

An IEP for the Juvenile Justice System: Incorporating Special Education Law Throughout the Delinquency Process

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I. STUDENTS WITH SPECIAL EDUCATION NEEDS: DISPROPORTIONATELY INVOLVED WITH THE DELINQUENCY SYSTEM.....	879
A. <i>Higher Rate of Disciplinary Actions Lead to Contact with the Delinquency System</i>	879
1. Special Education Students Are Subject to a Higher Rate of Suspensions and Expulsions.....	880
2. Zero-Tolerance Policies Strip IDEA-Eligible Children of the Procedural Rights Originally Provided by the Act.....	882
B. <i>Inappropriate Education Programs and Lack of Support Services Contribute to Dropout Rates and Contact with Delinquency System</i>	885
II. ASSERTING SPECIAL EDUCATION NEEDS IN THE COURTROOM AND BEYOND	886
A. <i>Encouraging Competent Defense of Youth with Disabilities</i>	889
B. <i>The State's Responsibility to Address the Special Education Needs Throughout the Delinquency Process</i>	890
C. <i>Educating the Court: The School's Responsibility to Inform the Court of a Youth's Special Needs</i>	891

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III. APPLYING IDEA PROVISIONS AND DISABILITY RIGHTS THROUGHOUT THE JUVENILE JUSTICE SYSTEM	892
A. <i>Comparison of Section 504 and the ADA with the IDEA</i>	893
1. Section 504 and the ADA: Access to Education	894
2. The IDEA's Special Education and Related Services Provision	895
B. <i>Application of Special Education and Disability Rights Throughout the Delinquency Process and Juvenile Justice System</i>	898
1. Invoking Rights from the Start: Referral, Interrogation, and Arrest	898
a. <i>School-to-Prison Pipeline: School Referral to Law Enforcement</i>	899
b. <i>Interrogation and Confessions: "Do you understand the rights I have just read to you?"</i>	900
c. <i>Appropriateness of a Charge: Two Ways to Challenge</i>	902
2. Least Restrictive Environment and Appropriate Services Must Be Contemplated if Initial Detention Is Considered	903
3. Appropriate Accommodations Required in the Courtroom During All Hearings	904
4. Reading, Writing, and Adjudication	910
5. Appropriate Disposition and Appropriate Placement	912
a. <i>Appropriate Services Are Conducive to Successful Completion Probation</i>	913
b. <i>Residential and Secure Facilities Must Provide an Appropriate Education</i>	917
c. <i>Asserting Disability Rights to Combat Harmful Conditions of Confinement</i>	917
6. Services Should Continue Through Post-Release and Completion of Parole	918
IV. CONCLUSION	919

"I get my high school diploma in a month and I'm outta here a couple months after. I can't read. How am I gonna get a job so I don't violate [parole]? I been here for a long time. I don't wanna come back."

-Thomas, an adjudicated delinquent juvenile.

Thomas,¹ one of my teenaged clients, shared his concerns as he sat across from me in the secure facility's interview room. He had been charged and adjudicated accordingly several times over the previous four years. Fifteen months before this meeting, Thomas had been placed in the custody of the state's juvenile justice agency for a period of not more than two years. As his attorney, I was equally concerned about Thomas's ability to meet the post-release conditions. We both knew those conditions would require that he find employment, but he knew he would not be able to read or fill out a job application, let alone find a job that would not require him to be able to read at some level.

Thomas and I spoke at length about the situation. With his permission, I contacted the state's designated disability rights protection and advocacy agency. Within days of our meeting, I asked for an educational evaluation,² which was conducted soon thereafter. The educational evaluation indicated that Thomas had a specific learning disability³ that affected his reading proficiency; he was therefore eligible for special education services. Thomas began receiving intensive tutoring and, within weeks, told me that he had begun to read a "real" book—a "chapter book."

The story of Thomas's success is not one of great legal prowess or even knowledgeable advocacy; in many ways it is one of happenstance and luck. Luckily, Thomas was part of a post-disposition pilot program.⁴ The program made it possible for him

1. Thomas's story is adapted from that of a client represented by the author in 2012, during the author's fellowship providing post-disposition representation for adjudicated youth in New Jersey. All identifying information has been changed to protect confidentiality.

2. See 20 U.S.C. § 1414(a)(1) (2012) (listing the requirements and procedures for an initial evaluation).

3. See *id.* § 1401(3)(A) (defining the phrase "child with a disability"); see also 34 C.F.R. § 300.8(c)(10)(i) (2013) (defining specific learning disability as 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 the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations"); *id.* § 300.309 ("[d]etermining the existence of a specific learning disability").

4. In 2008, with the support of the MacArthur Models for Change Juvenile Indigent Defense Action Network, the Schools of Law of Rutgers-Camden

to meet regularly with me after he had been adjudicate delinquent and committed to the secure juvenile facility. Despite being a new member of the bar and, essentially, a legal neophyte, I had no option but to question the system and get Thomas the help he needed. I found it mind-blowing that Thomas had participated in numerous hearings prior to every one of his adjudications and subsequent dispositions, yet no one in the courtroom had ever realized that he was unable to read. Thomas had read and signed more than one plea agreement over the years. Though Thomas had never volunteered information about his disability with anyone in the juvenile justice system, based on my conversations with him, it was clear that no one had asked him whether he could read.

Further, it is unsettling to think that a teenager could spend more than a year in a state facility—receiving daily educational services—without anyone realizing that he could not read. There could be none of the excuses for his lack of access to education that kids who are not in the custody of the state justice system use for not attending school and learning. For instance, truancy could not be an issue in Thomas’s case because he was committed to a secure facility where he would incur institutional discipline charges for not attending school. Although it will likely never be clear who was at fault for the educational failings that led to Thomas’s inability to read, the remedy was clear: get him evaluated and get the services he needed in place as quickly as possible.

According to a 2005 study, the percentage of youth in correctional facilities with identified special education needs varies from state to state, ranging from 9.1% to 77.5%, with the national median at 33%.⁵ The study recognizes that there is an “underidentification” of children in the juvenile system and that some juris-

and Rutgers-Newark, in conjunction with the New Jersey Office of the Public Defender, launched a post-disposition project which provided representation for New Jersey youth placed in the custody of the state’s Juvenile Justice Commission. See *Juvenile Indigent Defense Action Network (JIDAN)*, MODELS FOR CHANGE, <http://www.modelsforchange.net/about/Action-networks/Juvenile-indigent-defense.html> (last visited Apr. 1, 2014) (providing general information about the initiative).

5. See Mary Magee Quinn et al., *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPTIONAL CHILD. 339, 342 (2005).

6. *Id.* at 343.

7. *See id.*

8. *Id.* at 342. According to a 2011 report, 13.1% of children served in federally supported programs are identified with a disability defined by 34

dictions did not consider mental health disorders or “social maladjustment” in their responses.⁶ This suggests that the percentage of incarcerated youth with special education needs is actually higher than the study reflects.⁷ In juvenile corrections institutions, the number of youth with special education needs is nearly four times the national average of all school-aged children identified as having a disability.⁸

Having represented many children involved in the juvenile justice system from initial detention through post-release, as well as speaking with fellow juvenile defenders, it is clear to me that the application of special education law is underutilized throughout the delinquency process. One reason for this underutilization may be that defenders, or other key players in the delinquency system, regard special education law as too cumbersome to contemplate or non-applicable in delinquency matters. As the statistics reflect,⁹ however, special education is clearly a serious factor to consider from initial detention through post-release. Given the rehabilitative goals of juvenile justice,¹⁰ it is illogical not to consider the ed-

6. *Id.* at 343.

7. *See id.*

8. *Id.* at 342. According to a 2011 report, 13.1% of children served in federally supported programs are identified with a disability defined by 34 C.F.R. § 300.8(c). *See* THOMAS D. SNYDER & SALLY A. DILLOW, U.S. DEP’T OF EDUC., DIGEST OF EDUCATION STATISTICS 2011, at 61 (2012). Of those children, 4.9% are identified with a specific learning disability, and 2.9% have a speech or language impairment. *Id.* at 85.

9. Youth with disabling conditions account for over one-third of all youth in juvenile corrections. *See* Quinn et al., *supra* note 5, at 342.

10. *See, e.g.,* *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971) (noting the resources needed to achieve rehabilitative goals); *In re Winship*, 397 U.S. 358, 375 (1970) (Harlan, J., concurring) (calling for a consideration of whether the requirement of proof beyond a reasonable doubt serves to rehabilitate the juvenile); *Kent v. United States*, 383 U.S. 541, 554 (1966) (“The objectives are to provide measures of guidance and rehabilitation for the child.”); *see also In re Gault*, 387 U.S. 1, 15 (1967) (“[Early juvenile justice reformers] believed that society’s role was not to ascertain whether the child was ‘guilty’ or ‘innocent,’ but ‘What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.’” (quoting Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909))).

educational goals and needs of children having contact with the system.

This Article encourages and attempts to demystify the use of special education law and its “tools” (e.g., Individualized Education Programs and Independent Educational Evaluations) throughout the delinquency process. Part I of the Article explores the probable causes for the disproportionate representation of juveniles with special needs who come into contact with the delinquency system. Part II identifies key players in the juvenile justice system and discusses their responsibility for ensuring that a child’s special education needs and rights are being addressed as the child moves throughout the system. Part III applies case law and the statutory provisions of the Individuals with Disabilities Education Act (“IDEA”), the Americans with Disabilities Act (“ADA”), and Section 504 of the Rehabilitation Act (“Section 504”) as they apply to youth involved with the juvenile justice system. This Part also illustrates the practical application of special education law and the use of special education records and evaluations throughout the delinquency process.

A defender can be a better advocate for his client in a variety of ways. He can invoke the federally recognized civil rights afforded by the IDEA and use special education records and evaluations. He can propose dismissal of charges based on the youth’s disability or proper placement and therapeutic treatment of a youth who is ultimately detained in state custody.¹¹ He can also require the system to provide proper transition and re-entry services for the youth.¹² Implementing an appropriately developed Individualized Education Program (“IEP”) ensures the provision of all required therapeutic, transition, and other related services for an incarcerated youth. Such provisions would also allow for agencies other than the juvenile justice agency, like local or state boards of education and service providers, to monitor conditions of confinement. Additionally, an incarcerated youth who is experiencing difficulty conforming to a facility’s rules might be able to avoid disciplinary

11. See *infra* Chart 1 (noting specifically the disability issues to be considered during the stages of interrogation, arrests, and detention hearings).

12. See *infra* Chart 1 (noting specifically the disability issues to be considered during the stages of post-disposition and post-release).

charges and sanctions if such behaviors are determined to be a manifestation of his disability.

