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STATEMENT OF JOSEPH B. TULMAN

to the

Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

Ending the School-to-Prison Pipeline

Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

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The United States leads the world in incarceration. We incarcerate more people than any other country, both in total numbers – one quarter of the world's incarcerated people are in America – and per capita. Other advanced democracies incarcerate, from the adult population, between fifty and 150 per 100,000. America is over 700 per 100,000.[1] America incarcerates nearly five times as many children per capita as the next highest country.[2] No evidence establishes that American adults and American children are inherently more deviant, delinquent, or criminal than people in other countries. America's outlier status and experience in regard to incarceration do not suggest that mass incarceration is an effective strategy for controlling or reducing crime.

America only recently began to use mass incarceration. In the last forty years, we have increased by seven-fold the number of incarcerated people in America. On first blush, this unprecedented rise appears to violate the general rule that systems tend toward equilibrium. A closer examination, however, explains the apparent anomaly. Michelle Alexander has aptly and accurately described how America has maintained equilibrium in subjugating mostly low-income people of color.[3] Slavery ended, but the Jim Crow era arose. Jim Crow ended, finally, in the 1950s and 1960s, but mass incarceration – focused overwhelmingly on poor people of color – arose, starting with campaigning for "law and order" in 1968.[4] In the District of Columbia, literally 100 percent of the incarcerated children are children of color from low-income families.[5]

My practice of law started with delinquency defense and child welfare representation over thirty years ago. In the fall of 1984, I started teaching at the Antioch School of Law, in the Juvenile Law Clinic, supervising law students and representing clients in delinquency cases. Subsequently, I became a professor of law at the University of the District of Columbia David A. Clarke School of Law.[6] I direct the law school's Juvenile and Special Education Law Clinic, and I direct the Took Crowell Institute for At-Risk Youth. Over several years, beginning in the early 1980s, I began to recognize a clear pattern: almost all of the children whom I was representing in the delinquency system had unmet special education needs. The same was true for many of

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[1] *See*, DAVID M. KENNEDY, DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA 146-47 (2011) (calculating the increase as an 1100 percent rise); *cf., e.g.*, Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford this Much Injustice?*, 75 MO. L. REV. 683 (2010) (calculating rise from approximately 200,000 to 2.3 million incarcerated persons as an 800 percent increase).

[2] "No Place for Kids: The Case for Reducing Juvenile Incarceration," p.2 (2011), available at http://www.aecf.org/~/media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf.

[3] *See generally*, Michelle Alexander, *The New Jim Crow*, 9 Ohio St. J. Crim. L. 1, 11-15 (2011) and Michelle Alexander, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

[4] *Id.*

[5] *Cf. e.g.* Arthur L. Burnett, Sr., *Race and National Origin as Influential Factors in Juvenile Detention*, 3 D.C. L. REV. 355, 370 tbl.1 (1995) (showing that the percentage of the population of incarcerated children in D.C. that are minority is 100 percent).

[6] The Antioch School of Law closed in the late 1980s, and the District of Columbia created the public law school – the D.C. School of Law and, subsequently the U.D.C. David A. Clarke School of Law (UDC-DCSL). The public law school inherited, and has sustained, the unique mission of training law students who themselves come from underrepresented backgrounds; using clinical, hands-on education to the maximum extent feasible; and serving D.C.'s low-income residents. UDC-DCSL is one of the most diverse law schools in the country; the law school has more clinical education per student than any other law school; and UDC-DCSL faculty and law students provide thousands of hours of legal services to low-income D.C. residents each year.

the children and parents I had represented in the child welfare system. Virtually none of my clients had succeeded in school.

Having recognized that the lack of educational success was a principal and perhaps defining factor that led to delinquency involvement for children in D.C. (and elsewhere), I incorporated special education representation into the clinic. Since the early 1990s, my colleagues and I, along with the law students whom we supervise, have been providing special education representation for low-income D.C. residents, with a focus on children who are at-risk of delinquency involvement.

