation include a functional behavior assessment, or other assessment that will enable school personnel to develop positive strategies and supports for addressing the behavior?

After reviewing the evaluations and the evaluation process, counsel should analyze IEP's prepared for the child since the child was first identified as eligible for special education. One should organize the IEP's chronologically along with any other progress reports, deficiency notices, or truancy and disciplinary records. Counsel should determine whether the documents reveal that, for each year, school personnel complied with procedural requirements established by regulation. For example, counsel may ask the following questions:

- Did the parent or surrogate parent participate in the meeting to develop the IEP?
- Did the necessary school personnel participate in the IEP meeting?
- Does the IEP reflect the child's current strengths and weaknesses?
- Are there objective criteria to measure the student's progress?
- Does the IEP justify the extent, if any, to which the child will not be educated with regular education peers?
- Does the IEP justify the extent, if any, to which the child will not participate in the general curriculum?
- For IEPs in effect on or after July 1, 1998, does the IEP include a statement of the supports that will be provided to the child's teachers to enable the child to reach goals, learn the general curriculum, and be educated with regular education peers to the maximum extent appropriate?

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If the child has always had poor grades or has been retained, or if standardized testing reveals that the child is significantly deficient compared to peers, the child may have a specific learning disability or possibly mental retardation.

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- For IEPs in effect on or after July 1, 1998, does the IEP describe how the child's parents will be regularly informed of his or her progress?
- Were the child's IEPs and progress reviewed at least annually?
- Were IEPs reviewed during the course of the school year and modified as necessary when there were indications that the child was having difficulty in school?
- Was a current IEP in place during all periods for which the child was identified as needing special education and related services?

Again, investigating the child's records for each year, counsel should determine whether the child has been making progress by answering the following questions:

- Are the IEP goals the same, year in and year out?
- Does the annual testing reveal that the child has failed to make progress moving from grade to grade?
- Do progress reports and student work indicate that the child is not mastering the competencies taught in the general curriculum?
- Do the reports demonstrate persistent problems, despite the requirement that services be provided to address those problems?
- Do the IEPs include services, goals and objectives designed to address all areas of need, including emotional, social and behavioral needs?

The final, and perhaps most important, issue is placement. Documents collected by counsel

should include the initial notice and the notices of continuing special education placement. Regarding placement, counsel may ask the following questions regarding compliance by school personnel with procedures:

- Does the notice include all the necessary procedural information regarding the proposed placement and the basis of the school's decision?
- Does the placement notice advise the parents of their rights?
- Is the placement notice timely?

Counsel may ask the following questions regarding substantive compliance by school personnel with placement requirements:

- Can the teachers, administrators, and service providers at the placement implement the child's IEP?
- Are all the necessary related services in place?<sup>17</sup>
- Does the school's classroom size (student: teacher ratio) and the teacher's qualifications conform to the school system's own requirements?
- Is the educational program close to or distant from the child's home?
- Has the school made a meaningful effort to include the child as much as possible with non-disabled peers, including through the provision of support services for the child and teacher, and any necessary modification of the content of the curriculum or the method by which it is delivered?

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Even after counsel has interviewed all of the relevant people, some questions will remain unanswered.

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<sup>17</sup>For example, if a child's IEP requires individual psychological counseling two times a week, but the school psychologist is scheduled to be at the designated placement only once each week, the placement will not be appropriate.

These questions and other questions generated by counsel, the parent and child, and any expert engaged by the parent (with or by counsel), will lead counsel to a conclusion as to the appropriateness of a program and a specific placement. Counsel will not be able to answer all of these questions simply by reviewing documents. Even after counsel has interviewed all of the relevant people, some questions will remain unanswered. The objective, however, is to generate as much information as possible in order to assist the client in reaching an informed decision regarding what services, program, and placement are appropriate for the child.

**B. Developing a special education theory applicable to the delinquency case:  
A remainder of the advantages in undertaking special education advocacy clients**

As suggested throughout this chapter, counsel should explore, as part of the investigation in every delinquency case, whether the client has special education needs. Indeed, identifying that the client is eligible for special education and has not received appropriate services can have beneficial effects in the delinquency case. Often, upon determining that a client is eligible for special education, counsel next will discover that the school system either has not developed or has not implemented an IEP. In practically every case, such a discovery is useful. If, for example, an IEP mandates group and individual counseling as related services, counsel's securing those services for the child might provide sufficient justification for a delinquency judge to decide that the child is not dangerous and the judge, therefore, can release the child from pre-trial detention. Furthermore, a promise by counsel to advocate for special education services may be sufficient, by itself, in a marginal case to convince a judge to release rather than to detain a child prior to the trial. Similarly, in probation revocation situations in which the government is attempting to demonstrate that the child has failed to comply

with the conditions of probation (e.g., attending school), counsel often can show that the child has not received the services required by the IEP; this showing, in effect, can shift the locus of blame from the child and thus help counsel de-feat the revocation. If the school system personnel have followed special education procedures – this is, a current IEP exists and school personnel are implementing it, counsel still can help the client by requesting that the school personnel meet with the parent and the child to revise the IEP to include appropriate services or a new program that the child has not previously received. Such revisions may insulate the child from a possible detention order or other potentially punitive and non-rehabilitative responses from the delinquency system. These examples illustrate the strategic advantages available to an attorney who uses special education on behalf of a delinquency client.

# Chapter

# Eight

The Special Education Process: Evaluations

Understanding special education evaluations is a challenge that counsel must tackle successfully in order to provide competent special education representation.

*Written by*

Mary G. Hynes

Under the Individuals with Disabilities Act (IDEA), a “full and individual evaluation of the child’s educational needs” must occur before placing the child who is disabled in an educational program and before providing services. 34 C.F.R. §300.531 (1997).<sup>1</sup> The Rehabilitation Act regulations (§504) contain the same requirement. *See* 34 C.F.R. §104.35(a).

Understanding special education evaluations is a challenge that counsel must tackle successfully in order to provide competent special education representation. Although an in-depth analysis of diagnostic criteria and test interpretation is beyond the scope of this chapter, the material that follows contains an overview of some of the diagnoses and tests that commonly arise in the context of evaluating for special education purposes children who are involved in the delinquency system. In addition to educating themselves on matters of special education diagnoses and testing, advocates who are incorporating special education advocacy into their delinquency practice should seek out professionals with expertise in the areas of special education testing to explain evaluation results in each case.<sup>2</sup>

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<sup>1</sup>In addition to the initial evaluation, the student must have a comprehensive re-evaluation every three years, or more frequently if conditions warrant reevaluation or if the parent or teacher requests it. 20 U.S.C. §1414(a)(2); 34 C.F.R. § 300.534 (b)(1997). Schools must also reevaluate a child before determining that he or she is no longer in need of, or eligible for, special education and related services. 20 U.S.C. §1414(c)(5). Under the Rehabilitation Act regulations, a reevaluation is required before any significant change in educational placement. 34 C.F.R. §104.35(a).

<sup>2</sup>Moreover, several good texts on psychological testing are available; they provide brief descriptions of individual tests commonly used for diagnostic purposes. *See, e.g.,* Anastasi, *Psychological Testing*, (MacMillan Publishing, N.Y.)(6th Ed. 1988); Sattler, *Assessment of Children*, (Jerome Sattler Pub., Cal.)(3rd Ed. 1988); and

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Counsel also should discuss each evaluation with the person who conducted it. These evaluators are themselves experts and usually provide in-valuable information about the child and about the relevant diagnostic instruments and disability categories. Furthermore, these evaluators likely will participate with the parent, the child, counsel, and the child’s teacher in developing the child’s Individualized Educational Program (IEP). Hence, counsel is well-advised to understand the perspectives that these evaluators bring to the IEP, and counsel is well-advised to develop constructive relationships, whenever possible, with these evaluators. These evaluators are also potential witnesses, either for or against the child and the parent, if the special education case goes to a hearing. In an appropriate case, counsel may decide to call an evaluator as a witness for the child in a delinquency hearing, as well. An evaluator could testify, for example, that a child could not read or understand the Miranda warnings. An evaluator could testify at a disposition hearing that, for example, a child’s prognosis for improved behavior is good, assuming school personnel work in accordance with the IEP to institute a behavior management program.

Counsel’s learning to comprehend the intricacies of special education testing is a necessary but, of course, not a sufficient capability by itself to elevate the practitioner to the status of competency. Counsel must also be familiar with the

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Salvia/Ysseldyke, *Assessment*, (Houghton Mifflin Co., Boston)(5th Ed. 1991).

manifold procedures established by regulation concerning the proper administration and use of test data. Failure to comply with these procedures may invalidate the resulting IEP, and ultimately, any proposed educational placement. A common goal of special education advocacy is to invalidate a program developed by or a placement proposed by school system personnel. Consequently, counsel might wish to challenge the evaluations in order to demonstrate deficiencies in the development of the program and in the designation of the placement.

Before turning to the diagnoses and tests that commonly arise in the context of special education evaluations for children involved in the delinquency system, it is important to understand the multiple purposes of these evaluations. Evaluations and reevaluations under the Individuals with Disabilities Education Act and the Rehabilitation Act regulations are intended to determine the existence, nature and scope of a child's disability, to provide insight into the educational consequences of the disability, AND to provide information about the kinds of services, supports and instruction the child needs to address those consequences and learn effectively. All too often, however, a review of a child's records will reveal years of evaluations and reevaluations that simply confirm the existence of a disability, without producing instructionally-relevant information and recommendations.

In order to address this pervasive problem, Congress in the IDEA Amendments of 1997 made more explicit schools' obligations to align evaluations with students' learning needs. The statute specifies that in conducting evaluations, schools must use "a variety of assessment tools and strategies" to gather relevant information for "determining whether the child is a child with a disability and the content of the child's individualized educational program, including information related to enabling the child to be involved in and progress in the general curriculum. . . ." 20 U.S.C. §1414(b)(2). Schools must employ

"assessment tools and strategies that provide relevant information that assists persons in determining the educational needs of the child. . ." 20 U.S.C. §1414(b)(3)(D). Reevaluations must focus not only on whether the child continues to have a disability, but also on whether current services need to be modified in order to enable the child to attain IEP goals and learn in the general curriculum. 20 U.S.C. §1414(c)(1)(B). Evaluations or reevaluations that do not meet all of these requirements should be challenged as legally insufficient.

### **I. Understanding diagnosis and educational testing**

To understand educational testing, counsel first must read the regulations that define the various educational disabilities; and counsel must become familiar with the elements (in the regulations) of each relevant disability. A brief description of all of the tests used by a local school system should be available from that school system. Ensuring that evaluators and school personnel diagnose the actual nature of the child's disabling condition and its educational and instructional implications is critical to developing an appropriate educational program. In the case of children who are involved in the delinquency system, the most common forms of disability are: serious emotional disturbance (SED); specific learning disability (LD); and mental retardation (MR). A child may also have a combination of disabilities, such as serious emotional disturbance and a learning disability, justifying a dual diagnosis or a multiply-handicapped diagnosis.

#### **A. Serious Emotional Disturbance (SED)**

##### **1. Diagnostic criteria for SED**

The term "serious emotional disturbance" (SED) means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be



explained by intellectual, sensory, or health factors;<sup>3</sup>

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. §300.7(a)(9)(I) (1997) (emphasis added). The term does include schizophrenic children, but the term does not include “socially maladjusted” children (unless the child is also seriously emotionally disturbed). 34 C.F.R. § 300.7(a)(9)(ii). Note that the diagnosis requires that the emotional difficulties persist over time. A single act, however offensive it may be, is not by itself a justification for an SED diagnosis.

School system personnel often designate children with disabilities who are involved in the juvenile justice system as SED, regardless of whether the child’s emotional issues are the sole, or even primary, source of the child’s learning difficulties.<sup>4</sup>

Generally, the SED diagnosis is based on one of the mental disorders described in the Diagnostic and Statistical Manual of Mental Disorders (the DSM-IV).<sup>5</sup>

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<sup>3</sup>The State of New York requires that a child receive a physical examination as a pre-condition of an SED diagnosis in order to rule out any potential physical causes of emotional problems.

<sup>4</sup>Counsel likely will encounter the inverse problem, as well. School and delinquency personnel will resist applying the SED label to a child who is actually emotionally disturbed precisely because the child has committed an offense.

<sup>5</sup>American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, (4<sup>th</sup> ed. 1994).

Familiarity with the specific criteria for diagnosis is essential to understanding whether an SED diagnosis is warranted. Common bases for an SED coding among children in the juvenile justice system are “disruptive behavior disorders” such as a “conduct disorder” or “oppositional defiant disorder.” Like the designation of SED itself, each of these disorders requires that the negative behaviors must persist over time.

## 2. Educational testing for SED

In order to diagnose a child as seriously emotionally disturbed, school system personnel will administer “projective” tests designed to assess characteristics of the student’s personality. Projective tests generally involve presenting the student with a relatively unstructured task, permitting an infinite variety of answers. These tests are designed to assess the test taker’s entire personality, rather than individual traits, and are touted as effective instruments for revealing unconscious or hidden aspects of personality.<sup>6</sup>

Attorneys should be cautious in reviewing projective testing results. Data regarding the validity of projective testing are inconclusive.

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 People easily misconstrue the results  
 of psychological testing done for  
 delinquency system purposes.  
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Attorneys, generally speaking, should not allow school system personnel to adopt projective testing done by evaluators from other agencies connected to the child’s delinquency case. The testing generated by mental health professionals associated in preparation for delinquency proceedings is generally designed to assess danger-

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<sup>6</sup>Anastasi, *supra* note 2.

ousness,<sup>7</sup> competency,<sup>8</sup> or some other issue peculiar to the delinquency process. This kind of testing is not only irrelevant to whether the child has an emotional condition that impairs the child's ability to learn, it is often highly prejudicial. People easily misconstrue the results of psychological testing done for delinquency system purposes. For example, if the delinquency system finds that the child is competent to stand trial, some observers might understand that the child is not seriously emotionally disturbed. Delinquency system evaluators rarely understand, on the other hand, the legal and functional definitions of disabilities relevant to eligibility under the IDEA. A person performing psychological evaluations for the delinquency system, for example, may conclude, based on no relevant criteria, that a child with a conduct disorder is – by virtue of that diagnosis – not eligible for special education services.<sup>9</sup>

Projective testing techniques include inkblot, thematic apperception tests, verbal techniques, and expressive techniques.<sup>10</sup> The inkblot technique, usually the Rorschach Inkblot Test, involves presenting the test taker with ten bilaterally symmetrical inkblots and asking the

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<sup>7</sup>“Dangerousness” suggests an inquiry into whether the child is a danger to self or to the community.

<sup>8</sup>“Competency” is an inquiry into whether the child can understand the charges and participate in the defense.

<sup>9</sup>See generally, Jerome G. Miller, *Last One Over the Wall: The Massachusetts Experiment in Closing Reform Schools*, Ohio University Press 1991, pp. 229-39; Dr. Miller demonstrates that, rather than diagnosing children based upon their actual needs, experts who provide evaluations in the delinquency system generally speaking fashion their findings and recommendations based upon the limited options – usually placement for presumptively “dangerous” youth in incarceration facilities – that are available in the delinquency system.

<sup>10</sup>Anastasi, *supra* note 2 at 594-624.

test taker what each blot represents.<sup>11</sup>

Another frequently used testing technique is the Thematic Apperception Test (TAT) or one of its variants, the Children's Apperception Test (CAT) or the Roberts Apperception Test for Children. In these tests, the evaluator presents to the test taker a series of cards with different pictures, and the evaluator asks the test taker to tell a story to fit the picture.<sup>12</sup> Verbal techniques include word association and sentence completion. A commonly used test is the Rotter Incomplete Sentence Test in which the test taker is asked to complete forty sentence stems to express their feelings.<sup>13</sup> Expressive techniques, such as the House-Tree-Person and Human Figure Drawing tests, involve measuring personality through an individual's drawings of figures directed by the test.<sup>14</sup>

## **B. Specific Learning Disabled (LD)**

### **1. Diagnostic criteria for LD**

The term “ ‘[s]pecific learning disability’ means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations.” 34 C.F.R. §300.7(a)(10) (1997). The term does not apply to children whose learning problems are primarily the result of another disability, such as mental retardation, nor does it apply to children whose learning problems are primarily the result of “environmental, cultural, or economic disadvantage.” 34 C.F.R. §300.7(a) (10) (1997).

In addition, in order for a school to classify a student as “learning disabled,” the school must

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<sup>11</sup>Anastasi, *supra* note 2 at 596.

<sup>12</sup>Anastasi, *supra* note 2 at 602.

<sup>13</sup>Anastasi, *supra* note 2 at 608.

<sup>14</sup>Anastasi, *supra* note 2 at 610.

find that the child is not achieving commensurate with his age and ability “when provided with learning experiences appropriate for the child’s age and ability levels” and that there is a “severe discrepancy between achievement and intellectual ability” in one or more of seven basic areas related to oral and written expression, aural and reading comprehension, and reading and math skills. 34 C.F.R. §300.541(a) (1997)<sup>15</sup>

The term “severe discrepancy” is not defined by federal regulation. Local regulations and case law, however, may provide guidance for determining how significant a discrepancy must be in order to qualify as “severe.” See *Hiller v. Board of Educ.*, 743 F. Supp. 958 (N.D.N.Y. 1990) (student’s achievement was not severely discrepant from his ability where IQ tests revealed student had average to above average intelligence, and achievement tests revealed student was functioning at or above grade level).<sup>16</sup>

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A child who is functioning significantly below grade level, despite average intelligence, may be learning disabled.  
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## 2. Educational Testing for LD

Educational testing for learning disabilities in-

volves measurement of both intelligence and achievement. A child of average intelligence may be expected to function on grade level in academic work. A child who is functioning significantly below grade level, despite average intelligence, may be learning disabled.

To measure intelligence for older children, evaluators generally use the Wechsler Intelligence Scale for Children - III (WISC-III). This test measures intelligence on performance and verbal scales, and those two scales together comprise the full-scale IQ. Both the performance and the verbal scales include subtests. The subtests for verbal performance are information, similarities, arithmetic, vocabulary, comprehension, and digit span. The subtests for the performance scale include picture completion, picture arrangement, block design, object assembly, coding, and mazes.<sup>17</sup> A child whose scores reflect a significant difference between verbal and performance IQ scores, or between subtests scores, may have a learning disability.<sup>18</sup>

Although intelligence testing is generally accepted as reliable, advocates should recognize that these tests have been criticized as racially biased for, in particular, underestimating the intelligence of minority test takers.<sup>19</sup> Moreover, counsel for a special education client should be aware that a child may score poorly on intelligence testing for other reasons. For example, a child may be affected by drug use at the time of testing. A child may be inattentive

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<sup>15</sup>The DSM-IV now recognizes four separate forms of learning disorders: reading disorder, math disorder, disorder of written expression, and learning disorder not otherwise specified.

<sup>16</sup>The DSM-IV provides that “A variety of statistical approaches can be used to establish that a discrepancy is significant. Substantially below is usually defined as a discrepancy of more than two standard deviations between achievement and IQ. See DSM-IV at 46.

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<sup>17</sup>See Kaufmann, *Intelligent Testing with the WISC III*, (Wiley and Sons, N.Y.) (1994) for an excellent description of the appropriate diagnostic uses of the WISC III.

<sup>18</sup>Anastasi, *supra* note 2 at 482 (fifteen or more point difference is “clinically suspect”); *but see*, Sattler, *supra* note 2 (discrepancy in scores is not, in itself, sufficient to support a diagnosis of learning disability).

<sup>19</sup>As notes below, the regulations prohibit racially- and culturally-discriminatory tests. 34 C.F.R. §300.530(b).

and unfocused at the time of testing based upon emotional issues (e.g., grief, post-traumatic stress, distress over conditions of incarceration). The person administering the testing to a child should be aware of emotional issues and other factors that may distort the child's ability to perform adequately on the test;<sup>20</sup> counsel can not assume, however, that the test administrator has exercised that kind of oversight, and, therefore, counsel should investigate the circumstances surrounding the testing and investigate also the child's frame of mind at the time of the testing. Counsel also should check for consistency of intelligence test results for a particular child over time. Consistent scores over time do not establish necessarily that the testing has produced accurate results. Inconsistent results, on the other hand, do suggest strongly that some or all of the testing has produced invalid results.<sup>21</sup>

In addition to intelligence testing, achievement testing is also required to diagnose a learning disability. Achievement tests measure the grade level at which the child is functioning in a variety of basic academic areas, such as reading, writing, spelling, and math. Commonly-used achievement tests include the Wide Range Achievement Test (WRAT), the Kaufman Test of Educational Achievement (K-TEA) and the Woodcock Johnson Psychoeducational Battery. The WRAT is a quick and easily-administered test. It measures achievement in reading, spelling and math, but it does not test reading comprehension or relatively complicated math skills.<sup>22</sup> The K-TEA is an untimed test designed to measure reading decoding and comprehension, math application and computation, and spelling. Research suggests that the K-TEA pro-

vides reliable and valid scores.<sup>23</sup> One of the most comprehensive achievement tests is the Woodcock-Johnson Psycho-Educational Battery which measures twenty-seven areas of cognitive ability, achievement and interest.<sup>24</sup> Some school administrators limit their use of this test to the subtests measuring achievement, excluding the subtests measuring ability and interest.

### C. Mental Retardation (MR) 1 Diagnostic criteria for MR

The term “ ‘[m]ental retardation’ means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. . .” 34 C.F.R. §300.7(a)(5) (1997). By definition, to be mentally retarded, a student must have both significantly subaverage intelligence and deficits in adaptive behavior. A low IQ score alone does not justify a diagnosis of mental retardation. The DSM-IV subdivides this category into four separate diagnoses: mild mental retardation (IQ of 50/55 - 70); moderate mental retardation (IQ of 35/40 - 50/55); severe mental retardation (IQ of 20/25 - 35/40); and profound mental retardation (IQ below 20/25).<sup>25</sup> The vast majority of individuals with mental retardation, approximately eighty-five percent, function in the mild range of retardation and, in practically all cases, can learn to live in the community independently.<sup>26</sup>

#### 2. Educational testing for MR

Consistent with the two-pronged definition for mental retardation, testing for mental retardation requires measuring both intelligence and adap-

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<sup>20</sup>See 34 C.F.R. §300.532(a)(3).