CHART 1: RAISING DISABILITY PROTECTIONS THROUGHOUT THE DELINQUENCY PROCESS¹³

Stage of Delinquency Process	Disability Issue to Be Considered	Applicable IDEA Provisions	Applicable 504/ADA/Case Law Provisions
Referral (i.e., truancy or probation violation)	<ul style="list-style-type: none"> · Transmission of records (Spec. Ed. & Discipline) · Behavior as a manifestation of the disability · School's failure to provide appropriate services · Treated differently than non-disabled peers 	<ul style="list-style-type: none"> · 34 C.F.R. § 300.535(b) (Spec. Ed. & Discipline Records sent by reporting agency) · 34 C.F.R § 300.530(e)(1)(i), (ii) (Manifestation of disabilities) 	
Interrogation	<ul style="list-style-type: none"> · Comprehension level/ability (evaluations & IEP) · Manner in which questions were asked · Is youth able to read? · Suppression of Miranda waiver and confession 	<ul style="list-style-type: none"> · 34 C.F.R. § 300.535 (Records) · 34 C.F.R. § 300.8 (Definition of disabilities) · 34 C.F.R. § 300.6 (Assistive technology service) 	<ul style="list-style-type: none"> · Accommodations for disability · <i>Tennessee v. Lane</i>¹⁴ · <i>J.D.B. v. North Carolina</i>¹⁵
Charges &	<ul style="list-style-type: none"> · Mitigation: behav- 	<ul style="list-style-type: none"> · 34 C.F.R. § 300.8 	<ul style="list-style-type: none"> · <i>Atkins v. Virgin-</i>

13. Note that this chart is not exhaustive. The application of these various protections are explained throughout this Article but primarily, *infra* Part III.

14. 541 U.S. 509, 515 (2004) (holding that a state must generally provide accommodations for disabled persons in the courtroom).

15. 131 S. Ct. 2394, 2408 (2011) (holding that the voluntariness of confession and appropriateness of a Miranda waiver may be based on the age of the child).

Arrest	<ul style="list-style-type: none"> · ior was manifestation of the disability · Appropriate charge · Intent (intellectual disability yields less culpability) · Non-disabled peers involved treated differently or given lesser charges · Treatment at arrest comports with IEP & Disability (i.e., use of restraints) 	<ul style="list-style-type: none"> · (Definition of disabilities) · 34 C.F.R. § 300.535 (Records) 	<ul style="list-style-type: none"> · <i>ia</i>¹⁶ (culpability/intent)
Detention Hearing	<ul style="list-style-type: none"> · Is facility able to meet special needs and appropriate services of youth as provided for in IEP? · Is placement consistent with Least Restrictive Environment (“LRE”)? · Is behavior a manifestation of disability? · Accommodations & assistive services in courtroom 	<ul style="list-style-type: none"> · 34 C.F.R. § 300.118 (Placements consistent with 34 C.F.R. § 300.114 – LRE) · 34 C.F.R. § 300.2(b)(1)(iv) (IDEA applies to juvenile facilities) · 34 C.F.R. § 300.34 (Related Services) · 34 C.F.R. § 300.14 (Equipment) · 34 C.F.R. § 300.6 (Assistive tech- 	<ul style="list-style-type: none"> · Accommodations for disability · Least Restrictive Environment (LRE) · <i>Tennessee v. Lane</i> · <i>Olmstead v. Zimring ex rel. L.C.</i>¹⁷ · <i>Pennsylvania Department of Corrections v. Yeskey</i>¹⁸

16. 536 U.S. 304, 316 (2002) (holding that mental retardation of a defendant may diminish legal culpability).

17. 527 U.S. 581, 602 (1999) (holding that appropriate treatment must be provided in an LRE under the ADA when the state’s own professionals determine that the individual has met the “essential eligibility requirements” for habilitation in an LRE).

18. 524 U.S. 206, 213 (1998) (holding that an inmate denied an LRE because of disability is a violation of the ADA).

		<ul style="list-style-type: none"> nology service) · 34 C.F.R. § 300.535(b) (Records) 	
Pre-Adjudication & Other Appearances	<ul style="list-style-type: none"> · Accommodations & assistive services in courtroom 	<ul style="list-style-type: none"> · 34 C.F.R. § 300.8 (Definition of disabilities) · 34 C.F.R. § 300.535(b) (Records) · 34 C.F.R. § 300.34 (Related Service) · 34 C.F.R. § 300.14 (Equipment) · 34 C.F.R. § 300.6 (Assistive technology service) 	<ul style="list-style-type: none"> · Accommodations for disability · <i>Tennessee v. Lane</i>
Adjudication & Plea	<ul style="list-style-type: none"> · Comprehension ability (Evaluations & IEP) · Is colloquy appropriate for level of comprehension? · Is youth able to read? 	<ul style="list-style-type: none"> · 34 C.F.R. § 300.8 (Definition of disabilities) · 34 C.F.R. § 300.530(e)(1)(i),(ii) (Manifestation of disabilities) 	
Disposition	<ul style="list-style-type: none"> · Consideration of educational, developmental, & behavioral needs · Services (education, transition, related) available through disposition placement must comport with all special needs of disabled youth · Can be placed in a more restrictive environment because LRE cannot provide appropri- 	<ul style="list-style-type: none"> · 34 C.F.R. § 300.2(b)(1)(iv) (IDEA applies to juvenile facilities) · 34 C.F.R. § 300.535(b) (Records) · 34 C.F.R. § 300.114 (LRE) 	<ul style="list-style-type: none"> · Accommodations for disability · Consideration of LRE · <i>Tennessee v. Lane</i> · <i>Olmstead v. Zimring ex rel. L.C.</i> · <i>Pennsylvania Department of Corrections v. Yeskey</i>

	ate special education services		
Post-Disposition (Probation; Placement; Conditions of confinement)	<ul style="list-style-type: none"> · Services of placement must comport with IEP provisions · Educational evaluation must be conducted at least every 3 years · IEP must be reviewed & revised annually regardless of placement · Parent has right to be involved in IEP development · Youth must be placed in LRE · Does placement exacerbate behaviors associated with disability? (particularly important for classification of emotional disturbance) 	<ul style="list-style-type: none"> · 34 C.F.R. § 300.2(b)(1)(iv) (IDEA applies to state & local juvenile facilities) · 34 C.F.R. § 300.114 (LRE requirements) · 34 C.F.R. § 300.118 (SEA must ensure that 34 C.F.R. § 300.114 is implemented in public institutions) · 34 C.F.R. § 300.149(d) (SEA responsibility for children in adult prisons) · 34 C.F.R. § 300.154(b) (Obligations of non-educational agencies) · 34 C.F.R. § 300.324(d) (Children with disabilities in adult prisons) 	<ul style="list-style-type: none"> · Accommodations for disability · Consideration of LRE · <i>Tennessee v. Lane</i> · <i>Olmstead v. Zimring ex rel. L.C.</i> · <i>Pennsylvania Department of Corrections v. Yeskey</i>
Post-Release & Parole	<ul style="list-style-type: none"> · Entitled to all appropriate education services until 22nd birthday or graduation from high school (whichever comes first) · Violation: was behavior manifestation of disability? · Violation: were appropriate ser- 	<ul style="list-style-type: none"> · 20 U.S.C. § 1412(a)(1)(A) (IDEA applies until 22nd birthday). · 34 C.F.R. § 300.102(a)(2)(ii) (Children aged 18–21 are eligible for free appropriate public education if identified before incarceration) 	

	vices provided?		
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I. STUDENTS WITH SPECIAL EDUCATION NEEDS:
DISPROPORTIONATELY INVOLVED WITH THE DELINQUENCY SYSTEM

As indicated by the 2005 national survey of “Youth with Disabilities in Juvenile Corrections,” there is an overrepresentation of children identified with special education needs in contact with the delinquency system.¹⁹ Youth with special needs end up in the juvenile courtroom as part of the “school-to-prison pipeline” for many reasons.²⁰ The pipeline is “a disturbing national trend wherein children are funneled out of public schools and into the juvenile and criminal justice systems.”²¹ Often, contact with the system is a direct result of the high rate of suspensions and expulsions from school due to zero-tolerance policies for certain actions.²² In addition to the unilateral school push-out of youth with special education needs, special education students often become frustrated with their educational situation and decide to stop attending school altogether.

A. *Higher Rate of Disciplinary Actions Lead to Contact with the Delinquency System*

Discretionary disciplinary actions and zero-tolerance policies have forced students with special education needs out of school and into the streets. Schools often fail to implement discipline protocols to better deal with these students, whose inappropriate behaviors may be manifestations of their disabilities. As a result, these youth are at a greater risk of becoming involved in the juvenile court system. When special needs students are not in school, they are not receiving the services and support to which they are entitled that enable them to develop appropriate behavioral skills. Any child who is not in school is susceptible to involvement in delinquent behavior.

19. See *supra* text accompanying note 8; see also Quinn et al., *supra* note 5, at 342.

20. *School-to-Prison Pipeline*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/school-prison-pipeline> (last visited Apr. 1, 2014).

21. *Id.*

22. *Id.*

1. Special Education Students Are Subject to a Higher Rate of Suspensions and Expulsions

Prior to the enactment of the IDEA and its predecessor, the Education for All Handicapped Children Act of 1975,²³ children with disabilities “did not receive appropriate educational services,” and they “were excluded entirely from the public school system and from being educated with their peers.”²⁴ The IDEA, with implementing regulations at 34 C.F.R. §§ 300–301, was enacted in part “to ensure that the rights of children with disabilities and parents of such children are protected,”²⁵ and “to assess, and ensure the effectiveness of, efforts to educate children with disabilities.”²⁶

In 1988, when addressing the intent of the IDEA, the U.S. Supreme Court held “that 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.”²⁷ Nine years later, the Wisconsin Court of Appeals, in *In re Trent N.*, reiterated the Supreme Court’s opinion: “the purpose of the IDEA is to prevent schools from initiating juvenile proceedings against students with exceptional educational needs.”²⁸ While Congress may have intended to prevent the push of children out of school and into the juvenile justice system, research shows that youth with disabilities are in fact at a higher risk of contact with the delinquency system than their peers without special needs.²⁹

In 2011, two days before the Department of Justice and Department of Education announced their joint Supportive School Discipline Initiative aimed at reforming discipline policies that unduly force children out of school and into the juvenile justice system, the Council of State Governments Justice Center released results of a study focused on the relationship between school discipline, academic success, and involvement in the juvenile justice

23. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at scattered sections of 20 U.S.C.). This Act is often referred to as the EAHCA.

24. 20 U.S.C. § 1400(c)(2)(A)–(B) (2012).

25. *Id.* § 1400(d)(1)(B).

26. *Id.* § 1400(d)(4).

27. *Honig v. Doe*, 484 U.S. 305, 323 (1988).

28. *In re Trent N.*, 569 N.W.2d 719, 724 (Wis. Ct. App. 1997).