As part of conducting investigations for our clients, my colleagues and I, along with the law students, excavate and examine the school histories of the young people who are the focus of our representation. What we find invariably is a stunning lack of academic success in elementary school. These kids tread water for years; then they start to drown. They fail academically, and they fail socially and emotionally. Often, the problems manifest in serious emotional and behavioral problems at some point in late elementary school or in early middle school. Sometimes, we see that school administrators have held the child back for one, two, or more grades in elementary school. Repeating a grade, however, is not a factor in every case. The substantial lack of academic progress, though, is uniformly a factor.

Another uniform problem that we see in the school histories of these young, at-risk youth is that disproportionately they have been the subject of disciplinary exclusion. Public school and public charter school administrators in D.C. – and, indeed, around the country – are relying on school exclusion. This reliance is demonstrably counter-productive and indefensible. The Council of State Governments and Texas A&M recently concluded and published a massive, longitudinal study on suspensions and expulsions. This study is conclusive. Controlling for every variable imaginable, the researchers established that excluding children increases the likelihood that a child will repeat a grade, increases the likelihood that a child will not complete high school, and increases the likelihood that a child will enter the delinquency system. In addition, the researchers found, not surprisingly, that the use of school exclusion is discriminatory in regard to race and disability.[7] Moreover, other definitive studies show that alternatives to school exclusion – like PBIS and restorative justice – are effective. School administrators should be using positive behavioral interventions and supports, as well as restorative justice approaches. For individual children who present extraordinary behavioral challenges, school administrators should be employing the evaluations and delivering the services mandated by the Individuals with Disabilities Education Act (IDEA).

Another factor that I recognize as common to at-risk students in late elementary and in middle school years is that they typically have unmet special education needs. We often find in our representation of parents and children that school administrators and other school personnel have assiduously avoided the obvious fact that a child has an education-related disability. Further, we consistently find that school personnel have failed to provide appropriate, detailed and useful, special education evaluations. Frankly, in addition, I have never seen, from a D.C. public school or public charter school, a correctly-designed and properly-implemented functional

[7] The study, *Breaking Schools' Rules*, is available at http://knowledgecenter.csg.org/drupal/content/breaking-schools-rules-statewide-study.

behavioral assessment (FBA). School administrators ordinarily countenance, as a substitute for an appropriate FBA, having a teacher or administrator fill out a form (designated as an FBA) in which that person lists behaviors that the child has exhibited. Compounding the FBA problem, school administrators generate behavioral contracts instead of legitimate behavior intervention plans.

Public school and charter school administrators ignore various other Congressional dictates that are part of the IDEA. These include a failure to provide appropriate related services, particularly behavioral supports, parent training, school-based social work services, recreation and therapeutic recreation.[8] Moreover, special education officials avoid having representatives of other agencies (e.g., in D.C., the Department of Mental Health or the Rehabilitation Services Administration within the Department of Disability Services) come to individualized education program (IEP) meetings. Special education officials, as well as special education coordinators at individual public and public charter schools, avoid engaging personnel from other agencies in the IEP process based upon an expectation that the personnel from those other agencies will not provide services listed in the IEP and that, therefore, the public school or public charter school personnel will have to provide the service. Thus, inter-agency collaboration is rare. A real integrated system of care for children does not exist in D.C. Even coordinating Medicaid reimbursement is a struggle. I have observed these problems in jurisdictions across the country.

In passing the original special education law, Congress intended to stop the discriminatory exclusion of children with disabilities from public schools. "Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school."[9] The problem has gotten much worse, however, since Congress acted in 1975. Children with disabilities are much more likely to be excluded from school and referred to delinquency court than are their non-disabled peers.