<sup>21</sup>Lower results on intelligence testing following significant head trauma or other similar, intervening occurrence could be reflecting an accurate picture of intellectual functioning.

<sup>22</sup>Sattler, *supra* note 2 at 332.

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<sup>23</sup>Sattler, *supra* note 2 at 334.

<sup>24</sup>Sattler, *supra* note 2 at 336.

<sup>25</sup>Commonly, educators and other refer to people with IQs between 70 and 85 as having “borderline intelligence”, while people with IQs between 85 and 99 are of “low-average intelligence.”

<sup>26</sup>DSM-IV at 41.

tive functioning. As defined by the U.S. Department of Education, adaptive behavior is “the effectiveness with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group.” 34 C.F.R. part 104, App. A. para. 25 (emphasis added). Thus, the assessment of adaptive behavior includes “(a) the degree to which individuals are able to function and maintain themselves independently and (b) the degree to which they meet satisfactorily the culturally imposed demands of personal and social responsibility.”<sup>27</sup>

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Some people score in the MR range on standardized intelligence tests (perhaps due to racial biases in the intelligence test), but are capable of independently caring for themselves and otherwise conducting themselves appropriately.  
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In other words, to measure adaptive behavior, one elicits information about how well the individual functions in society, regardless of IQ. Some people score in the MR range on standardized intelligence tests (perhaps due to racial biases in the intelligence test), but are capable of independently caring for themselves and otherwise conducting themselves appropriately. Such a person would not meet the criteria for mental retardation.

A commonly-used test to measure adaptive behavior for diagnosing mental retardation is the Vineland Scales of Adaptive Behavior (Vineland). In the Vineland, the test giver asks a respondent familiar with the child questions concerning the following five areas of adaptive functioning: communication, daily living skills, socialization, motor skills, and maladaptive be-

havior.<sup>28</sup> Each area of functioning is assessed based on comparison with standards of behavior appropriate for the child’s age range. Generally, a parent or guardian is the person who possesses the most information about the child and is, therefore, the preferred respondent for the Vineland. A child’s teacher can be the respondent in an appropriate case; a classroom edition of the Vineland is available for that purpose.

Advocates should keep in mind the fact that adaptive behavior refers to behavior expected in light of a child’s particular cultural group. Standard instruments for assessing adaptive behavior may be culturally inappropriate for some children, and thus may lead to their being labeled as having mental retardation when in fact they do not.

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School systems generally have a standard battery of tests used in all special education assessments, such as a combination of intelligence, aptitude, and language tests.  
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#### D. Other tests

The following tests are commonly administered as part of a comprehensive special education evaluation;<sup>29</sup> visual motor integration testing; speech and language testing; a physical (medical) examination; hearing and vision screening; occupational and physical therapy; and vocational testing and assessments. Many

<sup>28</sup>Sattler, *supra* note 2 at 384.

<sup>29</sup>As noted above, each child is entitled to a “full and individual evaluation”. 34 C.F.R. §300.531 (1997); *see also* 20 U.S.C. §1414(b)(3)(C) (requirement to “assess [ ] in all areas related to the suspected disability. . .”); 34 C.F.R. §300.532(f) (1997)(same).

<sup>27</sup>Sattler, *supra* note 2 at 376.

disabilities go undetected because school personnel do not provide a neurological evaluation. In appropriate cases, counsel should request neurological and psycho-neurological evaluations.

### E. Other reading

It is beyond the scope of this manual to exhaustively describe the intricacies of special education evaluations and interpretation. For further information on evaluations, counsel should consult any of the standard resources on assessment of children. Some well recognized professional resources are: Anastasi, *Psychological Testing*, (Macmillan Pub., New York) (6<sup>th</sup> Ed. 1988); Sattler, *Assessment of Children*, (Jerome Sattler Pub., Cal.) (3<sup>rd</sup> Ed. 1988); and Salvia/Ysseldyke, *Assessment*, (Houghton Mifflin Co., Boston) (5<sup>th</sup> Ed. 1991).

The professional texts tend to be fairly dense, but valuable and informative reading. Counsel may also wish to consult with a text which is oriented more towards the non-professional such as David Woodrich's easily readable book, *Children's Psychological Testing*, (Brooks Publishing, Baltimore) (3<sup>rd</sup> Ed. 1997).

In addition to the psychological testing, counsel may wish to consult texts which deal with various types of non-psychological testing. Books for non-professionals, such as Patricia hamaguchi's *Childhood Speech, Language and Listening Problems*, (Wiley and Sons, New York) (1995), regarding speech issues, or Carol Kranowitz's *The Out of Sync Child*, (Skylight Press, New York) (1998), can provide a basic understanding of some commonly used non-psychological tests as well as further readings.

## II. Procedures related to testing

The 1997 amendments to the IDEA changed significantly the way in which evaluations (and reevaluations) must be designed and conducted. The evaluation/reevaluation process now begins with a review of existing evaluation data con-

cerning the child, including information provided by the parents, current classroom-based assessments and observations, and teacher and other service provider observations. 20 U.S.C. § 1414(c)(1)(A). This review is performed by the child's IEP team (which, by definition, includes the parent) and other appropriate qualified professionals. *Id.* Based upon its review, this group then identifies the additional data that are needed to determine whether the child has (or continues to have) a particular disability; the child's present levels of educational performance; whether the child needs (or continues to need) special education and related services; and whether current services need to be changed in order to enable the child to meet IEP goals and learn in the general curriculum. 20 U.S.C. § 1414(c)(1)(B). The school system must then arrange for the tests and other evaluation methods necessary to obtain the required information. 20 U.S.C. §1414(c)(2).

In addition to understanding the nature of the disability, the substantive character of the educational testing, and the evaluation planning process, an advocate must be familiar with the procedural protections relating to the evaluation process. The IDEA provides that all testing and evaluation materials must not be racially or culturally discriminatory. 20 U.S.C. §1414(b)(3)(A) (i). Evaluations must be validated for the specific purpose for which they are being used, 20 U.S.C. §1414(b)(3)(B)(i), and must be conducted in the child's native language. 20 U.S.C. § 1414 (b)(3)(A)(ii). The testing must be administered by a person trained to give the test and in accordance with relevant instructions. 20 U.S.C. §1414(b)(3)(B)(ii), (iii).<sup>30</sup> Tests must be tailored to assess specific areas of educational need. 34 C.F.R. §300.352(b) (1997). Tests must be administered in a way that accurately reflects the child's aptitude. 34 C.F.R. §300.532(c)

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<sup>30</sup>The requirements of 20 U.S.C. §1414(b)(3)(A) and (B) have been part of the IDEA regulations for many years, see C.F.R. §300.532 (1997), and were incorporated into the statute of 1997.

(1997). No single test score can be the sole criterion for determining whether a child has a disability or determining an appropriate education program. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.532(d) (1997).<sup>31</sup> The Rehabilitation Act regulations contain some, but not all of these requirements: tests and other evaluation materials must have been validated for the specific purpose for which they are being used, must be administered by trained persons in conformity with the instructions of the producer, must assess specific areas of educational need (rather than simple producing a single general intelligence quotient), and must accurately reflect the child's aptitude. 34 C.F.R. §104.34(b).

Allegations that testing materials are discriminatory has resulted in a profusion of litigation. In the Ninth Circuit, for example, litigation challenging as racially discriminatory the use of IQ tests that resulted in a disproportionate identification of black children has spanned over twenty years. *See Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972) (granting preliminary injunction prohibiting use of IQ tests to classify black students as educable mentally retarded (EMR)), *affirmed*, *Larry P. v. Riles*, 502 F.2d 963 (9<sup>th</sup> Cir. 1974); *Larry P. v. Riles*, 495 F. Supp. 296 (N.D. Cal. 1979) (holding that use of IQ tests for placement of black children in EMT classes violated, inter alia, the EHA, now the IDEA); *affirmed as modified* in *Larry P. v. Riles*, 793 F.2d 969 (9<sup>th</sup> Cir. 1984).

In the 1984 *Larry P.* Circuit Court decision, the Court held that IQ tests which had the effect of disproportionately labeling black students as EMR were invalid because (1) the tests were not validated for the purpose for which they were used and (2) the placement decision was based primarily on IQ testing, without other information. Most recently, the Ninth Circuit ruled that

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<sup>31</sup>Advocates should be aware that additional procedural safeguards attach when a child is being evaluated for suspected specific learning disabilities. *See* 34 C.F.R. §§ 300.540 - 300.543.

the original injunction against the use of IQ tests to place black children in EMR classes would not be expanded to prevent the use of IQ tests in any special education assessments of black children. *Larry P. v. Riles*, 37 F.3d 485 (9<sup>th</sup> Cir. 1994).

In contrast, a District Court in Illinois concluded that the use of IQ testing for the purpose of placing black children in EMR classes was not unlawfully discriminatory and was not impermissible under the EHA (now the IDEA) and its educational and instructional implications. *Parents in Action on Special Educ. v. Hannon*, 506 F. Supp. 831 (N.D. Ill. 1980). Noting that "the exact issue of racial bias" in the testing was addressed in the *Larry P.* litigation, the court held "the witnesses and the arguments that persuaded [the California court] have not persuaded me." *Id.* at 882. To the contrary, the judge in Illinois held that while a few items on standardized intelligence tests were culturally biased, "these few items do not render the tests unfair and would not significantly affect the score of an individual taking the test." *Id.* at 883. In addition, the court held that when IQ tests are used in conjunction with other criteria as required by statute, the resulting decisions were not discriminatory. *Id.* at 883.

Once tests and other evaluation materials have been administered, a team of qualified professionals and the child's parent consider the evaluation data in order to determine whether the child has a disability, and, if so, to decide the nature of the disabling condition. 20 U.S.C. § 1414(b)(4)(A).<sup>32</sup> A copy of the evaluation report

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<sup>32</sup>The requirement that a team of "qualified professionals" and the child's parent review evaluation results and determine disability was added to the IDEA in 1997. The IDEA regulations promulgated prior to the 1997 amendments require a "multi-disciplinary team" that includes at least one teacher or other specialist with knowledge in the area of suspected disability. 34 C.F.R. §300.532(e). Proposed IDEA regulations implementing the law as amended in 1997, published at 62 Fed. Reg. 55025 *et*

and the documentation of the determination of whether or not the child is eligible for services under IDEA must be given to the parent. 20 U.S.C. §1414(b)(4)(B). In addition, the Rehabilitation Act regulations require that in interpreting evaluation results, the school must “draw upon information from a variety of sources” and must ensure that information from all sources is “documented and carefully considered.” 34 C.F.R. §104.35(c). Case law establishes that school personnel, rather than the parent, carry the burden of obtaining all of the necessary information. *See Smith v. Union School*, 15 F.3d 1519 (9<sup>th</sup> Cir. 1994) *cert. denied*, 513 U.S. 965 (1994) (failure of parents to provide school with parents’ expert’s report does not excuse school from duty to secure its own evaluation of student.) *See also, Holland v. D.C.*, 71 F.3d 417 (D.C. Cir. 1995).

Finally (as suggested in section I (D) above), the child must be assessed in all areas related to suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities. 20 U.S.C. § 1414(b)(3)(C); 34 C.F.R. §300.532 (f) (1997). School systems often have a standard battery of tests used in all special education assessments, such as a combination of intelligence, aptitude, and language tests. The IDEA provisions described above, however, make it clear that evaluation plans and strategies must be individually designed to assess and meet student needs. A standard battery of tests may not cover every area of potential disability and educational need. For example, if a child is exhibiting significant emotional issues, a test a battery that does not include projective testing will not provide a complete assessment of the child’s needs. *See Babb v. Knox County Sch. Sys.*, 965 F.2d 104 (6<sup>th</sup> Cir. 1992), *cert. denied*, 113 S. Ct. 380 (1992) (holding that school failed to assess student in all areas of suspected disability when school psychologist failed to examine student’s

complete academic, psychological, and behavioral history, and failed to consult student’s treating psychologist and parents before making recommendation). In addition, the 1997 amendments to IDEA explicitly require IEPs to address through positive strategies and educational interventions the behavioral needs of students whose behavior impedes learning; the language needs of students who are limited English proficient; the communication needs of children with hearing impairments and other disabilities that effect their ability to communicate; and the child’s needs for assistive technology devices and services. 20 U.S.C. § 1414(d)(3). Doing so requires evaluations beyond a standard test battery. *See also* 20 U.S.C. § 1414(k)(1)(B) (requiring functional behavioral assessments for students suspended from school).

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*seq.*, would delete this requirement and incorporate instead the new statutory language.



# Chapter

# Nine

The Special Education Process:  
Individualized Education Program (IEP)

The IEP dictates instruction  
and services a student will  
receive, which, in turn, directly  
affect the child's opportunities  
for educational success.

*Written by*

Susan E. Sutler

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A free, appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) essentially consists of special education instruction and related services that are provided "in conformity with an IEP . . ." 20 U.S.C. § 1401 (8); 34 C.F.R. § 300.8(d)(1997).<sup>1</sup> A valid Individualized Education Program (IEP) must meet the requirements of 20 U.S.C. § 1414(d) and 34 C.F.R. §300.340-300.350 (1997) regarding the procedures for creating IEPs and the content of IEPs. *Id.* The IEP is a creature of the IDEA; the Rehabilitation Act does not require such written plans. The Rehabilitation Act does, however, provide that implementation of an IEP developed under the IDEA is one way of complying with the FAPE requirement contained in the § 504 regulations. *See* 34 C.F.R. § 104.33(b) (2).<sup>2</sup>

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 Creating an IEP requires  
 a team effort.  
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Creating an IEP requires a team effort. The parent, the child, the child's teacher, and an individual qualified to interpret the instructional implications of the evaluation results<sup>3</sup> jointly consider all of the

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<sup>1</sup>As previously discussed, to constitute a FAPE, the education provided a child with a disability must also meet the standards of the state educational agency, including curriculum standards, and provide an appropriate elementary or secondary education as defined in that state. 20 U.S.C. § 1401(8).

<sup>2</sup>An increasing number of school systems are now developing written "§504 plans" for students who are eligible for services under the regulations implementing § 504 of the Rehabilitation Act, but not under IDEA.

<sup>3</sup>*See* 20 U.S.C. § 1414(d)(1)(B). At least one regular education teacher of the child and one special education teacher or provider must be part of the team. Another participant required at the meeting is a representative of the school system who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; is knowledgeable about the general curriculum; and is knowledgeable about the availability of resources in the school system. 20 U.S.C. §

information gathered through the evaluation process about the child's present academic, cognitive, emotional, and perceptual functioning. This team -- referred to in the IDEA as the "individualized education program team"-- constructs long- and short-term educational goals for the child which respond to the child's specific needs. The "team" must also construct a plan for the child to accomplish those goals. The goals and the plan for accomplishing the goals become part of the IEP.

The child is a member of the team and should be encouraged to attend the IEP conference, the meeting at which the team drafts the IEP. The statute stops short of mandating the child's participation at the meeting,<sup>4</sup> but does require either participation or input by the child at any meeting in which the team considers transition services.<sup>5</sup> At an IEP meeting at which transition services will be considered, the public agency must also invite "a representative of any other agency that is likely to be responsible for providing or paying for transition services". 34 C.F.R. § 300.344 (c)(1)(ii)(1997).

The formulation of a written IEP is a critical phase of the special education process. The IEP dictates the

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1414(d)(1)(B)(iv).

<sup>4</sup>The relevant provision, 20 U.S.C. § 1414(d)(1)(B)(vii), requires the public agency to ensure the child's participation "whenever appropriate". Given the range of ages and disabilities covered by the IDEA, one might conclude that the modifying language, "whenever appropriate", is not meant to empower school personnel to exclude students, particularly teenagers, from participation. Whether student attendance of IEP meetings is "appropriate" should be determined by parent and student. The independent IDEA requirement that parents be permitted to invite to participate on the team anyone with "knowledge. . . regarding the child," 20 U.S.C. § 1414(d)(1)(B)(vii), buttresses this interpretation. A child's presence has value, and may be "appropriate in the view of parent and/or child," even if he or she is not capable of fully comprehending the import or content of the meeting.

<sup>5</sup>*See* 300 C.F.R. § 300.344(c)(1)(I) (1997)(if purpose of meeting to consider transition services, "public agency shall invite the student")(emphasis added); 300 C.F.R. § 300(c)(2)(1997) (agency re-sponsible to ensure that student's preferences and interests are addressed if student does not attend).

instruction and services a student will receive. In turn, the IEP directly affects the child's opportunities for educational success. In light of the central function of the IEP, counsel must attend and participate in the IEP conference. Counsel often can make critical contributions at an IEP conference. For example, counsel can persuade the other participants at the conference to include a particular service or to change an aspect of the program.

The IEP is particularly important for a child with a disability who is in the delinquency system. The IEP can function as an alternative-to-detention plan, or as a treatment plan that supersedes a standard dispositional program. A properly-constructed IEP should be superior in design and content to anything typically found in the delinquency system. Thus, by ensuring that the IEP includes particular types of instruction, as well as particular related and transition services, counsel can enhance the child's chances of avoiding detention or a delinquency disposition that is punitive and ineffectual.

The overlap of education-related services and delinquency demands may provide better alternatives to a child. For example, if a child has had relatively minor delinquency involvement, a typical disposition might be probationary supervision. An IEP that provides for psychological counseling and some specialized instruction in school may be sufficient to help the child abstain from delinquent conduct. The supervision, structure, and programming in an IEP can easily be more comprehensive than services available through probation or commitment; a judge, therefore, might readily accept the IEP as an alternative to a standard disposition of a delinquency case.

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Signing the IEP does not necessarily  
signify that a parent agrees with the  
contents of the IEP.  
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**I. Parent participation**

The public agency must take steps to ensure that parents have the opportunity to attend and participate in the IEP conference/meeting. 34 C.F.R. §300.345

(1997). The parent/guardian is a member of the IEP team and has the right to be an equal participant in developing, reviewing, and revising the student's IEP. The public agency must provide the parent with notice – in a language and manner the parent can understand – that indicates the purpose, time, place, who will be in attendance, and the parent's right to bring other persons to assist them at the IEP meeting. 34 C.F.R. §300.345(a) & (b) (1997). All attempts to contact the parent should be documented by the public agency. 34 C.F.R. § 300.345 (d) (1997). Transition services, if necessary, must be indicated in the notice of an IEP meeting. In addition, the agency must also extend an invitation to the student and notify representative from other agencies, if applicable.

The IEP meeting is required to be scheduled at a "mutually agreed upon time and place." 34 C.F.R. §300.345(a)(2). Often, the public agency will schedule a time for an IEP without input from the parent.

The parent and child should not have to leave work or conform to the agency's schedule if it would cause hardship. Once the evaluations are completed, it is recommended that the advocate propose – in a letter to the IEP coordinator – several dates and times that are convenient for the parent, child and advocate. It will be necessary for the advocate to inform the public agency – in writing – that the parent and student have retained an advocate for the special education case. In addition, the advocate should request that the public agency notify the advocate of any meetings to be scheduled pertaining to the child.

A client may, at times, fail to inform the advocate of information received from the public agency regarding an IEP. The advocate, being proactive, should talk with the client about the importance of keeping the advocate informed of any notices received from the public agency. The advocate should establish a rapport with the client that makes it easy for the client to communicate. An advocate should propose convenient meeting dates and frequently contact the client and the public agency.

In order for the parent to have meaningful input, the public agency may be required to provide an interpreter for a parent who is deaf or non-English speaking. 34 C.F.R. §300.345(e)(1997). The parent

should fully understand the significance of signing the IEP. In some states and school systems, the signature only indicates a parent's presence and participation in the meeting. Signing the IEP does not necessarily signify that a parent agrees with the contents of the IEP. In other states and school systems, however, signing the IEP constitutes agreement with its contents.

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The parent/guardian is a member of the IEP team and has the right to be an equal participant in developing, reviewing, and revising the student's IEP.

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The public agency cannot bring a completed IEP to the meeting and simply request the parent to approve and sign it. In an effort to save time, the public agency will often bring a "draft IEP" based on their recommendation for goals and objectives. The "draft IEP" can then become a working document to be modified in whole or part depending on the parent's input, the student's needs, and the advocate's input during the IEP conference.

Under certain circumstances, the public agency can proceed with the development of an IEP without the parent's presence. When a parent refuses to attend an IEP, or chooses not to attend, and proper notification has been given, the public agency can proceed with the IEP provided they have made a good faith effort, that is well documented, to convince the parent to attend and schedule a mutually-agreed-upon time and place. 34 C.F.R. § 300.345(d)(1997). If the parent cannot attend, the agency must use other methods to ensure parent participation, including individual or conference telephone calls. 34 C.F.R. § 300.345(c)). If an IEP is developed without the parent present, and the parent later claims at a due process hearing that proceeding in the parent's absence constituted a procedural violation of IDEA, the public agency will be re-quired to produce evidence to show that a good faith effort was made to notify the parent and convince the parent to attend before having proceeded. The public agency can bring such evidence as "detailed records of telephone calls," "copies of correspondence sent to the parents. .," and "detailed

records of visits made to the parent's home or place of employment. . ." Even under these circumstances, failure to attend the meeting does not waive the parent's right to challenge the contents of the IEP.<sup>6</sup>

On occasion, a parent may give the advocate permission to attend the IEP meeting without the parent. The advocate should make every effort to encourage the parent to participate. In addition, the advocate should explain the importance of the parent's participation at the IEP meeting. In the event that the advocate waives the client's right to attend the IEP meeting, the advocate should reserve the parent's right to review the IEP and request changes or additions, if necessary. Under these circumstances, an IEP meeting can be reconvened without all the team members, depending on the nature of the parent's disagreements or requests.

## II. Purpose of IEP conference

The multiple purposes for the IEP conference are as follows: (1) to review the evaluation information; to explain the team's findings and to answer any questions the advocate and the clients may have; (2) to determine the child's eligibility and needs for special education services; (3) to provide ample opportunity for parent/student input and participation in this decision-making process; and, most importantly, (4) to formulate a written IEP.