29. *See supra* text accompanying note 8.

system.³⁰ Researchers analyzed six school years' worth of data for each child involved in the study and reviewed school and juvenile delinquency records of all Texas public school children who were in the seventh grade between 2000 and 2002.³¹ Alarming, nearly 75% of "students who qualified for special education services during the study period were suspended or expelled at least once."³² Additionally, 97% of the disciplinary actions that resulted in suspensions or expulsions were minor, discretionary, local school code-of-conduct infractions.³³ Further, children classified as having an "emotional disturbance" were "especially likely to be suspended or expelled."³⁴ The study looked at the relationship between the number of youth involved in school disciplinary actions and the number of youth in contact with the juvenile justice system, reporting that 23% of those involved in school discipline actions were also involved in delinquency proceedings.³⁵ Conversely, only 2% of the students who were never subject to disciplinary proceedings were in contact with the delinquency system.³⁶

Youth who are suspended from school are those children "least likely to have supervision at home."³⁷ Put simply, youth who are not supervised at home are more likely to get into trouble. Youth who are not in school are more likely to "become involved in a physical fight and to carry a weapon" and are "more likely to smoke; use alcohol, marijuana, and cocaine; and engage in sexual

30. See *Justice and Education Departments Move Forward in Joint Effort to Keep Children in School and out of the Justice System*, OJJDP, http://www.ojjdp.gov/newsletter/238636/sf_1.html (last visited Apr. 1, 2014).

31. See JUSTICE CTR. & PUB. POLICY RESEARCH INST., *BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT*, at ix (2011), http://issuu.com/csgjustice/docs/breaking_schools_rules_report_final-1/13?e=2448066/1603396.

32. *Id.* at xi.

33. See *id.* at x.

34. *Id.* at xi (internal quotation marks omitted).

35. See *id.* at 66.

36. *Id.*

37. See Comm. on Sch. Health, *Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206, 1207 (2003), available at <http://pediatrics.aappublications.org/content/112/5/1206.full.pdf>.

intercourse.”³⁸ School dropout rates are linked to the number of males in jail or juvenile detention.³⁹ For example, “one in every 10 young male high school dropouts is in jail or juvenile detention, compared with one in 35 young male high school graduates.”⁴⁰

While the 2011 study focused solely on the state of Texas, analysts did not rely only on a small sampling of students but, in fact, reviewed the records of every seventh grade student in the state.⁴¹ Further, the study was released at a time when Texas had the second largest public school system in the United States.⁴² In another study, the U.S. Department of Education’s Office for Civil Rights, using a sampling of 85% of students nationwide, reported that students who are eligible for special education under the IDEA are twice as likely to be suspended than their non-disabled schoolmates.⁴³ Despite congressional intent and the protections provided by the IDEA, the results of these studies clearly indicate that school-aged children identified with special education needs are more likely to be suspended or expelled from school, resulting in a greater chance of contact with the juvenile justice system.

2. Zero-Tolerance Policies Strip IDEA-Eligible Children of the Procedural Rights Originally Provided by the Act

In 1994, Congress introduced a platform for strict anti-violence and anti-drug policies in schools as part of the Improving America’s Schools Act.⁴⁴ The Act, in conjunction with the Gun-

38. *Id.* (citing Ctrs. for Disease Control & Prevention, *Health Risk Behaviors Among Adolescents Who Do and Do Not Attend School—United States, 1992*, 43 MORBIDITY MORTALITY WKLY. REP. 129 (1994)).

39. See Sam Dillon, *Study Finds High Rate of Imprisonment Among Dropouts*, N.Y. TIMES, Oct. 8, 2009, at A12 (discussing ANDREW SUM ET AL., THE CONSEQUENCES OF DROPPING OUT OF HIGH SCHOOL (2009)).

40. *Id.*

41. See JUSTICE CTR., *supra* note 31, at ix.

42. *Id.*

43. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVEALING NEW TRUTHS ABOUT OUR NATION’S SCHOOLS 1, 3 (2012), available at <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf>.

44. See RICHARD W. RILEY, U.S. DEP’T OF EDUC., THE IMPROVING AMERICA’S SCHOOLS ACT OF 1994: REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (1995), available at

Free School Act of 1994,⁴⁵ gave rise to zero-tolerance policies across the nation. A zero-tolerance policy is a “school or district policy that mandates predetermined consequences or punishments for specific offenses.”⁴⁶ According to a 2000 survey conducted by the Department of Education and the Department of Justice, by the 1996–1997 school year, more than 90% of all U.S. schools had adopted zero-tolerance policies for weapons, 87% had policies targeting alcohol and drugs, and 79% had zero-tolerance policies directed at violence and tobacco possession.⁴⁷ Despite these strict policies, however, there has been very little change in school-violence rates.⁴⁸ Between 2002 and 2006, national expulsion rose from around 89,000 to 102,000 children and out-of-school suspensions rose from 3.1 million to 3.3 million children.⁴⁹

By construction, the IDEA and zero-tolerance policies are in conflict. Thus, students identified as having special education needs under the IDEA lose their protections when zero-tolerance policies are enforced in schools. When a special education student is facing disciplinary sanctions that will result in removal from school, the IDEA requires a “manifestation determination review” to conclude whether “the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability.”⁵⁰ This provision speaks to the IDEA’s goal of developing unique, appropriate education programs for school-aged children found

<http://www2.ed.gov/offices/OESE/archives/legislation/ESEA/brochure/iasa-bro.html>.

45. See 18 U.S.C. § 922(q) (2012).

46. U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY 2000, at 133, 135 (2000), available at <http://nces.ed.gov/pubs2001/2001017.pdf> (citing statistics of public schools having zero-tolerance policies).

47. See *id.* at 133.

48. See Am. Psychological Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 853–54 (2008), available at <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf>.

49. See NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., THE CONDITION OF EDUCATION 2009, at 70 (2009), available at <http://nces.ed.gov/pubs2009/2009081.pdf>.

50. 20 U.S.C. § 1415(k)(1)(E)(i)(I) (2012); see also 34 C.F.R. § 300.530(e)(1)(i) (2013).

eligible for special education.⁵¹ Conversely, by definition, zero-tolerance policies do not allow for any consideration of individual circumstances, as the punishments for certain conduct and behaviors are predetermined.⁵² In 1997, perhaps as a result of the growing policy trend of zero tolerance, the IDEA was amended to include a provision for “special circumstances,” including possession of drugs or weapons or causing “serious bodily injury upon another,” which allows school administrators to remove special education students from their regular school setting for up to forty-five days without consideration of disability related behaviors.⁵³

The 1997 amendment to the IDEA nullifies the procedural right to the manifestation determination review process that should take place when a special education student is facing long-term suspension or expulsion.⁵⁴ As a result, the youth faces changes to his regular school placement and an extended loss of his special education and behavioral services for a period of up to forty-five days. However, there is hope on the horizon for all school-aged children, regardless of their education needs. The Obama Administration, through the Secretary of Education and the Secretary of

51. See 20 U.S.C. § 1401(9); see also 34 C.F.R. § 300.17.

52. See U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUSTICE, *supra* note 46, at 133.

53. See 20 U.S.C. § 1415(k)(1)(G) (Special cases exist when a student “(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency; (ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or (iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.”); see also 34 C.F.R. § 300.530(g)(1)–(3) (2013). As defined elsewhere within the U.S. Code, serious bodily injury is “bodily injury which involves— (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” 18 U.S.C. § 1365(h)(3)(A)–(D) (2012).

54. See 20 U.S.C. § 1415(k)(1)(E); see also *supra* notes 52–53 and accompanying text.

Justice, recently recommended that schools put an end to zero-tolerance policies.⁵⁵

*B. Inappropriate Education Programs and Lack of Support
Services Contribute to Dropout Rates and Contact with
Delinquency System*

In the 2010–2011 school year, 19.8% of students eligible for services under the IDEA dropped out of school.⁵⁶ By comparison, only 5% of all teens, ages 16 to 19, were not in school or were not high school graduates during that same school year.⁵⁷ As discussed above, youth who are suspended from school are often from a home where they are unsupervised, increasing the likelihood of delinquent behavior.⁵⁸ When youth with special education needs drop out of school, they lose access to the counseling,⁵⁹ vocational training,⁶⁰ and transition services to which they are entitled under the IDEA.⁶¹ Loss of support services, in conjunction with expo-

55. See U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 19 (2014), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>.

56. See INST. ON DISABILITY, ANNUAL DISABILITY STATISTICS COMPENDIUM, at tbl. 11.7 (2012), available at <http://disabilitycompendium.org/compendium-statistics/special-education/11-7-special-education-dropout-rate-among-students-ages-14-21-served-under-idea-part-b> (providing that, including D.C., the dropout rate among students aged 14–21 ranged from 7.5% in Tennessee to 76.3% reported in Utah).

57. See KIDS COUNT DATA CTR., ANNIE E. CASEY FOUND., TEENS AGES 16 TO 19 NOT IN SCHOOL AND NOT HIGH SCHOOL GRADUATES (2011), available at <http://datacenter.kidscount.org/data/tables/73-teens-ages-16-to-19-not-in-school-and-not-high-school-graduates?loc=1&loct=2#ranking/2/any/true/867/any/381> (stating that state data ranged from 2% in Wyoming to 9% reported by New Mexico; there was no data reported from D.C.).

58. See Comm. on Sch. Health, *supra* note 37, at 1207.

59. See 34 C.F.R. § 300.34(c)(2) (2013) (defining counseling services as “services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel”).

60. See 34 C.F.R. § 300.43(a)(1), (2)(iv) (stating that vocational training is provided under the transition services, which include “vocational education, integrated employment” and “development of employment and other post-school adult living objectives”).

61. *Id.* § 300.34(a)(1)–(2) (defining transition services as “a coordinated set of activities for a child with a disability that—(1) Is designed to be within a

sure to unsupervised activities, provides greater opportunity for these youth to come in contact with the juvenile justice system.⁶²

Youth with disabilities drop out of school for a variety of reasons.⁶³ Some reasons are similar to those of their peers without disabilities: absenteeism, tardiness, low or failing grades, lack of family support, or problems with drugs and alcohol.⁶⁴ However, the dropout rate of students with disabilities is related to the special education services those youth receive.⁶⁵ Factors contributing to the special-needs dropout rate include “frequent changes in the level of services received,” whether the student is pulled out of class or receives mainstream services, the amount of time allocated to special education services, and the type of services provided for the student.⁶⁶ If a youth with special needs is receiving an appropriate education that meets his unique needs, he is less likely to drop out of school and, therefore, less likely to experience contact with the juvenile justice system.

II. ASSERTING SPECIAL EDUCATION NEEDS IN THE COURTROOM AND BEYOND

When a youth with special education needs comes in contact with the juvenile justice system, his needs and behaviors are often not raised or addressed for a variety of reasons. Throughout

results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation; (2) Is based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests”).

62. Comm. on School Health, *supra* note 37, at 1207 (“Without the services of trained professionals . . . and without a parent at home during the day, students with out-of-school suspensions and expulsions are far more likely to commit crimes.”).