In the 1997 amendments to the Individuals with Disabilities Education Act, Congress attempted to ensure that court personnel have the information necessary to push back to the schools cases in which school administrators were doing an "end run" of their obligation to identify and to serve children with disabilities.[10] When public school and public charter school personnel refer children – children whom they know or should know have education-related disabilities – to law enforcement and to delinquency court, those school personnel uniformly and without exception fail to comply with the requirement, in 20 U.S.C. §1415(k)(6)(b), to send "copies of the special education and disciplinary records of the child…" Similarly, the juvenile court's intake personnel (usually intake probation officers) do not sufficiently investigate the circumstances surrounding the delinquency allegations and almost never question whether school

[8] *See* 34 C.F.R. §300.34.
[9] *Honig v. Doe*, 484 U.S. 305, 323 (1988).
[10] See, e.g., *In re* Trent M., 569 N.W.2d 719, 724 (Wis. Ct. App. 1997). Whether school administrators are attempting an end run of special education responsibilities should be considered at the "investigative and referral levels" of the juvenile court process at which decisions are made regarding "whether the case belongs in the juvenile system in the first instance..."

personnel have provided the child with appropriate special education services to address the child's needs. This inquiry, though, is a central function of the court's intake personnel.[11] Thus, the child gets "the worst of both worlds" – a lack of legally-required services in school, and a failure by the court system to catch the problem. The court inherits the school's problem, and the community collectively criminalizes another child. In short, we have a rapidly-flowing and jam-packed school-to-prison pipeline.

An effective school should avoid referring children to the police and to the delinquency court for behavior that does not rise to the level of serious and violent conduct. By radically increasing the number of delinquency cases, jurisdictions around the country have inundated their juvenile courts with children who have allegedly engaged in conduct that would never have resulted in a court referral in previous generations. Under current standards – as applied primarily to low-income children of color – almost all of us who are now adults would have been processed as delinquents. Less than three percent of the school exclusions documented in the Texas study were for "zero tolerance" conduct like bringing a firearm to school; over ninety-seven percent of the school exclusions in the Texas study were for discretionary charges.

Congress should not support nor condone the infusion by state and local governments of police presence into public schools. Further, no school system should have mass exclusions.[12] The only children who should be out of school should be those for whom a court has determined -- either pursuant to the delinquency preventive detention standard or pursuant to the mental health civil standard -- that the child is too dangerous to self or to others to be maintained in the community. As the definitive Texas study (see n. 7, *supra*) has established, school exclusion is counter-productive and racially discriminatory. In addition, school administrators disproportionately exclude children with disabilities.

The District of Columbia has about 16,000 suspensions and expulsions per year. Many schools in low-income neighborhoods have allowed administrators to transform schools into hostile, prison-like environments. Uniformed personnel roam the halls, confronting children. This kind of atmosphere is poisonous. It triggers the kind of oppositional attitude that many people consider developmental normative – albeit, usually manageable -- for teenagers.[13]

As I have outlined above, teenagers who are at-risk of delinquency involvement and incarceration have underlying educational issues (including social and emotional issues) that develop before high school. Indeed, my experience is that the problems develop before and

[11] "Powers of the probation officer" include "mak[ing] investigations, reports, and recommendations to the juvenile court; receiv[ing] and examin[ing] complaints and charges of delinquency, unruly conduct or deprivation of a child for the purpose of considering the commencement of proceedings. . . . [and] mak[ing] appropriate referrals to other private or public agencies of the community if their assistance appears to be needed or desirable…" Model Juv. Ct. Act § 6 (1968)

[12] The establishment of "alternative" schools for excluded children exacerbates the problem of the school-to-prison pipeline. Texas, for example, has a two-tiered, pervasive system of alternative schools. Yet, the "Breaking Schools' Rules" study demonstrates that school exclusion is counter-productive and discriminatory.

[13] This dynamic brings to mind the following quote (misidentified as a quote from Mark Twain): "When I was a boy of fourteen, my father was so ignorant I could hardly stand to have the old man around. But when I got to be twenty-one, I was astonished at how much he had learned in seven years."

during elementary school, but the problems begin to manifest in seriously disruptive behaviors often in middle school. Children who are in elementary school are not generally capable of absenting themselves from school routinely. Elementary-age children are generally not chronically using and abusing illegal drugs and alcohol. Similarly, most young children who are seriously at-risk do not begin to steal or commit other delinquent acts at a frequent rate until some point during middle school. I must add also that all of us are more likely to identify children who "act out" in school or elsewhere than we are to identify children who "act in." That is, some children who are depressed or who are traumatized quietly and, in a sense, unobtrusively harm themselves. They withdraw; they engage in self-injurious behavior or contemplate suicide. They get pregnant.