A conference to review, revise, and update the IEP must take place at least annually; however, a parent, an advocate, or school personnel may request an IEP review meeting at any time. 20 U.S.C. § 1414(d)(4); 34 C.F.R. § 300.343(d) (1997). The IEP is not considered a binding contract,<sup>7</sup> but it does serve a

<sup>6</sup>See also *Jackson v. Franklin Co. School Board*, 806 F.2d 623, 632 (5<sup>th</sup> Cir. 1986)(IDEA right to appropriate education is not simply parent's right to give up; even if parent had voluntarily agreed to child's withdrawal from school in wake of behavioral problems, school district remained obliged to convene IEP meeting and comply with IDEA).

<sup>7</sup>Federal regulations indicate that while the public agency is required to provide the services in the IEP, if the child does not achieve the goals and objectives, the agency is not in violation of the regulations, assuming proper implementation of the IEP and good faith efforts

dual purpose to guide the teacher and service providers in planning and implementing their instruction and intervention services, and to help the parents and advocates monitor the educational progress of the student.

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The IEP is both a process and a written document; the IEP establishes rights for the parents of the child and creates corresponding obligations upon the public school agency.

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The IEP is both a process and a written document; the IEP establishes rights for the parents of the child and creates corresponding obligations upon the public school agency. The advocate should be aware that the process affects the product and should raise both procedural and substantive challenges to the client's programming. In the *Rowley* case, the U.S. Supreme Court emphasized the importance of compliance with procedural mandates pursuant to the IDEA as a prerequisite to formulating an appropriate IEP. The involvement and presence of an educational advocate can increase the likelihood of compliance.

The regulations covering IEPs are 34 C.F.R. §§ 300.340 - 300.350 (1997). The advocate should be familiar with these sections of the regulations. It is also imperative that the advocate be thoroughly familiar with Appendix C to Part 300: Notice of Interpretation. This appendix addresses the purpose and requirements of the IEP, covered by the aforementioned statutory provisions, in a question-and-answer format. At due process hearings, the advocate can cite to this appendix as law in support of a substantive challenge.

The regulations should be taken to the IEP conference for reference purposes. The advocate should also be familiar with the state's specific standards and

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have been made to help the child achieve. 34 C.F.R. §300.350 (1997).

eligibility requirements for each category of disability. In addition, the advocate should be familiar with the state standards for special education programs and services. The state standards should be in written form in every state and the advocate must obtain and keep a copy of them. The IEP team relies on such standards in determining eligibility and, in some cases, the kinds of services and instructional supports that the child will receive. Therefore, it is important that the advocate take the state standards to an IEP meeting as well. The public agency is responsible for the development and implementation of IEPs for children placed in public facilities and students placed and funded in private facilities by the public agency. 34 C.F.R. § 300.341 (1997). As a general rule, the public education agency is responsible for initiating and conducting the IEP conference with all the necessary participants present. 34 C.F.R. § 300.343 (1997). If, however, a client has already been identified as eligible and has been placed and funded in a private school by the public agency, the private facility may initiate and conduct the IEP conference "at the discretion of the public agency," on the condition that both the parent and the agency are involved in decisions made regarding the IEP before it is implemented. 34 C.F.R. § 300.348(b)(1997).

Regardless of the particular state's applicable time line for completing assessments and proposing placements for eligible children, one of the few time lines contained in the federal regulations mandates conducting an IEP conference "within 30 calendar days of a determination that the child needs special education and related services." 34 C.F.R. § 300.343(c) (1997). In addition, the IEP must be implemented 'as soon as possible following' the IEP meeting. 34 C.F.R. § 300.342(b)(2)(1997). The purpose for this regulation is to ensure that the student should receive the benefit of specialized instruction and related services as soon as possible.<sup>8</sup>

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<sup>8</sup>The U.S. Department of Education's 1997 proposed amendments to the IDEA regulations state that "[f]or most children, it would be reasonable to expect that a public agency offer services in accordance with an IEP within sixty days of receipt of parent consent to initial evaluation." Note to proposed 34 C.F.R. §300.343, 62 Fed.

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The advocate must ensure that the public agency representatives do not limit instructional goals or recommended services to the available resources of the school system; rather, goals and services must meet the individual educational needs of the child.

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### III. Contents of the IEP

The contents of the IEP must be tailored to meet the specific individual needs of the child being represented. The goals and objectives in an IEP provide a mechanism for determining whether the student is progressing, whether the desired out-comes are being met, and whether the placement and services are appropriate to meet the student's needs. The goals and objectives in the IEP should focus on deficiencies that interfere with the child's learning, the child's ability to learn what all children are taught in the general curriculum, and promoting the child. The goals and objectives require specialized instruction, related services, and/or transition services. At the IEP meeting, an advocate and parent must articulate, in detail, any instruction or services they want or expect the child to receive. The ad-vocate must ensure that the public agency representatives do not limit instructional goals or recommended services to the available resources of the school system; rather, goals and services must meet the individual educational needs of the child.

The child's current performance levels should be based on data taken from testing less than one year old. The team should consider and review standardized and informal assessment measures; teacher-made tests; classroom observations; teacher/service provider anecdotal and progress notes; and behavioral statements and programs.

Mastery of goals and objectives can be measured in

percentages, ratios or time. With respect to percentages, the goal may be that the student will perform a task with eighty percent accuracy over a specified period of time. This particular means of measuring mastery of a goal is often confusing to parents and educators, unless it pertains to test scores. For example, the student will show mastery of two digit addition/sub-traction when he obtains eighty percent or higher on three consecutive teacher-made tests. A student can also demonstrate mastery of a goal by performing a task a certain number of times correctly when performing the task for a specified number of tries. For example, if the student can "tie his shoe," eight out of ten tries, the student is mastering this goal with eighty percent accuracy. In other examples, a student can "identify the main theme in a paragraph," or, "correctly get in and out of a specific computer program" eight out of ten tries and master such goals with eighty percent accuracy.

It is helpful to prioritize goals in the IEP by starting with the skills most difficult for the child. For example, if the child is found to be seriously emotionally disturbed, the IEP should first address emotional and behavioral goals with recommended objectives and services. If the child is learning disabled in reading, spelling, and math, the IEP should first address academic goals and objectives designed to reduce and improve the deficits in reading, spelling and math, and enable the child to attain the mastery all other students are expected to attain.

Related or transition services should be specified regardless of whether the public agency is actually providing the service or funding a private provider. It is not enough to simply indi-cate the need for counseling. If the child needs psychological counseling, and the advocate and the client want a particular type of professional to provide the service, the IEP should expressly state that. For instance, depending on the stu-dent's needs, the IEP may need to denote a "school psychologist" or perhaps a "clinical psychologist" as the provider. This type of detail is required. Without such detail on the IEP, the child will not receive either the service, or the public agency will make a determination unilaterally. Advocates should prevent the public agency from

making such decisions when they can easily be determined at the IEP conference.

The IEP should contain great detail when the child needs any technical equipment, instructional materials, furniture, or supplemental aids – in the special or regular education classrooms – to ensure educational benefit. If the child needs to have access to a computer or calculator, manipulatives, a specially designed chair, or preferential seating, the advocate should ensure that such devices and adaptations are reflected in the IEP with specificity.

The frequency of services a child is to receive per week (e.g., once or twice per week), the duration of time the student is to receive each service (e.g., thirty or forty-five minutes), and the type of setting in which the child is to receive each service (e.g., group, individual, classroom, consultative), must be indicated on the IEP. Consultation is designed to be provided directly to the teacher as opposed to the student. For example, the IEP should indicate that the speech therapist will consult with the classroom teacher, biweekly, for thirty minutes. It is also important to be specific in the IEP when a need for a service provider to conduct an “in class” service to the student is necessary, while he or she is involved in a class activity, as opposed to pulling the student out of the classroom.

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Nothing should be left open to interpretation by the teachers or decided at a later time by a service provider.  
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Nothing should be left open to interpretation by the teachers or decided at a later time by a service provider. The parent, teacher, or service provider can always request to reconvene the IEP meeting to amend or modify an IEP, if necessary. The advocate and parents are not limited to the related services specifically outlined in 34 C.F.R. § 300.16(1997). As indicated in the note following that statutory

provision, the list of services is not exhaustive of all the developmental, supportive, or corrective services a client may need. Further, it is critical for the advocate to remember that related services should be included based upon the student’s desires and the student’s needs. Often, public agency representatives do not want to include certain services because they can not provide them or they do not have the resources to acquire the service or equipment. An advocate should not be deterred from requesting that certain services be incorporated into the IEP. An agency’s lack of resources is not a determining factor for what should or should not be in a student’s IEP; the student’s specific needs govern. 34 C.F.R. § 300.17(a)(1)(1997).

Finally, the advocate must be thoroughly familiar with the definition and types of “assistive technology devices and services” available. 20 U.S.C. §§ 1401(1), 1401(2), 1414(d)(3)(v)(B); 34 C.F.R. §§ 300.5, 300.6 (1997). These services and devices can be invaluable tools for students with disabilities. These too, must be outlined with specificity in the student’s IEP. The advocate should keep in mind that these provisions may support and require the public agency to evaluate the client to determine if some type of technological device or service is required. The advocate may be able to get assistance for the child’s family to learn how to use or operate the technological device if it is something the child needs at home to insure progress at school. The advocate should take advantage of these provisions.

**IV. Transition services**

When the IDEA was amended in 1990, one of the primary amendments mandated that students age sixteen or older and, when appropriate, students fourteen or older, have transition services integrated into their IEP. The 1997 IDEA amendments strengthened this mandate, requiring transition services related to the child's course of study beginning at age fourteen, and the full panoply of transition services beginning at age sixteen, and earlier "if appropriate.." 20 U.S.C. § 1414(d)(1)(A)(vii). The IDEA defines transition services as follows: "A coordinated set of activities for a student, designed within an outcome-oriented

process, which promotes movement from school to post school activities, including: post secondary education; vocational training; integrated employment (including supported employment); continuing and adult educational adult services; independent living; or, community participation." 20 U.S.C. § 1401(30)(A); 34 C.F.R. §300.18(a) (1997). The statutory provision further requires that the coordinated set of activities be included in the student's program and based on the student's individual needs, interests, and preferences. 20 U.S.C. § 1401(30)(B).

Additionally, the set of activities outlined in a student's IEP must include the following: "instruction; community experiences; development of employment and other post school adult living objectives; and, when appropriate, daily living skills and functional vocational evaluation." 20 U.S.C. § 1401(30) (A); 34 C.F.R. § 300.18(b)(2)(1997). If the team decides the student does not need services in any of the previously-specified areas, the IEP must contain a statement to this effect and the basis upon which this decision was made. 34 C.F.R. §300.346 (b)(2).

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 In order for transition planning to be effective for a child with disabilities, that planning must begin while the child is still in school.  
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**A. Goals of transition services**

There are four primary goals of transition from school life to life in the community. The advocate and team need to address any or all of these areas when integrating transition planning into the IEP process. They include: (1) employment and education; (2) independent living; (3) interpersonal and social relationships; and (4) self-advocacy. When integrating these aspects into the IEP, the advocate and the team must design objectives and activities

which promote the achievement of these goals. Further, the transition goals and objectives must be based on the student's current levels of performance. However, unlike developing statements pertaining to special education instruction and related services, the team must look several years into the future in order to pro-actively address the transition needs of the student. The advocate and team must ask themselves the following question when considering transition planning each school year: in light of the remaining number of years the student has in school, the student's level of performance, and where he or she needs to be at the end of high school, what transition services are needed this year?

The first category – education and employment – can include among other things, college, apprenticeships, continued vocational training, independent or supervised employment, and volunteer positions. The second category – independent living – pertains to such skills as the student's ability to: care for, feed, cloth, and provide shelter for himself; manage time; pay bills; travel from place to place; become involved in the community; and relax. The third category – interpersonal and social relationships – involves skills in the areas of self-awareness and confidence, written and verbal communication, the ability to read social cues, and to interact and behave appropriately. Finally, the fourth category – self-advocacy – pertains to knowing basic rights, standing up for yourself, assuming responsibility for your actions, articulating your needs, asking for help when necessary, and problem solving and decision-making skills.

**B. Transition planning**

In order for transition planning to be effective for a child with disabilities, that planning must begin while the child is still in school. The transition goals must be a component of the IEP in order to ensure that the student gets assistance, experience, and practice prior to leaving the school setting. The IEP team must discuss, re-view, reassess and even modify, if necessary, the student's curriculum in light of transition goals. The team members should link the student's curriculum to the skills the student needs in order to meet post-secondary-education goals.



Transition planning is a process which involves the student, the family, school and post-school service personnel, local-community represent-atives, employers, members of the business community, advocates, transition specialists, work-experience coordinators, and government-al-service personnel. The advocate must be familiar with the student’s interests and preferences to help determine what other agencies, if any, the student should attend. Some transition services will not be delivered by the school system; rather, another participating agency or private industry will provide the agreed-upon services.

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The advocate must ensure that the agency/private provider is specified in the actual written IEP. In addition, the advocate should have strategies outlining how that agency will assist the student in meeting the transition objectives explicitly stated in the IEP.

The advocate should inform the public agency’s IEP coordinator of persons to notify from outside private and public agencies. The advocate should also notify these person/ agencies independently, to assure their atten-dance at the IEP meeting. When possible, the advocate should have already forwarded the following documents to outside agencies: evaluation reports; the last IEP; the applicable curriculum; the student’s schedule; and any other relevant information. By forwarding such in-formation, the advocate enables the appropriate personnel from the outside agency to become familiar with the student’s level of performance, as well as with the student’s strengths and weak-nesses. The advocate should talk with outside agency staff prior to the IEP meeting. Again, despite the legal obligation created by the IDEA, advocates should not rely on the public

agency to do all the necessary preparation or identifica-tion of appropriate persons or agencies needed to develop, implement, and finance transition ser-vices for the student.

If the participating agency fails to provide the services, it is the educational public agency’s obligation to reconvene the IEP meeting in order to identify another agency, come up with some alternative strategies to meet the student’s transition program, or revise the IEP. 34 C.F.R. § 300.347(a)(1997).

The vast majority of special-education-eligible clients who have cases pending in the delinquency system will be eligible for transition services. For those students, transition services open a door to a wide range of services. These services exceed what is available pursuant to the IDEA’s related-services provision and what the delinquency court can offer typically. The ad-vocate plays a critical role in ensuring that trans-ition services are identified and integrated into the IEP. To secure a successful transition ser-vices program the advocate should, among other things,

- N remind the public agency of – and hold them accountable for – their obligation to provide transition services as created in the statute;
- N assist the student/client in identifying interests, career goals, and any post-secondary objectives, and make these known to the public agency;
- N begin to identify and contact post-secondary schools, businesses, other government agencies, programs, services, and sources of financing -- based on the client's interests;
- N notify necessary persons about the IEP and provide each person with the information needed to allow for meaningful planning and input;
- N monitor and follow-up with appropriate contacts to ensure compliance with and success of the transition services program; and, notify the public agency and team to reconvene the IEP, if modification of the transition services program is needed.

In constructing a transition plan, the advocate needs to be innovative and creative. It is unlikely that one person, agency, or organization can design the plan or put it into operation. Collabor-ation and

coordination are central to the success of a transition service plan, and will pose a significant challenge for the advocate and team members. Much of the transition service planning must take place prior to the IEP meeting. Transition planning cannot happen if the advocate, clients, school system, and other appropriate agencies have not coordinated their efforts prior to, and in preparation for, the IEP meeting.

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### C. Other legal resources for transition services

In addition to the IDEA, three other federal laws provide resources for transition services. They are (1) The Carl D. Perkins Vocational and Applied Technology Education Act, (2) The School-to-Work Opportunities Act, and (3) The Rehabilitation Act (for funding of state initiatives and services). The advocate should be familiar with all three of these federal laws.

The Carl D. Perkins Vocational and Applied Technology Education Act, 20 U.S.C. §2301 *et seq.*, provides funds to states and local school systems for vocational education programs for all students. The Perkins Act provides special rights and protections for students who are members of "special populations," including students who are economically disadvantaged (low-income); educationally disadvantaged (low-achieving); have disabilities; have limited English proficiency (LEP); are seeking to participate in programs designed to eliminate sex bias (i.e., students trying to enter a field not traditional for their gender); and are in correctional institutions. 20 U.S.C. §2471(31). School systems receiving Perkins funds must provide special population students with equal access to the full range of vocational education programs; to recruitment, enrollment, and placement activities;

and, to the extent practicable, to comprehensive career guidance and counseling services. 20 U.S.C. §§ 2328 (a)(1), 2328(2). Moreover, programs may not discriminate on the basis of special population status. 20 U.S.C. § 2328(a)(2). Beyond provision of equal access and nondiscrimination, Perkins recipients have an explicit obligation to provide supplementary services to enable students to succeed in programs. 20 U.S.C. §§ 2328(c)(3), 2343(12)(B), 2471(38). Supplementary services include curriculum modification; equipment modification; classroom modification; supportive personnel; instructional aids and devices; counseling; English language instruction; child care; and special aids. *Id.*

The School-to-Work Opportunities Act, 20 U.S.C. § 6101 *et seq.*, provides states and local communities with funds to create "school-to-work systems" that provide all students, including students with disabilities, with the opportunity to participate in programs that integrate school- and work-based learning, vocational and academic education, and secondary and postsecondary education. In addition to school- and work-based learning, school-to-work programs must include school- and work-site mentoring, assistance with placement into both jobs and postsecondary education and training, and linkages to other community services that may be necessary to assure a successful transition from school to work. 20 U.S.C. §§ 6112-6114.

Finally, advocates should be aware of transition-related services to which their clients may be entitled under their state's vocational rehabilitation program. These services, funded in part through the federal Rehabilitation Act, 29 U.S.C. 701 *et seq.*, are geared towards allowing individuals to prepare for and engage in employment. As adolescents (and adults) who meet eligibility requirements are entitled to services, the state vocational rehabilitation agency is often a critical participant in transition planning and transition service delivery under the IDEA.

There may be a Transition Advisory Committee (TAC) in each jurisdiction or district that functions at the state or local level. This decision-making body operates as a community inter-agency transition planning committee. An advocate should inquire and

take advantage of the TAC, if available, for knowledge and resources. The public agency should be aware of such a committee, or one can contact the regional Council For Exceptional Children (CEC) office, if such an organization exists in your jurisdiction. The Council For Exceptional Children publishes documents on a variety of issues pertaining to children with special needs.<sup>9</sup>

## V. Preparing for the IEP

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In order to have meaningful input during the IEP, the parent and advocate need time to review the reports alone, with each other, and with an outside expert (e.g., educational consultant, psychologist), if applicable.

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Early in the evaluation process and in preparation for the IEP meeting, the advocate should make a written request of the public agency to provide copies of the evaluation reports to the advocate and parent/guardian upon completion of all assessments, and at minimum, seventy-two hours before the IEP meeting is conducted. Although there is no regulation which mandates a time certain for receipt of the evaluation reports, the regulations require the public agency to comply with parents' request to review and receive copies, ". . . without unnecessary delay and before any meeting regarding an IEP . . . and in no

case more than forty-five days after the request has been made." 34 C.F.R. §§ 300.562 (a), 300.562(b) (2) (3) (1997). This regulation also makes it clear that a parent's representative has every right to inspect the student's educational records, as well. In order to have meaningful input during the IEP, the parent and advocate need time to review the reports alone, with each other, and with an outside expert (e.g., educational consultant, psychologist), if applicable.

If an outside expert is needed, the reports will have to be forwarded to the expert with sufficient time to review, and in some cases produce a written response to, or critique of, the public agency's report. A written report will be especially important if the expert can not attend the meeting and is disagreeing in any way with the public agency's findings or recommendations. The advocate may want to submit the report to the team for consideration.

In light of the above, the advocate should make three (3) copies of the documents received. One clean copy of each report should be kept in the file. The advocate may need to reproduce these documents again for use at a due process hearing. One set should be forwarded to the clients; one set should be used as a working document for the advocate to highlight and annotate with questions and comments; and the advocate should forward the last set to an expert for review. In some instances the advocate will not receive the evaluations more than seventy-two hours before an IEP meeting, and the reports may only be *handwritten*. To accomplish the client's objectives, however, the advocate may need to go forward with the development of the IEP. A pending delinquency court proceeding, for example, may necessitate the expeditious production of an IEP.

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<sup>9</sup>Other resources for advocates on transition services issues are the National Transition Alliance for Youth with Disabilities (University of Illinois, 113 Children's Research Center, 51 Gerty Dr., Champaign, IL 61820; 217-333-2325); the National Transition Network, University of Minnesota, 106 Pattee Hall, 105 Pillsbury Dr. SE, Minneapolis, MN 55455; 612-626-7220); and National Information Center for children and Youth with Disabilities (NICHCY) (which puts out information on a variety of issues, and has an extensive publications catalog), P.O. 1492, Washington DC 20013-1492; 800-695-0285 or 202-884-8200).

Pursuant to a request at the outset of the representation for a client's educational records, the advocate should have received and reviewed all of those records with particular focus on the student's existing (or last) IEP, the last assessment reports preceding the current evaluation, and the student's grades and attendance records, again with an emphasis on the last two years. Of course, any outside evaluation reports submitted to the public agency for review, pursuant to 34 C.F.R. §§

300.503(c)(1), 300.503(2) (1997), either done by private practitioners or through the court system, should also be thoroughly reviewed and considered when preparing for the meeting. If the advocate or the school assessment team members suspect that the child may be eligible as a Seriously Emotionally Disturbed (SED) student, the advocate's record review will need to go back further in time, since eligibility in this disability category requires that the child exhibit certain "characteristics over a long period of time and to a marked degree". 34 C.F.R. § 300.7(b) (9) (1997).

In addition to the evaluation reports, the advocate should have a number of other documents when attending IEP conferences. The advocate should bring to the IEP, for reference purposes, a copy of the special education regulations and any other state code provisions, or Board of Education Rules, which may apply in the jurisdiction. The advocate must also be familiar with, and have a copy of, the applicable state standards and eligibility requirements for each disability category and for the special education programs (i.e., teacher-pupil ratio, class size, age range, etc.). This information should be in written form in every state. The team relies on state standards in determining eligibility and placement. This document is referred to during eligibility and IEP meetings. Having the written eligibility criteria accessible is helpful in keeping the team focused. The special education advocate should use such standards also in formulating questions to challenge or clarify the team's eligibility findings.