63. See CAMILLA A. LEHR ET AL., NAT’L CTR. ON SECONDARY EDUC. & TRANSITION, ESSENTIAL TOOLS: INCREASING RATES OF SCHOOL COMPLETION: MOVING FROM POLICY AND RESEARCH TO PRACTICE 12–15 (2004), available at <http://www.ncset.org/publications/essentialtools/dropout/dropout.pdf>.

64. *Id.* at 13.

65. *Id.*

66. *Id.*

the system, a variety of juvenile justice stakeholders have the ability to ensure that a youth's special education rights are asserted and his needs are met.

Elliott's story. Seventeen year-old Elliott⁶⁷ was charged with armed robbery, and the State petitioned the court for his transfer to criminal court where he would be tried as an adult. Elliott's mother informed his defender and the intake probation officer of Elliott's special education classification as a multiply disabled student.⁶⁸ After consideration of Elliott's mental-health needs and educational deficits, the State withdrew the transfer petition. In turn, the judge accepted a plea agreement and recommended placement in a small juvenile facility where Elliott's education and mental health needs could be met.

Elliott's case is an example of juvenile justice stakeholders considering a youth's individual mental health needs as well as his developmental and educational deficits beginning at his initial contact with the delinquency system. The Model Juvenile Court Act of 1998 is clear as to the purpose of the juvenile court, charging the system with the responsibility of providing "for the care, protection, and wholesome moral, mental, and physical development of children coming within its provisions."⁶⁹ Accordingly, most jurisdictions require that juvenile courts consider academic or developmental needs of the youth when deciding the disposition of a delinquency case.⁷⁰ Experts like the Office of Juvenile Justice and

67. This story is adapted from a delinquency case in a New Jersey Superior Court—Family Division in 2011. The author provided post-adjudication representation. All identifying information has been changed to protect confidentiality.

68. See 34 C.F.R. § 300.8(c)(7) (2013) (This subsection defines "multiple disabilities" as "concomitant impairments (such as mental retardation-blindness or mental retardation-orthopedic impairment), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. Multiple disabilities does not include deaf-blindness").

69. MODEL JUVENILE COURT ACT § 1(1), 9A U.L.A. 6 (1998).

70. See, e.g., 705 ILL. COMP. STAT. ANN. 405/5-701 (West 2007) ("Upon the order of the court, a social investigation report shall be prepared and deliv-

Delinquency Prevention and judges across the country are concerned with the number of youth involved in the juvenile system who are failing or dropping out of school prior to system contact, as well as the disproportionate number of youth with special education needs entering the system.⁷¹ The responsibility of raising issues concerning a child's educational and developmental needs throughout the delinquency system lies with a variety of stakeholders, including defenders, judges, service providers, and schools.

The National Council of Juvenile and Family Court Judges Delinquency Guidelines encourage judges to consider education.⁷² The ABA's Model Rules and state bar Rules of Professional Responsibility require that an attorney "provide competent representation to a client."⁷³ Recommendations aside, the IDEA requires

ered to the parties at least 3 days prior to the sentencing hearing. . . . [It] shall include an investigation and report of the minor's physical and mental history and condition, family situation and background, economic status, education, occupation, personal habits, minor's history of delinquency or criminality or other matters which have been brought to the attention of the juvenile court, information about special resources known to the person preparing the report which might be available to assist in the minor's rehabilitation"); N.J. STAT. ANN. § 2A:4A-43(a)(6)–(7) (West 2011 & Supp. 2013) ("In determining the appropriate disposition for a juvenile adjudicated delinquent the court shall weigh . . . [w]hether the disposition recognizes and treats the unique physical, psychological, and social characteristics and needs of the child[, and] . . . [w]hether the disposition contributes to the developmental needs of the child, including the academic and social needs of the child where the child has mental retardation or learning disabilities."); OHIO REV. CODE ANN. § 2152.04 (LexisNexis 2011) ("[A] social history may be prepared to include court record, family history, personal history, school and attendance records, and any other pertinent studies and material that will be of assistance to the juvenile court in its disposition of the charges against that alleged or adjudicated delinquent child.").

71. See NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 14 (2005) [hereinafter DELINQUENCY GUIDELINES], available at <http://www.ncjfcj.org/sites/default/files/juvenile%20delinquencyguidelinescompressed%5B1%5D.pdf>.

72. See generally *id.* (discussing the need to address the correlation of education with entry into the juvenile justice system).

73. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013); see, e.g., MO. RULES OF PROF'L CONDUCT R. 4-1.1, 4-1.3 cmt. 1 (2007) ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal

that the State identify and evaluate “[a]ll children with disabilities . . . regardless of the severity of their disabilities.”⁷⁴ Therefore, as a matter of law, any state agent—including any state juvenile justice system stakeholder—who suspects that a juvenile involved in a delinquency matter has a disability, must request that the youth be evaluated accordingly.

A. Encouraging Competent Defense of Youth with Disabilities

Juvenile defenders are faced with a variety of challenges when representing youth in the delinquency system beginning with the number of youth they represent. Often, the child has given up on outside help, is scared, or is acting on bravado. These impediments make open, honest discussions about his educational struggles challenging. Further, although school records are at times required,⁷⁵ such records are generally not included in the intake or discovery packet that the defender receives at the initial hearing. Additionally, because parents also retain educational rights for the child,⁷⁶ it may be difficult to obtain school records in a timely matter as schools are hesitant to turn records over to anyone except the parent without a release and records request. Finally, the defender

inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. *A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.*” (emphasis added)); TENN. RULES OF PROF’L CONDUCT R. 1.3 cmt.1 (2013) (“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. *A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.*” (emphasis added)); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. pml., ¶ 3 (2014) (“In all professional functions, a lawyer should zealously pursue client’s interests within the bounds of the law. In doing so, a lawyer should be competent, prompt and diligent.”).

74. 20 U.S.C. § 1412(a)(3)(A) (2012); *see also* 34 C.F.R. § 300.111(a)(1)(i) (2013).

75. *See* 34 C.F.R. § 300.535(b)(1).

76. *See* 20 U.S.C. § 1415(a) (ensuring procedural safeguards for children with disabilities as well as their parents with respect to “free appropriate public education”); *see also* *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 535 (1925) (“The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

may lack an understanding and general knowledge of delinquency case requirements provided by special education and disability rights laws.

Attorneys are required, as a matter of professional responsibility, to “provide competent representation to a client.”⁷⁷ Comment 5 to Rule 1.1 of the ABA’s Model Rules addresses “thoroughness and preparation,” stating that “[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem The required attention and preparation are determined in part by what is at stake.”⁷⁸ What greater stake can be at risk for a youth than loss of liberty? Even if the youth will not be placed in a secure facility as part of his final disposition, proper rehabilitative services are essential to increasing his chances of disengaging from the system.⁷⁹ Statistically, his risk of recidivism greatly increases without proper rehabilitative services.⁸⁰

B. The State’s Responsibility to Address the Special Education Needs Throughout the Delinquency Process

Key Principle 1 of the Juvenile Delinquency Guidelines, encouraging a “juvenile delinquency court of excellence,” calls for a systemic collaboration among judges, defenders, and educators, as well as prosecutors and detention staff.⁸¹ As educational functioning is vital to development, it makes sense that the educational needs of the youth be identified and met for the juvenile justice system to successfully rehabilitate any youth involved with the delinquency system. As early as the initial detention hearing, the judge should be provided with some information pertaining to the

77. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2013).

78. *Id.* R. 1.1 & cmt. 5.

79. Mark W. Lipsey, *Can Rehabilitative Programs Reduce the Recidivism of Juvenile Offenders? An Inquiry into the Effectiveness of Practical Programs*, 6 VA. J. SOC. POL’Y & L. 611, 640 (1999) (concluding that properly conducted rehabilitative programs can result in a considerable decrease in recidivism).

80. *Id.* (“[T]here are practical programs represented in the research literature that show worthwhile recidivism effects, for example, 20–25 percent reductions in the recidivism rate among participating juvenile offenders.”).

81. DELINQUENCY GUIDELINES, *supra* note 71, at 23.

youth's educational and mental health needs so that the State may ensure that those needs are met as the case proceeds.⁸²

Prior to adjudication, court appointed evaluators conduct evaluations and assessments in various settings and for a variety of reasons.⁸³ These evaluations can be less than comprehensive, often relying solely on the youth's answers to a finite number of questions completed during a short appointment.⁸⁴ The court should question whether more thorough clinical evaluations are needed if the youth "is under the age of fifteen; . . . has a history of mental retardation, mental illness, or trauma; [t]he juvenile's educational or medical records describe borderline intelligence or learning disabilities; or [t]he juvenile is exhibiting deficits in memory, attention, or reality testing."⁸⁵ Importantly, before the youth's case goes to adjudication, the defender should review all evaluations and redact any aggravating or incriminating information that the youth may have shared with the evaluator while counsel was not present.

According to the Guidelines, prior to disposition, a juvenile court judge should be able to assess what the youth's educational needs are, what services he or she is receiving, and what assessments or evaluations are needed to maximize the youth's educational success.⁸⁶ Whether a youth is released on probation or placed in a secure facility, the state, through the "interagency coordination," must continue to provide appropriate special education services to the disabled youth.⁸⁷

C. Educating the Court: The School's Responsibility to Inform the Court of a Youth's Special Needs

When a school or other agency reports a disabled student's alleged crime to law enforcement or court authorities, "[a]n agency

82. *Id.* at 92–93.

83. *See, e.g., id.* at 93 ("A clinician who has specialized training and experience in forensic evaluation of juveniles must assess the decisional capacity of a youth with regard to the youth's ability to understand the nature of the juvenile delinquency court proceedings and to assist counsel with his or her defense.").

84. *See id.* (indicating that the court should consider external circumstances in evaluating the youth).

85. *Id.*

86. *Id.* at 142.

87. 20 U.S.C. § 1412(a)(12)(A)(iv) (2012).

reporting a crime committed by a child must ensure that copies of special education and disciplinary records” are sent for “consideration by the appropriate authorities.”⁸⁸ Through this regulatory provision, the IDEA requires coordination between the referring state agencies and the courts, encouraging consideration of disabilities and special education needs of youth in contact with the juvenile justice system. Key Principle 11, one of sixteen “Key Principles” set forth in the Juvenile Delinquency Guidelines, also acknowledges the benefits of collaboration, providing that a “juvenile delinquency court enhances a youth’s chance for success by working with school systems and other community support systems.”⁸⁹

III. APPLYING IDEA PROVISIONS AND DISABILITY RIGHTS THROUGHOUT THE JUVENILE JUSTICE SYSTEM

School-aged youth classified with disabilities are subject to rights and protections under Section 504,⁹⁰ the ADA,⁹¹ and the IDEA.⁹² Under these federal laws, youth classified as disabled

88. 34 C.F.R. § 300.535(b)(1) (2013).

89. DELINQUENCY GUIDELINES, *supra* note 71, at 26.

90. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (2012). Section 504 provides, in pertinent part:

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

91. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012). Section 12132 provides, “Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” *Id.* § 12132.

92. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2012). The expressed purpose of the IDEA is

(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their

may not be discriminated against because of their disability and are entitled to special accommodations and services. Asserting the rights and provisions set forth in Section 504, the ADA, the IDEA, and applicable case law is vital to the protection of youth with special needs throughout the juvenile justice system.

A. Comparison of Section 504 and the ADA with the IDEA

Although Section 504, the ADA, and the IDEA all provide protections for people with disabilities, *how* each is applied to school-aged children is a source of confusion. Section 504 and the ADA are both broad enough to provide some accommodations for students with disabilities, enabling them to access their education regardless of disability.⁹³ However, only the IDEA requires the provision of special education services so that the student receives

unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C)(1) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

20 U.S.C. § 1400(d)(1).

93. See 29 U.S.C. § 794(a) (2012) (under section 504 of the Rehabilitation Act); 42 U.S.C. § 12132 (under the ADA).

educational benefit.⁹⁴ For example, if a child is blind and only requires adaptive materials in the classroom, a 504 Plan may require that the child be provided with Braille books.⁹⁵ By comparison, if the student's ability to learn and make academic progress is impacted by his blindness, he is eligible for special education services under the IDEA.⁹⁶

1. Section 504 and the ADA: Access to Education

Although Section 504 is a broad piece of civil rights legislation, it does not provide, or require public schools to provide, special education services to disabled school-aged children.⁹⁷ But Section 504 does prohibit discrimination and harassment as a result of a disability, including exclusion from activities and unequal services.⁹⁸ Under Section 504, a student has the right to equal access to an education, as public schools must provide "regular or special education and related aids and services that . . . are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met."⁹⁹

For people identified with "a physical or mental impairment that substantially limits one or more major life activities,"¹⁰⁰ the ADA provides nearly the same rights as Section 504. Congress enacted both Section 504 and the ADA to prohibit discrimination of persons on the basis of disability by providing equal protections and appropriate accommodations in publicly funded facilities.¹⁰¹ For students in public schools, protections under Section 504 and

94. 20 U.S.C. § 1400(d)(1); 34 C.F.R. § 300.1(a) (2013); *see infra* Chart 2 (comparing Section 504, the ADA, and the IDEA).

95. *See* 29 U.S.C. § 3001 (providing that the purpose of this chapter is to improve the availability and use of assistive technologies for individuals with disabilities).

96. 34 C.F.R. § 300.8(a)(1) (defining a "[c]hild with a disability" to include a child suffering deaf-blindness who, by reason of this affliction, requires special education and related services).

97. *See id.* §§ 104.31–.39.

98. *See id.* § 104.34(a)–(c).

99. *Id.* § 104.33(b)(1).

100. 42 U.S.C. § 12102(1)(A) (2012) (providing one definition for the term "disability" for purposes of this chapter).

101. *Compare* 42 U.S.C. § 12132, *with* 29 U.S.C. § 794 (2012). *See also supra* notes 90–91.

the ADA are used interchangeably. Neither Section 504 nor the ADA requires that a child be placed in a special education setting. Further, neither Section 504 nor the ADA requires that an education or services plan be put into writing.

2. The IDEA's Special Education and Related Services Provision

Whereas Section 504 and the ADA provide protection from discrimination due to disability, the IDEA is purposed with providing disabled school-aged youth with an appropriate, individualized education program that is designed to meet his or her needs.¹⁰² Congress enacted the IDEA to ensure that a student is provided with “special education and related services designed to meet their unique needs”¹⁰³ and to “confer some educational benefit upon the handicapped child.”¹⁰⁴ Further, if children are found eligible for special education services, the IDEA provides extensive, detailed protections for both children and their parents. These protections include discipline protections when behavior is a manifestation of the student's disability,¹⁰⁵ prior written notice whenever services are changed,¹⁰⁶ and review of the individualized education program (“IEP”) at least annually.¹⁰⁷ Although the IDEA provides a wide range of rights pertaining to a youth's education, the ADA and Section 504 provide protection from discrimination because a person's handicap may also be exploited in the classroom. Furthermore, failure to provide educational services to a youth with an educational or mental health deficiency may be a violation of equal protection under the ADA.

Contrary to what many parents and students believe, the IDEA does not require that the youth be removed from a general education setting and placed in special education classes, but only that the youth is provided with an appropriate education in the least

102. See 20 U.S.C. § 1400(d) (2012).

103. *Id.* § 1400(d)(1)(A); 34 C.F.R. § 300.1(a).

104. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 200 (1982).

105. 20 U.S.C. § 1415(k)(1)(E); *see also* 34 C.F.R. § 300.530(e)–(g).

106. 20 U.S.C. § 1415(b)(3); *see also* 34 C.F.R. § 300.503.

107. See 20 U.S.C. § 1414(d)(1)(A), (d)(4); 34 C.F.R. §§ 300.320, .324(b)(1)(i).

restrictive environment.¹⁰⁸ The following chart compares the protections of Section 504, the ADA, and the IDEA.

CHART 2: COMPARING SECTION 504, THE ADA, AND THE IDEA¹⁰⁹

	Section 504: The Rehabilitation Act of 1973	ADA: Americans with Disabilities Act of 1990	IDEA: The Individuals with Disabilities Education Act
Responsibility	Regular Education	Public and Private Schools	Special Education
Funding	State and Local Responsibility (No Federal Funding)	Public and Private Responsibility (No Federal Funding)	State, Local, and Federal
Purpose	Broad civil rights law, which protects the rights of individuals with disabilities in programs and activities that receive Federal financial assistance from the U.S. Department of Education	Provides a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities	Federal funding statute whose purpose is to provide financial aid to states in their efforts to ensure adequate and appropriate services for students with disabilities
Who Is Protected?	Identifies student as disabled so long as she/he meets the definition of qualified	Identifies persons as disabled so long as she/he meets the definition of quali-	13 classifications of eligible disabilities ¹¹⁰ Part B of the IDEA

108. 20 U.S.C. § 1412(a)(5)(A); *see also* 34 C.F.R. §§ 300.114, .116.

109. *See Comparison Highlights of IDEA, Section 504 and ADA: Flow Chart of Services—Comparison Highlights of Each Law*, U. OF ALASKA ANCHORAGE (emphasis added), available at http://www.uaa.alaska.edu/dss/student/upload/ADA_504_IDEA_Chart.pdf (last visited Apr. 2, 2014).

110. 34 C.F.R. § 300.8(c)(1)–(13); *see also* 20 U.S.C. § 1401(3)(A) (defining a “child with a disability” as one “with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities . . . who, by reason thereof, needs special education and related services”).

	persons with disabilities; i.e., has or has had a physical or mental impairment which substantially limits a major life activity, or is regarded as disabled by others	fied persons with disabilities; i.e., has or has had a physical or mental impairment which substantially limits a major life activity, or is regarded as disabled by others	covers school children, ages 3–21 ¹¹¹ Part C provides early intervention services for children younger than 3 years old ¹¹²
Service Tool	Accommodations and/or Services	Reasonable Accommodations and Legal Employment Practices	Individualized Education Program
Type of Education Provided	Student not required to need special education in order to be protected	Student not required to need special education in order to be protected	Student entitled to a free appropriate public education ¹¹³ (FAPE) through implementation of an individualized educational program ¹¹⁴ (IEP) in the least restrictive environment (LRE) ¹¹⁵

111. 20 U.S.C. § 1412(a)(1)(A).

112. *Id.* §§ 1432(1), 1433.

113. *Id.* §§ 1401(9), 1412(a)(1) (defining “free appropriate public education” and requiring that states provide free appropriate public education in order to receive federal funding assistance, respectively); *see also* 34 C.F.R. §§ 300.17, .101 (defining “free appropriate public education” and requiring states to provide free public education, respectively).

114. 20 U.S.C. §§ 1401(9) (requiring program to be individualized), 1412(a)(1) (requiring that states create a free appropriate education program in order to receive federal funding assistance), 1414(d)(1)(A) (defining “individualized education program”); *see also* 34 C.F.R. §§ 300.112, .320 (requiring the state to implement an individualized education program and defining individualized education program, respectively).

115. 20 U.S.C. § 1412(a)(5) (defining “[l]east restrictive environment”); *see also* 34 C.F.R. § 300.114 (discussing the requirements of a least restrictive environment).

*B. Application of Special Education and Disability Rights
Throughout the Delinquency Process and Juvenile Justice System*

Section 504, the ADA, and the IDEA protect people with disabilities when they are in contact with state agencies, including schools receiving state funding.¹¹⁶ In addition to schools, the term “public agencies” also includes police stations, courthouses, detention facilities, and public healthcare providers.¹¹⁷ These special education issues and protections, provided for in the aforementioned laws addressing disabilities, can be and should be asserted for youth in contact with the juvenile justice system.

1. Invoking Rights from the Start: Referral, Interrogation, and
Arrest

The initial phases of a delinquency case may happen very quickly, and, most likely, before the youth has had contact with his lawyer. Regardless of how the charges against the juvenile arise, whether the petition has been referred from his school or whether the youth was arrested at the scene of a crime, disability rights and protections are available to a youth who has been identified as having a disability. Additionally, if a youth has not been identified as having a disability prior to contact with the juvenile system but is suspected to be in need of special education, the State has a duty, under the IDEA’s “Child Find” provision, to ensure that youth “in need of special education and related services, are identified, located, and evaluated.”¹¹⁸

116. See 20 U.S.C. § 1412(a) (relating to the IDEA); 29 U.S.C. § 701(c) (2012) (relating to § 504); 42 U.S.C. § 12132 (2012) (relating to the ADA).

117. See 29 U.S.C. § 794(b)(1)(A) (defining “program or activity” to include “a department, agency, special purpose district, or other instrumentality of a State or of a local government”); 42 U.S.C. § 12131(1)(A)–(B) (defining “public entity” to include “any State or local government” as well as “any department, agency, special purpose district, or other instrumentality of a State or States or local government”); 34 C.F.R. § 300.2(b)(1)–(c) (specifying that the IDEA applies to State agencies “such as Departments of Mental Health and Welfare and State schools for children with deafness and blindness,” to juvenile and adult correctional facilities at the State and local level, and to private schools and facilities where the child has been referred to or placed by a public agency).

118. 34 C.F.R. § 300.111(a)(1)(i).

a. School-to-Prison Pipeline: School Referral to Law Enforcement

The IDEA is explicit as to the mandatory procedural safeguards that apply to students with disabilities when schools report alleged crimes committed by such students.¹¹⁹ When a school or other agency reports a crime to “law enforcement and judicial authorities,” the reporting agency “must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.”¹²⁰ There are no exceptions to this transmission requirement, and, as such, this obligation applies for all referrals, including status offenses like truancy.