For most of the children with whom I have worked, especially those who are identified as delinquent, the problems began to manifest in seriously-disruptive and self-destructive behaviors in late elementary and in middle school. Obvious indicia include poor school attendance and frequent tardiness, failing classes in school, and repeating grades. School exclusion (suspension or expulsion) is another primary concern. Children who have changed schools often are clearly more likely to be at risk, as well.

As Congress found in passing the federal special education law (and in passing other disability rights laws), this country has a history of excluding and segregating children with disabilities. America also has a history of discriminating by institutionalizing people (including children) with disabilities. On the other hand, one should not have to say that a child is "at-risk" because the child has an education-related disability (i.e., specific learning disability, emotional disturbance, intellectual disability, and the other disabilities covered by the IDEA). On the contrary, if people complied with the IDEA and other laws, children with disabilities would not be at greater risk.[14] In reality, however, children with education-related disabilities continue to be at greater risk than their non-disabled peers. For these reasons, I must also include – in the list of factors that put a child "at-risk" of entering the school-to-prison pipeline – that the child has an education-related disability.

Another huge component of the school-to-prison pipeline is the almost complete lack of meaningful access to defense counsel for children from low-income families who are facing delinquency charges. Having traveled to most of the states to explore with attorneys and others the state of the delinquency system, I can report that children in some jurisdictions still do not get court-appointed attorneys. In virtually every jurisdiction, court-appointed attorneys have unmanageable caseloads and do not provide effective assistance, as required by the Sixth Amendment. Indeed, in a number of jurisdictions, attorneys counsel child clients to plead guilty at the initial hearing. This practice, in my view, constitutes *per se* ineffective assistance of counsel. Prior to investigation and discovery, no attorney can advise a client to plead guilty.

[14] "Of course, it would be a violation of Section 504 of the Rehabilitation Act of 1973 if a school were discriminating against children with disabilities in how they were acting under this authority (e.g., if they were only reporting crimes committed by children with disabilities and not [those] committed by nondisabled students)." 64 Fed. Reg. 12631 (March 12, 1999).

The courts, including the U.S. Supreme Court, have helped to widen the school-to-prison pipeline and to increase its flow. In *Schall v. Martin*,[15] the Court fundamentally undermined the due process advances of the late 1960s cases of *Kent*,[16] *Gault*,[17] and *Winship*[18] by revising and redefining the liberty interest of a child. In the breakthrough cases, the Court recognized that children had a fundamental liberty interest and that due process was consistent with treating children differently than adults. In *Schall v. Martin*, the Court explained that a child's liberty interest was not as great as an adult's liberty interest because a child is either in the custody of the state or the parent. By falsely equating one form of "custody" with the other, the Court defied common sense and experience. The impact of incarceration on a child is likely more disruptive and even devastating than the impact of incarceration on an adult. In addition, by removing a child from the custody of parents, a court not only overrides the child's liberty interest but also the liberty interest of the parent in maintaining custody over the child. The latter interest is not one that the *Schall v. Martin* opinion considered.

The Supreme Court has also made the litigation of special education matters more difficult for parents, particularly for low-income parents. Specifically, the Court, in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*,[19] ended the "catalyst theory" for attorney-fee shifting in civil rights cases, and, in *Arlington Central School District v. Murphy*,[20] interpreted the IDEA's fee-shifting provision as not including reimbursement for expert witnesses. Parents, particularly low-income parents, are seriously prejudiced by these decisions. A third Supreme Court case interpreting the IDEA, *Schaffer v. Weast*,[21] also creates barriers for parents of children with disabilities by ruling that the burden in a special education case is on the moving party (typically the parent). To her credit, Justice O'Connor is careful, though, in writing for the majority, to explain that only the burden of *persuasion* is on the parent. The Court does not explicitly rule on the burden of *production.* Unfortunately, administrators in public school systems and hearing officers in administrative special education hearings uniformly mush the two together. Schools do not provide adequate information; parents are in the dark; parents lose hearings; and children do not get appropriate services.