Another critical document is the student's existing or recently-expired IEP. For a student who has already, the team members should review annual goals and objectives set forth in the last IEP and also, of course, should discuss any new test results. The teacher or service provider should go through each of the objectives and discuss to what extent over the past school year the student accomplished the goal and any of the incremental objectives, and whether the particular goal needs to be included, modified, or left out of the new IEP. There should also be discussion about what teaching techniques did or did not work in assisting the student accomplish these goals. The advocate must be familiar with the last IEP, compare

the information contained therein with the new evaluation data, and be prepared to ask questions or make recommendations. The advocate should have discussed the current IEP with the client before the IEP conference to determine what goals the parents believe did or did not get accomplished and what they want the student to focus on during the upcoming school year.

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If the outside expert reviewing the evaluation reports is unable to attend the IEP meeting, the advocate needs to confer with that person prior to the meeting to obtain advice and answers to questions.

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If the outside expert reviewing the evaluation reports is unable to attend the IEP meeting, the advocate needs to confer with that person prior to the meeting to obtain advice and answers to questions. If the expert plans to write a report or attend the meeting, preparation should include reviewing the evaluations, interviewing the student (and others), and observing the student in class, etc. The advocate should explain to the expert what the client's short- and long-term objectives are in order to avoid having the expert articulate some position during the meeting that is contrary to the client's objectives.

Finally, the advocate will want to meet with the client to go over the evaluations; the goals on the last IEP; the student's accomplishments and any pending issues or problems needing to be addressed by the team; any questions the clients may have; and what is it the clients want for the student, based on their knowledge, objectives and information received from the evaluations. Particularly for clients who have never participated in an IEP meeting the advocate must describe what will take place and how the meeting is conducted. Prior to representing a family at an IEP meeting, a novice advocate should observe at least a few IEP meetings. If a more experienced advocate's client gives permission, an opportunity to

observe can easily be arranged. It is also important for the clients (parent and student) to know that they are key members of the team and that their attendance and participation is important. The clients should be informed that if they have questions, comments, or disagree with anything said, they should express their concerns during the meeting or inform the advocate to share their concerns. If the client has been, or is in, the delinquency system with pending court case(s), the student and parent/guardian should be advised not to discuss any arrests, charges, or dispositions during the evaluation process and the IEP conference, unless there is some beneficial or strategic reason to do so.

In providing family history to the team social worker, parents often volunteer information that is negative and irrelevant with respect to eligibility and designing an educational program for the student. As a general rule, the advocate should request that details about the student's present and past delinquency involvement be deleted from the report. Often such information is irrelevant to the issues being discussed and is presented either inaccurately or in a fashion which assumes guilt. This is a particular problem when a client is incarcerated during the time of the evaluation and IEP conference.

Public agency personnel may make frequent references to the student's having been arrested, charged, and incarcerated. Further, during the placement stage, public and private school administrators use this information as a discriminatory basis for rejecting the students.

## VI. The IEP conference and its participants

The public agency must ensure that the following persons participate in the formulation of a child's IEP: the child's parents; at least one of the child's regular education teachers; at least one of the child's special education teachers or providers; a representative of the school system who is (I) qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of children with disabilities, (ii) knowledgeable about the general curriculum, and (iii) knowledgeable about school system resources; an

individual qualified to interpret the instructional implications of evaluation results; and the child, whenever appropriate. 20 U.S.C. §1414(d)(I)(B).<sup>10</sup> The school system representative on the team must have the authority to commit the agency to provide whatever services are included in the IEP, so that the IEP will not be "vetoed" by school administrators or other school officials. 34 C.F.R. part 300, App. C, ¶ 13 (1997). If the IEP is to include transition services, both the student and representatives from any agency providing transition services must be invited and present. 34 C.F.R. §300.344(c) (1997).

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 The advocate should not assume  
 that the public agency will make  
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 have all of the necessary  
 persons present.  
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To ensure the presence of all the appropriate persons at an IEP meeting, the advocate should inform the school system's IEP coordinator, in advance and in writing, who from the public agency should attend. It is advisable to have the entire assessment team present at initial and triennial evaluations to discuss their findings and recommendations and to answer questions. When vocational assessments or transition services are to be discussed, the vocational assessors or transition specialists also should be present. The advocate should not assume that public agency personnel will make arrangements to have all of the necessary persons present. Therefore, the advocate

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<sup>10</sup>These requirements reflect modifications made by the IDEA Amendments of 1997, Pub. L. 105-17 (June 4, 1997). IDEA regulations promulgated prior to the 1997 legislation provide that, in the case of a child who has been evaluated for IDEA services for the first time, the IEP the child and is familiar with the evaluation results. See 34 C.F.R. § 300.344(b) (1997). The U.S. Department of Education proposed regulations implementing the 1997 amendments delete this requirement. See 62 Fed. Reg. 55089 (October 22, 1997).

should be prepared to notify all persons who should be present. The advocate's decision on whom to include in an IEP meeting and how to proceed should always be client-centered and influenced by the facts of the case.

For an initial evaluation and placement, the team members should begin by sharing their test results and observations. Too often, however, the main focus is on information from persons who have recently tested the student. The student's teachers are critical members of the team. Because teachers work with the student on a daily basis, their perspective and knowledge is of particular importance. A teacher can attest to the child's strengths, weaknesses and learning styles. If the client has a number of teachers, it is useful to hear from all of them. It is usually a must, however, to have present at the IEP meeting the teachers who focus on math and language arts. With input from teachers, parents, the child, and evaluators, the team collectively determines the child's eligibility and disability classification.

The designated agency representative attending the meeting should have the authority to guarantee that the programs and services described in the IEP will be provided and the authority to commit the necessary agency resources to implement the plan. Who from the agency assumes the role of representative depends on the student's disability, intensity, and the extent of services required. A teacher, counselor, principal, or high-ranking administrator may assume the role.

If mandated or critical participants are not in attendance, the advocate has several options to pursue. As a general rule, the preference should be to move forward to complete the IEP. One option is to proceed with the IEP, with the persons who are present, while having someone try to get the missing person(s) to the meeting before it is over. Another option is to complete as much of the IEP as possible and schedule another date to allow for the missing persons to have input. Yet another option is to request to adjourn before starting the IEP and reschedule the conference for another day when all persons can be present.

The advocate's decision on how to proceed will depend on the facts of the case. For example, it may be necessary to complete the IEP prior to an upcoming delinquency status hearings trial, or disposition without further delay if it will in any way assist in getting the desired outcome in the delinquency case.

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The advocate's decision on who to include in an IEP meeting and how to proceed should always be client-centered and influenced by the facts of the case.  
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As a general rule, the student should attend the IEP meeting. Even though the parent and student have the final decision on whether to attend the IEP, the advocate should strongly encourage the student's participation. The student's attendance is of particular importance when transition services are included in the IEP because the student's vocational/career interests and post-school preferences must be taken into account. 20 U.S.C. §1401(30)(C); 34 C.F.R. §300.18(b)(1) (1997). If the student is fourteen years old or older (or younger, if appropriate), transition services must be discussed at the meeting and the public agency must have invited the student to attend. 20 U.S.C. §1414(d)(1)(A)(vii); 34 C.F.R. §300.344(c) (1997).

Attendance and notice requirements may be mandatory for younger students in appropriate cases. This is especially true for younger students who are in the delinquency system, have dropped out of school, have high rates of truancy, have extremely low levels of academic functioning, and have little-to-no interest in, or compatibility with, conventional education settings. It is also important for the student client to exercise some control over what is taking place in the education arena. Many student clients will not have a voice because it is difficult for them to express their transition needs, vocational/career interests, or they are not sure what their interests really are. The advocate will need to engage the

student and explore those interests. In addition, the advocate should prepare the student to communicate such interests to the team during the meeting. One way to pursue engaging a student is to inquire about any jobs the student has already had and ask whether the student liked or disliked the jobs. It can also be helpful to discuss any hobbies the student may have or how the student spends free time. The advocate can also make arrangements with the public agency for the student to participate in career exploration by visiting some of the vocational schools/centers in the system. Such an opportunity will allow the student to see what is available. A vocational assessment must be completed and should be helpful in developing recommendations about the types of jobs which seem suitable to the student's strengths, weaknesses, and interests. Despite what the vocational findings are, the advocate should not allow the team to limit the student's exposure or opportunity to investigate certain job experiences when the student has expressed an interest in a field which may not "appear" to some team members to be suitable for the student.

#### **A. When parties disagree at the IEP conference**

The public agency is mandated to develop and implement an IEP for a child with disabilities. 34 C.F.R. §300.341 (1997). Even though statutory and case law requires parental participation in an IEP, much is left to the agency's discretion. There will be times when the public agency and the parent, along with the student, will not agree on what should be included in the IEP or how and where it should be implemented. The public agency should inform the parent(s) of their right to resolve the issues at a due process hearing. The advocate should make every effort to help the team resolve differences during the IEP meeting so that the student can begin to receive all of the desired services as soon as possible.

When disputes are related to any IEP issue, the parties should try to arrange an interim course of action. If there is no agreement as to the interim measure to be taken and/or the parent decides to file a complaint, the student would remain in the current educational setting, unless the parties agree

otherwise. 20 U.S.C. §1415(j); 34 C.F.R. §300.513 (1997). A student who is in a regular education class, would remain there. If the student has already been identified, the student would continue to get services under the existing IEP, in the current placement, until the matter is resolved. See 34 C.F.R. Part 300, App. C ¶ 35 for a complete discussion of alternatives available when the parties disagree.

Parties may agree with the overall IEP, but disagree with respect to the provision of a related service. In particular, parties may disagree on whether a service is needed, the frequency of the service, or who will be the provider. In such a case, the parties can agree to implement the portions of the IEP not in dispute while the parties negotiate, mediate, or go to hearing on the disputed issues.

If the parties disagree with the continuum level of services (e.g. a resource room versus a self-contained classroom), pending resolution, the parties can leave the student in the current placement or select one of the other options as a temporary arrangement for the student. In the aforementioned example, the student could be placed in either the resource room of the self-contained class. This temporary setting would constitute an "interim" placement until resolution of the matter. The benefit of an interim placement is, at minimum, twofold. The student begins to receive some of the appropriate services while decisions are made as to the appropriateness of the interim placement itself. Under any of the aforementioned circumstances, the advocate with a client who has a pending delinquency case will want to opt for an interim placement. The advocate will then be in a position to show the court that the client is not only disabled and eligible for special education services, but also that the client is receiving individualized services and is making progress toward rehabilitation.

It is good practice to write an education status memorandum to the judge in the delinquency case. The memorandum should outline some of the critical evaluation data, the student's disability classification, the related services, equipment, and the specialized instruction the client is to receive pursuant to their IEP. Such a memo should be written

and submitted to the court whether the IEP is final or interim. In addition, the memo should integrate the special education information in a way that encompasses the following: (1) supports a denial, mitigation, or justification of the client's involvement in the "alleged" charges; (2) influences the judge to dismiss the case or reach a suitable disposition; and (3) specifically sets forth the client's re-requested relief. A copy of the IEP or any other educational reports that will promote the client's objectives should be attached to the memo for the judge's review.

The downside of an interim placement is that the student may have to change placements after developing relationships with the staff and students. Transitional times are often difficult for children with special needs, but the decisions made by the advocate and client should balance the student's strengths and weaknesses, reflect the current and long-term objectives based upon what is at stake for that student.

### **B. Follow-up to the IEP conference**

In many cases, the public agency will come to the IEP conference with a beginning draft of an IEP from which the team will work during the meeting. The advocate and client should request their own copies of the draft as soon as the meeting begins. The team should not have to share one or two copies. The law clearly states that "the public agency shall give the parent, upon request, a copy of the IEP." 34 C.F.R. §300.345 (f) (1997). The advocate and parent will need their own copies in order to document – during the meeting – any additions, modifications, etc. At the completion of the meeting, all participants will sign off on the IEP. If the parent disagrees or has a problem with anything in the IEP, the advocate should either make an entry on the public agency's actual document, or should write out on a separate sheet the client's dissenting opinion. The advocate should then request that this page be attached and incorporated as part of the IEP document itself. The advocate should make and keep a copy of this written dissent. Parents also have the option of reserving a decision on the IEP and taking the time they need to reflect upon it. Further, the advocate must re-request a

copy of the completed IEP from the public representative on behalf of the parent/ guardian.

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 If no actual placements were offered or considered during the meeting, there must be a discussion to determine when a meeting to discuss placement will be held.  
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If the document needs to be cleaned up or re-written to reflect all of the modifications, the advocate should request delivery of a finalized copy of the IEP by a specified date. The advocate should determine who will be responsible for delivering the document. The advocate must be sure to get the address and phone number of the person responsible for delivering the IEP. If anything different than what was agreed to is in the finalized copy, the IEP will have to be changed to reflect accurately what occurred at the conference, or, if necessary, the team will have to reconvene. The parent always has the right to file a complaint. 20 U.S.C. §1415(b)(6); 34 C.F.R. §300.506 (1997).

Within twenty-four hours of the IEP meeting, the advocate should write a follow-up letter to the IEP coordinator. The follow-up letter should accomplish the following: state when the IEP is to be received; state any IEP-related agreements between the parties; state the issues that are pending, disputed or unresolved; and state the client's expectation with respect to each of the mentioned IEP-related concerns. A courtesy copy of the follow-up letter should be sent to the IEP coordinator's supervisor. The follow-up letter may become a critical document if a due process hearing is necessary later on.

In some cases, it is possible to discuss placement options during the IEP conference after the document is completed. If the public agency proposes a placement or placement options during the IEP meeting, the advocate should seek assistance in



scheduling a visit by the parent and student. The advocate should ensure that a notice of placement is not issued until the parent has had an opportunity to visit the programs. It is good practice to maintain communication with assessment team members prior to the meeting because they often will provide to an advocate information regarding the type of program they think may be appropriate for the client. Opinions on placement options may change as a result of the IEP conference; however, obtaining opinions from evaluators prior to the IEP meeting does provide the advocate with an opportunity to visit some programs even before the IEP meeting. Additionally, if the client already has a desire to attend a particular program, the parent may want to inform the public agency and during the IEP conference make a request for that placement.

If no actual placements were offered or considered during the meeting, there must be a discussion to determine when a meeting to discuss placement will be held. The 1997 amendments to IDEA explicitly grant parents the right to be members of any group that makes placement decisions. *See* 20 U.S.C. §1414(f). The advocate should know which member of the IEP team is responsible for arranging this meeting. It is necessary for the advocate to know this process, how this takes place, and when a proposed placement will be discussed. Again, the advocate should obtain the name, phone number and address of the person(s) involved in the placement decision. The follow-up letter should include this information and the advocate's understanding regarding the placement process.

The advocate and parent must always keep in mind that the least restrictive environment is determined during the development of the IEP. The placement proposed is determined by the continuum of services, the contents of the IEP, and is the means by which the IEP is carried out. The student is not entitled to receive any goals, related services, transition services, equipment, or professional services if they are not specified in the IEP document without either reconvening the IEP conference, or prevailing pursuant to a hearing.

# Chapter

# Ten

The Special Education Process: Placement

To understand the legal underpinnings of the placement process, counsel needs to appreciate several basic concepts: the continuum of alternative placements; the least restrictive environment; and, with respect to the educational needs of delinquent children in particular, the rationale for residential placement.

*Written by*

Mary G. Hynes

Upon completion of all necessary evaluations and the development of an Individualized Educational Program (IEP), the school must issue a notice of proposed placement for the student, at least annually, based on the child's IEP. 34 C.F.R. §300.522 (1997). Whether acting under the Individuals with Disabilities Education Act (IDEA) or the §504 Rehabilitation Act regulations, in making the placement decision, the school must consider information from a variety of sources and the decision must be made by a group of persons, including person knowledgeable about the child, the evaluation data and the placement options. 34 C.F.R. §300.533(a)(1), (3) (1997); 34 C.F.R. §104.35(c). The child's parent must be a member of this group. 20 U.S.C. §1414(f) (IDEA). As a general rule, the school must attempt to propose a placement as close as possible to the child's home. 34 C.F.R. §300.552(a)(3); 34 C.F.R. §104.34(a). In addition, unless the IEP requires some other arrangement, the child should be placed in the same school that he or she would attend if not disabled. 34 C.F.R. §300.552(c) (1997) (IDEA). To understand the legal underpinnings of the placement process, counsel needs to appreciate several basic concepts: the continuum of alternative placements; the least restrictive environment; and, with respect to the educational needs of delinquent children in particular, the rationale for residential placement.

### I. Continuum of alternative placements

The "continuum of alternative placements" is an IDEA concept, and simply means that schools must have special education available in a variety of settings, both in the context of regular education programs and segregated special education programs. 34 C.F.R. §300.551(a) (1997). Specifically, the regulations require that schools maintain placements for special education students in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. §300.551(b)(1) (1997). Additionally, schools must ensure that supplementary services are available in

conjunction with regular education for special education students. 34 C.F.R. §300.551(b)(2) (1997).

### II. The least restrictive environment

In selecting the placement from the continuum of alternatives, the school must select the "least restrictive environment" for the student. The "least restrictive environment" requirement is derived from two related provisions, included in the IDEA statute and both the IDEA and Section 504 regulations. The first is that the school shall ensure that "to the maximum extent appropriate, children with disabilities. . . are educated with children who are non-disabled." 20 U.S.C. §1412(a)(5); 34 C.F.R. §300.550(b)(1) (1997); 34 C.F.R. §104.33(a). The second is that "removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in the regular education classroom with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. §1412(a)(5); 34 C.F.R. §300.550(b)(2) (1997); 34 C.F.R. §104.33(a). The regulations also provide that, in selecting the least restrictive environment, "consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs." 34 C.F.R. §300.552(d) (1997). *See Lachman v. Illinois Bd. Of Educ.*, 852 F.2d 290 (7<sup>th</sup> Cir. 1988), *cert. denied*, 488 U.S. 925 (1988) (Congress has established preference for mainstreaming, but mainstreaming preference is only to be given effect when appropriate for the individual child.) Interpreting these sections together, weighing the child's needs for specialized attention in conjunction with the right to receive that attention in regular classes alongside non-disabled peers, courts have developed a wealth of case law on assessing the least restrictive environment. In addition, the 1997 amendments to IDEA contain express statutory mandates that supplement existing case law. Thus, for example, IEPs must include a description of the special education, related services, supplementary services and program modifications that

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are necessary to enable the child to be educated in the regular education classroom, as well as any necessary supports for regular education teachers. 20 U.S.C. §1414(d)(1)(A)(iii)(III). The IEP must also justify the extent, if any, to which the child will be removed from the regular education setting. 20 U.S.C. §1414(d)(1)(A)(iv).

Whether a child can be educated within a regular education setting, or whether a more restrictive setting is required, is a highly fact-intensive question. Some of the factors the courts consider are: whether the child has been able to make progress in a mainstream setting; whether the child is disruptive to other children in the mainstream setting; and what efforts the school has made to enable the child to make progress in a regular education setting. In *Moraind v. Grover*, 755 F. Supp. 243 (E.D. Wis. 1990), the Court was persuaded that, absent any evidence of harm to the child be mainstreaming, the child's opportunities to interact with her non-disabled peers in non-academic settings justified a placement in the child's neighborhood high school, rather than a segregated setting. In *Mavis v. Sobol*, 839 F. Supp. 968 (N.D.N.Y. 1993), the Court held that the school's program for a child with mild mental retardation, in which the child was mainstreamed in art, music and gym, was not sufficient under the IDEA's mainstreaming requirement. Instead, the Court found that the school failed to make adequate efforts to keep the child in regular class with supplemental aids and services, although there was no evidence that the child would be disruptive in the regular education setting. On the other hand, the Court in *MR v. Lincolnwood*, 843 F. Supp. 1236 (N.D.Ill. 1994), held that placement in a therapeutic day program was appropriate where the student was not benefitting from interaction with non-disabled peers, the student was regressing academically, and the student was disrupting others.

One of the more recent, and controversial, trends in special education placement is "inclusion." "Inclusion" is unlike the traditional concept of "mainstreaming," where special education

students spend as many hours as possible in regular education, supplemented by special education services in a segregated setting (such as a resource room). Rather, inclusion seeks to accommodate the child with a disability entirely within the regular education classroom. To accomplish this objective, schools may provide special education students with different materials, an in-class aide and computer assistance; they may also provide special training on inclusion to regular education teachers. The situations in which inclusion is appropriate are growing and changing areas of special education law and practice. In addition, the support systems available to students are growing and changing.

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Regardless of what the current trends  
may be, each child must be considered  
on an individual basis.  
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The Ninth Circuit has developed a four-part test for determining whether "inclusion" is appropriate for individual students. In *Sacramento City Sch. Dist. v. Rachel H.*, 14 F.3d 1298 (9<sup>th</sup> Cir. 1994), *cert. denied*, 114 S. Ct. 2679 (1994), the Court held that in deciding the appropriateness of a full-time placement of a special education student in a regular education class, the court should consider the educational benefits of full-time placement in a regular education class, the non-academic benefits of such a placement, the effect the student has on the teacher and the other students in the regular education class, and the costs of the placement. In *Rachel H.*, the Court concluded that this test supported the regular education placement of a nine-year-old child with mental retardation where the child was making progress on her IEP goals with the assistance of an in-class aide; the child was able to develop her socialization and communication skills in the regular education setting; there was no evidence that the child's presence interfered with either the teacher or the other students; and the school system's complaints about costs were

exaggerated. In *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396 (9<sup>th</sup> Cir. 1994), the Court applied the *Rachel H.* test to remove a child with ADHD and Tourette's Syndrome from a regular education setting where the child was making no academic progress and was "socially isolated," and where the student had attacked both school staff and his classmates in the regular education setting.

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If incarceration in the juvenile case appears likely, or if the child is already incarcerated, counsel may want to offer the court a more therapeutic alternative which will provide a structured setting, but will be independent of the court system.

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The Third and Eleventh Circuits have adopted methods of analysis similar to the Ninth Circuit's.<sup>1</sup> It is questionable whether cost considerations or the impact the child has on other students are even legitimate factors under the IDEA. Moreover, counsel should be cautious and investigate any inclusion program offered by the school to ensure that the program is being implemented appropriately with all the necessary training for staff and supports for the child in the regular education setting. Absent sufficient training and individualized supports for the child in the regular education setting,

"inclusion" can become simply a means to limit services to special education students. Finally, counsel should heed the precatory words of the comment to the regulations: "The overriding rule in this section is that placement decisions must be made on an individual basis." 34 C.F.R. §300.552 Comment (1997). In other words, no single program, theory, or philosophy will meet the needs of all children. Regardless of what the current trends may be, each child must be considered on an individual basis.