Regardless of whether the youth’s school referred the case to authorities, counsel for the youth should request all special education records from the school, including evaluations, individualized education programs, discipline records, and attendance records as part of intake documents. This provides the first opportunity for counsel to request the withdrawal of charges due to a school’s failure to adhere to procedural protections under the IDEA. The records, particularly psychological and educational evaluations, should provide information as to how the particular youth’s disability affects his behavior.¹²¹ Before changing the placement of a student with a disability for more than ten days in any school year, the school must determine whether the inciting violation is a manifestation of the student’s disability.¹²² If it is determined that the student’s behavior is a manifestation of the disability, other IDEA protections may apply.

Using Disability Rights in Advocacy. An educational evaluator may report in an evaluation that a youth who receives special education services as a student with an emotional disturbance may exhibit aggressive, assaultive behaviors. If, following a fight at school the youth is charged with aggravated assault, counsel should inform law enforcement or

119. 20 U.S.C. § 1415(k)(6)(B).

120. 34 C.F.R. § 300.535(a)–(b)(1).

121. *See id.* § 300.530(e) (providing that review of such records should include a determination of how the youth’s disability affected the conduct in question).

122. *Id.* § 300.530(b), (e).

the court of this manifestation of the youth's behavior. Although the charges may not be withdrawn entirely, the degree of the charge may be reduced, as the manifestation should be considered a mitigating factor. Review of the discipline records will also reveal whether the youth has been treated differently than other, non-disabled students involved in the altercation. If the defender believes that the disciplinary action is harsher than that imposed on the others equally as involved, the defender should move for dismissal on the basis of discrimination as a violation of both the IDEA and the ADA.

b. Interrogation and Confessions: "Do you understand the rights I have just read to you?"

In recent years, the Supreme Court has ruled in a series of cases that, based on their brain development, youth are generally unable to make informed decisions, thus making them more susceptible to immature choices.¹²³ The Supreme Court has, on more than one occasion, "spoken of the need to exercise 'special caution' when assessing the voluntariness of a juvenile confession."¹²⁴ In *Fare v. Michael C.*, the Court held that the "totality of circumstances" should be considered with respect to the admissibility of a youth's waiver of his Miranda rights, noting that the approach "includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him."¹²⁵ More recently, in *J.D.B. v. North Carolina*, the Court spoke directly to Miranda warnings and interrogation, noting that "[e]ven for an adult, the physical and psychological isolation of custodial interrogation can 'undermine the individual's will to resist' and . . . compel him to speak where he would not otherwise do so freely."¹²⁶

123. See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404–05 (2011); *Graham v. Florida*, 560 U.S. 48, 68–69 (2010); *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

124. *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002) (quoting *In re Gault*, 387 U.S. 1, 45 (1967)).

125. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

126. *J.D.B.*, 131 S. Ct. at 2401 (second alteration in original) (citing *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)).

As discussed, law enforcement officials often do not present Miranda warnings and waivers in a manner that is comprehensible by juvenile offenders. Considering more than 500 Miranda warnings from more than 300 agencies,¹²⁷ researchers found that many Miranda warnings given to juveniles contain vocabulary that require at least a tenth-grade reading comprehension level, and some terms (i.e., “retain” and “counsel”) require a twelfth-grade reading level.¹²⁸ From 2006 to 2013, the Texas Juvenile Justice Department reviewed the reading levels of nearly 12,000 juvenile offenders in state juvenile facilities.¹²⁹ Most of the juveniles, with an average age of less than 16 years old, had not finished the ninth grade and had reading levels between fifth and sixth grade.¹³⁰

The aforementioned studies illustrate that Miranda warnings are not comprehensible for most youth who are interrogated. As such, defenders representing youth with special education needs, particularly specific learning disabilities, speech and language impairments, or intellectual disabilities should challenge the voluntariness of the waiver of Miranda rights and the voluntariness of a confession. Information pertaining to the reading comprehension level of a special education student is included in an education evaluation as well as in an IEP, and defense counsel should gather this information to protect her client’s rights.

Using Disability Rights in Advocacy. After reviewing his client’s education records (IEP and educational evaluations), the defender learns that the youth comprehends at a second grade reading level. The youth signed a Miranda warning when he was interrogated by police. Subsequently, he read and signed a confession, prepared by a police officer. The defender should ask his client if anyone read or explained these documents to him. The defender may want the youth to explain what the documents mean. If the youth is unable to read the documents or demonstrate an

127. Richard Rogers et al., *The Comprehensibility and Content of Juvenile Miranda Warnings*, 14 PSYCHOL. PUB. POL’Y & L. 63, 69 (2008).

128. *Id.* at 75.

129. See TEX. JUVENILE JUSTICE DEP’T, NEW COMMITMENT PROFILE: FISCAL YEARS 2006–2013 (2014), available at <http://www.tjjd.texas.gov/research/profile.aspx>.

130. *Id.*

understanding of the contents, the defender should move for suppression on the basis on voluntariness.

c. Appropriateness of a Charge: Two Ways to Challenge

One potential challenge to the appropriateness of a charge requires a determination of whether the youth's disability was a manifestation of his behavior, thus mitigating the seriousness of the charge. A behavior is a manifestation of a youth's disability if "the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability."¹³¹ For example, a youth who has been classified as a student with an emotional disturbance may exhibit "[i]nappropriate types of behavior or feelings under normal circumstances," in addition to not being able to "maintain satisfactory interpersonal relationships with peers and teachers."¹³² As such, the youth's actions may actually be a manifestation of his disability. The youth may act aggressively when approached by others, display limited self-control, act impulsively, display rapid changes in behavior, and have "limited premeditation" or "limited ability to predict consequences of behavior."¹³³ If the youth's behavior is a manifestation of his disability, the "manifestation" might be considered a mitigating factor, potentially reducing the degree or seriousness of the charge.

Using Disability Rights in Advocacy. A youth is charged with aggravated assault of an officer, having pushed the officer away while the officer tried to intervene during an argument between the youth and his cousin. The fifteen-year-old youth has been recently diagnosed as having an emotional disturbance. The defender should look to the youth's psychological educational evaluation for information to determine how the youth's behavior is affected by his disability. If the evaluating psychologist has determined that the youth acts inappropriately or, perhaps, ag-

131. 20 U.S.C. § 1415(k)(1)(E)(i)(I) (2012).

132. 34 C.F.R. § 300.8(c)(4)(i)(B)–(C) (2013) (defining "[e]motional disturbance").

133. CONN. DEP'T OF EDUC., GUIDELINES FOR IDENTIFYING AND EDUCATING STUDENTS WITH EMOTIONAL DISTURBANCE 22–23 (2012), available at http://www.sde.ct.gov/sde/lib/sde/pdf/publications/edguide/ed_guidelines.pdf.

gressively, the defender should present that information to the State for reconsideration of the charge, particularly if it seems that the youth has not received appropriate services related to his behavior.

Asserting a youth's diminished culpability due to an intellectual disability may provide a challenge to the appropriateness of a specific-intent charge. In *Atkins v. Virginia*, the Supreme Court spoke to the culpability of "mentally retarded offenders":

Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.¹³⁴

Applying *Atkins* to the case of a youth with an intellectual disability (formerly, "mental retardation") who has been charged with a specific-intent crime, defenders should assert diminished culpability to challenge the appropriateness of a charge. Perhaps a youth who has been found to have any disability that affects his ability to reason, to control impulses, or to understand consequences of his behavior may have diminished personal culpability and, as such, the appropriateness of a charge should be considered accordingly.

2. Least Restrictive Environment and Appropriate Services Must Be Contemplated if Initial Detention Is Considered

Consistent with the ADA, states must "accommodate persons with disabilities in the administration of justice."¹³⁵ Whether an initial detention hearing is conducted in a courtroom or by tele-

134. *Atkins v. Virginia*, 536 U.S. 304, 317–18 (2002).

135. *Tennessee v. Lane*, 541 U.S. 509, 533 (2004).

phone from the detention facility, a disabled youth facing the prospect of continued detention has a right to accommodations such that he may participate in the proceedings. Such accommodations include assistive technology devices,¹³⁶ such as a telecommunication device or other related services that provide access to the proceedings.¹³⁷

More importantly, the State must consider the youth's emotional, educational, and developmental needs when considering placement.¹³⁸ The IDEA requires that public agencies meet its least restrictive environment provisions, ensuring a continuum of special education and related services for youth with disabilities.¹³⁹ Further, when a youth transfers to and from public agencies within a state, the state is required to provide services that meet the unique needs of a youth, as determined by his appropriate IEP.¹⁴⁰ Accordingly, a youth with special education needs should either be released from detention and provided with services from his "regular" school, or, if the charges are appropriate and public or personal safety is at risk, the youth should be detained in the least restrictive environment where he can receive appropriate, unique services.

3. Appropriate Accommodations Required in the Courtroom During All Hearings

State and county courthouses are public entities as defined by the ADA.¹⁴¹ Thus, youth identified with disabilities are entitled to accommodations for their disabilities whenever they are subjected to an appearance in any proceeding within such courthouses.¹⁴² In *Tennessee v. Lane*, the Supreme Court held, under the Fourteenth Amendment's guarantee of the right to due process, that because the accused has the right to be present at all stages of his proceedings, courts must accommodate the disabilities of that per-

136. 34 C.F.R. § 300.5 (defining "[a]ssistive technology device").

137. *Id.* § 300.34 (defining "[r]elated services").

138. *See supra* note 70 and accompanying text.

139. *See* 34 C.F.R. §§ 300.114–.118; *see also supra* Chart 1.

140. 34 C.F.R. § 300.323(e).

141. *See* 42 U.S.C. § 12131(1) (2012).

142. *See Tennessee v. Lane*, 541 U.S. 509, 523 (2004).

son as provided for in the ADA.¹⁴³ Accordingly, an eligible youth must be provided with appropriate accommodations, as required by the ADA, when involved in delinquency proceedings. Chart 3 provides examples of accommodations that should be provided for eligible youth according to their specific disability.

CHART 3: IDEA DISABILITIES & EXAMPLES OF COURTROOM ACCOMMODATIONS

Disabilities as Defined by the IDEA ¹⁴⁴	Courtroom Accommodations ¹⁴⁵
(1)(i) Autism means developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental	<ul style="list-style-type: none"> • Rearranging chairs in the courtroom so that the youth may comprehend the hearing more easily. • Court hearing postponements are highly discouraged. Such postponement can lead to the youth experiencing prolonged uncertainty and anxiety. • Slowly explain, in simple terms, the constitutional/statutory rights to the juvenile and the juvenile's parent,

143. *Id.* at 531–33.

144. 34 C.F.R. § 300.8(c)(1), (4)–(6), (9)–(13) (emphasis added).