Congress should legislatively correct *Schall v. Martin* and the trio of cases (*Buckhannon*, *Murphy*, and *Schaffer*) that prejudice children and that accelerate the flow of the school-to-prison pipeline.

Another factor that is adding to the size and speed of the school-to-prison pipeline is the lack of access to economic opportunity for children from low-income families, and particularly children of color who also have education-related disabilities. Our housing patterns remain segregated by race. In past decades, however, racially-segregated African-American neighborhoods were heterogeneous in regard to income levels. These neighborhoods had small businesses, banks, and professionals, alongside working-class people. In recent decades, African

[15] 467 U.S. 253 (l984).
[16] *Kent v. United States*, 383 U.S. 541 (1966).
[17] In re Application of Gault, 387 U.S. 1 (1967).
[18] *In re Winship*, 397 U.S. 358 (1970).
[19] 532 U.S. 598 (2001).
[20] 548 U.S. 291 (2006).
[21] 546 U.S. 49 (2005).

Americans who are economically successful tend to live in neighborhoods that are segregated by class. Thus, the children whom I represent do not grow up in neighborhoods that provide sufficient organic access to legitimate economic opportunity.

Furthermore, workers in today's economy generally cannot make a decent living and support a family without a solid high school education. Ordinarily, to successfully integrate into the economy, a student must attain a post-secondary education. Even a factory job or a hands-on job like auto repair is likely to require computer skills. Many inner-city and rural schools are simply failing to educate effectively. As John Taylor Gotto and other commentators have noted, schools are operating still on the industrial revolution model -- training people to be factory workers rather than information-age workers.

The IDEA requires that every student with a disability who is sixteen or older (and younger, if appropriate) receive individualized transition services. This requirement is meant to ensure that children with disabilities integrate effectively into the world of work. It is not happening. No one is complying with the law. Children with disabilities are not receiving appropriate vocational evaluations, and they are not receiving appropriate training and preparation. A common-sense solution is to use the so-called "*Burlington* Remedy"[22] to incentivize school systems to pay culturally-competent adults in low-income neighborhoods to train children with disabilities. This use of the special education law would help children to gain real-world work skills and to integrate into paying jobs. Further, this arrangement would re-cycle public funds into the neediest neighborhoods, rather than shifting resources to high-priced professionals from other geographic areas. Moreover, as I had observed for three decades, many children from low-income families who fail in school consistently, eventually find informal mentors who lead those children too often into illegitimate economic activity.

Another part of America's school-to-prison pipeline is the pervasive push to treat low-income children of color as adults for purposes of criminal prosecution. Virtually every state changed laws in the 1990s to treat more children as adults. More recently, the Centers for Disease Control conducted a meta-study and established that this trend is also counter-productive. We have solid information about what works. One can review the 2001 Surgeon General's Report on Youth Violence. Chapter Five of that report lists effective interventions, most notably certain evidence-based forms of wraparound services (e.g., multi-systemic therapy and functional family therapy) and therapeutic foster care. The multi-year experiment in Missouri is also instructive. That state is striving to incarcerate only children who are serious and violent offenders. In addition, Missouri is demonstrating that incarceration in a small and humane environment, emphasizing treatment and education, can dramatically lower recidivism. The Annie E. Casey Foundation, through the Juvenile Detention Alternatives Initiative, has effectively helped over 100 jurisdictions lower rates of pre-trial and pre-sentence detention, without compromising community safety.

America also must engage in a conversation about our outlandish sentencing policies and guidelines. Criminality is a phenomenon that mostly concentrates in males in mid-to-late adolescence and the early twenties. By sentencing individuals to, by international standards,

[22] *Burlington v. Dept. of Educ.*, 471 U.S. 359 (1985).

uniquely long terms of incarceration, we waste both public financial resources and individual potential. The members of the Subcommittee are doing a good thing by beginning a conversation that should have started over forty years ago.