### III. Residential placements

One issue frequently faced by students who are involved in the juvenile system is residential placement. Counsel may wish to explore the possibility of residential placement for a juvenile client through the school system for a variety of reasons. If incarceration in the juvenile case appears likely, or if the child is already incarcerated, counsel may want to offer the court a more therapeutic alternative which will provide a structured setting, but will be independent of the court system. Alternatively, the juvenile court may be considering a residential placement through the juvenile system. In that case, counsel may want to use educational advocacy to take a pro-active role in the selection of the placement, rather than allowing the juvenile court to select a placement designed principally for juvenile offenders rather than children with disabilities. These scenarios, as well as others, are described more fully in Chapter Two. In this section, we will briefly explore the legal basis for residential placement through the educational system.

The IDEA and §504 regulations specifically authorize residential placements for educational purposes and provide that such placements, including non-medical care and room and board, must be provided at no cost to the parents. 34 C.F.R. §300.302 (1997); 34 C.F.R. §104.33(c) (3). Courts have held that state rules requiring that parents pay for a part of the child's residential placement are contrary to the IDEA's requirement that schools provide students with a

<sup>1</sup>See *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11<sup>th</sup> Cir. 1991), opinion withdrawn and remanded on other grounds, 956 F.2d 1025 (11<sup>th</sup> Cir. 1992), previous opinion reinstated by rehearing en banc, 967 F.2d 470 (11<sup>th</sup> Cir. 1992); *Oberti v. Bd. of Educ. of Clementon*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993). The Ninth, third and Eleventh Circuit decisions all build on the analysis first set out by the Fifth Circuit in *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989).

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free appropriate education. See *Parks v. Pavkovic*, 753 F.2d 1397 (7<sup>th</sup> Cir. 1985), cert. denied, 473 U.S. 906 (1985).

The comment to the IDEA regulation indicates that the rule applies to residential placements for “educational purposes.” However, neither the regulation nor the comment offers any guidance on how a residential placement for educational purposes can be distinguished from a residential placement for non-educational purposes. In *North v. District of Columbia*, 471 F. Supp. 136 (D.D.C. 1979), the Court rules that it would not engage in the “Solomon-like task” of parsing out which of the child’s needs were educational and which needs were non-educational, and directed the school system to find the child’s residential placement, despite the school system’s argument that the parent should have sought residential placement through the child welfare authorities and the juvenile court. Other courts have similarly held that where the child’s educational and emotional issues are intertwined so that the child requires a comprehensive therapeutic setting in order to learn, the school is responsible for providing an appropriate residential placement. See, e.g., *Ash v. Oswego Sch. Dist.*, 766 F. Supp. 853 (D. Or. 1991), aff’d, 980 F.2d 585 (residential placement for educational reasons justified where autistic child could not generalize from one setting to another, thus requiring twenty-four hour coordinated care); *Babb v. Knox County School System* 965 F.2d 104, 109 (6<sup>th</sup> Cir. 1992) (“[t]he concept of education under the Act clearly embodies both academic instruction and a broad range of associated services traditionally grouped under the general rubric of ‘treatment’ . . . [a]ny attempt to distinguish academics from treatment when defining ‘educational placement’ runs counter to the clear language of the Act”).

One area of potential conflict arises where the residential placement issue is a psychiatric hospital. Some courts have held that the IDEA does not authorize placements in psychiatric hospitals. See *Clovis v. California Office of Admin. Hearings*, 903 F.2d 635 (9<sup>th</sup> Cir. 1990);

*Darlene L. v. Illinois State Bd. of Educ.*, 568 F. Supp. 1340 (N.D. Ill. 1983). In *Clovis*, the court held that a psychiatric hospitalization was primarily for medical problems, apart from the learning process, and that the psychiatric placement was not covered by the IDEA because it was principally a medical service. In contrast, in *Vander Malle v. Ambach*, 667 F. Supp. 1010, 1040 (S.D.N.Y. 1987), the Court held that the school was responsible for full cost of psychiatric hospitalization for a schizophrenic child because the child’s “educational disability could not be separated and treated apart from his emotional and behavioral problems.” Absent treatment in a psychiatric hospital, “it is extremely doubtful that he could have been educated at all.” *Id.* at 1040.

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Residential placement, for any purpose, may be unattractive to clients for a variety of reasons.  
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Residential placements, for any purpose, may be unattractive to clients for a variety of reasons. Perhaps the most important reason is that residential placements are often located at a considerable distance from the child’s home and family, thus isolating the child and limiting the family’s ability to be involved in the child’s treatment process. Additionally, because these placements are often not easily accessible, the opportunities to monitor the treatment offered by the placement are limited. Finally, the racial mix of children residing in a residential facility may be very different from the racial mix of the child’s home and neighborhood, a fact which may cause tension and alienation.

On the other hand, residential placement through the educational system may offer a real alternative for children faced with incarceration. Therapeutic and educational services may be available in a residential setting that are simply nonexistent in a detention facility. In addition, children

who face imminent danger in their own communities resulting from their involvement in criminal activities may welcome the chance to escape to a safe place where they can get a fresh start. Additionally, concerns about lack of family participation and lack of the residential placement's accountability for services can be addressed through advocacy to obtain relief such as payment for travel expenses for family visitation or the appointment of a surrogate parent in the community in which the residential facility is located for the purposes of monitoring the child's progress. In short, as with any placement decision, the choice to pursue residential placement is highly individual and fact specific.

# Chapter

# Eleven

The Special Education Process: Due Process Rights

Informed parental consent is required before a school conducts an initial evaluation, before a school provides special education and related services for the first time, and before a school conducts a reevaluation of the child.

*Written by*

Mary G. Hynes



The Supreme Court has placed at least as much emphasis on the importance of the school's compliance with procedural protections under the Individuals with Disabilities Education Act (IDEA) as on the substantive standard of appropriateness of a school's educational program. In fact the Court held that

When the elaborate and highly specific procedural safeguards embodied in Section 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis on compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process. . . as it did upon the measurement of the resulting Individual Educational Program (IEP) against a substantive standard.

*Hendrick Hudson Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-206 (1982).

The critical procedural protections conferred by the IDEA are: (1) the opportunity to examine records and to obtain an independent educational evaluation of the child; (2) written prior notice whenever the school proposes to initiate or change (or refuses to initiate or change) the identification, evaluation, educational placement, or educational program of a child with a disability; (3) procedures to protect the rights of children whose parents are unknown or unavailable, or the child is a ward of the State, including the assignment of an individual to act as the child's surrogate parent for educational purposes; (4) an opportunity to present complaints to a due process hearing; (5) the availability of mediation to resolve disputes, where both parties agree to participate; and (6)

the maintenance of the child's current educational placement during the pendency of any proceedings involving a complaint regarding the child's education. 20 U.S.C. §§1415(b) - (j).<sup>1</sup> This chapter will address these basic due process rights, with the exception of due process hearings, which is the subject of a separate chapter.<sup>2</sup>

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The Supreme Court has placed at least as much emphasis on the importance of the school's compliance with procedural protections under the IDEA as on the substantive standard of appropriateness of a school's educational program.

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<sup>1</sup>As discussed in further detail below and in Chapter 10, IDEA's general maintenance of placement provision, 20 U.S.C. §1415(j), does not apply in the context of certain disciplinary actions. See 20 U.S.C. §1415(k)(7).

<sup>2</sup>In addition to the rights conferred by the IDEA, federal courts will enforce additional procedural rights granted by state law. *Smith v. Union School*, 15 F.3d 1519, 1524 (9<sup>th</sup> Cir. 1994), cert. denied, 115 S. Ct. 428 (1994); (additional state law protections for parents which are not inconsistent with IDEA are enforceable rights in federal court; state confers right to receive related services independent of special education); *Antowiak v. Amback*, 838 F.2d 635 (2<sup>nd</sup> Cir. 1988); (additional procedures that protect rights more stringently are enforceable, but those that merely require additional steps not required by IDEA are not enforceable.) See also *Town of Burlington v. Department of Education*, 736 F.2d 773, 789 (1<sup>st</sup> Cir. 1984), aff'd., 471 U.S. 359 (1985); *Johnson v. Independent School District*, 921 F.2d 1022, 1029 (10<sup>th</sup> Cir. 1990); *Thomas v. Cincinnati Bd. of Ed.*, 918 F.2d 618, 629 (6<sup>th</sup> Cir. 1990); *Geis v. Bd. of Ed. of Persippany-Troy Hills*, 774 F.2d 575, 581 (3<sup>rd</sup> Cir. 1985).

## I. Records

Parents have the right to inspect and review all education records with respect to the identification, evaluation, and educational placement of the child, as well as the provision of a free, appropriate public education (FAPE). 34 C.F.R. §300.502 (1997).<sup>3</sup> States may also give the child access to educational records, depending on the student's age and the type or severity of the child's disability. 34 C.F.R. §300.574 (1997). Students age eighteen or older have an independent right under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232 (g), to access their records. 34 C.F.R. §§ 99.5, 99.10. In addition, as an IDEA matter, states may opt to transfer all IDEA rights, including records access rights, from parents to students when students reach the age of majority under state law. 20 U.S.C. § 1415 (m).<sup>4</sup> The school must respond to a parent's request for records "without unnecessary delay and before any meeting regarding an IEP or any hearing" but "in no case more than 45 days after the request has been made." 34 C.F.R. §300.562(a) (1997); 34 C.F.R. §99.10(a)-(b). The right to review records also includes the right to have the records interpreted for the parent as well. 34 C.F.R. §300.562(b)(1) (1997); 34 C.F.R. §99.10. The term "education records" is broadly defined to include records which are directly related to the student and are maintained by the educational agency. 34 C.F.R. §99.3. Some few exceptions exist for records which include teacher records maintained privately by the

<sup>3</sup>The §504 regulations also require that parents be given access to records. *See* 34 C.F.R. §104.36.

<sup>4</sup>Under §1415(m), added to the law as part of the IDEA Amendments of 1997, states exercising this option must continue to provide all required IDEA notices to parents as well as student. *See* 20 U.S.C. §1415(m)(1)(A). States may, however, elect to terminate the notice of rights of students who have reached the age of majority and are incarcerated in an adult or juvenile correctional institution. 20 U.S.C. § 1415(m)(1)(D).

teacher, personnel matters, law enforcement matters, certain types of mental health information related to treatment of students aged eighteen or older, and information concerning a student after graduation. 34 C.F.R. §99.3.

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Attorneys should file a request for educational records as soon as possible after picking up the juvenile case, regardless of whether educational advocacy appears necessary.  
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Attorneys should file a request for educational records as soon as possible after picking up the juvenile case, regardless of whether educational advocacy appears necessary.<sup>5</sup> Federal law provides similar rights of access to both regular and special education records. 34 C.F.R. §300.562 (1997) and 34 C.F.R. Part 99. Attorneys should obtain a release from the parent and provide the release, along with a cover letter identifying consult their local school system to determine where to submit the request for records. Some schools maintain special education records separately from regular education records; other schools maintain separate records on the student

<sup>5</sup>Of course, in a matter involving a juvenile case, the attorney also has the option of issuing a subpoena for the records. One should avoid using a subpoena to obtain records, however, if the records subpoenaed are not relevant to the hearing. Moreover, counsel should not delay in obtaining educational records; waiting for a delinquency hearing may occasion unnecessary delay in obtaining records. In addition, the attorney may not want to alert the school to the existence of a juvenile matter through the use of a subpoena. A school official, even a custodian of documents, may be a witness who is hostile to the child's interests in a delinquency case; school officials, knowing of a child's delinquency involvement, may attempt to suspend or expel the child from school or otherwise act prejudicially to the child.

in each school attended by the student. Thus, several copies of essentially the same letter may be necessary to garner and compile all the student's records.

Generally, a request for records should include a request for any and all records maintained by the school concerning the student, including but not limited to: attendance records; progress reports; deficiency notices; truancy notices; notices of major or minor suspensions and expulsions; report cards; correspondence to and from parents; awards; commendations; standardized testing results; and class schedules. If the child is in special education, attorneys should also include a request for the following documents: referrals for evaluations; evaluations; notes from multidisciplinary team meetings; IEP's; notices of placement; and statements of rights which were provided to parents.

## II. Independent evaluations

Once all the records have been obtained, the attorney should review them carefully. One is well-advised to construct a chart of a chronology, or both, to summarize the child's educational history. If the child is not already in special education, but has a history of poor performance in school, the parent may wish to refer the student to the local school for a special education assessment. See Chapter 7. The parent also always has the option of obtaining an independent evaluation of the student at private expense. A privately-obtained evaluation may be submitted to the school, and the school must consider the results of the evaluation. 34 C.F.R. §300.503(c)(1) (1997).<sup>6</sup> If the child is tested by the school and is found ineligible, or has pre-

viously been found ineligible but the parent disagrees with the specific test results, then the parent has a right to seek an independent evaluation at public expense. 34 C.F.R. §300.503(b) (1997).

The results of the independent evaluation must be considered by the school in any decision regarding the provision of free, appropriate public education (FAPE) to the student and may be presented as evidence at a due process hearing. 34 C.F.R. §300.503(c) (1997). The independent evaluation, if done at public expense, must meet the same criteria which the school uses in its own evaluations. 34 C.F.R. §300.503(e) (1997). The parent is not obligated either to notify the school of specific areas of disagreement with the school's evaluation or to seek the school's permission prior to obtaining the independent evaluation at public expense. See *Inquiry of Fields*, EHLR 213:259 (1989). The school may seek a due process hearing to establish that its evaluation was appropriate, and, if the hearing officer decides in favor of the school, the school does not have to pay for the evaluation. 34 C.F.R. §300.503(b) (1997).

Finding an independent expert to do the evaluation is something of an art form in itself. Local hospitals and universities are a good source for referrals. If the parent is interested in pursuing a private school placement, most private schools are aware of professionals in the community who do independent testing. The child may have a treating pediatrician or counselor who may have suggestions. Attorneys in the local jurisdiction who already practice in special education should be able to provide referrals to reputable professionals. Most jurisdictions also have a non-profit organization designated to act as a protection and advocacy (P&A) system for persons with disabilities.<sup>7</sup> These organizations often work with

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<sup>6</sup>Under the revised IDEA regulations proposed by the U.S. Department of Education in October, 1997, schools would not be required to consider privately-obtained independent evaluations unless it meets the same criteria that the school uses in its own evaluations. See 62 Fed. Reg. 55097 (October 22, 1997)(proposed 34 C.F.R. §300.502(c)(1).

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<sup>7</sup>An advocate or parent who has difficulty locating the nearest P&A office can contact the National Association of Protection and Advocacy Systems (NAPAS). People in that office should be able to provide information about the location and

professionals who may also be available to individual attorneys. Some school systems maintain a list of private evaluators available to parents.

Before retaining any expert, the attorney must carefully review the expert's qualifications with the expert to ensure that the particular expert is appropriate for the task at hand. For example, if the child has been diagnosed as seriously emotionally disturbed based on the school's projective testing, the independent evaluator must have the necessary qualifications to perform projective testing; usually only a clinical psychologist is qualified to perform this kind of testing. Another important factor to consider in seeking expert assistance is whether the expert has any experience with children from the same racial and socio-economic background as the client. Finally, the attorney should determine whether the evaluator has ever testified before as an expert witness and whether the expert will be available to testify about the results, if necessary.

### III. Notice

Written notice is required a reasonable time before a school either proposes to or refuses to initiate or change the identification, evaluation, or educational placement of a student with a disability, or the provision of a free appropriate public education to the child. 20 U.S.C. §1415 (b)(3),(c),(d).<sup>8</sup> The required content of the notice depends upon the context in which it is being given. In all circumstances, the notice must include a description of the action proposed or

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phone numbers of all state and local P&A offices.

<sup>8</sup>The regulations implementing §504 also require notice with respect to actions regarding the identification, evaluation or educational placement of students who need, or may need, special education or related services. However, they do not specify whether the notice must be written, and do not contain the explicit content requirements set out in IDEA. *See* 34 C.F.R. §104.36.

refused by the school, and the basis for the school's decision; a description of any other options that the school considered, and the reasons why those options were rejected; a description of each evaluation procedure, test, record or report the school used as a basis for the decision; and a description of any other factors relevant to the school's decision. 20 U.S.C. § 1415(c). If the notice is being provided in connection with an initial referral for evaluation or a reevaluation, it must be accompanied by what the statute calls a "procedural safeguards notice"; otherwise, the notice must inform parents that they have protection under the procedural safeguards of the Act, and notify them of how they may obtain a description of the safeguards. 20 U.S.C. §§ 1415(c)(6), 1415(d). The procedural safeguards notice must also be given to parents each time they are notified of an IEP meeting, and whenever a complaint is filed. 20 U.S.C. § 1415(d)(1). The procedural safeguards notice must be written in easily understandable language and include a full description of rights regarding independent evaluations, prior written notice, parental consent, access to records, complaints and due process hearings, maintenance of placement, placement in an interim alternative educational setting, placement by parents of children in private schools at public expense, civil actions and attorneys' fees. 20 U.S.C. § 1415(d)(2). Notices must be written in language understandable to the general public and must be provided in the parent's native language. 20 U.S.C. §§1415(b)(4), 1415(d)(2).<sup>9</sup>

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<sup>9</sup>Notice requirements may prove a source of confusion for advocates and schools for the near future. While IDEA and its implementing regulations have long required prior written notice of school decisions, many of the detailed requirements discussed above were added to the statute as part of the IDEA Amendments of 1997, and took effect on June 4, 1997. Prior to that time, these issues were addressed in detail solely through regulation. The pre-existing regulation on this issue, 34 C.F.R. §300.505 (1997), however, is inconsistent with the new statute, and is no longer a good law. New regulations, proposed on October 22, 1997, are expected to be finalized in 1998.

The level of scrutiny given a notice varies among the courts. Some courts have held that any technical defect in the notice may be cured as long as the notice reasonably apprised the parents of the school's proposed action and the parents had the opportunity to actually investigate the proposed placement or program. *Smith v. Union School*, 15 F.3d 1519, 1525 (9<sup>th</sup> Cir. 1994), *cert. denied*, 115 S. Ct. 428 (1994). Other courts have held that the notice requirements must be scrupulously enforced in order to assist parents in making an informed decision and to create a clear written record of the school's program or proposed placement. *See Squillacote*, 800 F. Supp. 933 (D.D.C. 1992).

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In assessing the adequacy of the notice in an individual case, an attorney should find out from the parent what notice, if any, was actually received and when it was received.

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In assessing the adequacy of the notice in an individual case, an attorney should find out from the parents what notice, if any, was actually received. Schools may fail to provide any notice or may attempt to provide notice by telephone contact only, a means which is insufficient as a matter of law. If written notice was provided, the attorney should review the notice and compare it with the statutory requirements. Does the notice advise the parent of the parent's rights, or, when the procedural safeguards notice is not required, of the fact that the parent does have rights, and may obtain a detailed explanation of them? Does the notice describe the agency's proposed action and all of the evaluations and any other factors used to justify the proposed action in sufficient detail that the parent can make an informed decision about the school's proposal? Or is the notice merely a "cursory and essentially

meaningless standardized description?" *Mckenzie v. Smith*, 771 F.2d 1527, 1532-1533 (D.C. Cir. 1985).

#### IV. Consent and surrogate parents

Informed parental consent is required before a school conducts an initial evaluation, before a school provides special education and related services for the first time, and before a school conducts a reevaluation of the child. 20 U.S.C. §§ 1414(a)(1)(C), 1414(c)(3); 34 C.F.R. § 300.504(b)(1).<sup>10</sup> If the parent refuses to consent to the evaluation or reevaluation and the school wishes to proceed nonetheless, it may seek mediation or a due process hearing to resolve the dispute, unless state law provides otherwise. 20 U.S.C. §§ 1414(a)(1)(C)(ii), 1414(c)(3).<sup>11</sup> The consequences of a parent's refusal to consent to the initial provision of special education services are less clear. Regulations in existence prior to the IDEA Amendments of 1997 provide that under these circumstances, too, the school can resort to a due process hearing to override the parent's withhold of consent. *See* 34 C.F.R. §§ 300.504(b)(2), 300.504(3) (1997). Proposed regulations implementing the amended statute, however, delete this provision. *See* 62 Fed. Reg. 55098-55099 (October 22, 1998) (proposed new 34 C.F.R. § 300.505(b). A parent, within the meaning of the IDEA, means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent. 20 U.S.C. §1401(19); 34 C.F.R. § 300.12 (1997). A parent does not include the State if the child is a ward of the state. *Id.* A "person acting as a parent" includes persons such as grandparents or

<sup>10</sup>However, consent need not be obtained for a reevaluation if the school can demonstrate that it has taken reasonable measures to obtain consent and the parent has failed to respond. *See* 20 U.S.C. §1414(c)(3).

<sup>11</sup>For example, state law might prohibit evaluation over parental objection, or provide for some other mechanism for overriding parental wishes. *See also, Holland v. D.C.*, 71 F.3d 417 (D.C. Cir. 1995)

a step-parent with whom the child lives, as well as persons who are legally responsible for a child's welfare, including potentially foster parents. See Note to 34 C.F.R. § 300.13 (1997).<sup>12</sup> See *Inquiry by Hargen*, 16 EHLR 738 (March 19, 1990); *Criswell v. Department of Educ.*, 1986-1987 EHLR 558; 156 (M.D. Tenn. 1986).

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 In the event the child is living with someone other than a parent, the attorney should determine whether that person has legal custody of the child.  
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In the event a child is living with someone other than a parent (a grandparent or other extended relative, for example), the attorney should determine whether that person has legal custody of the child. In delinquency matters, this determination may include locating an order releasing the child to the person with whom the child is living. If the person does not have legal custody, the attorney should inquire whether the child's parent has given the person written authority to act on the parent's behalf for educational or other purposes. If there is no written authority, the attorney should explore whether the person has been accepted as the child's guardian by the school and other authorities in the past.