145. In general, an Education Counsel or Guardian ad Litem or should be appointed “to represent the best interests of youth when complex educational and/or disability issues are present.” BRADLEY M. BITTAN, *JUVENILE DELINQUENCY: A PROTOCOL FOR YOUTH WITH DISABILITIES 6* (2007) (addressing generalized principles utilized in the juvenile justice system). “Counsel or Guardian ad Litem should inform the court of special needs of youth with disabilities and what specific accommodations should be made in the courtroom.” *Id.* When making detention decisions, parents, custodians, or guardians of the youth should be “questioned regarding any special needs, medications, or other information that would affect a youth in detention.” DAVID OSHER ET AL., *ADDRESSING INVISIBLE BARRIERS: IMPROVING OUTCOMES FOR YOUTH WITH DISABILITIES IN THE JUVENILE JUSTICE SYSTEM 19* (2002) (addressing the arrest and prosecution of youth with disabilities). “A checklist for the probation officer should consider whether the child is a special education student and, if so, whether there is an Individualized Education Program (IEP) for the juvenile.” *Id.*

<p>change or change in daily routines, and unusual responses to sensory experiences.</p>	<p>custodian, or guardian.</p> <ul style="list-style-type: none"> • Allocating more time for the explanations of rights. • Requiring a quiet atmosphere. • Cutting down on possible distractions in the court room. • Providing written explanations of juvenile rights that the youth may take with him for later reference. • Should the juvenile admit/plead to the allegations, then the court must be careful to go through a question-and-answer process to make sure the juvenile knows what he is doing and is voluntarily admitting/pleading to the allegations. • Careful repetition of important information. • Additional time to think in response to questions. • Non-confrontational communication.
<p>(4)(i) Emotional disturbance 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:</p> <p>(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.</p> <p>(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.</p> <p>(C) Inappropriate types of behavior or feelings under normal circumstances.</p> <p>(D) A general pervasive mood of unhappiness or depression.</p> <p>(E) A tendency to develop physical symptoms or fears associated with personal or school problems.</p> <p>(ii) Emotional disturbance includes schizophrenia. The term does not</p>	<ul style="list-style-type: none"> • Maintain sufficient security in the courtroom when necessary to deter and contain aggressive behaviors. • Court hearing postponements are highly discouraged. Such postponement can lead to the youth experiencing prolonged uncertainty and anxiety. • Rearranging chairs in the courtroom so that the youth may comprehend the hearing more easily. • Slowly explain, in simple terms, the constitutional/statutory rights to the juvenile and the juvenile's parent, custodian, or guardian. • Allocating more time for the explanations of rights. • Requiring a quiet atmosphere. • Cutting down on possible distractions in the court room. • Providing written explanations of juvenile rights that the youth may take

<p>apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.</p>	<p>with him for later reference.</p> <ul style="list-style-type: none"> • Should the juvenile admit/plead to the allegations, then the court must be careful to go through a question-and-answer process to make sure the juvenile knows what he is doing and is voluntarily admitting/pleading to the allegations. • Careful repetition of important information. • Additional time to think in response to questions. • Non-confrontational communication.
<p>(5) Hearing impairment means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section.</p>	<ul style="list-style-type: none"> • Certified interpreters should be present if youth is hearing or visually impaired. • Requiring a quiet atmosphere. • Providing written explanations of juvenile rights that the youth may take with him for later reference. • Careful repetition of important information.
<p>(6) Mental retardation means significantly sub-average general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance. "Intellectual Disability" has been adopted as the preferred term for Mental Retardation.</p>	<ul style="list-style-type: none"> • Rearranging chairs in the courtroom so that the youth may comprehend the hearing more easily. • Slowly explain, in simple terms, the constitutional/statutory rights to the juvenile and the juvenile's parent, custodian, or guardian. • Allocating more time for the explanations of rights. • Requiring a quiet atmosphere. • Cutting down on possible distractions in the court room. • Providing written explanations of juvenile rights that the youth may take with him for later reference. • Should the juvenile admit/plead to the allegations, then the court must be careful to go through a question-and-answer process to make sure the juve-

	<p>nile knows what he is doing and is voluntarily admitting/pleading to the allegations.</p> <ul style="list-style-type: none"> • Careful repetition of important information. • Additional time to think in response to questions.
<p>(9) Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—</p> <p>(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and</p> <p>(ii) Adversely affects a child’s educational performance.</p>	<ul style="list-style-type: none"> • Rearranging chairs in the courtroom so that the youth may comprehend the hearing more easily. • Modifying lighting in courtroom. • Slowly explain, in simple terms, the constitutional/statutory rights to the juvenile and the juvenile’s parent, custodian, or guardian. • Allocating more time for the explanations of rights. • Requiring a quiet atmosphere. • Cutting down on possible distractions in the court room. • Providing written explanations of juvenile rights that the youth may take with him for later reference. • Should the juvenile admit/plead to the allegations, then the court must be careful to go through a question-and-answer process to make sure the juvenile knows what he is doing and is voluntarily admitting/pleading to the allegations. • Careful repetition of important information. • Additional time to think in response to questions. • Non-confrontational communication.
<p>(10)(i) Specific 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 the imperfect ability</p>	<ul style="list-style-type: none"> • Rearranging chairs in the courtroom so that the youth may comprehend the hearing more easily. • Slowly explain, in simple terms, the constitutional/statutory rights to the juvenile and the juvenile’s parent,

<p>to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.</p> <p>(ii) <i>Disorders not included.</i> Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.</p>	<p>custodian, or guardian.</p> <ul style="list-style-type: none"> • Allocating more time for the explanations of rights. • Requiring a quiet atmosphere. • Cutting down on possible distractions in the court room. • Providing written explanations of juvenile rights that the youth may take with him for later reference. • Should the juvenile admit/plead to the allegations, then the court must be careful to go through a question-and-answer process to make sure the juvenile knows what he is doing and is voluntarily admitting/pleading to the allegations. • Careful repetition of important information. • Additional time to think in response to questions.
<p>(11) Speech or language impairment means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance.</p>	<ul style="list-style-type: none"> • Slowly explain, in simple terms, the constitutional/statutory rights to the juvenile and the juvenile's parent, custodian, or guardian. • Allocating more time for the explanations of rights. • Requiring a quiet atmosphere • Cutting down on possible distractions in the courtroom. • Providing written explanations of juvenile rights that the youth may take with him for later reference. • Should the juvenile admit/plead to the allegations, then the court must be careful to go through a question-and-answer process to make sure the juvenile knows what he is doing and is voluntarily admitting/pleading to the allegations. • Careful repetition of important information.

	<ul style="list-style-type: none"> • Additional time to think in response to questions.
<p>(12) Traumatic brain injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.</p>	<ul style="list-style-type: none"> • Modifying lighting in courtroom. • Slowly explain, in simple terms, the constitutional/statutory rights to the juvenile and the juvenile's parent, custodian, or guardian. • Allocating more time for the explanations of rights. • Requiring a quiet atmosphere. • Cutting down on possible distractions in the court room • Providing written explanations of juvenile rights that the youth may take with him for later reference. • Should the juvenile admit/plead to the allegations, then the court must be careful to go through a question-and-answer process to make sure the juvenile knows what he is doing and is voluntarily admitting/pleading to the allegations. • Careful repetition of important information. • Additional time to think in response to questions. • Non-confrontational communication.
<p>(13) Visual impairment including blindness means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.</p>	<ul style="list-style-type: none"> • Certified interpreters should be present if youth is hearing or visually impaired. • Modifying lighting in courtroom

4. Reading, Writing, and Adjudication

Like the IDEA, the ADA, and Section 504 protections and rights available at all pre-adjudicatory hearings, accommodations that are appropriate to meet the unique needs of the youth must be

afforded at the adjudication hearing.¹⁴⁶ At this point in the delinquency process, the defender, the court, and the state should be aware of the youth's special needs as related to his disability. The adjudication stage is paramount in deciding the youth's future, regardless of the youth's acceptance of a plea or his decision to have a trial.

If the youth has opted to accept a plea deal, the defender must make sure that the youth understands the long-term ramifications of taking a deal because "[i]n most cases, it is extremely hard to undo or withdraw a guilty plea. It is not a decision to make quickly or under stress."¹⁴⁷ Further, the youth will be subjected to a colloquy that may be conducted by the defender or the judge, with the possibility of additional questioning by the prosecutor.¹⁴⁸ The statements the youth makes will be part of the court transcripts. Accordingly, it is imperative that the youth fully understands the details of the deal.

The youth has the right to have a trial in which a judge, or jury in some jurisdictions, decides his guilt or innocence. When counseling the youth about the right to a trial, the defender should clearly explain the proceedings and possible outcomes to the youth in terms that he can clearly understand. If, because of his disability, the youth has a tendency to become agitated or act inappropriately when he is subjected to a stressful situation, the defender and court should take extra steps to provide accommodations.

Using Disability Rights in Advocacy. The defender represents a youth who has specific learning disability, and as such, he has difficulty understanding spoken and written language.¹⁴⁹ The defender should look to the psychological educational evaluation for information about the youth's comprehension level as well as information about the

146. See *Lane*, 541 U.S. at 531–33; see also *supra* Chart 3.

147. SANDRA SIMKINS, *WHEN KIDS GET ARRESTED: WHAT EVERY ADULT SHOULD KNOW* 70 (2009); see also FED. R. CRIM. P. 11(e) (2012) ("After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.").

148. See FED. R. CRIM. P. 11(b).

149. See 34 C.F.R. § 300.8(c)(10)(i) (defining "[s]pecific learning disability").

youth's behaviors during stressful situations. The defender, the judge, and all others involved in the proceeding should speak slowly, and use simple, short sentences. The youth may require time to process what has been said. It may be helpful to have the youth repeat what has been said in a manner that demonstrates his understanding of the proceedings. The defender may ask to have the courtroom cleared of any possible distractions. Once adjudicated, if the youth is asked to sign any documents, the defender should explain each document, employing simple terms that are clearly understood by his client.

5. Appropriate Disposition and Appropriate Placement

Where counsel shows that a youth suffers from a qualified disability, ideally, the charges against the youth will be withdrawn or dismissed. However, if the youth is adjudicated delinquent, National Guidelines encourage, and some state juvenile codes require, that a judge consider a youth's educational, mental-health, emotional, and developmental needs when deciding a disposition.¹⁵⁰ Congress enacted the IDEA to provide disabled youth with appropriate education, including services "designed to meet their unique needs and prepare them for further education, employment, and independent living."¹⁵¹ Ensuring that an adjudicated youth, in need of special education, be provided appropriate services and accommodations throughout his disposition is imperative for his successful rehabilitation and re-entry into society.

A youth identified with special education needs is entitled to services, rights, and protections in accordance with the IDEA, ADA, and Section 504, regardless of where he receives educational services.¹⁵² The same considerations contemplated at the initial detention hearing concerning placement (i.e., least restrictive environment and the facility's ability to provide an appropriate education) should be raised at disposition. Additionally, to ensure that the youth's disability rights are protected, a defender should request that the judge draw attention to the youth's needs, and the

150. See *supra* Part II.B (discussing the Guidelines).

151. 34 C.F.R. § 300.1(a).

152. See *supra* Part III.B and note 117.

accommodations required to meet those needs, in the disposition order.¹⁵³

a. Appropriate Services Are Conducive to Successful Completion Probation

In most circumstances, a term of probation will most likely result in the least restrictive environment for the adjudicated delinquent youth. Probation will probably result in the youth staying enrolled in, or returning to, the school he was attending when he was initially charged. The defender should consider whether the school will be able to appropriately meet the youth's educational and behavioral needs so that the youth will be able to fulfill the conditions of probation. The defender should recommend that the parent engage the services of an educational advocate to assist with attaining appropriate services at the youth's school. In some jurisdictions, the court may order that an educational advocate be assigned to the case. Chart 4 provides examples of accommodations that should be considered when ordering appropriate placement of an adjudicated youth.

CHART 4: DISABILITIES AND ACCOMMODATIONS TO BE CONSIDERED AT DISPOSITION

Disability Classifications ¹⁵⁴	Accommodations for Placement ¹⁵⁵
(1)(i) Autism	<ul style="list-style-type: none"> • If the youth benefits from medications, and the detention center does not have access to those medications, then the court should enter an order providing for the administration of the medications. • Disposition orders that require juveniles be given information to help them understand their disability and strategies to manage their disability. • If in a program that does drug screening, the

153. See *infra* Chart 4 (outlining the disabilities and corresponding accommodations).

154. 34 C.F.R. § 300.8(c)(1), (4)–(6), (9)–(13) (emphasis added).

155. See *supra* note 145.

	<p>screening should be modified to screen not only for illegal drugs, but also to ensure the proper medications are being taken.</p> <ul style="list-style-type: none"> • Repetitive and routine schedules as students on the Autism spectrum have difficulty with change. • Direct instruction of academic and social skills, seeing and hearing new information is not sufficient for students on the Autism spectrum. • Stress relief breaks. • Use of direct language; students with Autism comprehend messages literally and do not generally pick up on sarcasm. • Avoid abstract ideals and complex vocabulary.
<p>(4)(i) Emotional disturbance</p> <p>(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.</p>	<ul style="list-style-type: none"> • If the youth benefits from medications and the detention center does not have access to those medications, then the court should enter an order providing for the administration of the medications. • Disposition orders that require juveniles be given information to help them understand their disability and strategies to manage their disability. • If in program that does drug screening, should be modified to screen not only for illegal drugs, but also to ensure the proper medications are being taken. • Allow time for cool-down period in a safe environment that does not include isolation. Isolation exacerbates emotional disturbances. • Non-confrontational communication.
(5) Hearing impairment	<ul style="list-style-type: none"> • Certified interpreters for youth that are hearing or visually impaired. • Provide assistive listening devices (small microphone device worn by the instructor that increases the volume and clarity of the class lecture for the student who wears the device). • Note takers – provide a written, braille, or taped secondary source of information during a class lecture.
(6) Mental retardation “ Intellectual Disability ” has been adopted as the preferred term for Mental Retardation.	<ul style="list-style-type: none"> • Disposition orders that require juveniles be given information to help them understand their disability and strategies to manage their disability. • Allow the student with physical impairments that cause writing difficulties to use a word processor for

	<p>writing assignments. In addition, the student may use a pencil grip, raised lined paper, a voice recorder, or a note-taker instead.</p> <ul style="list-style-type: none"> • Written, explicit instructions that students can reference due to short-term memory problems. • Avoid abstract ideals and complex vocabulary.
<p>(9) Other health impairment (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) Adversely affects a child's educational performance.</p>	<ul style="list-style-type: none"> • Access to medical treatment as needed/required on IEP. • Access to physical therapy as needed/required on IEP. • If the youth benefits from medications, and the detention center does not have access to those medications, then the court should enter an order providing for the administration of the medications. • Disposition orders that require juveniles be given information to help them understand their disability and strategies to manage their disability. • If in program that does drug screening, should be modified to screen not only for illegal drugs, but also to ensure the proper medications are being taken. • Written, explicit instructions that students can reference due to short-term memory problems. • Appropriate time to recover if suffering from a disorder such as epilepsy or a heart condition. Provide student with work while recovering from an episode and is unable to participate in a classroom setting in a facility. Or allow for rescheduling/leniency when meeting with a probation officer and recovering from an episode.
<p>(10) Specific learning disability (i) [I]ncluding conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (ii) <i>Disorders not included.</i> Specific learning disability does not include</p>	<ul style="list-style-type: none"> • Disposition orders that require juveniles be given information to help them understand their disability and strategies to manage their disability. • Dependent upon student's specific learning disability, accommodations will widely vary. <ul style="list-style-type: none"> - For specific learning disabilities related to reading, students will need additional help in all aspects that involve reading (from reading classroom or facility instructions and following them to being able to move freely throughout the facility due to com-

<p>learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.”</p>	<p>plex signage).</p> <ul style="list-style-type: none"> - For specific learning disabilities that involve mathematical skills, students will need additional help in all aspects that involve mathematics (from being able to tell time in order to follow facility rules or for meeting probation officers in a timely matter to calculating the correct amount of change when working or doing community service).
<p>(11) Speech or language impairment</p>	<ul style="list-style-type: none"> • Disposition orders that require juveniles be given information to help them understand their disability and strategies to manage their disability. • Written, explicit instructions that students can reference due to language processing difficulties. • Avoid abstract ideals and complex vocabulary.
<p>(12) Traumatic brain injury means an acquired injury to the brain caused by an external physical force Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.</p>	<ul style="list-style-type: none"> • If the youth benefits from medications, and the detention center does not have access to those medications, then the court should enter an order providing for the administration of the medications. • Disposition orders that require juveniles be given information to help them understand their disability and strategies to manage their disability. • If in program that does drug screening, should be modified to screen not only for illegal drugs, but also to ensure the proper medications are being taken. • Written, explicit instructions that students can reference due to short term memory problems and language processing difficulties.
<p>(13) Visual impairment including blindness</p>	<ul style="list-style-type: none"> • Certified interpreters for youth that are hearing or visually impaired. • Note takers – provide a written, braille, or taped secondary source of information during a class lecture. • Large print/braille materials or taped textbooks.

b. Residential and Secure Facilities Must Provide an Appropriate Education

If the youth requiring special education services is committed to a residential or secure facility as a result of his adjudication, he is entitled to an appropriate education program designed to accommodate his unique needs.¹⁵⁶ The judge should be encouraged to recommend any appropriate services and accommodations as part of the order of disposition.

In addition to the aforementioned accommodations, the IDEA requires that an IEP be developed for a youth with a disability.¹⁵⁷ An appropriate IEP addresses a youth's annual academic goals, as well as his unique needs and related services.¹⁵⁸ According to the IDEA, a youth's parent has a right to participate as a member of the IEP team,¹⁵⁹ which meets to review and revise the IEP "not less than annually."¹⁶⁰ There is no exception or limitation to the provision of appropriate services, including related and transition services, for youth in juvenile correctional facilities.

c. Asserting Disability Rights to Combat Harmful Conditions of Confinement

A defender may combat harmful conditions of confinement by asserting the disability rights of youth in custody. Using the ADA, Section 504, or IDEA provisions as part of post-disposition representation, defenders may eliminate the overuse of isolation and mechanical restraints in secure facilities.

Research shows that the use of isolation, for even a short time, will exacerbate mental health conditions, including increased anxiety, depression, and distorted perception.¹⁶¹ Isolation removes a youth from his regular education placement, often denying ap-

156. *See supra* Part III.B.2.

157. *See* 34 C.F.R. § 300.320 (defining "IEP").

158. *See id.*

159. *Id.* § 300.321(a)(1).

160. *Id.* § 300.324(b)(1)(i).

161. Sandra Simkins, Marty Beyer & Lisa M. Geis, *The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation*, 38 WASH. U. J.L. & POL'Y 241, 253–57 (2012).

appropriate educational and behavioral related services.¹⁶² According to the IDEA, when a disabled student is removed from his current educational placement for more than ten days in a school year, a manifestation determination hearing must be held to determine if the youth's offending behavior was "caused by, or had a direct and substantial relationship to, the child's disability."¹⁶³ The ADA and Section 504 protections could even be asserted to protect against discrimination if the youth has been unduly segregated from others.

Further, an evaluation may show that the use of mechanical restraints or isolation is harmful to a disabled youth. In theory, an appropriate IEP would include prohibition of the punitive use of restraints and isolation for that youth. As such, IDEA protections could be asserted as the youth would be denied an appropriate education if restraints or isolation were used in his case.¹⁶⁴

6. Services Should Continue Through Post-Release and Completion of Parole

Once an adjudicated youth is released from a residential or secure care facility, he may be subject to post-release conditions or parole. He is guaranteed a free public appropriate education until he graduates high school or reaches his twenty-second birthday.¹⁶⁵ An appropriate education would include related and transition services, including but not limited to, vocational training, "integrated employment," and independent living training.¹⁶⁶

Finally, if a youth with special needs has been accused of violating his parole, the offensive behavior may be substantially

162. *Id.* at 260.

163. 34 C.F.R. § 300.530(e).

164. Statement of the Interest of the United States of America at 7–10, *G.F. v. Contra Costa Cnty.*, No. 3:13-cv-03667-MEJ (N.D. Cal. 2014), available at http://www.justice.gov/crt/about/spl/documents/contracosta_soi_2-13-14.pdf (addressing the denial of disability and special education rights, as applied to juveniles placed in restrictive confinement and isolation while in custody of California's juvenile justice agency).

165. 20 U.S.C. § 1412(a)(1)(A) (2012) ("A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21 . . .").

166. 34 C.F.R. § 300.43(a)(1).

related to his disability. Again, review of evaluations and IEPs would aide in determining whether the behavior was a manifestation of the youth's disability. It may be possible for the defender to assert the manifestation at a parole hearing to prevent the youth's return to custodial care.

IV. CONCLUSION

Statistically, youth with special education needs are more likely to be suspended, to be expelled, and to have contact with the juvenile justice system. Over 40% of youth in secure facilities across the nation have been identified as disabled.¹⁶⁷ The school-to-prison pipeline—due in part to zero-tolerance policies—provides a conduit for these youth to enter the delinquency system. The educational, behavioral, and mental health needs of disabled youth are often unaddressed throughout the delinquency process, as it is often unclear to many of the juvenile-justice stakeholders how disability rights can be asserted on behalf of a disabled youth.

It is possible that a youth with special needs who has been referred to the court, having been accused of committing an offense, may not belong in the delinquency courtroom at all. Regardless of whether a youth is appropriately charged and adjudicated, a youth with a disability is entitled to accommodations, protections, and rights in accordance with the IDEA as well as the ADA and Section 504. These accommodations, protections, and rights are available to youth throughout the delinquency process. The responsibility to ensure that the needs of the special education youth are met, making successful rehabilitation and reentry possible, falls on the shoulders of all of those involved in the juvenile justice system.

167. *Special Education in Correctional Facilities*, NAT'L CENTER ON EDUC., DISABILITY & JUV. JUST., http://www.edjj.org/Publications/pub05_01_00.html (last visited Apr. 4, 2014) (providing that 45% of incarcerated youths had "learning disabilities").