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<sup>12</sup>The revised IDEA regulations proposed by the U.S. Department of Education in October 1997 would permit state law to treat foster parents as "parents" for IDEA purposes if the natural parents' authority to make educational decisions for the child has been terminated, and the foster parent (1) has an "ongoing, long-term parental relationship" with the child, (2) is willing to participate in educational decision-making, and (3) has no conflict of interest. See 62 Fed. Reg. 55071 (October 22, 1997) (proposed new 34 C.F.R. §300.19.)

In the event that the identity or the whereabouts of the parent are unknown, or if the child is a ward of the state, the school system must appoint a surrogate parent to protect the rights of the child in all matters relating to the identification, evaluation, and educational placement of the student. 20 U.S.C. § 1415(b)(1)(2); 34 C.F.R. § 500.514 (1997).<sup>13</sup> The surrogate parent has the right to receive notice and the right to consent, or refuse consent, to the evaluation and placement of the child. The surrogate parent can not be an employee of a public agency responsible for the care or education of the child. 20 U.S.C. §1415 (b)(2); 34 C.F.R. §300.514(b) (1997). The surrogate parent must not have any interests which conflict with the interests of the child and must have the knowledge and skills necessary to ensure adequate representation of the child. 34 C.F.R. §300.514(c)(1997).

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 Although federal law explicitly requires that states have a surrogate parent program, not every jurisdiction actually has surrogate parents available.  
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Although federal law explicitly requires that states have a surrogate parent program, not every jurisdiction actually has surrogate parents available. Moreover, despite the law's clear prohibition, social workers employed by the agency with custody in some instances (e.g., in formulating IEPs) in some jurisdictions participate in lieu of the parents. In the event that a child has no available parent and educational advocacy would be helpful, the attorney may wish to file a due process hearing request on the child's behalf to force the school to appoint a surrogate, preferably someone the lawyer has

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<sup>13</sup>If a surrogate is to be appointed because a child is considered to be a ward of the state, and the parent's right to make education decisions has not otherwise been terminated under state law, the parent may be appointed to serve as the surrogate.

selected who meets the general criteria for surrogate parents. In addition, the failure to provide surrogate parents for committed children has been the subject of class action relief in some jurisdictions. *See e.g., Ramon H. v. Illinois State Dept. Of Educ.*, 19 IDELR 12 (N.D. Ill. 1992) In situations where the child is committed to the state and is placed in a distant residential facility, the attorney may wish to locate a surrogate parent for the child in the jurisdiction in which the residential facility is located. The surrogate parent can serve as an important source of information about the child, independent of the information the facility provides.

### V. The “Stay Put” provision

In the event that the parent disputes the school’s proposed placement or program, the child “shall remain in the then current educational placement of such child,” unless the State or local educational agency and the parents otherwise agree. 20 U.S.C. §1415(j); 34 C.F.R. §300.513 (1997). This provision protects the child from interruptions in his or her education while parents pursue their due process rights. *Joshua B. v. New Trier Township*, 770 F.Supp. 431 (N.D. Ill. 1991). The “stay put” rule applies through the due process hearing stage and any judicial appeals.<sup>14</sup> Thus, the provision has been aptly characterized as an “automatic injunction” to prevent a change in placement over a parent’s objection. *Honig v. Doe*, 484 U.S. 305, 326 (1988) (quoting *Doe v. Maher*, 793 F.2d 1470 (9<sup>th</sup> Cir. 1986)).

Advocates must address two essential questions when invoking the “stay put” provision. First,

what is the child’s “current educational placement?” Second, what constitutes a change in placement sufficient to trigger the “stay put” provision? For most purposes, the child’s “current educational placement” will simply be the last uncontested school the child attended or the last school placement ordered by a hearing officer. *Zvi D. v. Ambach*, 694 F.2d 904 (2<sup>nd</sup> Cir. 1982). Somewhat more complex issues are presented where the placement is arguably not a school setting. *In M.R. v. Milwaukee Public Sch.*, 495 F. Supp. 864 (E.D. Wis. 1980), the school argued that day treatment centers for students with mental retardation were not “educational placements” because the students were placed and funded at these facilities by the local Department of Human Services, rather than the school system. The Court disagreed, holding that the treatment centers were educational placements within the meaning of the “stay put” provision because the state educational agency is responsible for all educational placements of students with disabilities, regardless of which agency delivers the services. *Accord McClain v. Smith*, 793 F.Supp. 756 (E.D. Tenn. 1989).

With regard to private school placements by parents, if a hearing officer concludes that the parent’s placement is appropriate and the school’s program is inappropriate, the school must pay for the private placement through the appeals process. *Clovis v. California Office of Admin. Hearings*, 903 F.2d 635 (9<sup>th</sup> Cir. 1990)(school district responsible for cost of private hospitalization as directed by Hearing Officer and District Court although Circuit Court ultimately concluded that the hospital was not the child’s educational placement). Of course, a parent can not simply place a child in a private school and then insist on public funding, absent a hearing officer’s determination that the school should be liable, and absent the school’s agreement. *Joshua v. New Trier Township*, 770 F.Supp. 431 (N.D. Ill. 1991). In some jurisdictions, even a temporary private placement may be considered the child’s “current educational placement” where the school failed to propose a public placement in a timely manner as required

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<sup>14</sup>The D.C. Circuit Court of Appeals has held that “stay-put” applies only through the district court level. *See Andersen v. District of Columbia*, 877 F.2d 1019 (D.C. Cir. 1989). The Sixth Circuit recently held the same, without analysis, in an officially unreported per curiam opinion. *See Kari H. v. Franklin Special School District*, 26 IDELR 569 (6<sup>th</sup> Cir. 1997).

by law. *Board of Ed. of City of N.Y. v. Ambach*, 612 F.Supp. 203 (E.D.N.Y. 1985).

Regardless of whether private or public placement is at issue, the stay-put provision entitles parents who prevail at the due process hearing level to have the favorable placement decision implement-ed even if the school system appeals. The favorable decision is considered an agreement between parents and the “State or local educa-tional agency” within the meaning of the stay-put provision, entitling the parents to immediate implementation. *See School Committee of Twon of Burlington v. Dept. of Educ.*, 471 U.S. 359, 105 S. Ct. 1996, 2003-03 (1985); *Clovis, supra*, 903 F.2d at 641.<sup>15</sup>

In determining what constitutes a change in placement, advocates should be cautioned that not every change in an educational placement triggers the “stay put” provision. *Concerned Parents v. New York City Bd. of Educ.*, 629 F.2d 751 (2<sup>nd</sup> Cir. 1980)(transfer of special education classes at one school to substantially similar classes at other schools in same district did not trigger “stay put” rule). Rather, only those changes that effect a fundamental change in the student’s basic educational program allow invocation of the “stay put” provision. *Id.*; *see also Lunceford v. District of Columbia*, 745 F.2d 1577, 1582 (D.C. Cir. 1984)(“stay put” is triggered by a “fundamental change in, or elimination of a basic element of the educational program . . .”) In this regard, advocates should not that the termination of all educational services by graduation is generally considered to be a change of placement which triggers “stay put.” *See Mrs. C. v. Wheaton*, 916 F.2d 69 (2<sup>nd</sup> Cir. 1990). Advocates should also note that if remaining in the current placement would harm the child and the parent can meet the traditional criteria for injunctive relief, the parent may

obtain an order changing the child’s placement despite the stay-put provision. *Cf. Komminos v. Upper Saddle River Board of Education*, 13 F.3d 775 (3<sup>rd</sup> Cir. 1994).

Perhaps the most significant aspect of the “stay put” rule for advocates representing children involved in the delinquency system is its operation in the context of student discipline. For a full discussion of this issue, including the implications of the IDEA Amendments of 1997, *see* Chapter. 4.

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<sup>15</sup>*See also Grace B. v. Lexington School Committee*, 762 F.Supp. 416 (D.Mass. 1991); *Blazejewski v. Board of Education of Allegheny Central School District*, 560 F.Supp. 701 (W.D.N.Y. 1983).



# Chapter

# Twelve

The Special Education Process: Due Process Hearing

A parent is entitled to a due process hearing to challenge the school system's actions at each stage of the education process

Written by

Mary G. Hynes

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Without question, the linchpin of special education practice is the due process hearing. Uniformly, practitioners have experienced that, for all but the most trivial of disputes, matters are usually best resolved either through a due process hearing or through negotiations surrounding a due process hearing. One does not accomplish the client's objectives simply by attending individualized education program (IEP) meetings and writing letters to the school system. A due process hearing is often necessary. This section will cover basic due process hearing rights and procedures and will offer some practical guidance on preparing for, conducting, and following up after, a due process hearing.

First, however, it is important to note 1997 amendments to the Individuals with Disabilities Act (IDEA) intended to encourage mediation of special education disputes. States or local school districts must make mediation available to resolve all disputes regarding evaluation, placement or the provision of a free appropriate public education to a child with disabilities. 20 U.S.C. §1415(e)(1). Mediation cannot be used to deny or delay a parent's right to a due process hearing, and must be voluntary on the part of the parties. 20 U.S.C. §1415(e)(2)(A). However, a local school system or state agency can, at its option, require parents who choose not to mediate to attend a meeting with a "disinterested party," whose role it is "to encourage the use, and explain the benefits, of the mediation process to parents." 20 U.S.C. §1415(e)(2)(B). Advocates should check state and local rules and practice to see if this requirement has been adopted, and, if so, to familiarize themselves with the procedures in their jurisdiction.<sup>1</sup>

### I. Hearing rights and procedures

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<sup>1</sup>State or local mediation procedures must meet minimum requirements set out in IDEA regarding the qualifications of mediators, written mediation agreements, confidentiality, and other matters. *See generally* 20 U.S.C. §1415(e)(2).

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 Rather than requesting a series of piecemeal hearings, however, a better strategy is often to let the process play itself out and then raise all the issues in a single hearing.  
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The parent is entitled to a due process hearing before an impartial hearing officer for any challenge to the identification, evaluation, or educational placement of the child, or the provision of free, appropriate public education (FAPE) to the child. 20 U.S.C. §1415(b)(6), (f); 34 C.F.R. §300.506(a)(1997).<sup>2</sup> In other words, the parent is entitled to a hearing to challenge the school system's actions at each stage of the process. Rather than requesting a series of piecemeal hearings, however, a better strategy is often to let the process play itself out and then raise all the issues in a single hearing. As discussed previously, federal law seems to confer the right to a due process hearing primarily on parents, guardians, or surrogate parents, rather than on the child. 20 U.S.C. §1415(f). Thus, counsel for a child who fails to secure the parent's cooperation in the educational case may be left without a client with standing at the due process hearing.

Parents have the following hearing rights:

- the right to be accompanied and advised by counsel and by individuals with special knowledge and training with respect to the problems of children with disabilities;
- the right to present evidence, and to confront, cross-examine, and compel the attendance of witnesses;

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<sup>2</sup>The regulations implementing §504 of the Rehabilitation Act similarly entitle parents to an impartial hearing to challenge actions regarding the identification, evaluation or educational placement of their children. 34 C.F.R. §104.36.

- the right to prohibit the introduction of any evidence that has not been disclosed at least five working days before the hearing;
- the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and
- the right to a written, or, at the option of the parents, electronic findings of fact and decision within forty-five days after the school receives the hearing request. 20 U.S.C. §1415(h); 34 C.F.R. §§ 300.508(a) and 300.512(a)(1997).<sup>3</sup>

Parents also have the right to have the hearing open to the public and to have the child who is the subject of the hearing attend the hearing. 34 C.F.R. §300.508(b)(1997). The hearing must be scheduled at a time and place reasonably convenient to the parents and child. 34 C.F.R. § 300.512(d)(1997).

The allocation of the burden of proof at due process hearings varies among jurisdictions as do local rules regarding which party has the burden of going forward. Some jurisdictions allocate the burden of production to the parent and the burden of persuasion to the school. Some jurisdictions assign both the burdens of production and persuasion to the school, and some assign both burdens to the parent. Some jurisdictions assign the burden to the party challenging the status quo. See Huefner and Zirkel, *Burden of Proof Under the Individuals with Disabilities Act* (1993). Allocation of burden of proof may also vary depending upon the particular issue being litigated. See 34 C.F.R. §104.34(a) (school has burden of demonstrating that exclusion from regular education classroom is permissible); *Oberti v. Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1219 (3<sup>rd</sup> Cir. 1993) (holding same

under IDEA). Given the diversity of possibilities, counsel should consult local regulations and case law to determine which party bears the burden of proof in the specific jurisdiction, and on the specific issue.

Similarly, the rules on witnesses and evidence vary among jurisdictions. Federal regulations require that an independent evaluation obtained by a parent “must be considered” by the school and “may be presented as evidence” in a due process hearing. 34 C.F.R. §300.503(c)(1997). Other than this requirement, states may adopt their own rules on evidence for due process hearings. Strictly competent evidence is generally not required, provided that both parties have the opportunity to cross-examine witnesses. In this regard, some hearing officers permit expert witnesses to testify by telephone – often a significant selling point to busy, reluctant expert witnesses. Despite the differences among jurisdictions, several basic rules for hearing preparation and conducting hearings apply.

## II. Hearing preparation

Although lawyers are often intimidated by special education proceedings, in fact, due process hearing preparation and due process hearings involve the same skills as a judicial proceeding. Legal analysis of the issues, development of exhibits, and witness preparation are all implicated by special education proceedings. Thus, regarding the special education hearing, the following remarks simply provide some guidance for lawyers and encouragement to apply the skills they have already developed.

### A. Identifying the legal issues

After thoroughly investigating the case, counsel must review all the documents and all counsel’s notes from conversations with persons involved with the child, and then, with the federal regulations in hand, counsel must determine what

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<sup>3</sup>Note that these regulations, in effect prior to the IDEA Amendments of 1997, do not reflect the new statutory requirement that parents be provided a written verbatim record (transcript) unless they choose to receive an electronic one (customarily in most jurisdictions, cassette tapes).

issues are present.<sup>4</sup> For the purpose of developing a clear presentation, counsel may wish to divide the issues by category. An outline is generally a helpful tool at this stage of the analysis. Oftentimes, cases present issues that cut across the entire spectrum of special education, involving matters related to an inappropriate or untimely identification of the student; an in-appropriate IEP; and an inappropriate resulting placement. For each issue, counsel should be able to rely on particular documents and testimony and be able to cite the relevant legal authority. Additionally, each issue should be tied to a claim for specific relief. This outline should be used as a guide in gathering documents and determining what testimony will be necessary at the hearing.

### **B. Filing a complaint and requesting a hearing**

The right to an IDEA due process hearing is triggered by the filing of a complaint. 20 U.S.C. §1415(f). Until recently, requirements, if any, regarding the content of complaints were left exclusively to state law (providing that they did not burden the IDEA right to a hearing). Nineteen ninety-seven amendments to the statute provide federal requirements for the first time. In addition to the child's name, address and school, the complaint must include a description of the "nature of the problem" underlying the complaint, including "facts relating to such problem," and "a proposed resolution of the problem to the extent known and available to the parents at the time." 20 U.S.C. §1415(b)(7).

### **C. Preparing documents**

The process of gathering and developing documents continues throughout the case. As discussed elsewhere in this manual, counsel must obtain and analyze all the records on the student from the school system. Counsel may also

obtain the child's medical records, as well as outside reports and evaluations concerning the child. A description of the various records which counsel should explore obtaining is included in Chapter 7. A discussion of the documents necessary to secure certain types of relief is provided in Chapter 7.

The school records should be maintained in chronological order and counsel should be familiar with the significance of each document. Using the documents to develop a chronology can be an extremely useful device both for organizing voluminous documents and identifying violations of the child's rights. Likewise, a chart comparing the child's progress on each year's IEP can also be a useful tool for demonstrating a lack of progress, or even a decline in progress (*see* Chapter 7). Ultimately these kinds of visual aids and summaries (assuming they are based on documentation or testimony) may be admitted as part of the documentation for the due process hearing.

In addition to records, throughout the case counsel must document each contact with the school system by contemporaneous correspondence. For example, if the school system refuses to permit the parent to participate meaningfully in the development of the IEP, counsel should immediately write a letter describing the violation of the client's rights and insist that the matter be rectified. Similarly, if the school is failing to provide the services required by the child's IEP, that fact should be communicated to the school immediately. The purpose of this kind of ongoing correspondence is two-fold: first, it serves as evidence that the school has failed the child; and second, it serves as evidence that the school system was aware of the problem but did nothing about it.<sup>5</sup>

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<sup>4</sup>State and local regulations give rise to additional issues. Case law, of course, is another source of identifying issues.

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<sup>5</sup>Counsel should cite 20 U.S.C. §1415(b)(3) and 34 C.F.R. §300.504 (1997) whenever appropriate and, based on that provision, require school system personnel to explain in writing actions (or inactions) proposed or taken by the school personnel.

Ideally, several weeks before the hearing, counsel should be deciding what documents will be necessary for the hearing. All documents, with a list of all potential witnesses, must be submitted to opposing counsel **FIVE WORK DAYS BEFORE THE SCHEDULED HEARING DATE**. Failure to meet this deadline is generally fatal to the case. Counsel must also comply with the new statutory requirement, added in 1997, that at least five business days prior to the hearing, that each party disclose all evaluations completed by that date and any recommendations based upon those evaluations that the party intends to use at the hearing. 20 U.S.C. §1415(f)(2)(A). If such disclosure is not made, the hearing officer may bar introduction of the relevant evaluation or recommendation without the consent of the other party. 20 U.S.C. § 1415 (f)(2)(B).

The outline of the case will help determine what documents to produce. For example, if one issue is the school's failure to evaluate the student in all areas of suspected disability pursuant to 20 U.S.C. §1414(b)(3)(C) and 34 C.F.R. §300.532 (f)(1997), then the school's evaluations and related documents, including correspondence and referrals from outside providers requesting additional testing, should be produced. Never simply disclose every document in the file. Such a practice merely obscures the issues for the hearing officer and may serve to alert opposing counsel to information which is helpful to the school's case. Each document produced with the five-day letter must be relevant to the issues at hand, although it is a good cautionary practice to state in the letter that the parent reserves the right to rely on any witnesses disclosed by the school. Thus, counsel must complete a list of documents which are relevant to establishing either the violations of the client's rights or the clients' entitlement to the relief requested.

#### **D. Preparing witnesses**

Each special education case may require relying on the testimony of several kinds of witnesses: lay witnesses, school system witnesses, and out-

side experts. Although due process hearings are less formal than judicial proceedings, the same general rules of witness preparation apply. Counsel must discuss each witness' testimony with that witness and must prepare the witness for any potential cross-examination. It is not sufficient to simply provide the witness with a list of questions counsel intends to ask. Counsel and the witness must work together to develop testimony that will be accurate, complete, and helpful in achieving the objectives of the case.

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 As in a child custody case, a genuine display of emotion by the parent in a special education proceeding is both appropriate and helpful.  
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In developing testimony with the parent or the child, counsel should be sensitive to the emotional issues involved. Parents often feel angry that the school system has failed their child and has ignored their requests for help. Recounting the school's failures in the context of a hearing may make the parents angry all over again. Further, parents sometimes have difficulty describing limits a child's disability imposes on the child's ability to learn and otherwise participate in school activities. As in a child custody case, a genuine display of emotion by the parent in a special education proceeding is both appropriate and helpful. Also as in a child custody case, however, overly-broad accusations and vilification by the parent are, ultimately, self-defeating in that the parent's own credibility is likely to be undercut.

Whether the child should testify depends on the circumstances of each case, and also on the child's wishes. Teenagers often have a great deal to contribute by their testimony and may feel a sense of vindication and empowerment through the hearing process. On the other hand, some

students prefer to avoid the hearing process. In any event, the presence of the student (appropriately dressed for the occasion) can go a long way toward dispelling the school's characterization of the child as dangerous or indifferent to school.

In each case, counsel must decide whether to compel the attendance of school system employees to testify on behalf of the parent. There are a variety of reasons for exercising this option. First, some school system employees are willing to "blow the whistle," at least in some cases, on the school itself. For example, a teacher may be prepared to testify that the student has been unable to make progress in the program provided by the school. A principal may be prepared to testify that there is, in fact, no room in the program the school is proposing. Second, simply securing the presence of certain school system employees at a hearing may generate results for the client. At times, only a face-to-face order from a hearing officer to a principal will prevent future misconduct by the school administration toward the student.

Along with developing testimony for the direct case, counsel should also prepare a draft of cross examination questions for school system witnesses. The names of these witnesses will be disclosed in the five-day letter produced by the school system, but generally, counsel will already be familiar with the likely identities and probable nature of the testimony of the school's witnesses based on counsel's previous work in the case. Again, the general rules of witness preparation apply. Regarding any unfamiliar person on the opponent's list, counsel must immediately investigate that person's relationship to the case.

### III. Conducting a hearing

Due process hearings are less formal than, but otherwise are not very different from non-jury judicial proceedings. The hearing opens with some formal remarks by the Hearing Officer pursuant to the statute and the opportunity to

have the parent's due process rights read to the parent. Each party then has the opportunity to present an opening statement, followed by the admission of documents, eliciting testimony on direct examination, followed by cross-examination, and, finally, a closing statement. Counsel should remember that in some states the burden of going forward and the burden of proof do not fall on the same party, or on the party one might assume.

As with any opening statement, an opening statement in a special education proceeding describes what the evidence will show. Typically, the hearing officer will want to hear also what result the client is seeking and the legal basis for the client's claim. Counsel should make reference in the opening statement to specific documents as they relate to either the legal violations or the relief requested in the opening statement. Indeed, if the documents clearly demonstrate that the school system has failed to adhere to the IDEA's procedural requirements, the parent may essentially move for summary judgment against the school as a preliminary matter, arguing under the *Rowley* decision that the school system can not establish that its program is substantively appropriate because it has failed to comply with procedural requirements.

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The parent's case will generally consist of the admission of the parent's documents, and the parent's and child's testimony, any expert testimony, and the testimony of any helpful school system witnesses.  
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The parent's case will generally consist of the admission of the parent's documents, and the parent's and child's testimony, any expert testimony, and the testimony of any helpful

school system witnesses. The order of witnesses varies among cases, but a common order is: (1) an independent expert witness or a friendly school system witness – to describe the child’s current functioning and needs, the child’s failure to make progress in the current program, the requisites of an appropriate program, and that the parent’s proposed program or service will meet the needs of the child; (2) parent – to get the hearing officer’s sympathies and describe the child’s difficulties in school, the child’s special needs, the school’s repeated failure to meet those needs, and the basis for the parent’s request for relief; (3) the proposed service provider – to describe the service or placement available for the child. (A further discussion of expert testimony in special education proceedings is provided in Chapter 7.)

The school’s case also consists of the admission of documents and testimony, often by the school professionals who evaluated the child, the administrators who made the placement decision, and the principal and teacher in the current educational placement. Ordinarily, counsel for the parent should ignore the temptation to seek to establish that the school’s witnesses are incompetent or indifferent. A better course is to elicit testimony regarding the school professionals’ lack of familiarity with the child and the school’s failure to provide the services required by the IEP, or, to the extent that services were provided, the child’s failure to make progress in the school’s program despite the provision of services.

Finally, as with any closing statement, the closing in a special education case should be in the form of an argument, drawing on the law and the evidence adduced at the hearing to support the parent’s claim for relief. Again, counsel should draw the hearing officer’s attention to specific documents and specific testimony. Closing arguments are also a time when the hearing officer may request clarification from both counsel in order to narrow the issues which need to be decided. At times, the school system will simply concede certain points to the parent.

Rarely should counsel for the parent concede any issue to the school. At the conclusion of both parties’ final statements, the hearing officer may either close the record or leave it open until a specified date for the receipt of written briefs and/or proposed findings of fact and rulings of law. A post-hearing brief and/or proposed findings and rulings can be important tools for focusing the hearing officer’s attention on the critical issues, organizing and explaining the legal significance of the evidence presented at the hearing, responding to the school’s case, and addressing any complex, or obfuscated, legal issues that may have arisen. Counsel’s request to submit a post-hearing brief and/or proposed findings and rulings generally should be granted. Parents are entitled to a written determination within forty-five days of making the hearing request. 34 C.F.R. §300.512(a) (1997). Local rules may also provide that the hearing officer must issue a written determination within a prescribed time, such as ten days, after the hearing so that the hearing and any post-hearing written submissions must be scheduled to give the hearing officer sufficient time under the local rules to issue a decision within the outside time limit of forty-five days set by the federal rules. The hearing officer may extend this deadline at the request of either party. 34 C.F.R. §300.512(c) (1997).

#### **IV. Follow-up**

the end of the hearing does not mean the lawyer’s obligations are over. If the decision is favorable, counsel must ensure that the decision is implemented. If the decision is not favorable, counsel and the client must assess whether to pursue an appeal. In either case, important tasks, perhaps the most important tasks, are not finished yet.

Favorable decisions, while always desirable, are not self-executing. This simple fact often comes as a dismal surprise to both lawyers and clients. The lawyer should provide the decision to affected parties and other persons and ensure

that the decision is actually implemented.<sup>6</sup>

For example, if the hearing officer orders the school to place the child at the educational placement suggested by the parent, the lawyer must make sure that transportation to the new placement, if necessary, is made available. If the hearing officer directs that an additional service be provided in the current educational setting, counsel must ensure that the service provider is notified of the decision and actually begins to provide the services.

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 Not surprisingly, school systems do not always abide by the hearing officer's order, even when repeatedly pressed to do so by counsel.  
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Not surprisingly, school systems do not always abide by the hearing officer's order, even when repeatedly pressed to do so by counsel. In such cases, counsel may wish to seek enforcement of the hearing officer's order in a judicial proceeding, usually, but not necessarily, in federal court. These types of enforcement actions are most appropriately brought pursuant to Section 1983 of the Civil Rights Act, in addition to the IDEA (and Section 504 of the Rehabilitation Act, if applicable). The rationale for invoking the Civil Rights Act is that, because the hearing determination is favorable, the parent is not "aggrieved" by the decision of the hearing officer, and thus the matter is not in the nature of an appeal. 20 U.S.C. §1415(i)(2); *Robinson v. Pinderhughes*, 810 F.2d 1270 (4<sup>th</sup> Cir. 1987). The school's refusal to obey the final determination of a hearing officer violates the parent's and the

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<sup>6</sup>Similarly, the attorney for (or representative) the school system should take all steps necessary to ensure implementation of the hearing officer's decision. Counsel for the parent, ever hopeful, might trust that the other side will implement, but – in this context – "Trust, but verify" is a good rule.

child's civil rights.<sup>7</sup>

In the event of an unfavorable decision, the parent is, by definition, aggrieved, and counsel may pursue an appeal. 20 U.S.C. §1415(i). Whether the appeal in the first instance is to a court or to a higher administrative body within the state's department of education depends upon state law. The IDEA gives states the option of operating either a one- or two-tiered administrative hearing system. *See* 20 U.S.C. § 1415(f), (g),(i). In a two-tiered system, appeal from the due process hearing decision is through an impartial administrative review arranged by the state department of education, 20 U.S.C. §1415 (g), and, ultimately, to either federal district court or a state court of competent jurisdiction. *See* 20 U.S.C. § 1415(i)(2).<sup>8</sup> Aggrieved parties in a one-tiered system may proceed directly to court. *Id.* The court "shall receive the records of the administrative proceedings" and "shall hear additional evidence at the request of a party, and, basing its decision on a preponderance of the evidence, shall grant such relief as the court determines is appropriate." *Id.* While not quite a "de novo" review, the review in the IDEA proceedings is broader in scope than the "abuse of discretion" standard in most administrative appeals. *See e.g., Kerkam v. McKenzie*, 862 F.2d 884 (D.C. Cir. 1988); *Block v. D.C.*, 748 F.Supp. 891 (D.D.C. 1990). Counsel should consult local case law to determine how local courts have treated appeals pursuant to the IDEA.

In either an enforcement action or an appeal, counsel is likely to be seeking injunctive relief. In most cases, the traditional four-part test for preliminary injunctive relief applies. Counsel should consult local case law to determine whether courts have treated the denial of FAPE

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<sup>7</sup>As previously discussed, parents are entitled to immediate implementation of a favorable hearing decision even if the school system appeals.

<sup>8</sup>Juvenile courts generally are not state courts of competent jurisdiction for purposes of hearing IDEA disputes or appeals.



as, in itself, irreparable harm. *See Cox v. Brown*, 498 F.Supp. 823, 829 (D.D.C. 1980) (“absent injunctive relief, [the children] will suffer the irreparable harm of lacking each day of their young lives an appropriate education, one that is sensitive to their particular disabilities, commensurate to their levels of understand, and fulfilling their immediate needs”). In this regard, counsel should remember that the parent is entitled to an automatic injunction under the “stay put” provision if the school is seeking to change the child’s placement. *Honig v. Doe*, 484 U.S. 305, 326 (1988).

This chapter has simply touched on the bare fundamentals of due process hearings. While lawyers are often intimidated by the prospect of litigating in a different forum in a specialized area of law, the principles of all good advocacy remain the same.

# Chapter

# Thirteen

The Special Education Process: Remedies

The principal private remedies are as follows:  
the provision of related services by private providers;  
private school placement;  
compensatory education;  
damages and attorneys' fees

Written by

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In a sense, this entire manual is about remedies available from the local public school system for students with disabilities. The right to a free, appropriate public education (FAPE), inclusive of the rights to be identified and evaluated by the school, to have an educational program designed by the school to meet one's unique needs, and to have an educational placement capable of implementing one's individual program, are all, in themselves, remedies. This chapter, however, is principally about private remedies in those cases where the school fails to provide an appropriate public education. The principal private remedies are as follows: the provision of related services by private providers; private school placement; compensatory education; and attorneys' fees.

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As a practical matter, attorneys representing children with disabilities should ensure that the child receives all the services which the student needs, regardless of whether the school has the public resources available or not.

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### I. Some general strategic considerations

As a practical matter, attorneys representing children with disabilities should ensure that the child receives all the services which the student needs, regardless of whether the school has the public resources available or not. While seeking out private providers can be time consuming and requires creativity, counsel should not be content with accepting the limitations imposed by the school system's resources. A successful argument that the school has failed to provide FAPE and a successful demand that the school be required to provide FAPE in the future may be in-sufficient to protect the client's interest. Unlike other areas of the law, special education

practice requires that counsel not only hold the school system accountable to the legal standard, but also that counsel develop remedies independent of the school in order to meet the needs of clients.<sup>1</sup>

While "it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school," as a practical matter, a great deal of the case law involves the school's obligations to reimburse the parents for costs the parents have already incurred as a result of the school's failure to provide FAPE. *See, e.g., School Comm. of the Town of Burlington, Massachusetts v. Department of Educ. of the Commonwealth of Massachusetts*, 471 U.S. 359, 370 (1985). Most clients involved in the delinquency system, however, do not have sufficient cash on hand to pay for private services up front. As a result, counsel seeking payment for private services will ordinarily need to pursue one of two strategies. The first, and most preferable strategy, is to make a contingency arrangement with the private provider to provide services immediately in exchange for counsel's agreement to seek reimbursement for the providers' expenses at a due process hearing. This strategy is preferable because it prevents delay in the provision of services, it gives the service provider amply time before the hearing to develop familiarity with the child, thereby improving the service provider's testimony; and once services have been initiated, hearing officers are loathe to disrupt services which are benefitting the child. Many private providers, however, are leery of the financial risks associated with a contingency agreement. This hesitancy may be more

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<sup>1</sup>This discussion concerning counsel's seeking private resources, including placement for children in private schools, is not an endorsement of the proposition that a private service or private school is the only remedy or even the best remedy in every case in which the public school system fails to provide FAPE. Each case is different. Each client has different needs and makes unique choices.

pronounced if the child has a history of failing or refusing to participate in service delivery.

The other alternative is to seek in a due process hearing an order against the school for future payment of private services. This strategy has the advantage of being a fairly low-risk proposition for the service provider, who merely has to testify at the hearing about the services they provide, generally, and the services they would provide to the child, specifically, if the school system were ordered to pay for the services. As a result, private providers who refuse to accept the risk inherent in a contingency arrangement may nonetheless agree to participate in a hearing for prospective relief. The difficulties with this strategy are that it delays services to the child, it gives the school system more time to develop a program of its own which, if inappropriate, counsel must defeat at the hearing; absent direct experience with the child, the private service provider is not very knowledgeable about the unique needs of the child.

Attorneys should consider the private resources available in the local jurisdiction. Is there a hospital or a university or other professional group that could be a source of information on private providers of related services? Is there a listing of private, special education schools available? What summer programs or individual tutoring services exist in the area? While generating information on these kinds of resources may be labor intensive, the result will be that children will have more options open to them and will not be constrained by the lack of resources in the public school system.

## II. Private related services

Related services are incorporated into an individualized educational program's (IEP) as supplementary services to enable the child to benefit from special education. 34 C.F.R. § 300.16 (1997). For example, a child who is seriously emotionally disturbed may not be able to learn without psychological counseling. Thus, the IEP may require that the child receive psych-

ological counseling to address the child's emotional needs in addition to special education services for the child's academic deficiencies. Due to the chronic lack of resources in schools, however, the school may fail to provide the child with the counseling required by the IEP. In such cases, the parent may seek to have these services provided by private providers at the school's expense.

Courts have ordered that public schools pay for many kinds of privately provided, related services where the school has failed to provide the necessary services itself. One frequently required related service is counseling. In *Max M. v. Illinois State Bd. of Ed.*, 629 F.Supp. 1504 (N.D. Ill. 1986), the Court ordered that the school pay for the child's private psychotherapy, subject to some cost limitations, where the school failed to provide him with counseling as required by the student's IEP. Similarly, in *Vander Malle v. Ambach*, 667 F.Supp. 1015 (S.D.N.Y. 1987), the Court required that the school reimburse the parent for psychotherapy and other services the child received with in a hospital setting.

Another common related service is transportation to and from the educational program. Courts have often directed that schools pay the bill for private transportation services where the school has failed to provide the child with transportation itself. See *Northeast Cent. Sch. Dist. v. Sobol*, 584 N.Y.S.2d 525 (N.Y. 992) (affirming order directing school to reimburse parents for cost of transportation as a necessary related service). In addition to ordering payment for transportation, courts have ordered that schools pay the cost of a parent's lodging that is associated with the child's placement. In *Union School v. Smith*, 15 F.3d 1519 (9<sup>th</sup> Cir. 1994), *cert. denied*, 513 U.S. 965 (1994), the Court held that the term "related services" included the cost of transportation and lodging for both the parent and the child near the special education day school where the school was not within daily commuting distance from the parent's home. Similarly, in *Ojai Sch. Dist. v. Jackson*, 4 F.3d 1467 (9<sup>th</sup> Cir. 1993), *cert. denied*, 115 S. Ct. 90

(1993), the Court ordered that the school pay “caretaker” fees to the grandparents of a deaf, blind and developmentally disabled student where the grandparents resided within daily commuting distance to the only appropriate facility for the child.

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In addition to counseling and transportation, related services may include a variety of therapies, such as physical therapy, occupational therapy, and speech/language therapy.

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In addition to counseling and transportation, related services may include a variety of therapies, such as physical therapy, occupational therapy, and speech/language therapy. Again, if these services are necessary for the child to benefit from special education and the school fails to provide the services, parents may seek an order directing that these services be provided privately at public expense. *See Rapid City Sch. Dist. v. Vahle*, 733 F.Supp. 1364 (D.S.D. 1990), *aff’d*, 922 F.2d 476 (directing school to reimburse parents costs of private occupational therapy); *accord Das v. McHenry Sch. Dist.*, 20 IDELR 979 (N.D.Ill. 1994) (requiring school to reimburse parents for privately-provided additional occupational therapy services where hearing officer concluded that the amount of occupational therapy provided by school was insufficient to meet child’s needs). *See also, Johnson v. Lancaster-Lebanon Intermediate Unit*, 757 F. Supp. 606 (E.D. Pa. 1991) (ordering reimbursement for private speech therapy where hearing officer found that child needed three times as much speech therapy as the school was actually providing).

Tutoring services are not generally considered “related services” because tutoring is academic instruction itself; nevertheless, courts have ordered that parents be reimbursed for special

education tutoring services, as a substitute for special education, where the school has failed to provide FAPE. Thus, in *W.G. v. Target Range Sch. Dist.*, 960 F.2d 1479 (9<sup>th</sup> Cir. 1992), the Court ordered that the parents be reimbursed for the cost of private tutorial services where the school failed to develop an appropriate IEP for the student. The Court agreed with the parent that the school had failed to provide the child with any special education services and that reimbursement for privately-obtained special education tutoring was an appropriate remedy because, under the circumstances, the parents were entitled to seek a special education placement. Of course, the child must actually be eligible for special education in order for a court to conclude that reimbursement for private tutoring services provided during the period the school failed to provide FAPE is an appropriate remedy. *Hiller v. Bd. of Ed. of Brunswick*, 743 F.Supp. 958 (N.D.N.Y. 1990) (parents not entitled to reimbursement for private tutorial services where child not eligible for special education.)

### III. Private placement

#### A. Legal entitlement to private placement

The single most sought after, and most often contested, remedy is private school placement. In short, the public school system may be liable for private school tuition for an appropriate private facility when it fails to propose an appropriate public special education placement. In *Burlington v. Mass. Dept. of Ed.*, 471 U.S. 359 (1985), the Supreme Court held that the IDEA confers the power to order school authorities to reimburse parents for their expenditures on private special education if the public placement offered by the school system is inappropriate. The Court expressly rejected the education department’s argument that tuition reimbursement was the equivalent of monetary damages, holding instead that reimbursement was a form of injunctive relief because it “merely requires the Town to belatedly pay expenses it should have paid all along and would have borne in the first instance had it developed

a proper IEP.” *Id.* at 370-71. *See, also, Union School v. Smith*, 15 F.3d 1519 (9<sup>th</sup> Cir. 1994), *cert. denied*, 513 U.S. 965 (1994); *Northeast Central Sch. Dist. v. Sobol*, 584 N.Y.S.2d 525 (N.Y. 1992); *Max M. v. Illinois Bd. of Ed.*, 629 F.Supp. 1504 (N.D. Ill. 1986) (giving Burlington retroactive application).

After *Burlington*, there was considerable conflict among the Circuits regarding whether parents could obtain reimbursement for private school placements where the private school had not been approved by the state as a special education facility. However, the Supreme Court resolved this issue in 1993 in its decision in *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993). In *Carter*, the Supreme Court held that tuition reimbursement for a unilateral placement by parents in a private school is an appropriate remedy where the public school fails to provide an appropriate public placement, even where the private school selected by the parents was not on the state’s list of approved private schools. Specifically, the Court explicitly rejected the school system’s argument that parental placements must meet the state education standards. Instead, the issue is whether the program offered by the school selected by the parents offers an appropriate education for the child as determined on a case-by-case basis before a hearing officer or a court. *Id.* at 366.

Reimbursement for private placement first emerged through case law, as a judicially created remedy; *Burlington* held that IDEA language authorizing courts to award “appropriate” relief<sup>2</sup> endowed them with broad equitable powers to fashion remedies, including tuition reimbursement.<sup>3</sup> The IDEA Amendments

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<sup>2</sup>See 20 U.S.C. §1415(i)(2)(B)(iii), formerly codified at 20 U.S.C. §1415(e)(2).

<sup>3</sup>In the years following *Burlington*, it generally was agreed that due process hearing officers have this authority as well. The 1997 amendments to IDEA explicitly provide for reimbursement awards by hearing officers. See

of 1997 brought tuition reimbursement into the statute itself for the first time. The statute now imposes a number of procedural requirements that parents must follow before removing their child from the public school. See 20 U.S.C. §1415(a)(10)(C) (iii), (iv).<sup>4</sup> Failure to do so may result in a reduction or denial of reimbursement. *Id.*<sup>5</sup>

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U.S.C. §1412(a)(10)(C)(ii).

<sup>4</sup>These include rejecting the school’s proposed placement at the most recent IEP meeting prior to the removal, including stating their concerns and their intent to enroll the child in a private school at public expense, OR giving written notice containing all of this information 10 business days prior to re-moving the child from the public school, and cooperating with a school’s request to evaluate the child if made prior to the removal from the public school. 20 U.S.C. §1412(a)(10)(C)(iii). Reimbursement may also be reduced or denied upon a judicial finding of unreasonableness with respect to actions taken by the parents. 20 U.S.C. §1412(a)(10)(C)(iii)(III). Reimbursement cannot be reduced or denied for failure to give the required notice if the “parent is illiterate and cannot write in English; . . . compliance [with the notice requirement] would likely result in physical or serious emotional harm to the child; . . . the school prevented the parent from providing such notice; or the parents had not received notice, pursuant to 20 U.S.C. §1415, or the notice requirement . . .” 20 U.S.C. §1412(a)(10)(C)(iv).

<sup>5</sup>The amended statute also includes language that may cause confusion in some cases. The Act now states that “[i]f the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private . . . School without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost. . . . If the court of the hearing officer finds that the agency had not made a free appropriate public education available in a timely manner prior to that enrollment.” 20 U.S.C. §1412(a)(10)(C)(ii)(emphasis added). The emphasized language may lead some school attorneys to contend that reimbursement is not available unless a child has al-

There are numerous ways to pursue a private placement, but the fundamental legal strategy is always the same: to establish that the public school has failed to provide FAPE and the private placement proposed by the parent is appropriate to meet the child's needs.

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 In some cases, children become  
 "behavior problems" only after  
 school personnel have ignored for  
 years the children's learning  
 disabilities.  
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### B. Strategies for attacking public placement

There are several methods to defeat the public school's claim that it has provided FAPE. A parent may be able to establish that the public placement is inappropriate because the school failed to adhere to the procedural requirement imposed by the Act and, therefore, the resulting placement is fatally flawed under the *Rowley* decision. See *Union School District v. Smith*, 15 F.3d 1519 (9<sup>th</sup> Cir. 1994), *cert. denied*, 513 U.S. 7 (1993) (failure to provide valid notice rendered proposed placement inappropriate), but see, *Max M. v. Illinois State Bd. of Ed.*, 629

ready received special education services, thus eliminating, for example, cases where parent and school disagree over the appropriateness of a proposed initial placement, or there is undue delay in initiating services after an initial determination of eligibility, or where a school fails to timely provide an initial evaluation. This view is incorrect. The 1997 revision of IDEA retained the language cited in *Burlington* and *Carter* as endowing courts with broad equitable powers to fashion relief. See 20 U.S.C. §1415(I)(2) (B)(iii). While the provisions of 20 U.S.C. §1412(a) (10)(C)(ii) may apply to those situations described by the emphasized language, the provisions of 20 U.S.C. §1415(i)(2)(B)(iii), as interpreted in *Burlington* and *Carter*, applies to the rest.

F.Supp. 1504, 1517-1518 (N.D. Ill. 1986) (failure to provide written notice of rights was not fatal where parents participated in developing educational program); and *Hiller v. Bd. of Ed. of Brunswick Cent. Sch. Dist.*, 743 F.Supp. 958, 970 (N.D.N.Y. 1990) (procedural failings did not result in denial of FAPE where parents were "thoroughly involved" in educational planning for child). While procedural failings alone should be sufficient to establish that the school's placement is inappropriate, counsel should also be prepared to argue specific prejudice to the child resulting from the procedural errors and the substantive deficiencies of the program.

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To establish that the school's proposed placement is substantively deficient, counsel may take any one of, or a combination of, several approaches. One alternative, often the case with children involved in the delinquency system, is that the child has failed to make sufficient, or any, progress in the public school's program. In *Ojai Unified School v. Jackson*, 4 F.3d 1467 (9<sup>th</sup> Cir. 1992), *cert. denied*, 115 S. Ct. 90 (1993), the Court held that a private school placement was warranted where the child made little, if any, progress on meeting his IEP goals in the public placement over a period of seven years. Similarly, in *Straube v. Florida Union Free School*, 801 F.Supp. 1164, 1177 (S.D.N.Y. 1992), the Court held that when "education within the regular school system is not effective, as clearly it was not in this case, then a private placement must be considered by the

educational agencies.” In this regard, courts have held that the practice of “social promotion,” i.e., passing a child from grade to grade for social reasons related to the child’s age, even if the child is not making academic progress, does not constitute academic progress under the IDEA.<sup>6</sup>

To establish a lack of progress from year to year in the public school program, counsel should carefully examine the school’s documents regarding the child. For a child who is already in special education, the IEP’s for each year in special education will be critical evidence. The standardized testing reflecting the child’s current functioning which is done each year may reveal no progress; for example, the child may remain at the first or second grade reading level for several years in a row. Another good guide is to compare the IEP goals and objectives for each year. If the goals and objectives do not change, that generally means the child has made no progress during the year. If the student is meeting the goals and objectives and they are changing every year, insufficiently rigorous IEP goals and objectives may render the placement substantively inappropriate nonetheless. Thus counsel should also compare the child’s progress and educational achievement with the standards set in the general curriculum or elsewhere for what students of similar age and grade level are expected to know and be able to do. For a child who is not in special education, counsel should review the child’s progress reports to determine if the child has consistently made substandard grades and should also ascertain whether the child has ever been retained and, if so, how often.

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<sup>6</sup>See also Chapter 6, discussing the concept of educational “benefit” and progress under IDEA.

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 Instead of truancy being the cause of  
 academic difficulty, it is at least as  
 likely that the child’s academic  
 problems caused the refusal to  
 participate in school.  
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School system personnel commonly argue that a child’s failure to progress in school is attributable to the child’s truancy rather than to any inadequacy of inappropriateness in the educational program. In other words, school system personnel argue that the program is appropriate but the child refuses to participate. Under such circumstances, counsel should argue that, if a child is not progressing academically, school system personnel must modify the child’s program. Moreover, children’s academic difficulties often precede truancy issues. Instead of truancy being the cause of academic difficulty, it is at least as likely that the child’s academic problems caused the refusal to participate in school.

Another method of attacking the school’s proposed placement is to establish that the proposed placement can not implement the child’s IEP. 34 C.F.R. §300.552 (1997). There are several fairly simple but effective methods of demonstrating that a placement can not implement the child’s IEP. First, the placement may be overcrowded based on the State’s standards for student:teacher ratios in various educational settings. Generally speaking, the more intensive the level of special education services, the smaller the student:teacher ratio. If the child’s IEP designates the child as needing a small, special education classroom (or counsel can establish the child’s need for a small student:teacher ratio independent of the IEP), but the only public alternative is already overcrowded, a private placement with a small student: teacher ratio may be justified.

Alternatively, the public placement may not have access to all the necessary related services.



Many public placements do not have unrestricted access to the services of a speech pathologist or a psychologist but must share the services of a limited number of professionals with a number of schools. Thus, for a child who needs counseling three or four times a week may not get this service in a public placement where the psychologist only visits the school once or twice a week and already has a high caseload. As a result, a private placement may be the best alternative. Additionally, some students, particularly students with behavior problems, may require a comprehensive behavioral support program to be incorporated into all aspects of their educational programming. Such programming may not be available in a public school setting.

At times, a parent's or a child's hostility to the public school's program may render the public placement inappropriate. In *Board of Educ. of Community Consolidated Sch. v. Illinois Bd. of Educ.*, 938 F.2d 712 (7<sup>th</sup> Cir. 1992), *cert. denied*, 502 U.S. 1066 (1992), the parents disagreed with the school's proposed placement for their son, characterized as "behavior disordered." In the course of developing an educational plan for the student, the parents became extremely hostile to the school and, as a result, hostile to any placement the school proposed. As a result of this "parental hostility," the court concluded that "the parents' attitudes were severe enough to doom any attempt to educate" the student at the school's proposed placement. *Id.* at 716. See also *Greenbush School Committee v. Mr. and Mrs. K.*, 949 F.Supp. 934 (D. Me. 1996) (parental hostility and child's fear of the school in which placement was proposed would prevent him from receiving educational benefit if IEP were implemented there). The converse is equally true. A history of suspensions or other disciplinary actions against the student for conduct related to the student's disability may well establish that the public school placement is inappropriate for the child.

In some jurisdictions, local rules and case law may provide a quick procedural mechanism for obtaining a private placement. In the District of

Columbia, a "Conciliation Agreement" between the District of Columbia Public Schools and the U.S. Department of Education, enables parents to obtain private services at public expense virtually automatically where the school fails to provide the services publicly within a time frame set by a hearing officer. In New York City, a consent decree enables parents to obtain a private placement at public expense if the public school fails to propose a placement within sixty days of the parents' request. *Zvi D. v. Ambach*, 694 F.2d 904, n. 6 (2<sup>nd</sup> Cir. 1982); *Bd. of Educ. of City of New York v. Ambach*, 682 F.Supp. 972 (E.D.N.Y. 1986). Consequently, counsel should become familiar with any uniquely local rights conferred on parents.

### C. Strategies for demonstrating appropriateness of private placement

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 In order to prevail, counsel will need to present information from the parent and child, from the parent's proposed placement, as well as, in many circumstances, and independent expert.  
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If the school system is unable to meet its burden of proof to establish that its placement is appropriate, a parent does not automatically or necessarily win the parent's preferred private placement. Parents still have the burden of showing that their proposed placement is capable of meeting the needs of the child. Consequently, counsel should always be prepared to come forward with evidence supporting the appropriateness of the parents' proposed placement. In the absence of such evidence, the hearing officer may well simply order the school system to propose a difference placement. In order to prevail, counsel will need to present information from the parent and child, from the parent's proposed placement, as well as, in many circumstances, an independent expert.

#### D. Documents

In addition to all the documents upon which counsel might rely to defeat the public school's placement, counsel must also obtain and submit to the hearing officer documents relating to the private program. Most private placements have brochures or other materials that describe the educational program offered by the facility and the population of students served. Additionally, counsel should attempt to secure a letter of acceptance from the private school, indicating that the admissions staff have met with the student, have reviewed the student's educational records and testing results, and that the student has been accepted as appropriate for the program. It is often helpful for the admissions staff to include a brief statement describing why the school believes its program is appropriate for the student. Some schools will be so accommodating as to allow counsel to review and suggest re-visions to a draft of the acceptance letter before it is finalized.

If counsel is also relying on an independent educational consultant or a psychologist, counsel should obtain that person's resume as well as, in some circumstances, a written report. The expert's resume should establish the individual's credentials as an expert – usually in the areas of special education placement and programming or diagnosis and treatment. Whether a written report is helpful depends on whether the nature of the child's disability and need for services is disputed. In addition, counsel must analyze whether a report will do more to assist the hearing officer or more to assist opposing counsel prepare for the hearing. If counsel is satisfied that the public school's evaluations and IEP sufficiently describe the child's needs and the necessary educational program, then an additional report is probably cumulative. If the evaluations or IEP are deficient, then counsel may wish to consider having the expert prepare a written report for the hearing officer to review in juxtaposition with the school's documents. Unless the parent's program is truly unique, the expert should not make a specific placement recommendation in the report but should des-

cribe the child's needs, functioning, and, in general, the type of program the child needs in order to make educational progress. In addition, the report must be couched in the legal terms of "appropriate" and "necessary" and never employ the phrases "the best program" or the program which will "maximize potential."

#### E. Testimony

The testimony should include at least the parent's or the child's impressions of the placement as well as testimony regarding the placement. If the parent and the school disagree concerning the child's level of functioning and needs, then counsel should consider securing the testimony of an independent expert, as well. The parent's testimony generally includes the child's educational history, including a description of the child's failure to make progress in the public setting, and the parent's impressions of the private program. The parent actually needs to visit the private program in order to be able to testify effectively. Depending on the child's age, the child may also testify regarding why the program is appropriate. Some juvenile clients find testifying to be an empowering experience.

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In addition to preparing the parent and the child, counsel also must prepare to elicit private school personnel – usually by the admissions director – to testify, and, if the child's functioning and needs are in dispute, from an independent expert, as well.

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In addition to preparing the parent and the child, counsel also must prepare to elicit private school personnel – usually by the admissions director – to testify, and, if the child's functioning and needs are in dispute, from an independent expert, as well. The testimony of the admissions director should include the following elements: the individual's education, work experience and

current responsibilities; familiarity with the child; de-scription of the child's current functioning and needs (if in dispute); general description of the type of program offered by the private school; more specific description of how the private school will meet the child's needs; and the private school's decision to accept the child and the date on which the child can enroll. Many, if not most, private school admissions directors will have had previous experience testifying. Counsel should not hesitate, specifically when just beginning this kind of practice, to seek the assistance of this witness in developing testimony.

Whether an independent expert is necessary depends on the nature of the dispute with the school system. In some cases, school system representatives do not genuinely challenge the parent's claims regarding the child's educational needs and, in essence, may be signaling that the parent need only to establish that the parent's proposed placement is appropriate. In such a case, the parent may not need to engage an expert witness (in addition to a representative of the parent's proposed placement who can testify about that placement and its ability to implement the IEP).

In cases characterized by more fundamental disputes regarding the child's educational needs and the appropriateness of proposed placements, counsel should seriously consider securing expert testimony to buttress the parent's case. A parent may seek, for example, a 100 percent special education day program, while school system representatives contend that the child requires residential treatment. In another case, by contrast, school system representatives may argue that the child needs a part-time special education program within a neighborhood school, but the parent may contend that a full-time program is appropriate. Despite the parent's contention that the child is not making progress in a current program, school system personnel may argue that the program is appropriate. In disputes of these sorts, counsel should probably engage expert support and prepare the expert to testify.

In engaging an expert, counsel has several fundamental responsibilities. One responsibility is arranging for payment.<sup>7</sup> Counsel also must ensure that the expert is actually competent to testify about the matters in dispute. Counsel must ascertain whether the expert will be available to testify and will not just write a report. Counsel also must make sure that the expert has reviewed all of the documents and that the expert has sufficient personal knowledge of the child – through, to the extent necessary, interviews, testing, and observations – to testify persuasively.

The actual testimony should include at least the following elements: the witness' qualifications (including whether the witness has testified before); familiarity with the child (including personal experience with the child); a description of the child's current functioning and needs (including any independent testing done by the expert as well as a critique of the school's testing); the expert's opinion that the student has failed to make progress in the setting that the parent is challenging and the basis of the opinion; the expert's opinion regarding the kind of program the student needs in order to make progress and the basis for this opinion; the expert's familiarity with the parent's proposed school; and the expert's opinion that the school is appropriate to meet the needs of the student.

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 During the testimony, counsel should encourage the expert to use specific examples and make specific recommendations drawn from the expert's experience with the child.  
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<sup>7</sup>Of course, if the parent prevails then the school system is liable for attorneys' fees as well as costs (including the cost of engaging an expert).

the expert to use specific examples and make specific recommendations drawn from the expert's experience with the child. The expert should make eye contact with the hearing officer and should never simply read from a prepared report. Experts should avoid professional jargon whenever possible, and, to the extent that terms of art are necessary, the expert should define those terms. The expert should avoid phrases – both in testimony and in written reports – like “the best program to meet the student's needs” or the “program which is most likely to maximize the student's potential.” Instead, the expert should use the terms “appropriate” and “necessary.”

#### **F. Some pros and cons of private placement for students in the delinquency system**

Counsel should consider some of the practical pros and cons of seeking a private placement for a student who is also involved in the delinquency system. One advantage of private school placement is that a new school gives a child who has had a history of school failure a “fresh start”; a private placement may provide an educational program, typically in a smaller setting, that more specifically meets the needs of the child. As a result, counsel may be able to obtain a dismissal of the child's juvenile case by demonstrating the availability of a new school program, offering coordinated services designed to meet the child's unique needs, provided at no cost to the court. In a juvenile justice system which is overloaded, a private placement offers the court an easy and attractive way to end a case. In that sense, a private school placement may be the figurative or even the literal equivalent to “sending a child to military school” as a quid pro quo for a delinquency dismissal.

A private school placement also presents significant negative considerations. Many private school administrators, not surprisingly, reject summarily applicants who have a juvenile court history. Counsel, therefore, may decide to withhold – to the extent practicable and ethical – in-

formation about the child's delinquency involvement. Further, the private school program may not be near the child's home, and the child, quite reasonably, may resist a school placement proposal that entails a lengthy, daily commute. Moreover, private schools may present racial, cultural, and class barriers for many children in the delinquency system. Hence, a private school placement is not necessarily the best choice in every situation.

#### **IV. Compensatory education**

Compensatory education is a remedy designed to meet the needs of children who have been denied FAPE for a specific period of time. Frequently referred to as “the poor man's Burlington,” the remedy initially came into being for children whose parents were unable to pay in advance the costs of private school tuition; hence, those children would remain in inappropriate placements while the parents pursued a challenge to the public school placement. While a parent ultimately might have prevailed, sometimes years elapsed before the parent's position was vindicated. Compensatory education, in essence, gives the child back the years lost languishing in an inappropriate placement. *Brown v. Wilson County Sch.*, 747 F.Supp. 436 (M.D. Tenn. 1990). Different jurisdictions vary in the standards they apply in determining when compensatory education is appropriate. Where a child has been denied services, courts generally agree that compensatory education should be awarded. *See, e.g., Lester H. v. Gilhool*, 916 F.2d 865 (3<sup>rd</sup> Cir. 1990), *cert. denied*, 111 S. Ct. 1317 (1991); *Burr v. Sobol*, 863 F.2d 1071 (2<sup>nd</sup> Cir. 1989), *vacated and remanded*, 109 S. Ct. 3209 (1989), *aff'd per curiam on remand*, 999 F.2d (1909); *Harris v. District of Columbia*, 19 IDELR 105 (1992). In regard to children who have received inappropriate services, rather than no services at all, compensatory education should be awarded if the school knew or should have known that the child had an inappropriate IEP or was not receiving sufficient educational benefit, yet failed to correct the situation. *M.C. v. Central Regional School District*, 81 F.3d 389 (3<sup>rd</sup> Cir.

1996), *cert. denied*, 117 S. Ct. 176 (rejecting “good faith” defense mounted by school district, and contention that compensatory education award requires “gross” deprivation of the right to free appropriate public education).<sup>8</sup>

Often, compensatory education is awarded in the form of a day-for-day remedy: for each day the child was deprived of an education, the child is entitled to an additional day of compensatory education. *Burr v. Ambach*, 863 F.2d 1071 (2<sup>nd</sup> Cir. 1988) *vacated and remanded*, 492 U.S. 902, *reaff’d on recon.*, 888 F.2d 258 (1989) (awarding one and one-half years of compensatory education to student who was unable to attend school due to school’s errors and procedural delays). Some recent case law suggests, to the contrary, that compensatory education is an equitable remedy, not a contractual one, so “there is no obligation to provide a day-for-day compensation for time missed.” *Parents of Student W. v. Puyallup Sch.*, 31 F.3d 1489 (9<sup>th</sup> Cir. 1994) (compensatory education for lost time refused where student was able to graduate from high school before age twenty-one without additional services).

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Counsel is not limited to seeking  
compensatory relief simply for  
the period the parent was actively  
challenging the school’s placement  
but may seek relief for the entire  
period the child was deprived  
FAPE  
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<sup>8</sup>Some courts, however, have required a higher level of school misconduct, at least in certain situations. *See, e.g. Garro v. Connecticut*, 23 F.3d 734 (2<sup>nd</sup> Cir. 1994) (requiring showing of “gross procedural violations” for award of compensatory education to students already past the age of entitlement to services under IDEA).

More than other remedies, compensatory education lends itself to creativity both in terms of measuring the duration of the entitlement and in terms of crafting a remedy. Counsel is not limited to seeking compensatory relief simply for the period the parent was actively challenging the school’s placement but may seek relief for the entire period the child was deprived FAPE. For a child who has not been previously identified as needing special education services but who has performed poorly in school, counsel may argue that the school violated its obligation to identify the child as needing special education and thus the child is entitled to compensatory education dating from the time the child first began to perform poorly until the time the child was identified as needing special education. *Parents of Student W.* at 1496. Counsel may seek compensatory education for each school year the child had an inappropriate IEP and failed to make educational progress. Similarly, counsel may seek compensatory education for each year that the school system personnel failed to implement a child’s IEP. In yet another scenario, counsel may seek compensatory education for the period of any unlawful suspensions or exclusions from school.

The parameters of compensatory education are unclear. Stated most broadly, compensatory education is whatever supplemental services are necessary, over and above whatever the school must already provide as “appropriate,” to remediate the educational damage done to the child during the period the child was deprived of FAPE. *See Chicago Bd. of Educ.*, July 9, 1984 IDELR 257:568 (Department of Education’s Office of Civil Rights states that compensatory education includes services “over and above” the services required by the IEP as compensation for lost time). Initially, compensatory education tended to be in the form of additional years of eligibility for special education services beyond the age of 21. *See, e.g., Harris v. D.C.*, 19 IDELR 105 (1992). Another common form of compensatory education is summer school. When developing a summer program, counsel should not be limited to simply academic remediation. Special education programs combining

camp experiences with remedial instruction may be a more appropriate remedy.

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Tutoring may be particularly useful remedy for students who balk at summer school. Regular, individualized attention may even make schoolwork accessible for the the first time for students who have historically performed poorly in a group setting but who do not want a more restrictive environment.

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Instead of summer programming and extended years of eligibility, counsel may wish to argue for immediate, supplemental services so that relief will not be further delayed. *See Chicago Bd. of Educ.*, July 9, 1984 IDELR 257:568. Thus, individual tutoring in the areas in which the student is experiencing the most difficulty, in tandem with an appropriate special education program, may be an appropriate remedy. *See Hall v. Detroit Public Schools*, 823 F. Supp. 1377, 13?? (E.D. Mich. 1993); *Phil v. Massachusetts Dept. of Educ.*, 9 F.3d 184, 188 (1<sup>st</sup> Cir. 1993). Tutoring may be a particularly useful remedy for students who balk at summer school. Regular, individualized attention may even make schoolwork accessible for the first time for students who have historically performed poorly in a group setting but who do not want a more restrictive environment.

Tactically, compensatory education has a number of advantages for students involved in the juvenile delinquency system. First, it shifts the focus of blame from the child to the school. If the child can establish that the school failed to provide him with the services he needed in order to succeed in school, the child may be able to defeat the school's action to punish the child for his academic failures. Second, compensatory education can be part of a comprehensive pack-

age of remedial services which will so occupy the child's time that participation in additional activities through the court would not only be superfluous but may interfere with the child's education. By the same token, a child who is occupied with constructive activities is, arguably, less likely to become involved in delinquent conduct. Moreover, the court views a child who is receiving tutoring in the afternoon and who will participate in a summer academic enrichment program as being less available to participate in delinquent acts, and thus less of a threat to the community. Finally, a child who fails to participate in court-ordered programs and services may face, as a consequence, revocation of probation or parole (aftercare). In contrast, a child who fails to take advantage of special education services does not, as a practical matter, face incarceration as a sanction.

## V. Damages and fees

The law on the availability of damages for violations of the Individuals with Disabilities Act (IDEA) rights, whether under IDEA directly or in an action linking IDEA to § 1983, is in a state of flux and confusion. While there are many cases stating that damages beyond tuition reimbursement are not available, the majority of these cases (or the authority upon which they rely), pre-date the U.S. Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). Franklin held that as a general rule, absent "clear direction to the contrary by Congress," federal courts have the power to award any appropriate relief, including damages, in a cognizable cause of action brought pursuant to a federal statute. Applying *Franklin*, the Third Circuit in *W.B. v. Matula*, 67 F.3d 484 (3<sup>rd</sup> Cir. 1995), found no such "clear direction" in IDEA, and accordingly held that compensatory damages, including damages for violations of IDEA. *See also, Walker v. D.C.*, 969 F.Supp. 794 (D.D.C. 1997); *Brantley v. Independent School District No. 625*, 939 F.Supp. 649 (D. Minn. 1996) (compensatory damages may be available for IDEA/§ 1983 claim where plaintiff can prove actual injury); *McMillan v. Cheatham Co. Schools*, 25 IDELR

398, 407 (M.D. Tenn. 1997) (stating that youth who has aged-out of the IDEA entitlement may recover compensatory damages for “gross violation” of IDEA). Other post-Franklin courts have rendered adverse decisions without discussing, or even acknowledging, Franklin and its implications. *See, e.g., Heideman v. Rother*, 84 F.3d 1021 (8<sup>th</sup> Cir. 1996) (“general damages” for emotional injury or injury to dignitary interest not available); *Whitehead v. School Board for Hillsborough County*, 918 F. Supp. 1515 (M.D. Fla. 1996).

To the extent that money damages may be recoverable, parents may also bring claims based upon § 504 of the Rehabilitation Act (and the implementing regulations), under which damages are available for at least intentional disability-based discrimination. *See, e.g., W.B. v. Matula, supra; Rodgers v. Magnet Cove Public Schools*, 34 F.3d 462 (8<sup>th</sup> Cir. 1994); *Pandazides v. Virginia Bd. of Ed.*, 13 F.3d 823 (4<sup>th</sup> Cir. 1994). Alternatively, parents may argue that their civil rights were violated by the school’s failure to adhere to the procedural protections of the IDEA. *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141 (2<sup>nd</sup> Cir. 1983), *cert. denied*, 104 S. Ct. 1426.

In contrast, attorneys’ fees are available to the parents or guardians of a student with disabilities who is the “prevailing party” in either an administrative proceeding or a judicial proceeding. 20 U.S.C. § 1415(i)(3)(B). The amount of the fees “shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished.” 20 U.S.C. § 1415 (i)(3)(C). The court has the discretion to reduce the fees if the parent unreasonably protracted the case or the fees are excessive, except in cases where the school system also unreasonably protracted the final resolution of the matter. 20 U.S.C. § 1415(i)(3) (F), (G). The court may also reduce a fee award if parents’ counsel did not provide in the due process hearing complaint the information required by 20 U.S.C. § 1415(b)(7). 20 U.S.C. § 1415(i)(3)(F)(iv). In the event the school system makes a settlement offer within

the time period prescribed by rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins and the offer is not accepted within 10 days, the parent is not entitled to fees for work performed after the settlement offer if the relief finally obtained by the parents is not more favorable to the parents than the settlement offer. 20 U.S.C. § 1415(i)(3) (D)(I). An exception may be made, however, and full fees awarded, if the parent was substantially justified in rejecting the offer. 20 U.S.C. § 1415 (i)(3)(e). Expert witness fees are also recoverable as part of the necessary fees and costs to the prevailing party. *See, e.g., Aranow v. District of Columbia*, 791 F.Supp. 319 (D.D.C. 1992), *reversing* 780 F.Supp. 46. Attorneys seeking fees should check the law in their local jurisdiction to determine what the statute of limitations is on actions to obtain fees. *Dell v. Town-ship High*, 32 F.3d 1053 (7<sup>th</sup> Cir. 1994).